procedures required by the *Native Title Act* did not change the 'basic principles of litigation' in the Federal Court, where civil cases are decided on the balance of probabilities with 'regard only to evidence which is relevant, probative and cogent.'[66] In the leading High Court case concerning proof, *Briginshaw v Briginshaw*, Latham CJ said:

> No court should act upon mere suspicion, surmise or guesswork in any case. In a civil case, fair inference may justify a finding upon the basis of preponderance of probability. The standard of proof required by a cautious and responsible tribunal will naturally vary in accordance with the seriousness or importance of the issue.[67]

Because Justice Olney's judgment relies overwhelmingly on biased records, especially Curr's account of indigenous culture written down many decades after his limited observations, it is based largely on suspicion, not on preponderance of probability. Simply put, Justice Olney did not use the same standard of proof when evaluating written as opposed to oral evidence. His assessment of the latter seems often to be based on a higher standard than a balance of probabilities (namely, beyond reasonable doubt), than he uses when evaluating written European records. At the very least, Justice Olney's disregard of oral Aboriginal tradition, in favour of written accounts which are far from contemporaneous or insightful, is inconsistent with the 'standard of proof required by a cautious and responsible tribunal'[68]. Justice Olney's view of what is admissible and cogent evidence appears inconsistent with the requirements of the *Native Title Act* for a procedure of determination which is 'just and proper'. Justice Olney's decision, which relies on the dubious re-constructions of the pastoralist Curr reveals, finally, not simply a poverty of evidence, but a poverty of interpretation.

66 *Yorta Yorta v Victoria* (1998) [17].
67 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 343-344.
68 Ibid.

Danaya Wright *

THE 'ANTI-*BOOMER* EFFECT': PROPERTY RIGHTS, REGULATORY TAKINGS AND A WELFARE MODEL OF LAND OWNERSHIP

The last decade of the twentieth century has witnessed a profound restructuring of the takings clause in U.S. property law. This has partly been caused by, and is a cause of, a new mythology in the public discourse of property rights.[1] This rethinking has resulted in the payment from federal and state treasuries of $480 million to the Pacific Lumber Co *not* to cut the 7,470 acres of timber near Eureka, California which is one of President Clinton's pet preservation projects.[2] Only weeks before Dupont agreed for a $90 million payout *not* to mine for titanium in the environmentally sensitive Okefenokee swamp.[3] And a year ago the federal

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* Asst. Professor of Law, University of Florida Levin College of Law. I would like to thank the Levin College of Law for a research grant that enabled me to begin this research and the faculty that had to listen to my presentations on the topic and offered wonderful comments, and Andrew Buck and Nancy Wright for their continuous encouragement and prodding to complete the paper I was unable to finish in time for the conference.

1 I am aware of the contested nature of the terms 'property' and 'rights'. To the greatest extent possible I attempt not to use the term property when referring to land or other physical things but part of the rhetorical strategy of the property rights movement is to occlude the distinction between the object and the legal rights associated with it.

2 This amounts to over $642,500 per acre. The deal included 3000 acres of ancient redwoods, surrounded by 4500 acres of buffer forest sold directly into public ownership and an agreement by Pacific Lumber not to cut trees in certain 'no-cutting' zones on its remaining 211,000 acres at risk of fines of $1,000 to $3,000 per tree. Each tree, however, is worth about $20,000 or more in lumber. Frank Clifford, 'Last Minute Deal Reached on Headwaters' *L.A. Times* (3/3/99) A1; John Howard, 'Ancient Trees Preserved in Headwaters Forest' *The Seattle Times* (5/9/99) K3.

3 Although this settlement was primarily between private environmental groups and DuPont, the environmental groups are looking to the state and federal

government paid $65 million to Battle Mountain Gold Co. of Houston and other owners of the New World Mine on the border of Yellowstone National Park *not* to mine for gold. This is because it was believed cyanide runoff would damage Yellowstone's waterways.[4] Traditionally, the takings clause was interpreted to require compensation to landowners only when their land was physically appropriated.[5] Now we seem to be paying them not only when we let them keep the land, but when we require they NOT impose pollution and harmful nuisances on neighboring landowners. I call it the 'anti-*Boomer* effect,' an ironic reversal from the nuisance line of cases best exemplified by *Boomer v Atlantic Cement Co.*[6] that would permit harmful uses of land, but only if the users pay for the external costs their activities impose on their neighbors.

These buyouts are the result of an attempted fundamental redefinition of property rights, a redefinition that appears to go beyond anything within the minds of the framers, of eighteenth-century Lockean liberals, of even the most libertarian property rights theorists writing in the nineteenth century, and is primarily supported and funded by an odd coalition of ultra-conservative economic groups, corporate farmers, miners, and developers. Richard Epstein of the University of Chicago has become the property rights' poster child as researchers at the conservative Cato Institute, the Olin Foundation, and the Competitive Enterprises Institute take the position that any limitation on property rights caused by governmental regulation

governments to help raise the money. Charles Seabrook, 'DuPont Aborts Mining Project' *The Atlanta Journal* (2/6/99) B1.

4 'Land Deal Scuttles Mine: Green Groups Cheer Demise of Noranda Project' *The Toronto Star* (8/13/96) B3.

5 See William Michael Treanor, 'The Original Understanding of the Takings Clause and the Political Process' (1995) 95 *Columbia Law Review* 782. The Takings Clause 'has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power.' *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1871).

6 26 NY2d 219, 223, 257 N.E.2d 870 (1970). Justice Bergan, speaking for the Court, observed that regulation of air pollution 'is an area beyond the circumference of one private lawsuit. It is the direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant.' The connections between traditional nuisance law, Justice Scalia's nuisance exception in Lucas, and the government's role in making companies internalize the costs of environmentally harmful externalities is at the heart of my larger research project.

constitutes a taking deserving of compensation.[7] Takings cases funded by these, and other property rights groups, have gone so far as to allege that a provision of the Oil Pollution Act of 1990 that allowed the Exxon Valdez to operate anywhere in the world *except* in Prince William Sound, was a taking of Exxon's property, another provision of the Act, which would require only double-hull barges be in service by the year 2003, was a taking of Maritrans, Inc.'s 37 single-hull barges.[8] Ironically, ultra-conservative religious groups are troubled by the property rights movement because they envision taxpayers having to compensate pornography shop operators, who would be restricted by zoning and community bans on the sex trade, or by liquor store operators who have to close down their drive-through windows because of the war on drunk driving.[9]

Of course, environmental groups are pulling out their collective hair from the frustration of having to fight ludicrous cases like the one in Prince William Sound. When companies like Dupont and Pacific Lumber receive huge buyouts not to exercise their 'rights' to destroy their own land and the land around them, every developer, mining company, and farmer who engages in destructive activities has the incentive to threaten to exploit their land to its utmost in the hopes of being paid not to do so. Ryan Lizza of the *New Republic* has criticized Charles Hurwitz of Pacific Lumber for purchasing an environmentally sensitive area, publicizing big plans for destructive development, and then covertly hiring a PR firm to create a

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7 See the websites of these organizations: the Competitive Enterprises Institute at <http://www.cei.org>; the Cato Institute at <http://www.cato.org>; the Olin Foundation at <http://www.jmof.org>; the Center for Defense of Free Enterprise at <http://www.cdfe.org>; and the Defenders of Property Rights at <http://www.defendersproprights.org>.

8 See James Gerstenzang, 'Tanker Seeks Return to Alaskan Waters' *L.A. Times*, May 4, 1996, at A16 and 'Maritrans to Sue Over Spill Law Losses' (1996) *Journal of Commerce* 1B.

9 See Glenn Sugameli, 'Takings Bills Threaten Private Property, People, and the Environment' (1997) 8 *Fordham Environmental Law Journal* 521, 578 citing Donald Wildmon who called a Mississippi Takings Bill the 'Porn Owners Relief Measure' The Republican party is split between those who support across-the-board takings legislation that would aid big business and corporate America and those who advocate governmental restrictions on a wide variety of social practices that would put porn shop and abortion clinics out of business but possibly require taxpayer compensation in the process.

green organization advocating the preservation 'at all costs' of the 'irreplaceable treasure' that he was threatening to destroy.[10] Pacific Lumber received $480 million for less than 5% of the over 200,000 acres it bought for $900 million in the mid-1980s.[11] And another land speculator made a 600% profit in a land swap deal with the federal government.[12]

More disturbing, perhaps, is the relatively recent trend in property rights legislation that has resulted in takings bills being introduced into every state legislature and Congress within the past 10 years.[13] Every year since 1990 a bill has been introduced into Congress to compel compensation for interference with property rights that do not rise to the level of a constitutional taking. And a number of states have adopted legislation requiring compensation to property owners of greater than 100% of the fair market value of the 'taken' property and often to be given in cases that explicitly do not meet the state or federal takings definitions. Yet, every state that put the issue to a public referendum found that the public strongly disagreed with these bills.[14]

What has caused this rather radical property rights movement to arise? Why now? How do current developments in takings jurisprudence fuel this movement? And how can we reconceptualize property rights in a way that allows for a satisfactory balance between individual ownership of land, the public demand for a healthy environment and a conservation program for future generations?

In this article I briefly examine the history of regulatory takings jurisprudence and fit it within both an originalist interpretation and the historical tradition of economic substantive due process doctrines. I then

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10 Ryan Lizza, 'Gold Diggers: How Developers Mine the Government' (1998) 218 *The New Republic* 18, 17. The Forest Service has closed 429,000 acres of publicly-owned lands on the Rocky Mountain Front to new hard rock mining claims for two years under fears that people will stake claims and then expect federal compensation if the government determines that mining in the area would be against the public interest. Sherry Devlin, '429,000 Acres Closed to Hard Rock Mining' *Missoulian* (2/4/99) A1.

11 At that price per acre, it works out to a roughly 13,877% return on his investment.

12 Lizza, above n 10.

13 Sugameli, *Takings Bills.*

14 Ibid at 563.

examine the property rights movement more specifically and suggest that the source of the problem is two-fold: the happenstance of the repudiation of *Lochner* era economic due process has forced advocates to stretch the takings clause to cover cases that might more appropriately be handled under due process analyses, and the critical situation in the environmental and growth management areas, caused by our unprecedented population growth and the resulting strain on our natural environment, has led to more stringent land use controls that conflict with a long-standing mythology of absolute property rights. Objections to land control have spilled over into a wide variety of land-use regulations including historic preservation, national rivers and streams clean-up initiatives, rails-to-trails conversions, billboard removal in highways, endangered species protections, limits on grazing permits on federal lands, coastal zone protections, and a wide variety of environmental, zoning, and growth management laws.[15] In conclusion, I suggest a two-fold solution to dealing with the claims of the property rights movement: a return to due process as the proper analytic tool for viewing deprivation of property rights, and a shift away from a rights-based model of property law to a stewardship or welfare model, which recognizes and more fully protects important claims of the public to restrict detrimental uses of land.

REGULATORY TAKINGS: A CONSTITUTIONAL PANDORA'S BOX?

The Fifth Amendment to the U.S. Constitution provides that no person shall be 'deprived of . . . property without due process of law,' 'nor shall private property be taken for public use without just compensation.' The Fourteenth Amendment makes both provisions applicable to the states.[16] Until 1922, the Supreme Court adhered to a bright-line rule that takings cases were limited to the archetypical situation of the government physically appropriating land through the exercise of eminent domain while the due process clause governed police power regulations enacted to

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15 John Echeverria, 'Why the Takings Issue Matters' Georgetown University Law Center's Environmental Policy Project <http://www.envpoly.org/papers/why.htm>.

16 Chicago, *B & Q R R. v Chicago,* 166 U.S. 226 (1897); *Penn Central Transp Co v New York City,* 438 U.S. 104, 122 (1978) (stating that 'of course' the Fourteenth Amendment makes the takings clause applicable to the states).

promote the public welfare.[17] The bright-line test was easy to apply insofar as the takings clause would require compensation when land was taken; the due process clause would require nullification of regulations that did not meet the requisite standards. Hence, land taken for railroads, highways, courthouses, and even easements for the preservation of civic health and safety, like sewers or utilities, were considered within the scope of the takings clause. But police power regulations, like the power to regulate industrial pollution and discharge into rivers, the power to outlaw certain trade practices like brothels and distilleries, and the power to pass zoning laws were not considered to fall within the takings clause protections because, although they deprive people of a certain value they placed on their property, they did not 'take' their land for public use.[18] Not all government actions that reduced property values required compensation or nullification, for, as Justice Holmes explained, 'government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.'[19] What Holmes was acknowledging is that property is not identical to value, for the value of a physical resource is a function of the market price and may be adversely affected by government regulations, while the physical resource itself might remain untouched.[20] Hence, the lay person's equating of property with the physical thing, and not with some abstract bundle of legally protected rights that carry a particular market value, more closely accords with the nineteenth-century distinction between a taking as a physical appropriation of the land and a due process deprivation as a regulatory effect on the market value of that land or resource.[21]

Before the Bill of Rights there were few U.S. precedents for the proposition that the government had to pay for land or personal goods taken for public

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17 Steven J. Eagle, *Regulatory Takings* (1996) 2.

18 Edward Keynes, *Liberty, Property, and Privacy: Toward a Jurisprudence of Substantive Due Process* (1996) 112-128.

19 *Pennsylvania Coal Co v Mahon*, 260 U.S.393, 413 (1922).

20 Ironically, no property rights activist has been willing to compensate the government for incidental increases in property values caused by zoning regulations, declarations of war, or the promotion of certain dietary practices that increase the value of residential property, the value of wheat farmland when we remove a wheat embargo, or broccoli farmers when the government supports the rule of 9 servings of fruits and vegetables a day.

21 Eagle, *Regulatory Takings* 62-65.

use.[22] Only two colonial documents included some form of a takings provision, though the Massachusetts Body of Liberties of 1641 limited compensation only to takings of personal property, while the 1669 Fundamental Constitutions of Carolina, which did provide for compensation for the taking of real property, was never fully implemented.[23] Other provisions that existed to place limits on the governmental seizure of real or personal property ultimately stemmed from Article 39 of Magna Charta. This provided that 'No free man shall be . . . dispossessed . . . except by the legal judgement of his peers or by the law of the land,'[24] and was at heart procedural limits. The Vermont Constitution of 1777, the Massachusetts Constitution of 1780, and the Northwest Ordinance of 1787, were the state constitutional takings provisions that preceded the Fifth Amendment. Notably, all three were provisions motivated by realistic fears of legislative overreaching that, in the case of Vermont, was justified by the New York legislatures' failure to recognize the title of, and attempt to terminate the property rights of, Vermont and New Hampshire landowners.[25] In all three instances, however, the relevant issue was compensation, not a belief that taking of private property was inherently unjustifiable or impermissible.

The Fifth Amendment takings clause was the brainchild of its liberal author James Madison, for unlike every other provision of the bill of rights, no state had requested the inclusion of the clause. For Madison, the just compensation provision reflected strongly his liberal ideology that society 'is instituted no less for protection of the property, than of the persons of individuals.'[26] Madison's worries about the unequal distribution of property in society, which inevitably led to bitter disputes, underlay his insistence that property was a fundamental right deserving of especial

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22 See William Michael Treanor, 'The Original Understanding of the Takings Clause and the Political Process' (1995) 95 *Columbia Law Review* 782 and William Michael Treanor, 'The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment' (1985) 94 *Yale Law Review* 694 and John F. Hart, 'Colonial Land Use Law and its Significance for Modern Takings Doctrine' (1996) 109 *Harvard Law Review* 1252.

23 Treanor, *Original Understanding* 785.

24 *Magna Charta* art 39.

25 Treanor, *Original Understanding* 790-791.

26 *The Federalist* No 54.

protection. What upset Madison most, however, was the seizure of Loyalist property, the taking of private land for building roads, and the bills that forestalled debt collection in order to spur the economy.[27] Most notably, these situations, and the evidence of scant discussion of this clause at the Constitutional Convention, indicate that the only governmental action that the framers believed required compensation were outright physical appropriations or the complete destruction of security interests. Developed land taken for highways and courthouses, debts extended and consolidated for the benefit of debtors, slaves executed for participating in rebellions, and cattle taken to feed troops were all considered outright physical appropriations of land or chattel deserving of compensation.[28]

Before 1922, it would seem that the bright-line rule of compensation only for outright appropriation was followed without any serious dissent. John Hart has compiled an impressive list of colonial land use regulations that amounted, at times, to the complete transfer of title from one landowner to another to further the public welfare, and which did not implicate the takings clause.[29] In disproving the myth that minimal land use regulation was a longstanding tradition, Hart details scores of land use regulations that caused forfeiture of title from landowners who failed to develop, improve, or seat their land. Government patents were dependent on 'tak[ing] possession . . . and commenc[ing] preparations for fencing and planting the same . . . on pain of having the Lots and Plantations which are not entered upon within that time, given and granted to others, who may be disposed to improve them.'[30] Owners who improved their land but then deserted it to 'the extreme prejudice which will necessarily ensue to the colony by deserting of plantations which are now seated' were also subject to forfeiture.[31] In certain colonies, penalties were imposed for noncompliance with mandatory fencing requirements. In others, private landowners whose land lay adjacent to common fields, or which could be

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27 Treanor, *Original Understanding* 836-856.

28 Ibid at 787-788.

29 Hart, *Colonial Land Use Law*.

30 Ordinance of Nov 27, 1658, *Law and ordinances of New Netherland 1638-1674* at 361.

31 Act of Feb 17, 1644[-5], 1 *The Statutes at Large* (Virginia) 291.

conveniently used for common fields, would be required to dedicate a portion of their land to the common.[32] Some states had statutes that authorized giving private land conducive to particular uses to other owners if the original owner was not developing or utilizing the land at a satisfactory rate. Such uses included mines, mills, foundries and forges. Other laws required the draining of wetlands under threat of forfeiture or fines. Owners could also be required to contribute to large-scale drainage projects that would benefit the public at large. Some colonies allowed the public to use private land for hunting, fishing, grazing and even prospecting on otherwise undeveloped land.[33]

Beyond the land use regulations that clearly encouraged development, there existed numerous other restrictions attempting to encourage optimal uses of land in urban areas, from limiting leases to outsiders, to restricting overly dense housing situations. There were aesthetic restrictions demanding a 'regular Order and Uniformity . . . be kept and observed in the Streets and Buildings' of New York[34] and that dwelling houses be 'upheld, repaired and maintained sufficiently in a comely way' in Connecticut.[35] 'Landowners in Charleston were required to cut down 'all young pine trees or pine bushes, and by the roots dig up all other sorts of bushes, brushes, all weeds and under wood''[36], while New York City ordered landowners that all 'poysonous and Stincking Weeds . . . before Every ones doore be forth with pluckt up.'[37] And every homeowner in Philadelphia, Newcastle and Chester was to plant and maintain 'one or more . . . shady and wholesome trees before the door of his, her or their house.'[38] These statutes, even the forfeiture laws, coexisted with laws or practices that compensated landowners for physical appropriation of lands for roads,

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32 Hart, *Colonial Land Use Law* 1263-1265.

33 Ibid at 1265-1272.

34 Ordinance of May 4, 1691, as more thoroughly cited in Hart, *Colonial Land Use Law* fn 159.

35 Act Concerning Home Lotts of Oct. 1672, *the Laws of Con[n]ecticut*, as cited in Hart, Id, fn 161.

36 Act of Aug 28, 1701, No 190, Para. VII, 7 *The Statutes at Large of South Carolina*, as cited in Hart, Ibid fn 185.

37 *Ordinance of July 7, 1691*, as cited in Hart, Ibid fn 184.

38 Act of Nov 27, 1700 ch. LIII, sec. III, 2 *The Statutes at Large of Pennsylvania* 65, 66-67, as cited in Hart, Ibid fn 187.

courthouses, prisons, and the like.[39] Hence, it was not so much that the colonial landowner was at the whim of governmental regulations, as that he or she was required to use land in a manner consistent with the welfare of the general public and the developing agricultural and industrial needs of the colonies. Land appropriated outright for public projects were generally compensated;[40] but land forfeited because the landowner failed to maintain proper fencing did not create a claim for the taking of or interference with private property rights.

As late as 1871, the Supreme Court could explain that:

> [The Takings Clause] has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared? . . . [I]t is not every hardship that is unjust, much less that is unconstitutional; and certainly it would be an anomaly for us to hold an act of Congress invalid merely because we might think its provisions harsh and unjust.[41]

Hence, until the turn of this century the Court adhered to its bright-line rule that physical appropriations of title required compensation while regulations under the police power did not, even when these regulations

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39 James W Ely Jr, 'That Due Satisfaction May Be Made': The Fifth Amendment and the Origins of the Compensation Principle, (1992) 36 *American Journal of Legal History* 1, 5.

40 John F Hart, *The Colonial Highway Acts*.

41 *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551-552 (1871).

rendered valueless the plaintiff's property.[42] Relatively deferential review was given to legislation on the grounds that '[i]t belongs to [the legislature] to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health or public safety.'[43]

This bright-line rule did not mean that the Court upheld all regulations adversely affecting property values or property rights. Quite the contrary in fact. Takings cases between the Civil War and 1922 were actually quite sparse: the Court was heavily active in scrutinizing governmental interference with economic liberties and property rights through the creation of economic substantive due process doctrines.[44] There is some disagreement as to the extent that the Court's antipathy to social welfare legislation negatively affected property values. However, there is no question that the Court routinely used the due process clause to strike down legislation that did not reflect an appropriate level of public purpose, that did not adequately provide a means/end fit between the restrictions imposed and the ends sought, or that substantially interfered with fundamental economic liberties of contract and property rights.[45] Laurence Tribe counted 197 cases striking down economic regulations under substantive due process between 1899 and 1937.[46]

After the Civil War, the country experienced profound social changes, including industrialization and urbanization, waves of new immigrants, the transcontinental connection of the nation by railroad and telegraph, and the rise of the public corporation, all of which transformed industrial capitalism and imposed new strains on the legal system.[47] Cities and states reacted to these changes by enacting a host of protective laws: protective labor statutes,

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42 See *Mugler v Kansas*, 123 U.S. 623 (1887) (denying compensation when a regulation prohibiting the manufacture of alcohol rendered the plaintiff's beermaking equipment valueless).

43 Ibid at 661

44 Keynes, *Liberty, Property and Privacy; Eagle, Regulatory Takings*; Glen E. Summers, 'Private Property Without Lochner: Toward a Takings Jurisprudence Uncorrupted by Substantive Due Process', (1993) 142 *University of Pennsylvania Law Review* 837.

45 Keynes, Ibid at 97-128.

46 Tribe, *American Constitutional Law* 567 (2d ed 1988).

47 Keynes, 97.

public health and consumer protection statutes, railway and utility rate regulations, zoning and land use laws, and new municipal services to promote public welfare. While the Court upheld many of these economic restrictions,[48] it struck down those without an adequate public welfare justification, those that seemed to be merely class-based legislation, or those that interfered with economic liberties necessary to 'live and work . . . to earn [one's] livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to [one's] carrying out to a successful conclusion the purposes above mentioned.'[49] Economic substantive due process was based on a belief that economic rights of property and contract were 'fundamental maxims of a free government.'[50]

The apex of economic substantive due process came in the 1905 case of *Lochner v New York*, in which the Court struck down a New York law prohibiting bakers from working over 60 hours a week or ten hours a day because it interfered with the employees' rights to contract to work longer hours, even when those hours were shown to be detrimental to their health.[51] The worker's health was not the same as the public health, for the worker ostensibly had the freedom to contract away his own right to a healthy working environment. Despite a blistering dissent by Holmes, *Lochner* was cited by the Court regularly as it struck down legislation believed to be class-based, without the appropriate public purpose, or without an adequate means/end fit.[52] But it wasn't until the 1930s, when the Court's abrupt about-face on economic legislation reversed *Lochner*,[53]

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48 *The Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873), *Munn v Illinois*, 94 U.S. 113 (1877).

49 *Allgeyer v Louisiana*, 165 U.S. 578, 589 (1897); *Lawton v Steele*, 152 U.S. 133 (1894); *Lochner v New York*, 198 U.S. 45 (1905).

50 *Wilkinson v Leland*, 27 U.S. (2 Pet) 627, 657 (1829).

51 198 U.S. 45 (1905). See also: Matthew S. Bewig, 'Lochner v The Journeymen Bakers of New York: The Journeymen Bakers, the Hours of Labor, and the Constitution', (1994) 38 *American Journal of Legal History* 413.

52 *Hammer v Dagenhart*, 247 U.S. 251 (1918); *Adkins v Children's Hospital*, 261 U.S. 525 (1923); *Morehead v New York ex rel. Tipaldo*, 298 U.S. 587 (1936); *A.L.A. Schechter Poultry Corp. v U.S.*, 295 U.S. 495 (1935).

53 *West Coast Hotel v Parrish*, 300 U.S. 379 (1937); *NLRB v Jones & Laughlin Steel Co*, 301 U.S. 1 (1937); *U.S. v Carolene Products*, 304 U.S. 144 (1938); *Wickard v Filburn*, 317 U.S. 111 (1942).

that the period took on its mythic quality. The *Lochner* era, as it came to be known, was a period marked by fundamental dissension on the Court over the proper balance to be drawn between the individual's fundamental liberties of contract and property and the emerging welfare state's police power to enact legislation for the public health, safety, and welfare. When the Court reversed *Lochner* and washed its hands of substantive review of economic legislation, the period became stigmatized by a critique of the counter-majoritarian difficulty of a non-elected judiciary substituting its views on economic rights for that of the legislatures, thus threatening to break down the constitutional separation of powers necessary to our federal regime. The myth of *Lochner* was far more powerful than the actual effect; yet, because of the unpopular currency of the *Lochner* era, any attempt to revive economic due process rights is met with a shudder.

The new rule, as Harlan Stone expounded in *West Coast Hotel*, would be that 'regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of legislators.'[54] The effect of the demise of *Lochnerism* has been the virtual abdication of judicial review in any case involving economic and commercial transactions.[55] The rational basis test applied to economic regulations continues to have virtually no bite.

In 1922, in the midst of protecting economic due process rights, the Court expanded the takings clause to cover a completely new class of cases in which legislation that interfered with property rights would not be struck down, but would require compensation when it imposed a sufficiently detrimental economic effect on the property holder. With Justice Holmes' pathbreaking decision in *Pennsylvania Coal v Mahon*,[56] the Supreme Court recognized a new category of takings case beyond outright appropriations, later called 'regulatory takings,' a category in which

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54 304 U.S. at 152.

55 This is, of course, an oversimplification as the Court has routinely engaged in covert heightened scrutiny under the guise of rational basis review. See *City of Cleburne v Cleburne Living Center*, 473 U.S. 432 (1985); *Zobel v Williams*, 457 U.S. 55 (1982); *Hooper v Bernalillo County Assessor*, 472 U.S. 612 (1985); and *Plyler v Doe*, 457 U.S. 202 (1982).

56 260 U.S. 393 (1922).

regulations were deemed to interfere to such a large extent with property rights that the government might as well have taken the property outright. Justice Holmes' decision in *Mahon* opened the door to a rewriting of the takings clause to require compensation, when otherwise legitimate public welfare legislation had incidental effects on property that went too far in forcing a single landowner to bear a burden that should, in all fairness, be borne by all.[57] However, there is some disagreement as to whether Holmes himself thought he was rewriting the takings clause or was rather deciding another 'minor substantive due process case.'[58] *Mahon* and *Lochner*, as Justice Stevens noted, both involve 'potentially open-ended sources of judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair.'[59]

Although *Mahon* was a *Lochner*-era case, it has withstood and even flourished since the demise of economic substantive due process. Between 1935 and 1958 *Mahon* was never cited by the Court, reflecting what most scholars see as a 'substantial abandonment of the regulatory takings doctrine.'[60] But in the 1960s the Court was faced with a handful of takings cases, and it cited back to *Mahon* 'because it accorded with late-twentieth-century approaches to property and constitutional law.'[61] Between 1958 and 1978 the Court spent most of its time trying to pin down when a regulation 'goes too far'. It did this by ultimately relying on ad hoc determinations about the extent of the economic burden on the landowner, the nature of the property rights being interfered with, and the interference with reasonable expectations about development of the property.[62] In

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57 Frank Michelman's influential article focusing on the ethical foundations of the takings clause looks precisely at the element of 'too farness.' Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harvard Law Review* 1165.

58 See Treanor, *Jam for Justice Holmes*, 827-830; Robert Brauneis, "The Foundation of Our 'Regulatory Takings' Jurisprudence". The Myth and Meaning of Justice Holmes' Opinion in Pennsylvania Coal Co v Mahon, (1996) 106 *Yale Law Journal* 613, 620.

59 *Dolan v City of Tigard*, 512 U.S. at 407 (dissent).

60 Treanor, *Jam for Justice Holmes*, 864.

61 Ibid at 865.

62 These were the three elements that Justice Brennan distilled from the cases between 1922 and 1978 when *Penn Central Transp Co v City of New York* was decided. 438 U.S. 104 (1978).

effect, the Court could ameliorate the harsh burdens of economic legislation that otherwise passed the toothless rational basis test of *West Coast Hotel* by finding undue hardship under regulatory takings. In doing so, however, the Court focused on the unfair burden to the landowner as an unfortunate but necessary effect of allowing legislatures their economic freedom. The laws withstood judicial scrutiny but might require compensation if the burdens fell too harshly on a single landowner.

But the rather unsteady contradiction between the Court's repudiation of *Lochner* and economic due process in *West Coast Hotel* and its maintenance of regulatory takings began to change in 1987, when the Reagan appointees could shift the majority. In 1987, the Court's opinions began to import into the takings calculus a clear substantive due process inquiry. In *Nollan v California Coastal Comm'n*,[63] landowners were denied a permit to rebuild their beach-front cottage with a larger home unless they allowed an easement to connect public beaches on either side of their land. The Court struck down the condition for the permit on the grounds that the state must show an 'essential nexus' between the harm to be prevented and the condition imposed on the landowner. This essential nexus test examines the relationship between the public purpose of the regulation or state action and the individual harm to the landowner. Thus, an infringement on property rights would be justified only if it is essential to avoiding the public harm to which the landowner's threatened use may contribute. The means/end prong of due process analysis just became an element of the takings equation by shifting the burden back to the government to show a substantial relation between the restriction and the public welfare, a requirement that had been ousted from due process by *West Coast Hotel v Parrish*.[64]

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63 483 U.S. 825 (1987).

64 In footnote 3 to *Lucas*, Justice Scalia disputes Justice Brennan's claim that the Court is applying due process standards, yet Scalia's assertion that the due process rational basis test is different from the takings clause 'substantially advance' test is belied by his reliance on *Agins v City of Tiburon* (447 U.S. 255 (1980), which cites to *Nectow v City of Cambridge* (277 U.S. 183 (1928)), which cites to *Village of Euclid v Ambler Realty Co* (272 U.S. 365 (1926)), the latter two being due process cases.

And in the case of government exactions, this prong was further strengthened in the 1995 case of *Dolan v City of Tigard* [65] in which the Court struck down the city's demand for a dedication of land in the flood plain for a bicycle path in exchange for a building permit to expand the plaintiff's business. In further refining the means/end fit the Court demanded a 'rough proportionality' in fit between the harm caused by the development and the nature of the government exaction. *Nollan* and *Dolan*, therefore, bring into certain regulatory takings cases an additional analysis of the legitimacy of the governmental purpose and the fit between the government's actions and the prevention of harm. These are classic substantive due process issues that are being reborn in a stricter form in takings cases, cases that also shift the burden back to the government where it was located in the *Lochner* era.

On the fundamental liberties prong, the 1992 *Lucas v South Carolina Coastal Council* [66] case imported the due process issue of the reasonableness of the governmental action when the Court held that South Carolina's coastal zone protection act worked a taking if it unreasonably interfered with core property rights. In effect, the Court resurrected the premise that certain property rights are fundamental and that interference with those rights will constitute a per se taking under certain circumstances.[67]

Although none of these cases fully import economic substantive due process tests into the general takings calculus, the signs are all pointing in that direction for the future.[68] Rather than settle for an analysis of the law's burden on the landowner, which was the traditional rule in regulatory takings cases prior to 1987, the Court seems now to expect that the regulatory agency meet higher public welfare and means/end thresholds in

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65 512 U.S.

66 112 S.Ct. 2886 (1992).

67 It's not clear if this shift indicates a desire to resurrect fundamental property and contract rights ala *Lochner*, or simply create certain categorical takings for physical invasion or loss of all economic value. See *Loretto v Teleprompter Manhattan CATV Corp*, 458 U.S. 419 (1982).

68 The cases can be distinguished on their facts or narrowly interpreted as establishing minor exceptions; yet they clearly point us in the direction of a shift from Penn Central's three-prong ad hoc rule to a new set of standards that incorporate traditional due process calculations. The three-pronged ad hoc rule is defined *supra* n 62.

the process of showing their actions do not unduly burden the landowner. Of course, this is problematic. The burden to the landowner does not change just because the governmental goal happens to be particularly worthy. And if the goal is not worthy and the Court therefore finds the burden to be deserving of compensation, the government may continue down that path so long as it compensates the landowner, presumably even if the regulation does not further important public interests. If the two doctrines are kept separate, violation of due process would require invalidation of the law. It makes no sense, therefore, to import a due process test into the takings equation and then find that failure to meet it merely requires compensation when it would traditionally have required invalidation.

But what does this have to do with the property rights movement? I suggest that this desire to import *Lochnerian* due process issues into the takings clause is an effort by conservative justices to go back to the laissez faire economic freedoms of the *Lochner* period without answering to all the criticisms that struck it down the first time. In part this is a response to a somewhat legitimate need to heighten scrutiny of economic regulations that the stigma of *Lochner* otherwise would prevent.[69] But it is also fueled in part by a highly organized political movement that emphasizes the simplistic rhetoric of the takings clause. When the takings clause says 'private property shall not be taken,' they argue it should mean exactly that, that private property should never be adversely affected for the greater public good without compensation. Although the property rights advocates are able to argue about the complex abstractions in property law that property rights are legal entitlements to utilize resources in uninhibited ways, or that a taking of a single twig in the bundle of rights can be separated out into a discrete loss of property, they do not extend such sophistication to their interpretation of the word 'take' or distinguish it from the word 'deprive.'[70]

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69 This does not address the quite reasonable criticisms of economic due process that balancing economic liberties and regulations is precisely the kind of role we commit to legislatures and that judicial review of 'ordinary commercial transactions' are best left to the 'knowledge and experience of legislators.' *West Coast Hotel v Parrish*, 304 U.S. at 152.

70 See *Hodel v Irving*, 481 U.S. 704 (1987); Margaret Jane Radin, 'The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings,' (1988) 88 *Columbia Law Review* 1667, 1676 (arguing that every regulation of any portion of an owner's bundle of sticks is a taking of that portion).

A look at their efforts on the legislative front reveal a concerted effort to stifle land-use regulations at every turn. And because the demise of *Lochner* made it impossible to challenge economic and commercial legislation in terms of whether it reasonably advances an important public interest, expansion of the takings clause effects the same goal by attacking policy makers through the pocketbook.

THE TRAIL OF THE ELUSIVE PROPERTARIAN

The property rights movement, which until recent years consisted of a fringe coalition of die-hard western cowboys, midwestern family farmers, and urban libertarians, has now become a multi-billion dollar political movement. The faces are of small-time homeowners, struggling farmers, and senior citizens worried about property crimes.[71] But the money behind the faces comes from the National Mining Association, the Chemical Manufacturers Association, the National Association of Manufacturers, the American Petroleum Institute, the American Independent Refiners Association, the American Forest and Paper Association, the International Council of Shopping Centers in league with think tanks like the Cato Institute, the Defenders of Property Rights, and the Competitive Enterprise Institute.[72] These groups are bankrolling litigation, buying legislation, and

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71 Even the law reviews are not immune from the heart-wrenching stories of private individuals, as reflected in the stories of the 'blind and crippled music teacher,' James Hernandez, or the World War II hero, Paul Kollsman, or the 'wheel-chair-bound' Bernadine Suitum that Michael Berger and Gideon Kanner roll out in 'The Need for Takings Law Reform: A View from the Trenches - A Response to Taking Stock of the Takings Debate,' (1998) 38 *Santa Clara Law Review* 837, 839-840. Even Republican Vice Presidential Candidate Jack Kemp spoke of an unnamed Oregon farmer who allegedly was deprived of the right to use his road or to mend his fences, yet efforts to locate the source of the story were unsuccessful. Sugameli, *Takings Bills*, 527. See especially, William Michael Treanor, 'The Armstrong Principle, the Narratives of Takings, and Compensation Statutes,' (1997) 38 *William and Mary Law Review* 1151.

72 For instance, a quick trip to the following web sites will reveal an interesting assortment of claims that 'thousands of homes and thousands of acres of private land have been confiscated by the federal government and added to National Parks and National Forests, causing the federal domain to increase and the private sector to shrink' <http://www.cdfe.org/issues.html>; and see the site of the American Land Rights Association that lists the sponsors of its yearly congressional vote index at <http://www.landrights.org/_private/105%201st/1051cospon.html>. Of

funding judicial junkets with a very simple message: any infringement of one's property rights constitutes a taking for public use and must be compensated.[73] Even where there has been no diminution in market value, as with many historic preservation projects, landowners want a piece of the taxpayer's pie.

The explosion in takings and property rights legislation at both the federal and state levels is quite astounding. At the federal level the beginning of the movement was Ronald Reagan's Executive Order 12630 in 1988 that required all federal regulations and agency actions be analyzed for takings consequences.[74] That was swiftly followed in 1990 by a house bill that would apply Executive Order 12630 to future regulations, and bills followed every year thereafter that broadened the application to all federal agencies. In 1994 a compensation bill was introduced for American Heritage Areas, a program that *gives* federal money to designated areas. The biggest boost to the property rights movement was the 1994 Republican Contract with America that included a property rights provision. In response to that, the Private Property Protection Act of 1995 (HR 925) was introduced. That bill demanded compensation if the value of any affected portion of land was diminished by 10% or more. On the House floor this was changed to 20% but the House rejected an amendment that would look at all of the property, not just the affected portion, despite the Supreme Court's long-standing insistence that takings analysis cannot focus just on the affected portion.[75] HR 925 never made it out of the House. But that didn't stop Senator Bob Dole from introducing the Omnibus Property Rights Act of 1995 (SB 605) that would have required payment for any regulatory action that reduced by 1/3 or more the

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the 1998 co-sponsors, 228 were corporate sponsors and only 34 were individuals (less than 8%).

73 See Ruth Marcus, 'Issues Groups Fund Seminars for Judges: Classes at Resorts Cover Property Rights' *The Washington Post* (4/9/98) A1.

74 This history of property rights legislation is most thoroughly detailed in Sugameli, *Takings Bills.*

75 The Court has rejected the segmentation argument in *Penn Central Transp Co v NYC* and reaffirmed that position in *Concrete Pipe and Products of Cal Inc v Construction Laborers Trust For So* Cal, 113 S. Ct. 2264 (1993). See also *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 U.S. 470 (1987) and *Andrus v Allard*, 444 U.S. 51 (1979) for further refusal to accept segmentation arguments.

speculative value of any affected portion of a real, personal, or intangible piece of property. That bill died as well, the result of senate opposition.

Not surprisingly, most senators and representatives do not look favorably on converting the immense federal treasury into a cash cow for every person affected by a regulation and all these bills were shot down either in committee or in full house votes. None made it to the other house on an affirmative vote. But legislation at the state level has been far more successful. Every state has had at least one takings bill introduced and currently twelve states have enacted assessment legislation requiring that state agencies undertake a thorough takings assessment to determine the impact on every potential property owner.[76] Not surprisingly, the legislation effectively chills broad agency activities. Five other states have adopted compensation-type legislation that either provides for compensation when regulations diminish property rights in ways that don't rise to the level of a constitutional taking or that requires greater than 100% compensation for takings under eminent domain or reductions in market value over and above a certain percentage.[77] Notably, the only two states that have put the issue to public referenda, Arizona and Washington, discovered that the public were skeptical of the true protections to property rights these laws would entail.[78]

As a general rule, individual private landowners favor broad regulatory powers because they do not want to be subjected to large-scale environmental nuisances caused by cement plants, mines, logging, farm effluent, and other industrial uses. Despite the image of private landowners

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76 George Grimes Jr, 'Texas Private Real Property Rights Preservation Act: A Political Solution to the Regulatory Takings Problem,' (1996) 27 *St Mary's Law Review* 557, 588. The states are: Delaware, Idaho, Indiana, Kansas, Missouri, Montana, Tennessee, Utah, Virginia, Washington, West Virginia, Wyoming. Arizona had passed an assessment bill, but it was repealed by public referendum in 1994.

77 Fla. Stat. Ann. §70.001 (West Supp. 1996); Miss. Code Ann. §§ 49-33-1 to -19 (Supp. 1995); La. Rev. Stat. Ann. §§ 3601-3602, 3608-3612, 3621-3624 (West Supp. 1996); Tex. Govt. Code Ann. §§ 2007.001-.006, .021-0.26, .041-.045 (West Supp. 1996); N.D. Cent. Code §§ 28-32-01 to –03; and Wash. Legis. Serv. 261 (repealed by referendum, Nov. 7, 1995).

78 Sugameli, *Taking Bills* 563.

being told that they cannot protect their homes from forest fires because the kangaroo rat lives nearby, these takings bills are designed to protect corporate landowners. It is very revealing that 78% of all privately held land in the U.S. is owned by only 2.65% of private landowners. In contrast, the nearly sixty million owners of residential property own only three percent of all private land.[79] These takings bills are designed to protect the large landowner with the resources and sophistication to influence legislatures and bankroll litigation at the expense of the vast majority of small and residential landowners whose land will pay the cost of deregulation and whose pockets will fund the buyout.

From the political side, these property rights groups are pulling out all the stops. The website of Dick Welsh, founder of the National Association of Reversionary Property Owners (NARPO) gives details on how to get environmentally friendly politicians out of office and property rights advocates in. It suggests ways to disrupt town and county commission meetings by 'stacking' the audience with everyone available. It suggests that one bring in all of one's family members, including children, just to take up the seats that would otherwise be occupied by members voicing opposing views. It recommends being loud and vocal to attract the news media and reminds us that 'local elections are much easier to influence than the nationals. Besides, not much media attention is focused on the local elections' and therefore more influence can be imposed with less oversight.[80] And a trip to the NARPO website can lead one on a seemingly endless journey to property rights sites loaded with information about how to influence local politics. Interestingly, the site for the American Land Rights Association (ALRA) lists the financial sponsors of its yearly congressional vote index that tallies the federal legislators and their voting records on property rights issues.[81] The list of sponsors is a predictable medley of forestry, logging, mining, farming, cattle ranching, free enterprise, and development interests. On the 1998 co-sponsors list, there are 228 corporate sponsors to 34 individual sponsors, nearly 7 to 1, further

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79 Private Property Rights and Environmental Laws: Hearings Before the Senate Comm. on Env't and Pub. Works, 104th Cong. 33, (1996) S. Hrg. 104-299, at p. 205. See Sugameli, *Taking Bills* fn. 215.

80 See <http://www.halcyon.com/dick/election.html>.

81 <http://www.landrights.org>.

supporting the claim that this is a movement primarily funded by corporate development interests who use the plights of individuals to appeal to politicians while seeking to halt land-use controls that would restrict their development and exploitation rights.

I suggest that there are two principal reasons why this property rights movement has had the successes of the past 10 years. In the first place, the repudiation of *Lochner* era economic substantive due process probably was not a good idea.[82] If property rights are to have any meaning in the constitutional triad of life, liberty, and property, there should be some teeth in the property protections guaranteed by the constitution. To say that economic regulations should meet a legitimacy threshold of reasonable public necessity and a means/end fit may require more than the minimum level of scrutiny, the currently toothless rational basis test. Although the Court has attempted to heighten scrutiny in a few cases, it has done so in covert ways because of the stigma of *Lochnerism*. And although it does not make sense that the courts should be overseeing economic and commercial regulations that are, in point of fact, squarely within the province of legislative expertise, it may be reasonably argued that certain economic and property rights require more than the 'arguably plausible' rationale that has become the substance of rational basis review.

I don't believe this means the Court should adopt strict scrutiny, but it might mean elevating the due process requirements and continuing to compensate for regulations that 'go too far' in affecting land use and values. On the other hand, it is not reasonable for landowners to reap all the benefit when a governmental action causes their land to increase in value and yet complain when another action causes it to lose that value. Embargoes routinely affect the price of land but no one would suggest that Jimmy Carter's prohibition of wheat sales to the Russians after their invasion of Afghanistan required compensation to wheatland owners in South Dakota when their land values declined.

Secondly, current growth and migration patterns have created a situation in which high impact land uses caused by the demand for new goods and

82 See Keynes, *Liberty, Privacy, and Property: Toward a Jurisprudence of Substantive Due Process.*

resources come into conflict with low impact residential and conservation uses. *Boomer* is the quintessential land conflict case today. No longer can we tell industrial cement companies or slaughterhouses to move to the outskirts of our cities, because the suburbs will keep encroaching on them. Even the strip mines and clear cut timbering being done miles away from population centers upsets erosion patterns, taints water supplies, and fouls the air for downwind and downstream residential users. With urban sprawl comes a greater demand for privacy as rural residents move even further into pristine forests, beach cliffs, and mountain canyons seeking isolation and the perfect view. Yet at the same time we want titanium bicycles mined from under the Okefenokee swamp and sport utility vehicles made from stronger steel processed in the Pennsylvania steel mills, and which guzzle the gas being transported on the Exxon Valdez. We are a consumer culture that wants all the disposable creature comforts of the 1990s while those goods are produced anywhere but in our backyards.

The hypocrisy of the American consumer is legendary, but does it explain the seductive power of the property rights movement? On the one hand yes; the average residential landowner wants to continue believing in the myth that a man's home is his castle, that on his land he can do as he pleases, that the Constitution protects us from the overreaching of government. But on the other hand, the average residential landowner is scared to death of the pesticides from upwind farms, the threat of a nuclear meltdown in nearby power plants, and the invasion of everything from acid rain to cement dust. Residential landowners are generally in favor of zoning and air and water quality standards imposed on manufacturing facilities, greenspace buffers, and a green and healthy environment. But they would rather not pay for it. The allure of the property rights movement is ultimately a cry for a return to a simplified and healthier past, a past without all the problems of our modern urban societies. It is unfortunate that those advocating a shift to a simpler, more absolute world are precisely those commercial landowners whose very survival depends on the unfettered exploitation of natural resources, the blind consumption of an unaware market, and the unending greed of a capitalist economy. The irony, however, is that there never was a simpler past, a past in which the landowner's motto was *damnum absque injuria*, when a man could do anything on his land unfettered by governmental controls or the rights and interests of his neighbors.

Rather than hearken back to a non-existent, Edenic past, I would suggest that we seriously rethink the relation between economic value and land in striking the delicate balance between property rights and the governmental controls necessary to preserve the planet for future generations. We need to reexamine the role of land in our changing, post-modern society. Land regulations in 1922 were vastly different than they are in 1999. Reexamining the legal meaning of 'rights' in the property context should be just as high a priority as it has been in the context of individual liberties. And as with individual liberties, property rights will be hotly contested - not just as to substance, but as to the role of rights generally in our increasingly crowded world. Without advocating that we return to the *Lochner* era of laissez faire capitalism, I do advocate a serious reconsideration of the role of substantive due process in economic and commercial regulations, if for no other reason than to disaggregate due process from takings doctrines.[83] But with that reconsideration must come a serious commitment to weighing the relative merits of Pacific Lumber's rights to timber 2000-year-old redwoods and the rights of downstream landowners not to suffer the erosion of their land and the rights of future generations to be inspired by the magnificence of these natural giants. In principal, this means we seriously rethink whether the due process or takings clause should apply appropriations of land or to the market-dependent economic value of our land.

A STEWARDSHIP MODEL OF LAND OWNERSHIP IN THE POST-REAGAN ERA

I also suggest that while re-evaluating the nature of 'rights' under property law, we also re-evaluate the nature of 'ownership' over natural resources. The rights, if we call them that, of the public to have pure groundwater may supersede the individual landowner's rights to spray pesticides within the borders of his own land. The rights of future landowners to purchase land that has not been despoiled by mining, logging, and industrial uses may limit the scope of exploitation by any one owner. The rights of individuals

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83 I'm not alone in this wish. See John Echeverria and Sharon Dennis, 'The Takings Issue and the Due Process Clause: A Way out of a Doctrinal Confusion,' (1993) 17 *Vermont Law Review* 695; Summers, (1993) 142 *University of Pennsylvania Law Review* 837.

to make reasonable uses of their lands must surely be protected, but how do we draw the line *between damnum absque injuria* and *sic utere tuo ut alienum non laedas.*[84]

To begin with, I believe we should look to the centuries-old notion that certain natural resources are simply not appropriate for private ownership. As Justinian says, for instance, '[t]he things which are everybody's are: air, flowing water, the sea, and the seashore.'[85] Chapter 23 of Magna Charta and the medieval English treatise of Bracton both assert such a doctrine at the heart of the common law.[86] This exception to private property rights is at the heart of the public trust doctrine.[87] While some might disagree as to the actual origins of the doctrine, or its wisdom, there is a longstanding belief that certain natural resources are inappropriate for private ownership. The air, the running streams, and the oceans are the usual examples. But the public trust doctrine has been tentatively expanded to cover ground water and may justify abolition of the rule of prior appropriations of ground water acquisition in some of the western states.[88]

Liberal justifications for private property most frequently stem from John Locke's labor theory that human labor invested in a thing gives rise to a pre-political property right in the thing.[89] Protection of that pre-political property is a primary responsibility of legitimate government. Republican theories, on the other hand, see the end of government as the promotion of the common good and that rights created by the polity are subject to limitation by the polity.[90] As legal historians have shown, both Republican and Liberal values underlay the Constitution and reflect an inherent tension

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84 These are the two competing nuisance doctrines, meaning 'harm without injury [or remedy]' and 'use your own property in such manner as not to injure that of another' respectively.

85 *Justinian Institutes*, 2.1.1-2.1.6 at 55 (P Birks & G McLeod trans. 1987).

86 *Bracton on the Laws and Customs of England*, vol. 2, ed. S E Thorne (1968), 39-40.

87 Charles F Wilkinson, 'The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine,' (1989) 19 *Environmental Law* 425, 429.

88 Wilkinson, Ibid.

89 John Locke, *Second Treatise of Government* chap v.

90 Treanor, *Original Understanding* 820-825.

between the takings clause and the police power.[91] This tension is aptly reflected in the two competing civil-law adages, *damnum absque injuria* and *sic utere*, the former protecting the landowner's rights to use and develop his land and the latter protecting neighbors from those harmful uses. But rather than identify certain resources or things to which we apply the Republican public trust doctrine - like the air and water - while recognizing liberally-motivated private property rights over such other things as development rights, 2000-year-old redwoods, or even private residential land, I would suggest that we reinvest the notion of a property right with both values. Thus, even the quintessential private property would be subject to Republican values by the recognition of the public's or future generations' interests in the thing. While this might mean I cannot chop down certain trees on my land because they contribute to the air quality of the area, they shade the land and reduce greenhouse effects, and they contribute to the aesthetic quality of my neighborhood, I may install a hideous staircase in my house that will be the bane of all future homeowners.

I also believe we can shift back to the basic principles of common-law nuisance for support for the idea that one should use one's land so as not to injure the rights of another. A somewhat toothless version of this underlies the nuisance exception articulated by Justice Scalia in *Lucas*. But I am not so sure that it has to be toothless. In response to the Pacific Lumber case, a downstream rancher sued the California Dept. of Forestry and Fire Protection claiming that the Department's granting of a clear-cutting permit to Pacific Lumber allowed them to cut on steep forestlands that resulted in excess runoff that cut away the land of downstream residents.[92] Similarly, one of the principal issues in the New World Mine was the likely result of cyanide runoff in the rivers and streams of Yellowstone.[93] Why these projects, which have been determined will cause permanent ecological

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91 Joyce Appleby, *Liberalism and Republicanism in the Historical Imagination* (1992) 322-39; Lance Banning, 'Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic', (1986) 43 *William and Mary Law Review*; Isaac Kramnick, the 'Great National Discussion': The Discourse of Politics in 1787, (1988) 45.3 *William and Mary Law Review.*

92 Glen Martin, 'State Remiss in Allowing Clear-Cutting in Forest, Court Rules/Rancher's Success May Challenge Headwaters' Deal', *The San Francisco Chronicle* (3/16/99) A16.

93 'Land Deal Scuttles Mine', *The Toronto Star* (8/13/96) B3.

damage on neighboring lands, cannot be stopped under common-law nuisance grounds is not at all clear. The federal government, as a neighboring landowner, is just as entitled to prevent noxious uses as a private neighboring landowner. Ironically, as in the Pacific Lumber case, the government is paying the landowner not to timber at the same time as it might be paying the neighbors for the value of diminution to their land when it does permit the timbering.[94]

But the stewardship model is more than simply recognizing that the public has rights in certain broad categories of natural resources, and it demands a more pro-active legal stance than the currently neutral nuisance doctrines that allow landowners to sue each other for damage but do nothing to prevent the damage in the first place. Ironically, one of the slogans of many environmentalists and politicians is that we need to leave the planet in at least as good a shape for our children as we found it. I would suggest that analogies to our children is the best way to think of this stewardship model of land. For hundreds of years the Anglo-American legal system treated custody of children as a matter of parental rights, well, paternal rights to be precise. The law changed when mothers started seeking custody of their children under arguments that if anyone was entitled to a 'right' under traditional labor theories it was they, not the fathers who had very little direct involvement in the caregiving of children.[95] But when the courts were faced with two equally deserving parents claiming they had legal rights to custody, the conflict was resolved only by recognizing a weaker set of relative rights for parents *vis-à-vis* third parties, but a best interests of the child standard that would subsume the parental dispute into the larger and more important issue of the child's welfare.

Just as opponents to the recognition of maternal custody rights called the legislation the 'Robbery of Father's Bill,'[96] there will be inevitable

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94 The State of California was held remiss in allowing the activity, while not allowing the activity would have opened the state to a takings challenge from Pacific Lumber. Martin, 'State Remiss in Allowing Clear-Cutting', *The San Francisco Chronicle* (3/16/99) A16.

95 Danaya C Wright, '*DeManneville v DeManneville*: Rethinking the Birth of Custody Law Under Patriarchy' (1999) 17 Law and History Review 247.

96 Edwin Hill Handley, 'Custody of Infants' Bill' (1838) 7 *British and Foreign Review* 269-411.

opposition from those who see regulations as a greater infringement of their rights. Nonetheless, in the realm of property law, I believe we will find ourselves moving further and further away from a rhetoric of rights when we speak about land, and closer to a notion of the best interests of the land. Although this does not mean that land will be taken out of the hands of the current owner and placed into land trusts that will preserve and protect it; it does mean that current owners will have a protected status as against non-owners, just as parents have preferences over non-parents in making custody decisions. But the ownership status cannot be a trump. Just as parents who abuse their children lose the privilege of their custody, landowners who do the same thing may lose their title.

But how do we determine 'land abuse'? In the same way in which colonial governments passed ordinances that caused forfeiture if a landowner did not remove the noxious and poisonous stinking weeds from the land in the name of protecting the general public need for a wholesome environment, a current government can regulate land abuses that cause harmful effects on neighbors or leave the land permanently scarred. And just as the doctrine of waste entails a notion of controlled use in the name of protecting the remainder from permanent injury, a welfare model of land ownership would protect the remainder for future owners. I believe the law has a way to go before it catches up with the values and needs of the polity, but some of those values are already voiced by the philosophers and poets of our time. I would like to think that the law can learn from other perspectives, for we do not have a monopoly on truth. As Marjorie Kinnan Rawlings concludes her memoir of living at Cross Creek, Florida, we begin to see what the law has difficulty envisioning — the inevitability of time:

> Who owns Cross Creek? The red-birds, I think, more than I, for they will have their nests even in the face of delinquent mortgages. And after I am dead, who am childless, the human ownership of grove and field is hypothetical. But a long line of red-birds and whippoorwills and blue-jays and ground doves will descend from the present owners of nests in the orange trees, and their claim will be less subject to dispute than that of any human heirs. Houses are individual and can be owned, like nests, and fought for. But what of the land? It seems to me that the earth may be borrowed but not bought.