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The Sanctity of Property Rights in American History

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2001

WORKINGPAPER SERIES
Number 14

POLITICAL ECONOMY RESEARCH INSTITUTE

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The Sanctity of Property
In American Economic History

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February 2001

Commissioned for the Natural Assets Project
Funded by the Ford Foundation

Program on Development, Peacebuilding, and the Environment
Political Economy Research Institute (PERI)
University of Massachusetts Amherst

> *The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.*
>
> — Oliver Wendell Holmes (Holmes 1881, 1).

Introduction: Property in Economic Theory and Social Practice

Society makes property. Economic systems are defined by what they allow to become property, and the extent of property varies enormously. Some allow property claims to fixed objects, such as land and trees, sometimes including the ephemeral, such as wildlife or flowing water. Some extend property to include ideas (patents); a few include human beings themselves as chattel slaves.

Societies also differ in the *intensive* rights they accord property holders, the bundle of state-enforced privileges attaching responsibility for the impact actions have on others. Intensive rights prevent us from assessing law as involving 'more' or 'less' protection to property because each use of property affects the property of others. Property has intensive dimensions because it involves reciprocal relationships among people; my intensive right to use property diminishes your right to be free of intrusion. For example, giving one the right to dump wastes into the air and water detracts from the rights of neighbors to clean air and water on their property; withholding rights to pollute reduces intensive property rights but protects the property of others.

A society can allow the intensive exploitation of a property owner's land and water even if it damages neighboring property. Or it may privilege neighbors by restricting actions that affect others. This makes property law distributional. Where property owners have intensive rights to pollute, it reduces neighbors' real income by the loss of clean air and water or by the cost of paying the polluter to refrain from polluting. Without intensive privileges, polluters are poorer because they must mitigate their pollution or must buy rights to pollute from neighbors.

Few dispute that property law has important effects on income distribution, but some choose to emphasize arguments over efficiency. In a pioneering article, Ronald Coase (1960) argued that regardless of the allocation of property rights, *any* clear demarcation will lead to the same efficient social outcome, the same mix of production of goods and services. Whether polluters must buy the right to pollute from their neighbors or neighbors must pay polluters to stop polluting, pollution will continue wherever mitigation costs more than the neighbors' valuation of clean air, and will be

stopped wherever the costs of mitigation are less. Free market exchange will lead to the same *efficient* outcome regardless of the allocation of property rights, regardless of who owns rights in air and water.

Coase's article has had an enormous impact on economic theorizing, leading many economists to neglect distribution while focusing on the efficiency implications of different legal regimes.[1] But there are problems with these applications. The separation of prices from distribution holds only in a special case: distribution will affect prices and the output mix wherever economic actors have different preferences and there are increasing or decreasing returns to scale.[2] Furthermore, as Coase himself noted, his theory ignores *transactions costs*, or the expenses involved in negotiating and enforcing contracts. These can be crucial in bargaining situations involving externalities where it often proves hard to mobilize a large number of individuals to buy off a single polluter.

The determination of property rights is often regarded as particularly disputatious in a liberal democracy like the United States that embraces both individual liberty and the right of the majority to govern (Horwitz 1992, 9-10; Demsetz 1964; Dillon 1895). On one side is the protection of intensive property rights as manifestations of a property owner's individuality. Against this stands the right of the majority to regulate economic activity, to advance communal goals and to protect property owners from the external impact of polluters' actions. But this common juxtaposition misstates the dispute over intensive property rights because they too restrict the rights of others. Property rights give individuals state-sanctioned monopoly privileges over resources, privileges backed by the right to call on the state police powers to restrict the actions of others. Thus, property fundamentally restricts some liberties by placing the weight of public authority behind property owners against other citizens. Rather than a dispute over principles of natural liberty and justice, debates about property regulation involve fundamental choices about *which* property is to be protected and *which* property rights are to prevail when property rights conflict.

Contention over democratic rights and regulation has been complicated by the particular structure of the United States legal system where legal questions are disputed repeatedly in different sites of government. First, there is federalism, establishing separate legal systems for every state and the Federal government. Then there is the division at each level of government between the executive, the legislature, and the judiciary, each charged to respect and enforce the Constitution as they interpret it. Compounding these differences of interpretation has been the ongoing division between the written constitution and legal code and the sometimes-legally-valid "Common Law" with its roots in England and interpreted by English law writers. These different sources provide abundant material for judicial interpretation. Oliver Wendell Holmes was not the first to acknowledge that the scope for interpretation gives judges an independent role in American law. As interpreters, they also draw on their experience to make law an instrument to advance their vision of the good society (Fisher, Horwitz and Reed 1993). American property rights have been created by judges and politicians through a civic process conditioned by the peculiar institutions of the American government, legal tradition, and by political conflict.[3]

Locke, Labor, and Right: Property's Origin and Justification

Seemingly so simple, the concept of 'private property' continues to bedevil economic theory. Of course, many happily ignore the whole question, characterizing commodities in one dimension, owned or not owned. The new property-rights paradigm recognizes multiple dimensions of property, but still treats 'property rights' as a relationship between people and objects (Barzel 1997; Libecap 1989). This simplified view allows scholars to analyze changes in property rights along a single dimension where an object's attributes are owned. Thus defined, property rights exist independently of other social circumstances. As a relationship between people and things, property exists without human society; Robinson Crusoe, too, has property rights.[4]

As a relationship between people and the things that they create, property acquires moral legitimacy and economic significance because it rewards labor that shapes the non-human material world. Labor, John Locke states, "in the beginning, gave a right of property" (Locke 1952, 27 [para. 45], 17 [para. 27]). There is an "unquestionable" right to property in an individual's own labor because:

> *Though the earth and all inferior creatures be common to all men, yet . . . [t]he labor of his body and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature has provided and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property. . . . For this labor being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to, at least where there is enough and as good left in common for others.*

Thus Locke sanctifies property as a physical manifestation of past labor. Property is an essential natural right; to take it is to take one's labor, to make one a slave. Seen in this way, property rights owe nothing to society; on the contrary, property owners form society and governments to protect their property (Smith 1999). The very purpose of social organization, property becomes an *end in itself*. Such thinking permeated the early American republic, and Lockean arguments continued to be cited by late-nineteenth century Supreme Court justices arguing against public regulation of intensive property rights (Ely 1998).[5]

Others defend property with *instrumental* arguments. For them, intensive private property rights are to be protected because they provide incentives to entrepreneurs (North 1981). However persuasive, such instrumental arguments do not *sanctify* property; they do not make it an end-in-itself, an unquestioned right that transcends all other considerations. Instead, by making property a *means* to presumably higher *ends*, the resort to instrumental reasoning undermines the defense of intensive property rights. As an instrument, a particular form of property may be *convenient*, but it can never be *necessary*. [6]

Locke's own defense of property was considerably less absolute than one might conclude from the famous passage cited above (Horne 1990; Katznelson 1998, 77). There he directs his argument to a particular question, the right of England's Stuart monarchs to impose taxes without consent of Parliament. But beyond that narrow question, Locke recognized a social dimension where property rights should be limited by other considerations including other natural rights. No one, Locke argues, should have more property than can be used for one's own consumption. Accumulation should be restrained to ensure that everyone can share nature's bounty, leaving "enough and as good" for others. Citing biblical authority, Locke (1952 [1690], 19) argues that

> *The same law of nature that does by this means give us property does also bound that property too. 'God has given us all things richly' (1 Tim. vi. 17), is the voice of reason confirmed by inspiration. But how far has he given it to us? To enjoy. As much as any one can make use of to any advantage of life before it spoils, so much he may by his labor fix a property in; whatever is beyond this is more than his share and belongs to others. Nothing was made by God for man to spoil or destroy.*

It was the invention of money as a store of wealth that, to Locke's regret, allowed some to monopolize a "disproportionate and unequal possession of the earth," giving them power over others. Restraints on the accumulation of property, therefore, are needed to guarantee all access to society's wealth. This side of Lockean property theory led to a natural rights argument for curbs on individual accumulation, a perspective later developed by others including the great trans-Atlantic radical Thomas Paine.

Modern advocates of sanctified property rights have had cause to regret Locke's extended discussion. Charging that Locke was confused in his biblical exegesis, Richard Epstein, for example, acknowledges that Locke created "no little difficulty" for the defense of intensive property rights (Epstein 1985, 10). As a relationship between people and things, property can be defended as socially neutral: the accumulation of property in the products of one's own labor does not detract from what is available for others. But recognizing the social dimensions to property acknowledges a distributive aspect, in that one person's property rights can harm others, for example, by monopolizing resources previously available to all. As a social relationship, property becomes contested ground (see Fried 1998, 19, 24; Horwitz 1992, 128).

American Exceptionalism, the Sanctity of Property, and the Police Powers

A convention, even an organizing myth, in the study of American history holds that the United States is a country uniquely devoted to individual rights and market freedom. Owing much to Louis Hartz and his classic work, The Liberal Tradition in America (1955), American society is seen as quintessentially liberal in the classic Lockean sense, suffused with a passion for individualism and

private property rights. This national ethos sanctifies private property and individual initiative, undermining "efforts to mobilize workers and others on behalf of socialist and collectivist objectives, including unions" (Lipset 1996, 69, 95; Friedman 1999).

This vision has always depended on narrow visors. Some Americans accumulated property in the Lockean way, by mixing their labor with land and materials. But more became wealthy through military conquest and theft, following the example of the original Norman lords who followed William to England. White Americans became rich by enslaving millions of Africans and using military force to expropriate land held by native peoples. Even the American Revolution of 1776, a war fought in the name of liberal ideals, became the occasion for massive theft, including the forced redistribution of two-thirds of the property in New York and its suburbs and most of the land in Queens, Richmond, Kings and Suffolk counties in New York (Flick 1901, 153). British property received as little consideration: debts owed to British creditors were summarily annulled; some states, including Virginia, closed their courts to suits by British subjects (Ely 1998, 35).

The widespread seizure of Loyalist property did not bode well for the security of property in the new republic. Prominent rebels worked to rein in what they saw as "an excess of democracy" (Tomlins 1993, 60). Securing property, "the guardian of every other right" became a matter of urgent concern to the framers of the early state constitutions (Ely 1998, 26; Foner 1976, 133). Conservative fears led the Constitutional Convention of 1787 to restrict the authority of state governments to interfere with contracts. Later, the Fifth Amendment was added to protect property from seizure without compensation and due process (Rakove 1996, 314-5; Ely 1998, 43-54; Jacobs 1954, 4-5).

Notwithstanding these constitutional protections for property, states continued to reallocate wealth. Indeed the Thirteenth Amendment enshrines in the United States Constitution itself the principle of property confiscation: The uncompensated expropriation of slave property under that amendment redistributed nearly $3 billion, half the South's total wealth. This made America's slave emancipation one of history's largest expropriations of property.[7]

Government interference with private property did not end with these confiscations. Throughout the colonial and ante-bellum period, state and local governments regularly interfered with private property, reflecting a widespread belief in government's moral obligation to promote a healthy economy and to sustain troubled citizens. Most localities, for example, set bread and transportation prices, restricted trade in foodstuffs, regulated wages and entry to occupations, and restricted the activities of liquor dealers, prostitutes, and taverns (Handlin and Handlin 1947; Bourgin 1989; Novak 1996; Laurie 1999; Levy 2000). And local governments employed the power of eminent domain to advance social ends at the expense of private property holders.
First coined by the Dutch scholar Hugo Grotius in 1625, the term 'eminent domain' entered English law through Locke, who grounded it in 'natural law,' the original consent of the population as delegated to the legislature (Eagle 1996, 8). American judges and legal commentators radically

expanded the concept, grounding it on purely *instrumental* considerations. Implicitly denying any sanctity to private property rights, the Vermont Constitution of 1791 proclaimed: "Private property ought to be subservient to public uses, when *necessity* requires it" (Ely 1998, 33; emphasis added). The United States Supreme Court similarly grounded eminent domain on convenience and instrumental considerations, declaring in the 1875 case *Kohl v. United States* that the power of eminent domain is "the offspring of political necessity; and it is inseparable from sovereignty."

Eminent domain was one example of the use of government power to promote a "well-ordered community," to advance the "public good" or "welfare" through regulations interfering with owners' intensive property rights. Regulation reflected the common law maxims: *salus populi suprema lex est* ("the welfare of the people is the supreme law") and *sic utere tuo ut alienum non laedas* ("use your own so as not to injure another"). Often cited in legal decisions, these broad doctrines serve as "common law blueprints for governance in a well-regulated society," providing the legal basis for extensive public regulation of property to reflect the reciprocal interests and rights of all citizens (Novak 1996, 42). Writing in 1826, New York's Chancellor Kent declared that "every individual has as much freedom in the acquisition, use, and disposition of his property, as is consistent with good order and the reciprocal rights of others… [T]hough property be thus protected. . . the lawgiver has a right to prescribe the mode and manner of using it, so far as may be necessary to prevent the abuse of the right, to the injury or annoyance of others, or of the public."

To protect the public welfare and respect the interests of all, local and state governments assumed extensive powers throughout the 19th century. In 1837, for example, the Illinois legislature needed three typed pages to catalogue all the powers over property to be held by the new city of Chicago. In addition to regulating and licensing ferries, and preventing "the rolling of hoops, playing at ball, or flying of kites . . . having a tendency to annoy persons," the new city had the authority "to compel the owner or occupant of any grocery, cellar, tallow-chandler's shop, soap factory, tannery, stable, barn, privy, sewer, or other unwholesome, nauseous house or place, to cleanse, remove, or abate the same" (Novak 1996, 3-6). Other cities assumed similarly extensive powers over property. New York City used several pages to set rates on the East River ferry, enumerating the price of transporting items ranging from fat ox, steer or bulls (twenty-five cents) to cords of nutwood (fifty cents), empty milk kettles (one cent), children's corpses (twenty-five cents) and corpses of adults (fifty cents) (Novak 1996, 118-20). Local governments regularly seized houses used for immoral purposes, filled privately owned mill-creeks accused of "endangering the public health," banned dangerous chemicals, and blocked fires by destroying private dwellings and warehouses without paying compensation. Officials regulated access to dozens of trades, including those associated with public health, like medicine and butchering, but also others of economic but not health consequence, such as the right to trade and to buy and sell produce (Novak 1996, 84-94). Where regulation failed to achieve the public purpose, officials took direct action. In 1872, for example, the Jersey City street commissioner led 25 armed police officers into a fertilizer plant owned by the Manhattan Fertilizing Company and proceeded to 'abate' the nuisance caused by

the plant's operation by destroying machinery and carrying away essential parts (Novak 1996, 226).

Such acts were justified under what is called the state's 'police powers,' or what Oliver Wendell Holmes, writing for the Supreme Court in *Hudson County Water Co. v. McCarter* (1908), labeled the "limits set to property by other public interests." The concept of police powers has a long history in Anglo-Saxon law, with the first reference dating back to 1187. Writing in the 1760s, William Blackstone stated that "By the public police and economy I mean the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well governed family, are bound to conform their general behavior to the rule of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations" (Blackstone 1979, 4, 162). In the 1827 case of *Vanderbilt v. Adams*, New York's Justice Woodworth gave similarly broad scope to the police powers, saying: "The sovereign power in a community, therefore, may and ought to prescribe the manner of exercising individual rights over property. . . . The powers rest on the implied right and duty of the supreme power to protect all by statutory regulations, so that, on the whole, the benefit of all is promoted. . . . Such power is incident to every well regulated society." The classic statement on the police power was by Massachusetts' Chief Justice Lemuel Shaw in *Commonwealth v. Alger* (1851), where he upheld legislation regulating property in Boston harbor and restricting building beyond the wharf line:

> *We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth . . . is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature . . . may think necessary and expedient.*

Shaw concludes by observing, "It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise." Indeed, by using flexible and elastic terms like "public interest," "domestic order," "the implied right and duty of the supreme power to protect all," and "the common good and general welfare," Shaw defined the police powers to accommodate a broad variety of uses. Southern state governments used the police powers to enact laws restricting the use of slave property, for example, by forbidding slave-owners from teaching their slaves to read. Later, after the abolition of slavery, they placed

extraordinary restraints on private property by instituting strict racial segregation, restricting property sales to African-Americans or their employment in certain occupations.

The discriminatory enforcement of laws, providing unequal protection to the property and labor of African-Americans, again illustrates the social construction of property (Cohen 1991; Lichtenstein 1996; Wiener 1978; Woodward 1955).[8] Property owned or used by African-Americans did not have the same degree of sanctity as that owned and used by Americans of European descent. After the Civil War and emancipation, southern blacks gained the right to hold property, but the nature of their property rights expanded and receded with their political fortunes and their political influence. The same instrumental approach that northern governments used to restrict intensive property rights to advance goals of clean air and water was used to restrict southern property rights to keep African-Americans dependent on whites. In both cases, property rights were socially defined to achieve social goals; only the goals differed.

Redistributing Property Rights to Promote Economic Growth

Subsidizing public infrastructure by reallocating property rights

In 1837, Chief Justice of the United States Supreme Court Roger Taney used instrumental arguments to pronounce for the Court in abrogating the contractual rights of the Charles River Bridge Company to operate the sole bridge over the Charles River between Boston and Cambridge *(Charles River Bridge v. Warren Bridge)*. Protecting the Company's property rights was inconvenient. It would threaten the "millions . . . which have been invested in railroads and canals, upon lines of travel which had been occupied by turnpike corporations . . . We shall be thrown back to the improvements of the last century, and obliged to stand still." Here, as throughout American law, property rights established to advance social goals were overturned when they impeded these objectives.

Eager to promote industry and commerce, early nineteenth-century governments embarked on a campaign of road, canal, and railroad building. Infrastructure construction involved indirect costs, damages to adjacent property, and a loss in value to property bypassed by improvements. Under the legal doctrine of *sic utere tuo ut alienum non laedas,* or "use your own so as not to injure another," investors would have been responsible for the indirect costs, significantly increasing the financial cost of improvements. Changing the meaning of the *sic utere* doctrine, to free entrepreneurs from responsibility for the effects of their actions on neighboring property, would dramatically reduce the cost of infrastructure building.

The transformation of *sic utere* began in 1823 in the precedent-setting Massachusetts case of *Callender v. Marsh*. Callender sued for damages when street reconstruction work exposed his Boston home's foundation. His attorney cited English statutes, common law precedents, and the *sic utere* doctrine to argue for compensation. But the defense rejected the use of English precedent

with an instrumental argument. American circumstances, the defense argued, require road construction but "if such an action" as Callender's "can be sustained, it will put a check to all improvements in our highways."

This argument resonated with judges, who denied Callender compensation. Worse for property owners adjacent to public works, the Massachusetts court accepted the state's suggestion of a market-based interpretation to avoid future damage claims. "Those who buy road-front property," the court ruled, "might reasonably take into account in the value the future raising or reduction of a street or road." Further compensation would be double billing for the same expense.

Similar conclusions were reached in New York in 1828. In *Lansing v. Smith* Walter Quackenbush sued New York State for damages when his docks lost value after the state constructed a new boat basin at Albany. As Massachusetts did in *Callender v. Marsh*, the New York court used explicitly instrumental grounds to reject Quackenbush's claims. "Every great public improvement," the court ruled, "must of necessity, more or less affect individual convenience and property; and where the injury sustained is remote and consequential, it is *damnum absque injuria* [injury for which no compensation is due] and is to be borne as a part of the price to be paid for the advantages of the social condition." This, the court concluded, "is founded upon the principle that the general good is to prevail over partial individual convenience."

Subsidizing private entrepreneurship

By freeing government to erect public improvements at the expense of neighboring property holders, case law like *Lansing* and *Callender* shifted to some individuals the cost of achieving social goals (Horwitz 1977, 70). Other precedents extended these instrumental principles to private actions. Writing in *Thorpe v. Rutland and Burlington Railroad Company* (1855), for example, Vermont's Chief Justice Isaac Redfield upheld a law requiring railroads to fence their lines because the "police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state according to the maxim, *sic utere tuo ut alienum non laedas.*" The use here of the *sic utere* maxim provides a window into the social construction of property. Justice Redfield invoked it to sustain restrictions on intensive property rights because he recognized that actions taken by one property owner affect others even when performed on their own property. But *sic utere* is a principle, not a rule; it provides no guidance in most cases that involve individuals with *competing* property interests where both complain about a neighbor's interference with the use of their property (Holmes 1894, 11).[9] Property was redefined in the nineteenth-century to facilitate entrepreneurial activity even at the cost of harming others' property. *Sic utere* survived, but it was now used to protect entrepreneurs' right to act over the claims of passive neighbors to enjoy their property undisturbed. Rather than referring to the consequential actions of a property owner on another's property, injury was reinterpreted to mean *preventing* property owners from using property.

The new approach freed industrial entrepreneurs from compensating those hurt by productive uses of property. Here the seminal case was New York's *Palmer v. Mulligan* (1805) where a downstream user sued for damages when an upstream dam obstructed the flow of water to his property. The court ruling turned on the equal right of a new arrival to do what older occupants had done. Speaking for the court, Judge Livingston concluded:

> *defendants had the same right opposite their ground. . . [sic utere] must be restrained within reasonable bounds so as not to deprive a man of the enjoyment of his property, merely because of some trifling inconvenience or damage to others . . . Were the law to regard little inconveniences of this nature, he who could first build a dam or mill on any public or navigable river, would acquire an exclusive right, at least for some distance, whether he owned the contiguous banks or not. . . . the public, whose advantage is always to be regarded, would be deprived of the benefit which always attends competition and rivalry.*[10]

This approach democratized property rights by giving new arrivals privileges equal to those enjoyed by older residents. It, thus, redistributed wealth towards entrepreneurs by preventing established occupants from restricting their actions. But, at the same time, by eliminating established monopolies and freeing entrepreneurs from suit for consequential damages, these cases undermined existing property rights. The transformation of the *sic utere* rule thus owed nothing to Lockean concepts of sanctified private property. The new approach was neither a general attack on property rights, nor a general reaffirmation of property rights: instead, by reallocating rights, it affirmed *some* property against *other* property.

This is an example of what legal historian Willard Hurst (1956, 6) saw as one of the working principles of the United States legal order: "the release of creative human energy". Had the burden of compensating neighbors for consequential damages remained on entrepreneurs, efficient projects may still have been undertaken. In theory, if the project was worth more than the damages inflicted, it would still go forward even if the entrepreneur had to carry the cost of the damages.[11] In practice, however, shifting the burden to the injured party favors the entrepreneurs' projects by putting all the risk and the transactions costs on the neighbors. Had intensive property rights been accorded greater legal respect, high transactions costs would have prevented projects from proceeding. Instead, by sparing entrepreneurs legal risk and transactions costs, the new doctrine promoted entrepreneurship.[12]

Reining in an Excess of Democracy?

The Civil War inaugurated a new era in American politics, demonstrating through war and emancipation the power of the national state to expand freedom. Reformers looked for more. Labor activist George McNeill, for example, warned that America must "engraft republican

principles into our industrial system" or risk losing her democracy. "The Declaration of Independence," railroad trainman C. F. Bracey argued, "was not made for such purposes as the trusts of today are enforcing upon us. The strike of '61 was to free the colored slave, but the working people today are nothing more or less than slaves of the combined trusts" (Foner 1998, 99, 124-5).

The war also fostered forces opposed to these reform demands. The financial requirements of the war, and the associated expansion and centralization of government, promoted large-scale financial and industrial capital able to supply the government. Sheltered behind a protective tariff, the iron and, later, steel industries mushroomed to feed the growing railroad net. Over it all stood a newly centralized banking system based in New York, built up during the war and maintained afterwards by the policies of the victorious Republican Party (Bensel 1984, 1990).

Angry workers and farmers saw clear targets in the iron masters, railroads, and bankers, whose massive properties were subsidized by state authority. They pushed for new laws expanding public regulation of property. They achieved some dramatic successes, including the enactment of eight-hour day laws and laws setting railroad rates. Over the objections of many business leaders, such legislation even passed muster with the Supreme Court. Well into the 1880s, the Supreme Court continued to assent to extensive state regulation of intensive property rights.

Most alarming to business interests concerned with the rising tide of popular radicalism was the 1877 Supreme Court decision in *Munn v. Illinois.* There a Chicago grain elevator challenged an Illinois law regulating the prices charged by railroads, warehouses, and grain elevators. Plaintiffs argued that by overturning existing contracts, the law violated the constitution's contract clause, and that it also violated the newly-enacted Fourteenth Amendment's protection against state interference with the rights of citizens. Recently enacted to protect the civil liberties of freed slaves in the South, the Fourteenth Amendment was now invoked as a constitutional guarantee of property, privileging intensive private property rights from state interference as an essential civil right.

This remained a minority view on the Court in 1877, however. Rejecting the plaintiff's expansive constitutional protection of property, the Court upheld and even extended past regulation. Citing "powers inherent in every sovereignty," the Court ruled that "a government may regulate the conduct of its citizens toward each other, and, when necessary for the public good, the manner in which each shall use his own property." Chief Justice Waite quoted England's Lord Chief Justice Hale in saying that when property was "affected with a public interest, it ceases to be *juris privati* [subject to private regulation] only." Citing the doctrine of *salus populi suprema lex est* ("the welfare of the people is the supreme law"), Waite added:

> *when the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must to*

> *the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use. He may withdraw his grant by discontinuing the use.*

In a sweeping assertion of the scope of public power in a democracy, Waite acknowledged few restraints on state regulation. Regulated property "is entitled to a reasonable compensation for its use," but Waite argued that final judgment on compensation should remain with the legislature. "Every statute," he stated, "is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained." Acknowledging that this power might be abused, he urged citizens go for redress "to the polls, not to the courts."

Advocates of intensive property rights were appalled at the expansive reading of the police powers in *Munn*. Dissenting Justice Stephen Field warned that "The principle upon which the opinion of the majority proceeds is . . . subversive of the rights of private property." "If this be sound law," he warned, then "all property and all business in the State are held at the mercy of a majority of its legislature."

The *Munn* decision made property rights one among many interests, another instrument to achieve social ends with no more constitutional protection than is accorded any other. Facing a rising tide of popular unrest, this approach terrified conservatives, and produced almost hysterical outbursts from those who feared expanded police powers would undermine all property rights (Friedman 1999). Writing in the shadow of the Haymarket Affair of 1886, the prominent legal scholar Christopher Tiedeman (1971 [1886], v-vi) warned that the divine right of kings had allowed no restraint on police power. The spread of *laissez-faire* had limited "the encroachments of government upon the rights and liberties of the individual." But now:

> *the political pendulum is again swinging in the opposite direction . . . Governmental interference is proclaimed and demanded everywhere as a sufficient panacea for every social evil which threaten the prosperity of society. Socialism, Communism, and Anarchism are rampant throughout the civilized world. The state is called on to protect the weak against the shrewdness of the stronger, to determine what wages a workman shall receive for his labor, and how many hours daily he shall labor. . . Contemplating these extraordinary demands of the great army of discontents, and their apparent power, with the growth and development of universal suffrage, to enforce their views of civil polity upon the civilized world, the conservative classes stand in constant fear of the advent of an absolutism more tyrannical and more unreasoning than any before experienced by man, the absolutism of a democratic majority.*

In the late nineteenth century, taking a stand against the "great army of discontents," lawyers and judges set out to sanctify private property. Frequently citing Tiedeman, they sought to curb dramatically the scope of state regulation, limiting state police powers to restraints founded on the entrepreneur-friendly form of the *sic utere* doctrine.

State courts took the lead in erecting new foundations for a sanctified, rather than instrumental, notion of private property. Even before the Civil War, in *Wynehamer v. People* (1856), the New York Court of Appeals overturned a statute outlawing the sale of liquor, ruling that when applied to liquor owned when the law took effect it was a deprivation of property without due process. Discovering for the first time that the concept of due process protected *property*, the court found that "the legislature cannot totally annihilate commerce in any species of property, and so condemn the property itself to extinction."

The holding in *Wynehamer* found few echoes for nearly 30 years, but thereafter it was taken up with a vengeance. In a landmark case, *In re. Jacobs* (1885), the New York State Court of Appeals overturned a law prohibiting the manufacture of cigars in tenements because it "interferes with the profitable and free use of his property by the owner," and thereby "deprives him of his property and some portion of his personal liberty." Dramatically applying the concept of individual liberty to the defense of intensive property rights, Judge Earl warned that

> *Liberty, in its broad sense as understood in this country, means the right, not only of freedom from actual servitude . . . but the right of one to use his faculties in all lawful ways to live and work . . . All laws, therefore, which impair or trammel these rights . . . are infringements upon his fundamental rights of liberty.*

The legislature had based the act on the state's police powers, claiming it was needed "to improve the public health." Ominously for advocates of state regulation, the court felt entitled to review this claim, which it then found wanting. Concluding that the law really "had no relation whatever to the public health," Judge Earl warned the legislature that "under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded."

In re. Jacobs inaugurated a period of unprecedented judicial activism by state courts in defense of intensive property rights. In *Godcharles v. Wigeman* (1866), for example, the Supreme Court of Pennsylvania overturned a law requiring payment in lawful money (rather than company scrip). The court claimed "the Act is an infringement alike of the right of the employer and the employee; more than this, it is an insulting attempt to put the laborer under legislative tutelage" because it prevented workers from selling their labor on any terms they were willing to accept. The *laissez faire* prejudices of the era's judges were perhaps best exemplified by the West Virginia Court of Appeals in *State v. Goodwill* (1889), which held that a law requiring payment in money was

unconstitutional because government should not "do for its people what they can best do for themselves. The natural law of supply and demand is the best law of trade."

Justice Stephen J. Field and the Construction of Sanctified Private Property

The United States Supreme Court was slow to join the attack on state regulation, but Justice Stephen Field challenged the concept of the police power as early as 1872, in his dissenting opinion in the case *Butchers' Benevolent Association of New Orleans v. The Crescent City Live-Stock Landing and Slaughter-House Company [Slaughter-House]*. The case arose after the Louisiana legislature restricted the slaughtering of animals in New Orleans to a newly-constructed centralized and regulated facility. Justified on public health grounds, this law was similar to regulations enacted many times before in many other cities. Citing the decision of Massachusetts Chief Justice Shaw in *Commonwealth v. Alger* (1851), the Louisiana Supreme Court approved the law, finding that "The sacrifice of the individual right in this case is of no consequence in view of the general benefit and commerce of a great commercial community" (Novak 1996, 230-31).

The New Orleans butchers appealed their case to the U.S. Supreme Court, where they were represented by Field's predecessor on the Court, John A. Campbell, a Democrat and the Confederacy's Assistant Secretary of War (Foner 1988, 530). Serving on the Supreme Court before the war, Campbell had ruled, in the *Dred Scott* case, that African-Americans could not be citizens of the United States. Fifteen years later, he invoked free labor principles to urge the Court to protect a citizen's right to intensive property rights. Citing the struggle against feudalism, Campbell argued that the New Orleans regulations marked a step back to a time "when the prying eye of the government followed the butcher to the shambles and the baker to the oven."

The New Orleans butchers lost their case on a vote of 5-4, but Campbell's arguments resonated with judges and lawyers feared rising pressures to extend regulation and to redistribute income, property, and power. Today, Justice Stephen J. Field's dissent is remembered better than Justice Miller's majority opinion with its conventional citations in support of the police powers. Like Campbell, Field argued that Louisiana had violated fundamental rights of free labor. Quoting extensively from Adam Smith, he grounded his defense of intensive property rights on Lockean precepts that because free labor is the ultimate source of property, property is an "essential part of liberty . . . in the American sense of the term." [13]

It would take Field two decades of chipping away at the *Slaughter-House* and *Munn* rulings before his views were accepted by the Supreme Court. In 1897, in *Allgeyer v. Louisiana*, the Court struck down a state law that prohibited a person from obtaining insurance from a company not licensed to do business in Louisiana as an intrusion on the liberty guaranteed by the Fourteenth Amendment. Echoing the New York State court *In re. Jacobs*, Supreme Court Justice Rufus W. Peckham argued that liberty included more than freedom from "physical restraint of his person," but also embraced a right to "work where he will; to earn his livelihood by any lawful calling; to

pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

The train of judicial reasoning behind *Allgeyer* peaked eight years later in *Lochner v. New York* (1905) where the Court overturned a New York law restricting hours of work for bakers. Writing again for the Court, Justice Peckham asserted flatly that "[t]he statute necessarily interferes with the right of contract between the employer and employes (*sic)*" violating the "general right to make a contract in relation to his business" which is "protected by the Fourteenth Amendment of the Federal Constitution." Acknowledging a state police power justification for property regulation to protect "health or morality," Peckham insisted that in this case, "[T]here is no reasonable ground for interfering with the liberty of person or the right of free contract by determining the hours of labor in the occupation of a baker." It is, Peckham concluded,

> *a question of which of two powers or rights shall prevail -- the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. We think the limit of the police power has been reached and passed in this case.*

Property, Instrumentalism and the New Deal

Lochner was followed by other decisions affirming intensive property rights. In *Adkins v. Children's Hospital* (1923), the Court overturned a minimum wage law for the District of Columbia, ruling that it unconstitutionally seized the property of workers and businesses by intruding on their "freedom of contract" which should be "the general rule and restraint the exception."

Oliver Wendell Holmes and Pennsylvania coal

Shortly before *Adkins*, the Supreme Court made another historic ruling that seemed to commit it to the defense of intensive property rights. In *Pennsylvania Coal Co. v. Mahon* (1922) the Court overturned a Pennsylvania law that restricted coal mining in order to maintain the underground support for the surface. The Court found that

> *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. . . . In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. . . . strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the charge. . . . this is a question of degree.*

Cited more than 100,000 times in the next 75 years, *Pennsylvania Coal* is still 'good law.' It established the new field of *takings* law. By extending the protection of property from security against absolute seizure to the protection against loss of value, the case *appeared* to rest on a Lockean vision of absolute property rights and to mark the final and complete reversal of Chief Justice Waite's decision in *Munn*. But note the last phrase quoted above: "this is a question of degree." Written by Justice Oliver Wendell Holmes, this qualification consciously re-inserted into the law an instrumental vision of property rights which was to overturn the previous 50 years of judicial activism.

Holmes had already dissented in the *Lochner* case. Objecting that the "case is decided upon an economic theory which a large part of the country does not entertain," he continued:

> *The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every State or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.*[14]

In contrast to *Lochner*'s absolutist defense of intensive property rights, Holmes saw that competing interests require balance. Defeated in *Lochner*, he chose his dissenting words carefully to build a case for an alternative law. Rather than addressing the Court majority's beliefs in natural rights and John Locke, he accused it of following "Spencer's Social Statics." He thereby characterized their defense of intensive property rights as itself an instrumental choice, a *means* to the ends of efficiency and prosperity rather than the defense of a *sanctified* representation of free human labor. As an instrument, intensive property rights become vulnerable to a different economic theory, a different instrumental vision, or the adoption of a different social end.

This was not the first time Holmes had challenged prevailing forms of legal reasoning used to defend intensive property rights. In his book The Common Law (1881), he rejected simple arguments for absolute property rights with the original and fertile recognition that they stood in conflict with the premises of a competitive market economy. "The law," Holmes observed, "does not even seek to indemnify a man from all harms . . . He may establish himself in business where he foresees that the effect of his competition will be to diminish the custom of another shop-keeper, perhaps to the ruin of him." Competitive injury, Holmes concluded, is permitted on grounds of "policy without reference to any kind of morality" (Holmes 1881, 115, 128). [15]

In his 1894 essay "Privilege, Malice and Intent," Holmes built on this concept of competitive injury to show a general need for an instrumental approach and a 'balancing test' in property law where judges weigh competing rights instead of applying syllogistic reasoning (Horwitz 1992, 130-35).

On the Supreme Court, in 1903, Holmes applied this approach in *Diamond Glue Co. v. United States Glue Co.* "In modern societies," he argued,

> *every part is related so organically to every other that what affects any portion must be felt more or less by all the rest. Therefore, unless everything is to be forbidden and legislation is to come to a stop, it is not enough to show that in the working of a statute there is some tendency logically discernible to interfere with commerce or existing contracts. Practical lines must be drawn and distinctions of degree must be made.*

In this context, Holmes's ruling in *Pennsylvania Coal* was a Trojan Horse rather than a victory for advocates of sanctified property rights. Instead of treating intensive property as a natural right, Holmes founded the 'takings doctrine' on a balance of competing interests. No compensation is *necessarily* due property owners; instead, restitution depends on a variety of circumstances. Property, Holmes acknowledged, should not be left without 'reasonable' use; but what is 'reasonable' is deliberately left vague. Interference that goes 'too far' is a 'taking' requiring recompense; but 'too far' is to be evaluated by judges considering society's needs and particular circumstances. Neither the owners of private property nor the public has *absolute* rights; their competing interests must be weighed and balanced *in each case* – neither has sanctified rights. Property owners should not be arbitrarily indisposed but Holmes also insisted that "government hardly could go on if to some extent values incident to property could not be diminished." Judges, therefore, must carefully weigh competing interests on a case-by-case basis.

Holmes left intensive property rights vulnerable to attack in the event of a change in the priority to be given different social ends. The gradual acceptance of Holmes's instrumentalist view made the 1920s an "Indian Summer" for the sanctity of property rights. The decade that began with *Adkins* ended with the spread of the "Legal Realism," which by 1930 dominated some major law school faculties (Horwitz 1992; Fisher, Horwitz and Reed 1993). Following Holmes, the realists insisted that the law was to be studied instrumentally using the tools of empirical social science.

New priorities in the New Deal

Gradual retreat became a general rout when the political support for sanctified property rights collapsed during the Great Depression of the 1930s. Rallying around President Franklin Delano Roosevelt (FDR) and the New Deal, a new breed of liberals promoted government regulation to relieve distress and to end the depression by reforming capitalism. To their left and right others called for stronger measures. Under pressure, even the Supreme Court retreated from the absolute defense of intensive property rights. Scholars have highlighted Supreme Court decisions in 1937, even referring to a "constitutional revolution of 1937" after two conservative judges resigned when FDR threatened to 'pack' the Supreme Court. But landmark decisions like *West Coast Hotel Co. v. Parrish* (1937), *National Labor Relations Board v. Jones and Laughlin Steel Corp.* (1937),

United States v. Carolene Products (1938), and *United States v. Darby* (1941), were prefigured by decisions from the early 1930s that reflected the spread of judicial pragmatism and an instrumental approach to property rights.

Most remarkable was a decision made in 1934. In *Home Building and Loan Association v. Blaisdell* the Supreme Court approved special government powers to regulate property because of extraordinary economic distress. The Court accepted a Minnesota statute that imposed a moratorium on mortgage foreclosures during a legislatively declared economic emergency. Speaking for the Court, Chief Justice Charles Evans Hughes declared that the Constitution's contract clause, restraining state regulation, was not "to be applied with literal exactness like a mathematical formula, but is one of the broad clauses of the Constitution which require construction to fill out details." The Court, he continued, should construe the contract clause "in harmony with the reserved power of the State to safeguard the vital interests of her people." Legislation "is to be tested, not by whether its effect upon contracts is direct or is merely incidental, but upon whether the end is legitimate and the means reasonable and appropriate to the end." Here is the social and the instrumental interpretation of property erected into constitutional doctrine. Denying any privileged status to private property, Hughes concluded that:

> *Economic conditions may arise in which a temporary restraint of enforcement of contracts will be consistent with the spirit and purpose of the contract clause, and thus be within the range of the reserved power of the State to protect the vital interests of the community. . . . Since the contract clause is not an absolute and utterly unqualified restriction of the States' protective power, the legislation is clearly so reasonable as to be within the legislative competency. . . . Whether the legislation is wise or unwise as a matter of policy does not concern the Court.*

As early as 1934, then, the Court was prepared to withdraw from the evaluation of economic legislation and from property rights cases when a legislative body declared a need to "protect the vital interests of the community."

After Roosevelt's reelection in 1936 and his attempt to 'pack' the Court in 1937, the Court became even more amenable to his reform program. No decision marked so clearly the Supreme Court's new approach as *United States v. Carolene Products Co.* (1938). The case involved a suit brought under the Filled Milk Act of 1923 banning the interstate sale of milk with added fat or oil other than milk fat as "an adulterated article of food, injurious to the public health." Attorneys for Carolene argued that the law unconstitutionally restricted the liberty to contract. Rejecting these property rights arguments, the Court found the law valid as a reasonable use of state regulatory authority to protect public health.

By itself, this would be an unremarkable decision, simply affirming established police powers. But more important than the decision itself was Footnote Four of Justice Stone's opinion, where the Court majority explicitly separated property from the bundle of sanctified civil liberties guaranteed by the Bill of Rights. The Court, Stone asserted, intends to act with a presumption of constitutionality in judging economic legislation, deferring to elected legislators in assessing economic regulations and restrictions on property rights. Because such regulations are imposed for instrumental reasons, the Court will leave the necessary balancing of contending economic interests to the legislatures. In contrast, Stone warned that intrusions on personal liberties, such as free speech or religious practices, will be examined carefully:

> *There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments which are deemed equally specific when held to be embraced within the Fourteenth.*

Environmental protection and the "takings" counteroffensive

Since *Carolene,* the Supreme Court has allowed democratically elected legislators wide discretion in choosing the objects of social policy, even when they have restricted the actions of property holders. Environmental protection has been among the policy objectives pursued in this context. The 1972 Wisconsin case of *Just v. Marinette County* illustrates well the judiciary's post-*Carolene* posture. Ronald and Kathryn L. Just sued to overturn regulations preventing them from filling designated wetlands to build houses. Rejecting the Justs' claims, the Wisconsin Supreme Court upheld the legislation as a legitimate use of the police powers. But the court went further to approve much broader restrictions on property. "An owner of land," the court found, "has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." Zoning regulations, the court acknowledged, "must be reasonable" but "we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses." There is no 'taking' of property, as defined under *Pennsylvania Coal* because the "uses consistent with the nature of the land are allowed."

Just v. Marinette has not yet been tested in the United States Supreme Court, but it has been accepted in other state supreme courts, including New Jersey and Minnesota, and has been cited in Justice Blackmun's dissent from the Court decision in *Lucas v. South Carolina Coastal Council* (1992). *Just* illustrates how far the law has moved from *Lochner v. New York* or *In re. Jacobs*. Property owners responded to the growing restraints placed on their claims with powerful political and ideological campaigns. A well-funded cottage industry developed in the academy elaborating arguments against state regulation, labeling any restraint on the scope of intensive property rights as a 'taking' of property requiring compensation (Kitch 1983). At first, property

owners found little satisfaction. In *Penn Central Transportation v. New York* (1978), for example, the Penn Central Transportation Company sued the New York Landmarks Preservation Commission for damages when the Commission vetoed construction above Grand Central Station. Rejecting the suit, the Supreme Court propounded a "balancing test" derived from Holmes's ruling in *Pennsylvania Coal*. Justice William Brennan gave three criteria to determine due compensation, including the character of the government action, interference with "investment-backed expectations," and the "extent of the diminution of value." These criteria were sufficiently vague and elastic that they have provided little protection for the intensive rights claimed by some property holders.

Advocates of intensive property rights did better in 'takings' litigation after the election of President Ronald Reagan in 1980. Led by a Reagan appointee, Antonin Scalia, the Court made a series of decisions beginning in 1987 that seemed to mark a dramatic swing of the pendulum towards the Court's pre-*Carolene* stance. In *First English Evangelical Lutheran Church v. County of Los Angeles* (1987), for example, the Court required Los Angeles County to pay compensation after the flood control district prohibited rebuilding of the church's flood-damaged campground. The Court reminded Los Angeles that "regulation depriving owner of all use of property" has been "held to entitle the owner to compensation."

Supported by liberal judges Brennan and Marshall, the opinion in *First English* broke no new constitutional ground, merely reaffirming established principles from *Pennsylvania Coal.* Decided in the same year, however, *Nollan v. California Coastal Commission* (1987) was a different story, because it imposed a new standard on regulations. Owners of an oceanfront lot, nestled between public parks to the north and south, the Nollans sought to replace their dilapidated bungalow with a three-bedroom house similar to other structures in the area. The California Coastal Commission granted the required permit only on condition that the Nollans grant a public easement of way between the mean high-tide line and the seawall behind their house to allow public passage along dry sand between the parks to the north and south. The Commission justified the requirement saying that the larger house would contribute to a "wall of residential structures" that "would prevent the public psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit" (Eagle 1996, 255).

In *Nollan*, the Supreme Court overturned the Commission and established a new criterion for judicial review of property regulations. Writing for the Court, Justice Antonin Scalia admitted that placing "a condition on the granting of land-use permit" is not "a 'taking' within the meaning of the Fifth Amendment" as happened in *First English.* But he argued that "[t]he evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." Requiring an easement "does not serve the supposed purpose of protecting the public's visual access to the beach" and is "thus invalid in the absence of compensation." Scalia concluded by pronouncing a new standard:

> *the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. . . . unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'*

This time Brennan and Marshall dissented. They rejected Scalia's call to second-guess legislators, arguing for the post-*Carolene* standard that "the proper standard for review . . . is whether the state could rationally have decided that the measure adopted might achieve the state's objective." But after these liberal icons retired in 1990 and 1991, the Court moved to impose additional restrictions on state regulation. In *Lucas v. South Carolina Coastal Council* (1992), for example, the Court ordered that a South Carolina landowner be compensated for loss of the value of his property after the new state Beachfront Management Act precluded construction on his land. Writing for the Court, Justice Scalia sought to re-establish an absolute standard in defense of intensive property rights. "Our decision in [*Pennsylvania Coal Co. v.*] *Mahon*," he warned:

> *offered little insight into when, and under what circumstances, a given regulation would be seen as going 'too far' for purposes of the Fifth Amendment. In 70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far, preferring to 'engag[e] in . . . essentially ad hoc, factual inquiries.'*

Rejecting such 'ad hoc' arguments and 'balancing tests,' Scalia urged the Court to establish categorical rules for analyzing 'takings' questions:

> *Regulations that deny the property owner all 'economically viable use of his land' constitute one of the discrete categories of regulatory deprivations that require compensation without the usual case-specific inquiry into the public interest advanced in support of the restraint. Although the Court has never set forth the justification for this categorical rule, the practical - and economic - equivalence of physically appropriating and eliminating all beneficial use of land counsels its preservation.*

Again voicing his distrust of elected legislators, Scalia warned as he had in *Nollan* that judges need to evaluate regulations carefully to insure against the "risk that private property is being pressed into some form of public service under the *guise* of mitigating serious public harm." [Emphasis added.]

The Court refined its new standards in *Dolan v. City of Tigard* (1994) where it instructed courts to shift some of the burden of proof from property owners to the government. The case was brought when the city of Tigard, Oregon, approved Florence Dolan's plan to expand her plumbing supply store only on condition that she dedicate land for public green way along the neighboring Fanno Creek and provide a pedestrian and bicycle pathway to relieve traffic congestion. Writing for the Court, Chief Justice William Rehnquist argued that the city had "not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by Dolan's development reasonably relates to the city's requirement for a dedication of the pathway easement."

The *Nollan*, *Lucas*, and *Dolan* decisions signal a new era of heightened scrutiny of property regulation that could return property law to the pre-New Deal era. But a considerable body of law and judicial practice and precedent still stand against the advocates of intensive property rights. Even in 1987, the same Court that ruled in *Nollan* accepted, in *Keystone Bituminous Coal Association v. DeBenedictis*, a Pennsylvania law remarkably similar to that overturned by Justice Holmes's Court in *Pennsylvania Coal Co. v. Mahon*. Rehnquist's Court was not prepared to go as far in the protection of Pennsylvania coalmine property as Holmes's Court was in 1923.

Thus far, few judges have accepted the full implications of *Nollan*, *Lucas*, and *Dolan* as intended by Scalia. And perhaps they never will. This caution has frustrated advocates of intensive property rights. In *Claude Lambert et ux. v. City and County of San Francisco, et al.* (2000), for example, Justice Scalia berated his fellow judges that "the object of the Court's holding in *Nollan* and *Dolan* was to protect against the State's cloaking within the permit process 'an out-and-out plan of extortion'." But such, he complained, is the current practice in San Francisco and many other localities where municipal officials regularly require payments to approve zoning changes. The acceptance by lower courts of such practices, Scalia warns, calls "into question [their] willingness to hold state administrators to the Fifth Amendment standards set forth by this tribunal." Scalia's disappointment must have been enhanced when only two of his fellow justices joined his dissent.

Conclusion: Means and Ends in Property Law

Notwithstanding Justice Scalia, Footnote Four remains good law. Since it was propounded, the Supreme Court has approved almost all legislation regulating property, recognizing the power of elected legislatures to be "as broad as the economic needs of the nation."[16] At the same time, the Supreme Court has established itself as the watchdog of individual rights and civil liberties guaranteed by the Bill of Rights and the Fourteenth Amendment, elevating these above any property owners' claims to a right to pollute or to discriminate on the basis of gender, race, or religion.

Treating property as a social construction, the post-*Carolene* Court has based property law on two pillars: the reciprocal nature of injury or damage, and property as an instrument rather than a sanctified right. Recognizing the reciprocal nature of damages, the courts view any asserted

property ‘right’ as only one of several competing ‘rights’ where all must be balanced. Accepting Holmes’s balancing test leads the Court to view each asserted property ‘right’ instrumentally, as an alternate means to achieve broader social ends. Instrumental, competing property ‘rights’ can never be absolute, never sanctified ends-in-themselves. Because some must prevail over others, there must be criteria beyond ‘natural rights’ to adjudicate competing claims. Some still urge a return to the rhetoric of natural rights, but the recent generation of judicial conservatives has failed to move American law significantly. Change would require that courts reverse a history of legal reasoning that views property as a social construct rather than an end in itself. Even more problematically, it would require that they elevate abstract property above the needs of living people.

Endnotes

1. Extending Coase's analysis, some argue that legal systems will move towards efficient property rights regimes that minimize legal costs (Posner 1992).

2. Distribution will not affect demand patterns where economic agents have common preferences because reallocation between individuals will not affect consumption. This assumes uniform preferences and income elasticities of unity for all goods. Demand will not affect prices only if there are constant returns to scale because increases or reductions in output will leave average costs constant.

3. Surprisingly, given their different political perspectives, Richard Posner reaches the same conclusion as do legal realists cited by Fisher, Horwitz, and Reed. See Posner (1987, 777); Posner (1992, 252).

4. This point has been made by scholars of the San Francisco gold rush and the American land claim movement in the west, who have shown how groups of individuals established property rights prior to the formal organization of local governments (Hurst 1956, 3-5; Umbeck 1977, 1981).

5. Note Justice Field's dissent in the *Slaughter-House* cases cited below.

6. This point is made repeatedly by Richard Ely (1971). Presumably, it contributes to Richard Epstein's rejection of instrumental reasoning (as used, for example, by Posner) (Epstein 1985; Mercuro and Medema 1997, 73).

7. In 1999 dollars, this expropriation would be worth over $300 billion. Ransom and Sutch estimate that in 1860 slave capital represented $1.6 billion of the assets in the five major cotton-producing states, or 45.8% of the total wealth of these states (Ransom and Sutch 1977, 52-3; also see Jaynes 1986, 35 ff.). Towards the end of the war, President Lincoln was prepared to offer $400,000,000 in compensation if the confederate states would lay down their arms (Connor 1920, 166-8).

8. One of the few victories won by liberals before the Supreme Court in the early twentieth century came in *Buchanan v. Warley* where the Court overturned a Louisville, Kentucky, ordinance forbidding blacks from living in neighborhoods in which the majority of homes were occupied by whites. The law was overturned as a violation of the rights of property owners to sell their property.

9. This insight led to Holmes's instrumental reasoning and his explicit weighing of costs and his use of 'balancing rules' for the adjustment of differences in cases involving externalities, most famously in *Pennsylvania Coal Co. v. Mahon*. His line of reasoning is still good law, as shown in *Penn Central Transportation v. New York* 438 U.S. 104 (1978).

10. *Palmer v. Mulligan* was to be used as precedent many times, including in New York, *Platt v. Johnson and Root* 15 Johns (1818) and Massachusetts, *Tyler v. Wilkinson* (1827).

11. This, of course, is the approach taken in Coase (1960).

12. The significance of this subsidy to entrepreneurial activity is discussed in Horwitz (1977). The magnitude is questioned in Epstein (1982) and Schwartz (1981).

13. By citing Smith rather than Locke, Field avoided Locke's lapse into biblical exegesis.

14. The nineteenth-century English philosopher Herbert Spencer was an advocate of *laissez faire* economics and social Darwinism.

15. This is discussed further in Horwitz (1992, 127 ff.).

16. Majority decision in *American Power and Light Co. v. Securities and Exchange Commission* 329 U. S. 90 (1946).

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The Natural Assets Project

The Natural Assets Project, based at the Political Economy Research Institute of the University of Massachusetts, Amherst, is a collaborative initiative launched with support from the Ford Foundation. The project aims to promote critical analysis and discussion of the potential for building natural assets – individual and social wealth based on natural resources and ecosystem services – to advance the goals of poverty reduction, environmental protection, and environmental justice.