The Social Origins of Property

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> It was easier to make a revolution than to write 600 to 800 laws to create a market economy.[1]
>
> Jiri Dienstbier, Foreign Minister of Czechoslovakia (1990)

> [I]t would be as absurd to argue that the distribution of property must never be modified by law as it would be to argue that the distribution of political power must never be changed.[2]
>
> Morris Cohen (1927)

I. Introduction

The takings clause of the United States Constitution requires government to pay compensation when private property is taken for public use.[3] When government regulates, but does not physically seize, property, the Supreme Court of the United States has had trouble defining when individuals have been deprived of property rights so as to give them a right to compensation. The takings clause serves "to bar Government from forcing some people alone to bear public burdens that, in all fairness and justice, should be borne by the public as a whole."[4] To determine when a regulation amounts to a "taking" of property requiring compensation, the Court has rightly stated that the ultimate question is whether the burden of regulation has been unfairly placed on a small class of individuals rather than the public at large.[5] To answer this question, the Court has identified a variety of factors to consider, including the character of the governmental action, (whether the regulation effects a permanent physical invasion, destroys a core property right, or is intended to prevent public harm),[6] whether the regulation interferes with reasonable investment-backed expectations,[7] and the extent of the diminution in value of the property

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1. William Echikson, "Euphoria Dies Down in Czechoslovakia" (September 18, 1990) The Wall Street J. A26.
2. Morris Cohen, "Property and Sovereignty" (1927) 13 Cornell L.Q. 8 at 16.
3. The fifth amendment to the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. This provision has been held applicable to the state governments through the due process clause of the fourteenth amendment. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226 (1897).
4. *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).
5. See *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 325 (1893); *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*,480 U.S. 470, 506-21 (1987) (Rehnquist, J. dissenting).
6. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that a permanent physical invasion of property is a per se taking); *Hodel* v. *Irving*, 481 U.S. 704 (1987) (holding that deprivation of any right to pass on property at death by either inheritance or bequest constitutes a per se taking of property); *Mugler* v. *Kansas*, 123 U.S. 623 (1887); *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, *ibid.* (both holding that regulations intended to protect the public from harm are highly unlikely to be characterized as takings of property).
7. See *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979).

(particularly whether the regulation deprives the owner of any economically viable use of the property).[8]

In recent years, the Supreme Court's analysis of takings cases has gotten further and further away from the central question of whether a regulation imposes an unfair distribution of social obligations. Rather than focusing on this central normative question, the Court has increasingly attempted to both naturalize and formalize the bundles of rights that will be conceptualized and classified as property interests protected from legislative revision without compensation. In this essay, we hope to explore how and why this has happened, and explain why directly confronting the central question is preferable to the Court's formalistic approach. We will also suggest some new ways to conceptualize the relationship between property and sovereignty which develop the central normative ideal of judging what constitutes a fair distribution of obligations.

In Part II, we will describe the Court's emerging natural rights ideology which implies that property rights have a built-in inherent structure. This ideology rests on two central ideas. First, some Justices assume that property rights can be defined by a purely logical or definitional method of analysis. We will argue, instead, that property rights can and should be structured through instrumental and value-oriented reasoning. Second, an increasing number of Justices appear to assume that property rights have, not only a single form, but a natural basis. We will argue, in contrast, that property rights exist in varied forms which are socially and politically constructed for human purposes.

In Part III, we will argue that the Court wrongfully denies the social origins of property rights. We will argue, instead, for the legal realist notion that property rights can and should be defined through consideration of policies or values, and that property rights are instituted through the social and political construction of human relationships. The distribution of property in the United States, and the rules governing subsequent alienation of property distributed by government, occurred not as a result of a natural evolution from a state of nature to civil society but rather was accomplished through a combination of social action and government policymaking and planning. Government policies included a combination of efforts to delegate and disperse control over valued resources to private citizens while simultaneously providing for necessary collective regulation of the use of those resources to promote the common good and the interests of neighboring property owners. Determining the relative scope of individual control versus government regulation requires a host of complicated normative and instrumental judgments about the justice and wisdom of different distributions of decision-making power, both between private organizations and state officials, and among private organizations and individuals themselves.

By denying the social origins of property, the Court has attempted to avoid directly confronting the value choices involved in making these judgments. Instead of articulating reasonable bases for its decisions, perhaps in policy or underlying values, the Court has relied on the Justices' intuitive conceptions of the meaning

8. See *Agins* v. *Tiburon*, 447 U.S. 255 (1980); *Penn Cent. Transp. Co.* v. *New York*, 438 U.S. 104 (1977).

of property. As Cass Sunstein has argued, these intuitions are based on a pre-New Deal conception of the relation between state and society and a pre-legal realist picture of the legal system.[9] The result is a form of conceptualism that is not only divorced from underlying values but is biased by pre-existing common law definitions of property rights and unresponsive to the need to address contemporary social ills.

Part IV addresses some of the consequences of the Court's denial of the social construction of property. First, the Court has shown a marked solicitude for certain kinds of interests which it privileges as "property" protected by the Constitution.[10] Most importantly, the Court appears to be increasingly hospitable to takings claims brought by private landowners. This stands in stark contrast with the Court's treatment of claims regarding government benefits and other interests not traditionally identified as property interests. Although some scholars have attempted to dignify government benefits with the property mantle by dubbing them "new property" interests,[11] the Supreme Court has been hostile to this effort. While government benefits are sometimes treated as property for due process purposes, no takings clause restrictions have been placed on either the withdrawal of benefits or on conditioning the receipt of benefits on the waiver of other rights.[12] We will describe and criticize the Court's distinction between so-called "traditional" and "new" property rights and argue that this distinction is based on the false dichotomy between "private property" and "government benefits."

Second, we will argue that this distinction, in conjunction with the Court's denial of the social origins of property, has a built-in class bias, effectively promoting discrimination on the basis of class, race, sex, and disability. By failing to identify government benefits as property interests while granting greater protection to owners of land, the Court may not only leave the most vulnerable members of society without effective judicial protection of their interests, but may effectively prevent legislative bodies from exercising governmental power to deal adequately with poverty.

Third, we will argue that the Court's perspective on property has the potential to both frustrate public policy goals and subvert democracy. The Court's natural law picture threatens to constrict illegitimately the available means by which important governmental policies can be achieved. In particular, the Court's natural law ideology threatens to inhibit achievement of important public policies such as protection of the environment.

Finally, in part V, we will suggest an alternative picture of property which fully accepts its social origins and conceives of it as a setting within which people engage

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9. Cass Sunstein, "Lochner's Legacy" (1987) 87 Colum. L. Rev. 873.

10. This solicitude is evident in some majority opinions, such as *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987); *Hodel* v. *Irving*,*supra*, at note 6; and *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987); and in a significant number of dissenting opinions, see, e.g., *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, *supra*, note 5, (Rehnquist, C.J., dissenting, joined by Justices Powell, O'Connor, and Scalia); *Pennell* v. *City of San Jose*, 485 U.S. 1, 15-24 (1988) (Scalia, J., concurring in part and dissenting in part, joined by Justice O'Connor).

11. See Charles Reich, "The New Property" (1964) 73 Yale L.J. 733.

12. The conceptual force behind the lack of protection for new property interests is the notion that government benefits are gratuities and are thus unlike traditional property interests which are vested rights.

in social relationships. This reconceptualization has its intellectual roots in Joseph Sax's landmark article *Takings, Private Property and Public Rights*,[13] and the influence of that article is evident throughout this essay. Rather than asking whether a particular right constitutes a core strand in the traditional bundle of property rights, the Court should more forthrightly focus on the question it has itself recognized as the key to the takings problem: what kinds of burdens wrongfully discriminate against individual property holders by making them uniquely suffer burdens that should fairly be borne by the community as a whole? To answer this question, the Court should shift its attention from natural law and formalistic conceptualizing and turn instead to consider the role that property plays in shaping the contours of social relationships.

One possible approach is to shift our focus from rights to obligations. We might usefully ask: what obligations do people owe others? On one hand, owners owe duties to non-owners; they must not use their property in ways that illegitimately harm others. They also have no right to monopolize property in ways that prevent others from participating equally in economic life. At the same time, non-owners owe duties to owners; the legal system delegates control over certain valued resources to decentralize some aspects of economic life and to promote access to resources necessary for personal fulfillment. Singling out particular owners by imposing burdens on them not shared by others may both unfairly deny them the power to participate in social life and to attain personal security, and thus constitute wrongful discrimination. Our focus should be on the range and quality of those social obligations of both owners and non-owners. This kind of inquiry will allow us better to articulate what we mean by wrongful economic discrimination.

II. Denying the Social Origins of Property

The Supreme Court has long recognized that, from the standpoint of property owners, a regulation that "goes too far" can as effectively "take" property rights as outright seizure by the government.[14] For this reason, the Court has placed itself in the business of trying to determine when regulations should be treated as takings of property requiring just compensation. While there is general agreement that fairness to the property owner and the degree to which the owner's use of the property is likely to cause social harm are important factors in the takings inquiry, it has proven to be extremely difficult to formulate acceptable legal doctrines to distinguish between legitimate government regulations and discriminatory regulations that "go too far" and thus unfairly single out property owners to bear burdens rightly shared by the public as a whole.[15]

The Court has identified three factors as central to its analysis: (1) the character of the government action, (2) the extent of diminution in value of the property interest in question, and (3) the extent to which the regulation interferes in reasonable

13. Joseph Sax, "Takings, Private Property and Public Rights" (1971) 81 Yale L.J. 149.
14. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922).
15. See *Keystone Bituminous Coal Assoc.* v. *DeBenedictus*, *supra*, note 5 at 495, citing *Kaiser Aetna* v. *United States*, *supra*, note 7.

investment-backed expectations. The factors rightly appeal to important facets of the relationship between individual market actors and the community as a whole, acting through the state. However, rather than solving the takings problem, each of the factors invokes dilemmas; none of them can be determinative in the absence of prior value judgments about the legitimacy and scope of property rights. Yet this is the very question these factors are meant to help identify. Each factor thereby recreates the problem it was meant to solve.

The "character of the government action" prong asks us to distinguish between laws that regulate behavior to promote the general welfare from those that represent wrongful appropriation of private property by the collectivity. One way to do this is to distinguish between harms and benefits. This requires us to distinguish regulatory programs which legitimately prevent individuals from harming others from those that illegitimately extract benefits from individuals to be redistributed to others. A second approaches distinguishes between those laws that legitimately promote an "average reciprocity of advantage" from those that occasion unfair sacrifices for the public good. Neither of these distinctions solves the problem, however. The distinction between harm and benefit is increasingly incoherent in a legal and social world which imposes numerous affirmative obligations on actors to consider the interests of others, and the problem of identifying an unfair sacrifice depends on a judgment about what obligations people should have. We are therefore directed back to the prior question of the scope of property rights vis-à-vis state power—in other words, we must return to the central question of what constitutes a fair distribution of obligations.

The "extent of diminution in value" brings forward the question of how to define the property interest at issue. *Every* regulatory law affects property values. Moreover, if property rights are understood in legal realist terms as bundles of particular rights, then every regulatory law could be interpreted as taking one hundred percent of a particular strand in the bundle. The extent of diminution in value therefore depends on a prior definition of the property right in question. That, however, is the very question we are trying to answer.

"Interference with reasonable investment-backed expectations" similarly requires a determination of *what* expectations are reasonable. On one hand, owners should expect that all laws are subject to change; however, taken to the extreme, this would mean that no property rights are protected from seizure by the state because all property is held subject to the police power to regulate its use to promote the general welfare. On the other hand, if we conclude that investors have a right to rely on the laws in effect at the time they act, then no regulatory programs can be enforced retroactively; this would have the perverse effect of requiring government to compensate existing property owners whenever it passed a regulatory statute intended to prevent them from using their property in socially destructive ways. However, the ownership of property has *never* included the unlimited right to harm others; nuisance law limits property owners from destroying *other* property owners' assets. Moreover, the police power constitutes the state's ability to recognize and regulate new harms over time as social conditions change. Thus, all owners know that their property rights are subject to legitimate regulation to protect the public welfare.

The question, therefore, is not just what owners expect, but what sorts of stability in expectations property holders have a *right to expect*. The question of defining which expectations were reasonable again depends on a prior definition of the extent of property rights.

The fact that each of the central factors invokes dilemmas and requires judgments about the scope of property rights does not mean that they are irrelevant; on the contrary, it is *precisely because* they invoke crucial dilemmas that they *are* relevant. Nonetheless, to decide takings problems, it is necessary for the Court to develop techniques of analysis to deal with those dilemmas by defining the contours of property rights and state power.

One way of escaping these dilemmas is to leave policymaking to the legislatures by generally refusing to find regulatory programs to constitute takings of property requiring just compensation. For the most part, this was the approach taken by the Supreme Court between 1937 (the end of the *Lochner* era) and the mid-1980s. A second way to solve the dilemmas is to discuss directly the value choices implicated in these decisions. This is the approach proposed by Professor Jeremy Paul, which we also advocate.[16] However, the Court is unwilling to do this because it involves honestly confronting and making controversial value choices. This approach contradicts the judicial philosophy of "leaving lawmaking to the legislature" and keeping (or, rather, pretending to keep) the Court out of the business of making law.

The Court has therefore increasingly adopted a third way of handling these dilemmas—formalistic identification of what it sees as essential or "core" property rights. Because more and more members of the Court have become frustrated with what they see as inadequate constitutional protection for property owners, they have prompted the Court to start becoming somewhat more activist in intervening in regulatory programs established by legislatures. However, they cannot justify intervention by direct invocation of value choices; this would not sit well with a Court which defines its institutional role as based on judicial restraint rather than activism. To engage in activism, while simultaneously denying that it is activist, the Supreme Court has increasingly resorted to what Professor Margaret Jane Radin has called "conceptual severance":

> [Conceptual severance] consists of delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken. Thus, this strategy hypothetically or conceptually "severs" from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.[17]

In other words, by conceiving of ownership of property as a bundle of sticks, with each stick representing a distinct incident of ownership, it is possible to portray the elimination, through regulation, of one stick, or several sticks together, as a deprivation of a distinct interest rather than a mere restriction on an otherwise intact property interest.

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16. Jeremy Paul, "The Hidden Structure of Takings Law" (1991) 64 S. Cal. L. Rev. 1393.
17. Margaret Jane Radin, "The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings" (1988) 88 Colum. L. Rev. 1667 at 1676.

In applying conceptual severance, the Court identifies the strand or strands taken from the bundle of rights that may characterize property ownership and then simply *defines* that right or set of rights as a separable property interest. For example, the Court has sometimes held that property owners' right to exclude others from property is so fundamental to ownership that government action limiting that right is a taking regardless of the overall effect on the value or use of the property.[18] Thus, in *Kaiser Aetna* v. *United States*,[19] the Court held that imposing the long-recognized navigational servitude, allowing public access to navigable waters, on a private marina that became navigable because of private development, required compensation under the takings clause. And in *Nollan* v. *California Coastal Commission*,[20] the Court held that state imposition of an easement for public access to beachfront property constituted a taking requiring compensation. In neither case was the overall effect on the value or use of the property deemed relevant to whether a taking had occurred. Rather, under the Court's conceptual severance reasoning, simply because an important strand in the bundle of property rights, here the right to exclude, had been taken, a taking was found to have occurred.[21]

This reasoning is circular; it presumes that the right identified is severable without explaining why it should be severed. This procedure employs one of the techniques of formalistic reasoning: attempting to answer controversial questions by deduction from abstract premises which are claimed to be uncontroversial.[22] The Court gives these formalistic incantations substantive content by reference to the Justices' intuitions about the meaning of property. However, the Justices cannot admit they are using their intuitions. The problem is both that the premises are more controversial than the Court claims and the process of deriving implications from those premises is more discretionary, difficult and value-laden than the Justices are willing to admit. Definitional claims are even more formalistic than other kinds of decision procedures because they skip more steps in the argument; they are based on controversial and unexamined premises, and they fail to give any argument whatsoever for the conclusions derived from these premises—the conclusion is simply *identified* with the premise. Nonetheless, circular arguments are extremely useful; they allow the Court to limit government regulatory power while giving the appearance of avoiding value judgments about desirable public policy.

This definitional reasoning presumes that it is not necessary to justify the choices which the Court has made about which types of interests to protect from legislative revision. It therefore effectively presumes a natural rights basis for the substantive content of the "property" rights protected by the Constitution. The Court has not appealed to natural law to justify its conception of property. Rather it has attempted to "naturalize" property by reference to an imagined historical tradition.[23] The Court

18. But see *Prune Yard Shopping Center* v. *Robins*, 447 U.S. 74 (1980) (upholding a state law requiring shopping center owners to allow leafletting); *Yee* v. *City of Escondido*, 112 S. Ct. 1522 (1992) (upholding an anti-eviction statute).
19. *Supra*, note 7.
20. *Supra*, note 10.
21. See Radin, *supra*, note 17 at 1671-78. The examples in the text are Radin's, although we have recharacterized them somewhat.
22. Joseph William Singer, "Legal Realism Now" (1988) 76 Calif. L. Rev. 465 at 496-503, 516-17.
23. See, e.g., *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

does not engage in detailed philosophical analysis to give substantive content to the rights it has tried to "naturalize." Nor does the Court demonstrate the actual historical basis of its claim that certain property rights inhere in established tradition. Rather, it has simply identified core rights as necessarily connected to property. In defining core rights, the Court presumes a pre-New Deal, pre-legal realist conception of both property and the public/private distinction; the Court's conceptualization of this distinction means that it is unable even to assimilate the role that regulation has long played in limiting rights in real property. Without argument, and therefore without explicit justification, the Court has assumed that the nature of property rights is set either by the abstract concept of private property, or by some version of historical tradition, and that the incidents of property cannot be traced to a social system that defines the contours of those rights, distributes them, and engages in continuing redefinition and regulation. By thus naturalizing property rights, and by appealing to an imagined, but made-up tradition, the Court has begun a renewed effort to immunize property rights from legislative revision through democratic processes, and it has done so without adequate elaboration and substantive justification and the value choices it has made.[24]

As Professor Frank Michelman has noted,[25] this process has led the Court to identify a few, relatively narrow, circumstances in which a taking will be found. However, the list seems to be growing. As of the beginning of 1992, it includes the following: (1) permanent, forced physical occupations, no matter how small, by either government officials or private actors;[26] (2) total abrogation of the right to pass on property at death;[27] (3) interference with vested rights, i.e., reasonable investment-backed expectations formed in substantial reliance on regulatory permission, which permission is subsequently revoked;[28] and (4) denial of any economically viable use unless the prohibited use falls within traditional nuisance law.[29]

The simplistic and formalistic reasoning increasingly adopted by the Court is belied by the complexity of the cases. When we consider the rigid formulae which the Court has invented in recent years, it becomes clear that the Court does not mean what it says; under various circumstances, the rigid doctrines are ignored. An honest Court would justify the results it reaches by more forthright inquiry into the values it is seeking to protect though the takings clause.

For example, consider the idea that permanent, forced physical occupations of property necessarily constitute takings of property. This is widely regarded as the holding of *Loretto* v. *Teleprompter Manhattan CATV Corp.*,[30] in which the Court held that a statute which required landlords to allow cable television boxes and cables to be installed on their buildings constituted a per se taking of property without just compensation. This formulation derives strength from a physicalist con-

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24. See Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (Chicago: University of Chicago Press, 1990).
25. Frank Michelman, "Takings, 1987" (1988) 88 Colum. L. Rev. 1600.
26. See, e.g., *Loretto* v. *Teleprompter Manhattan CATV Corp.*, *supra*, note 6; *Nollan* v. *California Coastal Comm'n*, *supra*, note 10 at 831-32, 833 n.2.
27. *Hodel* v. *Irving*, *supra*, note 6.
28. *Kaiser Aetna* v. *United States*, *supra*, note 7 at 179-80.
29. *Agins* v. *Tiburon*, *supra*, note 8 at 260; *Lucas*, *supra*, note 23.
30. *Supra*, note 6.

ception of property,[31] and gives the appearance of furnishing a bright-line test that protects the Court from having to make value judgments about the nature of property or the scope of state power. Moreover, it formalistically identifies the "right to exclude" as a core property right which cannot be taken or infringed without compensation. It therefore provides a paradigm case of the Court's formalistic, natural rights approach to the takings clause.

While rhetoric from Supreme Court opinions stresses the seriousness of permanent physical occupation and thus justifies its treatment as a taking regardless of the economic consequences, the Court has not actually adhered to the doctrine that permanent physical occupation constitutes a taking. For example, in *PruneYard Shopping Center* v. *Robins*,[32] the Court held that it did not constitute a taking of property for state law to require owners of shopping centers open to the public to allow members of the public to enter the shopping center to solicit signatures on a petition.[33] And in *Block* v. *Hirsh*,[34] which was specifically reaffirmed in *Loretto*, the Court upheld against a takings challenge a rent control ordinance which granted tenants protection against eviction at the end of their lease terms at rents set by a city commission, unless the owner wished to regain possession for occupancy by herself or her family. This occupation by the tenant was in direct violation of the contract between the landlord and the tenant, and is thus a forced, potentially long-term, physical occupation by the tenant.[35]

The Court attempts to distinguish *Loretto* from rent control and other forms of regulation on two grounds. First, it notes that in the landlord/tenant situation, the tenant is invited onto the land while in *Loretto* the only claim to access was the result of a government license.[36] Second, it argues that the occupation in *Loretto* was permanent, while in the other situations, such as *PruneYard*, the occupation was not permanent because the owner could always end the physical occupation by taking the property out of the use that entailed the public access.[37] Thus, if the owner converted the property to an industrial park, the right of access would cease. This distinction does not work, however. The physical invasion in *Loretto* was similarly contingent on the property continuing to be used for rental housing purposes; conversion to owner-occupied housing or non-residential use would end the obli-

31. Paul, *supra*, note 16 at 1416-23.
32. *Supra*, note 18.
33. See also *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964) (upholding federal public accommodations statute against a takings challenge).
34. 256 U.S. 135 (1921).
35. The Court has noted that it is an open question whether a permanent physical invasion results from rent control ordinances that do not allow the property to be taken out of the rental market. See *Federal Communications Commission* v. *Florida Power Co.*, 480 U.S. 245, 253 (1987). Permanent physical invasion was found in such a situation in *Hall* v. *City of Santa Barbara*, 833 F.2d 1270, 1276 (9th Cir. 1986); cert. denied, 485 U.S. 940 (1988); but the same claim was rejected in *Yee* v. *City of Escondido*, 224 Cal. App. 3d 1349, 1355-56 (1991), affirmed, *supra*, note 18.
36. See *Federal Communications Commission* v. *Florida Power Co.*, *ibid.* at 252-53.
37. It also differed because the property in *PruneYard* had been open to the public, unlike the single family house at issue in *Nollan*. However, if this is the key factor, then the important consideration is not the fact that the statute required a permanent, physical invasion, but the extent to which private property has been devoted to "public" uses. This issue is extremely controversial. State and federal courts disagree about whether citizens have free speech rights to enter shopping centers for communicative purposes. Moreover, federal and state civil rights laws regulate "public accommodations", requiring nondiscriminatory public rights of access to "private" property which is open to the public.

gation.[38] There is no reason to believe the use of property for commercial shopping center purposes (as in *PruneYard*) is likely to be less long-lasting than use of property for rental housing purposes (as in *Loretto*). Permanence seems not to be the sole factor at work here; nor is physical invasion.[39]

Perhaps the distinction is voluntariness. For example, the owner in *Block* v. *Hirsh* had entered a voluntary relationship with the tenant, while the regulation in *Loretto* forced the owner to allow entry to a stranger.[40] But consider that under the common law of adverse possession,[41] a long term, physical occupation of someone else's property may transfer ownership from the original owner to the possessor. Why doesn't a court judgment affirming such a transfer of title constitute state action effecting a taking of property without just compensation? The occupation here is by a neighbor—normally not someone with whom the true owner has any kind of contractual relationship—yet no taking will be found.

Now compare *PruneYard* to *Kaiser Aetna* v. *United States*.[42] In that case the owners of a private lagoon invested substantial amounts of money in developing it, connecting it to navigable waters, and creating a marina that was to be open only to fee-paying members. The owners notified the Army Corps of Engineers, which acquiesced in the proposals. After the property had been developed, the federal government tried to force the owners to open the marina to the public, rather than keeping it as an exclusive private club, on the ground that there could be no private ownership of navigable waters and that the public had a right of access to the waters under the navigational servitude doctrine. The Supreme Court held that such a forced physical invasion would constitute a taking of property without just compensation. *Kaiser* differed from *PruneYard* partly because the property was used as a private club and had not been opened to the general public, as had the shopping center in *PruneYard*. More important, however, to the Court's reasoning was the fact that the owners had invested substantial sums of money in developing the marina in the expectation that they would be able to recoup that investment by controlling access to the property, and that the property became included in normally

38. At the same time, rent control legislation may have prevented the conversion of the property to nonresidential use. Yet the Court specifically *approved* such legislation, including the anti-eviction element of it, in *Block* v. *Hirsh*. Moreover, the Court never adequately explained why the rule requiring landlords to provide access to cable television differed from building code regulations requiring the landlords to provide a toilet, a mailbox, and telephone, for their tenants. It might be argued that the cable box and wires are *owned* by the cable television company while these other items are owned by the landlord. Yet it is not clear that this should make a difference. The Court would probably uphold a land use regulation that conditioned development of property on the developer providing for hook-up of residences to water and sewer facilities, even if ownership of the water and sewer pipes was retained by the utility companies. Such a condition on development would likely be upheld as reasonable and satisfy the close "nexus" test established by *Nollan* v. *California Coastal Comm'n, supra,* note 10.

39. See also *Nollan* v. *California Coastal Comm'n, Ibid.* In *Nollan*, a regulation that arguably coerced owners to grant an easement to the public was held to be an impermissible permanent invasion.

40. Moreover, the regulation in *Block* v. *Hirsh* applied *retroactively*; it therefore forced the landlord to transfer to the tenant a substantial portion of the landlord's reversionary rights *against the landlord's will and without prior notice*. Given that the Court is certain to view the reversionary interest as a separable property interest protected by the Constitution, this is as if an owner of two houses sold one of them and the state subsequently announced that since the owner had sold one of her houses to this buyer, she was obligated to sell the other as well. The stranger/contractual partner distinction is not a persuasive basis for explaining the disparate results in these cases.

41. See Paul, "Hidden Structure," *supra,* note 16.

42. *Supra,* note 7.

public navigable waters *only because of* the owner's investment which was premised on the right to exclude the public.

The Court never fully addresses the question of whether the developer's investment-backed expectations in *Kaiser Aetna* were reasonable. In other words, did the owners have a *right to expect* that they would be able to exclude members of the public from the marina once it was connected to navigable waters? Should the baseline[43] in *Kaiser Aetna* have been private property's usual right to exclude or navigable waters' usual openness to the public? The Supreme Court has long held that there can be no private ownership of navigable waters,[44] and related state law restricts beachfront ownership, for example by holding that members of the public are entitled to access for various purposes to the beach, especially to the lands overflowed by the tides.[45]

The Court could easily have held that the public interest in navigable waters is so strong and the public ownership of them is so well-established that the owners in *Kaiser* had no right to expect that they would necessarily be able to exclude members of the public once they had connected their property to navigable waters no matter how much they invested with this goal in mind. The Court failed to address this question. The doctrine of protecting investment-backed expectations is indeterminate in the absence of a substantive theory about the circumstances under which property owners have a right to be protected against both subsequent legislative modifications of property rights and established limits on the powers of property owners to exclude others from their property.[46] Thus, neither the prohibition on forced, permanent, physical invasions of property nor the protection of reasonable investment-backed expectations fully explains the differing results in *Kaiser Aetna* and *PruneYard*.

A slight scratch below the surface of takings doctrine reveals that the permanent physical invasion rule has not been consistently applied and therefore cannot account for the results the Court has reached. Perhaps the Justices believe that certain forms of physical invasion are particularly obnoxious and that, through a case by case analysis the Court will succeed in identifying and prohibiting those without unduly hampering government interests in other situations. So far, the effort does not appear to have succeeded. Although we can *describe* the results reached by the Court, those results are not adequately explained or justified by reference to the idea of preventing government from engaging in permanent, forced, physical invasions of property. The Court has rightly refused to mechanically apply the physical invasions test; rather, it has distinguished allowable from prohibited physical invasions. However, it has not adequately explained the distinctions it has made.

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43. On baseline analysis, see Jack M. Beermann & Joseph William Singer, "Baseline Questions in Legal Reasoning: The Example of Property in Jobs" (1989) 23 Ga. L. Rev. 911; Jeremy Paul, "Searching for the Status Quo" (1986) 7 Cardozo L. Rev. 743; Sunstein, *supra*, note 9.

44. *Illinois Central R.R. Co.* v. *Illinois*, 146 U.S. 387 (1892).

45. See *Gion* v. *City of Santa Cruz*, 465 P.2d 50 (Cal. 1970); *Matthews* v. *Bay Head Improvement Association*, 471 A.2d 355 (N.J.1984); cert. denied, 469 U.S. 821 (1984); Opinion of the Justices, 313 N.E.2d 561 (Mass. 1974); *State ex rel. Thornton* v. *Hay*, 462 P.2d 671 (Or. 1969).

46. See, e.g., *State* v. *Shack*, 277 A.2d 369 (1971); *Uston* v. *Resorts Int'l*, 445 A.2d 370 (1982); (both holding that property owners have no common law right to exclude non-owners from the property in a variety of circumstances).

To do so, it must articulate more directly the value choices underlying those judgments. The Court is loath to do so, but a review of the cases demonstrates that its flight from value judgments has not succeeded.

III. The Social Origins of Property

We think that much of the confusion in takings law is due to the denial of the social origins of property. By affirming the social origins of property, we mean that property rights do not have a built-in, inherent structure which can be discerned by logical deduction from either the concept of property or the social practices surrounding property use. Several points are relevant. First, rather than containing a unitary structure, property rights are various. A wide variety of property interests have been created by private arrangement and recognized by government. Second, property rights are limited rather than absolute. The use of property by one must be limited to protect the property of others. Third, the definition of property rights depends on a host of instrumental and value judgments and cannot be derived simply by a logical process that appears to be value neutral and nondiscretionary. Fourth, property rights are socially and politically constructed by both private action and government policies. It is not the case that a single set of property institutions arises naturally by interaction among citizens and then is recognized and protected by government officials who simply defer to those interests. Rather, the distribution and definition of property rights has been crucially structured both by government policy and legal institutions.

Finally, because property rights help to structure human relationships, they are dynamic rather than static. Because property is socially and politically constructed, the scope of property rights changes over time as social conditions and relationships change. This is because the *social meaning* of a property right depends on its effects in the real world on human relationships. As those relationships change, rights that served the function of giving the holder legitimate personal security and autonomy may increasingly allow that holder to exert illegitimate power over others in ways that deny them the same rights to security and autonomy. The police power embodies the community's ability to regulate and alter the scope of entitlements over time as their social meaning changes. This power to change the scope of property rights is necessary to *preserve* their social function. For this reason, the Court's increasing appeal to "tradition" to define property cannot succeed, both because the changing definition of property means that there is no single tradition to which we can look, and because rigid application of "traditional" rules will have different effects as times change and therefore diverge from tradition in fact.

To conceptualize the social origins of property law, consider the transition to private ownership that is now occurring in Eastern Europe and the former Soviet Union. This transformation requires privatization of substantial amounts of personal and business property. For example, the Treuhand Corporation in Germany is undertaking a massive sell-off of business concerns that were formerly owned by the government of the now non-existent German Democratic Republic.[47] There are

47. See Ferdinand Protzman, "Growth Seen For Eastern Germany," (Oct. 22, 1991) N.Y. Times at D6.

myriad ways this could be accomplished, involving such choices as whether the property is sold or given away and the price at which it is sold. It must also be determined who is to get the property. This could be decided by auction, giving it to the highest bidder, or specific individuals or organizations could be given preemptive rights. The form and incidents of ownership of the property subject to privatization in such a situation are shaped with an eye toward maximizing the public policies that led to the move toward privatization in the first place and to other public policies concerning the ownership and use of property throughout the Federal Republic of Germany.

Closer to home, it is notoriously easy for most North Americans to forget the fact that the land they own and rent was originally owned by American Indian nations.[48] What colonists and settlers thought of as vacant land was actually claimed by hundreds of nations. The picture many people have of settlers going off to claim vacant land by possessing and improving it and then having their labor and possessory rights recognized and protected by a government that followed them is historically inaccurate. It is true that settlers often illegally invaded Indian lands and their titles were later confirmed by government. However, sometimes the government protected Indian nations from these illegal invasions by sending in the cavalry to remove the settlers. Sometimes, it did the opposite, sending in the cavalry to remove the Indians. It was a government policy choice whether to protect the rights of first possessors—American Indian nations—or to arrange for a transfer of possession from Indian nations to non-Indians. It was also a government policy choice to determine when and how such transfers would occur—voluntarily, by fraud (arranging for transfers by bribing a few chiefs who did not represent anyone else in their tribes), or by military force.

The legal origin of non-Indian titles is in the government grant, not the possession of settlers. Land titles originate from government grant after the land was seized from American Indian nations—in almost all cases by force.[49] Land in the United States was distributed by government in a process analogous to the privatization of socialist property.[50] The land was redistributed from Indians and given to non-Indians because the Indians were thought to have more than they needed while the non-Indians needed the land, and because the Indians were thought to

48. Most tribes denied that they "owned" the land because they thought of it as spiritual, and one would no more say that one owned land than one would say that one owned God or one's mother. This spiritual relation with the land was used as an excuse for claiming the land was unowned. However, the Indians' failure to claim "ownership" did not represent a less close connection to the land than claimed by non-Indians, but rather represented a *closer connection* to the land, precisely because of its spiritual and community importance.

49. Compare Richard Epstein's claim that in the United States, property rights originate from below (society) rather than from above (from the state), by "homesteading, and not from state grant." Richard Epstein, "No New Property" (1990) 56 Brooklyn L. Rev. 747 at 749-50. Where, exactly, did the homesteaders' titles come from, if not from state grant? His argument, typically, ignores the myriad public policy decisions that had to be made in determining how much property to give away, whether to give it away for free or to sell it, what price at which to sell, whether to give preferences for buyers who would develop it in certain ways (like schools and railroads), and how much property to force American Indian nations to cede, at the price of how much war.

50. See *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 280 (1955); ("The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was *parcelled out according to the will of the sovereign power*, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies.") (emphasis added.)

be misusing the land by not developing it in the way non-Indians preferred.[51] Some land was given to settlers, some to railroads, some to colleges, some to the new state governments, and some land was given to or left in the hands of American Indian nations. The price of the land varied over time as government policies toward public land distribution changed. While the policies that motivated the original distribution of land might not be completely relevant today, the general notion that private property can be redistributed to promote the public good, and that property exists to further the public, as well as the private, good has not been undermined by subsequent developments.

In what we might call an admission against interest, the Supreme Court has held that American Indian tribal property will be constitutionally protected from seizure by the federal government only if it has been "recognized" by treaty or statute, i.e., if ownership can be traced to a "grant" by the federal government. In the absence of such a government "grant", property held under original Indian title may be constitutionally taken without paying just compensation. In other words, the inability to trace ownership back to a government grant deprives the claimed property interest of the status of "property" protected from being taken without just compensation under the fifth amendment.[52] The failure to require compensation for takings of property held under original Indian title is fundamentally unjust. However, the reasoning behind it demonstrates that the distinction drawn by the Supreme Court between so-called "private property" and "government benefits" is spurious; both originate in government grant.

IV. Consequences of the Denial of the Social Origin of Property

A. *Disparate treatment of so-called "traditional" and "new" property*

The Court's denial of the social origins of property allows it to treat what it characterizes as "government benefits" much less favorably than traditional property interests. Under the Court's conceptual framework, the much mooted question of whether government may terminate an entitlement program is easy—government benefits are gratuities, not property for the purposes of the takings clause, and therefore there is no constitutional impediment to prospective termination of a benefits program.[53] The obvious social origin of welfare programs allows the Court to conceptualize the interest in continued benefits as something foreign to traditional prop-

51. Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).

52. *Tee-Hit-Ton Indians* v. *United States*, *supra*, note 50. We do not mean to argue that this case was rightly decided. The question of whether American Indian nations had legitimate claims to the lands they occupied should be addressed, in the first instance, by reference to *tribal law* rather than federal law. Looked at from the perspective of the Indians, there is no question that the United States wrongfully invaded and forcibly appropriated Indian lands over which they had rightful possession.

53. See *Atkins* v. *Parker*, 472 U.S. 115, 129 (1985); *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986). See also *Lyng* v. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 485 U.S. 360, 368 (1988) (characterizing food stamps as a subsidy); *Wyman* v. *James*, 400 U.S. 309 (1971) (receipt of welfare benefits may be conditioned on consent to official visit of recipient's home since refusal of visit does not result in any liability on part of recipient, merely loss of aid).

erty whose social origins are obscured in talk of the essential attributes of property ownership.

Consider *Nollan* v. *California Coastal Commission* in light of *Wyman* v. *James*.[54] In *Wyman*, New York conditioned receipt of Aid to Families with Dependent Children on the recipient allowing a welfare worker to visit the home. Barbara James challenged the condition on the ground that it violated her right to be free from unreasonable searches and seizures since there was no requirement that she be suspected of wrongdoing before her house would be searched. The Court rejected her claim on the ground that she was perfectly free to refuse the visit by giving up her claim to benefits. The Court characterized her choice between adequate nutrition for her child and her right to exclude the welfare worker from her home as perfectly free and voluntary and thus no cause for constitutional complaint.

By contrast, in *Nollan*, the California Coastal Commission conditioned a building permit for increases in development of beachfront property on the granting of an easement to the public to cross the applicant's beach.[55] This condition was challenged as a taking and the property owner won the case. The Court characterized the imposition of the condition as a plan of extortion, coercing the owners into yielding their right to exclude third parties from their property; the regulation thereby constituted a forced, physical occupation of the owner's land.

If anything, one would suspect that a poor family might have no realistic alternative to submitting to the demands of the government in order to avoid starvation, while a family that is able to afford beachfront property could find an affordable, attractive lot somewhere else, or decide to avoid the imposition simply by *repairing* the house rather than demolishing it and building a larger structure.[56] Why, then, did the Court find coercion in *Nollan* and no coercion in *Wyman*? In both cases, the government required a citizen, as a condition of receiving a government benefit, to waive her right to exclude others from her property. According to the Supreme Court, the key difference between the two cases is that, although the Court in *Wyman* conceptualized public assistance as a "government benefit", *Nollan* involved "the right to build on one's own property," a right the Court stated "cannot remotely be described as a 'governmental benefit.'"[57] Since the right to build on one's property is not a government benefit, "the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary 'exchange.'"[58]

However, it was disingenuous of Justice Scalia to characterize the right at stake in *Nollan* as "the right to build on one's property." The Nollans claimed a right to *expand* development of the beachfront. The regulation at issue required a permit from the Coastal Commission only if the owner planned to expand the structure by ten percent or more. This restriction was therefore analogous to the height or setback requirements that have been long been approved in zoning cases.[59] The

54. *Ibid.*
55. The applicant in *Nollan* wanted a permit to build a bigger house on the beachfront parcel.
56. See Michelman, *supra*, note 25 at 1610.
57. *Nollan*, *supra*, note 10.
58. *Ibid.*
59. See, e.g., *Euclid* v. *Amber Realty Co.*, 272 U.S. 365 (1926).

owners in *Nollan* were asking for a government benefit—a right to expand development in a way that the government had decided would contribute to social problems, and would also violate otherwise applicable land use restrictions. The Court itself acknowledged that it would not have constituted a taking if the California legislature had simply limited development along the beachfront to single story homes.

The Court's failure to recognize this point strongly supports the idea that the Justices who signed the majority opinion were attempting to separate property rights that have their origin in government distribution (i.e. welfare benefits) from those that supposedly have their origin in society (real property). Those that supposedly come from society are conceptualized as private and are therefore protected from government revision under the takings clause; those that come from the state are public and therefore can be revoked at will. This historically inaccurate dichotomy made it impossible for the Justices to see that land use regulation law partakes of both sides of the public/private dilemma. Private property is limited by reasonable land use regulations passed to protect both neighboring property owners and the community as a whole. The right to violate otherwise applicable regulations is a government benefit. It is not a right that normally accompanies property ownership and it can be obtained only by state grant; it is an *exemption* from otherwise applicable restrictions and constitutes a *special benefit* accorded the owner not granted to others.

The difference between real property and "government benefits" is that the amount of those benefits is paid out over time and the amount can change with changing legislation. This distinction does not differentiate between the two forms of property, however, for the purpose of determining whether the government can condition receipt of the property interest on the recipient's waiving other rights. That is because, with real property, as with welfare payments, the question remains: what rights went along with the property grant and what implied limitations can be rightfully recognized?

The Supreme Court has failed to focus adequately on the *limitations* on real property rights implicit in both common law definitions of those rights and the implied subordination of all property to legislation designed to promote the public good by limiting harms caused by individual economic actors. Harm is caused, not just by affirmative harmful acts by property owners, as in nuisance cases, but also in *monopolizing* property ownership in a way that wrongfully excludes others. Thus, if the California Supreme Court in *Nollan* had ruled, as a matter of state common or constitutional law, that all citizens have a right to walk along oceanfront beaches and that private property along the oceanfront simply does not include the right to exclude people from the beach, the Court should defer to that ruling. The fact that California attempted to achieve the same result by legislation should not change the result. The only legitimate question is whether the Nollans were wrongfully singled out to provide such access. They were "singled out" only because they sought to injure the public interest by exacerbating development of the seashore. It therefore was legitimate for the state of California to insist that if they wanted to so injure the public interest, they should compensate for that harm by

granting what the state saw as a public right of equivalent value.

The Court has defined "government benefits" by reference to the Justices' intuitions about what interests are "private" and which are "public." When welfare benefits are involved, the Court has become increasingly hostile to claims for protection from coerced deprivations of property. In *Bowen* v. *Gilliard*,[60] for example, the Court went so far as to condone the outright seizure of *traditional* property as a condition for receipt of government benefits. In that case, the Court approved a statutory modification of the AFDC program that assigned to the state any child support payments paid to a child in a household that received AFDC benefits.[61] The new law eliminated the right of the custodial parent to exclude the support-receiving child from the family unit applying for benefits. This could have substantial negative effects on the economic well being of the child receiving the child support benefits unless the child were able and willing to move out of the household of his otherwise welfare-entitled parent and siblings.[62] Moreover, it is clear that child support payments constitute a property interest *of the child*. If the father handed over a support check to the mother and someone were to come along and steal the check and cash it, there is no question that a theft of property has occurred. However, the Court allowed the state to force *the child* to give up her support check if *her mother* applied for welfare benefits *for her other children*.

In rejecting the claim that this amounted to an unconstitutional seizure of the support-receiving child's property, the Court relied on two factors that place this interest beyond the protection of the takings clause. First, the Court held that the support receiving child had no "vested protectable expectation" in continued child support since support orders are subject to legislative and judicial modification. But the "right to build on one's land" is similarly subject to legislative and judicial modification, through zoning laws and modernization of nuisance law. In *Nollan*, the Court viewed the right to exclude others from the beach as an essential attribute of ownership of the property. The attempt to change the regime by legislation to one in which beachfront owners did not have the right was the problem in *Nollan*, not an answer to the claim that the easement was a taking. Consider the Court's reaction if California courts, through common law decisionmaking, adopted a rule that effectively granted the same easement to the public. Rather than view all prop-

60. 483 U.S. 587 (1987).

61. For an excellent discussion of this case, and an enlightening treatment of poverty law issues generally, see Thomas Ross, "The Rhetoric of Poverty: Their Immorality, Our Helplessness" (1991) 79 Georgetown L.J. 1499, at 1528-32. Professor Ross notes specifically the marginalization of the property interest in receipt and use of child support benefits and generally the Court's ill-treatment of the interests of the poor.

62. For example, imagine a child whose support was so high that her income alone placed the household above the line for benefits.The only way that the child could avoid use of her support for the benefit of the rest of the household would be to move out. If the child stayed in the household, the absence of benefits would presumably lead to the use of the child support for the benefit of the entire household. Alternatively, imagine a child granted enough support to attend a special school because she is gifted intellectually. That child likewise could not remain in the household and still use the support for that purpose if the household also wanted to receive AFDC benefits because the other children could not obtain child support from their noncustodial parent. These two situations might arise if the custodial parent had children with more than one partner, if the custodial parent had little or no income and if the economic situations of the noncustodial parents varied substantially. The court found unimportant the interference in family relationships.

erty ownership as subject to the possibility of common law alteration of the bundle of rights, the Court under *Nollan* would probably view the change as a taking. Yet in *Bowen* v. *Gilliard*, the court presumed that child support payments set by state law are subject to defeasance by federal regulations.

Second, as in *Wyman*, the Court argued in *Bowen* v. *Gilliard* that the parent was not *forced* to apply for AFDC benefits, so that in actuality the child support is voluntarily turned over to the government by the child's guardian, rather than forcibly seized. The Court would not accept reasoning like this as justification for similar restrictions on real property. No one forced the Nollans to replace their house with a larger one. Rather than view this as a choice to accept the condition that the easement be granted, the Court views the condition as a burden on the right (not a governmental benefit) to build on his land.

The Court thus holds two complementary beliefs about so-called "government benefits" that distinguish its treatment from that of what it characterizes as "property" interests. First, since government benefits are not "vested rights", conditioning their receipt on waiver of other rights does not present a takings problem. Second, because no one is forced to apply for government benefits, conditions placed on receipt of such benefits are not coercive.[63]

Consider *Ruckelshaus* v. *Monsanto Co.*[64] Parties wishing to manufacture and market pesticides in the United States must apply for registration (essentially a permit) with the United States Environmental Protection Agency.[65] Trade secret information concerning the formula and test results must be submitted along with the application, and governing law provides that the EPA may, under certain circumstances, disclose the trade secret information. This disclosure was challenged as a taking of the property interest in the trade secrets. The Court rejected the takings claim, reasoning that "as long as [the applicant] is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking."[66]

Why is the submission to restrictions in exchange for a permit any more voluntary than the implicit consent to the beachfront easement on application for a permit to expand beachfront development in *Nollan*? The difference boils down once again to the Court's view that the owners in *Nollan* had an *inherent property right* to build on their property, while it sees no comparable right to engage in the business of manufacturing and marketing pesticides. Since the business of pesticides is one of general public concern,[67] regulation, including disclosure of trade secrets, should be expected. But the same can be said about development of land generally and of beachfront land in particular. The widespread existence of zoning codes in

63. In addition to the discussion above, see *Lyng* v. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, supra*, note 53, 366-69. (excluding strikers' families from food stamp program insofar as loss of income due to strike creates need for food stamps does not coerce strikers to either give up strike or leave household).
64. See *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984).
65. See *Monsanto, ibid.* at 990-97 (discussing provisions of the *Federal Insecticide, Fungicide and Rodenticide Act*).
66. See *Monsanto, ibid.* at 1007.
67. See *Monsanto, ibid.* at 1008-09.

the United States coupled with the particular environmental and social issues surrounding coastal development should alert owners of such property that future development might contain conditions such as granting an easement to walk along the beach.[68] As environmental concerns, and concerns regarding other potential negative effects of over-development become more pressing, property owners should expect ever greater restrictions on rights traditionally thought of as incident to ownership.[69]

B. *Class, race, disability and gender bias*

There is a strong element of class bias that pervades the Supreme Court's choices regarding which interests to protect. The Court is not moved by claims of the personal liberties of welfare recipients to protect their privacy from government snooping and invasion of their homes[70] or to maintain their family units in the face of programs that give them incentives to break up.[71] Nor is the Court receptive to claims from workers[72] or criminal defendants that their respective rights have been violated.[73]

Poor people are more likely than rich people to be dependent on what the Supreme Court has characterized as "government benefits." White women with children, and men and women of color with children, and persons with disabilities are more likely than able-bodied white males to be recipients of public assistance. By finding no coercion when the government places conditions on receipt of these entitlements, the Court has redistributed power in a way that promotes disadvantage on the basis of race, sex, disability and class.

As further evidence, consider that the Court in recent years has granted more protection against minor deprivations of real property than against serious deprivations of liberty. For example, the Court recently[74] held unconstitutional, on due process grounds, a Connecticut statute allowing plaintiffs, upon commencing a law-

68. In fact, since the condition that the easement be granted existed at the time that Nollan bought the property, Nollan was on the same sort of notice as Monsanto. The Court, however, rejected this argument on the ground that the California law would have taken the prior owner's property without compensation, and that Nollan succeeded to the rights of the prior owner. See *Nollan, supra*, note 10. But presumably the price Nollan paid would have reflected whatever restrictions existed at the time of purchase, so Nollan would have no investment backed expectation that the property could be developed without an easement being granted.

69. Cf. *Agins* v. *Tiburon, supra*, note 8 (recognizing legitimacy of local interest in protecting residents from "the ill effects of urbanization").

70. See *Wyman, supra*, note 54.

71. See *Lyng, supra*, note 53; *Bowen*, 483 U.S. 587 (1987).

72. *Ibid.*

73. See *Lyng, ibid.*; *County of Riverside* v. *McLaughlin*, 111 S. Ct. 1661 (1991). We have oversimplified somewhat in attributing all of the various disparities in treatment to a perceived distinction between interests in government benefits and interests in real property. After all, the Court did not jump to protect the sanctity of the home in *Wyman* v. *James*. Further, the trade secrets in *Monsanto* were not government benefits. The disparities appear to run on a few different axes. The most highly protected rights involve the right to develop and exclude others from land. Other property interests, such as trade secrets, receive protection but only to the extent that government interferes with expectations that are legally well-founded. When, however, government uses the threat of termination of welfare benefits to compel the surrender of other rights, including the right to exclude government officials from real property, the view that government benefits are a matter of grace supersedes protection of the interest in real property.

74. *Connecticut* v. *Doehr*, 111 S. Ct. 2105 (1991).

suit, to attach defendants' real property. The attachment issued ex parte, but the defendant was entitled to a prompt[75] post-attachment hearing to establish that the attachment was not proper and to damages (perhaps even double damages) if the suit was commenced without probable cause.[76] The Court decided that attachment, because it works a deprivation of property with potentially serious consequences, may be accomplished only with a pre-attachment hearing.[77] By contrast, in *County of Riverside* v. *McLaughlin*,[78] the Court held that arrested persons were not entitled to a hearing immediately after the administrative steps incident to arrest were completed, but rather that people may be held in jail up to 48 hours without any hearing at all. So for attachment of real property, a pre-deprivation hearing is required, while for liberty a "prompt" post-arrest hearing, up to 48 hours later, is enough.[79]

C. *Frustration of public policy goals and subversion of democracy*

Devaluation of public policies of recent vintage could have serious implications for the community's ability to achieve important public goals, such as environmental protection. In its recent takings jurisprudence, the Court has done just that. In *Lucas* v. *South Carolina Coastal Council*,[80] the Court held that coastal protection regulation that prohibited construction on certain parcels, and thus arguably deprived the property of economically viable use, presumptively constituted a taking requiring compensation. The Court rejected the argument that beachfront restrictions that protected the environment and reduced hurricane damage did not amount to a taking because, under well established principles,[81] regulation that prevents an owner from causing harm to others is within the police power and cannot cause a taking. Rather, the Court held that regulations which deny an owner any economically viable use constitute takings unless they prevent "nuisances" as defined under state common law. While it may seem reasonable to find a taking when regulation destroys the value of property completely, the rejection of the state's argument that development of the land would cause a public harm has far reaching implications for environmental protection.

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75. There was disagreement over whether hearings were provided for promptly, but for purposes of its decision, the Court assumed that a prompt post-deprivation hearing was available. See *ibid.* at 2114 n.5.
76. *Ibid.* at 2117 n. 8.
77. The Court noted that attachment "clouds title; impairs the ability to...alienate the property; taints any credit rating;reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause." *Ibid.* at 2113.
78. 111 S. Ct. 1661 (1991).
79. The Court seemed much less concerned about the potential consequences of a couple of days in jail, such as loss of a job or physical and psychological injury at the hands of fellow inmates. Further, the consequences of temporary imprisonment may be very similar to temporary attachment of real property. Suppose, for example, that the arrestee had a real estate closing scheduled for the time period that he was in jail or a rent payment due during this period. The inability to alienate property during that time, or to safeguard existing property interests might mirror or exceed the disability in *Doehr*, especially in light of the State's argument, and the Court's assumption, that the post-attachment hearing was available immediately after the attachment.
80. *Supra*, note 23.
81. See *Mugler* v. *Kansas*, *supra*, note 6 (holding that prohibiting the operation of a brewery did not constitute a taking even though property was rendered valueless because the operation of a brewery was found by the legislature to cause harm).

The Courts' reasoning in *Lucas* employs both conceptual severance and natural rights reasoning. The Court conceptually severed "the right to build on one's land" and treated that particular right as equivalent to the entire fee. Although the Court did not hold that complete deprivation of the right to build was a taking per se, conceptual severance of this strand in the bundle of property rights made Justice Scalia receptive to the argument that there was a one hundred per cent diminution in value of Lucas's property. Preventing development appears to take 100 per cent of the right to build; for this reason Justice Scalia assumed the state court acted reasonably in concluding that the regulation deprived the owner of any economically viable use. But, as several other Justices pointed out, the assumption that Lucas was left with no economically viable use was almost certainly wrong—or at least there was no evidence to support this conclusion.[82] The land could be sold to a neighbor, a conservation organization, or perhaps the city. Moreover, Lucas might be able to rent the space for people wanting to go to the beach to swim or have a picnic. The question of whether the state court had employed the correct test in determining that the property had, in fact, been denied any economically viable use was not reviewed by the Supreme Court in this case; nonetheless, by refusing to question the plausibility of that conclusion, Justice Scalia's majority opinion suggested that it *was* plausible, thereby giving a powerful message to lower court judges.[83] The dissenters correctly argued that this conclusion would be true in only a very narrow range of circumstances—which had not been proven in this case. The implicit acceptance of this implausible result demonstrates the Court's willingness to treat the right to build as a severable property interest whose complete deprivation creates a presumptive claim to compensation.

The Court also revealed a natural rights slant in its attempt to accommodate the traditional notion that government may prevent harmful uses of property without paying compensation even if the value of the property is completely destroyed. It noted that while destruction of the value of *personal* property had been allowed, it found that "in the case of *land*,...the notion...that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture."[84] While this is nice rhetoric, there is no basis for distinguishing land from other forms of property for takings purposes and no truth to the idea that land has historically been protected in the way the Court claims.[85] Further, it ignores that the implied limitation on prop-

82. This assumption was questioned and treated as implausible by Justices Kennedy, Blackmun, Stevens and Souter.

83. Recent cases in the United States Claims Court have found takings of property requiring compensation in the case of wetlands regulations which prevented the owner from filling in the land and therefore prevented development. The claims court specifically found that wetlands regulations did not prevent the owner from unreasonably harming neighboring property owners. *Lucas* gives the Claims Court a green light to continue deciding cases in this fashion. See, e.g., *Florida Rock Industries* v. *United States*, 21 Cl. Ct.. 161 (1990); *Formanek* v. *United States*, 26 Cl. Ct. 332 (1992); *Love Ladies Harbor* v. *United States*, 15 Cl. Ct. 381 (1988), 21 Cl. Ct. 153 (1990).

84. *Lucas*, *supra*, note 23.

85. As noted above, *Mugler* v. *Kansas* held that destroying the value of a brewery was not a taking. The *Lucas* Court distinguished *Mugler* on the basis that uses other than as a brewery were still allowed, *ibid.* n. 13. But that is true in *Lucas* as well, and there is no mention in *Lucas* of the fact of the destruction of value in *Mugler*.

erty rights derives from important social goals, not whim or caprice. In addition, as in *Nollan*, the Court treated the right to build as an inherent part of property, unless traditional nuisance principles applied. This naturalizes the right to build because it assumes that the effect on others is irrelevant unless traditional nuisance tests are satisfied. Once again, the Court's reasoning relies on the nature of property rights rather than the interests at stake.

The threat to accomplishment of important public policies is also exacerbated by the Court's characterization of traditional common law rules as somehow more worthy than policies advanced through contemporary legislative action. The Court recognized that a strict rule finding a taking whenever the value of property was destroyed would go too far in handicapping government's ability to prevent harmful uses of property. The Court held that the state may impose (without compensation) only those value-destroying restrictions that "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[86] While it is not altogether clear, it appears that the Court means to find a taking whenever value-destroying regulations result from any significant legislative (and perhaps judicial) alternation of what the court considers traditional "nuisance" principles.[87]

Anchoring takings jurisprudence to traditional common law principles makes no sense. Once the nuisance exception is allowed, the Court cannot claim to be advancing a principle against the complete destruction of property value. It may be argued that the Court's standard protects the expectations of owners who bought property expecting only those restrictions that pre-existed ownership. But unless the Court insists that pre-existing common law address the specific use and situation implicated in the takings claim, the expectations of property owners are likely to be frustrated by legislative or judicial action even under the Court's highly protective standard.[88] Further, we do not see why expectations that property may be used in ways that cause significant, albeit newly discovered, social harm should be protected.

The Court's standard is also not sensitive at all to the seriousness of the social harms involved in more contemporary regulation. For example, protection of coastal areas and wetlands generally may be an essential part of a comprehensive plan to safeguard the quality of water and fishing resources, and in the case of coastal areas, may create an important buffer against the effects of hurricanes. These kinds of harms may have been only recently recognized, perhaps due to increased understanding of ecosystems and water supplies or perhaps because recently increased development created the harms. In any case, achieving the plan may require that development be completely prohibited on some pieces of land, and the social harm implicated may be greater than involved in many traditional nuisance situations.

Democratic control over land use policy may also be threatened by overly strict

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86. *Lucas, supra*, note 23.
87. The Court held that for South Carolina to prevail on remand it "must identify background principles of nuisance and property law that prohibit the uses [Lucas] now intends in the circumstances in which the property is presently found." *Ibid.*
88. Note, in this regard, the Court's reference to "background principles of nuisance and property law" rather than a reference to pre-existing specific rules. See *ibid.*

takings rules. Justice Scalia has argued that requiring compensation for arguable deprivations of property rights will be democracy-*enhancing* since they will force the majority that benefits from regulation to determine that the benefits are worth the costs imposed on those few property owners forced to bear the burden of the public program. If the majority is not willing to compensate the owners for their loss, this is evidence that the harm to the property owners outweighs the benefit of restrictions to the public. Requiring compensation thus tests the proposition that the legislation is in the public interest in the sense that it creates more good than harm.[89]

This is a truly radical argument, and applying it would entail massive judicial activism that would make the Warren Court and the *Lochner* era look tame in comparison. The logical consequence of this argument would be to make all government regulation with any negative effect on property values a taking—even regulation consistent, for example, with common law notions of nuisance. No one can seriously argue that the takings clause, on its face or as a matter of the framers' intent, invalidates the police power. The attractiveness of this argument does, however, illustrate the tension between two competing principles in takings law; that government should not be required to pay compensation when it acts to prevent social harm, but that property owners should be compensated when their property is "commandeered" to achieve public goals.

The premise that a community would willingly pay the costs of efficient regulation is also not necessarily true. This is because compensation must be raised by taxation. Hysteria about "taxes" has gotten worse and worse in the United States since the beginning of the 1980's, even though, compared to other advanced industrial democracies, United States residents are hardly overtaxed. It has become almost impossible to even talk in public about levying taxes for any purpose. Requiring compensation may have the effect of killing the regulatory program entirely because taxpayers are unwilling to pay the short run costs of preventing long-term environmental disasters. This may be, as Justice Scalia suggests, because they have rationally compared the costs and benefits of environmental regulation of property use. However, it may also be because they irrationally refuse to face the long-run consequences of immediate conduct. If taxpayers had perfect foresight and information, and were not affected by psychological needs to avoid confronting the negative consequences of behavior that generates immediate, but short-lived satisfaction, they might very well favor taxation to protect the environment. But it is precisely because people myopically refuse to face the negative, long-run effects of their conduct that they may engage in behavior that does not maximize their welfare as they themselves conceive of it. Thus, rather than promoting reflective democratic decisionmaking, requiring compensation may result in socially inefficient public policies which decrease the general welfare. Allowing regulation of the environment without compensation to property owners whose interests are adversely affected in the short-run may therefore be democracy-*enhancing* because it better approximates the decisions that would be collectively reached by rational

89. *Pennell* v. *City of San Jose*, *supra*, note 10, at 22-24; (Scalia, J., concurring in part and dissenting in part, joined by Justice O'Connor).

judgment free from the cognitive distortions caused by excessive focus on short-run costs.

At the same time, if property owners view the failure to compensate those who are denied the right to develop wetlands as illegitimate interferences with property rights, they may effectively lobby for changes in environmental laws that remove restraints on developing wetlands altogether.[90] This means that neither the argument in favor of compensation nor the argument in favor of regulation provides a complete answer to the dilemma. Requiring compensation may or may not promote the appropriate level of protection of the environment.

Consider the social effects of requiring compensation for regulations impinging on the development of property designed to combat poverty. The public purpose most reviled in the beginning of the 1990's is programs for poor people, among whose ranks men and women of color and white women, especially women with children, are more likely to find themselves than white men. There is a fair amount of racial and gender prejudice at work here. There is also some myopia, or cognitive distortion, going on; the failure to provide sufficiently for children and other poor persons is not in the long-run interests of the country, yet people are unwilling to incur smaller short-term costs to avoid much larger long-range costs.[91] If both prejudice and myopia are present, citizens may fail to support public programs that are in their own self-interest as they conceive it and would understand it if they had perfect information and foresight. Thus, requiring the raising of taxes for such government programs may not promote efficiency but, rather, inhibit it, thereby decreasing social wealth.

One alternative way to fund certain kinds of social welfare programs for the poor is through linkage legislation. Several cities, including Boston and San Francisco, have conditioned building permits for large construction of commercial and sometimes residential housing on the developer contributing to a fund to provide for services such as low-income housing and child care facilities. These programs are premised on the presumption that development increases the need for low-income housing by bringing in new employees and increasing demand for housing, thereby driving up prices and driving out the lowest-income persons, who do not have sufficient income to afford nonsubsidized housing on the open market. Affordable child care facilities, for various reasons, are also unlikely to arise without government assistance. Such linkage proposals may have the ironic effect of inducing developers—not a group we generally think of as politically weak—to press for more social service programs funded by taxes on everyone to spread the costs of providing such services from developers to other taxpayers. Precisely because developers are likely to be more politically efficacious than poor people, it is more likely that they can and will press for social programs that are funded by general taxation. Witness the current trend of big business starting to push for national health care legislation in the United States. To the extent such expenditures are in the long-run best interests of the community as a whole, this effect may promote efficiency and social welfare and be democracy-enhancing because it enables the

90. We owe this point to Betsy Foote.
91. See Cass Sunstein, "Legal Interference with Private Preferences," (1986) 53 U. Chi. L. Rev. 1129

community to see its true long-term interests and thus engage in reflective self-government, as opposed to unconsidered knee-jerk prejudicial and myopic reflexes.

We can conclude that it is not possible to assume, as Justice Scalia does, that requiring government to compensate everyone harmed by a government regulatory program will promote wise and well-considered democratic governance. Just the opposite may be the case. This does not mean that we should trust the government to make perfect decisions any more than we should trust private actors in the marketplace to make perfect decisions. It does mean that the issue of promoting democratic decision-making is complicated rather than simple. Neither approach is per se guaranteed to promote reflective, mature self-governance. The meaning of self-governance and democracy and the circumstances under which compensation to those harmed by government programs would promote these ends are complicated and cannot be reduced to the rigid verbal formulae that have become popular with some members of the Supreme Court.

V. Property and Social Relations

Given the fact that property is socially constructed, it is imperative that we shift the discussion from identifying core property rights to begin talking about what is good for human beings. What normative ideals should structure the social vision of property that should be promulgated and encouraged by the legal system? We have three suggestions: (1) an ongoing commitment to dispersal of access to and decentralization of decisionmaking power; (2) understanding property rights as functioning within and helping to structure the contours of social relationships to encourage interdependence and mutual reliance; and (3) defining property rights so as to effectuate a fair distribution of social obligations. None of these ideals is self-executing. They all require difficult value judgments. However, they represent an attempt to develop a discourse to talk about underlying values so that the legal structure of the relationship between property and sovereignty better embodies and reflects considered judgments about justice in human relationships.

A. *Ongoing commitment to dispersal of access and dynamic decentralization of power*

One way to think about the social meaning of property is to consider what kind of arrangements we would *not* characterize as a private property system. Two examples come to mind: first, feudalism, in which all land is "owned" by the monarch and control over it is delegated in hierarchical status relationships between lords and vassals, and second, total state ownership, in which all land, structures on it, and businesses are owned directly by a centralized government which makes all decisions about its use. In both feudalism and state ownership, control over valued resources is centrally concentrated in the hands of ruling officials and access to that property is delegated through hierarchical structures with power flowing from the top down.

In contrast to these two systems, when most people imagine a private property system, they assume a fairly large amount of *decentralization.* Ownership of property is delegated by the state to many individuals or organizations who have substantial (although far from absolute) power to manage and control its use and disposition. When we talk about a private property system, then, we are assuming a relatively large *dispersal of ownership and access to valued resources.* Widespread access is necessary to maintain the requisite level of decentralization of power over economic life. *A property system only works if lots of people have some.*[92]

Dispersal of access to property and deconcentration of power require two complimentary strategies. First, they require initial distribution systems that ensure that a relatively large number of individuals attains access to a minimum amount of valued resources necessary to participate in the economic system. Second, because (a) property can be transferred in the marketplace; (b) property managers can make contracts about its use (hiring labor, renting property, sharing profits with investors, mortgaging it, etc.), and (c) the profit motive, there is an ever-present danger that property holdings will become concentrated again, this time in the hands of ostensibly private, rather than public officials. In order to maintain the requisite level of dispersal of ownership (and hence the desired decentralization of power), it is therefore crucial for the property system to develop a series of rules to prevent the reconcentration of ownership over time. Thus, private property requires an *ongoing* commitment to redefine property rights over time to prevent the re-emergence of pockets of illegitimately concentrated power. To maintain the requisite amount of both dispersal of access and deconcentration of power, the property system must be dynamic, with the definition and allocation of property rights changing over time. This is one major function of the police power.

These principles are embodied in United States property law in a variety of ways.

(1) The traditional rules about the estates system, originating in the statute of *Quia Emptores* in 1290, prohibit sub-infeudation, thereby promoting the transfer of property to new owners, rather than the formation of a feudal hierarchy. Other common law and statutory rules also serve this function, including the rule against creating new estates, the rule against perpetuities, rules limiting the enforceability of servitudes over time, and marketable title acts.[93] All these rules are intended to encourage the control of property to be pushed downward to current possessors rather than allowing the accumulation of power in large landlords. They also are intended to prevent owners from transferring their property or devising it to their descendants or relatives in ways that illegitimately prevent future owners from developing and using property for current needs.

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92. John Kenneth Galbraith reports that Professor Robert Montgomery, an economist at the University of Texas, was unpopular with the Texas legislature because of his liberal views. When asked whether he favored private property, he replied, "I do—so strongly that I want everyone in Texas to have some." Clifton Fadiman, ed., *The Little, Brown Book of Anecdotes*, (1985) at 395.

93. See also the *Hawaii Land Reform Act of 1967*, Haw. Rev. Stat. ch. 516, discussed in *Hawaii Housing Authority* v. *Midkiff*. The Act forced the sale of land in Hawaii from a small group of owners to a much larger group of homeowners whose homes stood on leased land. The statute was passed because concentrated land ownership was thought to "inflate land prices, and injur[e] the public tranquility and welfare." *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 232 (1984).

(2) Similarly, nuisance law limits what owners can do with their property depending on the extent to which their activities harm the legitimate interests of others. A lawful property use may become unlawful if others move in next door and the presence of incompatible uses causes a conflict. A use that is perfectly lawful in one context may be unlawful in another locality because of the uses of neighboring property. Property rights are defined legally in the *context* of relations with neighbors and others in the community. This means that the extent of one's property rights depends on the context within which those rights operate and the *effect* they have on others. Property rights are relationally dependent. Nuisance law, like the estates system, prevents owners from exercising illegitimate power over others.

(3) Antitrust statutes prevent owners from developing undue power over others by monopolizing various markets. If the operation of the marketplace allows property ownership to become overly concentrated, what we have is a monopoly or something analogous to it, and monopoly is not what we mean by a private property system. Effectively allowing a single owner or small set of owners to control a sector of economic life means decisionmaking by fiat rather than by a process of voluntary interaction among many market participants. Concentration of ownership means that non-owners are excluded from participation on equal terms in the marketplace; ownership means *withholding* resources from others and this very withholding may have negative effects on others and on the community as a whole. Antitrust laws therefore place limits on the rights of owners, when ownership becomes too concentrated, in order to achieve the social goal of reestablishing dispersal of economic power. As with nuisance law, this requires an ongoing commitment to redefine property rights over time; if any owner gets too much power in a particular market, then acts that would otherwise be perfectly lawful become unlawful, to preserve the appropriate level of deconcentration of power.

(4) Civil rights statutes prevent owners from excluding groups of persons in public accommodations, employment, and housing. These statutes thereby assure widespread access to the market for property and prevent the emergence of a social caste system with separate markets based on race, sex, or disability. These statutes again require an ongoing commitment to preserving access. Under the *Fair Housing Amendments Act of 1988*,[94] landlords that are in perfect compliance with law may become lawbreakers if they refuse to accommodate persons with disabilities by allowing them to make reasonable modifications in the premises. They may also violate the law by failing to make reasonable modifications in policies to accommodate persons with disabilities.

All these rules demonstrate that property rules serve the social goal of promoting widespread access to valued resources needed for human life, and preventing the concentration of power that would inhibit such access. As society changes, the means necessary to achieve these, or any social goals, is likely to change. Property rules are no exception: today's rule might have an entirely different social effect several years from now. Accomplishing the above-stated goals of property law requires an *ongoing* commitment to dispersal of access. This necessarily means

94. 42 U.S.C. 3601 *et seq.*

that property rights must be redefined over time as circumstances and social conditions change in order to promote the appropriate level and quality of empowerment of individuals and decentralization of economic life. Further, property law has always been informed by society's need to prevent social harm, and thus property rules are adjusted as new social harms emerge or as familiar social harms become more pressing.

B. *From boundaries to relationships based on interdependence and mutual reliance*

The Supreme Court's formalistic adoption of conceptual severance depends on a particular image of property rights. This image is the individual owner of a plot of land exercising sole dominion within its physical borders and determining how to use the property, when to exercise or waive the right to exclude, and when to transfer the property. Rather than conceptualize property rights solely as boundaries separating a sphere within which an owner has complete power and is secure from having her power infringed by either other property owners or the state, we suggest conceptualizing property law in legal realist terms as rules regulating relationships among people with regard to control of valued resources.[95] Those rules differ depending on the social context and relationships at issue; for example, control of property within the family may require rules that are quite different from those effective in control of businesses or in the area of residential housing. Property rules operate in the context of relations among strangers (shopping center owners and customers), neighbors, and in ongoing commercial and family relationships (including landlord/tenant, mortgagor/mortgagee, buyer/seller, condominium association/unit owner, husband/wife, parents/children).

Property rules have various functions in those relationships. First, they define the distribution of entitlements with which parties meet each other in the marketplace. Contracts can only take place if people exchange what they own; property rules are necessary to define initially the distribution of entitlements *before* bargaining takes place.

Second, when people enter relationships, they often do not specify all the terms of their relationships. Property rules help to clarify ambiguities in contractual relationships by identifying presumptions that can be applied in particular relationships in the absence of agreement to the contrary. Sometimes these presumptions simply mirror the initial presumed distribution of entitlements between the parties, on the grounds that we presume that people intend to keep whatever entitlements they do not unambiguously give away. At other times, presumptions depend on the assumption that most persons entering a particular transaction would intend to include alienation of particular entitlements as part of the deal or that such alienation furthers public policy goals that should be promoted in the absence of clear agreement to the contrary.

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95. See, e.g., Nedelsky, *supra*, note 24 at 273; Carol Gould, *Rethinking Democracy* (Cambridge: Cambridge University Press, 1988).

Third, property rules identify compulsory terms in contracts. The effect of compulsory terms is to limit the debundling of rights. In effect, the state says, "You are free to give away right #1, but if you do, we will force you to give away rights #2, 3, and 4, as well; they have to go together as a package." (Think about the estates system in this regard.)

Fourth, property rules determine the circumstances under which entitlements will be lost.

Whichever function is at issue, property law can be usefully conceptualized as helping to shape the contours of various social relationships by defining the distribution of power over both individual and collective resources.

This relational model of property is preferable to the Supreme Court's reliance on the image of absolute powers within rigidly defined boundaries because it encourages analysis of the *effects* that property rights have on others, thereby enabling us to analyze the limits to property rights needed to protect the property rights of others. Analysis of the role that property rights play in shaping the contours of social relationships enables us to escape the circularity that characterizes the Supreme Court's traditional approach to the takings clause. Moreover, because it focuses our attention on the role that property places in social relationships, the relational perspective better promotes the ongoing normative commitment to dispersal of access and deconcentration of decisionmaking power.

For example, consider the question of whether it constitutes a taking of property to promulgate a rent control ordinance that allows the rent control board to consider the hardship to a particular tenant in setting the allowable rents. Justice Scalia has argued that the only legitimate purpose of rent control is to prevent landlord from obtaining "exorbitant returns" on their investment; once this general goal is satisfied, further decreasing rents because of a particular tenant's financial problems wrongly requires the landlord to act as a private welfare agency for that tenant. This simple transfer of wealth from the landlord to the tenant constitutes, in his view, a taking of the landlord's property for the private use of the tenant. If there is a public purpose in ensuring minimum welfare to individuals, they should be taken care of through general taxation rather than imposing the burden on whoever happens to be the landlord of an indigent person.[96]

This perspective assumes that landlords have no special obligations to those with whom they enter long-term market relationships. It also assumes that property rights cannot change over time depending on the effect they have on others, including those with whom owners form long lasting relationships. A relational perspective, in contrast, would not assume, a priori, that the existence of an ongoing relationship is irrelevant to defining property rights; rather, the definition of property rights helps to shape the legitimate contours of those relationships. Further, it would not assume, a priori, that property rights cannot change over time if their exercise has the effect of granting one person inordinate power over another. The relational perspective does not answer the question of whether or not it is fair to require the particular

96. *Pennell* v. *City of San Jose*, *supra*, note 10 at 15-24 (1988) (Scalia, J., concurring in part and dissenting in part).

landlord to enjoy a lower rate of return to avoid inflicting grievous harm on the tenant. It merely does not rule out consideration of this question.

C. *Fair distribution of social obligations*

We think the Court's per se rule that complete destruction of the value of property is a taking subject only to traditional nuisance rules is erroneous because it does not adequately take into account social harm and social obligations. We suggest, in its stead, a focus on the relative obligations of persons in the community, including the obligations of the owner to the public and the obligations of the public to the owner.[97] "Once property is seen as an interdependent network of competing uses, rather than as a number of independent and isolated entities, property rights and the law of takings are open for modification."[98] First, consider the obligations of the owner to the public. Rather than asking whether a law imposes too great a sacrifice in the owner's property rights, the Court should ask whether the regulation in question deprives the owner of an entitlement which that owner could rightly have expected to enjoy. Does ownership of property include the right to contribute to the destruction of the environment? The answer to this question is likely to be no. Second, consider the obligations of the public to the owner. Is the owner being wrongly singled out or discriminated against to unfairly bear the burdens or costs of a project intended to benefit the community? The answer to this question is harder, but it is still likely to be no.

The South Carolina law prohibiting development within a certain distance of the coastline was designed to promote several important public values including economic development, environmental protection and public enjoyment of natural resources.[99] Ownership of private property should advance the public interest, not stand in the way of the achievement of important public policies such as environmental regulation or public access to recreational and other natural resources. Alterations to property rights that advance the social interests reflected in these values should be presumptively valid as exercises of the police power. The Court should start from the premise that the environmental concerns that militate in favor of coastal protection are of substantial weight, and thus action taken to advance these concerns should be accorded great deference. Likewise, the public's ability to enjoy natural resources is an important social goal, and land use restrictions designed to accomplish these ends should not be greeted with disfavor.

The only question, then, is whether owners of beachfront property have been

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97. See generally Sax, *supra*, note 13.

98. *Ibid.* at 150.

99. The importance of *Lucas* may be narrowed somewhat by the fact that the regulation at issue prohibited all development on the beachfront property. The Court has been much less likely to find a taking when the owner can still earn a reasonable return on the investment in the property. See, e.g. *Penn Cent. Transp. Co.* v. *New York City*, *supra*, note 8. However, insofar as some regulatory goals may require that large pieces of land be kept out of development, for example to protect wetlands, *Lucas* may pose a significant threat to effective regulation. See "National Body Fears Wide Damage to Aquatic Ecosystems," (Dec. 12, 1991) The Boston Globe at 1, p. 10 (discussing report of the National Resource Council of the National Academy of Sciences that advocated, *inter alia*, restoration of 10 million acres of wetlands by the year 2010).

wrongly singled out to bear the burdens of protecting the coast from environmental damage due to construction. The answer to this question is likely to be no. After all, these owners are being asked *not to engage in the very conduct that causes the damage*. Even if an owner had invested in the expectation that she would be able to build, the question still remains whether she is entitled in some sense to build, *knowing what we know now*, i.e., that building will cause grievous harm to the community. This is not something to which she *should* be entitled. On the other hand, avoiding the harm to the community requires us to inflict harm on her, at least to the extent to that she could not have known that her development of the property would harm the community and she invested in reliance on existing permissive law. The question is who should fairly bear the cost of avoiding the harm? This is a distributive question. It is not clear that the burden on her, even if great, is unfair; the bottom line is that property ownership simply does not include the right to destroy the environment, and to the extent that her development can be conceptualized as the moral cause of any expected harm, placing the cost on her of avoiding that harm does not seem discriminatory.

Our view of whether the burdens of regulation have been distributed fairly should also be informed by the fact that members of society, including landowners, enjoy social benefits for which they are not required to pay directly. Many of these benefits may actually increase the value of the property, and the degree to which people enjoy these benefits is not necessarily proportional to their share of the tax burden. For example, land values may increase when a new highway is built nearby or when an old rapid transit line is destroyed. Many people's wealth may depend on such factors, and except in extreme cases, since no payment is expected for social benefits, compensation should not be expected especially when the reduction in value is due to society's desire to prevent the landowner from contributing to social ills.

The reorientation we propose suggests that greater protection for the recipients of government benefits is appropriate. The recipients of such benefits are uniquely vulnerable to arbitrary government action and, due to their general political powerlessness, are prime targets for bearing the burdens of government actions unfairly. We should abandon the formalistic and inaccurate distinction between so-called "private property" and "government benefits" and ask, instead, whether the regulation at issue wrongly discriminates against a particular claimant by making her wrongfully bear burdens not legitimately shared by others to promote the public welfare. Thus, the result in *Wyman* v. *James* was wrong. Unless it could be shown that home visits were necessary to run the state welfare program, there was no reason to discriminate against welfare recipients by making them, and no other citizens, solely liable to sporadic visits by state officials invading their homes with no evidence of child abuse or other justifying cause.[100]

There is a danger, of course, that an increasingly conservative Court, if it artic-

100. Such restrictions are less likely to be placed on more powerful groups. For example, it is unlikely that continued enjoyment of one's license to practice law will be conditioned on surprise home and office visits so the state can be sure that no activity, such as fraud, drug or alcohol abuse or gambling, poses a threat to the security of clients or the sanctity of the legal system.

ulated the values underlying takings law and placed property in a relational context, as we suggest, would generate outcomes which we would oppose and promote values with which we would disagree. It might be argued that formalism better protects individual rights because of its very abstraction. Moreover, it seems to be the recognition of the social origins of property that has allowed the Court to defer to the onerous conditions on welfare benefits to which we object.

There is substantial force to these arguments. Nevertheless, it is our view that the Court has furthered its own political values in any event; formalism, because of its abstraction, appears to mount no barrier whatsoever to the Court's deciding cases as it sees fit. On the other hand, we believe that more forthright articulation of the values underlying the Court's decisions will likely further public debate by clarifying what is at stake. If property has social origins, then property law is about shaping the contours of social relationships. That is where we should properly focus our attention.