Takings Jurisprudence and the Political Cultures of American Politics

Dennis J. Coyle

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TAKINGS JURISPRUDENCE AND THE POLITICAL CULTURES OF AMERICAN POLITICS

Dennis J. Coyle*

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I. THE RETURN OF THE Takings Clause

For sixty-five years, Pennsylvania Coal Co. v. Mahon was a tattered rag in the Supreme Court’s closet of precedents, never thrown out, but little valued. The case was ritualistically cited for its admonition that “if regulation goes too far it will be recognized as a taking,” but the Court gave little sign that it meant what it said. The year 1987, however, brought what passes for an earthquake in the small world of property rights jurisprudence, when the Court blew the dust off Pennsylvania Coal and returned it to the wardrobe of fashionable precedents. In nearly back-to-back decisions, the Court first ruled that regulatory takings would require compensation, and shortly thereafter, the Court actually found a taking. The tremors of these decisions shook worried bureaucrats and doctrine-starved property rights attorneys across the country, provoking cries of glee and horror that the sky was falling on the regulatory state.

1. 260 U.S. 393 (1922).
2. Id. at 415.
3. Ironically, 1987 also saw the Court gut Pennsylvania Coal, by not finding a regulatory taking under nearly identical facts in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987). As James Burling has put it, Keystone was “the Mr. Hyde to the Dr. Jekyll of Pennsylvania Coal Co. v. Mahon.” James S. Burling, Property Rights, Endangered Species, Wetlands, and Other Critters—Is it Against Nature to Pay for a Taking?, 27 LAND & WATER L. REV. 309 (1992). But the Court resurrected the principle of regulatory takings in subsequent cases. See infra part II.B. While many precedents have been narrowed over the years to their own peculiar facts, Pennsylvania Coal may be unique in that it may be valid in almost any set of facts except its own.
4. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 306-07 (1987). In summarizing its holding, the Court stated:

[W]here the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation....

.... [M]any of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them.

Id. at 321.
5. Nollan v. California Coastal Comm’n, 483 U.S. 825, 841-42 (1987). “California is free to advance its ‘comprehensive program,’ if it wishes . . . but if it wants an easement across the Nollans’ property it must pay for it.” Id. at 482.
Initial reaction turned out to be overheated, as the Supreme Court’s decisions represented only a modest shift in approach. But even small changes seem remarkable after so many decades in which the Court was indifferent to the confiscatory potential of regulations. While Nollan v. California Coastal Commission and First English Evangelical Lutheran Church v. Los Angeles County did not make a revolution, they did stimulate a flood of new cases seeking to plumb the depths of the newly rediscovered Takings Clause. A large share of the burden from this flood has fallen on the United States Court of Federal Claims, particularly in light of the penchant of the Army Corps of Engineers and the Environmental Protection Agency (EPA) to limit the filling of privately owned wetlands under Section 404 of the Clean Water Act of 1977. Both the wetlands litigation and recent Supreme Court cases have generated considerable alarm among those who

7. See Lee P. Symons, Property Rights and Local Land-Use Regulation: The Implications of First English and Nollan, 18 PUBLIUS, Summer 1988, at 81.
11. Simply defining a wetland has been a controversy in itself. See Betsy Carpenter, In a Murky Quagmire, U.S. NEWS & WORLD REP., June 3, 1991, at 45 (discussing the unintended and often illogical application of wetland protection measures).
fear that the federal courts are being turned into private banks from which unscrupulous developers are withdrawing the public's funds.13

Given the controversy swirling around takings jurisprudence, it is worth considering the underlying issue of the legitimacy of property rights. It does not suffice to argue simply that the Takings Clause is in the Constitution, so it should be enforced. Unless the function of the Clause is understood as a just one, a plain meaning defense only invites judges and scholars to find creative rationales to gut the Clause of serious protections, such as the California Supreme Court did when it ruled that the just compensation mandate would not apply to regulatory takings due to "various policy considerations."15

As a starting point, it is fair to ask why property owners should ever be able to demand money. Just what is so special about property rights? To investigate perspectives on property rights, this Article employs a model of political culture, arguing that American politics is fundamentally a conflict between three perspectives that are more aptly characterized as cultures than ideologies. Trusting government entirely to determine land use rights does not serve any of the three cultures well. Moreover, common ground between these cultures can be found for the greater protection of property rights. Part II of this Article briefly summarizes the demise of constitutional property rights and their recent resurrection. Part III discusses the three political cultures that animate disputes in American public policy and law, and applies them to property rights. Part IV then suggests some general principles of takings analysis that accommodate the three different political cultures while shoring up protection of property rights. This Article makes no pretense of having a bright line rule or a solution to the takings puzzle. It is questionable whether such a rule is possible, or even desirable, as it may turn the takings question into a mechanistic calculus that obscures the issues of freedom and fairness at the heart of the Takings Clause. That is not to say, however, that the takings inquiry must be unprincipled or rudderless.

II. THE FALL AND RISE OF CONSTITUTIONAL PROPERTY RIGHTS

A. The Demise of Property Rights

The beginning of the end for constitutional protection of the right to use land came in 1926, when the Supreme Court upheld the zoning ordinances involved in *Euclid v. Ambler Realty Co.* Any doubt left open by *Euclid* that judicial protection of landowner rights was passé was erased during the New Deal. Beginning in 1937, the Court declined to look closely at legislation for abuses of "economic" rights. The following year, in *United States v. Carolene Products Co.*, the Court effectively announced that not all constitutional rights were created equal. "[R]egulatory legislation affecting ordinary commercial transactions [that is, property or economic interests] is not to be pronounced unconstitutional," wrote Justice Stone, "unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." Under the Court’s holding, the basis for the legislation need not be evident: "[A]ny state of facts either known or which could reasonably be assumed" would suffice. This is an extraordinarily lenient standard, tantamount to abdication of judicial review, and for forty years, no governmental action was invalidated under *Carolene Products* standard of minimal rationality. If this standard was all there was to the story, modern constitutional law would be of little consequence, and many constitutional scholars would instead be teaching torts or selling cars for their livelihoods. In the famous footnote four, however, Justice Stone carved out categories of rights that the Court would continue to protect—conveniently, these did not include property rights.

In the decades following *Carolene Products*, "[i]f a lawyer defending such a restriction [on land use rights] was struck dumb as he rose before the

18. *Id.* at 396 (upholding minimum wage restrictions and stating that "we are unable to conclude that . . . the State has passed beyond the boundary of its broad protective power").
19. 304 U.S. 144 (1938).
20. *Id.* at 152.
21. *Id.* at 154.
22. Since the mid-1970s, the Court has gradually blurred the distinction between protected and unprotected rights, and between the different levels of scrutiny. In the area of land use regulation, Moore v. City of East Cleveland, 431 U.S. 494 (1977), discussed *infra* notes 62-65, was a watershed case.
24. Footnote four stated that greater protection would be given "when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments"; when legislation "restricts . . . political processes"; and when legislation is "prejudiced against discrete and insular minorities," such as "religious, or national, or racial minorities." *Id.* (citations omitted).
court, and could think of nothing to say, the restriction would be in some real trouble—but as long as he could manage to keep on making a noise like a lawyer, all would be well."

The Supreme Court's decision in *Berman v. Parker* epitomizes the consequences for property rights in this era of judicial abdication. In *Berman*, Justice Douglas, while rejecting a Takings Clause challenge to a redevelopment project, launched into a disquisition on majoritarian government. "[W]hen the legislature has spoken," he declared, "the public interest has been declared in terms well-nigh conclusive." Justice Douglas does not consider that judicial protection of private rights might itself be in the public interest, or that the legislature might be motivated by something other than enlightened public interest. Notably absent from the Court's discussion in *Berman* was any suggestion that the legislative process might be tainted by corruption, greed, or just plain factional politics and that these issues might be proper for judicial consideration in property rights cases.

Private ownership of property has been portrayed as a curious, archaic institution advocated only by those who view the world through 18th-century glasses. State courts that continued to protect property rights were accused of being reactionary guardians of obsolete doctrines. In states where substantive due process survived the *Carolene Products* purge, "Justice Peckham and other[s] . . . [M]en of the 'old' Court . . . still have their disciples," Dick Howard bemoaned. Alas, wrote Monrad Paulsen, "[t]he ideals which these state courts value are those of Nineteenth Century Liberalism." From the 1940s through the 1960s, the double standard of rights gradually seeped into the jurisprudence of state courts, as state after state moved closer to the Supreme Court's *Carolene Products* rationale, taking "a major (and a necessary) step forward to enable American communities to

27. *Id.* at 32.
28. *Id.* at 33. "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end." *Id.*
30. *Id.*
32. See 1 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, WILLIAMS AMERICAN PLANNING LAW § 5.04 at 106 (1988), for an account of the evolution of zoning regulation in state courts during this period.
capture some control over their own destiny" by refusing to give serious review to violations of property rights.

The abandonment of property rights by the Supreme Court and most state courts has been welcomed by many commentators. In the words of Justice Hans Linde, a nationally regarded member of the Oregon Supreme Court, individual property rights are anachronisms that serve only to "stir[ ] special atavistic memories of the feudal and pioneering past." Supporting this rationale, Herman Schwartz has argued that property rights should remain subordinated, despite calls for their resuscitation:

In constitutional law, property rights are now like the ugly duckling before it became a swan. They receive very little constitutional protection against legislative or administrative interference.

... In the fairy tale, the little duckling became a beautiful swan because it really was a swan and had been one all along. Property rights, however, are not and were not intended to be the swan of constitutional law—they really are just ducks, after all, despite all the quacking.

B. The Rediscovery of Property Rights

There has, indeed, been quite a bit of recent "quacking" about property rights, which are making a slow comeback in many jurisdictions. The growth of regulation has helped stimulate attention to property rights, as innovative land use controls have created new conundrums of freedom and responsibility. Courts "have increasingly isolated selective land use controls for differential and searching judicial treatment." Critical review of government motivations, under a substantive due process analysis, has survived in some state courts and is returning to prominence as these courts regain stature. The Supreme Court has even joined this movement, occasionally heightening its scrutiny of government rationality.

33. 1 id. at 107.
34. "The principle theme in American planning law for the last thirty years," wrote Norman Williams, "has been the gradual spread among the state courts of the implications of the constitutional revolution of 1937." 1 id. § 4.02 at 91.
The recent refocus on property rights fits into the larger debate on the role of states in the federal system. No sooner had state courts adopted the deferential approach of the New Deal Court then they began to be criticized for capitulating to national legal standards. Ronald Collins complained: "We have allowed American constitutional law to become lopsided. . . . [T]he rule of state law is no longer itself taken seriously." The state high courts had become, according to Justice Stanley Mosk of the California Supreme Court, "mere bus stops on the route from trial courts to the Supreme Court." Urged on by scholars and judges who saw the United States Supreme Court's enthusiasm for aggressive expansion of civil rights and liberties waning, state courts began basing their decisions on independent state grounds, and making their rulings immune from federal reversal. By 1985, there had been more than 250 state court decisions that relied on state constitutional provisions to go beyond United States Supreme Court constitutional standards.

Given the long-standing reluctance of the Court to protect rights to use property, there was a large void waiting to be filled by the newly activist state courts. State courts, Edward Sullivan wrote, were "becoming increasingly sensitive to the relationship between zoning practices and a wide range of contemporary problems." While some courts were treading tentatively in the waters of property rights for the first time in years, other courts had been acting in this area all along. The renewed luster of state courts brought greater attention to the substantive protection of property rights, not always to the cheers of commentators. As Marlin Smith complained: "[T]he gallop-

41. Stanley Mosk, State Constitutionalism After Warren: Avoiding the Potomac's Ebb and Flow, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, supra note 40, at 201.
ing revival of the most discredited aspects of the substantive due process test continues apace in Illinois.45

During this period of increasing state activism, the Supreme Court itself began to doubt the validity of the Carolene Products double standard that had relegated property rights to the constitutional wastebasket of the “any conceivable rational basis test.” Justice Stevens declared in Lynch v. Household Finance Corp.:46

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . A fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.47

The groundwork for renewed Supreme Court attention to land use rights was laid in the 1970s as the Court increasingly recognized property rights, although in a novel way. The “new property” of Charles Reich48 gained Court acceptance as public employment, education, and welfare services became subject to constitutionally protected claims of entitlement.49 The remarkable rise of substantive due process from the graveyard of discarded Court doctrines helped open the door to expanded recognition of property rights. The Court created privacy rights to contraception50 and abortion51 from the blank spaces between the lines of the Bill of Rights in a spirit reminiscent of the turn-of-the-century Court. In Griswold v. Connecticut,52 Justice Douglas disclaimed any relationship between the new right of privacy and the old substantive due process that protected liberty of contract,53 but most members of the Court were more candid, recognizing that they were

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47. Id. at 552.
52. 381 U.S. 479 (1965).
53. Wrote Justice Douglas, “[s]ome arguments suggest that Lochner v. New York should be our guide. But we decline that invitation . . . . We do not sit as a super-legislature . . . .” Id. at 481-82 (citations omitted). Rather, Justice Douglas argued, the right of privacy is protected by the “penumbras” that emanate from specific amendments. Id. at 483, 484.
once again reading into the Constitution a right not explicitly protected.\textsuperscript{54} Substantive due process was also restored under a more contemporary label by the doctrine that there are a few, very specific substantive rights, such as the right of travel,\textsuperscript{55} protected by the Equal Protection Clause.

Once the Court acknowledged that some rights not explicitly spelled out in the Constitution merit protection, it was increasingly difficult to justify why rights of property, which are in the Constitution, should not be protected. Both the formal distinction of the double standard—explicit rights versus substantive rights deemed implicit in due process—and its practical interpretation—separation of personal from property rights—were being eroded. A few more shock waves rippled through the legal and academic communities when the Court dusted off the Contract Clause and actually used it to strike down state actions in \textit{United States Trust Co. v. New Jersey}\textsuperscript{56} and \textit{Allied Structural Steel Co. v. Spannaus}.\textsuperscript{57} Ever so cautiously, the Court was venturing back into the forgotten wilderness of property owner rights.

In 1974, the Court applied the recently unearthed right of privacy in the context of land use regulation.\textsuperscript{58} In an ordinance, the village of Belle Terre, New York zoned out fraternities and other households of unrelated persons, implicating both property and personal rights.\textsuperscript{59} The Court sustained the regulation, characterizing it as just another example of “economic and social legislation,”\textsuperscript{60} and thus held that the village was free to keep out the college kids in order to protect “[a] quiet place where yards are wide, people few, and motor vehicles restricted.”\textsuperscript{61} But in \textit{Moore v. City of East Cleveland},\textsuperscript{62} when the city defined “family” in such a way as to prevent a child from living with his grandmother,\textsuperscript{63} this was a bit much even for the Supreme Court, which ruled that the city had violated privacy rights of the Moores protected under the Due Process Clause.\textsuperscript{64} \textit{Moore} represented the Court's

\begin{itemize}
\item \textsuperscript{54} See \textit{id.} at 486 (Goldberg, J., concurring); \textit{id.} at 499 (Harlan, J., concurring); \textit{id.} at 502 (White, J., concurring); see also \textit{Roe}, 410 U.S. at 152-53 (opinion of Blackmun, J).
\item \textsuperscript{56} \textit{431 U.S. 1} (1977).
\item \textsuperscript{57} \textit{438 U.S. 234} (1978).
\item \textsuperscript{58} \textit{Village of Belle Terre v. Boras}, 416 U.S. 1 (1974).
\item \textsuperscript{59} \textit{id.} at 2. The ordinance effectively prohibited households of more than two unrelated persons. See \textit{id.} at 2-3.
\item \textsuperscript{60} \textit{id.} at 8.
\item \textsuperscript{61} \textit{id.} at 9.
\item \textsuperscript{62} \textit{431 U.S. 494} (1977).
\item \textsuperscript{63} The grandchild came to live with his grandmother after his mother had died. \textit{id.} at 496-97. Under the East Cleveland ordinance, persons could live with both their parents and their children, and so a grandparent could live with a grandchild if the intervening generation of parents were in the same household. See \textit{id.} at 496 n.2.
\item \textsuperscript{64} \textit{id.} at 499 (invalidating ordinance under a substantive due process analysis). Justice Powell's opinion was criticized by a defender of the double standard of constitutional rights for
\end{itemize}
first tentative step back toward substantive protection of landowner rights, albeit in the modern costume of protection of privacy rights.\textsuperscript{65}

The Court spent most of the 1980s wringing its hands over what to do about the Takings Clause. On several occasions it accepted cases that could have served as platforms for ruling that the Constitution does indeed require compensation for regulatory takings, but each time it decided there was not a final enough judgment below.\textsuperscript{66} Eventually the Court sidestepped the finality issue\textsuperscript{67} and made compensation for regulatory takings the law of the land in \textit{First English Evangelical Lutheran Church v. County of Los Angeles},\textsuperscript{69} which essentially adopted the reasoning of Justice Brennan's more eloquent argument in favor of compensation in \textit{San Diego Gas \& Electric Co. v. San Diego}.\textsuperscript{70} In denying compensation for regulatory takings, the California Supreme Court, in the decision that would eventually give rise to \textit{First English}, relied on "policy considerations," reasoning that requiring payment would discourage municipalities from enacting beneficial regulation.\textsuperscript{71} Rejecting the California court's rationale, Justice Brennan argued in \textit{San Diego Gas} that constitutional rights cannot be discarded simply because they are


\textsuperscript{67} \textit{See First English Evangelical Lutheran Church v. County of Los Angeles}, 482 U.S. 304, 311-13 (1987) (rejecting the finality issue and stating that "[t]he posture of the present case is quite different").

\textsuperscript{68} "'Temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." \textit{First English}, 482 U.S. at 318.

\textsuperscript{69} 482 U.S. 304 (1987).


\textsuperscript{71} In \textit{Agins v. City of Tiburon}, 598 P.2d 25 (Cal. 1979), aff'd, 447 U.S. 255 (1980), the California Supreme Court stated:

\begin{quote}
We are persuaded by various policy considerations to the view that inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged. The expanding developments of our cities and suburban areas coupled with a growing awareness of the necessity to preserve our natural resources... has resulted in changing attitudes toward the regulation of land use.
\end{quote}

\textit{Id.} at 29.
costly or inconvenience policy makers.\textsuperscript{72} Despite the value of regulation, planning officials cannot be immune from the Constitution, Brennan concluded, asking "[I]f a policeman must know the Constitution, then why not a planner?"\textsuperscript{73}

Soon after the Supreme Court's decision in \textit{First English}, the Court ruled in \textit{Nollan v. California Coastal Commission}\textsuperscript{74} that demanding a public access easement in exchange for a permit is a taking unless the condition is clearly related to a public purpose that would justify denying the permit.\textsuperscript{75} Easements can be seen as classic physical invasions, for which the Court traditionally has required payment. The nexus requirement could also apply, however, to the myriad exactions commonly imposed on property owners.\textsuperscript{76} Prior to \textit{Nollan}, there was little need for planners to pay attention to issues of constitutionality in these exactions.\textsuperscript{77} The American Planning Association even offered a conference session on exactions entitled, "Extortion in the Public Interest."\textsuperscript{78}

\textit{First English}, \textit{Nollan}, and the Supreme Court's recent decision in \textit{Lucas v. South Carolina Coastal Council}\textsuperscript{79} were in a sense, unremarkable cases. Viewed narrowly, they stand only for the propositions that regulations are not immune from takings claims, that the government must pay for physical invasions, and that total deprivations of value are takings unless the property use can be characterized as a nuisance.\textsuperscript{80} None of these cases directly touched the lion's share of regulation of private property, however, which more typically restricts the use of property, but nonetheless leaves some value and does not require public access, thus avoiding characterization as either a total deprivation or a physical invasion. The Supreme Court cases have a significance beyond their facts, however, as their rules and arguments can be expanded. Also, as courts grapple with the regulatory takings prob-

\textsuperscript{72} "[T]he applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments . . . [N]or can the vindication of those rights depend on the expense in doing so." \textit{San Diego Gas}, 450 U.S. at 661.

\textsuperscript{73} \textit{Id.} at n.26.

\textsuperscript{74} 483 U.S. 825 (1987).

\textsuperscript{75} \textit{Id.} at 836-37 (outlining the "essential nexus" test).

\textsuperscript{76} For an application of \textit{Nollan} away from the shore, see Dennis J. Coyle, \textit{Private Property and Public Takings: Regulating the Regulators in New York}, 1 ST. CONST. COMMENTARY \& NOTES 15 (1990).


\textsuperscript{78} Bauman \& Ethier, \textit{supra} note 75, at 55-56.

\textsuperscript{79} 112 S. Ct. 2886 (1992).

\textsuperscript{80} \textit{Id.} at 2896-2902 (outlining and applying the nuisance criterion).
lem in the wake of these cases, they contribute to a dialogue on the role property serves in protecting individual rights. It is this underlying issue, the nature and legitimacy of property rights, that is crucial if judges, attorneys, scholars and policymakers are to accept compensation for regulatory takings as just, and not simply the costly consequence of a constitutional loophole. To consider this question more broadly, this Article looks briefly at attitudes toward private property during the nation's founding era, then examines their role today from different perspectives of political culture.

III. IN DEFENSE OF PROPERTY RIGHTS

A. Property and the Founding

The rationale of the judicial Solomons who cleaved personal rights from property rights would have confounded the pragmatic theorists of the founding era. For James Madison, the intellectual force behind the Constitution, property was synonymous with the very concept of rights. "[A]s a man is said to have a right to his property, he may be equally said to have a property in his rights," he declared.\(^1\) Madison shared the Lockean philosophy that the purpose of government is to secure the private property of the individual.\(^2\) Property was primary not for its own sake, but because it was the central invention by which a liberal regime recognized the freedom of the individual. "The instant I enter on my own land, the bright idea of property, of exclusive right, of independence, exalt my mind," proclaimed Crevecoeur. "This formerly rude soil . . . has established all our rights; on it is founded our rank, our freedom, our power as citizens."\(^3\) Property defined a sphere of autonomy that made the individual distinct from the state. As Edward Erler put it, "[t]he right to property serves as the litmus test because it is the right which is derivative from life and liberty. . . . In a sense, the right to property serves as a kind of 'early warning system' to invasions of life and liberty."\(^4\)

The founding era was not without conflict, of course. There was a vigorous debate between the Federalists, who sought to strengthen the national government through the Constitution, and the Antifederalists, who feared

\(^1\) James Madison, Property, NATIONAL GAZETTE, Mar. 27, 1792, reprinted in THE PAPERS OF JAMES MADISON 266 (Robert A. Rutland et al. eds., 1983).


\(^3\) J. HECTOR ST. JOHN DE CREVECOEUR, LETTERS FROM AN AMERICAN FARMER 22-23 (Franklin Library ed., 1982) (1782).

the corrupting effect of a large republic. Both camps, however, saw private property as serving a socially instrumental role. For the Federalists, particularly Hamilton, security of property was essential to encourage what Willard Hurst would later call the "release of energy," the self-interested pursuit of wealth that would create a strong, commercial nation. The Antifederalists were appalled by glorification of materialism, and saw private property as a mechanism that would engender and require self-responsibility, which in turn would inculcate virtue and civic awareness. To Hamilton's entrepreneurs and manufacturers, the Antifederalists contraposed a Jeffersonian agrarian idyll of sturdy yeoman tilling the soil, secure in their individualism yet committed to the good of the community. Although their visions differed, both relied on a regimen of property rights as the foundation of freedom and society. That property rights were valued in the founding era does not necessarily mean they should be valued today, of course, but perhaps they were on to something.

B. Property Rights and Political Culture

In analyzing modern beliefs and attitudes, it is tempting to ascribe universal status to one's own preferences, and speak of "we" or "our" as if there is a common American political culture that can be clearly translated into legal rules and principles. There is a long tradition of describing American exceptionalism, of course, to which there is considerable truth. What makes America distinctive, however, is not so much its unanimity, but

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87. See James W. Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States 3 (1956).

88. Id.

89. See Storing, supra note 85.

90. Id.

91. Nicolaus Tideman, for example, asserts that "[w]e are on the verge of an understanding" that land and natural resources should not be privately owned, without citing any evidence that there is broad public support for that notion. T. Nicolaus Tideman, Takings, Moral Evolution, and Justice, 88 Colum. L. Rev. 1714, 1714 (1988).

rather its unique combination of different perspectives. In short, individualism has always been notably strong in the United States, while the influence of egalitarianism has ebbed and flowed, and hierarchy has been clothed in more politically acceptable garb.

The terminology employed here is derived from a model of political culture developed by the anthropologist Mary Douglas. This approach is especially helpful in understanding policy disputes, and culture is a more apt term than ideology, particularly in the areas of environmental and land use policy. The term culture, as used here, is comprised of shared social practices and the values and beliefs that legitimate them. Culture, then, incorporates both ideas and practice. It is both more and less than ideology. More, in that the mundane aspects of life, such as eating and gardening habits, are as much a part of culture as the ideological theories of elites—perhaps less if anchoring thought in the details of day-to-day living is perceived as less elevating than the rarefied pursuit of pure ideology. Land use and environmental disputes raise basic questions of social life, freedom, and responsibility. However, they are more accurately characterized as cultural conflicts in which ideas and values are implicit in different patterns of resource use and control, than as consciously ideological disputes.

The model used here admittedly places a tremendous amount of diverse material into three categories. When a person is referred to as a libertarian, egalitarian or hierarchist, the labels are not intended to be pejorative or to imply excessive rigidity. They only suggest that particular cultures best characterize their arguments and preferences. Issues and individuals do not always fit neatly into the corners of the model. A basic comparative framework is essential, however, to effective understanding. As John Dryzek has said, "Taxonomy is a prerequisite to explication, explanation, and evaluation." The cultural argument is that the categories are not randomly chosen, but reflect the fundamental choices in politics and society. We may appreciate the virtues of these conflicting social and political arrangements, but if the model is correct, we will recognize a tension between them. This Article will show how the three major categories of the cultural approach—


94. For applications to welfare, mental health, transportation and environmental policy, see Dennis Coyle & Aaron Wildavsky, Requisites of Radical Reform: Income Maintenance Versus Tax Preferences, 7 J. Pol'y Analysis & Mgmt. 1 (1987); Politics, Policy and Culture: Applying Grid-Group Analysis (Dennis J. Coyle & Richard J. Ellis eds.) (forthcoming 1994).

hierarchy, libertarianism, and egalitarianism—help us understand the political and social conflicts embedded in property rights jurisprudence.

1. Hierarchy and Regulation

Hierarchy connotes respect for duties and obligations and devotion to the good of the larger community. In a nation with a rhetorical history emphasizing the individual, hierarchy has sometimes been the forgotten stepchild, never quite accepted as part of the family. But hierarchy has been an important force behind the regulatory state, both in its origins in the Progressive era and today. Private property rights are not a prominent aspect of hierarchical culture, but they can keep hierarchy from deteriorating into despotism, and reconcile it with the liberal tradition of America.

To the hierarchist, people may have an obligation to use natural resources responsibly, but people are clearly superior to nature and may use it to serve the good of society. This acceptance of man’s domination over nature can be seen in the early conservation movement, the predecessor of modern environmentalism.96 Conservationists such as Lester Ward and Bernhard Fernow saw care for the environment as an extension of the developing welfare state ethic, what Fernow characterized as “providential government.”97 In Fernow’s view, both the natural and the social worlds required restructuring and central direction to be efficient and harmonious. Similarly, Ward’s prescription was a national commission of wise elites, otherwise known as social scientists, to identify social problems and recommend solutions.98

In Village of Euclid v. Ambler Realty Co.,99 the Supreme Court ratified hierarchical control of land use. A lower federal court had invalidated the particular Euclid zoning ordinance, assailing the imposition of what can be called “hierarchy through regulation”: “The purpose to be accomplished,” the district court wrote, “is really to regulate the mode of living of persons . . . . [T]he result to be accomplished is to classify the population and segregate them according to their income or situation in life.”100 Ambler Realty argued that, in cultural terms, liberty trumps hierarchy: “That our cities should be made beautiful and orderly is, of course, in the highest degree

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desirable, but it is even more important that our people should remain free.”

On appeal to the Supreme Court, Justice Sutherland reasoned that zoning was in the public interest because it was essentially an extension of the common law that prohibits nuisances: “A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard.” Justice Sutherland makes a curious analogy, because we don’t know who owns the pig and who the parlor, and thus whether any nuisance exists at all. If I keep my own pig in my parlor, it is not a nuisance. If my pig prefers your parlor, but you do not prefer my pig in your parlor, then it is a nuisance. Under the ruling of Euclid, offending the new hierarchy of land use was sufficient to be condemned as a nuisance; pigs, factories and homes would now be required to stay where they belonged. The analogy of environmental degradation to the traditional notion of nuisance remains today an important underpinning of the constitutionality of regulation.

While traditional conservation and zoning infringed upon private control of land and resources, many modern environmentalists go a step further, arguing that respect for the environment undermines the very notion of private property. Sondra Berchin, in a blend of wishful thinking and perceptive analysis, has claimed that “land ownership has been redefined so that it no longer entails a constitutional right to develop.” Berchin adds that “[t]here is every reason to believe . . . this trend will continue until all developmental rights are under state control.” The United States Supreme Court, on the other hand, has insisted that governments, if they wish to avoid paying compensation, leave property owners with at least some “reasonably beneficial”—that is, economically viable—use of their land. Berchin argues, however, that development of natural areas is inherently an unreasonable use of property, and thus can be forbidden without invoking the Takings Clause. Joseph Sax shares Berchin’s belief in the obsolescence of private property. According to Sax, “[w]e are going to have to come to terms with the prospect that planning (a word Americans don’t much like), rather than property, is going to be a principal engine of social

102. *Id.* at 388 (opinion of Court).
105. *Id.* at 934.
106. *See Lucas*, 112 S. Ct. at 2895 (“[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses . . . he has suffered a taking.”).
benefit production in the future.\textsuperscript{108} Americans may resist Sax's prescription, however, not just because they have an aversion to the term "planning," but also because they sense that the shift from property to planning requires a fundamental removal of power from individuals. Taking the views of Berchin and Sax one step further, Nicolaus Tideman argues that private ownership of land and natural resources is as immoral as slavery:

"Claims to own land are as unsupportable as claims to own human beings. . . . [T]he losses sustained by the people who invested disproportionately in land deserve no more compensation than the losses of slave owners."\textsuperscript{109}

Many judges and justices also are quite sympathetic to environmentalist arguments for public control without compensation, especially concerning wetlands.\textsuperscript{110} Judges have an increasingly sophisticated understanding of ecology and pollution, according to James Hite, an agricultural economist. Consequently, "[t]his heightened scientific understanding allows contemporary judges to see some controls as reasonable today, where the same controls would have seemed unreasonable and arbitrary to scientifically less enlightened judges a generation or two ago."\textsuperscript{111} Hite recognized the threat that this environmental "enlightenment" posed to private property rights, stating that "[s]trictly construed, . . . [judicial acceptance of environmental restrictions] might be seen as a threat to all private property rights, making the 'taking' clause irrelevant."\textsuperscript{112} Yet he dismissed the possibility that private development rights could be deprived without compensation, because he did not think that such deprivation would serve the public welfare.\textsuperscript{113}

Without an adequate defense of property rights, it is not clear why the line must be drawn at that point. Once we have accepted that constitutional rights are porous and may be breached at will by a public entity pursuing its

\begin{thebibliography}{99}
\bibitem{109} Tideman, \textit{supra} note 91, at 1723, 1729.
\bibitem{112} Id. at 102-03.
\bibitem{113} For Hite, the distinction is clear cut:

[S]uch an extension of the doctrine would be untenable with the rationale for conservation. Conservation is a legitimate activity of government because the public welfare requires it; if government controls begin to be premised on protection and preservation of natural objects for their own sake to the extent of preventing human economic activity, the public welfare would not be served.

\textit{Id.} at 103.
\end{thebibliography}
claim of the "public welfare," then there is no qualitative distinction between conservation that allows limited private use of property, which Hite endorses, and preservationism that does not. While some judges have suggested otherwise, the Supreme Court has emphasized that the right to use one's property is indeed a right and not merely a privilege that the government may withdraw at will.

Shifting control of property from private to public hands is hardly a new idea, as many commentators have noted. The development of private property rights was fundamental to the shift from feudalism to liberalism, and some scholars and judges have suggested that perhaps some return to feudal traditions is desirable today. "Within the traditions of property law," E.F. Roberts has written, "there is nothing particularly radical in visualizing land being owned by the sovereign and being channelled out again to persons who would hold it only as long as they performed the requisite duties which went with the land." Arguments for the feudal-like encumbrance of private property have been heard since the rise of the "hierarchical" conservation movement. Francis Philbrick waxed nostalgic for feudalism in 1938, noting that "in the case of feudalism it is regrettable that there could not have been preserved the idea that all property was held subject to the performance of duties—not a few of them public." These sentiments were echoed nearly thirty years later by John Cribbet, who asserted that "the concept behind [feudal duties] was sound. . . . [T]he use of land is of more than private concern."

A return to essentially feudal property rights is well within the traditions of property law, which go back to the common law of the Middle Ages. The great tradition of America starts, however, with the ideas of John Locke, not the reign of William the Conqueror. Within the liberal tradition, the feudal encumbrance of property is radical indeed. As John McClaughry has written, "[t]he Old Feudalism was not without virtue. . . . It was a strong force for social stability. . . . The problem of the Old Feudalism was that it stifled

114. See Just, 201 N.W.2d at 761; see also Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (Brennan, J., dissenting).
115. Nollan, 483 U.S. at 833 n.2.
116. See Matthew O. Tobarin & Joseph R. Grodin, The Individual and the Public Service Enterprise in the New Industrial State, 55 CAL. L. REV. 1247 (1967), for discussion of the "hierarchy of relationships" maintained by feudal society, when "an individual's 'place' in society . . . basically was fixed by the circumstances of his birth." Id. at 1249.
individual liberty, productivity, and self-government. And that will also be the problem of the New Feudalism."120

If the culture of hierarchy, which reveres expertise and elevates the common good, is to be reconciled with liberalism, a critical role for private property rights remains. If there is a place for everything in the hierarchy, then there is a proper sphere for personal autonomy, however limited—I may answer to king and general, yet still be lord of my modest manor. Moreover, the effect of the self-responsibility required by private ownership on citizenship should not be lightly dismissed. Property rights, by protecting against arbitrary or capricious treatment, can restrain officials from exceeding or abusing their special roles.121 Private rights may be especially vulnerable at the local level, the locus for most land use regulation.122 If we assume that the introduction of hierarchical concepts in American public policy is an attempt to build some order and community within the liberal framework, then limits on the reach of government become crucial to the legitimacy of hierarchy in the polity. Accommodation of hierarchy entails allowing room for regulation, but it need not mean the end of property rights.

2. Equality, Property and the State

Egalitarianism, which values individual autonomy, participatory government and substantive equality, is ambivalent toward private property rights. Egalitarians seek to reconcile the libertarian concern for the individual with the hierarchical concern for the group, to combine the social responsibility of hierarchy with the freedom of libertarianism. In doing so, they create an alternative social vision, rooted in the pursuit of equality, that contrasts with both libertarianism and hierarchy.123 Private property is seen as both friend and foe in this quest.

Instead of hierarchical reliance on specialized expertise to protect the environment, the egalitarian ideal seeks an "ongoing dialogue in a community


121. The public choice literature clearly indicates that enlightened public interest is not always the motivating factor for government actions. The amount of literature is immense, but one succinct introduction can be found in James D. Gwartney & Richard E. Wagner, Public Choice and the Conduct of Representative Government, in PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 3-5 (James D. Gwartney & Richard E. Wagner eds., 1988).


123. See, e.g., FREDERICK C. THAYER, AN END TO HIERARCHY AND COMPETITION (1981).
of equals.”¹²⁴ Certainly some of the recent changes in administrative law, such as the broadening of legal standing to intervene in suits, the public funding of adversarial groups, the expansion of notice and hearing requirements, and the requirement of administrative responses to public comments, have progressed in this direction.¹²⁵ For example, a major consequence of the National Environmental Policy Act of 1969¹²⁶ has been the expansion of participation in regulation. Regulatory proceedings have become increasingly drawn out and complex, as every party potentially affected by a decision has her say.

During the 1960s, commentators concerned about forging a more egalitarian society began to see zoning and other hierarchical land use controls as sources of inequality.¹²⁷ Judicial abdication to legislatures was no longer the correct course of action. Reflecting on the movement away from judicial passivism in the area of land use controls, Norman Williams praised the entry of at least some state courts, during the 1960s and 1970s, into the era that he calls “[s]ophisticated [j]udicial [r]eview . . . wiser, more skeptical, and more realistic.”¹²⁸

The leading example of the push for substantive equality in land use is the demand for an end to “exclusionary” zoning. In this context, egalitarians have sought to disassociate themselves from broader libertarian attacks on regulation, focusing their critique on its inegalitarian aspects. “Exclusionary zoning,” according to Paul and Linda Davidoff, “may be defined as the complex of zoning practices which results in closing suburban housing and land markets to low- and moderate-income families. All regulations are, in a sense, exclusionary. For example, they are exclusionary in that they restrict degrees of individual freedom;” such coercion, however, is not of concern here.¹²⁹ Rather, as Williams argued, only limits on the rights of the poor


¹²⁵ For a classic analysis of these changes, see Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1723-47, 1700-75 (1975).


¹²⁷ See, e.g., Robert R. Linowes & Don T. Allensworth, The Politics of Land Use: Planning, Zoning and the Private Developer 62 (1973) (“We cannot solve a single one of our other domestic problems without launching a direct attack on community zoning.”).

¹²⁸ 1 Williams, supra note 32, § 5.05, at 107.

should be termed "exclusionary"; other groups may be only "highly
restricted." 130

The first step in breaking down exclusionary zoning is to remove regula-
tions, such as minimum lot- and floor-size requirements, which make it diffi-
cult to erect inexpensive housing. But full equality can demand more:
Municipalities can be required to accommodate their share of the region’s
poor by building housing, subsidizing rents and requiring builders to sell
units at designated prices. In South Burlington County NAACP v. Township
of Mount Laurel (Mount Laurel I), 131 the New Jersey Supreme Court led
the way in this direction, requiring that each developing municipality incor-
porate its "fair share" of low-income housing. 132 In subsequent litigation
(Mount Laurel II) 133 the New Jersey court explained its ruling, stating:
"The basis for the constitutional obligation is simple: the State controls the
use of land, all of the land. In exercising that control it cannot favor rich
over poor." 134

The doctrines enunciated in the Mount Laurel cases do not bode well for
the pursuit of equality and liberty through rights. However, the difficulties
of interpreting 135 and implementing 136 the court’s will as well as questions
about the legitimacy of the court's involvement in policymaking 137 have de-
terred other state courts from following the New Jersey lead. A study of the
aftermath of the 1983 Mount Laurel II decision concluded: "Perhaps the
worst burden overhanging the Mount Laurel process is the manner of its
birth. . . . With the judicial involvement came intense controversy, . . . which
has discouraged politicians everywhere and judges outside of New Jersey

130. Norman Williams, Jr. & Thomas Norman, Exclusionary Land Use Controls: The Case
131. 336 A.2d 713 (N.J.) [hereinafter Mount Laurel I], cert. denied and appeal dismissed,
132. See id. at 731-32. "As a developing municipality, Mount Laurel must, by its land use
regulations, make realistically possible the opportunity of an appropriate variety and choice of
housing . . . ." Id. at 731.
[hereinafter Mount Laurel II].
134. Id. at 415.
135. The Mount Laurel doctrine has been dubbed " 'New Jersey's Full Employment Act
for Lawyers and Planners.' " Jerome G. Rose, Waning Judicial Legitimacy: The Price of Judi-
136. By 1988, 13 years after Mount Laurel I, fewer than 2000 "Mount Laurel" units of
low- and moderate-income housing had been built in just 14 communities. Previously, the
court had estimated the need at 277,000 units. Anthony DePalma, Mount Laurel: Slow, Pain-
ful Progress, N.Y. TIMES, May 1, 1988, § 10, at 1, 20.
137. See G. ALAN TARR, STATE SUPREME COURTS IN STATE AND NATION 219-24
(1988); Rose, supra note 135, at 805-14.
from embracing the approach.” Furthermore, the degree of judicial and legislative interference with private property has raised questions concerning the constitutionality of such decisions.139

Fortunately, from the perspective of property rights, other egalitarian responses to regulation have been more encouraging. Property rights may give legal protection to social inequality, yet they also can guard against oppressive government. “Compared to other resources,” Robert Ellickson argues, “land remains a particularly potent safeguard of individual liberty. Like no other resource, land can provide a physical haven to which a beleaguered individual can retreat.”140 By allowing property rights to be denigrated—particularly those relating to land use—courts have tolerated the erosion of personal freedoms. Constantly expanding land use regulations threaten personal privacy, creativity and entrepreneurialism. Regulations may specify the relations of who may live in a house together. They can dictate what colors a house or business may be painted and its architectural style. They may require that an owner, without compensation, avoid using a private field or forest that the public likes to look at, and may require that a church maintain the appearance of a structure, even if it drains finances intended for religious purposes. They may forbid individuals from selling items made in their living rooms or offering services from their homes. Many of these regulations infringe upon rights important to the egalitarian culture.

Egalitarians may value property rights that protect free expression or privacy, but not rights to exclusive control of material resources. Margaret Radin, for example, would protect only those property rights she perceives as promoting “‘personhood.”141 But Leonard Levy, while disclaiming any intent to resurrect property or economic rights in general, has advocated elevating to the status of fundamental the right to pursue an occupation of one’s choice because he sees this right as essential to personal identity.142 As egalitarians push the dialogue on autonomy and property, more uses of property are likely to be seen as fundamental rights. Courts have increasingly been willing to strike down land use regulations that impinge on preferred rights, such as privacy, expression and equal protection.143 These cases are important steps in raising awareness about the relations between

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143. See cases cited infra notes 145-52 and accompanying text.
personal freedom and property. The future of property rights will depend in large part on the willingness of liberal judges and justices who may not have high regard for private property, yet who may venture willingly into the turbulent waters of judicial activism to protect property rights when they coincide with preferred rights.144

Since Moore v. City of East Cleveland,145 the Supreme Court often has been willing to protect rights of expression and equality even when they coincide with rights to use property. As John Costonis has concluded, "the Court has shifted its ground, suggesting that under some circumstances property may advance noneconomic values that are entitled to . . . protection."146 Protection of these rights is evidenced in a number of cases. The possible interference with noncommercial speech saved the billboard owners in Metromedia, Inc. v. San Diego;147 the expressive connotations of nude dancing provided the owners in Schad v. Mt. Ephraim148 with constitutional protection; banning a restaurant from serving liquor because of the wishes of a nearby church was found to offend the Establishment Clause in Larkin v. Grendel's Den, Inc.;149 and protection of the mentally retarded, who might be considered a "discrete, insular minority" meriting greater protection under the Carolene Products dichotomy of rights,150 saved the group home in Cleburne v. Cleburne Living Center, Inc.151 Many state courts have gone beyond the protections provided by the United States Supreme Court. In City of Santa Barbara v. Adamson,152 for example, the California Supreme Court found that the state constitution protected the right of unrelated peo-

144. See, e.g., Daniel R. Mandelker, Reversing the Presumption of Constitutionality in Land Use Litigation: Is Legislative Action Necessary?, 30 WASH. U. J. URB. & CONTEMP. L. 5 (1986) (arguing that rights related to real property (buildings and land) should be vigilantly protected only for minorities or when serving preferred rights).
145. 431 U.S. 494 (1977); see supra notes 52-55 and accompanying text.
147. 453 U.S. 490, 521 (1981) ("Because the [advertising] ordinance reaches too far into the realm of protected speech, we conclude that it is unconstitutional on its face.").
148. 452 U.S. 61, 76 (1981) (invalidating on First Amendment grounds a zoning ordinance that "totally excludes all live entertainment, including non-obscene nude dancing that is otherwise protected by the First Amendment").
149. 459 U.S. 116 (1982) (invalidating a Massachusetts statute that allowed churches and schools to veto applications for liquor licenses within 500 feet of the church or school).
150. See supra notes 18-22 and accompanying text.
152. 610 P.2d 436 (Cal. 1980).
ple to live together.\footnote{Id. at 442-44.} The high courts of Michigan\footnote{Charter Township of Delta v. Dinolfo, 351 N.W.2d 831 (Mich. 1984).} and New York\footnote{Baer v. Town of Brookhaven, 537 N.E.2d 619 (N.Y. 1989); McMinn v. Town of Oyster Bay, 488 N.E.2d 1240 (N.Y. 1985).} have made similar rulings.

First Amendment protections of expression and similar state constitutional provisions have been used to attack a variety of property restrictions under the theory that imposing public standards restricts expression of individual tastes. Zoning of music clubs in New York City, for example, fell victim to expressive rights.\footnote{See Dennis J. Coyle, Book Review, \textit{Law and Politics Book Review}, Apr. 1993, at 31 (reviewing \textit{Paul Chevigny, Gigs: Jazz and the Cabaret Laws in New York City} (1991)).} Ordinances that prohibit certain architectural styles, or require that the design of a building or a sign be approved by a public commission, raise similar questions of constitutionality,\footnote{See Annette B. Kolis, \textit{Architectural Expression: Police Power and the First Amendment}, 16 URB. L. ANN. 273 (1979).} as do historical preservation regulations that can require maintenance of building facades, forbid modifications and even specify use of certain materials.\footnote{The Pennsylvania Supreme Court has ruled that preservation requirements without compensation may be unconstitutional. United Artists Theater Circuit, Inc., v. City of Philadelphia, 595 A.2d 6 (Pa. 1991). See generally Thomas W. Logue, \textit{Avoiding Takings Challenges While Protecting Historic Properties From Demolition}, 19 STETSON L. REV. 739 (1990).} John Costonis has criticized such aesthetic and historic regulation for preserving "emotional stability" at the cost of creative freedom.\footnote{\textit{John J. Costonis, Icons and Aliens} 1 (1989).} Richard Babcock cited one absurd example in which an ordinance "simply stated that in any block no house 'shall be substantially similar to or substantially dissimilar from any other house.'"\footnote{See generally \textit{Paul Chevigny, Gigs: Jazz and the Cabaret Laws in New York City} (1991).} Aesthetic regulations have mushroomed in recent years, and as more courts are forced to consider the ramifications for expressive freedom, it is likely that constitutional limits will grow.

In a similar context, religious uses of property are just beginning to get special dispensation from the courts. If a property owner happens to be a church, this status will place it on firmer constitutional ground than the ordinary land owner.\footnote{See \textit{Susan L. Goldberg, Gimme Shelter: Religious Provision of Shelter to the Homeless as a Protected Use Under Zoning Laws}, 30 WASH. U. J. OF URB. & CONTEMP. L. 75 (1986); \textit{Scott D. Godshall}, Note, \textit{Land Use Regulation and the Free Exercise Clause}, 84 COLUM. L. REV. 1562 (1984).} As land use controls have become more extensive, they have begun to intrude on the functioning of churches, raising not only
takings concerns, but free exercise concerns as well. In New York City, for example, an historic preservation ordinance drew a court challenge because of the financial burden it imposed on a church struggling to fund its religious activities while maintaining its old structure.

Liberty is an important value if equality is to be freed from the shackles of coercion, and liberty of property may ultimately be inseparable from other individual freedoms, such as expression. Richard Funston, for one, has urged that the elimination of the double standard of constitutional rights could be an important step toward greater regard for and protection of equality. As egalitarians come to understand the role property can play in protecting fundamental values, a foundation is laid for cross-cultural agreement on traditional protections of property, such as those provided in the Takings Clause. Strengthening the role of the courts in protecting property rights does not require, however, that all rights be treated equally. Egalitarians may believe that equal protection and free expression deserve more protection than property rights, and hierarchists may assert that no rights should receive the nearly iron-clad protection of strict scrutiny judicial review, yet both may still agree with libertarians that property rights merit significant protection, whether to further personal rights or to provide the individual with a modicum of dignity in the larger polity.

3. **Liberty and Property**

The libertarian conception of social good and evil is virtually a mirror image of the hierarchical position. For the founders of the conservation movement, central control was a way to replace the nightmare of unregulated development with the serenity of order. For libertarians, it is the coercive power of the state that destroys community and individual satisfaction. From their perspective, the best way to serve the public is to promote the private. Libertarians such as Ellen Frankel Paul and Richard Epstein argue

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165. I sometimes refer to this as the “Gourmet Ghetto Effect.” As a graduate student at Berkeley, it was interesting to observe how radicals who proclaimed that “property is theft” in the best tradition of Proudhon, would suddenly start to see that perhaps government was the thief, as they opened trendy restaurants, tried to sell home-baked brownies, or otherwise encountered the Berkeley regulatory gauntlet.
that justice and the Constitution require a retraction of the government tentacles reaching over private property. Their agenda calls for a sweeping rollback of the welfare state. "It will be said," Epstein concluded, "that my position invalidates much of the twentieth century legislation, and so it does."167

Private property rights are most clearly at home in the culture of libertarians, who tend to see themselves as the heirs to the founders' concern for limited government. The Pennsylvania Supreme Court, which has been more sympathetic to arguments for property rights than most courts, ushered in the modern era of concern over the social consequences of land use regulation when, in 1965, it issued an opinion rich with libertarian language, invalidating large-lot zoning in National Land & Investment Co. v. Kohn.168 "Zoning is a means by which a governmental body can plan for the future," wrote Justice Roberts, "it may not be used as a means to deny the future."169 Local governments, the Pennsylvania court concluded, must shoulder the responsibilities that "time and natural growth invariably bring,"170 and cannot "stand in the way of the natural forces which send our population into hitherto undeveloped areas in search of a comfortable place to live."171 Contrast this openness to unregulated growth with the New Jersey Supreme Court's hostility to "uncontrolled migration to anywhere anyone wants to settle, [with] roads leading to places they should never be."172 The tendency in Pennsylvania has been to trust the market, whereas the New Jersey court has sought to bend hierarchical planning to its social preferences.

The libertarian tolerates exclusive communities, but not with a boost from government. Justice Roberts wrote: "There is no doubt that many of the residents of this area are highly desirous of keeping it the way it is, . . . . These desires, however, do not rise to the level of public welfare. This is purely a matter of private desire which zoning regulations may not be employed to effectuate."173 Quoting an earlier opinion, Roberts stated: "'An


167. Epstein, supra note 166, at 281. Among the governmental measures that would fail Epstein's standard are wealth redistribution, id. at 314-24, estate and gift taxes, id. at 303-05, urban renewal, id. at 178-81, rent control, id. at 176-77, 186-188, most zoning, id. at 263-73, and minimum wage and maximum hour regulations, id. at 279-80.


169. Id. at 610.

170. Id.

171. Id. at 612.


owner of land may constitutionally make his property as large and as private or secluded or exclusive as he desires and his purse can afford.' If forced to bargain in the private market, according to the libertarian argument, residents will have to face the social costs of their exclusionary predilections, and decide whether they are literally willing to pay the price. Government regulation, the libertarian argues, masks the social costs, skewing land-use development patterns toward socially inefficient uses.

Libertarians regard resource exploitation as a desirable consequence of individual initiative and creativity because the pursuit of personal preferences creates social wealth. They agree with John Locke that if God gave the earth to mankind, he gave it for "the use of the industrious." Nature provides a bounty for human prosperity, limited only by our imaginations. If "environmentalism" is taken to mean an obligation to consider what is good for nature separate from our own preferences, then it is not a part of the libertarian culture. The "free market environmentalism" school argues that there is nothing so unique about the environment that it cannot best be protected through the market pursuit of self-interest, so long as property rights incorporate the natural environment. Trees do not have property rights, but their owners do, and people who value trees will pay for them, by such methods as banding together to purchase a nature preserve. An alternative to a purchase plan is to negotiate covenants restricting the use of private property. A market solution is asserted by libertarians even for pollution. For example, an individual might pay an industry owner to stop his pollution, or the owner might pay the individual for permission to pollute his property. As an alternative to buying out the neighborhood polluter, an individual might take him to court. Pollution is a physical nuisance, and most libertarians, such as Murray Rothbard, would recognize a property right protection against such intrusions.

For the pure libertarian, only a minimal state that does little more than set up courts to enforce private agreements is justified. Therefore, most pub-

174. Id. at 612.
lic restrictions on property rights will be seen as illegitimate.180 "The right to property is the most misunderstood and unappreciated of human rights, and it is one most constantly violated by governments," John Hospers has complained.181 Only judicial review that gives the strictest scrutiny to infringements of private property rights is fully consistent with libertarianism, while such strict review could prove too severe for the group-oriented cultures of hierarchy and equality. Given the drought of constitutional protection for property owners during much of this century,182 a more modest standard providing significant protection without wiping out the regulatory state should be seen as important progress by pragmatic libertarians, while allowing reconciliation with competing cultures.

IV. A MODERATE APPROACH TO TAKINGS JURISPRUDENCE

China is a planners' paradise. There is no gap between plan making and plan implementation. Nor is there any private developer to lure or browbeat into conformance. . . . [W]hat the government plans, it simply does.

. . . The institutional framework for plan making is remarkably similar to what most planners say works best.183

Property rights are not just for libertarians. As long as individual dignity, freedom, moderation and responsibility are valued, there will be a role for property rights. Attempts to separate rights of property from personal rights have proved difficult at best, and ultimately unsatisfactory. Property is not simply the domain of the developer and the corporation. Young families, retirees, artists, even political activists have property.184 Property interests are universal in a liberal democracy, and property rights can accommodate each of the political cultures. Some general principles may help to provide firmer protection for property rights while still allowing a significant role for the state. These principles include: protection of use rights; giving precedence to takings claims over substantive due process

182. See supra notes 18-22 and accompanying text.
184. "[W]e challenge The Manifesto's implicit notion," wrote Berger and Kanner in their reply to a diatribe against property rights, "that litigants have to be pure of heart before they can assert their constitutional rights in an effective fashion. The notion that building homes is somehow inherently wicked, or even suspect, is preposterous." Berger & Kanner, supra note 13, at 688 n.13 (replying to Williams, supra note 13).
claims; applying a mid-level standard to governmental regulation; and acknowledging that procedural abuses may constitute takings.

A. Freedom to Use Property

As Elizabeth Patterson has shown, some property rights, such as the right to hold and transfer title to property, receive greater judicial protection than other property rights.\textsuperscript{185} The power to exclude other individuals from one's land has also withstood the erosive force of New Deal jurisprudence, as seen in \textit{Loretto v. Teleprompter Manhattan CATV Corp.}\textsuperscript{186} and \textit{Nollan v. California Coastal Commission.}\textsuperscript{187} It is the ability to choose, however, that marks freedom. Choice is what allows an owner to create what she wishes with her property, to reflect her character, her aspirations, and her beliefs. Freedom provides the test of responsibility, that one can decide what to do, make the effort, and live with the consequences. Whether we consider the importance of property for developing character, for personal expression, for generating political independence or economic entrepreneurship, it is autonomy in use that makes it possible. Yet, it is this freedom that has been most ignored by the courts. The Washington Supreme Court, for example, has attempted to deny the import of \textit{First English Evangelical Lutheran Church v. County of Los Angeles}\textsuperscript{188} and \textit{Nollan} by declaring that no regulation can be challenged as a taking unless it infringes upon rights of possession, exclusion, and alienation.\textsuperscript{189} In other words, you can by buy and sell your property, but just don't try to use it.

Beyond the drastic effect that use restrictions can have on the market value of property lie basic issues of freedom. Under current takings doctrine, a restriction on land use may not be a taking if it leaves the owner with at least one "reasonably beneficial use,"\textsuperscript{190} regardless of whether the owner wishes to pursue that use. This confuses the power to decide use with economic expectations. If a state deposits a ready-made apartment building on an individual's land and orders her to operate it, the state has effectively destroyed her rights to use the land as she sees fit, even if it guarantees her an adequate profit. In contrast, speech rights are not violated only when no

\begin{itemize}
\item \textsuperscript{186} 458 U.S. 419 (1982).
\item \textsuperscript{187} 483 U.S. 825 (1987).
\item \textsuperscript{188} 482 U.S. 304 (1987).
\item \textsuperscript{189} Presbytery of Seattle v. King County, 787 P.2d 907, 912 (Wash.) ("If a regulation does not infringe upon a fundamental attribute of ownership, and if it protects the public from ... [certain] harms, then no constitutional 'taking' requiring just compensation exists."), \textit{cert. denied}, 498 U.S. 911 (1990).
\end{itemize}
"reasonably beneficial speech" is permitted. Freedom lies in choosing what to say, not in having state permission to express "correct" speech. Freedom to use property should be recognized by the courts as a fundamental right subject to compensation under the Takings Clause if it is restricted too severely.

B. Distinguishing Takings From Substantive Due Process

The Takings Clause gives the clearest constitutional protection to landowners: If the government covets your property, it must pay for it. This clarity makes the takings doctrine less susceptible to the frequent criticism of substantive due process, that it lacks constitutional grounding. The United States Constitution does not even include the word "substantive" in the due process clause, let alone specify what it might mean. The Constitution does, however, clearly state in the Takings Clause that government may not take property without just compensation. Just what constitutes a taking, a public use, and just compensation is not immediately apparent. The level of specificity, however, is similar to that of the expressive and criminal rights clauses that the courts regularly interpret and enforce. Protection of landowner rights, therefore, can be compatible with the Carolene Products dictum that the Court should support only specific clauses of the constitution, and need not raise the specter of a rogue court.

The courts' confusion of takings doctrine with substantive due process has lessened the effectiveness of federal and state takings clauses as shields against government intrusion. When these two concepts are treated as one, with a single, rational basis standard so watered down as to permit virtually anything to pass, these protections of rights become empty shells. Justice Holmes's warning that "[w]hen this seemingly absolute protection [the Takings Clause] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." Although property has not disappeared, Justice Holmes anticipated the fate that befell rights to use property in the decades following the New Deal.

The Takings Clause should be considered first by the courts, lest substantive due process be used to excuse takings. The Supreme Court has typically found, however, that a restriction which advances a legitimate state interest

191. U.S. CONST. amend. V. "[N]or shall private property be taken for public use without just compensation." Id.
192. See U.S. CONST. amend. V (grand jury, double jeopardy); id. amend. VI (right to trial by jury); id. amend. VIII (cruel and unusual punishment).
193. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); see supra notes 19-23 and accompanying text.
(the substantive due process test) is not a taking. The issues may often coincide, but they are not identical. The takings standard should be whether the restrictions imposed on a property owner’s rights are so extensive as to constitute a taking. Whether the government actions are sufficiently related to an appropriate objective is the due process question. In the first instance the emphasis is on the harm to the owner while in the latter it is on the legitimacy of the governmental act. A particular measure may be essential or frivolous, and its impact on the owner may be severe or trivial; the issues are distinct.

To pass constitutional muster, an action by the state should surmount both the takings and the substantive due process obstacles. A governmental action that bears a sufficient relation to a legitimate objective may still impose such a burden on the property owner as to deprive rights, and thus require compensation. That which can be condemned (with compensation through eminent domain) cannot always be forbidden (through regulations pursuant to the police power) without payment. A municipality may condemn and purchase property for a park, for example, but it does not follow that a private owner may be forbidden, without compensation, from using his property in any way other than as a park. Once a taking has been found the issue of the government’s justification may be incorporated into the public use question in order to decide whether the taking will be permitted to continue. Because of the confusion of due process and takings questions, legitimate police power regulations have been virtually immune from compensation demands. Even in *Nollan v. California Coastal Commission*, the sole case during the 1980s in which the Supreme Court found that a regulatory body had taken an owner’s property, Justice Scalia indicated that a ban on rebuilding the coastal home, instead of the demand for an easement, was a permissible exercise of the police power and would not require payment, despite its greater confiscatory impact.

The virtual blanket exception for police power regulation provided under the lenient due process test of minimal rationality allows courts to dismiss takings claims without seriously weighing the impact on the rights of the landowner. This creates a logical absurdity. The Constitution requires that any taking of property serve a public use, which the Court considers synonymous with a public purpose. Thus, the class of governmental actions pro-

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moting a public purpose would encompass the class of takings for public uses. If the action serves a public purpose, however, it is not considered a taking, and thus no compensation need be paid. The classes of public-purpose regulation and takings become mutually exclusive; the distinction hinges on whether the government has chosen to offer compensation. Under its lenient takings analysis, for half a century the Supreme Court did not find a regulatory act (absent a physical invasion) to require payment.\textsuperscript{200}

The power to decide whether compensation is required has been abdicated by the judiciary to the legislatures and regulatory agencies. When these bodies wish to use the eminent domain power to condemn \textit{with} compensation, the elastic interpretation of the public use clause legitimates whatever action they wish to take. If they wish to avoid paying (and in a democracy, where the tax-leviers may be voted out by the taxpayers, there is great incentive to do so), their actions will be upheld under the equally indulgent standard for police power regulation. Using minimal substantive due process to decide whether there has been any taking at all in effect exempts government from the just compensation mandate.

The point of protecting rights is to protect the freedom of the individual, not to tell government what to do. Thus, the Takings Clause should logically focus on the detriment to the individual by asking what has been deprived. If a government thinks it has a good reason to substantially restrict an owner's rights, it may do so. Short of a public nuisance, however, the persuasiveness of its argument is irrelevant to the compensation issue. Whether the action passed a rationality test or not, partial payment for a temporary taking should be required. If it passed, the government could pay for a permanent taking if it wished to continue its action.

While the imposition of stricter judicial review over governmental action may seem, at first glance, to be excessive, every minuscule reduction of an owner's autonomy does not require compensation. That might warm libertarian hearts,\textsuperscript{201} but it clearly would be too severe to accommodate the wide range of political cultures existing today. At the other extreme, the notion that a valid regulation cannot be a taking unless it deprives \textit{all} economic value is equally draconian. That the compensation requirement should kick in somewhere in between, when deprivation is substantial but not necessarily

\textsuperscript{200} When the Supreme Court finally did find a taking in Nollan v. California Coastal Commission, 483 U.S. 825 (1987), even that case involved a physical invasion—the state's conditioning of a building permit on the property owner's grant of an easement for beach access. Id. at 828.

\textsuperscript{201} Roger Pilon of the Cato Institute, for example, would probably challenge the legitimacy of any reduction of a property owner's rights, especially without compensation. See Roger Pilon, Property Rights, Takings and a Free Society, 6 HARV. J.L. & PUB. POL'Y 165 (1983).
total, seems a matter of common sense. The Supreme Court, however, has never enunciated that point any more clearly than its vague admonition in Pennsylvania Coal Co. v. Mahon, that regulation may not go "too far." Remarkably, the argument of South Carolina in Lucas v. South Carolina Coastal Council, and indeed the ruling of the state supreme court in that case, was that compensation would not be required even if the deprivation were total. The United States Supreme Court's ruling in Lucas, that total elimination of value requires compensation, absent a nuisance, is exceedingly mundane, and remarkable only in that it is considered significant or controversial. The attention given to Lucas speaks volumes about the desiccated state of property rights, when even such a minimal protection is noteworthy. That total deprivation of value and use rights strips an owner of autonomy and dignity and merits compensation is a point on which reasonable hierarchists, egalitarians and libertarians should agree.

**C. Public Use and Public Purpose**

The Takings Clause allows compensated takings, but only if the property is taken for "public use." A strict interpretation of public use would greatly narrow the scope of legitimate governmental takings. Property could be taken only if it would be owned and used by the public, such as for highways and Army bases. Such an interpretation might be most compatible with libertarian landowner rights and perhaps with plain meaning constitutional interpretation, but it would eliminate whole categories of restrictions that persons of a more hierarchical or egalitarian bent might consider important for the public, such as aesthetic regulation or rent controls. Furthermore, when regulation is so restrictive as to be a taking, the public is, in a sense, getting "use" of it, even if it is not actually walking across it. Open-space or agricultural zoning, for example, gives the public the enjoyment of gazing at bucolic meadows and stately forests.

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203. Id. at 415 ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").
205. See id. at 900 (stating that deprivation of "all economically viable use" does not necessarily justify compensation).
207. U.S. CONST. amend V; see also Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 245 (1984) ("[T]he Constitution forbids even a compensated taking of property when executed for no other reason than to confer a private benefit on a particular private party.").
Therefore, expanding the concept of public use to encompass public purpose seems reasonable. The expansion of public use also serves to eliminate the absurdity that substantial or even severe regulatory deprivations of rights cannot be takings and thus need not be compensated because they do not serve public uses in the strict sense. Equating public use with public purpose is abusive only when it is used to excuse takings without compensation, or to allow a taking to proceed on the slimmest of public rationales. The public use clause is the logical place to consider the government’s justification for its action, once a taking has been found. The next section discusses how strong that justification should be.

A takings analysis should first consider if a taking has occurred. The answer is yes if the owner’s property rights have been substantially deprived, unless the deprivation was necessary to eliminate a nuisance. Once a taking has been found, the next question is whether the taking will be allowed to continue. If it is for a public use—that is, if it serves a public purpose—then the government may continue the restriction, as long as it pays for the taking. If the restriction does not pass the public use test, then it may not continue, but the government must still pay for the temporary taking that occurred in the interim.

If the restriction is not necessary to eliminate a nuisance, but it is still not a taking because it does not substantially deprive the owner’s rights, only then should the substantive due process question be considered. One might ask why judges should care about the rationality of governmental action if it does not substantially impair private rights. Should judges not leave such decisions to the legislature unless something serious is at stake? Perhaps they should, and dropping the substantive due process test entirely would not do extreme violence to the accommodation of cultures advocated by this

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210. Admittedly, “substantial” is vague, but the legal significance of that term is great; it would move courts away from the untenable extremes of total deprivation and trivial deprivation. Only through logical argument in court opinions and legal and policy literature will “substantial” gain meaning in specific circumstances, just as the mid-level standard in gender discrimination cases becomes more concrete through application. See, for example, Craig v. Boren, 429 U.S. 190 (1976), and its progeny. Vagueness may also be a virtue, as it allows room for variation under different state constitutions, for example, while still encouraging a moderate standard consistent with cultural pluralism.
211. Defining a nuisance is a trick in itself, and not one I plan to practice here, except to suggest that Justice Scalia was dead on in Lucas to argue that a nuisance must be something more than the passing whim of a legislature or agency. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2889 (1992). A nuisance must be defined independently of the legislature, or else rights as a fence against politics is a facade.
Article, if the takings review articulated within is adopted. However there are valid grounds as well for denying government the power to take actions that cannot even pass a substantive due process test. Rights may not be substantially deprived, but citizens may be hen-pecked by annoying, stupid or trivial legislation. Such harassment hardly seems desirable in a liberal society, although arguably it may be the price we pay for living in a polity that seeks to reconcile liberalism with democracy.²¹³

D. A Mid-Level Standard of Review

1. The Inadequacy of Rationality Review

Arguably there should be no substantive limit on takings—as long as a government is willing to pay the price, it should be free to take private property, whether through eminent domain or regulation. In fact, from a hierarchical perspective, government might properly expect private owners to surrender their property for the greater good of the group. Simply requiring compensation might discourage governmental excess. Unfortunately, there remains room for considerable abuse if the government can forcefully purchase any attribute of property it wishes. An example of this is the city of Oakland's attempt to condemn the Oakland Raiders football team in order to keep the idols of local fans from fleeing to the sunny South.²¹⁴ While Oakland's efforts were unsuccessful, a different questionable scheme was upheld by the Michigan Supreme Court in Poletown Neighborhood Council v. Detroit.²¹⁵ In Poletown, General Motors sought property for a new automobile plant and in order to facilitate this, the city of Detroit simply condemned an entire neighborhood.²¹⁶ Another example of creative use of the eminent domain power occurred in Hawaii Housing Authority v. Midkiff,²¹⁷ where the United States Supreme Court upheld a state plan to force large private landowners to sell homeowners the lots on which their houses stood.²¹⁸ This transfer of private property through government coercion has

²¹³. On the compound nature of the republic, and the distinctness of the liberal and republican traditions, see generally James W. Ceaser, Liberal Democracy and Political Science (1990).
²¹⁴. Oakland v. Oakland Raiders, 646 P.2d 835 (Cal. 1982) (en banc). The Oakland Raiders hoped to leave Oakland. The California Supreme Court could find no legal reason why such an attempt could not be made, although Chief Justice Rose Bird, no slouch when it came to supporting governmental control of property, was troubled by the broader implications of the decision. Id. at 845-47 (Bird, C.J., concurring and dissenting).
²¹⁶. Id. at 457.
²¹⁸. Id. at 245.
been criticized as an abuse of the eminent domain power, and certainly the Court in *Midkiff* stretched the limit of “public use.”

If the legitimate ends and means of government are without limit, then property may be condemned and purchased at any time for any purpose. This is where the great abuses permitted by the “any conceivable rational basis” test of substantive due process come home to roost in takings analysis. Even if the public use limits should be roughly equivalent with considerations of public purpose, courts should not go to the extreme of virtual abdication. The Supreme Court has justified such abdication of constitutional property rights in part by asserting that property owners can protect their own interests through the legislature. If the pressures on legislators somehow resulted in enlightened rule, promoting the public good while safeguarding individual rights, dependence on the legislature for the protection of individual freedoms would not be troubling. But “if, as frequently alleged, individuals are grasping, greedy monsters in the market place by what magic are they transformed into farsighted altruists in the privacy of the polling booth?” The attitude of the Court flies in the face of what we know about the capture of the legislative and regulatory processes by vested interests, large or small. “Such ‘guardianship’ by state legislatures alone,” David Callies has cautioned, “is not a particularly comforting prospect.”

Given the rapid growth of land use regulations, with various schemes to force property owners to provide public benefits without compensation—such as rent control, open space regulation, accessways and low-

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220. When property is condemned through eminent domain, rather than restricted through regulation, there may be a stronger case for interpreting public use narrowly, to discourage forced private transfers.

221. See William H. Riker & Barry R. Weingast, Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures, 74 Va. L. Rev. 373, 375 (1988) (“[T]he Court’s deference to legislatures in the area of economic rights . . . is inconsistent with its scrutiny of other rights.”).


income housing—property interests arguably do not dominate state and local politics.\textsuperscript{225} It is not hard for legislators to count votes, particularly when passing an ordinance may satisfy political pressure groups, burden only a limited number of landowners, and at the same time provide public benefits without raising taxes.\textsuperscript{226}

If substantive rationality review is to be an effective check on legislative power, it must use a higher standard of review than the "any conceivable rational basis" test.\textsuperscript{227} Rationality with teeth, such as the Supreme Court exhibited in \textit{Cleburne v. Cleburne Living Center, Inc.},\textsuperscript{228} requires the Justices to examine the reasons proffered for a governmental restriction and to reject those that are clearly facades for unacceptable intentions. The vast majority of governmental restrictions would likely survive such a test, but particularly egregious abuses would fail. Justice Marshall, however, in his opinion in \textit{Cleburne}, considered even this modest step as a "small and regrettable step back toward the days of \textit{Lochner v. New York}."\textsuperscript{229}

A rational basis test that is taken seriously would still not ensure justice for the landowner, for reason is not always equivalent to fairness. If rights do not outweigh reason or rationality, then rights are reduced to utilitarian conveniences to be tolerated only when government does not find them troublesome. For example, zoning a landowner's property for open space, although unjust, is a rational method of preserving space without taxing the public. By analogy, suppressing freedom of speech or stripping criminal suspects of their rights may be rational and effective ways to protect community order, but that does not make them constitutional.

\textsuperscript{225} See \textit{Coyle}, supra note 197, at 219-24.

\textsuperscript{226} "[W]hen an entity tells an individual property owner that he must leave his land vacant for public recreational use (or view, or buffer), or that he may only develop it if he provides some public service or dedicates part of the property to public use," observe Berger and Kanner, "it does not take a computer to calculate which side the greater number of votes is on." Berger & Kanner, \textit{supra} note 13, at 701.

\textsuperscript{227} In recent years, the Supreme Court has occasionally struck down a governmental action under the bargain-basement scrutiny of rational basis. In \textit{Cleburne v. Cleburne Living Center, Inc.}, 473 U.S. 432 (1985), the Court concluded that the mentally retarded did not deserve special protection, but that the ordinance, a restriction on group homes, was irrational. \textit{Id.} at 442 (mental retardation not a quasi-suspect class); \textit{id.} at 450 (ordinance irrational).

\textsuperscript{228} 473 U.S. 432 (1985).

\textsuperscript{229} \textit{Id.} at 460 (Marshall, J., concurring in part and dissenting in part). In \textit{Lochner v. New York}, 198 U.S. 45, 64 (1905), \textit{overruled by Day-Bright Lighting, Inc. v. Missouri}, 342 U.S. 421 (1952), the Court overturned a limit on baker's hours as a violation of the substantive due process right of "liberty of contract," and the case has ever since been a symbol of the supposedly illegitimate judicial protection of "economic" rights.
2. A More Substantial Standard

One way to avoid abuses of rationality would be to extend the highest scrutiny—the "compelling interest" test—to all rights. No property could be taken unless it was necessary to promote a compelling governmental interest. Bernard Siegan and Douglas Kmiec have proposed that land use controls be struck down unless necessary to achieve a "vital and pressing" governmental interest—a slightly less demanding standard. Such a high hurdle is unlikely to win friends except among libertarians. It may be that property is as essential as other rights that receive strict protection, but it is more important that property rights receive serious protection—a point on which egalitarians and hierarchists might concur with libertarians—than that all remnants of a double standard be obliterated, to which egalitarians would object. Mandelker, for example, would apply the vital and pressing interest test in land use cases only for parties (minorities, the disabled) and rights (expression, privacy) prominent on the egalitarian agenda. Even if a double standard remains, however, property rights can receive significant protection.

The slippery standard of mid-level constitutional scrutiny, under which legislation is required to bear a substantial relationship to an important governmental objective, would protect liberal property rights while still accommodating considerable regulation. In the area of property rights, the substantial relationship of legislation to the governmental objective is crucial because it eliminates two possibilities: first, that the rights of the landowner will be limited for naught, when there is but a remote relation between the hardship imposed on the owner and the governmental objective being pursued; and second, that reasons might be cavalierly proffered, while the actual purpose of the legislation goes unspoken. It may be more acceptable for a regulatory board to claim it is only seeking to safeguard the environment, not exclude the poor. Yet large-lot zoning, for example, may have only a remote or uncertain relation to the stated goal, and a direct relation to the illicit goal. Requiring a substantial relationship puts greater focus on the actual purposes of the legislation and its likely effects. Requiring an important governmental objective gives the state the flexibility to pursue goals that


231. Mandelker, supra note 144.

232. The Supreme Court's jurisprudence of gender discrimination under the Equal Protection Clause is probably the most well-known area in which a mid-level test is commonly applied. See Craig v. Boren, 429 U.S. 190 (1976).
may not be "compelling" or "pressing," while eliminating restrictions on property rights in the pursuit of illegitimate or trivial goals.

Since the means-end relation is more crucial than the goal, the next-best alternative would be to require a substantial relationship to a legitimate purpose, which is the standard the Supreme Court has gradually shifted toward in takings cases. The Court took a major step toward mid-level scrutiny in \textit{Nollan v. California Coastal Commission}, when it required that a condition placed on the use of property bear a substantial relationship to the governmental interest that might justify denying use of the property. Justice Scalia's search for real justifications for the easement demanded of the Nollans drew a rebuke from Justice Brennan that "the Court imposes a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century." If not for the better part of the century, certainly for the longer part, and \textit{Nollan} is a welcome step toward returning common sense to constitutional adjudication. If the Court were to consider the government's justification second, after deciding whether the deprivation of the owner's right had been so severe as to constitute a taking, then truly the jurisprudential light at the end of the takings tunnel would be seen.

Mid-level scrutiny generates neither the moral fervor nor the legal certainty of the minimal rational basis and strict scrutiny tests. No rights or parties can be universally worshipped or condemned. While strict scrutiny is white and rational basis black, mid-level scrutiny shows only gray. As Chief Judge Loren Smith of the United States Court of Federal Claims has said, "whether the application of a regulation results in a taking is highly fact-specific, and is not subject to analysis by a set formula." If we yearn for artificial certainty, the simplistic notions of rational basis and strict scrutiny are desirable. If, on the other hand, our goal is accommodation of competing political cultures within a liberal framework of rights, a more subtle, particularistic alternative, such as the substantial relationship test, is required. Critics will say that the heightened scrutiny of mid-level review will allow private property to triumph over the public good, but that is not the case. If the public good is to be served, it is not necessary to debase property rights, but only to demonstrate the substantial justification for the govern-

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  \item 234. 483 U.S. 825 (1987).
  \item 236. \textit{Nollan}, 483 U.S. at 842 (Brennan, J., dissenting).
\end{itemize}
ment's action. The delineation of constitutional property rights will never be an easy task. At best, mid-level takings and due process review not only give each party a fair hearing, but also raise the quality of the cultural and legal dialogue on land use controls and rights. Seeking substantial reasons for governmental action requires that assertions not only be stated, but also supported, whereas the "any conceivable rational basis" test encourages vapid doctrine and creates a void easily filled by arbitrary state control.

E. Taking Property Through Burdensome Procedures

Regulatory commissions have learned well that they do not have to give a final, unequivocal "no" in order to prevent particular land uses. Governments may skirt compensation requirements if they avoid making substantive decisions; that is the lesson from the long series of takings casesculminating in First English Evangelical Lutheran Church v. County of Los Angeles. For years, the Supreme Court ducked the compensation issue by claiming that it could not determine whether a taking had occurred, because not every possible use of the property had been explicitly forbidden, and so it was conceivable that some proposal might someday be approved. Of one such opinion, Michael Berger complained that the Court was "out of touch with the real world. Planning commissions do not make it their business to tell property owner's [sic] specifically how they will be allowed to develop their property."241

No matter how many times an owner is shot down before a regulatory panel, there always remains the possibility that someday the owner will discover the golden key, the land use proposal that wins approval. It can be "darned difficult" to allege a taking in court, according to David Callies, unless the owner has been "denied a lot of permits" for "virtually all potentially economic uses."242 Regulatory procedures become difficult to attack when officials engage in complicated stalling tactics without ever directly saying "absolutely not, ever."243 "[O]ften the problem is not a discrete regu-

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240. See supra note 65 and accompanying text.


243. After the Supreme Court held in Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 200 (1985), that development permit denials were not comprehensive and final enough to be considered takings, "[t]he collective municipal sigh of relief ... was audible throughout the land." Victor R. Delle Donne, Land Use, 56 PA. B. ASS'N Q. 172, 174 (1985).
lution," Berger and Kanner have observed, "but a course of conduct, involving moratoria, delays, broken promises, unreasonable demands for 'dedication' of property or 'donation' of money in lieu thereof, chilling publicity, bad faith and the like."244 The regulatory process itself, as well as the outcomes, can deprive owners of the use of their land. The courts should recognize this danger and develop standards specifying when obstructive procedures effectively deny the use of land, thus raising a takings issue, rather than simply an issue of procedural due process.

The potential for procedural obstruction of land use has increased in recent years. In response to charges that regulation was dominated by an elite few, courts and legislatures moved to open up the administrative process to incorporate more voices.245 At the same time, major regulatory initiatives, such as state and national environmental policy acts, wetlands protection legislation, and statewide open-space plans, have placed unprecedented burdens on local, state and federal regulators to investigate and mitigate a myriad of potential environmental effects.246 New Jersey, for example, so far has rejected statewide land use control, yet has "state-required and state-reviewed local planning; regional planning for the rural quarter of the state . . . and for the urban 30-square-mile, high-growth Hackensack Meadowlands . . . state hazardous waste, coastal zone, wetlands, and farmland protection laws . . . and . . . legislation governing the local placement and amount of new low-income housing."247 Regulatory officials now have far more to do, and many more voices must be heard, resulting in a lengthy, complex decision making process. This can leave the property owner as a lone voice in a deep wilderness.

The result of weak protections of landowner rights and flexible, open procedures is that regulation often becomes a "monumental crap game," according to Berger and Kanner.248 Accommodating myriad opinions, completing extensive studies to show that every potential effect of a land use has been anticipated and mitigated, and completing a series of hearings and

244. Berger & Kanner, supra note 13, at 737.
248. Berger & Kanner, supra note 13, at 700.
approvals can render property effectively useless for a seemingly endless period. The process can deprive property rights even when officials are just trying to do their jobs; when there is animosity toward the owner or the land uses she proposes, the potential for abuse is greater. "[T]he planning process postpones for months or years the development capability of property," according to Joseph DiMento.249 Even Norman Williams, a vigorous defender of land use controls, and his coauthors have concluded that intentional delays are "pervasive" and that abuses of the regulatory process are "ubiquitous, vicious and devoid of any resemblance of procedural due process."250 Not only do these abuses offend notions of fair play, but they can also deny the use of property just as surely as a quick, emphatic rejection of a permit.

Courts often indulge the procedural fiction that conditions imposed on land use are "voluntarily" accepted. It is, according to these courts, ostensibly the owner, and not the government, who has restricted use of the property, and thus there has been no taking. In In re Egg Harbor Associates (Bayshore Centre),251 for example, the New Jersey Supreme Court upheld the imposition of socioeconomic quotas on developments under the purview of the state Department of Environmental Protection on the grounds that the owners were free to reject the conditions.252 But such a choice is hollow. Each governmental unit, be it a town or a state agency, has a monopoly on the regulatory process, and the owner has nowhere else to go for approval. When courts are apathetic, property owners may have little choice but to play along, if the alternative is to abandon the proposed use. Yet courts cling to the myth that the government and the owner are like independent parties, freely contracting in an open market.

1. Bringing Fairness Back to Procedure

Three guidelines would enable the courts to consider whether procedural delays and denials amount to takings. First, discretionary conditions attached to land use permits or contained in ordinances could be evaluated under the same standards as mandatory regulations. Second, regulatory commissions, when they deny a permit, could be assumed to have denied all use of the property, unless they have specified examples of land uses that would meet their approval. Regulatory commissions would then not be able to deprive an owner of the use of his property, while escaping judicial scrutiny, simply by requiring an applicant to reapply endlessly for approvals that

250. Williams, supra note 13, at 242.
252. Id. at 1123.
would never be granted. The designated alternatives would help the courts
determine whether the restrictions on the owner were severe enough to re-
quire compensation.  

If a regulatory commission denied a use proposal without indicating a specific set of alternatives that would be approved, it
would be assumed that the government has denied all use of the property,
and compensation could be awarded.

Application of these two rules could, however, further discourage govern-
ments from making decisions. By never taking final action on applications,
neither denying nor approving them with conditions, officials could prevent
the use of land while delaying indefinitely the day of constitutional reckoning. Therefore, my third recommendation is that courts allow an owner to
show that administrative delays have, in effect, denied the use of property. The courts could then decide what compensation would be due, and how
soon a regulatory decision must be rendered to avoid further compensatory
obligations. The courts are likely to remain divided about the extent of sub-
stantive landowner rights, but procedural issues may attract greater consen-
sus. Giving owners a fair shake can appeal to egalitarian and hierarchical
concern for fairness and dignity. While the cultures would clash over the
substantive standards of what constitutes a taking, it does not promote the
ideal of any culture, except perhaps that of despotism, to perpetuate an
unending regulatory maze.

The confused case of PFZ Properties, Inc. v. Rodriguez, which caused
the Supreme Court to throw up its hands in frustration after hearing oral
argument, could be a step toward recognizing the confiscatory potential of
regulatory procedures. In that case, PFZ Properties claimed that a develop-
ment review board sat on its project drawings for six years without making a
decision. The United States Court of Appeals for the First Circuit ac-
tcepted the argument of Puerto Rico that even such an extreme delay is not

253. If a zoning ordinance specified the land uses available to an owner as a matter of right,
for example, and the owner had unsuccessfully sought an exception, the court could then
decide whether the zoning restrictions required compensation. Under a more discretionary
zoning category, such as a planned-use development, the rejection of a permit should be ac-
 companied by a statement of what alternative plan would be accepted. If the owner challenged
the decision, the court could consider whether the alternate plan sufficed to avoid a taking.

254. Despotism, the fourth culture in the model I employ, has little to recommend it, ex-
cept to the despot. It is rarely an important category in the analysis of public policy, although
partisans of other political cultures may portray their opponents as indistinguishable advocates
of despotic evil.

255. 928 F.2d 28 (1st Cir.), cert. granted in part, 112 S. Ct. 414 (1991), cert. dismissed, 112

improvidently granted).

257. See PFZ, 928 F.2d at 29-30 (outlining the chronology of events giving rise to the case).
unconstitutional because it does not "'shock the conscience.'"\textsuperscript{258} On appeal to the Supreme Court, PFZ made the curious argument that only proper conduct, not misconduct, can qualify as a taking,\textsuperscript{259} following the perverse logic of the California Supreme Court, repudiated in \textit{First English}, that the more lawlessly officials act, the more immune they are to compensation claims.\textsuperscript{260} PFZ instead asserted that the delays violated substantive due process.\textsuperscript{261} During oral argument, the Justices were understandably puzzled by this claim. However, Justice O'Connor recognized the possibility of a takings claim, despite the best efforts of PFZ attorneys to deny the connection,\textsuperscript{262} a small clue that the Court might be sympathetic to arguments that abusive procedures may be confiscatory.

V. CONCLUSION

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. \ldots They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.\textsuperscript{263} Norman Williams and his coauthors have argued that governments should not be required to pay for confiscatory regulations because to do so would "upset \ldots the delicate balance between co-equal branches of government that has served well for 200 years."\textsuperscript{264} Yet balance requires two active participants: the United States Supreme Court got off the see-saw of landowner justice before the New Deal, and has only hesitantly returned to the playground. There is no "balance" when the great weight of legislative and executive government can be pressed upon property owners while the judicial branch of government sits on the sidelines. When the courts close their eyes to abuses of property rights, they abandon their role in a liberal democracy.\textsuperscript{265} While legitimate concerns may be raised about the impact of certain

\textsuperscript{258} Id. at 31 (quoting Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 943 (D.C. Cir. 1988)).

\textsuperscript{259} Reply Brief of Petitioner at 12, \textit{PFZ}, 112 S. Ct. at 1151 (No. 91-122) (dismissing certiorari); see also Transcript of Oral Argument at 10, \textit{PFZ} (No. 91-122).

\textsuperscript{260} In Agins v. City of Tiburon, 598 P.2d 25 (Cal. 1979), \textit{aff'd}, 447 U.S. 255 (1980), the California court sought to deny the compensation remedy for regulatory takings by reasoning that an owner "may not \ldots elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid." \textit{Id.} at 273.

\textsuperscript{261} See \textit{PFZ}, 928 F.2d at 29.

\textsuperscript{262} See Transcript of Oral Argument at 7-8, \textit{PFZ} (No. 91-122).

\textsuperscript{263} Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

\textsuperscript{264} Williams, \textit{supra} note 13, at 233.

\textsuperscript{265} For the classic argument, see \textbf{THE FEDERALIST} NO. 78 (Alexander Hamilton); for a not-so-classic version, see Dennis J. Coyle, \textit{A Wallflower Court at the Legislative Dance}, BALT. SUN, July 5, 1991, at 11A.
property uses on the environment, private property rights remain today, as they were for the founders, a crucial fence for liberty, the instrument that allows citizens to be "let alone."

"[I]t is very rare in America to encounter any antipathy to new development," wrote John Delafons more than twenty years ago.\textsuperscript{266} Any planner, land use attorney, citizen activist or developer might wonder today what planet he was talking about. But Delafons was writing from a different perspective, as a British observer accustomed to extensive public control over land use. He was also writing of Texas and the Sunbelt, a region where the libertarian culture traditionally has been stronger and the hierarchical culture weaker, and in a different age, before the environmental movement burst upon the stage of American public policy. Today, environmental and land use battles can be long, heated, and bitter. More than ever, an appreciation of property rights is fundamental to keeping a balanced perspective in the confusion of political and legal debate.

The courts are on a journey of discovery, rethinking the limits of governmental power over the property owner, a journey in which the Court of Federal Claims is playing a major role. Central to navigating a path that is fair and just is appreciation for the three cultures of the American polity—libertarianism, hierarchy and egalitarianism. Although government regulation of land is likely to remain ubiquitous, the thoughtful discussion of rights and powers can encourage respect for rights, appreciation of the nuances of limited government, and an understanding of the centrality of property to personal liberty, dignity, and responsibility. Environmental and land use regulation cannot go home again to the indulgent days of the New Deal judicial regime. The guidelines this Article suggests can make a contribution to developing a jurisprudence of the Takings Clause that can protect fundamental rights while making room for the regulatory state and accommodating conflicting cultures within the pluralist umbrella of the American polity.

\textsuperscript{266} John Delafons, Land-Use Controls in the United States 3 (2d ed. 1969).