Takings and the Nature of Property

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I. Introduction

The issues surrounding governmental interference with the rights of private property have been a source of recurrent conflict throughout American social and political history. From Revolutionary-Era debtor relief laws,[1] to early nineteenth-century legislative grants of private monopolistic and condemnatory powers,[2] to the great abolitionist struggles of the Civil War Era,[3] to the rise of the twentieth century's regulatory state,[4] bitter rhetorical and political wars have been waged about the nature, extent, and sanctity of claimed individual rights of private property.

The typical reduction of property struggles in American political rhetoric and legal commentary to individual-state conflict—more precisely, to individual-state *constitutional* conflict—has been a subject of some mystification to observers abroad.[5] Clearly, issues about the nature, scope, and legitimacy of private property occur in contexts far more varied than simply that of the institutional conflict between the individual and government. Indeed, all of private property law—the grist of most interpersonal conflict and legal work in property law—involves no explicit role for the state at all.[6] However, it is the struggle between individual and collective, as enshrined in various constitutional guarantees, that has captured and preoccupied the American debate about the rights of private property.[7]

Of all of the possible sources of constitutional protection for private property,[8]

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1. See James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (New York: Oxford University Press, 1992) at 37, 41.
2. See Morton J. Horwitz, *The Transformation of American Law 1780-1860* (Cambridge: Harvard University Press, 1977) at 47-53, 122-39; William B. Scott, *In Pursuit of Happiness: American Conceptions of Property from the Seventeenth to the Twentieth Century* (Bloomington: Indiana University Press, 1977) at 137-58.
3. See, e.g., Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1977) *passim*; Scott, *supra* note 2 at 94-113.
4. See Ely, *supra* note 1 at 101-34; Lawrence M. Friedman, *A History of American Law* (New York: Simon & Schuster, Inc., 1985) at 439-66.
5. See, e.g., A.J. Van der Walt, "Subject and Society in Property Theory—A Review of Property Theories and Debates in Recent Literature: Part II," 1995-2 J. of S. African L. 322 at 332 (discussing the "typically American" framing of property issues in terms of the "constitutional struggle about takings and due process").
6. Of course, one could argue that the state is nonetheless (inevitably) involved, through the threat or use of its enforcement powers. See, e.g., Felix Cohen, "Dialogue on Private Property" (1954) 9 Rutgers L. Rev. 357 at 374.
7. For an interesting discussion of the history of property in American life, as mirrored through constitutional issues, see Ely, *supra* note 1 *passim*.
8. See, e.g., U.S. CONST. art. 1, sec. 10 ("No State shall ... pass any ... Law impairing the Obligation of Contracts ... ."); *ibid.* amend. V ("No person shall be ... deprived of ... property, without due process of law; nor shall private property be taken for public use without just compensation."); *ibid.* amend. XIV, sec. 1 ("[N]or shall any State deprive any person of ... property, without due process of law ... .").

it is the Takings Clause of the Fifth Amendment to the United States Constitution that has emerged as the contemporary battleground for real and symbolic struggles between individual property claims and the prerogatives of state power. The text of the Fifth Amendment is quite simple: "nor shall private property be taken for public use, without just compensation."[9] In what they claim to be the spirit of these words, property-rights activists in the United States have proposed a host of legislative initiatives on the national and state levels.[10] With the practical unavailability of economic-rights protection through substantive judicial review of governmental regulation, property-rights advocates have turned in increasing numbers to "takings" arguments as a way to galvanize public support and roll back what they argue to be oppressive governmental interference with the rights of private property.[11] They

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9. See, *supra* note 8. This amendment has been held to apply to the activities of the individual states through the "incorporation" theory of the Fourteenth Amendment to the United States Constitution. See *Dolan* v. *City of Tigard*, 114 S.Ct. 2309, 2316 (1994); *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 278-79 (1943); *Chicago, Burlington, & Quincy Ry. Co.* v. *Chicago*, 166 U.S. 226, 235-41 (1897).

10. Initiatives on the national level include the Private Property Protection Act, H.R. 925, 104th Cong., 1st Sess. (1995) (passed by the House of Representatives on March 3, 1995) (awards property owners compensation for diminutions in value of the affected "portion" of property by 20 percent or more, caused by enforcement of the Federal Water Pollution Control Act, the Endangered Species Act, the Food Security Act, and other laws); the Private Property Rights Act, S. 22, 104th Cong., 1st Sess. (1995) (requires a "takings impact analysis" for every federal policy, regulation, or proposed law that is likely to diminish the value of property or result in its taking under the Constitution); Private Property Rights Restoration Act, S. 145, 104th Cong., 1st Sess. (1995) (requires the compensation of owners whose land is devalued 25% or more, or more than $10,000, due to government regulation); Property Rights Litigation Relief Act, S. 135, H.R. 489, 104th Cong., 1st Sess. (1995) (establishes standards for takings claims and eliminates jurisdictional disputes between federal courts and the U.S. Court of Federal Claims); Private Property Owners Bill of Rights, S. 239, H.R. 790, 104th Cong., 1st Sess. (1995) (requires the federal government to reimburse landowners when federal action to protect wetlands or endangered species results in a 50% reduction in property value); Job Creation and Wage Enhancement Act, H.R. 9, 104th Cong., 1st Sess. (1995) (awards property owners compensation for any reduction in the value of property that equals or exceeds 20% of the property's value, if the reduction is a consequence of a regulatory limitation on an otherwise lawful use of the property). It was recently estimated that between 80 and 90 bills addressing property rights were also introduced in the legislatures of 30 states during 1994. John Ripley, "Property Rights Advocates Now More Hopeful" (November 26, 1994) Bangor Daily News 1.

One prominent academic commentator has testified that the failure of the Supreme Court to "formulate meaningful standards" for regulatory takings questions and to "put some teeth into the [T]akings [C]lause" renders a legislative response such as the Private Property Rights Act an appropriate one. Hearing Before the Subcomm. on the Constitution, House Comm. on the Judiciary, 104th Cong., 1st Sess. (1995) [Feb. 10, 1995] (statement of Prof. James W. Ely, Jr.).

11. In the words of Representative Newt Gingrich, Speaker of the United States House of Representatives:

> [P]eople had family ranches that were three and four generations old[.] [T]hey suddenly had a bureaucrat show up from Washington and say, "I now control how you live on your family property. You can't take me to court, you will not get compensated[,] but I've just changed [the] total value of your family inheritance." And people got into a rage. And across all of the West, in particular, you have people who are just enraged by the way in which they've been dealt with by government bureaucracies. ... [The Private Property Rights Act] is an effort to begin to re-balance ... .

Rep. Newt Gingrich, "Daily News Conference" (March 3, 1995) Federal News Service. Nancie Marzulla, president of the organization "Defenders of Property Rights", has argued that pending property rights bills "will help slay the regulatory monster." Greenwire (January 6, 1995).

argue that "our democracy was founded on principles of ownership, use, and control of private property";[12] and that fundamental American freedoms are threatened by the failure to confront the wholesale "taking" of the "rights" of private property by governmental regulation.[13]

The Takings Clause has been the subject of scrutiny by the United States

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Clashes in ideas about property, individual rights, and governmental interference have led to an escalating rhetorical war. Recent public debate in the state of Florida is typical:

> [Representative] Carlos Valdes said ... [that] he is all too familiar with what happens to an individual's property rights when government becomes too powerful.
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> "I had my family farm taken from [me]", the Cuban immigrant and Republican State representative ... told a rally of property rights advocates.
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> Overzealous regulation of private land, he said, is slowly doing in Florida what Castro's revolution did in his native Cuba.
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> "I'll be damned if I stand idle in this Capitol and let them take it away from us", said Valdes, one of 54 lawmakers supporting the Private Property Rights Act.

Craig Quintana, "Property Rights Advocates Garner Support for State Bill" (February 10, 1994) The Orlando Sentinel C1.

> Angered by bills that would give more rights to property owners .... a group of North Florida environmentalists has proposed the "Pavers Bill of Rights".
>
> If Florida legislators ... give more rights to developers, they should just let them pave the entire state and get it over with, say environmental activists ... .
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> ....
>
> Mocking supporters of the Private Property Rights Act, the group ... has proposed a bill that would:
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> Eliminate all environmental permits "and let developers get on with the process of paving Florida."
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> Remove all restrictions on dredging and filling shorelines, rivers, lakes, and swamps.
>
> Allow the destruction of all vegetation.
>
> Allow the elimination of all wildlife except for examples in museums, zoos, and aquariums.
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> ....
>
> Eliminate all public notice requirements and ban citizen objections to development.

Lucy Morgan, "Pave State; Don't Save It" (February 19, 1994) St. Petersburg Times 4B.

12. Private Property Owners Bill of Rights, S. 239, H.R. 790, 104th Cong., 1st Sess. (1995).
13. Although compensation initiatives do not (by their terms) immunize private property from governmental interference, the prospect of governmental liability for the payment of billions of dollars to property owners affected by land use, environmental, safety, and other laws has powerful potential to crush many areas of established governmental regulation. In a press release touting the Private Property Rights Act, United States Senator Alan Simpson estimated that "[t]here are literally billions in claims filed against the Federal government by landowners who believe their private property has been taken by the Federal government without just compensation as required by the Constitution." Sen. Alan Simpson, "Press Release" (March 3, 1994) Federal Document Clearing House, Inc. Congressional Press Releases. In Florida, for instance, a coalition of growth-management groups estimated that the proposed Florida Private Property Rights Act would require $16.7 billion a year in state, county, and local compensation, if existing environmental and planning laws were to remain in force. Craig Quintana, "Property Rights Advocates Garner Support for State Bill" (February 10, 1994) The Orlando Sentinel C1. See also Philip D. Hilts, "Study Pinpoints Death Risks From Small-Particle Pollution" (March 10, 1995) The New York Times A20 (regulation of small particle pollution, recently shown to "cost[] tens of thousands of American lives each year", would be precluded by property-rights legislation pending in Congress).

    Such concerns are not limited to the United States. See, e.g., Tim Bonyhady, "Property Rights" in Tim Bonyhady, ed., *Environmental Protection and Legal Change* (Sydney: The Federation Press, 1992) 41 at 48 ("This question of compensation dwarfs all other issues when one comes to consider the effect of Australian environmental law on property law.").

Supreme Court.[14] Scholars have also examined the "takings" question, arguing when—on the basis of social, economic, or other theories—compensation should be paid by government.[15] Most recently, it has been argued that attention should

14. The Supreme Court's opinion in *Mugler* v. *Kansas*, 123 U.S. 623 (1887), is generally considered to mark the beginning of modern takings law in the United States. See, e.g., Joseph L. Sax, "Takings, Private Property and Public Rights" (1971) 81 Yale L.J. 149 at 149 n.3 [hereinafter "Takings, Private Property and Public Rights"]. Since the advent of that opinion, more than eighty decisions construing the Takings Clause have been issued by the Court. Important decisions include *Dolan* v. *City of Tigard*, *supra* note 9; *Lucas* v. *South Carolina Coastal Council*, 112 S.Ct. 2886 (1992); *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299 (1989); *Bowen* v. *Gilliard*, 483 U.S. 587 (1987); *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987); *Hodel* v. *Irving*, 481 U.S. 704 (1987); *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470 (1987); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987); *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986); *Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229 (1984); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Agins* v. *Tiburon*, 447 U.S. 255 (1980); *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74 (1980); *Andrus* v. *Allard*, 444 U.S. 51 (1979); *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979); *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104 (1978); *Armstrong* v. *United States*, 364 U.S. 40 (1960); *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155 (1958); *United States* v. *Causby*, 328 U.S. 256 (1946); *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945); *United States* v. *Willow River Power Co.*, 324 U.S. 499 (1945); *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926); *James Everard's Breweries* v. *Day*, 265 U.S. 545 (1924); *Omnia Commercial Co., Inc.* v. *United States*, 261 U.S. 502 (1923); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922); *Block* v. *Hirsh*, 256 U.S. 135 (1921); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915); *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349 (1908); *Powell* v. *Pennsylvania*, 127 U.S. 678 (1888).

Repeated efforts by the Supreme Court to articulate workable principles for decisions under the Takings Clause have resulted in a body of law of profound doctrinal incoherence. If there is any point of agreement, it is perhaps with Justice Brennan's observation that "[t]he question of what constitutes a 'taking' [of property] for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty." *Penn Central Transp. Co.* v. *New York City*, *supra* at 123.

For trenchant critiques of the development and current state of the Supreme Court's takings doctrine, see, e.g., Bruce A. Ackerman, *Private Property and the Constitution* (New Haven: Yale University Press, 1977) at 113-67; Gregory S. Alexander, "Takings, Narratives and Power" (1988) 88 Colum. L. Rev. 1752; Richard A. Epstein, "Takings: Descent and Resurrection" 1987 Sup. Ct. Rev. 1; Glynn S. Lunney, Jr., "A Critical Reexamination of the Takings Jurisprudence" (1992) 90 Mich. L. Rev. 1892; Frank Michelman, "Takings, 1987" (1988), 88 Colum. L. Rev. 1600; Gary Minda, "The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Takings Problem" (1991) 62 U. Colo. L. Rev. 599 at 604-15; Jeremy Paul, "The Hidden Structure of Takings Law" (1991) 64 S. Cal. L. Rev. 1393; Andrea L. Peterson, "The Takings Clause: In Search of Underlying Principles (pt. 1)" (1989) 77 Cal. L. Rev. 1299 at 1305-41; Carol M. Rose, "Mahon Reconstructed: Why the Takings Issue is Still a Muddle" (1984) 57 S. Cal. L. Rev. 561; Jed Rubenfeld, "Usings" (1993) 102 Yale L.J. 1077 at 1088-94; Joseph L. Sax, "Takings and the Police Power" (1964) 74 Yale L.J. 36 at 38-46 [hereinafter "Takings and the Police Power"]; Joseph William Singer & Jack M. Beermann, "The Social Origins of Property" (1993) VI Canadian J.L. & Juris. 217 at 220-28.

15. See, e.g., Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge: Harvard University Press, 1985) at 5-31 (advancing natural rights, contractarian, and historical theories); Stephen R. Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990) at 425-36 (compensation questions should be considered in light of principles of utility, efficiency, justice, equality, and "desert"-based labor); Lawrence Blume & Daniel L. Rubinfeld, "Compensation for Takings: An Economic Analysis" (1984) 72 Cal. L. Rev. 569 (evaluating the payment of compensation for regulatory takings against the goal of economic efficiency); Jules L. Coleman, "Corrective Justice and Property Rights" (1994) 11 Soc. Phil. & Pol'y 124 at 136-37 (distinguishing between systematic and non-systematic redistributive takings, in determining when compensation is required); Robert C. Ellickson, "Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics" (1989) 65 Chi.-Kent L. Rev. 23 at 37-38. (discussing the role of psychological issues in takings cases); Daniel

be paid to that most forgotten part of the Takings Clause, the requirement that the taking, to be compensable, must be "for public use."[16]

Whatever one's theory of compensation might be, it is apparent that the threshold question—what "property" is, for constitutional purposes—is most crucial.[17] There is little point in discussing whether a taking of property promotes efficiency, or creates demoralization costs, or is (truly) for "public use", if we have no understanding of what property is in the first place. In fact, the answer to this question would seem, in many cases, to be determinative of later ones. Until we know what the property at stake is, it is impossible to evaluate whether it has been taken, or whether compensation for its loss should be paid.

Despite this importance, finding any coherent, underlying understanding of constitutionally cognizable property in Supreme Court takings cases is a challenging task. For a concept of such crucial significance, the sheer absence of articulation by the Court of its shape, contours, or other identifying characteristics is astonishing. In fact, in the mountains of Supreme Court takings jurisprudence in recent years, comparatively little attention has been devoted to this first, threshold question. The question of the "property" involved generally receives superficial gloss, with the Court moving quickly to the issue of "taking". A clear example of this phenomenon appears in the Supreme Court's very recent takings decision, *Dolan* v. *City of Tigard*.[18] Heralded by the New York Times as "a substantial victory for advocates of private property rights" and as establishing "new limits" on government,[19] this case involved an attempt by the City of Tigard, Oregon, to condition the approval of a building permit on the dedication of a portion of the owner's land for flood

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A. Farber, "Public Choice and Just Compensation" (1992) 9 Const. Commentary 279 (advocating a "uniformity theory" for regulatory takings); William A. Fischel, "Introduction: Utilitarian Balancing and Formalism in Takings" (1988) 88 Colum. L. Rev. 1581 (advocating an "economic-utilitarian approach" to takings and land use); William A. Fischel & Perry Shapiro, "Takings, Insurance, and Michelman: Comments on Economic Interpretations of 'Just Compensation' Law" (1988) 17 J. Legal Stud. 269 at 293 (arguing that theories of moral hazard and risk aversion "may illuminate the taking question"); Frank I. Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 Harv. L. Rev. 1165 at 1173-83, 1214-57 (advocating use of an economic calculus which considers the "efficiency gains" of the governmental action, the "settlement costs" involved in evaluating injuries, and the "demoralization costs" of uncompensated takings); Margaret Jane Radin, "The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings" (1988) 88 Colum. L. Rev. 1667 (arguing that a distinction between "personal" and "fungible" property generates takings guidelines); T. Nicolaus Tideman, "Takings, Moral Evolution, and Justice" (1988) 88 Colum. L. Rev. 1714 (arguing that takings should be guided by a conception of justice that embodies "equality, stability, efficiency, and authority").

16. See generally Rubenfeld, *supra* note 14. Cf. Sax, "Takings and the Police Power," *supra* note 14 at 62-67 (distinguishing situations where losses to individual property owners arise from governmental activity which benefits a government enterprise, and those where losses arise from governmental efforts to mediate conflicting private claims—with the former compensable and the latter not).

17. See, e.g., Bonyhady, *supra* note 13 at 45 ("The broader the concept of ownership and property ..., the more difficult it is for government to create new land use regimes ... . [T]he more ownership and property are seen as limited rights, involving no more than the autonomy which society can afford individuals in particular contexts, the easier it is for government to constrain individuals for larger social ends ... .").

18. 114 S.Ct. 2309 (1994).

19. Linda Greenhouse, "High Court Limits the Public Power on Private Land" (June 25, 1994) The New York Times A1.

control and traffic improvements. The question before the Court was whether the City's dedication requirements "constituted an uncompensated taking of ... property under the Fifth Amendment."[20] At various points in his opinion, Justice Rehnquist (writing for the majority) alternately implied that the "property interest" at stake was the right to exclude[21] (which is sometimes portrayed as absolute in nature[22] and sometimes not[23]); the right to use (which is apparently contingent in nature)[24]; the entire parcel owned;[25] or the strip subject to dedication.[26]

In another recent case, *Lucas* v. *South Carolina Coastal Council*,[27] the Court identified "two discrete categories of regulatory action" which are categorically compensable: regulation involving physical "invasion", and regulation which "denies [the owner] all economically beneficial or productive use of [her] land."[28] Presumably, situations other than these require the balancing of individual interests and public interests involved. Obviously crucial to these tests is what, in a constitutional sense, the "property" is—something which Justice Scalia acknowledged is "regrettably" imprecise and inconsistent under this, and other, decisions.[29] He suggested consideration of "the owner's reasonable expectations" or possibly "the [s]tate's law of property"—ending with the observation that "[i]n any event, we avoid this difficulty in the present case, since the 'interest in land' that Lucas has pleaded (a fee simple interest) ... [has] a rich tradition of protection at common law ... ."[30]

The problems in the Court's understanding of property in these two cases are not unique. Indeed, the understanding of property found in the Court's takings cases has been criticized as essentially incoherent.[31]

Popular and political images of property are no more searching. Proposed legislation which requires payment for "takings" or for diminution in "value" articulates no understanding of those terms, other than (presumably) an "obvious" or "popular" one.[32] Politicians' exhortations about tradition, family values, and so forth as the source of protected property rights[33] offer no articulation of what—in fact—these rights are, or why—on the basis of reasoned argument, or otherwise—they should be protected.

The reluctance of courts, commentators,[34] and politicians to squarely face the

20. *Dolan* v. *City of Tigard*, *supra* note 9 at 2315.
21. *Ibid.* at 2316.
22. *Ibid.*
23. *Ibid.* at 2317.
24. *Ibid.* at 2316.
25. *Ibid.* at 2316 n.6.
26. *Ibid.* at 2316.
27. 112 S.Ct. 2886 (1992).
28. *Ibid.* at 2893.
29. *Ibid.* at 2894 n.7.
30. *Ibid.*
31. See, e.g., Michelman, *supra* note 14 at 1628; Peterson, *supra* note 14 at 1308-16; Singer & Beermann, *supra* note 14 at 217.
32. See proposed national and state legislation, *supra* note 10.
33. See, *supra* notes 10-13, and accompanying text.
34. Several commentators have explored the nature of property in the particular context of the Takings Clause. Particularly valuable work includes that by Ackerman, *supra* note 14 (describing

issue of the nature of property is not surprising. Any attempted exposition of the nature of property, as an abstract or applied concept, is of notorious difficulty. As one analyst (in apparent frustration) commented, "what is property may depend upon the action that is dependent upon the answer."[35] The difficulty of the task does not, however, absolve us from it. As long as the idea of protection of individual property carries such rhetorical, political, and legal power, we must face what—as a practical matter—we advocate and protect.

In this essay, I shall use an examination of the decisions of the United States Supreme Court under the Takings Clause as the point of entry into questions about the nature, structure, and function of property. Although these decisions obviously do not reflect the whole of our legal (let alone extra-legal) understandings of property, they do reflect legal and popular understandings in a context of tremendous actual and symbolic importance. They also present, in a particularly striking manner, what I shall call the "two models" of property—models which can be used to illuminate the complexities, and inadequacies, of conventional property ideas.

In a prior essay, I argued that there are, in fact, two different conceptions of property that can be found in the Supreme Court's takings cases, and in other contexts. Under the first conception, property represents and protects the individual's autonomous sphere. It is identified individual interests, which—in the adjustment of societal conflict—are asserted against the collective. It represents our "rights", bounded and protected, against state coercive power.[36]

It is this understanding of property that is most common.[37] The idea of property as "rights", or as that which describes the individual's protected interests, accords with our ordinary notions of what property is and the protection it affords. It is this understanding that is encountered in common conversation and political rhetoric, and in juridical, philosophical, and other scholarly work.[38]

"Ordinary Observing" and "Scientific Policymaking" approaches to property and takings questions); Gregory S. Alexander, "Takings and the Post-Modern Dialectic of Property" (1992) 9 Const. Commentary 259 at 264 (discussing "self-regarding" and "communitarian" visions of property, which lead to "two different and incompatible understandings of ... property rights"); Michelman, *supra* note 14 at 1628 (discussing common understanding of property and its role in takings law); Frank I. Michelman, "Possession vs. Distribution in the Constitutional Idea of Property" (1987) 72 Iowa L. Rev. 1319 at 1349-50 [hereinafter "Possession vs. Distribution"] (discussing the "troubled relation between property's possessive and distributive sides", in the context of the Takings Clause); Rose, *supra* note 14 at 587 (discussing a "fundamental tension" in American property tradition, due to the need to protect property expectations and to achieve socially desirable ends); Singer & Beermann, *supra* note 14 (discussing the dependence of property rights on instrumental and value judgments which should be expressly addressed in takings law).

35. Francis S. Philbrick, "Changing Conceptions of Property in Law" (1938) 86 U. Pa. L. Rev. 691 at 694.

36. See Laura S. Underkuffler, "On Property: An Essay" (1990) 100 Yale L.J. 127 at 128-33.

37. See Ackerman, *supra* note 14 at 97-103 (describing the layperson's "ordinary understanding" of the nature and function of property).

38. This understanding of property has been recognized and variously described by commentators. See, e.g., Ackerman, *supra* note 14 (describing the "Ordinary Observing" approach to property); Alexander, *supra* note 34 at 264 (discussing "self-regarding" vision of property); Michelman, "Possession vs. Distribution," *supra* note 34 at 1349-50 (discussing property's "possessive" understanding); Rose, *supra* note 14 at 587 (discussing the expectations-protecting understanding of property rights). See also C.B. Macpherson, "The Meaning of Property" in C.B. Macpherson, ed., *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978)

Under the second conception, property is quite different. Under this understanding, individual interests are part of the concept of property, but there is no assumption of the primacy of individual interests over collective ones.[39] Property *describes the tension* between individual and collective, rather than a particular outcome of that tension. It does not represent the autonomous sphere of the individual, to be asserted against the collective; rather, the tension between individual and collective *is a part of the concept of property*, itself.[40]

The finding of two different and apparently competing conceptions of property raises as many questions as it answers. Why are two models of property used in these cases? What is the precise nature, and function, of each? Are there qualities

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1 at 3 [hereinafter "The Meaning of Property"] ("[P]hilosophers, jurists, and political and social theorists have always treated property as a right ...[,] an enforceable claim to some use or benefit of something.").

The idea of property as the individual's autonomous sphere, asserted against collective power, can be traced to ideas about self-ownership and the creation of individual rights in those parts of our environment with which we mix our labor or infuse our wills. See, e.g., John Locke, *Two Treatises of Government* [3rd ed. 1698] (Cambridge: Cambridge University Press, 1988), P. Laslett, ed., Sec. 27 at 287-88; G.W.F. Hegel, *Elements of the Philosophy of Right* (Cambridge: Cambridge University Press, 1991), Allen W. Wood, ed., Secs. 41-49, at 73-81. See also Alan Ryan, "Self-Ownership, Autonomy, and Property Rights" (1994) 11 Soc. Phil. & Pol'y 241 at 242-54 (discussing history of self-ownership ideas). *Cf.* C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1962) at 3 (discussing assumption of seventeenth-century individualist political theory that an individual "is free inasmuch as he is proprietor of his own person and capacities". Society, in this view, is a series of "relations of exchange between proprietors. Political society becomes a calculated device for the protection of this property and for the maintenance of an orderly relation of exchange.").

39. See Underkuffler, *supra* note 36 at 142, 144-45.

40. An example of this conception of property is the "historical" or "comprehensive" approach to property which I have previously described. Under this historical understanding, property embodies a broad range of human liberties *within a collective context* of support and restraint. Underkuffler, *supra* note 36 at 133-42. Other property notions which might be classified as belonging to this second, broad conception of property include older notions of property systems based upon ideas of trust and duties as well as rights. See, e.g., C.B. Macpherson, "Human Rights as Property Rights" (1977) 24 Dissent 72 at 76-77 (describing broad, seventeenth-century understandings of property as including "the use[,] ... development and enjoyment of human capacities" and "rights, enforced by law or custom, to a certain standard of life"); Philbrick, *supra* note 35 at 707-10 (discussing feudal origins of the idea that property ownership involves the assumption of duties, including public ones); Carol M. Rose, "Property as Wealth, Property as Propriety" in John W. Chapman, ed., *Compensatory Justice: Nomos XXXIII* (New York: New York University Press, 1991) 223 at 232-39 (discussing property as involving ideas of "propriety", in the eighteenth century and before).

The idea that property may have more complex meanings is not something of only arcane, historical interest. Indeed, Kevin Gray has argued that the concept of property rests upon "an inner morality" which includes both individual and community concerns. Drawing upon old and new understandings of property, he argues that individual property rights must be seen as subject to the claims of "equitable property", or the values of human dignity and "the sense of the reciprocal responsibility which each citizen owes to his or her community." Kevin Gray, "Equitable Property" (1994) 47 Current Legal Prob. 157 at 208-09. See also A. M. Honoré, "Ownership" in A.G. Guest, ed., *Oxford Essays in Jurisprudence* (Oxford: Clarendon Press, 1961) 107 (describing "liberal" conceptions and "social" conceptions of ownership); Carol M. Rose, "Environmental Lessons" (1994) 27 Loy. L.A.L. Rev. 1023 at 1042-43 [hereinafter "Environmental Lessons"] (describing the origins of ideas of stewardship and trusteeship, commonly used in environmental discourse, in property-rights ideas); Joseph William Singer, "Property and Social Relations: From Title to Entitlement," 1995 METRO: Institute for Transnational Legal Research (manuscript at 15-22) [hereinafter "Property and Social Relations"] and Joseph William Singer, "Jobs and Justice: Rethinking the Stakeholder Debate" (1993) 43 U. Toronto L.J. 475 at 481-91 (arguing that notions of distributive justice are inherent in our common conceptions of property and property systems).

that property, as a concept, *must* express? If so, is either of these conceptions capable of expressing those qualities?

In this essay, I shall explore these questions. I shall argue that each of these conceptions of property—which I will call the Apparent Model and the Operative Model, respectively—is comprised of four dimensions: the dimension of theory, the dimension of space, the dimension of stringency, and the dimension of time. Through an examination of these models, and their constituent dimensions, we shall find that neither model, alone, is adequate to express what property must mean in the takings context. Rather, *both* models are required—*both* are integral parts—of what property, in this context, must mean. I shall further attempt to show what property, *as a concept*, is capable, and is not capable, of expressing; and the dangers in belief that the concept of property can—of itself—establish appropriate boundaries between individual protection and collective power.

II. Takings and the Concept of Property: The Apparent Model

a. The Defining Dimensions of Theory and Space

It is difficult to find any consistent, underlying structure or "model" of constitutionally cognizable property in the takings jurisprudence of the United States Supreme Court. However, of the Supreme Court's opinions, this much can be said: all assume, and in fact often articulate, the need for what I shall call the first dimension of a constitutionally cognizable conception of property. This dimension, which I shall call the "*theoretical*" dimension, describes *the theory of the particular rights that is used for any particular conception of property.*[41] It recognizes that some theory of individual rights must be adopted for a constitutional idea of property to have meaning.

The theories of rights that the Supreme Court has adopted for this necessary dimension have been diverse and conflicting. Often a particular theory will be announced with great flourish, only to be forgotten (and another articulated) in the case that follows. Theories that have appeared, at various times, include the "bundle" of "traditionally" or "commonly" recognized rights to possess, use, transport, sell, donate, exclude, or devise;[42] the "fundamental attribute[s] of own-

41. An objection could be made that the name for this dimension is misleading, since *all* of the dimensions that I identify (as well as the conceptions of property themselves) are, in fact, theoretical in nature. This is certainly true. However, in this essay the dimension of "theory" shall refer to the "theory of rights" that is used in a particular conception of property.

42. See, e.g., *Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2901 (right to "essential use" of land); *Hodel* v. *Irving*, *supra* note 14 at 716 (right to devise, "part of the Anglo-American legal system since feudal times"); *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, *supra* note 14 at 496 (right to "economically viable use"); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, *supra* note 14 at 435 ("property rights in a physical thing" include the rights to possess, use, exclude, and dispose of it); *Andrus* v. *Allard*, *supra* note 14 at 64-65 ("traditional" rights of possession, exclusion, and other issues of disposition; "to possess and transport ..., ... to donate or devise"); *Kaiser Aetna* v. *United States*, *supra* note 14 at 176 ("rights that are commonly characterized as property", including right to exclude); *Penn Cent. Transp. Co.* v. *New York City*, *supra* note 14 at 124 (right to preclude physical invasion); *United States* v. *General Motors Corp.*, *supra* note 14 at 378 (rights "to possess, use and dispose"); *Pennsylvania Coal Co.* v. *Mahon*,

ership";[43] the "ordinary meaning" of "property interest";[44] the right to execute one's "reasonable", "investment-backed" or "historical" expectations;[45] the right to "anticipated [commercial] gains";[46] the rights enumerated in an executed contract;[47] the recognition of the particular interest claimed as an "estate in land" under state law;[48] the montage of the individual's generally existing rights under state law;[49] and combination theories.[50] Legal scholars and other commentators have articulated similar,

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supra note 14 at 414 (right to use).

This understanding, although traditional in nature, has occasionally implemented ideas of justice which were beyond the mores of the time. In 1917, the Court struck down a racially exclusionary municipal housing ordinance, on the ground that it violated the rights of property owners to sell to whom they pleased. "Property", Justice Day wrote, "is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property." *Buchanan* v. *Warley*, 245 U.S. 60, 74 (1917).

43. *Agins* v. *Tiburon*, *supra* note 14 at 262.
44. *Nollan* v. *California Coastal Comm'n*, *supra* note 14 at 831.
45. See, e.g., *Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2903 (Kennedy, J., concurring in the judgment) (protected expectations "based on objective rules and customs that can be understood as reasonable by all parties involved"; such "reasonable expectations must be understood in the light of the whole of our legal tradition"); *ibid.* at 2914-17 (Blackmun, J., dissenting) (discussing eighteenth- and nineteenth-century understandings of rights incident to land ownership); *Hodel* v. *Irving*, *supra* note 14 at 715 ("investment-backed expectations"); *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, *supra* note 14 at 499 ("financial-backed expectations"); *Nollan* v. *California Coastal Comm'n*, *supra* note 14 at 842, 847, 848 (Brennan, J., dissenting) ("reasonable expectations" possessed by landowners, and "settled public expectations"); *Agins* v. *Tiburon*, *supra* note 14 at 262 ("reasonable investment expectations"); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, *supra* note 14 at 441 (protection of "historically rooted" expectations); *Kaiser Aetna* v. *United States*, *supra* note 14 at 179 (discussing "a number of expectancies embodied in the concept of 'property'"); *Penn Cent. Transp. Co.* v. *New York City*, *supra* note 14 at 124-25 ("distinct investment-backed expectations" and "reasonable expectations").
46. See, e.g., *Andrus* v. *Allard*, *supra* note 14 at 64-66. Cf. *Duquesne Light Co.* v. *Barasch*, *supra* note 14 at 307-08 (right of public utilities to be free of governmentally imposed rates that are so low as to be "confiscatory").
47. See, e.g., *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 602 (1935) (rights under an executed mortgage contract); *Pennsylvania Coal Co.* v. *Mahon*, *supra* note 14 at 414 (contract for sale of land subsurface rights).
48. See, e.g., *Pennsylvania Coal Co.* v. *Mahon*, *supra* note 14 at 414 ("support" estate recognized in Pennsylvania law).
49. See, e.g., *Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2901, quoting *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972) (describing "traditional resort to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth (and Fourteenth) [A]mendments"); *Nollan* v. *California Coastal Comm'n*, *supra* note 14 at 857 (Brennan, J., dissenting) ("It is axiomatic ... that state law is the source of those strands that constitute a property owner's bundle of property rights."); *PruneYard Shopping Center* v. *Robins*, *supra* note 14 at 84 ("Nor as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enable it to define 'property' in the first instance."); *Ruckleshaus* v. *Monsanto*, *supra* note 14 at 1003 (interest in "health, safety, and environmental data" is "cognizable as a trade-secret property right under Missouri law"); *Kaiser Aetna* v. *United States*, *supra* note 14 at 178 and *United States* v. *Willow River Power Co.*, *supra* note 14 at 502 ("economic advantages" which are "back[ed]" by law).

Most often, the "state law" in question is assumed to be the state *common* law, not state *statutory* law. See, e.g., *Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2900. Common law benefits are somehow seen as "natural", and axiomatically entitled to protection; statutory ones are not. See Cass R. Sunstein, "Lochner's Legacy" (1987) 87 Colum. L. Rev. 873 at 885. Such positivist models are often used until they conflict with other, "traditional" or natural rights theories. See generally Cynthia L. Estlund, "Labor, Property, and Sovereignty After *Lechmere*" (1994) 46 Stan. L. Rev. 305 at 341.
50. See, e.g., *Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2899, 2894 n.7, 2900 ("'takings' jurisprudence ... has traditionally been guided by the understandings of our citizens"

and different, theories.[51]

In addition, the Court has often recognized another dimension necessary for a constitutionally cognizable conception of property. The adoption of a theoretical dimension—for example, positivist concepts of existing law, justified expectations, or "historical" understandings—must be accompanied by an understanding of *the space, or area of field, to which the theoretical dimension applies.* If we chose, for example, the property holder's "reasonable expectations" as the theoretical dimension for a constitutionally cognizable concept of property, the question arises, "reasonable expectations with respect to *what*?". The chosen theory of rights has meaning only with reference to a geographically or otherwise conceptually described field of application.

This dimension, which I shall call the "*spatial*" dimension,[52] is an implicit part of the Supreme Court's model, although it has received explicit articulation only in recent years. In the nineteenth and early twentieth centuries, it was assumed that the Takings Clause governed cases of governmental exercise of eminent domain

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regarding the content of property rights; such "reasonable expectations have been shaped by the State's law of property"—i.e., those "background principles of the State's law of property and nuisance" in place when property was acquired).

The combination of expectations theories with positivist theories is an approach with old roots. See Jeremy Bentham, "Principles of Civil Code" in C.K. Ogden, ed., *The Theory of Legislation* (London: Trench, Trubner & Co., Ltd., 1931), at 111 ("The idea of property consists in an established expectation." "[T]his expectation ... can only be the work of law. I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it to me.").

51. See, e.g., Lawrence C. Becker, *Property Rights - Philosophic Foundations* (Boston: Routledge & Kegan Paul, 1977) at 18 (property rights are "the rights of ownership", including rights to use, transfer, and exclude); Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge: Harvard University Press, 1991) at 56-64, 240-64 (creation and enforcement of property rights on the basis of local custom and practice); Munzer, *supra* note 15 at 17-23 (property as "a constellation of Hohfeldian elements [claim-rights, privileges, powers, and immunities], correlatives, and opposites"); Macpherson, "The Meaning of Property", *supra* note 38 at 3 (property is "a right in the sense of an enforceable claim to some use or benefit of something", "enforced by society or the state, by custom or convention or law"); Andrea L. Peterson, "The Takings Clause: In Search of Underlying Principles (pt. 2)" (1990) 78 Cal. L. Rev. 55 at 62 (property consists of the freedom to act in ways that are economically valuable, and any economically valuable legal rights created by federal, state, or local law); Charles Reich, "The New Property" (1964) 73 Yale L.J. 733 at 771-87 ("functional" approach to property); Joseph L. Sax, "Liberating the Public Trust Doctrine from Its Historical Shackles" (1980) 14 U.C. Davis L. Rev. 185 at 186-87 (footnote omitted) ("The essence of property law is respect for reasonable expectations."); Joseph William Singer, "The Reliance Interest in Property" (1988) 40 Stan. L. Rev. 614 at 652-63 (relational interests, i.e., reliance interests established between people over time, as creating cognizable property rights). See also Cheryl I. Harris, "Whiteness as Property" (1993) 106 Harv. L. Rev. 1707 at 1724-37 (analyzing various theories of property rights).

For a particularly interesting—and refreshingly objective—critique of these and other theories of property in the difficult and critical context of basic human rights, an emerging constitution, and land restitution issues, see André van der Walt, "Comparative Notes on the Constitutional Protection of Property Rights" in Roel de Lange, Gerrit van Maanen, & Johan van der Walt, eds, *Human Rights and Property: A Bill of Rights in a Constitution for a New South Africa* (Nijmegen: Ars Aequi Libri, 1993) 39.

52. The idea of a "spatial dimension" for a conception of property is obviously, as a literal matter, more readily applicable to land or other corporeal property than it is to property of an incorporeal sort. Where incorporeal property is concerned, descriptions such as "scope", "extent", or "limits" might more appropriately identify this dimension.

or their functional equivalents;[53] in such cases, there was generally little question—from a spatial, geographic, or otherwise conceptually described point of view—as to what the property in question was. With the additional recognition of regulatory takings by government,[54] the question of the spatial dimension of the property involved became more prominent. Indeed, the importance of this dimension has been the subject of increasingly sharp commentary by members of the Court. In *Penn Central Transportation Co.* v. *New York City*,[55] Justice Brennan (writing for the majority) rejected the contention of the building's owner and potential developer that the property in question was the "air rights" above the building, which were allegedly "taken" by the City's development prohibition. He wrote:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site."[56]

Similarly, in *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*,[57] Justice Stevens (also writing for the majority) argued that "[t]he 27 million tons of coal [left in the ground by the law] do not constitute a separate segment of property for takings law purposes. ... There is no basis for treating the less than 2% of petitioners' coal as a separate parcel of property."[58] Justice Rehnquist, in dissent, responded: "[T]he Court ... [finds] that the Subsidence Act does not impair petitioners' investment-backed expectations or ability to profitably operate their businesses. This conclusion follows mainly from the Court's broad definition of the 'relevant mass of property'... ." There was "no question", in his view "that this coal is an identifiable and separable property interest."[59] By the time that *Lucas* was decided, members of the Court openly acknowledged the importance—and difficulty—posed by this dimension of constitutionally cognizable property.[60]

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53. See *Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2892, quoting *Legal Tender Cases*, 12 Wall. 457, 551 (1871) (discussing historical assumption that "the Takings Clause reached only a 'direct appropriation' of property ... or the functional equivalent of a 'practical ouster of [the owner's] possession'"); *Transportation Co.* v. *Chicago*, 99 U.S. 635, 642 (1879).
54. See *Pennsylvania Coal Co.* v. *Mahon*, *supra* note 14 at 415.
55. 438 U.S. 104 (1978).
56. *Ibid.* at 130-31 (footnote omitted).
57. 480 U.S. 470 (1987).
58. *Ibid.* at 498.
59. *Ibid.* at 514, 517 (Rehnquist, J., dissenting).
60. *Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2894 n.7 (Scalia, J., writing for the majority) ("Regrettably, the rhetorical force of [the Court's takings test] ... is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole."); *ibid.* at 2913 (Blackmun, J., dissenting) ("[W]hether the owner has been deprived of all economic value of his property will depend on how 'property' is defined. The 'composition of the denominator in our "deprivation" fraction' ... is the dispositive inquiry."); and *ibid.* at 2919 (Stevens, J., dissenting) ("[B]ecause of the elastic nature of property rights", "courts may define

Both of these dimensions are obviously of critical importance in takings cases. The "property interests" or "property rights" which the individual is believed to hold, at the outset, provide the framework from which the question of undue governmental interference must be analyzed. Whether the right to exclude is, for example, a part of the "bundle of rights" which comprises the particular property in question, is of obvious importance in determining whether this right has been "taken" by government.[61] Similarly, an understanding of the spatial dimensions of the "property" in question bears an obvious importance to the question of the impact that any governmental action may have.[62]

This emerging model of property—what I shall call the "Apparent Model"—is in rough accordance with how we ordinarily think of property. Property describes our rights (defined by the relevant theory), applied to a space, object, or otherwise conceptually described field. It is, for example, the individual's right to unfettered possession, disposition, and use of land, chattels, or other corporeal or incorporeal things.[63] It defines "a bounded sphere" of individual autonomy, "into which the state ... [may] not enter."[64] It is comprised of "communal perceptions of the boundary

'property' broadly and only rarely find regulations to effect total takings." "The smaller the estate, the more likely that a regulatory change will effect a total taking.").

61. For example, compare *Loretto* v. *Teleprompter Manhattan CATV Corp.*, *supra* note 14 at 435 (right of apartment building owner to exclude entry by cable television company) with *PruneYard Shopping Ctr.* v. *Robins*, *supra* note 14 (no right of shopping center owner to exclude entry by high school students distributing political leaflets).

62. This dimension has also been the subject of extensive discussion by analysts of takings problems. See, e.g., Michelman, *supra* note 14 at 1614; Michelman, *supra* note 15 at 1192; Rose, *supra* note 14 at 566-67; Sax, "Takings and the Police Power," *supra* note 14 at 60. Margaret Radin has called this the problem of "conceptual severance". See Radin, *supra* note 15 at 1676.

The "fragmentation" of property into particular rights, or into smaller, conceptually defined or geographically defined pieces, has generally been associated with greater protection of property from government. The "smaller" the property in question is deemed to be, the greater the impact (on that property) of the proposed governmental action—leading to the conclusion that government has gone "too far" and a taking has occurred. See *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, *supra* note 14 at 498; *Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2894 n.7. However, as Morton Horwitz has so cogently observed, this can work in reverse as well. Regulation can, in fact, be legitimated through such reconceptualizations of property rights. By defining property rights more narrowly, more conflicting property rights are created, allowing the state's action to be viewed as protection for (rather than mere destruction of) particular property rights. See Morton J. Horwitz, *The Transformation of American Law 1870-1960* (New York: Oxford University Press, 1992) at 154-56.

63. See, e.g., Epstein, *supra* note 15 at 22-24.

64. Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts, and Possibilities" (1989) 1 Yale J. L. & Feminism 7 at 17. Charles Reich described property as the "circle" drawn "around the activities of each private individual", within which "he is master, and the state must explain and justify any interference." Reich, *supra* note 51 at 771. See also Rubenfeld, *supra* note 14 at 1140 (footnote omitted) (describing this model as one example of the "fundamental rights" approach, which attempts "to erect a barricade around those spheres of life in which the individual must be left to make his own law, to determine or define himself").

Reasons for protection of individual autonomy range from the need for the expression of the individual will through individual (external) action, see, e.g., Hegel, *supra* note 38, Secs. 41-53, at 73-84; Robert Nozick, *Anarchy, Sate and Utopia* (New York: Basic Books Inc., 1974) *passim*, to the creation of conditions necessary for the development of moral judgment, see, e.g., John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), to furtherance of "human flourishing" in a context with others. See, e.g., Radin, *supra* note 15 at 1687-88.

For a discussion of this "absolute" conception or approach to property, see Laura S. Underkuffler, "The Perfidy of Property" (1991) 70 Texas L. Rev. 293 at 306-07 [hereinafter "Perfidy"]; Underkuffler, *supra* note 36 at 130-33.

between liberty and privacy," "the mutual frontier between autonomy and vulnerability."[65] It is that "private sphere of individual self-determination securely bounded off from politics by law."[66]

This familiar model of property, when combined with the Takings Clause, yields another, familiar result. Property, defined by the dimensions of theory and space, describes those rights, afforded to us and protected for us, which the collective cannot take without payment of compensation.[67] Property, with takings protection, has concrete meaning. It means the protection of possessions; it means the protection of "expectations" of development of one's land; it means the protection of existing rights in economic resources. The "right to property", once these dimensions of the Apparent Model are chosen, is concrete and protected; it is "envisioned as box", with "all objects or interests within that box ... protected with equal rigidity."[68]

The Supreme Court's opinions are replete with this image. Protection of "expectancies", "historical understandings", existing rights under state law, and so on,[69] all assume the identification of concrete rights, applied to a conceptually described field, which cannot—under the Apparent Model—be taken without compensation.[70] For instance, in a recent, comprehensive opinion on the takings question, Justice Scalia (writing for the majority) held that property interests in land, protected by the Takings Clause, are defined by "background principles of the [s]tate's law of property and nuisance" in place when the title was acquired.[71] Indeed, so powerful is the appeal of this model that members of the Court who have opposed its results in practice have been loathe to depart from it in rhetoric. In

65. Gray, *supra* note 40 at 160.

66. Michelman, *supra* note 14 at 1626.

67. See, e.g., Epstein, *supra* note 15 at 35-56, 93-104; Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (Chicago: University of Chicago Press, 1990) at 30; Jennifer Nedelsky, "American Constitutionalism and the Paradox of Private Property" in Jon Elster & Rune Slagstad, eds, *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988) 241 at 264-65 [hereinafter "Paradox"]. This has been called the "classical liberal" conception of property which, combined with the Takings Clause, works to immunize individual property rights against change. See Radin, *supra* note 15 at 1668.

68. Underkuffler, "Perfidy", *supra* note 64 at 307.

69. See, *supra* text at notes 42-50.

70. See, e.g., *Nollan* v. *California Coastal Comm'n*, *supra* note 14 at 831 (public easement across private land would "no doubt ... have been a taking"); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, *supra* note 14 at 436, 432 ("[P]roperty law has long protected an owner's expectation" of undisturbed possession; as a result, there is a "rule that any permanent physical occupation is a taking.") (emphasis deleted).

Even those Justices who have rejected a positivist theory of property have sought to portray their conception in concrete terms. For example, Justice Marshall, in concurrence, wrote:

> ... I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common-law rights by Congress or a state government. The constitutional terms "life, liberty, and property" do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect.

PruneYard Shopping Ctr. v. *Robins*, *supra* note 14 at 93 (Marshall, J., concurring) (footnote omitted).

71. *Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2900. See also *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980) ("[A] [s]tate ... may not transform private property into public property without compensation.").

Nollan v. *California Coastal Commission*,[72] for example, Justice Brennan—although dissenting from the Court's holding of a compensable taking—stressed that "state law is the source of those strands that constitute a property owner's bundle of ... rights", and that "[t]he State [in this case] has not sought to interfere with any pre-existing property interest ...".[73]

The Apparent Model does not, of course, deny collective power. To the extent that a conception of property (using this model) is a legally enforceable one, its dimensions—its characteristics—are obviously the product of collective choice. The important characteristic of this model, however, is this: once its dimensions are chosen, the area of individual autonomy and control is established. Any subsequent, attempted collective change of this area is an infringement of established property rights.

b. The "Hidden" Dimensions of Stringency and Time

This, then, is the model of property that takings jurisprudence apparently assumes. It has two explicit dimensions: the dimension of theory, and the dimension of space. Under this model, "property" demarcates the boundaries of the individual's sphere of autonomy or control—such that any state infringement is a violation of existing property rights.

This understanding is certainly useful as far as it goes. But does it, in fact, completely describe this model of property? Closer examination reveals that identification of theoretical and spatial dimensions, without more, is woefully inadequate. We might know that a particular theory (such as the "right to possess, use, devise, and exclude") has been chosen, and that this theory is to apply to a particular piece of land, geographically defined. However, this does not tell us *how* these rights are protected, or *when*—in time—their content is determined. These additional dimensions, although never articulated by the Court, are (I shall argue) essential parts of the Apparent Model which it uses. Moreover, as we explore these issues further, we discover that the Apparent Model not only assumes the *existence* of these additional, "hidden" dimensions—it assumes their *content* as well.

Let us consider the first "hidden" dimension: that which I shall call *"stringency"*, or *how property rights (otherwise defined by theoretical and spatial dimensions) are protected.* Many property rights, under the Apparent Model, encompass a broader range of individual interests than do others. The "absolute right to exclude", for instance, may well encompass more individual interests than the "right to use, subject to reasonable regulation." Determining the breadth of protected interests, however, tells only part of the story. The question remains: *if* a particular right falls

72. 483 U.S. 825 (1987).

73. *Ibid.* at 857, 855. See also *ibid.* at 866 (Blackmun, J., dissenting) ("[n]o investment-backed expectations were diminished", since "the Nollans had notice of the easement before they purchased the property and ... public use of the beach had been permitted for decades"); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, *supra* note 14 at 445 (Blackmun, J., dissenting) (arguing that a statute requiring construction of a cable television apparatus on landlord's building was not a taking, since it "did not interfere with appellant's reasonable investment-backed expectations").

within our understanding of property, *how* is it held? With what *stringency* is it protected?

If the Apparent Model is examined, we find that it answers this question. Once a particular right (defined by theoretical and spatial dimensions) is found to exist, it falls within the sphere of individual autonomy and control. It is then—of necessity—held with the same intensity, and afforded the same protection, as all other property rights. There is no analytical basis, under this model, for rights (once defined) to be protected with greater, or lesser, stringency than others. The premise of this model, as described above, is property as a "bounded sphere", which represents and protects the area of individual autonomy. Once triggered, images of autonomy and control are, *by their very nature*, absolute. Indeed, the very idea of rights held with "varying" intensity or rights granted "varying" protection is intuitively inconsistent with the image of a bounded sphere of individual autonomy and control. The Apparent Model in fact has—very definitely—the dimension of stringency. Although unarticulated, it assumes the equal stringency—the equal protection—of all property rights.

The second "hidden" dimension is that which I shall call *"time" (or, perhaps more accurately, "change in time")*. This dimension is as essential as the others in constructing a complete model of property. We may know the theory that the model will employ; we may know the spatial dimension within which it is to be applied; and we may know the stringency of protection which "rights", recognized by the model, will be afforded. The question remains: at what moment, or point in time, is the content of these dimensions determined? Is the model of property a static one, or a dynamic one? Are its dimensions chosen once, with no change thereafter, or do they vary, potentially, in time?

If we examine the Apparent Model, we find the existence of this dimension as well. Whether property (under this model) is understood to be the "ordinary meaning" of ownership, the "reasonable expectations" of purchasers, the "historically rooted expectations" of landowners, or the "applicable background principles" of common and/or statutory law—applied to a particular spatial dimension, and protected with equal stringency—the content of each of these dimensions must be identified at a particular moment in time for the model to have meaning. This content may be determined at the moment of purchase or acquisition,[74] at a particular historical moment,[75] or at another time. However, *some* point in time must be chosen, as the reference for each.

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74. See, e.g., *Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2899 (discussing the "bundle[s] of rights" acquired by citizens "when they obtain title to property"); *Nollan* v. *California Coastal Comm'n*, *supra* note 14 at 847, 855 (Brennan, J., dissenting) (discussing landowner's "reasonable" expectations at the moment of purchase, in view of existing encumbrances and laws); *Penn Cent. Transp. Co.* v. *New York City*, *supra* note 14 at 135-36 (discussing impact of the law on the building's "present uses" and, hence, the owner's "primary expectation"); *Pennsylvania Coal Co.* v. *Mahon*, *supra* note 14 at 413 (discussing modification of "existing rights").

75. See, e.g., *Hodel* v. *Irving*, *supra* note 14 at 715-16 (discussing "investment-backed expectations" in land at the time of purchase, and rights which have inhered in property ownership as a "part of the Anglo-American legal system since feudal times"). See also Epstein, *supra* note 15 at 7-31 (proposing the use of the bundle of rights claimed to have been recognized in the American Founding Era).

Once this point in time is chosen, and the dimensions of these rights "fixed", the model assumes that the collective cannot change these rights. The element of time, under this model, involves not only the initial point of reference for the dimensions chosen, but also the "freezing" of the characteristics of these rights. Such rights, once defined and recognized, are within the area of individual autonomy and control; they cannot—by explicit definition—be changed by the collective thereafter.

Under this model, the definition or theory of rights that is chosen might, of course, *itself* permit some degree of future flexibility. For instance, property rights might be defined as a landowner's "reasonable expectations", understood in light of the laws, social assumptions, or other factors reasonably anticipated at the time of purchase.[76] To be consistent with this model, however, such theories are subject to two restraints. First, this model assumes that, *once established*, the theory of rights chosen cannot (itself) be changed. "Reasonable expectations at the time of purchase" cannot be changed to reflect another (more flexible) theory thereafter. In addition, and perhaps more importantly, this model *assumes the creation of a sphere of individual autonomy and control.* Indeed, it is in precisely this quality that the model's promise of concreteness and protectiveness inheres. Any theory which destroys this quality, by granting broad powers of collective change, would not create "property" in the terms of this model.[77]

The conjunction of property with familiar ideas of harmful, nuisance, or noxious uses illustrates the identity and restraints of the Apparent Model of property. It is often stated that "'harmful or noxious uses' of property may be proscribed by government" or that principles of common-law nuisance are an inherent part of a landowner's title.[78] In such formulations, a "theory of rights" is chosen that does not include harmful, noxious, or nuisance uses within the individual's protected

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76. An example of a common, temporally based limitation on land rights is provided by the theory of prescription or adverse possession. Under these rules, rights in land are lost to an encroacher, if the encroacher occupies or uses the land and other (generally statutorily defined) requirements are met. The idea that property interests can be gained or lost, through usage and time, is an old one. See Horwitz, supra note 2 at 43-44 (describing the eighteenth-century acquisition through prescription of rights to tolls, sunlight, water use, and trade).

77. In a series of recent cases, for instance, the Court has addressed whether an expressly reserved ability to change a "contractual right" previously conferred destroys any claim that this right is "property". Commenting upon a federal social security "contract", the Court stated:

> [T]he "contractual right" at issue in this case bears little, if any, resemblance to rights held to constitute "property" within the meaning of the Fifth Amendment. ... [T]he provision was simply part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare. ... [It] did not rise to the level of "property".

Bowen v. *Public Agencies Opposed to Social Security Entrapment*, *supra* note 14 at 55. Under this model, an *implied* power by government to change what appear to be statutory entitlements will likewise defeat claims of deprivation of property (without just compensation). See, e.g., *Bowen* v. *Gilliard*, 483 U.S. 587, 608 (1987), quoting *Reichelderfer* v. *Quinn*, 287 U.S. 315, 319 (1932) (no property interest in statutory entitlements "subject to modification by 'the public acts of government'"); *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 651 (1976) (no property interest created by federal statute providing that in fifty years, mineral deposits "shall become the property of ... [Indian allottees] or their heirs"); *United States* v. *Fuller*, 409 U.S. 488, 492 (1973) (no property interest in a federal grazing permit that is revocable, at will, by government).

78. See, e.g., *Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2897, 2900-02.

sphere. Such formulations may describe the Apparent Model of property if they establish a protected, individual sphere with sufficient substance and clarity, and if that sphere—once established—is not subject to collective change thereafter. If, for instance, what is "harmful", "noxious", or a "nuisance" is based upon the meaning of those terms at the time of a landowner's purchase; if those terms have an understood meaning, which provides concreteness; and if they cannot (by the collective) be changed thereafter—the model of property is an Apparent one. If it fails to have these qualities, it is not.[79]

c. The Apparent Model: Inherent and "Takings" Problems

We have, then, an Apparent Model of property with (in fact) four dimensions: the explicit dimensions of theoretical choice and spatial reference, and the implicit, unarticulated dimensions of equal stringency of protection for rights, chosen at one moment and remaining unchanged thereafter. What are the problems with this model? What are the problems with property rights chosen by theory, defined in space, protected equally, and frozen in time?

There are, for the theoretical dimension, obvious problems of choice. Particular theories may fail to establish the protected area with sufficient clarity or concreteness to yield identifiable or workable boundaries. What are a landowner's "reasonable expectations" about future land use regulations? What are the "ordinary understandings" which govern rights to anticipated commercial gains? How can they be articulated with any reasonable degree of precision? The inherent vagaries of these theories is in fundamental conflict with the concrete articulation of rights that the model demands.[80]

Articulating the spatial dimension can be difficult as well. Although geographical boundaries in land may be easily identified, the spatial dimensions of other, more "conceptually" defined property—such as autonomy over one's body or the "coal mining operations"[81]—are not. In addition, the identification of a particular spatial dimension may fail to reflect the actual "breadth" of the rights involved. The right to use land, for instance, is rarely restricted (in its effects) to a particular, definable parcel; it often conflicts with the asserted use (or other rights) in neighboring land. The Apparent Model of property, with its simple application of theories of rights to particular spatial dimensions, may fail to consider the external or "spillover" effects of such rights, and the practical limitations that they imply.[82]

79. As observed by Justice Holmes, "As long recognized, some values are *enjoyed under an implied limitation* and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone." *Pennsylvania Coal Co.* v. *Mahon*, *supra* note 14 at 413 (emphasis added).

80. Cf. Paul, *supra* note 14 at 1404 ("Each governmental action ... raises not only the question of whether values may be altered but also of which values should be treated as already established.").

81. *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, *supra* note 14 at 499.

82. See Sax, "Takings, Private Property, and Public Rights," *supra* note 14 at 150 (viewing property "as an interdependent network of competing uses, rather than as a number of independent and isolated entities"); Gray, *supra* note 40 at 161 ("[O]ur shorthand attributions of 'ownership' conceal only superficially the constant and comprehensive interpenetration of 'property' in the resources of the earth. It is an inevitable fact that all 'property' references have about them an utterly *interdependent* quality."). "We can talk about a landowner having a property interest in

Determining the temporal dimension, and the content of rights arrested at that moment, can also be highly problematic. What moment, in time, should we choose? If the property in question is conventional in nature, we might choose the moment of its acquisition. Even this, however, may prove to be more difficult than it appears. Some methods of acquisition, such as inheritance, may have quite complicated origins. If, for instance, we are using an "expectations" theory, should we consider the "expectations" of forebears, as well? Even if acquisition is conceptually more simple, such as purchase or gift, other problems remain. If our chosen theory uses state laws or regulations as a part of "expectations", what content does this yield? Do we include regulations authorized by existing law, but only enacted later? Do we include laws or regulations in existence at the time of purchase or other acquisition, but which become factually applicable to the particular property (due to changing conditions) only *after* the "magic moment" chosen? The more that we examine this model, the more elusive become the concreteness, the boundaries, and the protections that it promises.

Even if we manage (somehow) to describe sufficiently the Apparent Model of property, a deeper problem remains. In the words of C.B. Macpherson, "[p]roperty is not thought to be a right because it is an enforceable claim: it is an enforceable claim because it is thought to be a human right." It must "be justified by something more basic; if it is not so justified, it does not for long remain ... ."[83] Human society is not static. Values will change; scientific discoveries will be made; crises of war, pestilence, and economic development will require collective action. As human conditions and needs change, so will the bases on which prior property regimes were constructed. What may have been an appropriate configuration of property rights in one era, may be an undesired burden or constraint in another.[84] If property

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'full enjoyment' of his land, but in reality many of the potential uses (full enjoyment) of one tract are incompatible with full enjoyment of the adjacent tract. It is more accurate to describe property as the value which each owner has left after the inconsistencies ... have been resolved." Sax, "Takings and the Police Power", *supra* note 14 at 61 (footnote omitted).

83. C.B. Macpherson, "The Meaning of Property", *supra* note 38 at 11-12.

84. As Justice Stevens recently wrote:

> The human condition is one of constant learning and evolution—both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and the rights of property owners. Thus, when the Nation came to understand that slavery was morally wrong and mandated the emancipation of all slaves, it, in effect, redefined "property". On a lesser scale, our ongoing self-education produces similar changes in the rights of property owners: New appreciation of the significance of endangered species ...; the importance of wetlands ...; and the vulnerability of coastal lands ..., shapes our evolving understandings of property rights.

Lucas v. *South Carolina Coastal Council*, *supra* note 14 at 2921-22 (Stevens, J., dissenting). In the words of Morris Cohen:

> Looking at the matter realistically, few will question the wisdom of Holdsworth's remarks, that "[a]t no time can the state be wholly indifferent to the use which the owners make of their property". There must be restrictions on the use of property not only in the interests of other property owners but also in the interests of the health, safety, religion, morals, and general welfare of the whole community. ...
>
> ....
>
> [I]f the large property owner is viewed, as he ought to be, as a wielder of power over the lives of his fellow citizens, the law should not hesitate to develop a doctrine as to his positive duties in the public interest.

Morris Cohen, *Law and the Social Order: Essays in Legal Philosophy* (New York: Harcourt, Brace and Company, 1933) at 59, 63 (footnote omitted), quoting Sir William Holdsworth, VIII *A History of English Law* (London: Metheun & Co., 1922) at 100.

describes that area of individual autonomy and control, defined by dimensions of theory, space, and stringency, established in time and protected from collective change thereafter, the combination of this model with the inevitability of social shift and change presents an extremely difficult problem.

Property-rights advocates have argued that it is precisely for this reason that the Takings Clause exists. Conditions may change; the area ceded to individual autonomy and control may be altered; but this can be fairly done, under the Takings Clause, only if compensation is paid. It is in the assurance of compensation that the protection of the Apparent Model lies. Any attempt to change the configuration of individual property rights—defined by theory, space, stringency, and time—is a "taking", requiring compensation.[85]

The problem with this approach is, however, apparent in its statement. As Justice Holmes wrote in a famous observation, "[g]overnment 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."[86] Indeed, if "property" and the Takings Clause were so understood, neither legislatures nor courts would be able to modify common law or statutory rights without payment of compensation—a situation at which "[c]ommon sense revolts."[87] To "compel the government to regulate by *purchase*"[88] would, in practical effect, return us "to the era of *Lochner* v. *New York*..., when common-law rights were ... found immune from revision by State or Federal Government."[89]

It is obvious that property rights cannot, in fact, be rigid in this sense. The idea that compensation must be paid, whenever the individual's preexisting property rights are changed by government, would paralyze the functioning of the collective order. The problem is how to reconcile the following elements: a model of property which promises concreteness, rigidness, and protection against change; a constitutional provision which requires the payment of compensation upon the taking of private property; and the practical knowledge that these premises, taken together, would bankrupt government and freeze the process of social evolution. A solution to this dilemma could be found in one of three ways. What appears to be a "taking" may not, in fact, be one; "compensation", of a non-monetary type, may be imputed from another source; or what appears to be "property", under the Apparent Model, may in fact be something else.

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85. See, e.g., Epstein, *supra* note 15 at 35-104, 161-98 (if property is understood to be the individual's right to unfettered possession, disposition, and use of corporeal or incorporeal objects, and if these rights are defined as they were in the American Founding Era, any later governmental action that changes these rights is a prima facie "taking" under the Fifth Amendment).

Indeed, the idea of "payments for change" in existing rights has been argued, by some, to require the reverse, as well: if government provides betterments for individuals, it may have a claim (under some circumstances) to compensation from them. See Donald G. Hagman, "Windfalls and Their Recapture" in Donald G. Hagman & Dean J. Misczynski, eds, *Windfalls for Wipeouts: Land Value Capture and Compensation* (Chicago: American Society of Planning Officials, 1978) 15 at 15-19.

86. *Pennsylvania Coal Co.* v. *Mahon*, *supra* note 14 at 413. See also *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, *supra* note 14 at 473.

87. *United States* v. *Causby*, *supra* note 14 at 260-61. See also *Loretto* v. *Teleprompter Manhattan CATV Corp.*, *supra* note 14 at 454 (Blackmun, J., dissenting).

88. *Andrus* v. *Allard*, *supra* note 14 at 65 (emphasis in original).

89. *PruneYard Shopping Ctr.* v. *Robins*, *supra* note 14 at 93 (Marshall, J., concurring).

Often, the Supreme Court has attempted to articulate the first choice; as it once stated, "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property ... ."[90] However, this rationale is hardly convincing. If property rights (otherwise defined) are clearly impaired or destroyed by government, it is difficult to see how a "taking"—in any ordinary sense of the word—has not occurred.[91] Indeed, as the Court itself once stated, "[i]t would be a very curious and unsatisfactory result, if ... the government ... [could] destroy ... [the] value [of property] entirely, ... [could] inflict irreparable and permanent injury to any extent, ... [could], in effect, subject it to total destruction without ... compensation, because, in the narrowest sense of that word, it is not *taken* for public use."[92]

In other cases, the Court has argued the second choice: that non-monetary compensation—or, as it is sometimes phrased, "reciprocity of advantage"—has been provided, to the claimant, by the governmental action itself.[93] Although compensation (in the traditional sense) has not been paid, the Court has argued that the burdens that the governmental action in question has placed upon others (and which, arguably, inure to the claimant's benefit) work to offset the claimant's loss. Although such arguments might be persuasive in situations where benefits and burdens are roughly equal and widespread,[94] they have no appeal in the far more common situations that lack these characteristics.[95] When a particular property owner must forgo developing his property in order to preserve its "historic" state,[96] or must close

90. *Mugler* v. *Kansas*, *supra* note 14 at 668-69. See also *PruneYard Shopping Ctr.* v. *Robins*, *supra* note 14 at 82, quoting *Armstrong* v. *United States*, *supra* note 14 at 48 ("[I]t is well established that 'not every destruction or injury to property by governmental action has been held to be a "taking" in the constitutional sense'.").

91. See Underkuffler, *supra* note 36 at 130 & n.14.

Joseph Singer has described this problem in the following terms. Under the classical view, a "property right" is an extremely strong claim to indemnity for loss—placing the burden of proof upon the one who would deny that right, to justify that denial. See Joseph William Singer, "Property and Social Relations", *supra* note 40 (manuscript at 10); Singer, *supra* note 51 *passim*.

92. *Pumpelly* v. *Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177-78 (1871). See also *United States* v. *General Motors Corp.*, *supra* note 14 at 378 (footnote omitted) ("Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."); *Mugler* v. *Kansas*, *supra* note 14 at 678 (Field, J., dissenting) (law prohibiting manufacture or sale of liquor, and ordering the destruction of liquor on hand, "crossed the line which separates regulation from confiscation").

93. See, e.g., *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, *supra* note 14 at 491.

94. Examples of such situations include the requirement that pillars of coal be left in underground mines to protect miners laboring in adjacent mines, see *Plymouth Coal Co.* v. *Pennsylvania*, 232 U.S. 531 (1914), and uniform zoning regulations which protect pre-existing uses. See *Village of Euclid* v. *Ambler Realty Co.*, *supra* note 14.

95. Indeed, Justice Brewer, speaking for the Court, wrote one hundred years ago that the essential purpose of the Takings Clause is to "prevent[] the public from loading upon one individual more than his just share of the burdens of government, and ... when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 325 (1893). See also *Kaiser Aetna* v. *United States*, *supra* note 14 at 175; *Armstrong* v. *United States*, *supra* note 14 at 49.

96. See *Penn Cent. Transp. Co.* v. *New York City*, *supra* note 14.

his factory to accommodate newly arrived residential neighbors,[97] "compensation" in the form of the community's general preservation of historic structures or clean air for residential living may be of little consolation.

Efforts to address this problem through the elements of "taking" or "compensation" have generally failed as neither textually nor practically convincing. The need for takings without compensation has, most often, been solved through the third choice: the understanding of the property interest involved.

III. Takings and the Concept of Property: The Operative Model

When the Supreme Court's record is surveyed, its response to the dilemma of "takings" and property appears to be obvious. It has, we find, simply reached the results that it desires, with no serious attempt to reconcile those results with the model of property that it professes or with the constitutional text that it expounds. In its decisions over the years, the Court has repeatedly upheld the ability of government to destroy private property interests, without compensation, when changed conditions rendered continued protection of private interests undesirable.[98] In *Hadacheck* v. *Sebastian*,[99] for instance, the Court upheld a city ordinance which made the operation of a brickyard unlawful, even though the brickmaking operation predated (by many years) the annexation of this land by the city. Although the Court apparently agreed that the "property" in question included the land, the use of the land, and all aspects of the business investment,[100] the Court baldly denied the takings claim. To hold otherwise, the Court stated, "would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community."[101] In similar cases, and for similar reasons, the Court upheld laws that prohibited the continued operation of a livery stable;[102] prohibited the operation of a previously lawful brewery;[103] prohibited the continued manufacture of oleomargarine[104] and carbon black;[105] ordered the destruction of cedar trees, to preserve apple orchards;[106] permitted the destruction of private property to prevent the spread of fire;[107] prohibited the continued operation of a quarry in a residential area;[108] and

97. See *Hadacheck* v. *Sebastian*, *supra* note 14.

98. One could argue that the first example of this approach is found in the opinion of Justice Chase in *Calder* v. *Bull*. Making particular reference to the constitutional provision "'that *private* property should not be taken for public use, without just compensation'", he wrote that "the *right*, as well as the *mode*, or *manner*, of acquiring property, and of alienating or transferring, inheriting, or transmitting it, is conferred by society; [it] is regulated by *civil* institutions, and is always subject to the rules prescribed by *positive law*." *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 394 (1798) (emphasis in original).

99. 239 U.S. 394 (1915).

100. *Ibid.* at 410-12.

101. *Ibid.* at 410.

102. *Reinman* v. *Little Rock*, 237 U.S. 171 (1915).

103. *Mugler* v. *Kansas*, *supra* note 14 at 664-70.

104. *Powell* v. *Pennsylvania*, *supra* note 14.

105. *Wells* v. *Midland Carbon Co.*, 254 U.S. 300 (1920).

106. *Miller* v. *Schoene*, 276 U.S. 272 (1928).

107. *Bowditch* v. *Boston*, 101 U.S. 16, 18-19 (1879).

108. *Goldblatt* v. *Hempstead*, 369 U.S. 590 (1962).

ordered the closing of established gold mines.[109] These cases, and others like them, gave doctrinal rise to the "police power exception" to the Takings Clause: previously legitimate uses of property, which are (later) determined to be inimical to public health, safety or welfare, may simply be enjoined, with no compensation required.[110]

Problems in reconciling the Apparent Model, the Takings Clause, and the need for change worsen as one moves from cases involving public health, safety, or welfare to the broader area of simply desirable public regulation. In zoning cases, for instance, the Court has upheld all but the most extreme impairments of land use. In *Agins* v. *Tiburon*,[111] the Court stated that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, ... or denies an owner economically viable use of his land ... ."[112] Mere diminution in value, short of prohibition of *all* economically viable use, is not compensable, or is (at most) subject to a public-private balancing test.[113] A similar approach, with similar results, has been employed in the cases of

109. *United States* v. *Central Eureka Mining Co., supra* note 14.

110. See, e.g., *Penn Cent. Transp. Co.* v. *New York City, supra* note 14 at 145 (Rehnquist, J., dissenting) ("nuisance exception" involves whether the proposed use is dangerous to the safety, health, or welfare of others); *Calhoun* v. *Massie*, 253 U.S. 170, 175-76 (1920) ("An appropriate exercise by a State of its police power is consistent with the Fourteenth Amendment, although it results in serious depreciation of property values; and the United States may, consistently with the Fifth Amendment, impose for a permitted purpose, restrictions upon property which produce like results.").

One could argue that the police power exception is not inconsistent with the Apparent Model of property: property could simply be defined, under the Apparent Model, to exclude uses inimical to public health, safety, and welfare. For example, as Carol Rose has recently shown, the idea that an existing use could *become* a nuisance, by changes in surrounding land use, was a part of American legal culture as early as the nineteenth century. Carol Rose, "A Dozen Propositions on Property Rights: Observations on Property, Public Rights, and the New Takings Legislation" (1996) 53 Wash. & Lee L. Rev. (manuscript at 12-14). If the theoretical dimension of the property rights of the brickyard operator in *Hadacheck* v. *Sebastian* were interpreted in this way, no impairment of "rights" by the City's action would have been shown. See, *supra* text at notes 99-101.

In this context, a distinction must be made between uses which are known (or could reasonably be anticipated) to be prohibited at the time of the creation or vesting of the property interest, and uses which are determined, later, to be prohibited. In the case of the former, those restrictions on use would, indeed, be no different from any other restrictions which are parts of the theoretical dimension of the property in question. See, *supra* text at notes 42-51 and 76-79. In the case of the latter, however, a different problem is presented. Although a reserved ability to change some pre-existing rights might be compatible with the Apparent Model of property, allowing the collective to change such rights as it (in its discretion) sees fit would destroy any semblance of individual protection—the raison d'être of the Apparent Model. See, *supra* text at notes 76-79, and *infra* text at notes 142-47. See also *Keystone Bituminous Coal Ass'n* v. *DeBenedictis, supra* note 14 at 513 (Rehnquist, C.J., dissenting) ("A broad exception to the operation of the Just Compensation Clause based on the exercise of multifaceted health, welfare, and safety regulations would surely allow government much greater authority than we have recognized ..., for nearly every action the government takes is intended to secure for the public an extra measure of 'health, safety, and welfare.'").

111. 447 U.S. 255 (1980).

112. *Ibid.* at 260. See also *Penn Cent. Transp. Co.* v. *New York City, supra* note 14 at 127 ("[A] [land] use restriction ... may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose... ."). The range of governmental purposes and regulations that satisfies these requirements is "broad". *Nollan* v. *California Coastal Comm'n, supra* note 14 at 834-35.

113. See *Agins* v. *Tiburon, supra* note 14 at 260-61; *Lucas* v. *South Carolina Coastal Council, supra* note 14 at 2893-94; *Gorieb* v. *Fox*, 274 U.S. 603, 607 (1927); *Village of Euclid* v. *Ambler Realty Co., supra* note 14 at 396-97; *Hudson County Water Co.* v. *McCarter, supra* note 14 at 355.

Compensation in zoning cases has been denied, even when claimed individual losses were severe. See, e.g., *Village of Euclid* v. *Ambler Realty Co., supra* note 14 at 384 (75% loss); Sax, "Takings and the Police Power," *supra* note 14 at 44 & n.52.

historic preservation laws,[114] a law to prevent the subsidence of surface land in mining country,[115] and laws prohibiting commercial transactions in endangered species.[116] The Court "has ... recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values."[117] "[G]overnment regulation—by definition—involves the adjustment of rights for the public good. ... To require compensation in all such circumstances would effectively compel ... regulat[ion] by purchase."[118] This is true despite the fact that such restrictions interfere with pre-existing uses, the reasonable "expectations" of the property owner,[119] and other clear examples of Apparent Model property.

What is going on here? Despite sporadic attempts to claim that the government action is not a "taking",[120] or that there is some "compensation" or "reciprocity of advantage" afforded to the affected citizen,[121] it is obvious that the Court is not using the Apparent Model, at all. Consistent rhetoric about the "concreteness" of property, delineating the sphere of individual security, autonomy, and control, with protection of expectations or historically rooted compacts, cannot obscure the fact that the model of property in use is in fact quite different.[122]

What is this model of property? This model, which I shall call the "Operative Model", shares some characteristics with the other. Theoretical and spatial dimensions, an articulated part of the Apparent Model, are dimensions of the Operative Model as well. The Operative Model, like the Apparent Model, involves the choice of a theory of individual rights, and a spatial dimension for the application of those

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114. *Penn Cent. Transp. Co.* v. *New York City*, *supra* note 14 at 124-38.

115. *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, *supra* note 14 at 493-97.

116. *Andrus* v. *Allard*, *supra* note 14.

117. *Penn Cent. Transp. Co.* v. *New York City*, *supra* note 14 at 124. As boldly stated by the Court:"[I]n instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. ... Zoning laws are, of course, the classic example ... ." *Ibid.* at 125, quoting *Nectow* v. *Cambridge*, 277 U.S. 183, 188 (1928). See also *Pennsylvania Coal Co.* v. *Mahon*, *supra* note 14 at 417 (Brandeis, J., dissenting) ("[T]he right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance; and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare. Whenever they do, the legislature has power to prohibit such uses without paying compensation; and the power to prohibit extends alike to the manner, the character and the purpose of the use.").

118. *Andrus* v. *Allard*, *supra* note 14 at 65 (emphasis deleted). "The Takings Clause ... preserves governmental power to regulate, subject only to the dictates of 'justice and fairness.' ... There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate." *Ibid.*, quoting *Penn Cent. Transp. Co.* v. *New York City*, *supra* note 14 at 124.

119. See, e.g., *Penn Central Transp. Co.* v. *New York City*, *supra* note 14 at 136.

120. See, e.g., *ibid.* at 131 (Court's prior decisions "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking'"); *Omnia Commercial Co., Inc.* v. *United States*, *supra* note 14 at 508 ("destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense").

121. *See, e.g.*, *Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2894; *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, *supra* note 14 at 491-92.

122. Compare, e.g., *Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2894 n.7 (property interests of landowner are those protected by the "rich tradition of ... common law") with *Munn* v. *Illinois*, 94 U.S. 113, 134 (1877) ("A person has no property, no vested interest, in any rule of the common law ... . Indeed, the great office of statutes is to remedy defects in the common law ..., and to adapt it to the changes of time and circumstances." and *United States* v. *Causby*, *supra* note 14 at 260-61 ("[c]ommon sense revolts at the idea" that legislatures cannot alter common-law rights).

rights. We must know, under either model, whether positivist concepts of existing law, justified expectations, "historical understandings", and so on, describe the particular rights involved. We must also know, under either model, the breadth (or area) of field to which the theory of rights applies. Neither the existence of these dimensions, nor the content which is (generally) adopted for them,[123] is particular to the model involved.

This situation changes when we consider the remaining dimensions of stringency and time. Although these dimensions are parts of both models, the content of these dimensions is radically different. Under the Apparent Model, as described above, the content of these dimensions is assumed in a way that is consonant with the idea of property as individual protection. Under the Operative Model, as used by the Court, the content of these dimensions is understood in a way that confers broad collective control.

Under the Apparent Model, all property rights are protected with equal stringency: once a particular right falls within the protected sphere, it is held with the same intensity—and protected to the same degree—as all other "property" rights. When we examine the Operative Model in takings jurisprudence, we find something quite different. Under this model, all property interests are *not* held with the same intensity and are *not* protected equally. For instance, although the rights to use, possess, exclude, devise, and so on, are often cited as protected property interests, and thus should (at least facially) be equally held and equally protected, we find that this is not true. Suggesting a hierarchical ordering of stringency of protection, the right to exclude has (for instance) been called "'one of the *most essential* sticks in the bundle of rights that are commonly characterized as property.'"[124] Violation of this right is "*qualitatively* more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner ... ."[125] It is "a property restriction of an *unusually serious character* for purposes of the Takings Clause"[126], and leads to an almost automatic right to compensation.[127] The right to pass property to one's heirs has been afforded a similar, rigidly protected status. Complete abrogation of this right is "extraordinary"—and compels compensation.[128]

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123. There is, of course, some point where the content of these dimensions might be defined in a way that is so inconsistent with the essential characteristics of the model as to render it meaningless. See, *infra* text at notes 142-47.

124. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, *supra* note 14 at 433, quoting *Kaiser Aetna* v. *United States*, *supra* note 14 at 176 (emphasis added). "The power to exclude has traditionally been considered *one of the most treasured* strands in an owner's bundle of property rights." "[A]n owner suffers *a special kind* of injury when a stranger directly invades and occupies the owner's property." *Ibid.* at 435, 436 (footnote omitted) (emphases added and deleted).

125. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, *supra* note 14 at 436 (emphases added and deleted).

126. *Ibid.* at 426 (emphasis added). "[T]his Court's most recent cases ... have emphasized that physical invasion cases are special ...". *Ibid.* at 432 (emphasis deleted).

127. See, e.g., *Nollan* v. *California Coastal Comm'n*, *supra* note 14; *Loretto* v. *Teleprompter Manhattan CATV Corp.*, *supra* note 14; *Kaiser Aetna* v. *United States*, *supra* note 14; *United States* v. *Causby*, *supra* note 14; *St. Louis* v. *Western Union Telegraph Co.*, 148 U.S. 92 (1893).

128. *Hodel* v. *Irving*, *supra* note 14 at 716-18.

Jed Rubenfeld has argued that this hierarchical ordering of property interests parallels the fundamental-rights methodology long used in the evaluation of Fifth and Fourteenth Amendment liberty interests. See Rubenfeld, *supra* note 14 at 1097-1111.

Absolute rights to exclude and devise have been found, by the Court, in the context of land

This almost absolute protection for rights to exclude and devise must be contrasted with the "sliding scale" of protection afforded other rights.[129] Other rights, although recognized "property" interests, are simply not held with the same sense of inviolable protection; their protection, in any particular instance, is far more a matter of collective whim. For example, the right to use—in particular, the right to protect or to enhance value through continuation of pre-existing, permitted use—has been consistently characterized as "less protected" or "less compelling" than other property interests.[130] Use restrictions, such as those imposed by zoning, do not "extinguish a *fundamental* attribute of ownership."[131] As a result, there is "'no appropriation of private property'" when there is "'merely a lessening of value'" due to governmental action.[132] The right to sell is similarly unprotected, particularly where the rights "to possess and transport ..., to donate or devise" the property remain.[133]

One could argue that this difference in treatment is due not so much to differing stringencies with which these interests are protected, as to differing severities of violation: in cases of physical invasion, for instance, the right to exclude might be totally abrogated, while in cases of governmental use regulation, residual uses may remain. Such arguments, while they may accurately describe some situations, do not explain others. In *Loretto* v. *Teleprompter Manhattan CATV Corp.*,[134] for instance, the physical invasion at issue—the presence of a cable wire and junction box on the exterior of the owner's apartment building—was admittedly trivial in nature:[135] it was small in size and was granted to only one entity. Although the landowner's general right to exclude was far from totally abrogated, the Court upheld her takings claim. This must be contrasted with *Andrus* v. *Allard*,[136] where a governmental prohibition of all commercial transactions in the property in question was at issue. Despite this far more serious impact on the right of disposition,

ownership. For an interesting exploration of stringency issues in a wider context, see Margaret Radin, "Property and Personhood" (1982) 34 Stan. L. Rev. 957 (arguing that the relationships of interests to personhood should affect the degrees of their protection as property).

129. See, *PruneYard Shopping Ctr.* v. *Robins*, *supra* note 14 at 83, quoting *Pennsylvania Coal Co.* v. *Mahon*, *supra* note 14 at 415 (whether a "'regulation goes too far ... [and is] a taking'" will depend upon "inquiry into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations").

130. See, e.g., *Andrus* v. *Allard*, *supra* note 14 at 66 ("the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests"); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, *supra* note 14 at 428 (denial of access to property not a taking because it "only impaired the use of plaintiffs' property").

131. *Agins* v. *Tiburon*, *supra* note 14 at 262 (emphasis added).

132. *Andrus* v. *Allard*, *supra* note 14 at 67, quoting *Jacob Ruppert, Inc.* v. *Caffey*, 251 U.S. 264, 303 (1920). See also, *First English Evangelical Lutheran Church* v. *County of Los Angeles*, *supra* note 14 at 329 (Stevens, J., dissenting) (a use restriction is not compensable "unless it destroys a major portion of the property's value"). Cf. John J. Costonis, "Presumptive and Per Se Takings: A Decisional Model for the Taking Issue" (1983) 58 N.Y.U. L. Rev. 465 at 513-14 (arguing that the Court has elevated interests in "property's dominion" (right to exclude) "to a status coequal with ... conventional civil liberties interests"—a status not accorded to other property rights).

133. *Andrus* v. *Allard*, *supra* note 14 at 66. See also, *James Everard's Breweries* v. *Day*, *supra* note 14 and *Jacob Ruppert, Inc.* v. *Caffey*, 251 U.S. 264, 302-03 (1920) (upholding sales bans on previously acquired goods).

134. 458 U.S. 419 (1982).

135. See, *ibid.* at 438 & n. 16.

136. 444 U.S. 51 (1979).

the Court denied this takings claim. The difference in treatment of these rights cannot be explained by the degree of severity in their deprivation; it can be explained only by the degree of stringency with which they are, as an initial matter, protected.[137]

The Apparent Model and the Operative Model also differ in the crucial dimension of time. Under the Apparent Model, the rights which are cognizable property interests (and which are protected by the Takings Clause) are determined at a particular moment in time, and "frozen" against change thereafter. Under the Operative Model, we find something quite different. In case after case, the Court has upheld unilateral changes in what were clearly previously existing property rights, with *no* compensation required.[138] The previous model of property, consisting of individual rights, determined in time, and protected from change, is replaced by another: property as individual rights, fluid in time, established and re-established as "new social circumstances ... justify ...".[139]

By choosing dimensions of stringency and time that retain the possibility of future collective redefinition, change, and control, the Operative Model uses an approach to property that is fundamentally different from that of the Apparent Model. Under both models, there is some resolution of conflicts between individual assertions and collective demands. However, the critical difference is whether those conflicts—the inevitable tension between individual and collective—is *external* to the concept of property, or *internal* to it. Is "property" that which demarcates the boundaries between the individual's sphere of autonomy and control and that of collective power (the Apparent Model)? Or is "property" that which may describe the way that particular individual/collective disputes have been settled, at the moment, but which *incorporates* this individual/collective tension—and the possibility of change—*within* the concept of property, itself (the Operative Model)?

This difference can be illustrated by a simple example. Suppose that the question is whether a person can use his land in a way that produces environmental degradation. Suppose, further, that in resolving this conflict, we conclude that he cannot. Under the Apparent Model, "property" is defined to exclude this use. The use in question is simply defined to lie *outside* the concept of property. Under the Operative Model, on the other hand, the *question* of the permissibility of this use is *within* the concept of property. The way in which this question is resolved—and, perhaps later, re-resolved—is "part" of the concept of property itself.

137. Indeed, in a recent case, the Court explicitly discussed this idea and endorsed this conclusion. The Court described two wartime takings cases as "instructive" on the question of different protection for different property interests. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, *supra* note 14 at 431. In the first case, the government seized and directed the operation of a coal mine; this was held to be a taking. See *United States* v. *Pewee Coal Co.*, 341 U.S. 114 (1951). In the second case, the government ordered a gold mine closed; this was held *not* to be a taking. See *United States* v. *Central Eureka Mining Co.*, *supra* note 14. Although conceding that the effects of the actions were "'as a practical matter'" the same in both cases, the results—the Court reasoned—are explained by the intrinsic nature of the interests involved. The first case involved "physical possession" by government; the second did not. As a result, compensation was required in the first case; in the second, it was not. *Loretto* v. *Teleprompter Manhattan CATV Corp*, *supra* note 14 at 431-32.

138. See, *supra* text at notes 98-119.

139. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, *supra* note 14 at 454 (Blackmun, J., dissenting).

What, we might ask, is the significance of this difference? In both cases, the individual can win or lose: the question of the permissibility of this particular use can be decided for or against him. Analyzing the problem from these two points of view, however, produces very different results under the Takings Clause. Under the Apparent Model, we decide—at some point in time—what the "property" is, and then consign that area (so defined) to individual autonomy and control. Once conferred, no changes in those rights can occur without an "impairment" of property and (under the Takings Clause) the payment of compensation. Under the Operative Model, property does not describe an area of individual control—rather, it describes the tension between individual and collective. As a result, renegotiation and changes in such rights can occur without "impairment" of property interests and (under the Takings Clause) without payment of compensation. Under this model, "property rights" may assume a particular form today; but there is assumed power, on the part of the collective, to change them (in response to changing conditions, or other factors) tomorrow.

It could be objected that this is not, in fact, a new model of property, but merely a different form of the old one. One could simply choose a theoretical dimension for the Apparent Model that includes the idea of collective change: property could, for instance, be understood to be comprised of a landowner's "reasonable" expectations, with the latter defined—and redefined—as circumstances require.[140] The Court has occasionally employed such language, arguing that the "bundle of rights" that comprise property includes the expectation that "uses of ... property [will] ... be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers ...".[141]

Although a reserved ability to impose some restrictions might be compatible with the Apparent Model of property,[142] the idea that the collective can, in its "discretion", identify additional prohibitions "'as the special exigencies of the moment may require'"[143] clearly is not.[144] The "expectations" of the property holder must have meaning; they must be rooted in the legal rights, social assumptions, or other factors that exist or that can be reasonably anticipated at the moment in time (such as acquisition) chosen. For "expectations" simply to change with changing collective needs would render this conception of property, and its purported protection,

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140. Cf. Jerry L. Anderson, "Takings and Expectations: Toward a 'Broader Vision' of Property Rights" (1989) 37 Kan. L. Rev. 529 at 562 (landowners' legitimate expectations, recognized as property, "must be tempered by a public interest condition", i.e., an understanding that there may be later restrictions as the public interest requires).

141. *Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2899. See also *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, *supra* note 14, at 491-92, quoting *Mugler* v. *Kansas*, *supra* note 14 at 665 ("Long ago it was recognized that 'all property ... is held under the implied obligation that the owner's use of it shall not be injurious to the community' ...").

142. See, *supra* text at notes 76-77.

143. *Mugler* v. *Kansas*, *supra* note 14 at 669, quoting *Stone* v. *Mississippi*, 101 U.S. 814, 819 (1879). See also *Block* v. *Hirsh*, *supra* note 14 at 156 (emergency housing conditions sufficient to justify municipal determination of reasonable rents: "public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation").

144. In a recent dissent, Justice Blackmun noted that "[t]he brewery, the brickyard, the cedar trees, and the gravel pit [in *Mugler*, *Hadacheck*, *Miller*, and *Goldblatt*] were all perfectly legitimate uses prior to the passage of the regulation." *Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2913 n.16 (Blackmun, J., dissenting).

essentially meaningless.[145] It is the concreteness of the Apparent Model, and its vision of property as representing the individual's bulwark against the threat of collective change, that gives it its essential character. The elimination of this quality, through the choice of a theoretical dimension that repudiates it, will—in turn—destroy the very qualities that are essential to this model of property.[146] Indeed, the implicit absurdity of such an approach is tacitly acknowledged by the Court itself. In none of the cases where social redefinition was upheld, was there any attempt to justify this result in the "expectations" of the property holder involved.[147]

Just as we considered problems with the Apparent Model, we must consider problems with the Operative Model as well. The Operative Model solves one problem: it imports flexibility into a seemingly inflexible takings equation. But with this solution comes another problem. "Property" (as used in the Takings Clause) must have some meaning. It must have been intended to confer *some* degree of individual protection, *some* degree of individual control.[148] If change *is a part of the concept of property*, any protection that the Takings Clause might conceivably afford disappears. If we accept the Operative Model, and its broad notions of col-

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145. The "circularity" in defining "the owner's reasonable expectations" in terms of "what courts allow as a proper exercise of governmental authority" was discussed by Justice Kennedy in a recent concurring opinion. If this approach is taken, "property tends to become what courts say it is." The solution, he wrote, is to be found in the proposition that "[t]he expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved." "The Takings Clause ... protects private expectations to ensure private investment." *Lucas* v. *South Carolina Coastal Council, supra* note 14 at 2903 (Kennedy, J., concurring in the judgment).

146. Cf. *ibid.* at 2892-93, quoting *Pennsylvania Coal Co.* v. *Mahon, supra* note 14 at 415 ("[I]f the protection against physical appropriations of private property [is] to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property [is] necessarily constrained by constitutional limits. ... If ... the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].'").

147. In *Keystone Coal Ass'n* v. *DeBenedictis*, the Court discussed its typical approach in these cases: if the state's interest is deemed to be strong enough, it simply trumps private property interests, without the need for further explanation.

> In *Mugler v. Kansas*, ... for example, a Kansas distiller who had built a brewery while it was legal to do so challenged a Kansas constitutional amendment which prohibited the manufacture and sale of intoxicating liquors. Although the Court recognized that the "buildings and machinery constituting these breweries are of little value" because of the Amendment, ... Justice Harlan explained that a
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> > "prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot ... be deemed a taking or appropriation of property ...". ...
>
> ...[Similarly, in *Miller* v. *Schoene*], the Court did not consider it necessary to "weigh with nicety the question whether the infected cedars [which were ordered destroyed] constitute a nuisance according to common law; or whether they may be so declared by statute." ... Rather, it was clear that the State's exercise of its police power to prevent the impending danger was justified, and did not require compensation.

Keystone Bituminous Coal Ass'n v. *DeBenedictis, supra* note 14 at 488-90. Such regulations are simply "a burden borne to secure 'the advantage of living and doing business in a civilized community.'" *Andrus* v. *Allard, supra* note 14 at 67, quoting *Pennsylvania Coal Co.* v. *Mahon, supra* note 14 at 422 (Brandeis, J., dissenting).

148. See, e.g., *Wilkinson* v. *Leland*, 27 U.S. 627, 657 (1829) ("[G]overnment can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without ... restraint.").

lective power, what is left of the concept of property? Has it dissolved into complete collective power, to redefine whimsically individual rights with no restraint?

Faced with this problem, the Court has employed several techniques while using its Operative Model of property. First, the Court has identified particular areas where government interests are especially strong and, thus, where the case for redefinition of individual rights is most compelling. Such areas have been framed as "exercises of the police power", the "prevention of nuisance", the protection of "health, safety, and welfare,"[149] and so on. By clear implication, governmental actions that do not fall within these areas are subject to more exacting scrutiny.

The Court has also used the dimensions of stringency and space in attempts to limit collective power. By rejecting the assumption of equal stringency of protection for all rights, and employing a scheme that identifies certain rights as deserving greater protection than others, the Court has created a scheme that attempts to protect selected interests against collective power.[150] Manipulation of the spatial dimension has been employed to similar ends. Since (under the Operative Model) collective change of pre-existing individual rights is possible, the Court has adopted a test which uses the degree of interference with pre-existing rights as the determining factor in takings questions.[151] What that "degree" is, in any particular case, may well depend upon the spatial dimensions (or "size") of the "piece" of property chosen.[152]

The discretionary use of such techniques does not, however, address the basic question: how can we *ensure* consideration of restraining arguments in the adjudication of takings claims? The Operative Model, while granting needed flexibility, contains no inherent restraints against the collective will. Reliance upon the judicial branch to consider voluntarily the importance of individual interests (and to manipulate the Operative Model toward that end) seems no more well-founded, as a matter of theory, than reliance upon the elected organs of majoritarian government to do the same.

It seems that we have arrived at an insoluble dilemma. Neither the Apparent Model nor the Operative Model can express what, in this context, property must mean. The idea of property as individual protection—as something asserted against the collective—is a psychologically important and deeply ingrained one. The Apparent Model, which protects individual interests, meets this need. However, it fails to be responsive to the need for collective change—an inevitable requirement in takings law. The Operative Model of property, which allows collective change, meets this need. However, it fails to provide structural protection for individual interests—surely an essential consideration under the Takings Clause. There is little, in fact, which distinguishes this notion of property from a simple statement of

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149. See, *supra* text at notes 98-110.

150. Such specially treated rights are called "core" rights, "traditional" rights, "fundamental" rights, and "essential" rights. See, e.g., *Nollan* v. *California Coastal Comm'n*, *supra* note 14 at 831; *Kaiser Aetna* v. *United States*, *supra* note 14 at 176; *Loretto* v. *Teleprompter Manhattan CATV Corp.*, *supra* note 14 at 435-41; *Andrus* v. *Allard*, *supra* note 14 at 65.

151. See, e.g., *Agins* v. *Tiburon*, *supra* note 14 at 261; *Penn Cent. Transp. Co.* v. *New York City*, *supra* note 14 at 131.

152. *See Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2894 n.7.

collective power.

Is there no solution to this dilemma? Is "property", as used in this context, simply—hopelessly—incoherent?

IV. "Two Models of Property": A New Understanding

The seemingly conflicting impulses that property might express have been the subject of extensive scholarly commentary. In an article that has become a classic in the field,[153] Carol Rose examined the "takings problem" from the point of view of what she called a "fundamental tension" in the American property tradition. On the one hand, private property has been associated with the protection of individual expectations; on the other, it has been seen as a means to achieve socially desirable ends.[154] Gregory Alexander characterized these opposing visions as "self-regarding" and "communitarian" in nature;[155] Frank Michelman described conflicts between property "as security of legally justified possession" and critiques of "undemocratic relationships of power and subjection."[156] Jennifer Nedelsky, in an interesting and provocative essay, argued that these competing visions are not merely incompatible: rather, one is (in fact) destructive of the other.[157]

When "property" that involves individual-protectionist theories is compared to "property" that is based upon other theories, differences are expected.[158] What we have found in the Supreme Court's takings cases is, however, something quite different. Although the Court's express understanding of property is the ordinary one, based (as the starting point, at least) upon the protection (and primacy) of individual interests, the understanding of property which is reflected in these cases is far more complex. Two models (in fact) emerge: one which protects, and one which does not. Both models appear, in these cases, to be inherent and necessary parts of the individual-protectionist understanding, itself.

The existence of conflict between individual and collective goals is, of course, "insoluble" in nature; indeed, it is the very existence of that conflict that property, as a concept, is intended—somehow—to express. No model of property, no matter how well crafted, can eliminate the question for which it is the answer. What we

153. Rose, *supra* note 14.
154. *Ibid.* at 587-92.
155. Alexander, *supra* note 34 at 260-61.
156. Michelman, "Possession vs. Distribution", *supra* note 34 at 1320-35.
157. Nedelsky argued that the model of private property as individual protection has served, in the American constitutional system, as "the quintessential instance of individual rights as limits to governmental power." Property must have this special nature—this mythically concrete quality—if it is to perform its limiting role on claims of majoritarian legislative power. If this conception of property is replaced by a conception which explicitly acknowledges distributional calculations, if it "is finally perceived to be merely a legal entitlement, indistinguishable in nature from any other", "then it can serve neither a real nor a symbolic function as boundary between individual rights and governmental authority." Jennifer Nedelsky, "Paradox", *supra* note 67 at 241, 253, 251.
158. Whether the theoretical dimension adopted is individual-protectionist, communitarian, or otherwise defined will obviously affect the nature, structure, and function of the resulting conception of property. Indeed, the development of explicitly different theories of property and their places in individual-community relations has distinguished many recent commentaries. See, *supra* notes 34 and 40.

can do—and what I shall attempt to do here—is to articulate an understanding or model of property that accounts for these conflicting impulses in a workable way.

a. Property: Idea and Institution

We will begin with a consideration of the fundamental nature of that which we commonly call "property". Property, as noted by C.B. Macpherson, is a "man-made institution which creates and maintains certain relations" among people.[159] It is both an *idea* and an *institution*; it is both how people envision it—"that is, what concept they have of it"[160]—and how it is, as a political and social institution, implemented to resolve particular conflicts in society. There must be some relation between idea and institution, although this is "not necessarily an exact correspondence."[161]

The observation that there is the idea of property and that there is (separately) the institution of property is fundamental to our understanding of this concept. The importance of this distinction can be illustrated by a simple example. It is often said that the "propertyless" (those who have no property) have no interest in property's protection. If one is entirely disadvantaged by the existing scheme of property distribution, one has no interest in the protection of property. But is this true? As I have argued elsewhere,[162] it is impossible to imagine a class of persons who have no interest, no psychological investment of any kind, in the *idea* of property protection.

Every individual desires protection for his property, both that which is now possessed and that which may, in the future, be acquired. This is true no matter how meager one's current allotment may be. In fact, those who have little might have a greater stake in (and perhaps greater moral claim to) the protection of what they do have. In short, the idea of property—the "general concept" or "general right" to property protection—is different, in the minds of individuals, from the institution of property—the existing arrangements, or instantiations, of that right.[163] All might fervently agree with the idea or ideal of property protection, yet disagree over what the instantiations of that right should be. Indeed, the idea of individually secured, protected property can be as serviceable in the cause of guaranteed human (material) entitlements[164] or in securing a "voice [for all] in the [disposition of] ... vital social goods"[165] as in protecting other, more traditional notions. This idea of property—

159. C.B. Macpherson, "The Meaning of Property", *supra* note 38 at 1.
160. *Ibid.*
161. *Ibid.*
162. Underkuffler, "Perfidy", *supra* note 64 at 307.
163. See Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 170 (distinguishing a statement of a general right from particular rights, which are instances of it).
164. See C.B. Macpherson, *supra* note 40 at 72-77; Charles A. Reich, "The Individual Sector" (1991) 100 Yale L.J. 1409.
165. Gray, *supra* note 40 at 212. We may "com[e] to recognise, on behalf of the individual citizen, a significant 'equitable property' in the quality and conservation of the natural environment." We may "lock into the insidiously powerful leverage of the primal claim, 'its mine', and ... harness this claim for more constructive social purposes. When important assets of the human community are threatened, we are able to say, with collective force, 'you can't do that: these assets are ours.'" *Ibid.* at 188, 210 (footnote omitted). See also Alison Rieser, "Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory" (1991) 15 Harv. Env. L. Rev. 393

rigid in terms, abstract in form—stands apart, but influences (by its presence) what our institutional choices might be.[166]

b. A Model of Two Models

The realization that property involves both general rights and particular manifestations of those rights leads to an answer to our threshold question: what a workable understanding of property, for takings purposes, might be. When property is seen as a bipartite entity, with both general (conceptual) and institutional (applied) aspects, the two models of property, previously described, are seen in a different light. These are not competing visions, to express the same thing; rather, they are *different* expressions of *different parts* of a larger understanding of property. The Apparent Model expresses an idea of property, as an abstract and general right, absolute and rigid in nature, with which we might all (on some level) agree; it is the belief that property "is", and "should be", individual protection. Contrarily, the Operative Model expresses the institution of property. It includes the idea of protection, but as (often) compromised in a context of competing interests and real, conflicting, conditional choice.

Seen in this way, it is clear that both models have vital and valid functions. Both are, in fact, integral parts of the common understanding of property as "rights", bounded and protected, against state coercive power. Under this understanding, property is necessarily expressed by both conceptual (rigid, and abstract) and institutional (compromised) models. In that regard, it is no different from due process, freedom of religion, freedom of speech, or any other individual right.[167]

Although the institution of property must necessarily begin with the premise of the Operative Model, and the assumption of collective control, the common idea of property—with its concrete, rigid form—constrains this process. The idea of property as rigid and unchanging protection controls change, forces the scrutiny of change; it is the ideal, the conscience, against which incursions of pre-existing rights are measured.[168] Does the incursion violate the general right to the least extent possible? Are the reasons for violations articulated, and compelling? Each decision is measured, justified, and constrained, by the ideal of individual protection. *Both* models are necessary parts of a larger, dynamic understanding of property. *Both* are required—*both* must work together—to shape the resolution of conflicting claims that property involves.

(describing the public's "property rights" in non-commodified values associated with natural resources).

166. Cf. Macpherson, "The Meaning of Property", *supra* note 38 at 1 (describing how, "over time[,] the institution and the concept influence each other").

167. See Underkuffler, "Perfidy", *supra* note 64 at 310. Cf. Loren E. Lomasky, *Persons, Rights, and the Moral Community* (New York: Oxford University Press, 1987) at 14-15 (arguing that "a rational and worthwhile individualism" includes a scheme of basic rights, tempered by sociality and the need for flexibility within private and public spheres).

168. See Jed Rubenfeld, "Reading the Constitution as Spoken" (1995) 104 Yale L.J. 1119 at 1157-60 (describing commitment to prior principles in law as a "form of bindingness", forcing an acknowledgement of change and a reckoning with its consequences). Cf. Rose, *supra* note 110 (manuscript at 43) (discussing the "endowment effect", or the tendency of beneficiaries to believe that special favors, once granted, cannot be taken away).

V. Two Models of Property: The United States Supreme Court, Revisited

Recognition of the two models of property, and the necessary interaction between them, is certainly interesting as a matter of theory. It is illuminating to identify the four constituent dimensions of property—theory, space, stringency, and time; to see how these dimensions are assembled, in the creation of Apparent and Operative models of property; and to see how these models—representative, as they are, of idea and institution—have valid and vital functions in the *system* of property which the Takings Clause involves. However, several questions remain. Would the recognition of these models, their constituent parts and their necessary interaction, change—in any way—the manner of our resolution of takings questions? Would it change the analysis, or outcomes, of existing takings jurisprudence?

To explore these questions, we shall revisit the United States Supreme Court's opinion in *Lucas* v. *South Carolina Coastal Council.*[169] I have chosen this opinion (by Justice Scalia) for several reasons. First, it is clearly the most complete, and candid, statement of what has been the Court's emerging approach to takings issues. Second, its factual setting—dealing, as it does, with an individual's ability to build on his land—presents, in a relatively uncluttered fashion, one of the most basic issues in regulatory takings law.

a. The Lucas Case

The operative facts in *Lucas* were relatively simple. In 1977, the South Carolina Legislature enacted the Coastal Zone Management Act.[170] This Act required owners of coastal zone land that qualified as a "critical area" to obtain a permit from the South Carolina Coastal Council prior to committing the land to any use that differed from that to which the land was subjected on September 28, 1977.[171] In the late 1970's, Lucas began residential development activities on the Isle of Palms, a barrier island located near the City of Charleston. In 1986, he purchased two lots with the intention of erecting single-family residences on them. At the time of their purchase, the lots did not qualify as "critical areas" under the 1977 Act.[172]

In 1988, the South Carolina Legislature passed the Beachfront Management Act.[173] The purpose of this Act was to protect the beach/sand dune coastal system from unwise development which could jeopardize the stability of the beach/dune system, accelerate erosion, and endanger adjacent property.[174] As the result of this Act, in conjunction with the former Act, development of Lucas's parcels was prohibited.[175]

Lucas challenged this result in the South Carolina courts, claiming that it effected a taking of his property without just compensation. In Justice Scalia's words, "Lucas

169. 112 S.Ct. 2886 (1992).
170. S.C. Code Sec. 48-39-10 *et. seq.* (1987).
171. S.C. Code Sec. 48-39-130(A) (1987).
172. *Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2889.
173. S.C.Code Sec. 48-39-280 *et. seq.* (Supp. 1988).
174. S.C. Code Sec. 48-39-250 (Supp. 1991).
175. *Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2889-90.

did not take issue with the validity of the [1988] Act as a lawful exercise of South Carolina's police power, but contended that the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives."[176] The South Carolina trial court concluded that Lucas's properties had been "taken" by the operation of the Act, and ordered payment of compensation in the amount of $1,232,387.50.[177] The South Carolina Supreme Court reversed, on the theory that the Act was enacted "to prevent serious public harm",[178] a police power exercise which it held to be exempt from the provisions of the Takings Clause.

The United States Supreme Court reversed. Writing for the majority, Justice Scalia jettisoned the approaches of old case law and attempted to establish a new approach to these cases. He began his analysis with recognition that "[p]rior to Justice Holmes' exposition in *Pennsylvania Coal Co.* v. *Mahon*, ... it was generally thought that the Takings Clause reached only a 'direct appropriation' of property ..., or the functional equivalent of 'a practical ouster of [the owner's] possession.'"[179] As recognized in *Mahon*, however, "if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits." "If ... the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].'"[180] "These considerations", Justice Scalia wrote, "gave birth ... to the oft-cited maxim that 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'"[181]

The problem, Justice Scalia continued, is determining "when, and under what circumstances, a given regulation would be seen as going 'too far' for purposes of the Fifth Amendment."[182] The Supreme Court has "generally eschewed any '"set formula"' for determining how far is too far, preferring to 'engag[e] in ... essentially ad hoc, factual inquiries.'"[183] In making such calculations, "'[t]he economic impact of the regulation on the claimant and ... the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant ...".[184]

There are, however, "at least two discrete categories of regulatory action [which are] ... compensable without case-specific inquiry into the public interest advanced in support of the restraint." The first is where the property owner "suffer[s] a physical 'invasion' of his property." In this situation, "(at least with regard to permanent

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176. *Ibid.* at 2890. The majority in *Lucas* accepted Lucas's assertion that because of the construction ban, his two beachfront lots were "rendered valueless". *Ibid.* at 2896.
177. *Ibid.* at 2890.
178. *Lucas* v. *South Carolina Coastal Council*, 404 S.E.2d 895, 899 (S.C. 1991).
179. *Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2892, quoting *Legal Tender Cases*, 12 Wall. 457, 551 (1871) and *Transportation Co.* v. *Chicago*, *supra* note 53 at 642.
180. *Ibid.* at 2892-93, quoting *Pennsylvania Coal Co.* v. *Mahon*, *supra* note 14 at 415.
181. *Ibid.* at 2893, quoting *Pennsylvania Coal Co.* v. *Mahon*, *supra* note 14 at 415.
182. *Ibid.*
183. *Ibid.*, quoting *Penn Central Transp. Co.* v. *New York City*, *supra* note 14 at 124, quoting *Goldblatt* v. *Hempstead*, 369 U.S. 590 at 594 (1962).
184. *Ibid.* at 2895 n.8, quoting *Penn Central Transp. Co.* v. *New York City*, *supra* note 14 at 124.

invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation."[185] The second situation in which the Court has "found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land."[186] "As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'"[187]

It is this second, "categorically compensable" situation that the Court found to be applicable to the *Lucas* case.[188] Since Lucas was "called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[189] Although this "total loss" rule might be of difficult practical application in some cases, since it "does not make clear the 'property interest' against which the loss of value is to be measured",[190] that difficulty was avoided in *Lucas* since "the 'interest in land' that Lucas ... pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law". In addition, the South Carolina courts found that Lucas's lots, after regulation, were "without economic value".[191]

The clear implication in prior Supreme Court cases—that exercises of the state's police power, to prevent harmful or noxious uses, are noncompensable under the Takings Clause—was flatly rejected by the Court. "It is correct", Justice Scalia wrote, "that many of our prior opinions have suggested that 'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation."[192] However, since it is difficult (if not impossible) to distinguish regulation that "prevents harmful use" from that which "confers benefits" on an "objective, value-free basis", "it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory 'takings'—which require compensation—from regulatory deprivations that do not ... ."[193] In other words, state

185. *Ibid.* at 2893.
186. *Ibid.*
187. *Ibid.* at 2893-94, quoting *Agins* v. *Tiburon*, *supra* note 14 at 260 (emphasis deleted).
188. The reasons for this exception to the usual, *ad hoc* approach to takings are somewhat obscure. However, the Court listed several possible justifications. First, "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Ibid.* at 2894. "[I]n the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life.'" *Ibid.*, quoting *Penn Central Transp. Co.* v. *New York City*, *supra* note 14 at 124. In addition, there are practical reasons which support this rule. The concern that government could not go on, if every diminution in value incident to property required compensation, "does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses". *Ibid.* There is also "a heightened risk that private property [will be] pressed into some form of public service", when all economically beneficial use is taken. *Ibid.* at 2894, 2895.
189. *Ibid.* at 2895 (footnote omitted).
190. *Ibid.* at 2894 n.7. As Justice Scalia explained, if "a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole." *Ibid.*
191. *Ibid.*
192. *Ibid.* at 2897.
193. *Ibid.* at 2899.

police power is simply part of the state's interest, to be considered in cases subject to the usual balancing of interests approach.[194] In these cases, consideration of the state's interest is appropriate, because "the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the [s]tate in legitimate exercise of its police powers."[195] If, however, the incursion is of a categorical variety—if it involves a permanent physical occupation of land or a prohibition of all economically beneficial use of land—the situation is different. Unless this incursion is a "pre-existing limitation upon the landowner's title",[196] it cannot be enacted without compensation, "no matter how weighty the asserted 'public interests' involved."[197] The idea that land is "held subject to the 'implied limitation' that the [s]tate may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause ... ."[198]

Having determined (under this analysis) that Lucas's claim was of a "categorically compensable" nature, the Court remanded the case to the state courts for a determination of whether common law principles of property law and nuisance (concededly a part of Lucas's title) imposed the restrictions that the state desired. This analysis would "entail ... [consideration of] the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, ... the social value of the claimant's activities and their suitability to the locality in question, ... and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) ...".[199] Although opining that "[i]t seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land", the Court held that "[t]he question ... [was] one of state law to be dealt with on remand." In the Court's words, "... South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing."[200]

b. Four Dimensions, Two Models: Lucas Through a Different Lens

As noted by commentators, the Supreme Court's opinion in *Lucas* seems, in the end, oddly unsatisfactory.[201] We are left with the result that "two discrete

194. *Ibid.* at 2897.
195. *Ibid.* at 2899.
196. *Ibid.* at 2900.
197. *Ibid.*
198. *Ibid.*
199. *Ibid.* at 2901.
200. *Ibid.* at 2901, 2902.
201. For an excellent sampling of *Lucas* commentary, see Richard A. Epstein, "*Lucas* v. *South Carolina Coastal Council*: A Tangled Web of Expectations" (1993) 45 Stan. L. Rev. 1369; William W. Fisher, III, "The Trouble with *Lucas*" (1993) 45 Stan. L. Rev. 1393; Richard J. Lazarus, "Putting the Correct 'Spin' on *Lucas*" (1993) 45 Stan. L. Rev. 1411; Joseph L. Sax, "Property Rights and the Economy of Nature: Understanding *Lucas* v. *South Carolina Coastal Council*" (1993) 45 Stan. L. Rev. 1433.

categories of regulatory action" ("permanent physical invasion" and "deprivation of all economically beneficial use") are compensable, regardless of the public interest involved.[202] We are given few reasons for the distinct treatment of these categories, other than their rarity in number, their benefit to the public (and, hence, the temptation for abuse), and their rootedness (somehow) in fundamental property expectations.[203] About takings and other kinds of regulatory action, we know even less. Presumably, they are "essentially ad hoc, factual inquiries",[204] where the impact of the regulation upon the claimant's interests is balanced against the public interests at stake. If the former outweighs the latter, compensation is paid; if the latter outweighs the former, nothing from the government is due.[205]

The understanding of property which is used in this case purports to be the common one.[206] If we were to reexamine this opinion in light of the four dimensions and two models of property previously described, what would we find?

Both categorical and balancing approaches, used by the Court in this case, are rooted in an Apparent Model of property. The opinion began with the idea, described in *Pennsylvania Coal* and found in older cases, that the Takings Clause reaches only the "direct" or "physical" appropriation of property.[207] Under this idea, property is a "thing" or other conceptually bounded sphere under individual possession and control. If the government interferes with this property in a manner that approximates "direct" or "physical" appropriation, there is a taking of property by government, cognizable under the Takings Clause.[208]

It is apparent that this "physical appropriation" idea uses, in fact, an Apparent Model of property. Property is envisioned as something possessed or controlled by the individual, with which the state interferes. It is the protection of this individual sphere of autonomy and control that the Takings Clause addresses. The question is presented as one which considers whether the collective, through its action, has interfered with this "sphere", this "entity", this "property", to the point that compensation must be paid.[209] A compensatory taking occurs if the impairment is of a "categorical" kind (permanent "physical invasion" or the prohibition of "all economically beneficial use") or if the harm to the claimant outweighs the public interest involved (under a kind of balancing test).[210] In either instance, however, the approach is the same: the degree of collective interference with the individual's sphere is examined to see if an imaginary line has been crossed, with compensation (consequently) owed.

When the use of this model is recognized, the problems that it creates can be recognized as well. If property is a "sphere", an "entity", a "thing", why isn't *every*

202. *Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2893.
203. See, *ibid.* at 2894-95.
204. *Penn Central Transp. Co.* v. *New York City*, *supra* note 14 at 124.
205. See, *Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2893.
206. See, *ibid.* at 2894 n.7; *supra* text at notes 63-66.
207. *Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2892.
208. *Ibid.* The analogy to "physical appropriation" can be found in many of the Court's takings cases. See, *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, *supra* note 14 at 516-17 (Rehnquist, J., dissenting).
209. See, *Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2892-93.
210. *Ibid.* at 2893.

interference by the collective a taking? Why are "permanent physical invasions" or prohibitions of "all economically beneficial use" surely compensable, but other impairments—of arguably equal seriousness—not? Moreover, the idea that impairments that go "too far" are *completely* compensable, but other impairments (that stop a hair short of that magic line) are not compensable *at all*, seems to conflict with the model's basic premise. If property (under this model) is present, and is impaired by collective action, it would seem (under the Takings Clause) that compensation is required—whether the interference is the equivalent of a "physical appropriation", or not. The Court's response, that "[t]akings law is full of ... 'all-or-nothing' situations,"[211] is viscerally unsatisfactory. Nor does the practical explanation—that "'[g]overnment hardly could go on'" if all impairments were compensated[212]—reconcile these tests with the model of property used, or answer the question of the tests' seeming arbitrariness.

The Court did not acknowledge its use of the Apparent Model, or the problems, in the takings context, that this model creates. Faced with those problems, the Court appears to have abandoned this model, at times, for an Operative one. First we are told that property is a "thing", bounding (and protecting) the individual's interest; later we are told that government may, in fact, "redefine the range of interests included in the ownership of property."[213] The Court's failure to recognize that these are simply two different models of property, built upon deeply incompatible ideas, lends an odd doctrinal incoherence to the undertaking.[214]

Nor are we told, under the opinion, when we should use the Apparent Model, and when the Operative one. The old idea, that changes in property protection are linked to police power, was explicitly and emphatically rejected. Distinguishing police-power from non-police-power cases involves distinguishing "harm-preventing" from "benefit-conferring" regulation—a distinction which, in Justice Scalia's words, "is often in the eye of the beholder."[215] As he observed, "[i]t is quite possible ... to describe in *either* fashion the ecological, economic, and aesthetic concerns" that are involved in these cases.[216] "Police power" exercise cannot, in short, determine when property protects, and when it does not; it "cannot serve as a touchstone

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211. *Ibid.* at 2895 n.8.
212. *Ibid.* at 2894, quoting *Pennsylvania Coal Co.* v. *Mahon*, *supra* note 14 at 413.
213. *Ibid.* at 2892.
214. The unexplained use of Apparent and Operative models can be found in the Court's other opinions as well. In *Nollan* v. *California Coastal Commission*, for instance, the Court first asserted that a permanent physical occupation of property is a taking "'without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner'"—implying the use of an Apparent Model of property. *Nollan* v. *California Coastal Comm'n*, *supra* note 14 at 831-32, quoting *Loretto* v. *Teleprompter Manhattan CATV Corp.*, *supra* note 14 at 434-35. Later, the Court asserted that a land-use regulation "does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land'"—implying the use of an Operative Model of property. *Ibid.*, at 834, quoting *Agins* v. *Tiburon*, *supra* note 14 at 260. Neither the use of these different models, nor their implications, is acknowledged. See also *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, *supra* note 14 at 488-89 n.18; *Penn Cent. Transp. Co.* v. *New York City*, *supra* note 14 at 124-25; *Pennsylvania Coal Co.* v. *Mahon*, *supra* note 14 at 413-14 (using a mixture of Apparent and Operative models in discussing classic takings tests).
215. *Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2897.
216. *Ibid.* at 2897-98.

to distinguish regulatory 'takings'—which require compensation—from regulatory deprivations that do not ...".[217]

Use of the Operative Model, of course, creates its own problem: how this power of property "redefinition", granted to the collective, can be restrained. The necessity for restraint was clearly recognized by the Court; indeed, if there were no restraint, "'the natural tendency of human nature [would be] to extend the qualification [of property] more and more until ... private property disappear[ed].'"[218] The critical problem becomes how, under a scheme of alternative models, both flexibility and restraint can be achieved. If the Apparent Model of property is used, limits to collective action are certainly prescribed; indeed, *any* collective interference with the individual's sphere is an impairment of property under this model. If the Operative Model of property is used, the problem is as extreme, but the reverse; while this model permits collective adjustment (of individual interests), it provides no limit on its use. There is no way, under the Operative Model, to generate areas of exception to the general and plenary collective power.

However, the deepest problem with *Lucas* (and, indeed, with the Court's other takings opinions) is something else. Throughout its opinions, the Court repeatedly fails to examine the nature and consequences of the conceptions of property that it implements. In *Lucas*, for instance, property—rhetorically, at least—is an "entity", a "thing", an individual's inviolable "sphere". But how is this defined? What are its dimensions of theory, space, stringency, and time? Why do we, as a society, choose—and enforce—those dimensions?

The Court implicitly assumes that, under the Apparent Model, the nature of property *itself* imposes appropriate limits on collective action. If, under *Lucas*, a regulation "denies [a landowner] all economically beneficial or productive use of [her] land", compensation is (without question) paid. In this situation, impairment of protected property interests is argued to be so clear, and so compelling, that it—alone—gives the answer to the takings question.

The simplicity of this rule belies the complexity of the model of property on which it is founded. The Apparent Model of property, like all conceptions of property, is comprised of the four dimensions that we have discussed. Although a description of property as the landowner's "expectations" when title was acquired, understood against "background principles of nuisance and property law",[219] might begin to sketch a theoretical dimension, it says nothing about remaining questions of space, stringency, or time. The dimension of "space", critical to a determination of whether "all" value is taken, was admitted by the Court to present a serious problem; in the Court's own words, "[r]egrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured."[220] Temporal problems were also skirted. Although ostensibly freezing all understandings at the moment of the property's acquisition, caveats appear. It

217. *Ibid.* at 2899.
218. *Ibid.* at 2893, quoting *Pennsylvania Coal Co.* v. *Mahon*, *supra* note 14 at 415.
219. *Ibid.* at 2901-02.
220. *Ibid.* at 2894 n.7.

was acknowledged that "the property owner necessarily expects the uses of his property to be restricted, from time to time, by ... measures newly enacted by the [s]tate in legitimate exercise of its police powers."[221] Although this expectation does not include regulations which "subsequently eliminate all economically valuable use",[222] such regulations might be part of common law principles of property and nuisance—principles which are, under the Court's opinion, explicit parts of the landowner's title.[223] Indeed, the very factors that "principles of nuisance and property law" interject—an "analysis of ... the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's ... activities, ... the social value of the claimant's activities and their suitability to the locality in question, ... and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners)"[224]—are the very uncertainties that the "categorical" rules and other Apparent Model restraints are intended to avoid.

Through its rhetorical and ostensible adherence to an Apparent Model of property, the Court attempts to mask the questions that are part and parcel of any conception of property. It has encouraged—indeed, reified—the belief that property is an "entitlement", defined once (and forever) in the dimensions of theory, space, stringency, and time. Property is, in this vision, something "apart" from social forces or collective power. It is self-evident, self-executing, and self-justifying. Neither the choices involved in the content of its dimensions, nor the perpetuation of those choices, is questioned.

No model of property avoids value choice. Any model simply reflects, through its constituent dimensions, the choices that we make. What are Lucas's "expectations" of development? *Why should* we protect them? *Why should* we discard the claims of others—the social or collective demands—that compete with his "rights"? These questions cannot be answered by recourse to Apparent Models of property or other simplistic notions. Rather, in each case we must ask: *what are* the entitlements that are claimed? *What values do* those dimensions serve? Are there reasons why we, as a society, *should wish to promote or preserve* those values? The grant or denial of compensation should depend upon our answers to these questions.[225]

221. *Ibid.* at 2899.
222. *Ibid.* at 2900.
223. *Ibid.*
224. *Ibid.* at 2901-02
225. In asking these questions, we must question not only the dimensions of space, stringency, and time that we have chosen for our understanding of property—we must question the first, theoretical dimension as well. Simple theories of individual protection, as found in common conceptions, may fail to reflect the affirmative duties and social context which many human rights involve. Property may involve not only those rights that protect the autonomy and security of the individual against interference by others; it may also involve rights that are dependent upon social context for their expression, development or support. See Macpherson, *supra* note 40 at 76-77; Underkuffler, *supra* note 36 at 133-42. Ideas of trusteeship, duties, or other notions of responsibility may, in fact, better capture the true nature of individual-community relations than simple ideas of protection or autonomy alone. See Gray, *supra* note 40 at 208-09 (arguing that property involves the "reciprocal responsibility which each citizen owes to his or her community"); Rose, "Environmental Lessons", *supra* note 40 at 1042-43 (arguing that ideas of stewardship and trusteeship, commonly used in environmental contexts, are rooted in property-rights ideas); Singer, "Property and Social Relations", *supra* note 40 (manuscript at 11, 22-25) and Joseph William Singer, "No Right to Exclude: Public Accommodations and Private Property" (manuscript at 222-26).

It should not depend upon analogies to physical appropriation, manipulations of the spatial dimension of the model of property, arbitrary characterizations of "valuelessness", or other intellectually unconvincing and dishonest strategies.

The exposure of the underlying, competing values in these cases will not, of course, lead to simple answers as to how conflicts among these values should be resolved. In a case such as *Lucas*, for instance, the court could well decide that the *idea* of Lucas's property—his interests, and the values that they represent—should prevent change, or should not. The analysis involved in this decision would, however, be far more penetrating, and far more honest, than that which the *Lucas* opinion offers. Claimed entitlements to use land would no longer be seen as obvious, monolithic, and unchanging rights. Instead, they would be seen for what they are: interests that compete with other interests; expectations that conflict with the expectations of others. We would, in short, be shed of the dangerous (and naive) illusion that protection of property is "impartial" in nature, and that (by use of the Apparent Model) we can protect the interests and expectations of all.

An objection could be made that this approach is too complex—too subjective—for courts and others who must resolve these claims. However, this objection ignores the essential nature of these questions. As long as constitutional provisions are argued to immunize existing "entitlements" against change, we will have to come to grips with what those entitlements are and whether we wish to preserve them. Simple rhetoric that "our democracy was founded on principles of ownership, use, and control of private property,"[226] or that private property is "a fundamental right of the American people",[227] will not answer these questions. Times will change; conflicts will occur; one side, in each conflict, will lose. Use of an Apparent Model of property will not solve these problems. It may obscure these questions; it may obscure that we, as a society, *are deciding* these questions; but it cannot avoid the fact that, in the end, choices will be made.

The nature of property, in takings and other contexts, must be candidly faced. Property, and its protection, must be seen for what they are—not for what we might (in simplicity) wish them to be. The idea of property as "rights", bounded and protected, is a deeply ingrained and enduring one. It can be acknowledged as powerful and important; it may necessarily and usefully constrain—through its psychological and rhetorical force—those changes to existing or presumed entitlements which we might make. However, property—in its most concrete form—is, at best, a model of two models; it is an idea and an institution; it is the adjustment of conflicting claims within a social context and against the idea (and the "idea" *only*) of absolute protection. *Both* understandings are necessary for an integrated understanding of the concept of property. By refusing to recognize the complex and contingent nature of property, we lose the opportunity to make intelligent, conscious choices about what this legally, politically, and rhetorically powerful concept will be.

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226. Private Property Owners Bill of Rights, S. 239, H.R. 790, 104th Cong., 1st Sess. (1995).
227. Property Rights Litigation Relief Act, S. 135, H.R. 489, 104th Cong., 1st Sess. (1995).

VI. Conclusion

The common idea of property as "rights" provides human beings with a place of deep, psychological refuge. With its concreteness, its rigidness, and its unfailing assurances, property promises protection from change, the threat of change, the loss of tangible evidence of ourselves and of our passage through this world.

The idea of property as "rights", bounded and protected, will persist in our society and culture. The threat of governmental interference with this "property", and the containment of that threat, is an emotionally charged issue of our time. It pervades every level of government and touches—on the deepest levels—the feelings of security of every citizen. That "what is mine, is mine" seems to be the first, most basic principle of individual/collective interaction.[228] The plethora of bills, now pending in the United States Congress and state legislatures, to protect private property from public encroachment[229] is an outgrowth of this first, most basic, most deeply rooted principle. Property is seen as the bulwark, surrounding the sphere of individual liberty; the government is seen to be impairing this bulwark in a thousand ways; and the failure of collective institutions to recognize this impairment, and to compensate for it, brings feelings of deep, pervasive outrage.

The gulf between this idea of property and its necessary, institutional contingency is profound. Property's function, as a social and governmental institution, is the resolution of conflicting claims, visions, values, and histories. In this process, some individuals win, and others lose; the protection of some is, inevitably, sacrificed for the protection of others.

The conflict in American law between property as "protection" or as the individual's "inalienable" right and the essential powers of government (with their implied ability to modify or abrogate that right) has been traced to the deep, historic conflict between natural rights notions (with their rejection of sovereign prerogative) and the obviously positivistic nature of most American law.[230] The conflict between this common idea of property and the institution of property will not disappear. It is part and parcel of the very fabric of our understanding of property. The question is not how to deny, or solve, this dual nature; rather, it is how this dual nature will

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228. As stated by Kevin Gray:

> [I]n one of the earliest phrases articulated by almost every human child, there lies the strongest affirmation of [the] internalised concern to appropriate. ... [E]ven our own judges and legislators seem obsessed with the need to formulate human perceptions of the external world in the intangible terms of individualised ownership and "private property." Our lives are in every respect dominated by an intuitive sense of property and belonging.
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> ....
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> ... In this context we are still not far removed from the primitive, instinctive cries of identification which resound in the playgroup or playground: "That's not yours; it's *mine*."

Gray, *supra* note 40 at 157-59 (footnote omitted). The recognition of possessive relationships has been argued by some psychiatrists and social scientists to be an important part of the development of individuation and self-identity. See, *ibid.* at 158 notes 2 and 3 (citing studies).

229. See, *supra* text at notes 10-13.

230. See, Scott, *supra* note 2 at 114-16. The solution to this dilemma by one court is prescient of modern Apparent Model notions. Property, once granted, is a "natural" right, which cannot be taken without compensation; any other rule grants the legislature "despotic power". *Vanhorne's Lessee* v. *Dorrance*, 2 U.S. (2 Dall.) 304, 310-12 (1795). See also, Scott, *supra* at 116-17.

be accommodated by our political and legal institutions. The United States Supreme Court has responded to this problem with an answer of deceit: a rigid or absolute model of property is articulated, while a contingent model is in fact (silently) used. Through this stratagem, our psychological need to believe is preserved, while the Court (surreptitiously) does what has to be done. In the words of Kevin Gray, "property is not theft but fraud"; our concept of property "careless", our talk of it one of "mutual deception."[231]

Transparency, or the exposure of all thoughts, doubts, deeds, and contradictions, is often neither politic nor wise. It can—in law, as in life—shatter ideals, create discord, tell us what we would prefer (all things considered) not to know.[232] There is, at least arguably, a danger that acknowledgement of property's dual nature will destroy the idea of property, the "myth" of property,[233] that is necessary to constrain collective forces. However, as Jennifer Nedelsky has observed, "the idea that 'government can't take what's mine'" is in fact a hardy weed;[234] the outrage that we feel, at any challenge to this idea, seems quite unshakable.[235]

We must consider, in addition, the costs of deceit. Through its ostensible and rhetorical adherence to an Apparent Model of property, the Supreme Court has created a body of jurisprudence that is marked by logical contradictions and doctrinal incoherence. It has also distorted what, in truth, "property" and the "public" or "collective" interest are. To view property solely in Apparent Model terms is to encourage false beliefs of entitlement, strife, and resulting alienation from political and social institutions. In instances of conflict, the entitlements of everyone *cannot* remain unchanged. If current use pollutes the air we breathe, if the "right" to build on shoreline land will "accelerate[] erosion and endanger[] adjacent property",[236] there is no way to honor the "pre-existing rights" of all. Property simply must be seen, in these cases, in more complex terms.

The understanding of property for which I argue is not an easy one. The idea that "property" is truly two, interlocking models of property, each essential and

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231. Gray, *supra* note 40 at 159 (footnote omitted). See also Kevin Gray, "The Ambivalence of Property" in Gwyn Prins, ed., *Threats Without Enemies* (London: Earthscan Publications, Ltd., 1993) 150 at 151 ("few other legal notions operate such gross or systematic deception").

232. See, e.g., Guido Calabresi & Philip Bobbitt, *Tragic Choices* (New York: W.W. Norton & Co., 1978) at 17-28; Stephen Holmes, "Gag Rules or the Politics of Omission" in Jon Elster & Rune Slagstad, eds, *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988) 19 (discussing the value in excluding issues that elicit radical disagreement from the public sphere). See also John Rawls, "Justice as Fairness: Political Not Metaphysical" (1985) 14 Phil. & Publ. Affairs 223.

233. Cf. Nedelsky, "Paradox", *supra* note 67 at 263 (arguing that contingent understandings of property may threaten "the popular force of the idea of property as a limit to the legitimate power of government").

234. *Ibid.*

235. This should be compared to other legal systems, where acknowledgement of the complexity of property is, in fact, quite explicit. For instance, Article 14(1) of the German Basic Law provides that the rights of ownership and the law of succession are guaranteed, with their content and limits determined by statute. ("Das Eigentum und das Erbrecht werden gewährleistet. Inhalt und Schranken werden durch die Gesetze bestimmt.") In Article 14(2), however, it is stated that ownership entails duties for the owner, and that its exercise must serve the public interest. ("Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen."). Art. 14(1), (2), Grundgesetz für die Bundesrepublik Deutschland (1949).

236. See *Lucas* v. *South Carolina Coastal Council*, *supra* note 14 at 2896 note 10.

each constraining the other, is neither simple nor tidy. There is an irritation in thinking about such a fundamental right in complex terms. Our instinct, when we see complexity in law, is to ignore it or resolve it. How much simpler it is—and how much more comforting—to think of property as complete protection, or as none. How much easier it is to think of property as a bedrock of protection—or as the villain, impeding social change—than to think of it as both.

Facing the complexity of property—as idea and as institution, as Apparent Model and as Operative Model—allows us, in turn, to face a deeper truth. The question of property, the question of protection or change of rights or entitlements, will not be answered by conceptual models, mechanical formulae, economic equations, or takings tests. The question is not protection *or* redistribution; it is the protection *of whom*, and the distribution *of what*. In a world of scarcity, and its conflicts, the giving to one takes from another. It is that deeper issue which the law of takings must address.