

# PROPERTY RIGHTS, REGULATORY REGIMES AND THE NEW TAKINGS JURISPRUDENCE— AN EVOLUTIONARY APPROACH

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The year 1991 will mark the sixty-fifth birthday of one of the Supreme Court's watershed tests of regulatory authority over landed property. That test, which is set forth in *Village of Euclid v. Ambler Realty Co.*,<sup>1</sup> established the legitimacy of local zoning. At the outset, *Euclid* was something of a cliffhanger; the Court's majority was convinced only at the last minute of the propriety of local zoning regulations. But cliffhanger or not, localities since that decision have relied on *Euclid* as the central authority for a wide range of controls on private land development<sup>2</sup>—and as a protective screen against the charge that their regulations illegitimately take away the property rights of regulated landowners.

Perhaps because the case was about land, however, and perhaps because land is such a tangible form of property, *Euclid* has had an important role as a negative symbol as well. *Euclid* has acted as a kind of lightning rod for those who contest what they perceive as unwarranted governmental intrusion on private property rights. This has particularly been true in recent years. As advocates of private property have enjoyed a certain philosophical and popular revival, they have also put *Euclid* under siege, precisely because the case appeared to legitimate some of the most visible regulation of property. Thus, the old case's embattlement has created some opportunities to reassess not only the role that we assign to property rights, but also the role we expect from property *regulation*. In this article, I hope to contribute to that reassessment. My argument is that property on the one hand, and the regulation of property on the

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1. 272 U.S. 365 (1926).

2. *Euclid* was especially notable because it followed, by only a few years, another landmark case, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), which had overturned, as a regulatory "taking" of property, a Pennsylvania statute that attempted to restrain land subsidence due to mining.

other, are aligned in a set of overlapping evolutionary relationships.

### 1. *Euclid* and the Challenge of the New Takings Cases

Until the past decade, a generous reading of *Euclid* prevailed in the most important land use cases. Indeed, for forty years after *Euclid*, the United States Supreme Court refused to hear the claims of the aggrieved landowners who raised "takings" charges against the promulgators of local zoning regulations.<sup>3</sup> In spite of *Euclid's* remarkable vigor, however, the decade leading up to the case's sixty-fifth anniversary has been marked by some grumbling that the case has reached retirement age<sup>4</sup>—and with it, the post-*Euclidean* proliferation of far-reaching local land controls that are indeed the true target of the efforts to reverse, or at least narrow, *Euclid's* reach.<sup>5</sup>

Some have said that zoning and land use controls symbolize an intolerable infringement on the natural and just reach of a landowner's property rights, rights that our Constitution was designed to safeguard. To the guarded applause of such critics,<sup>6</sup> the Supreme Court finally has begun to consider seriously some takings charges based on land use controls,<sup>7</sup> and to suggest that some of *Euclid's*

3. D. HAGMAN & J. JUERGENSMAYER, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 41-42, 46 (2d ed. 1986).

4. See, e.g., R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 131-33 (1985) (*Euclid* reasoning unpersuasive); Siegan, *Editor's Introduction: The Anomaly of Regulation Under the Taking Clause*, in *PLANNING WITHOUT PRICES: THE TAKING CLAUSE AS IT RELATES TO LAND USE REGULATION WITHOUT COMPENSATION* 36 (B. Siegan ed. 1977) (*Euclid* case should be reconsidered); United States President's Commission on Housing, *Report of the President's Commission on Housing* 202 (1982) (same); see also Delogu, *Rethinking Zoning*, 38 *LAND USE LAW & ZONING DIG.*, March 1986, at 3, col. 1 (critics of zoning on the offensive; apologists have the burden of persuasion); Krasnowiecki, *Abolish Zoning*, 31 *SYRACUSE L. REV.* 719 (1980) (attack on zoning as anachronistic, from author sympathetic to other types of land regulation).

5. See, e.g., Kmiec, *Protecting Vital and Pressing Governmental Interests—A Proposal for a New Zoning Enabling Act*, 30 *J. URB. & CONTEMP. LAW* 19, 24-26 (1986); United States President's Commission on Housing, *supra* note 4, at 201-02.

6. See, e.g., Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 *URB. LAW.* 735, 756-57, 781 (1988) (approves of constitutional protection of property rights, but Berger thinks standards remain too vague); Epstein, *Takings: Descent and Resurrection*, 1987 *SUP. CT. REV.* 1 (same); Kmiec, *The Original Understanding of the Taking Clause is Neither Weak nor Obtuse*, 88 *COLUM. L. REV.* 1630, 1648 (1988) (discussing the author's own mixed reaction to *Nollan* case).

7. Prior to the 1987 cases, the Supreme Court signalled a hesitant but growing interest in takings cases by granting certiorari to several cases and then avoiding a decision on the merits by ruling on procedural grounds. See *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986);

modern permutations might so infringe private property as to require compensation. While not all the new Supreme Court takings cases have satisfied *Euclid's* critics,<sup>8</sup> at least some cases appear to promise a new stringency in reviewing local zoning regulations. Leading off this group was the 1982 case *Loretto v. Teleprompter Manhattan CATV Corporation*,<sup>9</sup> which found a "taking" of property in a regulation requiring a building owner to accept the minor intrusion of cable wiring equipment on the roof. The case indicated that the Court would revive at least one traditional takings test<sup>10</sup> and closely scrutinize regulations that physically invade landed property, no matter how slight the intrusion.

A second and more innovative case was one of several 1987 takings cases. *First English Evangelical Lutheran Church of Glendale v. Los Angeles*<sup>11</sup> established that if an owner succeeds in a takings claim, damages will be an available remedy against the regulating body, even if the harm is only a temporary taking of property.

A third, and probably the most significant case, was another 1987 decision, *Nollan v. California Coastal Commission*,<sup>12</sup> in which an owner successfully contested a California agency's refusal to grant a building permit for a beachfront house. The agency had conditioned the permit on the owner's grant of what was essentially a public easement over the waterfront end of his property. The *Nollan* majority rejected this condition as an uncompensated taking of property.

*Nollan* may be read merely as a straightforward application of the older taboo against "physically invasive" land regulations,<sup>13</sup> but the case might also be read much more broadly in one of two ways. First, it might be read as a use of takings doctrine to restrain any land use regulation, whether physically invasive or not, from imposing conditions on development that are unrelated to problems that the development itself creates. Second, taken even more generally, the case might be read as a signal that the courts should give something more than cursory attention to purported "takings" of property.<sup>14</sup>

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*San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (all avoiding compensation issue on procedural or "ripeness" grounds).

8. One case, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) appeared particularly problematic because it upheld a state mining statute very much like the statute that the old *Pennsylvania Coal Co.* case had overturned as a taking of property.

9. 458 U.S. 419 (1982).

10. *Loretto*, 458 U.S. at 427-35. For the classic "physical invasion" test, see *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166 (1872).

11. 482 U.S. 304 (1987).

12. 483 U.S. 825 (1987).

13. See, e.g., Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1607-08 (1988) (focusing on physical invasion aspects of *Nollan*, disputing broader reading).

14. On the issue of the stringency of review in takings cases, see the debate

Thus, these new decisions may appear to inch toward a vindication of those who regard much modern land use regulation as an infringement on the historic rights stemming from property ownership. Henceforth, I will refer to this view as the "property rights position," and it is perhaps most noticeably represented in the work of Bernard Siegan and Richard Epstein.<sup>15</sup> The property rights position often has a libertarian flavor which attempts to ground the position on a tradition—sometimes traced to John Locke—in which property rights are held to be central to the liberty and independence of individuals.<sup>16</sup> With respect to Constitutional interpretation, the property rights position generally argues that American law during the founding period was dominated by a strong commitment to the rights of individuals to hold property, that this commitment continued roughly until the end of the nineteenth century, and that it accorded to property rights a protection against governmental encroachment that was at least equal to the protection given other kinds of individual rights.<sup>17</sup> *Euclid*, however, departed from that tradition in permitting a wide range of local land controls.<sup>18</sup> *Euclid's* famous cousin, the 1938 *Carolene Products* case, marked the nadir in this development by suggesting that property rights were poor relations in the world of rights and, as such, much more subject to governmental intrusion than the rights that more directly safeguard political liberty and equality to insulated minority groups.<sup>19</sup>

In a recent paper, the political scientist Dennis Coyle has described the twentieth century land use cases as part of what he and others call a "double standard" in the Constitutional treatment of rights—a standard that gives property rights a lower status than other rights.<sup>20</sup> But he also argues that the new takings cases, such as *Nollan*, have emerged from a paradoxical development: the very concerns for liberty and equality, which initially created the double standard in rights analysis, have eroded the double standard itself. Realistically,

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between Scalia for the majority and Brennan in dissent. *Nollan*, 483 U.S. at 834 n.3 (Scalia, J.) and 842-64 (Brennan, J., dissenting).

15. See R. EPSTEIN, *supra* note 4, and Siegan, *supra* note 4.

16. See R. EPSTEIN, *supra* note 4, at 9-15. Epstein believes that his Lockeanism has been misunderstood by some commentators. See Epstein, *supra* note 6, at 2-3 n. 5.

17. See, e.g., Houle, *Eminent Domain, Police Power, and Business Regulation: Economic Liberty and the Constitution*, 92 W. VA. L. REV. 51, 54-58 (1989).

18. R. EPSTEIN, *supra* note 15, at 132-33 (*Euclid*), 266-73 (later zoning cases).

19. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938); for a comment from the property rights perspective, see Berger, *supra* note 6, at 752-55.

20. D. COYLE, *THE CIRCLE UNBROKEN: PROPERTY RIGHTS AND THE ECLIPSE OF THE DOUBLE STANDARD* (typescript, 1989); see also Funston, *The Double Standard of Constitutional Protection in the Era of the Welfare State*, 90 POL. SCI. Q. 261 (1975).

regulatory intrusions on property rights have serious detrimental implications for liberty and equality, just as regulatory intrusions on other rights do. Professor Coyle argues that the courts have haltingly come to recognize this point, and thus the new takings cases would appear to signal a limited return to a more vigorous protection of private property rights.<sup>21</sup> Hence, the new takings cases garner some applause from proponents of the "property rights" position.

This resurgence of the property rights position, however, has roused considerable consternation in some other land use quarters.<sup>22</sup> In particular, the Court's newfound willingness to find at least some regulatory "takings," coupled with the Court's assent to a damage remedy for those takings, has raised a specter that governmental agencies might be intimidated, and their members might be frightened away from their just and proper authority in regulating the use of property. Some commentators have attempted to exercise a certain "spin control" on the new takings cases by arguing that they will have little practical effect.<sup>23</sup> Others note the uncertainties of takings law and the chilling effects that potentially high damage awards may have on apprehensive would-be regulators.<sup>24</sup> Such commentators fear the possibility that newly emboldened developers may destroy the landscape and inflict immense damage on the public, while our cowed, overcautious officials refrain from imposing regulations that might otherwise properly restrain depredations on our communities.<sup>25</sup> These commentators, whatever their specific reading on the new takings cases, generally accept land use regulation as a proper role for government. I will refer to their views as the "regulatory position."

The property rights position and the regulatory position provide two quite sharply divergent reactions to the new takings cases, and

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21. Professor Coyle also identifies a second strand of judicial opinions that merely tries to fine-tune the double standard by incorporating egalitarian and libertarian concerns in such matters as the "exclusionary" effect of certain zoning regulations, infringement on free speech in the zoning treatment of adult movie theaters, and the like; the fine-tuning itself, however, seems merely to complicate property rights even further.

22. For an interpretation of the new takings cases as part of a resurgent property rights position, see Williams, *Legal Discourse, Social Vision and the Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in First English Lutheran Church and Nollan*, 59 U. COLO. L. REV. 427 (1988).

23. See, e.g., Michelman *supra* note 13 (*Nollan* case falls into traditional "physical invasion" category); Callies, *Property Rights: Are There Any Left?*, 20 URB. LAW 597, 627-32, 641-43 (1988) (new cases unlikely to have major effect on takings decisions).

24. See, e.g., Mixon, *Compensation Claims Against Local Governments for Excessive Land-Use Regulations: A Proposal for More Efficient State Level Adjudication*, 20 URB. LAW 675, 686 (1988).

25. Mixon, *supra* note 24, at 686.

they thus raise an opportunity to reconsider property and regulation from two different perspectives. First, the property rights position invites us to consider what historic property rights were supposed to accomplish. Second, the regulatory position leads us to ask what public *limitations* on property rights were supposed to accomplish. I will develop takings and related property issues from these two perspectives and synthesize them into a broader evolutionary perspective that encompasses both property rights and regulatory regimes.

## 2. The Purposes of a Property Regime

The purpose of a property regime is an issue that need not necessarily be dealt with historically, but because much of the property rights position appears to rest on an understanding of the founders' view of property, I will address that question briefly. The property rights position generally ascribes to the founders a libertarian attitude about property. The founders, it is said, thought that property itself may predate the governments that are themselves designed to protect property. Furthermore, whatever the chronological priorities between property and government, the founders are supposed to have thought that the law of property is an institution through which a rightly-ordered regime assures a domain of autonomy and individuality in the citizenry.<sup>26</sup>

No doubt, some of the founders did have this autonomy-protection function in mind. A famous quotation from James Madison, equating a wide variety of liberties and other good things with property, suggests that he believed the term "property" could be applied to rights generally.<sup>27</sup> In their insistence on protecting private property, however, some of the founders had an additional goal in mind as well: the goal of making America wealthy and, therefore, strong.<sup>28</sup> This is also a way of protecting autonomy, but it is autonomy as a collectivity; this goal represents a type of foreign policy objective—and foreign policy was a matter that was of great importance to eighteenth century American statesmen.<sup>29</sup>

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26. See, e.g. R. EPSTEIN, *supra* note 4, at 17; Siegan, *supra* note 4, at 22; Houle, *supra* note 17, at 54-58.

27. J. MADISON, *Property*, NAT'L GAZETTE, Mar. 29, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 266 (R. Rutland et al. eds. 1983) (land, merchandise, and money are property, but "in its larger and juster meaning" the term also includes "everything to which a man may attach a value and have a right," e.g. opinions, religious beliefs, personal safety, etc.).

28. See Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 Nw. U. L. REV. 74, 86-88 (1989).

29. See, e.g., G. STOURZH, ALEXANDER HAMILTON AND THE IDEA OF REPUB-

How can property rights serve the ends of national wealth and strength? They do so through *incentives*. In a regime of well-secured property, owners can reap the rewards of their investment and industry. The property regime encourages owners to devote their energy and time to locating valuable resources and making those resources more valuable. Such a property regime also permits owners to trade their possessions freely, and this also encourages the movement of resources into the hands of those who value them most. To use a common phrase,<sup>30</sup> the total "pie" is larger if private property is safeguarded. This is because a property regime encourages the individual industry that produces wealth—especially if all these industrious folk can trade freely over a wide and unimpeded market. Moreover, as students of Leo Strauss have often pointed out in their discussion of the founding period, once involved in trade and commerce, the citizenry is likely to discover that the pleasures of acquisition are superior to the wasteful pleasures of quarreling over possession of a particular piece of property, or over religion or the multiplicity of other subjects upon which proud and otherwise unoccupied people may feud.<sup>31</sup> Derivatively, the nation as a whole is wealthier and stronger because the tax base of propertied and prosperous citizens becomes larger, and because the citizens are contented and not fractious.

In these ways, a property regime uses indirect means to make the nation stronger. This political use of property diverges markedly from the more direct, command-and-control efforts proposed by the seventeenth century cameralist/mercantilist thinkers. John Locke understood the cumulative, political potential of private property; as he said, that "wise and godlike" prince who secured his subjects' property would "quickly be too hard for his neighbors."<sup>32</sup> Some of the eighteenth century's so-called enlightened monarchs adopted this idea too—as did Alexander Hamilton and James Madison. After all, Hamilton and Madison had read the property theorists of the Scottish Enlightenment, including Adam Smith.<sup>33</sup> More recently, of course, some of the leaders of twentieth century socialist countries also have learned the lesson that the protection of private property and trade

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LICAN GOVERNMENT 127-30, 142-45 (1977) (Hamilton's views of importance of wealth, unity for strength); LaFeber, *The Constitution and United States Foreign Policy*, 74 J. AM. HIST. 695, 695-96 (1987) (founders' attentiveness to foreign policy considerations of domestic policy); see also Rose, *supra* note 28, at 88.

30. See, e.g., R. EPSTEIN, *supra* note 4, at 3-6.

31. M. DIAMOND, *The Federalist*, in HISTORY OF POLITICAL PHILOSOPHY 631, 648-49 (S. Strauss & Cropsey, 2d ed. 1972).

32. J. LOCKE, SECOND TREATISE ON GOVERNMENT § 43.

33. F. McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 128 (1985) (Smith's *Wealth of Nations*, well-known in America, was read and used by Madison and Hamilton).

may enhance the national wealth substantially more than does direct command and control. Whatever the distributional problems of private property regimes, the command-and-control regimes often come to preside over impoverished and discouraged citizenries. While such regimes repress market allocations for the sake of greater productivity and a more equal distribution of goods, we have learned that they may in fact repress productivity, and they may not necessarily even be egalitarian. Instead, they may pass out their meager goods through political favoritism.<sup>34</sup>

The point of all this is that a property regime has a political goal that is independent of the goal of preserving individual autonomy. That political goal is the production of wealth and, through wealth, national strength—a concept that our founding fathers understood. Even Madison's famous assimilation of all rights into property rights may have to be understood metaphorically. One of the normal attributes of common-law property is the right of disposal and sale, but Madison almost certainly did not believe that people should be able to sell their religious views and their political rights. Clearly, however, he did believe that people should be allowed to sell their lands, their goods and their services to the highest bidder throughout the extent of a large commercial republic. This would transform the weak and fragmented Confederation into an empire that could repel any depredations from foreign powers. And it has, has it not? Perhaps it has, much more than Madison and Hamilton could have dreamed, or than some of their contemporaries would have even wanted.<sup>35</sup>

### 3. Scarcity, Externality, and Regulation

If the property rights position raises the question, "What good can a property regime produce?," the regulatory position raises another question; namely, what is the *regulation* of property supposed to accomplish? I propose to approach this question by inquiring into the relationship between property regimes and scarcity.

Property regimes are a means of managing conflicts over scarce resources. As commentators from William Blackstone<sup>36</sup> through Ri-

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34. See, e.g., Schuemann, *East German Marchers Demand Reunification and End to Party*, N.Y. Times, Dec. 5, 1989, p. 1, col. 3 (East Germans' fury upon learning about wealth and privileges enjoyed by socialist governmental and party leaders).

35. See, e.g., the complaints of the Antifederalists that the Federalists were attempting to create a country geared to empire and war, rather than to the flowering of individual liberty, cited in Rose, *supra* note 28, at 89 n.64, 93.

36. 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 3-4 (ed. 1979).



chard Posner<sup>37</sup> have noted, there is no reason to have property rights where there is an abundance of everything for everyone. Property rights are defined when there is a scarcity of something. When we have the good sense to create property rights in scarce goods, these rights help us to shift ownership of goods by trading them instead of fighting over them. Just as important, because property rights reward those who create desired goods, they also help to alleviate the scarcity itself. But we do not concern ourselves with property rights when a lot of something is available. We do not need them then, except perhaps as a framework to use to settle occasional localized conflicts.<sup>38</sup>

Historically, too, the use of property has tended to be loose and unconstrained as long as there is no scarcity of a given resource. Some writers on the "takings" clause have gleefully pointed out that although the statesmen of the early republic may have spoken much about the sacredness of property rights, early nineteenth century state governments often felt free to take undeveloped property for roads and other public projects without paying compensation to the owners.<sup>39</sup> That practice appears odd at first blush, but it really is not so amazing, considering that a great deal of undeveloped land was available, and that many landowners may not have believed that the expense of compensating as a general practice was worth the effort.<sup>40</sup> Only when land became more scarce and more valuable did we begin to hear more focused arguments about "takings." In the same pattern, private property owners took many liberties as well, and no one cared. For a long time, for example, factories dumped smoke into the air at will, effectively appropriating the airspace of their neighbors. Economists call this type of invasion an "externality," using up or appropriating something "external" to whatever an owner of property has bargained and paid for. But who cares, if nobody else is actually using the neighboring air?

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37. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 33 (3d ed. 1986).

38. See Rose, *Energy and Efficiency in the Realignment of Common-Law Water Rights*, 19 J. OF LEGAL STUD. 261, 270-73 (1990) (unexpectedly rigid rhetoric about rights sometimes appears in conditions of plenty, as a baseline to settle localized conflicts or extreme behavior).

39. See M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* 63-64 (1977) (uncompensated taking of undeveloped land in the early nineteenth century was sometimes based on a theory of "reservation" for public uses); F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKINGS ISSUE* 105-114 (1975) (same).

40. This could be attributable to a utilitarian calculus, as interpreted by Frank Michelman's famous formulation: demoralization costs may have been very low if more land were readily available, while settlement costs might have been high—a possible recipe for non-compensation. See Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214-15 (1967).

Who cares? Somebody cares if she *does* want to use the neighboring air. If she buys the air-polluted lot, for example, and she wants to establish an apartment complex there, she will care about neighboring air pollution.<sup>41</sup> In general, somebody is likely to care about externalities whenever and wherever resource uses become more intense. That is, externalities tend to matter more when competition for the resource is sharper. In the law of air pollution, for example, densely populated London put restraints on coal-burning as early as the thirteenth century.<sup>42</sup> In the United States, the common law of the later nineteenth century responded to the externalities of air pollution with nuisance law, a post hoc order to owners to use their property "reasonably" with respect to their neighbors and to avoid inflicting upon them more than a normally understood and normally accepted modicum of harm.

Nuisance is a vague way of defining externalities and forcing their creators to "internalize" them. Contemporary commentators envisioned the early twentieth century's land use regulations as a method to handle externality problems more precisely by defining potential problems in advance and preventing them from arising in the first place.<sup>43</sup> Predictably, these more exacting land use regulations arrived as more dense land uses created greater competition for development opportunities, especially in urban areas.<sup>44</sup> Among the precipitating events for New York's first zoning ordinance, for example, was the construction of skyscrapers, particularly the bulky Equitable Building, which was completed in 1914, and which was considered mammoth by contemporary New Yorkers. These new tall buildings elicited an outcry from nearby property owners who thought that the new buildings were adding to street congestion, usurping their light and air, and grossly devaluing their property.<sup>45</sup> Although they did not express the idea in these words, they thought that these structures imposed some unpaid-for externalities on them.

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41. For a famous example of a similar occurrence, see *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 494 P.2d 700 (1972) (conflict between a new retirement community and an established feedlot over the latter's odors and flies).

42. F. ANDERSON, D. MANDELKER & A. D. TARLOCK, *ENVIRONMENTAL PROTECTION: LAW AND POLICY* 128 (1st ed. 1984).

43. See Baker, *Zoning Legislation*, 11 CORNELL L. REV. 164, 165-69 (1926) (unplanned uses were often incompatible and caused harm to each other); Young, *City Planning and Restrictions on Property*, 9 MINN. L. REV. 518 (1925) (citing lack of coordination in urban growth).

44. See, e.g., Baker, *supra* note 43; Young, *supra* note 43 (citing rapid urbanization as bringing about the need for city planning and regulation).

45. See generally S. TOLL, *ZONED AMERICAN* 145-55, 162-66 (1969); see also Baker, *supra* note 43, at 167 (noting that skyscrapers generally covered whole blocks, and that their "upper stories use light and air that properly belong to neighboring landowners").

In general, the rationale for zoning and other land use controls has been the control of externalities. We should not be astonished that these regulations evolved in the direction of more detail and greater stringency as our land uses became more intense, and as we noticed that our previously free-and-easy ways might impose some tangible harm on neighbors. True, some of us may indeed have become accustomed to our free-and-easy ways with our property, to the extent that we believe that we have rights to continue these uses regardless of other people's concerns. Indeed, libertarian thinkers may convince us that regulatory limits violate our rights as owners. How the rights argument cuts is not clear, however. Whose rights are violated if a neighbor burns his old tires in the backyard, or plays his stereo at full volume? Who has a right to what?

The answer to this question depends on one's definition of rights, but until scarcity and more intense use confronts us with competition over land uses we have not normally bothered to define rights in those areas at all. Why should we be surprised if we ask our regulatory regime to do so, when the time arrives when our previously nonconflicting uses start to compete? Perhaps it never occurred to us, for example, that anyone might be injured by letting the trees around our residences grow tall. In an age of overhead wires (and solar collectors), however, we might start to wonder, and we might be better off as a community if our regulatory regime gave us some guidance.<sup>46</sup> Some regulation may be necessary even though we might want to make adjustments for individual owners who are adversely affected by changes in the regulations.<sup>47</sup>

#### 4. A Synthesis of Property and Regulatory Regimes: the Evolutionary Approach

One can assimilate these two sets of observations by pointing out that if private property historically had overall wealth enhancement as a goal, *so too did the regulation of externalities*. By defining and regulating externalities, we try to ensure that people will consider

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46. For the relatively recent legal activity in redefining solar rights, see, e.g., Bradbrook, *Future Directions in Solar Access Protection*, 19 ENVTL. L. 167 (1988); Eisenstadt, *Access to Solar Energy: The Problem and its Current Status*, 22 NAT. RES. J. 21 (1982); for this and wind access, see Bradbrook, *Australian and American Perspectives on the Protection of Solar and Wind Access*, 28 NAT. RES. J. 229 (1988).

47. For this reason, for example, zoning laws generally have a category of "pre-existing nonconforming uses" to permit some continuation of pre-regulatory structures. Subsequent efforts to stop such uses, however, can cause conflicts. See, e.g., the "amortization" scheme in *Metromedia, Inc. v. City of San Diego*, 26 Cal.3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980), *rev'd on other grounds*, 453 U.S. 490 (1981).

carefully the resources they use, instead of recklessly consuming resources in ways that can harm others or lead to conflict and waste. Moreover, with increasing development and competition for land, we should expect a more refined regulatory attention to the various aspects of land usage because as land resources become scarcer, the interactions of land usages become more noticeable and more important. This is one way to read the history of American landed property and its regulation. As land resources became more developed, we progressed from a regime of "anything goes" with one's landed property, to a regime of post hoc judicial control on "nuisances," to a regime of legislatively defined, ex ante regulation.

I do not mean to suggest that every regulatory regime is perfect, or that our regulators always adhere strictly to a program of defining and managing externalities—far from it. First, planners are not always sensible about their proposals for land use regulations, sometimes because they attempt to plan before anyone knows what developments might be in demand, or what external effects that might actually occur.<sup>48</sup> Second, regulators may be overly sensitive to the home folks and to "insiders" at the expense of "outsiders." When that is the case, they may pass regulations that place undue obstacles in the way of locally unwanted land uses—or locally unwanted newcomers who wish to enter a community and get fair treatment there.<sup>49</sup>

For a third and related matter, a regulatory regime is likely to present some opportunities for what is now called rent-seeking, or perhaps more bluntly, extortion.<sup>50</sup> It is well-known that land use control offers many opportunities for corruption.<sup>51</sup> Even assuming that we discount the element of graft, we can still observe that land

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48. For a critique of the abstract advance plan, from the perspective of the more recent "rolling" planning doctrine, see Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 873-78 (1983); see also Krasnowiecki, *supra* note 4. A revealing newspaper headline about advanced planning appeared in the Chicago Tribune a few years ago: *Mayor's New Goals Run from A to B by Way of Zzzz*, Chicago Tribune, Sept. 1, 1987, sec. 2, at 3, col. 1 (describing major planning report as "larded with pious generalities").

49. A major controversy of the last two decades has been the "exclusionary" land use regulations that raise the price of housing beyond the means of lower income residents. New Jersey's courts have led an effort to overcome these. For a recent description of the somewhat ambiguous results, see Lamar, Malach & Payne, *Mount Laurel at Work: Affordable Housing in New Jersey, 1983-1988*, 41 RUTGERS L. REV. 1197 (1989). Even ostensibly well-meaning regulations may have exclusionary effects. See, e.g., Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167 (1981).

50. See generally J. BUCHANAN, R. TOLLISON & G. TULLOCK, *TOWARD A THEORY OF THE RENT-SEEKING SOCIETY* (1980).

51. See J. GETZELS & C. THURLOW, *AN ANALYSIS OF ZONING REFORMS: MINIMIZING THE INCENTIVE FOR CORRUPTION* (Nat'l Inst. of Law Enforcement & Criminal Justice, U.S. Dep't of Justice 1979).

use regulation sometimes has been used as a way to extort public services from new development. The *Nollan* case provides an example, where the owner could not get a building permit unless he gave a right-of-way for public access across his beachfront. This type of activity amounts to a special tax on a very narrow tax base—the people who want to do something new with their land. While this special tax may be attractive to politicians who hate to propose general taxes, upon reflection, many of us might not believe the regulation is proper.<sup>52</sup> The property rights position might view the tax as a violation of a right; many other people would use the phrase “unfair” (because it is imposed only on a few); and a coldblooded economic calculator would view this kind of regulation as an inefficient disincentive to innovation and a distortion of the market for new development generally. Again, the increasing intensity of land use is likely to make us more aware of regulatory deficiencies of this sort.

The key point is that regulatory regimes have an evolution, too. *In many ways, the evolution of regulatory regimes replicates, at a meta-level, the evolution of private property regimes.* Just as we used to say, “anything goes” about private land uses, and just as private landowners became accustomed to uncontrolled use of their land, we have also gone through a period when we said “anything goes” for the *regulation* of private land uses. During this time, land use regulators became accustomed to believing that they were entitled to regulate anything that they pleased under the auspices of *Euclidean* zoning.<sup>53</sup> But with an increasing scarcity of land resources, we do not need just *any* regulatory regime; we need a good one. We need a regulatory regime that helps us to internalize externalities—a regulatory regime that induces us to think carefully about the way we use land, without distorting our decision-making process or diverting us from activities that are worthwhile and valuable.

This brings us back to a reconsideration of the recent Supreme Court takings decisions. These decisions might be viewed as a move

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52. See, e.g., F. JAMES & D. GALE, *ZONING FOR SALE* 31-34 (1977) (analogizes development exactions to tax, levied on narrow tax base and giving land issues presumed priority to other public uses of funds).

53. For the term “anything goes” explicitly applied to review of land use regulation, see Siemon, *The Paradox of ‘In Accordance With a Comprehensive Plan’ and Post Hoc Rationalizations: The Need for Efficient and Effective Judicial Review of Land Use Regulations*, 16 *STETSON L. REV.* 603, 605-606 (1987). For some examples of the wide-ranging uses of zoning for a variety of purposes, see *Wilson v. County of McHenry*, 92 Ill. App. 3d 997, 416 N.E.2d 426 (1981) (160-acre minimum lot farm zoning); *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986) (the use of zoning as a substitute for moral restraints on such uses as adult bookstores and movies); Ziegler, *Trouble in Outer Galactica: The Police Power, Zoning and Coin-Operated Video-Games*, 34 *SYRACUSE L. REV.* 453 (1983) (zoning to control teenagers at video arcades).

toward "regulating the regulators," when we need good regulation rather than the indulgence of planners' daydreams, or local xenophobic, or city councils' efforts to fob off the costs of infrastructure onto new development. Here, too, the evolution of the regulatory regime replicates the evolution of property regimes because, from one perspective, the Court's recent decisions about land regulations bear a strong resemblance to nineteenth century courts' nuisance decisions.

Indeed, "takings" doctrine concerning public regulations is a meta-version of "nuisance" doctrine on private land uses. Like nuisance adjudications, takings adjudications are post hoc judicial determinations and are based generally on ordinary practice and reasonable expectations about which regulatory efforts are fair and normal, and which are not. As with nuisance law, this post hoc and ad hoc judicial second-guessing makes possible gradual changes in the relationship between the regulated and the regulators, and provides for a change in ordinary regulatory practice—however theoretically unsatisfactory this ad hoc approach may be.<sup>54</sup>

What the critics of ad-hocery in "takings" cases may have overlooked is that the judiciary is not the only player in this game of "regulating the regulators." In recent years, state legislatures—sometimes acting under the compulsion of federal environmental legislation—have been much more active in making the local regulators rationalize their activities and coordinate them with surrounding communities.<sup>55</sup> Just as the shift from nuisance law to land use regulation entailed a shift from ex post adjudication to ex ante legislation, so new state statutory oversight over local regulation goes beyond ex post judicial determinations. To replace the vague, nuisance-like takings doctrine, these statutes contain ex ante legislative definitions of the obligations of local regulation. For example, some state legislation requires that local regulators plan in advance to accommodate a percentage of the state's low income citizens,<sup>56</sup> or requires that they consider the effects of industrial waste or street

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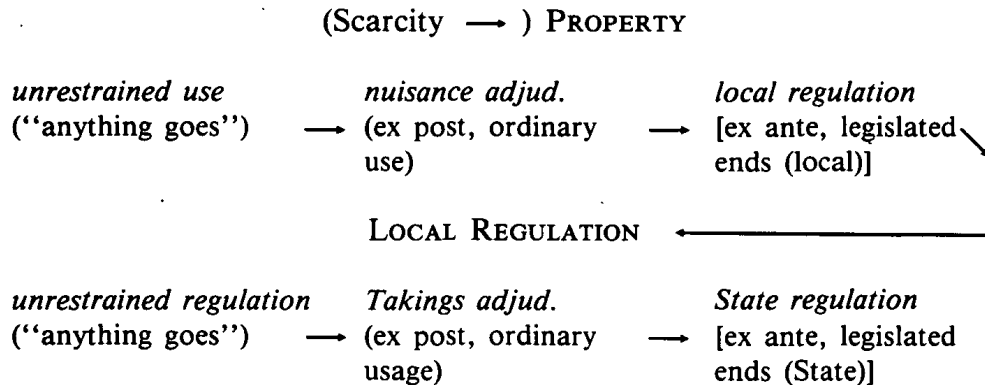
54. See Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561-62, 596-98 (1984) and literature cited therein (ad hoc, ordinary language approach of takings jurisprudence). For a recent critique of the vagaries of "takings," see Rose-Ackerman, *Against Ad-Hocery*, 88 COLUM. L. REV. 1697 (1989). In the last few years, several commentators have likened takings jurisprudence to insurance. See, e.g., Fishel & Shapiro, *Takings, Insurance and Michelman*, 17 J. LEG. STUD. 269 (1988). The approach of this article, in treating takings adjudications as ex post and ad hoc, is compatible with the insurance rationale, insofar as insurance provides an ex post and ad hoc remedy for harms whose incidence is uncertain and only imprecisely definable ex ante.

55. See R. HEALY AND J. ROSENBERG, *LAND USE AND THE STATES* (2d ed. 1979); F. POPPER, *THE POLITICS OF LAND-USE REFORM* (1981).

56. See, e.g., CAL. GOV'T CODE §§ 65302(c), 65580, 65915, 65008 (West 1983 & Supp. 1990); but see Ellickson, *supra* note 49.

construction or new development—not only inside their own boundaries but also on neighboring communities and the larger region and its resources.<sup>57</sup>

Thus as scarcity, competition, and the potential for conflict increase, we see a dual evolution. An evolution in landed property took place first, followed by a second and replicative evolution of the *regulation* of landed property. The dual evolution might be represented to look something like this:



This evolution, of course, does not always progress smoothly and evenly over time. Indeed, the new takings cases are emerging simultaneously with state legislative controls on local regulation. Moreover, all the kinks have not been worked out of local land regulations simply because of state legislative oversight. What may be most interesting, however, is the parallel development, in which state legislatures are now acting with respect to local boards the way local boards used to act with respect to private property owners; the state legislatures define, ex ante, what the local boards can and cannot do with their regulatory authority. At least some part of this "regulation of the regulators" is targeting the prevention of externalities that local regulation might create.

The property rights perspective sometimes appears to argue that the best way to handle land regulation is to minimize it, and to adopt a libertarian protection of rights that approximates the land use rights of the early republic. That is, if you are a land owner, "anything goes." My own view is that the day for an anything-goes approach to ownership rights are long gone. The anything-goes approach was a function of the general plenteousness of land. This

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57. See, e.g., Florida's Environmental Land and Water Management Act, FLA. STAT. ANN. § 380.012 -380.10 (West 1988 & Supp. 1990) (providing for regional councils to review local development decisions). See also Section 208 of the Federal Clean Water Act, 33 U.S.C. § 1288 (1977) (calling for state areawide planning to control "nonpoint" water pollution from such uses as construction and agriculture).

approach is not functional in an age where we live with much more heated competition over land uses, and when we need some help in defining rights in a much more detailed way, so that we can internalize the complex externalities that now exist. What we must notice is that regulatory regimes also evolve in at least some step with greater scarcity and demand, and that we have to monitor our regulatory regimes to ensure that they are doing what we require of them.

I will conclude with an example of why it is important that we consider the growing scarcity of land—and the attendant emergence of externalities—when we think about the proper relationship of property and regulation. Suppose we were to repress public land controls altogether, and suppose we were to control land ownership and use by a private rights system. Even if we did so, those externalities would remain, and landowners would continue to dislike them. They would not want tires to be burnt next door, and they might not want the neighbors' trees to block their views. How could they deal with the difficulties imposed by neighboring land uses? To handle such difficulties is certainly not impossible; private property law permits owners to impose restrictions—easements and covenants—on each others' land uses. Many private land use controls are now in use. Planned communities like condominiums have sheafs of restrictions—on drapes, paint color, window sizes, dogs and cats, musical instruments, and so forth. Because these restrictions must be agreed upon by all the owners subject to them, they are more easily implemented in new developments, during a time when one developer owns the whole property and subsequently parcels out units to purchasers who buy into the whole system. If public land regulation were to be suppressed, we could expect that residential landowners, especially in new developments, would employ these kinds of private land use controls extensively, in order to control the external harms from neighbors' uses.

An owner's rights under these easements and covenants are themselves private property rights. If one individual owner wishes not to abide by the restrictions, she must pay off the other owners, or otherwise get their agreement to extinguish their rights. From the perspective of the property rights position, I presume that if a governmental body wants to extinguish these easement and covenant rights, it has to compensate the owners too, under the taking clause.

Private land use controls are consequently a genuine alternative to at least some public controls. The next question is whether they are preferable. The problem is that occasionally private land restrictions impose an unattractive alternative to public controls. These private restrictions can regulate the living daylight out of the owners, of course, but any owner who does not like a restriction about paint colors, setbacks and drapes can presumably buy somewhere else. But in theory, nothing confines private land use controls to drapes and



setbacks. They mandate the amount of money you have to spend on your home, and whether you can have your children live with you. They might define group homes for the mentally retarded right off the block, and if it were not for existing public restraints, one supposes that they could define out Catholics, Jews, and any ethnic and racial minorities the drafters of such restrictions choose.<sup>58</sup>

Does this property rights approach enhance the cause of individual autonomy, equality and liberty? Undoubtedly in some ways it does because it is important to allow groups to set up common lifestyles for themselves. These private restrictions, however, are a subject to be approached with some caution because they may jeopardize some other elements of autonomy, equality and liberty—especially when they are widespread and cannot be avoided without considerable effort, as with racially restrictive covenants not so long ago. The point is that even something that looks like a property rights approach may have implications that we would conventionally call “public.”

A private property regime, after all, is a form of regulatory regime, and it is maintained and paid for by the public at least in part in order to enhance the welfare of the whole. We are not choosing property *or* regulation; we are choosing *among* regulatory regimes on property, and we are choosing regulatory regimes at least in part to induce people to respond with actions that accomplish the things to which we aspire in our larger common life. This is not a message of totalitarianism, of Big Brother regulating your property rights to a meaningless pulp, for some purported public end. Even if national wealth were not at all important to us, and even if the central point of a property regime were simply individual autonomy, people would still need help to arrive at that goal. Part of the help they need would be in a regulatory regime that encourages their autonomy. But I expect that even a property rights proponent would agree that we do not want a property regime that encourages autonomy by conflict or the rule of the stronger.

As resources get more scarce, we have to be more concerned about managing and deflecting conflict, and effectively, that is what a property regime ought to help us to do. To adhere to all the conceptions of landownership that we might associate with the Wild West is not helpful.<sup>59</sup> We do not have such plentiful land or resources

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58. This was, of course, the subject of *Shelley v. Kraemer*, 334 U.S. 1 (1948); see also *Crane Neck Ass'n v. New York City/Long Island County Servs. Group*, 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901 (1984) (invalidating as against public policy a covenant that would keep group home for the retarded out of residential community).

59. Property regimes showed considerable evolution even in the Wild West. See Anderson & Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J. L. & ECON. 163 (1975) (evolving property regimes in land, water, livestock); Umbeck, *A Theory of Contract Choice and the California Gold Rush*, 20 J. L. & ECON. 421 (1977) (same for Gold Rush).

any more, and our private-property-regulatory regime ought to help us take account of their greater scarcity—along with the greater probabilities of conflict—whether it is wealth, autonomy, or something else that we seek.

Moreover, semi-conscious regulatory regimes that blithely pile all the burdens on particular landowners, or create problems for other communities or for outgroup-members, do not achieve goals of either wealth or autonomy. Instead, they simply constitute another form of externality, but in this case, the externality comes from the regulators rather than the property owners. Just as we have had to move beyond an “anything goes” approach for landowners, so we now must move beyond “anything goes” for land regulation. The new takings cases—like the new state and federal oversight statutes—are an implicit recognition of that point.