48. Takings, Just Compensation, and the Environment

Mark Sagoff

“The power vested in the American courts of justice of pronouncing a statute to be unconstitutional,” Alexis de Tocqueville wrote, “forms one of the most powerful barriers that have ever been devised against the tyranny of political assemblies.”1 Judges apply this power to environmental law in many ways, but especially when they review zoning ordinances and statutes that restrict the uses of property.

Everyone who owns property has the duty, of course, to exercise his or her property rights in ways that respect the similar rights of others. In addition to this basic duty, political assemblies have gone far—perhaps too far—in obliging landowners, for example, to maintain the integrity of landmarks and scenic areas,2 to refrain from filling wetlands,3 to allow public access to waterways and beaches,4 to preserve open space,5 to maintain habitat for endangered species,6 to allow public access to waterways and beaches,7 to leave minerals in place to support surface structures,8 and so on.9 Landowners often ask judges to review these statutes on constitutional grounds.10

State and local governments, in general, impose these duties on landowners by regulation rather than by exercising eminent domain. States prefer regulation to condemnation so that they do not have to compensate landowners for the substantial losses in market value that often accompany the duties and restrictions statutes place on them. Governments may attempt to dedicate property to public use, then, not by taking property rights through eminent domain, but by regulating those rights away and, therefore, without compensating owners for the market value of those rights.

Courts are then called on to decide whether a statute that imposes public-spirited duties on property owners complies with the Fifth Amendment of the Constitution, which provides that “private property [shall not] be taken for public use, without just compensation.”11 When courts sustain these statutes and ordinances on constitutional grounds, as they frequently do,12 local governments gain an important legal weapon for protecting the aesthetic, cultural, historical, and ecological values that often attract people and, therefore, subdividers and developers to a region. If the courts sheathe this legal weapon, however, society may have to kiss these values good-bye, since it can neither afford to exercise eminent domain to purchase the property in question nor can it depend, except in a limited way, on private action in common-law courts to protect these values.

When does a regulatory “taking” of property require the state to pay compensation, and when not? Justice Oliver Wendell Holmes, in a leading case decided in 1922, asserted that “this is a question of degree—and therefore cannot be disposed of by general propositions.”13 The absence of such propositions, that is, the lack of a theory on which to decide cases, has characterized “just compensation” jurisprudence for more than half a century. Commentators generally describe this area of law as a “muddle,”14 a “crazy quilt,”15 “unilluminating,”16 “ad hoc,”17 “confused,”18 “baffling,”19 “mystifying,”20 and “chaotic.”21 In 1987, Justice John Paul Stevens summarized: “Even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court’s takings jurisprudence.”22

In recent years, several academic lawyers have analyzed takings law to try to define a theory on which future jurisprudence might be based.23 Such an analysis could succeed, I think, if it (1) rests on acceptable normative and constitutional principles, and (2) is not so inconsistent with existing case law that it requires a dramatic recission of environmental statutes and ordinances now generally thought to be constitutionally sound.

In this article, I want to suggest a line of analysis that will satisfy these conditions. I argue that compensation need not attend a regulation that takes property rights unless it also burdens some

individuals unfairly, thereby treating the public as a whole, in other words, may treat the public as members of a group (p. 139). Wou

Pragmatic Decision Making

Zoning is used in many ways in which public and private interests may conflict, especially in urban areas. When such a result occurs, the court must decide whether the public interest in preserving the aesthetic, cultural, historical, and ecological values of urban areas is sufficiently strong to justify the taking of property rights.

In one such case, the Supreme Court of the United States had to decide whether a proposed building was architecturally in harmony with its surroundings. The court reasoned, “The power vested in the American courts of justice of pronouncing a statute to be unconstitutional,” Alexis de Tocqueville wrote, “forms one of the most powerful barriers that have ever been devised against the tyranny of political assemblies.”1 Judges apply this power to environmental law in many ways, but especially when they review zoning ordinances and statutes that restrict the uses of property.

Everyone who owns property has the duty, of course, to exercise his or her property rights in ways that respect the similar rights of others. In addition to this basic duty, political assemblies have gone far—perhaps too far—in obliging landowners, for example, to maintain the integrity of landmarks and scenic areas, to refrain from filling wetlands, to allow public access to waterways and beaches, to preserve open space, to maintain habitat for endangered species, to allow public access to waterways and beaches, to leave minerals in place to support surface structures, and so on. Landowners often ask judges to review these statutes on constitutional grounds.

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Courts are then called on to decide whether a statute that imposes public-spirited duties on property owners complies with the Fifth Amendment of the Constitution, which provides that “private property [shall not] be taken for public use, without just compensation.” When courts sustain these statutes and ordinances on constitutional grounds, as they frequently do, local governments gain an important legal weapon for protecting the aesthetic, cultural, historical, and ecological values that often attract people and, therefore, subdividers and developers to a region. If the courts sheathe this legal weapon, however, society may have to kiss these values good-bye, since it can neither afford to exercise eminent domain to purchase the property in question nor can it depend, except in a limited way, on private action in common-law courts to protect these values.

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In this article, I want to suggest a line of analysis that will satisfy these conditions. I argue that compensation need not attend a regulation that takes property rights unless it also burdens some
individuals unfairly to benefit other individuals or the public as a whole. The “takings” question, in other words, may not depend fundamentally on an analysis of property rights; instead, it may depend on a conception of justice.

**Pragmatic Versus Theoretical Decision Making**

Zoning is ubiquitous. Every state restricts the ways in which property owners can develop their land, especially in sensitive areas such as in flood plains, coastal zones, and agricultural districts. When such a restriction causes the market value of parcels of land to fall, the owners may believe that their land is being dedicated to a public use, for which the public ought to pay. They may then go to court to seek damages under the Fifth Amendment of the Constitution.

In one such case, *Just v. Marinette County*, the Supreme Court of Wisconsin upheld a zoning ordinance that prevented owners of a coastal marsh from using landfill on their property and thus from developing it for commercial purposes. The court held that the “takings” clause of the Constitution does not protect an interest, however profitable, in “destroying the natural character of a swamp or a wetland so as to make that location available for human habitation.”24 Citizens have no claim for compensation, the court reasoned, when an ordinance restricts their use of their land “to prevent a harm from the change in the natural character of the citizens’ property.”25

Ellen Frankel Paul, in her timely and well-argued book *Property Rights and Eminent Domain*,26 points out that decisions such as *Just* strike “at the very heart of the property rights conception—that what is mine may be used by me as I see fit provided only that I not use it in a manner that violates the like right of other owners” (p. 138). Paul notes that by filling in his wetland, Mr. Just did not threaten the rights of others; he merely set about improving the economic utility of his land, just as many others had done up and down the coast.

Paul accepts common law, particularly tort, as the test for determining when a person uses his or her property in a way consistent with the rights of others. As she says, the concept of harm to others that limits the rights of landowners “would have to be comparable to a harm recognized in the tort law” (p. 139). Would filling the wetland cause an injury to anyone sufficient to give him or her standing to sue in common law? What sort of right could anyone assert as a matter of common law to enjoin Mr. Just from filling in his marsh?

Paul argues that nothing in nuisance, tort, or anywhere in common law suggests a basis for such an injunction. For more than a century, the public, for aesthetic, sanitary, economic, and other reasons, encouraged landowners to fill in swamps. Now, the public (for the same reasons) wants to keep remaining wetlands wet. This may be a valid objective; the public may legitimately change its values. Society may correctly believe that it now benefits many localities more from scenic and open space than from condominiums and commercial strips.

The question is whether the state may legitimately force Mr. Just and others like him to provide *gratis* the scenic, ecological, and perhaps moral benefits the public gains from the presence of open and undeveloped land. Should the state instead compensate Mr. Just for his financial loss or, if the government cannot afford to pay, allow him peacefully to develop his wetland?

Richard Epstein, in *Takings: Private Property and the Power of Eminent Domain*,27 analyzes this case in the same way. He observes that the plaintiff, by filling in his wetland, might pollute his own property, but he threatens others with no harm cognizable in common law. Epstein argues that “the normal bundle of property rights contains no priority for land in its natural condition; it regards use, including development, as one of the standard incidents of ownership.”

By building on their marsh, the plaintiffs do only what their neighbors had already done; no one would have a case against them in common law. Epstein concludes: “Stripped of its rhetoric, *Just* is a condemnation of these property rights, and compensation is thus required.”

Ellen Paul’s *Property Rights and Eminent Domain* and Richard Epstein’s *Takings* endorse a theory of natural property rights, at the heart of which is the principle that people may use their property as they see fit as long as they respect the same rights and liberties of others. Both authors deplore the legal doctrine dominant in “takings” cases for 60 years, since it fails to recognize the existence of “natural” property rights; in fact, it rejects that theory out of hand. In place of this theory, the dominant doctrine, formulated by Justice Holmes, has called for ad hoc,
case-by-case decision making, an approach that attempts to determine a fair or just outcome in the circumstances of each suit, without relying or even speculating on a general theory or conception of property rights.

So both Paul and Epstein confront and oppose the pragmatic, case-by-case approach taken by the U.S. Supreme Court and many state courts. They are outraged that these courts routinely uphold legislation that plainly contravenes the theory of natural property rights they espouse. They argue that these courts should overturn their precedents to give legal force to that theory, especially the “core” freedom to do as one wishes with one’s property as long as one remains within the constraints of common law. And they find thoroughly offensive the courts’ refusal to advance a theory or conception of property—any theory—in cases brought under the Fifth Amendment of the Constitution.

Two questions arise, then, that Paul and Epstein must answer. First, is the pragmatic, case-by-case approach unworkable, unfair, or otherwise flawed in itself? In other words, does Paul or Epstein offer ‘telling arguments against current practice per se’ these questions. Two books depends on how well they respond to approach works well enough? The importance of these courts should adopt it, even if the pragmatic approach unworkable, unfair, or otherwise flawed in itself? In other words, does Paul or Epstein offer explanations of the Constitution.

First, let us suppose that the courts reach principled and equitable, if pragmatic, resolutions of “takings” cases. Let us suppose that the principles on which the courts rely, while not unjust or unworkable in themselves, do not recognize but implicitly reject the theory of natural property rights Paul and Epstein espouse. Has this theory such a explicit rejection the theory of natural property rights?

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What Is Wrong with Current Practice?

The courts now follow a reasonably predictable course in “takings” jurisprudence—although not the one Paul and Epstein recommend. Courts at present view justice in this area as a privative virtue, which is to say, they overturn legislation only if it commits one of a list of specific injustices—for example, if it is intended (or plainly functions) to exclude racial groups from particular localities. Courts ask a series of ad hoc questions: Does the regulation physically remove the owner from the land? or deprive the owner of substantially all reasonable use of it? Does the regulation fail to advance a legitimate public interest in a way rationally and closely related to the proscribed use? Does the restriction unfairly burden a few landowners to benefit a few others? Was the owner prevented from representing his or her interests in the political process? Has the government, through zoning, merely attempted to lower the market value of the land to make it cheaper to condemn?

Courts address “takings” cases with an ad hoc, pragmatic checklist of questions such as these—all of which are well known—reflecting a variety of moral, policy, and equity considerations. These questions go to the fairness and legitimacy of the statutes landowners challenge, but they pay little or no attention to any theory of property rights.

Courts rely on well-known ad hoc principles or rules of thumb, such as those these questions suggest, to determine whether the interests of the property owner have received a fair shake. The courts also take notice of the political and civil rights of various parties affected by a statute (e.g., the rights of minorities to live where they wish, the rights of individuals to political representation). In “takings” cases, courts mull over questions involving fairness, justice, and personal, civil, and political rights before making their decisions. But in answering these questions, the courts do not address or appear to want or need to address a theory of property rights.

Since lawyers know the kinds of questions the courts will ask—for example, whether a statute is “exclusionary,” “extortionary,” or “confiscatory”—they nearly always formulate zoning ordinances to survive this kind of review. As a result, the outcome of “takings” or “inverse condemnation” proceedings is generally predictable. Absent some special infirmity in the law (e.g., it may be plainly extortionary), the decisions will go against the plaintiff.

Jurisdictions, then, through zoning and other ordinances, routinely succeed in vastly restricting the otherwise permissible ways landowners might use their land. And a good lawyer will tell aggrieved landowners not to bother to challenge a properly drafted statute because the courts will routinely and predictably uphold it, even though it makes a mockery of property rights.

As Paul notes, courts routinely uphold legislation that strikes “at the very core” of natural property rights. They do not properly remonstrate against this approach, instead properly remonstrate against the courts’ refusal to base themselves on all then.

First, Paul presents an alternative property rights theory—in cases brought under the Fifth Amendment. Since lawyers know the kinds of questions the courts will ask—for example, whether a statute is “exclusionary,” “extortionary,” or “confiscatory”—they nearly always formulate zoning ordinances to survive this kind of review. As a result, the outcome of “takings” or “inverse condemnation” proceedings is generally predictable. Absent some special infirmity in the law (e.g., it may be plainly extortionary), the decisions will go against the plaintiff.

Second, let us suppose that the courts reach principled and equitable, if pragmatic, resolutions of “takings” cases. Let us suppose that the principles on which the courts rely, while not unjust or unworkable in themselves, do not recognize but implicitly reject the theory of natural property rights. If Paul and Epstein espouse the theory of natural property rights, they find thoroughly offensive the courts’ refusal to base themselves on all then.

So both Paul and Epstein confront and oppose the pragmatic, case-by-case approach taken by the U.S. Supreme Court and many state courts. They are outraged that these courts routinely uphold legislation that plainly contravenes the theory of natural property rights they espouse. They argue that these courts should overturn their precedents to give legal force to that theory, especially the “core” freedom to do as one wishes with one’s property as long as one remains within the constraints of common law. And they find thoroughly offensive the courts’ refusal to advance a theory or conception of property—any theory—in cases brought under the Fifth Amendment of the Constitution.

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makes a mockery out of the notion of natural property rights.

As Paul notes, “takings” jurisprudence, which routinely upholds zoning regulations in this way, strikes “at the very heart of the property rights conception.” She is right. Should judges take the theory of natural property rights seriously? May they instead properly remain indifferent to that theory and, indeed, to all theorizing about property and property rights?

Professor Paul proposes that the case-by-case, pragmatic, ad hoc decision making that characterizes “takings” jurisprudence “has simply not worked” (p. 188). She offers three arguments to support this contention.

First, Paul proposes that current jurisprudence puts too much power in the hands of politicians, who may next decide, for example, where each citizen will live. “The slipperyslope is real, and it is alarming” (p. 192). Paul relies on this “slippery slope” appeal to dispatch what she sees, correctly, as her main opponent, namely, pragmatic modern liberalism. “If liberals are absolutists about any political value, it is certainly not property.” Paul adds: “Modern liberalism...holds that civil rights can be separated from property rights. For modern liberals like John Dewey, property rights are relatively unimportant. A democratic society can flourish by protecting civil rights while not unduly concerning itself with property rights” (p. 190). Paul fails to provide, however, a single example of the reality of this slippery slope—an instance in which a judge or other public official moved in practice from “takings” precedents to a denial of civil, political, or personal rights. On the contrary, while the U.S. Supreme Court in its “takings” jurisprudence, over the last 60 years, may have kicked property rights into a cocked hat, the same Court has greatly advanced political, civil, and personal rights and liberties against the government. Perhaps Paul believes that the latter rights are connected, logically or empirically, with rights, for example, to develop one’s marsh for commercial use. But no argument in her book, or anywhere else, as far as I know, demonstrates such a connection.

The second argument appeals to authority: “ Virtually everyone admits that this area of the law is in a chaotic state” (p. 188). The third argument asserts that the pragmatic approach fails “to develop a sound theoretical underpinning for property rights” (p. 185).

These last two arguments are correct as far as they go. Commentators on “takings” jurisprudence, including Supreme Court justices, describe it as chaotic. Yet “takings” doctrine has given predictable results: The property owner will lose unless some special injustice, from an ad hoc but well-known list, has been done. If it is predictable and consistent, how, then, has it failed? People describe it as chaotic—but why should they?

The principal reason Paul, Epstein, and others believe that pragmatic, ad hoc jurisprudence is chaotic, as far as I can tell, is that it is ad hoc and pragmatic. They think it is bad for an important area of constitutional property law to fail to develop a sound theoretical underpinning for property rights. But why? If “takings” jurisprudence relies on an ad hoc, pragmatic list of reasonable concerns, why do judges need to indulge in theorizing? Academics theorize as a condition of getting tenure, of course, but justices already have lifetime terms.

The answer to the question whether the pragmatic, case-by-case approach fails may depend on the answer to the second question, namely, whether a different basis—one residing in deep philosophical principles—can and should be found. “I will argue that natural rights provides a consistent theory of property rights,” Paul says, “and that a theory of property rights is essential for extricating ourselves from this impasse” (p. 188).

Paul Versus Epstein

I want to mention here reasons I believe Paul’s Property Rights and Eminent Domain is not only an excellent book but is also better argued than Epstein’s Takings. First, Epstein makes no attempt whatever to show that current jurisprudence has failed in its own terms, that is, failed to provide a workable, predictable resolution of controversies arising under the Fifth Amendment. Instead, Epstein merely reviews a large number of legal decisions, shows that they make mincemeat of the theory of natural property rights, and then rebukes the judges for being such jerks. If you, poor reader, are among the damned who have not seen the divine light of natural property rights theory, Epstein regards you—along with Congress, the courts, state legislatures, municipal authorities, and other sinners—with contempt. Contempt, however, is not
argument, and that is the problem with Epstein’s treatise.

Paul, on the contrary, does not preach only to the saved. She recognizes that her opponents may favor current jurisprudence for initially plausible reasons, for example, to prevent “irreversible loss of agricultural land, estuaries, wetlands, and open space, and the wasteful consumption of energy” (p. 192). Paul believes that it may be more important for the law to protect natural property rights than to protect nature beyond the limits of tort. Unlike Epstein, she recognizes, however, that the truth of this belief is not self-evident.

Second, Paul clearly recognizes what Epstein only occasionally glimpses, namely, the strict incompatibility and antagonism between utilitarian and libertarian approaches to property rights. The old utilitarians, such as Jeremy Bentham, thought that governments create and protect property rights for purposes of utility maximization; Bentham described talk of natural rights as “nonsense on stilts.” When property rights get in the way of the aggregate public interest (as they presumably do in “takings” cases), then it is property rights rather than the general welfare that must give way. Any intellectually honest utilitarian or utility maximizer must agree with Bentham on this point.

Chicago School utilitarians, who would maximize a form of utility Richard Posner calls “wealth,” are driven to Bentham’s conclusion. They would defend property rights, not as a matter of principle or of basic justice (as Paul would), but only insofar as that policy might promote the efficient allocation of resources. Owing to market failures, bargaining costs, holdouts, and everything else, however, governments may generally achieve greater efficiency through cost-benefit planning than by allowing free exchange. Paul notes correctly that the “wealth-maximization” or “efficiency” view presupposes the communist fiction that everyone wants the same thing, namely, efficient allocation, and thus it encourages experts to override individual rights to provide it. “It is ironic that a view that sincerely intends to be supportive of individualism and property rights, is actually collectivist, and just as aggregative as utilitarianism” (p. 217).

Paul has replied to Epstein in other places, showing that utilitarian goals, such as wealth maximization, conflict just as thoroughly as any other centralized statist program with a regime of natural property rights.28 Her discussion of this issue (pp. 212–24), which includes a devastating reply to Posner’s conception of ex ante compensation, may be the best in the literature.

Epstein, after a wave of the hand to Locke, assumes that everyone well-socialized individual knows that property rights are natural rights—and he is off and running. Paul, in contrast, recognizes that “the advocates of natural rights did fail to provide a logical, internally consistent, deductive defense of these rights. Bentham certainly has his point” (p. 188). Thus, Paul attempts to argue for the fundamental thesis that Epstein merely assumes, namely, that property rights are natural rights.

She attempts “to supply the natural rights theory of property with such a deductive defense,” which, she hopes, will be persuasive to those, like Bentham, “who are highly skeptical of ‘metaphysical rights’” (p. 188). How successful, then, is her argument for natural property rights?

The Argument for Natural Property Rights

Paul’s argument for natural property rights, although at times hard to follow, seems to depend on two plausible principles. First, following Locke, she reasons that every human being has a natural right to acquire from the commons such commodities as are necessary to his or her survival. “Man must labor;” Paul points out, “in order to attain the rudiments necessary for his survival” (p. 226). Second, following Locke, Paul argues that everyone has a fundamental property right to anything useful that person creates through his or her labor and ingenuity. She asserts “that the person who creates X ought to own X” (p. 232).

While both principles are familiar and plausible, they do not entail anything about compensation in “takings” cases. How does Professor Paul get from a natural right to own what one creates and/or needs for survival to a doctrine about just compensation in “takings” cases? Let us grant that individuals have a natural right to the products they create and/or need in order to survive. How does this show that the government should compensate Mr. Just when an ordinance against certain kinds of development lowers the market value of his land?

While the argument means evident, Paul makes it so. First, she rejects the voluntarist principle that is to judge what is just and necessary and which task would entail deduction, science, or else the caprice (p. 234).

Second, Paul argues that the value is the artifice of the individual property owner. It is part of the individual property owner’s bargain with the government to create and/or need in order to survive. Thus, Paul argues, the government will generally achieve greater efficiency through cost-benefit planning than by allowing free exchange. Paul notes correctly that the “wealth-maximization” or “efficiency” view presupposes the communist fiction that everyone wants the same thing, namely, efficient allocation, and thus it encourages experts to override individual rights to provide it. “It is ironic that a view that sincerely intends to be supportive of individualism and property rights, is actually collectivist, and just as aggregative as utilitarianism” (p. 217).

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While the answer to this question is by no means evident, Paul introduces two further premises. First, she rejects as "artificial" any "distinction between necessities and luxuries" (p. 236). "After all, who is to judge which are goods necessary for survival and which are luxuries?" Paul asks. "Such a task would entail the existence of a godlike omniscience, or else the moral system would hinge on caprice" (p. 234).

Second, Paul emphasizes this principle: "All value is the artifact of some purposive activity on the part of the individual." She continues: "What I am arguing goes one step beyond Locke, who contended, alternately, that nine-tenths or ninety-nine hundredths of the value of any commodity was the handiwork of man rather than nature. I maintain that 100 percent of the value of a good is the work of human activity" (p. 230).

Any real estate agent will tell you that there are three determinants of the market value of real property: location, location, and location. None of these depends on the labor, ingenuity, or creativity of the property owner. Henry George adopted his radical views about land tenure in part because he saw the price of property go up tenfold overnight when the government announced its plan to extend the railroad to a section of California. The lucky owners, far from laboring for their survival, were asleep at the time. They woke up to find that the government, by creating a railroad, highway, park, or whatever, had instantly multiplied the price at which they might sell their land.

Paul counters such an objection in advance by writing: "I am not talking about market value (or price) and how it is determined on a free market" (p. 231). She adds, in words that might warm the heart of any defender of current "takings" practice:

Each person has a perpetual property right in that which he or she has created, that is, in the values produced. Your right, then, is to the object or process itself, and not to the market value or price, which is nothing more than the appraisal in the minds of others, at the margin, of the value to them of your good. The preference orders are beyond your control, and form no part of your entitlement (p. 234).

If Paul is not concerned with market value, then, it seems, she would have little to say on behalf of Mr. Just, who sued for the difference between the price he could get for his land before and after the zoning ordinance. He had made no use of his land—he had invested no labor or ingenuity in processing it—and he still possessed the object itself. The entire value of the land that Mr. Just sued to recover was market value: the value the land would have, as a matter of speculation, if it could be developed for commercial or residential purposes. On Paul's account, then, Mr. Just would have no entitlement to this value, since it is the creation not necessarily of his own action, but of the preferences of others.

All or nearly all zoning ordinances maintain the kind of property right that Paul defends. Statutes and regulations uniformly "grandfather" every existing use that cannot be construed as creating a nuisance. Current "takings" jurisprudence respects the sort of property right a person has to the products of his or her own labor—or at least Paul provides no evidence to the contrary. Accordingly, Paul's interesting defense of property rights seems to support, or at least not to undermine, current pragmatic, ad hoc, case-by-case approaches to "just" compensation under the Fifth Amendment of the Constitution.

**Does the Right to Develop Imply a Right to Destroy?**

As we have seen, Professor Paul distinguishes between "use value (i.e., the utility of a thing) and market value (or price)" (p. 230). While Paul does not develop this distinction, there are familiar examples of it. Water and air, for example, have high use values, since life cannot go on without them. Yet air and water are so plentiful in most localities that they have a low market value or price.

Land also has value both as an object of use and an object of exchange and speculation. The use value of a wetland consists, for example, in the many services and benefits it provides to the public. These include its function in the tertiary treatment of wastes, in the control of floods, in providing habitat for fish and wildlife, and so on. Wetlands tend also to be beautiful ecosystems delighting those who experience intelligently the play of natural history, scenic landscapes, and open space.

The market value of a wetland, like that of any real estate, depends principally on its location. In a coastal area, a wetland, once filled in, may provide the site for profitable enterprises, especially if, as in Atlantic City, gambling casinos, massage parlors,
bars, and discos can be built. Everyone knows what happened to land values in and around Atlantic City when the government allowed gambling. That is what the market value or price of land is all about.

Now, policy problems arise when the use value of a wetland conflicts with its market value. In order to preserve the uses of the wetland—the ecological and aesthetic values associated with it—we should have to forbid certain kinds of development. In order to maximize the market value of the wetland, however, we should have to develop it in ways that destroy the use value. This is essentially the choice that confronted the Just court.

The court may have framed this question in terms of another: Did the owner's destruction of the use value of the wetland—for example, its value as a habitat, aquifer, or whatever—constitute a "noxious" activity that the legislature may prohibit without paying compensation, even though that sort of destruction would not be recognized as a tort in private law? In other words, if legislatures, rather than common-law courts, become the arbiters of what counts as a "nuisance" for purposes of "takings" jurisprudence, the Wisconsin zoning ordinance was perfectly constitutional. If the notion of a nuisance beyond what the Fourteenth Amendment also guarantees, namely, that a person shall not be deprived of property without due process of law.

One may surely argue, however, that the legislature should not be the judge of its own case, that is, that some "substantive due process" review is required to determine that the "noxious" use in question does involve a threat to the public health, safety, or welfare. How would this work out with respect to the Wisconsin ordinance? Does the ordinance simply benefit the public at the expense of the landowner? Or does it function to prevent the landowner from enriching himself at the expense of the public?

And so the question might amount to this: May legislatures identify and prohibit public nuisances that extend beyond activities that would contravene private rights and therefore be enjoined in common-law courts?

The courts have held that state governments will not run afoot of the Fifth Amendment when they enact measures to protect the public from injurious uses of private property, even when the injuries in question are not cognizable in tort. For example, the U.S. Supreme Court in Mugler v. Kansas 1887, its first full consideration of regulatory takings, found against the plaintiff, a brewery owner, the value of whose property had been severely diminished when the Kansas legislature prohibited the sale of alcoholic beverages in the state. Justice John Harlan wrote:

The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not . . . burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

It is clear in Harlan's majority opinion that the legislature has the power to declare as "noxious" or "injurious" uses that would not be identified as torts under common law. Although the Supreme Court has held that "the legislature has no right to declare that to be a nuisance which is clearly not so,"31 it has deferred to legislative findings as long as they met procedural due process requirements. Thus, when states justify regulations on the basis of a colorable "noxious use," the Fifth Amendment has no force beyond what the Fourteenth Amendment also guarantees, namely, that a person shall not be deprived of property without due process of law.

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While it is notoriously hard to identify general principles by which to answer this question, courts have found that restrictions are not compensable when they stop a landowner from "engaging in conduct he ought, as a well-socialized adult, to have recognized as unduly harmful to others."33 The conception of "undue harm" at work here is drawn not from common law alone but from the wider social and cultural standards of the community. Since these standards change and evolve, "definition and redefinition of the institution of private property is always at stake."35

The decision in Just builds on this rationale, as one commentator writes, by denying that expectations of profit are legitimate if they are inconsistent with widely prevailing standards of society.36 To assume that one has an inherent right to develop one's land (e.g., to fill a marsh) "ignores or distorts an obvious relationship between such activity and interests of the . . . until recently h.

This argument central incident to exclude, and to . . . to destroy.39 Point to Locke, the common is much and as for appropriation occur. Indeed, land one does not p.

It is easy does not entail a car one has to use by con and waste or spoil "heap up" as it to be used eco of his just prop possession, brlessly in it.40

One might such as food one for to use is to, ever, shows on not, use up—not re between them is too de velmental resource protect, more goods but "res umed but cur.

Similarly, on its face the auctioneer keeps the highest bidder or sell it out. But to that reason, on this reason, one to prevent public resources th Mr. Just, according to en...
interests of the public that have long existed, but that until recently have been taken for granted."37

This argument stands on the premise that the central incidents of property—the right to use, to exclude, and to alienate38—do not include the right to destroy.39 Professor Paul correctly attributes this point to Locke. She writes that appropriation from the common is limited by two conditions: "that as much and as good remain in common for the like appropriation of others, and that spoilage must not occur. Indeed, Locke maintains that one's right to land extends not beyond what one can use, so that one does not possess a right to waste" (p. 204).

It is easy to show that a right to use property does not entail a right to destroy it. The right to use a car one has borrowed or hired, for example, does not involve a right to destroy it; similarly, the right to use by consuming food does not entail a right to waste or spoil it. Locke reasons that a person can "heap up" as many resources as he can use or cause to be used economically—"the exceeding of the bounds of his just property not lying in the largeness of his possession, but in the perishing of anything useless in it."40

One might reply that the right to use consumables, such as food or fuel, implies a right to "destroy" them, for to use is to consume these things. This reply, however, shows only that the right to use entails a right to use up—not necessarily a right to destroy. The difference between using up provisions and destroying them is too obvious to require examples. Environmental resources of the sort that wetland regulations protect, moreover, are generally not consumable goods but "renewable" services. They are not consumed but conserved through proper use.

Similarly, the right to transfer property does not on its face entail a right to destroy it. Thus the auctioneer has a right to transfer property to the highest bidder, but this does not give him a right to destroy it, even if it is not sold. To be sure, if an item is worthless, the possessor may have a right to toss it out. But the right to destroy does not attach, for that reason, to property that has a high use value. For this reason, courts sometimes impose a "law of waste" to prevent property owners from destroying scarce resources that are of great usefulness to others.41

Mr. Just has no valid claim to compensation, according to this argument, because he has no right or entitlement to destroy resources that have become scarce and are of great importance to society. The decision in Just is correct, on this view, because a regulation that prevents a landowner from destroying resources by filling a marsh does not take a right from him. He has no right to destroy those resources.

This result seems entirely consistent with a Lockean theory of property rights, which limits property not only to that which can be possessed without waste, as we have seen, but also to that which may be acquired from a commons without creating scarcity. As Locke puts this thought, a person can rightfully acquire an unowned resource from the commons only if there is "enough and as good left in common for others."42

The Just court argued that an owner may not validly claim compensation when he or she is prevented from "destroying the natural character of a swamp or a wetland . . . when the new use . . . causes a harm to the general public."43 The contention may be that the prohibited development would destroy resources that the public owns in common, owing to "the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty."44 In the past, an individual may have been free to appropriate these resources without depleting the common unduly, but those times are gone. Mr. Just has come too late to the commons; there is no longer as much and as good for others.

One might argue that this famous Lockean proviso45 covers aesthetic and ecological resources that belong as organic parts (or even as emergent properties) to larger systems and are destroyed when land is removed from its natural condition. Those who come to the commons early may legitimately appropriate these resources by consuming or destroying them; but when a common resource, such as natural beauty, becomes critically scarce, society may rule against further appropriations because they significantly worsen the social situation from that which would obtain if the proposed "improvements" were not made. As Professor Paul rightly concludes in another place, a natural rights theory that "embraces the Lockean proviso can be utilized to validate environmental land use legislation . . . without such regulations constituting a compensable takings."46
Conclusion

Courts should uphold environmental regulations, such as the Wisconsin ordinance, that prevent landowners from destroying natural resources the public has long enjoyed and in which it has a legitimate interest. The incidents of property include the right to use, exclude, and transfer, but not the right to destroy. Destruction of resources that implicitly belong to the common, then, constitute a "noxious" use, which is not protected by the Constitution. This approach may leave landowners little protection in the Fourth Amendment that they do not find in the Fourteenth and in the larger, ad hoc, pragmatic approach to "takings" jurisprudence such as we have described. Absent a persuasive theory of natural property rights, however, this may be the most reasonable approach that does not squander use values for the sake of market value—that does not ruin the environment to make speculators rich.

Notes

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2. See, e.g., Penn Central Transportation Co. v. New York City, 438 U.S. 104, 107 (1978) (holding that the city could operate a "comprehensive program to preserve historic landmarks" without "effecting a 'taking' requiring the payment of 'just compensation'" ); Steel Hill Developers, Inc. v. Town of Sanbornton, 469 F.2d 956, 959 (1st Cir. 1972) ("preserving [the] 'charm of a New England small town' "); and County Commissioners v. Miles, 246 Md. 355, 372, 228, A.2d 450, 459 (1967) (allowing "the preservation, in some manner, of existing conditions").

3. Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d, 761 (1972); Sibson v. State of New Hampshire, 115 N.H. 124, 336 A.2d 239 (1975). In dozens of similar court challenges to state prohibitions on filling or otherwise changing wetland and coastal environments, plaintiffs generally succeed in winning compensation under the "takings" clause of the Fifth Amendment (or under analogous provisions in state constitutions) only if they are able to show that they are deprived of all reasonable and viable economic use of their land. For an exhaustive survey showing a "trend" toward upholding the validity of wetland regulations, see Daniel R. Mandelker, "Land Use Takings, the Compensation Issue," Hastings Constitutional Law Quarterly 8 (1981): 491, esp. 495-502; and Sarah E. Redfield, Vanishing Farmland: A Legal Solution for the States (Lexington, MA: D. C. Heath, 1984), chap. 2.

4. Agins v. City of Tiburon, 447 U.S. 255, 261 (quoting from the Cal. Gov't. Code Ann. sec. 65561(b) (West, 1983) (recognizing the legitimacy of open space plans to "discourage the 'premature and unnecessary conversion of open-space land to urban uses' ").


10. A landowner who proceeds against the government in this way is said to assert a theory of "inverse condemnation" of his land because he, rather than the government, initiates the action. See San Diego Gas and Electric Co. v. City of San Diego, 450 U.S. 621, 638 n. 2 (1981) (Brennan, J., dissenting).

11. The Fifth Amendment to the Constitution of the United States. This provision is now applicable to the states through the Fourteenth Amendment. Chicago, B. & O. R. R. v. City of Chicago, 166 U.S. 226, 235-41 (1897). Almost all the states have analogous clauses in their constitutions. For documentation, see "Developments in the Law," 1463.
12. Thus, in the leading case, *Pennsylvania Coal Co. v. Mahon* (260 U.S.S. 393, 415), Justice Holmes stated “that while property may be regulated to a certain extent, if regulation goes too far it will be considered as a taking.” It is difficult to predict how a “takings” will be decided. Ackerman notes that “recent wetlands regulation cases have divided approximately evenly on the issue of compensation.” Bruce Ackerman, *Private Property and the Constitution* (New Haven: Yale University Press, 1977), 191 n. 7 and 217 n. 54.


22. *Nollan v. California Coastal Commission*, 55 L.W. 5145, 5156 (Stevens, J., dissenting). Here Justice Stevens echoes Justice Brennan in *Penn Central Transportation Co.* (428 U.S. 123, 124) (stating that the question “of what constitutes a ‘taking’ for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty” susceptible to no “set for-


42. Locke, *Second Treatise*, chap. 5, sec. 27.

43. 56 Wis. 2d 18, 201 N.W.2d 768.

44. Ibid., 17.


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**49. The Rio Declaration (1992)**

**Preamble**

The United Nations Conference on Environment and Development,

Having met at Rio de Janeiro from 3 to 14 June 1992,

Reaffirming the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972, and seeking to build upon it,

With the goal of establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people,

Working toward international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system,

Recognizing the integral and interdependent nature of the Earth, our home,

Proclaims that:

**Principle 1**

Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

**Principle 2**

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

**Principle 3**

The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

**Principle 4**

In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

**Principle 5**

All States and all people shall cooperate in the essential task of eradicating poverty as an indispen-