



## THE ANTI-FEDERALIST TRADITION IN NINETEENTH-CENTURY TAKINGS JURISPRUDENCE

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One of the few truths about American takings jurisprudence is that it defies generalization. Legal thinkers have long complained about the lack of coherence of takings jurisprudence and how it therefore threatens the rule of law.<sup>1</sup> Yet most Americans probably believe that their property is well protected and that the U.S. has one of the most property-protective legal regimes in the world. They are mostly right. They are wrong only to the degree that they assume that the U.S. has only one property regime. Despite repeated attempts by some legal academics and jurists throughout American history to generate a national law of property and eminent domain, the U.S. still has multiple property regimes.

Two factors have contributed to the diversity of American property law: federalism and the traditional Anglo-American common law method of adjudication. First, the diversity within American takings jurisprudence is partly a function of federalism. States provide the primary definition of the property rights that are protected under the state and federal constitutional law of eminent domain. Therefore, what looks from the federal bench or the academy like muddle reflects, in part, the complex historical compromises of American federalism that mark the process by which separate colonies rebelled against the British empire, came together in revolution, and created a framework in which they could work out their relationship to each other and the federal government. The American founders did not intend for any single government—state or federal—to have full sovereignty; the people, not governmental institutions, were supposed to be sovereign. One consequence of this horizontal federalism—what I call legal federalism—was, and remains, variation in state property regimes.

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<sup>1</sup> For modern criticism, see James R. Gordley, *Takings: What Does Matter? A Response to Professor Penalver*, 31 *ECOLOGY L.Q.* 291, 291 (2004) (observing that the “doctrine is incoherent and the cases conflict”).

Second, Anglo-American courts historically viewed their role primarily in administrative terms as institutions designed to resolve disputes. If a court focuses on its duty to resolve particular disputes, it will spend less time trying to fit each decision into an intellectually coherent jurisprudence. The early modern common law method, in other words, did not promote the articulation of broad rules within each state, let alone across the United States.

That might be the only helpful light that legal history sheds on the constitutional law of takings. The historian's standard response to the question of whether history can inform normative positions at present (the question asked of this author) is that the past rarely provides a single, uncomplicated lesson for today. The first problem resides in the difficulty of recovering past understandings of law and accounting for the variety of those understandings—professional as well as lay, orthodox and heterodox. Legal history rarely delivers a tale of consensus and certainty. In the area of takings jurisprudence, for example, there was no single original understanding of property rights or of the police power in the two generations after the American Revolution.

Even if the historical picture of early American property law were clear, it would not follow that modern judges should fit their jurisprudence within it. The work of description and interpretation is separate from that of prescription and application. In other words, originalism is a normative jurisprudence that depends on justifications independent of knowing how past generations resolved problems similar to those arising today. Historians spend much of their time documenting the changes that occur over time and little of it judging later generations against the standards of those who came before. The past was different. Often it is best if it stays that way.

Yet this agnosticism about the relevance of history is neither satisfying nor fully right. The history of takings law can shed some light on present debates. It can help lawyers and judges approach contentious issues with a healthy skepticism about whether they can in fact generate uniform and lasting principles, as well as whether they should. History can do so by showing that throughout U.S. history there has rarely been a single takings jurisprudence. Rather, there have been multiple takings regimes. Takings law has been both internally dynamic, changing in response to social conditions across time, and subject to federalism, therefore differing across state lines at any given time.

Most takings law has been a mix of state property law and state constitutional law. In the nineteenth century, the federal takings clause in the Fifth Amendment covered few cases. It was only in 1897 that the Supreme Court held that the Fourteenth Amendment required the states to adhere to a standard derived from the federal takings clause.<sup>2</sup> But as the recent Michigan Supreme Court deci-

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<sup>2</sup>Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 241 (1897).

sion in *County of Wayne v. Hathcock*<sup>3</sup> demonstrates, federalism still matters. It matters not just because each state is free to provide property owners more protection than the federal constitution by, for example, holding the states to a more demanding standard of "public use." It also matters because there has always been variation across the state courts in the interpretation of the central concepts of takings law—including "property"—even when they appear to be adhering to the same standards.

Is there any virtue in this incoherence in American property law? Is this *just* incoherence, or does this diversity of regimes reflect a contingent, yet historically rooted, conception of the rule of law? In other words, when reviewing property regulations, are American courts supposed to articulate clear rules? Or are they supposed to resolve concrete disputes? Legal scholars generally believe that courts should do both and that the two are not inconsistent. They need not be. But sometimes the personnel of a court system view their dispute resolution function as paramount and their role as broadcasters of substantive rules as secondary. In fact, in the long history of Anglo-American law, courts have usually viewed their primary role to be dispute resolution rather than rule articulation. Rather than insisting on unchanging rules, American courts have instead encouraged local governments, which undertake most land use regulation, to resolve conflicts locally. One legal scholar has argued that the preference for standards instead of rules in regulatory takings cases produces the "virtue of vagueness" because standards leave more space for negotiation between the property owner and the regulating agency than do bright line rules.<sup>4</sup> Outcomes are therefore more particularized, as the negotiators take into account the specific plot of land, the political ends of the regulatory body, and the property traditions of the locality.

Clear property rights probably contribute to the efficient use of resources.<sup>5</sup> But other values are at work in American property law. One is the division of political sovereignty vertically, between the federal government and the states, and horizontally, among the states. In the late eighteenth century, this diffusion of authority was a legacy of empire and the price of Union. It still is. American citizens seem to prefer fragmented rather than unitary political power. Consequently, many of their rights are muddy because they refuse to give any one institution the power to make those rights crystal clear. The story of federalism, of course, is the central story of early American constitutional history, but its legacy for property regulation

<sup>3</sup> 684 N.W.2d 765 (Mich. 2004).

<sup>4</sup> Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93 (2002). See also Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

<sup>5</sup> George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 19–20 (1984) (arguing that fewer disputes will be litigated and more settled as the parties' errors regarding the relevant legal standard decrease). Carol Rose argues that the two approaches are complementary. Rose, *supra* note 4, at 603–04. There are of course other criticisms of the rule of law as the law of rules, to borrow Justice Scalia's formulation. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). One is that the clarity of bright line rules is often illusory because much discretion inheres in the definition of bright line rules and the classification of the facts to which they are applied.

has not been fully explored. For now, it must suffice to note that diversity, rather than efficiency, was the overwhelming preference of early Americans when establishing the constitutional environment for their property rights. From the law of slavery and manumission to the law of riparian rights and bankruptcy, most property law in early America was state law.

Thus, American takings jurisprudence has historically produced something like bargaining in the shadow of dynamic laws, with the definitions of property rights and legislative powers changing over time and across state borders. The consumers of the law, American property owners, seem to like it enough that they have not often revolted against it in outbursts of popular constitutionalism.<sup>6</sup> If a system of law produces outcomes that are enforced, the actors in the system believe that they are receiving protection for their interests, and as a relative matter they do receive substantial protection and are not "demoralized" by regulation,<sup>7</sup> then that system has succeeded in carrying out the rule of law, or at least one conception of the rule of law. This version of the rule of law has deep Anglo-American roots and identifies law foremost with effective administration in the simplest sense of that term. It is a procedural conception of the rule of law that depends on certain procedures for resolving disputes rather than a substantive one that depends on clear decisional rules. This conception of the rule of law is a legacy of the common law origins of American property law and the American commitment to divided government.

The rest of this essay will explore a few variables in early American takings jurisprudence. It is not possible to capture the broad landscape of that history in a brief essay. Instead, this essay will offer a few representative pieces of the history that suggest the larger picture. These pieces are themselves problems: they were problems subject to argument in their own time, and they remain so today. Still, one can identify a few elements that reveal how variable takings law actually was in the nineteenth-century United States, where most exercises of eminent domain and property regulation took place. The three elements are, first, the definition of the "property" protected by the just compensation principle; second, the meaning of the word "taking"; and third, the meaning of "public use." This brief exploration of early American takings law demonstrates, first, that the founding generation relied on early modern common law categories of property law quite different from those of modern legal thinkers and, second, that those common law categories were subject to political pressures within each state and, thus, to the centrifugal force of legal federalism.

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<sup>6</sup> Perhaps the resistance in the Poletown neighborhood of Detroit twenty-five years ago had some effect on the Michigan Supreme Court in *Hathcock*, though a quarter century is a long lag time. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981).

<sup>7</sup> Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214-16 (1967) (discussing the "demoralization costs" of takings).

## I. The "Property" Protected by State and Federal Taking Clauses

The legal definition of the "property" protected by state and federal takings clauses has not remained constant. Briefly put, in the early nineteenth century the category of protected property changed from traditional common law property interests to the more analytically defined rights to use, transfer, and dispose. In other words, the definition of property changed from a list of specific historically protected uses of property to a more abstract conception of property as a set of functional rights.

Early American legal thinkers conceptualized property rights in traditional categories mapped out by the common law forms of action. Like lawyers today, they saw property as conceptually severed into multiple claims rather than as a unitary whole. Unlike lawyers today, however, their lines of severance mapped onto the traditional remedies available to a property owner when someone interfered with her enjoyment of her property. In short, customary writs were more important than abstract rights in constituting property. The way that members of American legal culture in the early Republic conceived of property rights was so different from the way lawyers do now that it is difficult to imagine how to apply the lesson of that past to the present.

In modern terms, the early modern property known to the founding generation was marked by "conceptual severance."<sup>8</sup> But the severable elements were defined by a list of common law remedies available to property holders rather than by segments of market value. A familiar quotation might help illuminate the difference: "what is the land but the profits thereof[?]"<sup>9</sup> So asked the English common lawyer and judge Sir Edward Coke in his *First Institute on the Laws of England*, which he wrote in the early seventeenth century and which was the standard introductory treatise on property law into the nineteenth century.<sup>10</sup> When judges and commentators cite Coke today, they believe they are merely echoing the belief that property is market value. That, evidently, is what Justice Scalia believed when he used Coke's quotation in *Lucas v. South Carolina Coastal Council* to support the proposition that the takings clause protects development expectations, or an expected future stream of profit.<sup>11</sup> There is an enormous difference, however, between Coke's equation of land with its profits and the modern identity of property as market value. The word "profit" creates the illusion of continuity. Today it usually means the gain from a monetary investment; but it also refers to a common law

<sup>8</sup> The term conceptual severance comes from the work of Margaret Jane Radin. See Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988).

<sup>9</sup> EDWARD COKE, *FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* § 1(4)(b) (Charles Butler ed., Professional Books 1985) (19th ed. 1832).

<sup>10</sup> Coke remained on student reading lists into the middle of the nineteenth century. See 1 *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES* 318 (Steve Sheppard ed. 1999) (reproducing the 1851 syllabus for the University of Virginia Law School).

<sup>11</sup> *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1017 (1992).

property interest. Coke had in mind the common law connotation of profit, the sort law students still learn when they study servitudes in a first-year property course: valuable fixtures or produce that can be detached from the land—harvested or mined and sold. Coke's oft-quoted words on land as profits came in the midst of long discussion about what magic words were necessary to convey property and whether some words conveyed the whole fee or only discrete interests appurtenant to the fee, like the profits of trees, mines, fish, and other recognized property interests.<sup>12</sup> Profit was a traditional category of property interest, not an abstract conception of market value.

It would take a long book to document the development of alternative conceptions of property, in particular the equation of property with market value.<sup>13</sup> Common lawyers like Coke, however, had for a long time considered all those various property interests to be marketable, so something like commodities. That is why he thought it was important to figure out what was being conveyed in each deed—what was being sold on the property market. Early modern jurists like Coke, and law students throughout the Anglo-American world who began their legal education with his tome, believed that property was not simply a thing; it was multiple functional dimensions of a thing that governed relationships between people.<sup>14</sup> In other words, the early American legal conception of property was not simply physicalist or legal realist. Property comprised an intricate network of long-recognized, overlapping, and technical elements. Some were quite abstract, like the underlying conception of fee simple. Some were mundane, such as servitudes like easements and profits.

This lack of an overarching common law theory of property did not mean that there was little protection of property in common law courts. Nor did it mean that the founding generation did not think much about property law. The common law of property that is found in Coke's *First Institute* is no slim body of law. It is a fairly complete guide to common law property interests: present and future, possessory and use rights. There is also much that is incomprehensible, including fantastic etymologies, discussions of the ancient Greeks who supposedly lived in England, and treatment of medieval tenures that were defunct even in Coke's day. As an introduction to law, it makes even the casebook look like a rational means of organizing the law for the beginner. Although Thomas Jefferson reported that Coke's work was "the universal law book of students, and a sounder Whig never wrote, nor a profounder learning and judgment in the orthodox doctrines of the

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<sup>12</sup> COKE, *supra* note 9, at § 1(4)(b).

<sup>13</sup> Gregory Alexander provides one interpretation of that shift. See GREGORY ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970* (1997).

<sup>14</sup> Cf. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 *YALE L.J.* 357 (2001) (arguing that twentieth-century property theorists renounced the traditional *in rem* conception of property in favor of a conception that emphasized the relationship between people with respect to things).

British Constitution, or what is called British liberties,"<sup>15</sup> not everyone was so full of praise. Joseph Story, for example, also cut his legal teeth on Coke's *First Institute*, and the work left him in tears.<sup>16</sup>

Perhaps because Coke's work and other early modern professional guides are so difficult for the modern lawyer to penetrate, legal scholars rely on alternative sources when they try to recover the founding generation's legal ideas. They quote broad introductory statements in Sir William Blackstone's *Commentaries on the Laws of England* that describe property as "that sole and despotic dominion which one man may acquire in and to such external things as are unconnected with his person,"<sup>17</sup> while ignoring the hundreds of subsequent pages that define what it was that the owner held in dominion and all the common law restraints on that dominion.<sup>18</sup> For several decades after Blackstone's work was first published in the 1760s, it remained an important source for the novice. But it was deliberately written as a source for the *novice*, not as an in depth guide for the law student or practitioner. Yet modern scholars scratch only the surface of this book.<sup>19</sup>

Some modern property scholars also turn to a short opinion piece by James Madison on property, which he wrote to oppose Alexander Hamilton's tariff program rather than to define property law in a systematic way.<sup>20</sup> And of course there is always John Locke.<sup>21</sup> What is curious about this canon of law review historical property theory is that it includes very little of what lawyers actually read when learning property law.

Until American legal thinkers began to alter the common law conception of property as a collection of rights that were enforced through historically recognized writs, judges interpreted takings clauses as protecting these common law interests. They did not, in other words, focus on the *physicality* of the property. That, however, is the crux of the modern debate within the legal academy. William Treanor argues that there was a shift in American takings jurisprudence from the protection of physical property to protecting intangible interests like market value and that the shift occurred sometime around Justice Oliver Wendell Holmes Jr.'s decision in

<sup>15</sup> THOMAS JEFFERSON, *THE WRITINGS OF THOMAS JEFFERSON* 12 (Andrew A. Lipscomb ed., 1903).

<sup>16</sup> JOSEPH STORY, *Autobiography*, in *MISCELLANEOUS WRITINGS OF JOSEPH STORY* 20 (William Story ed., 1852).

<sup>17</sup> WILLIAM BLACKSTONE, 2 *COMMENTARIES* \*2.

<sup>18</sup> See, e.g., Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 *CORNELL L. REV.* 531, 543-44 (2005).

<sup>19</sup> On the purpose of Blackstone's work and its influence in early America, see Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 *N.Y.U. L. REV.* 731 (1976).

<sup>20</sup> See Eric Claeys, *Takings, Regulations, and Natural Property Rights*, 88 *CORNELL L. REV.* 1549, 1569 (2003) (assuming the importance of James Madison, *Property*, *NAT'L GAZETTE*, Mar. 27, 1792, at 174, reprinted in 14 *THE PAPERS OF JAMES MADISON* 266 (Robert A. Rutland et. al. eds., 1983)).

<sup>21</sup> See, e.g., Bell & Parchomovsky, *supra* note 18, at 536 (noting that Locke put value-creation at the center of his theory of property).

*Pennsylvania Coal v. Mahon* (1922).<sup>22</sup> But early American common lawyers knew all about incorporeal interests, and early state judges protected them under takings clauses. On the other hand, scholars who argue that Treanor is mistaken because courts protected property owners from state regulations that did less than take away the physical property also err when they conclude that courts were protecting the market value of potential development. Early American courts did not restrict compensation to cases in which the government or its agent took the physical property in the lay sense of taking. But neither did they entertain what we would call regulatory takings claims based on the loss of development value.<sup>23</sup> Instead, they conceptualized property in traditional common law ways. In short, early Americans viewed property, if not quite as a bundle of sticks, then as a bundle of writs, each property interest—whether an easement, a covenant, a profit, or the whole fee simple—protected by at least one form of action. Lawyers seeking to define property customarily listed the ingredients of property rather than beginning abstractly with some ideal analysis.<sup>24</sup> In other words, they believed that property interests were severable, but they were severable into the ingredients identified by writs rather than by concepts existing outside those writs.<sup>25</sup> When practicing law, early American lawyers knew a property interest by the remedy available to vindicate it. There was a writ for suing someone for trespass or for creating a nuisance that damaged one of the recognized uses of land. There was, however, no writ to sue someone for reducing the market value of potential development.

This common law conception of property as a collection of multiple, discrete interests was slowly supplemented, though never completely displaced, during the nineteenth century by what is now a more familiar conception of property as a bundle of rights to use, transfer, and capture the value of future development. Many causes contributed to this shift; more exploration of how and why it occurred is needed. These causes ranged from the intellectual to the political and professional. Intellectually, a new school of analytical jurists attacked Coke, Blackstone and the common law arrangement of property law in the first half of the nineteenth century. In England, Jeremy Bentham and John Austin reacted against Blackstone's

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<sup>22</sup> See William M. Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813 (1998) [hereinafter Treanor, *Jam for Justice Holmes*]; William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 798-803 (1995) [hereinafter Treanor, *Takings Clause*].

<sup>23</sup> Query whether modern cases fit into this framework. An early American judge would understand the decision in *Loretto*, for example, because the state slapped an easement on the plaintiff's property; an easement was a recognized common law property interest, and a coerced grant of an easement was a taking. That judge would not, however, have justified the decision in terms of a "permanent physical occupation." Cf. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

<sup>24</sup> Robert Brauneis distinguishes historical and ahistorical conceptions of property: historical conceptions rely on positive law to define property; ahistorical conceptions posit an "unchanging ideal boundary between a property owner and the surrounding community." Robert Brauneis, *The Foundation of Our "Regulatory Takings" Jurisprudence: The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon*, 106 YALE L.J. 613, 624 (1996).

<sup>25</sup> See Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988) (defining "conceptual severance").



outline of English law by engineering more functional legal categories for private law.<sup>26</sup>

Politically and professionally, there was a movement in the United States toward a more uniform definition of private law rights during the nineteenth century. There were, in turn, several causes for this movement, which again can only be suggested at present. One was the reform of the writ system in the early nineteenth century that culminated in the abolition of the writs and their replacement by a simple civil cause of action, most famously embodied in David Dudley Field's procedural code. Without the writs, how would law be organized? This question inspired newly analytical, rather than historical, ways of viewing property rights. American treatise writers worked furiously to figure out how to re-organize legal categories, and the goal of many of them, such as James Kent and Joseph Story, was to impress common definitions on all of the states. This, they hoped, would help bind together the Union as a commercial and political entity. One by-product of this flattening of American private law was that value became a key part of the definition of property rights, a process that became apparent in the late-nineteenth century railroad rate regulation cases. In those cases the Supreme Court began to interpret the Fourteenth Amendment to require legislatures to guarantee railroads a fair rate of return on their investment.<sup>27</sup> While these cases were decided under the Due Process Clause, their analysis eventually began to affect takings jurisprudence.

The shift did not occur everywhere in the same way. The gradual loosening of the writ system liberated some state judges from conventional definitions, and they could do what political conditions would permit. One example is the way some state judges redefined riparian property rights to subsidize internal improvements at the expense of property owners. Traditionally under the common law, a riparian landowner on a non-tidal waterway owned the riverbed too, which meant he had a claim to the water flow. In the early nineteenth century, canal companies needed this water for their canals, which lay beside existing waterways. If a canal company diverted water from a stream, it would owe the riparian owner for loss of that flow. In other words, the common law writ of nuisance permitted a riparian owner to sue for the loss. States routinely granted canal companies the power to condemn that property interest in water flow and then pay the riparian owner for the lost interest. But that was expensive and slowed down the pace of internal improvements. Consequently, state judges in Pennsylvania, which was trying to beat New York in the race to build a canal linking the Great Lakes to the Atlantic, found a fiscal short cut: they changed the common law presumption that a riparian owned the riverbed. The geography of Pennsylvania, they argued, was different from that of England; therefore, Pennsylvania should have different pre-

<sup>26</sup> See, e.g., DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN* 219-40 (1989).

<sup>27</sup> See generally Stephen A. Siegel, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187 (1984).

sumptions about water rights. This change saved the state and canal companies many thousands of dollars. The change, and the corresponding loss of the property interest in water flow, can be seen as an uncompensated taking. The judges almost admitted as much.<sup>28</sup> There are few clearer examples of judicial subsidy of development than this.<sup>29</sup> And it meant that Pennsylvania and New York, which shared a long border and some rivers, had different riparian regimes. Thus, their takings law operated differently too. In New York, riparians got paid. New York still won the race to link the Great Lakes to the Atlantic. But that was because foreign investors favored New York's canal fund.<sup>30</sup> Since these foreign investors in Amsterdam and London also owned many acres of upstate New York, they were probably not disappointed by the retention of the old common law presumption.<sup>31</sup>

The changing definition of property rights, across time as well as space, is the primary reason why it is not possible to present a simple account of American takings jurisprudence in the early United States. The common law method of resolving disputes, when combined with federalism, prevented the emergence of a national law of property or takings.

To compress a long story, the conventional wisdom is that, at least by the Supreme Court's decision in *Pennsylvania Coal Co. v. Mahon*,<sup>32</sup> all American courts began protecting the market value of property uses rather than simply protecting physical property. But Holmes's famous opinion in *Penn Coal* can be read in two ways. The traditional way, which Coke would have understood, was that the Pennsylvania Coal Company deserved compensation when the state refused to allow the company to exploit its subsurface coal rights and surface support rights, which were legally recognized property interests in Pennsylvania. The modern way to interpret the decision is that the state could not take the value of the property rights that the company had reserved two generations earlier when it granted the surface rights to homebuilders. Holmes's language leads us to the second, modern interpretation, and scholars like William Treanor and Robert Brauneis conclude that Holmes had been developing a value-based theory of property for decades.<sup>33</sup> Still, the decision as a whole might reflect a mixture of a particular, doctrinal conception of property interests and a more analytical conception that abstracted property into market value. Here is the first conceptual variable in the history of takings: the meaning of the property that is protected by takings clauses.

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<sup>28</sup> Daniel J. Hulsebosch, *Writs to Rights: "Navigability" and the Transformation of the Common Law in the Nineteenth Century*, 23 CARDOZO L. REV. 1049, 1092-95 (2002).

<sup>29</sup> MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 63-108 (1977) (describing "the subsidization of economic growth through the legal system" in the early nineteenth century).

<sup>30</sup> NATHAN MILLER, *ENTERPRISE OF A FREE PEOPLE: ASPECTS OF ECONOMIC DEVELOPMENT IN NEW YORK DURING THE CANAL PERIOD, 1792-1838*, 99-112 (1962), available at <http://ets.umdl.umich.edu/cgi/t/text/text-idx?c=acls;cc=acls;idno=heb00287.0001.001;view=toc>.

<sup>31</sup> I do not mean to argue that the change in property interests in Pennsylvania discouraged international investment there or encouraged it in New York.

<sup>32</sup> 260 U.S. 393 (1922).

<sup>33</sup> Treanor, *Jam for Justice Holmes*, *supra* note 22, at 856; Brauneis, *supra* note 24, at 620-21.

## II. The "Taking" in American Taking Clauses

The second element in the history of the law of eminent domain is the definition of "taking." In the history of eminent domain, there was one significant change wrought by the early state constitutions and the Fifth Amendment of the federal Constitution: the constitutionalization of the just compensation principle.<sup>34</sup> It had long been English practice to compensate property owners for land or other real interests taken for the public benefit. Rights of way across private land, for example, were compensated in England and in most colonies. Most state constitutions included takings clauses, and so did the federal Constitution. In addition, some judges in states without takings clauses protected property from expropriation anyway, arguing that such protection was implied in their state constitutions. But it is one thing to note the constitutionalization of the just compensation principle and another to identify what counted as property covered by the principle. Many legal scholars conflate the two issues.

One early New York case illustrates the difference between these questions. The original New York State constitution of 1777 did not have a takings clause. Following Anglo-American practice, the state legislature usually compensated landowners who suffered damage when, for example, a city government commandeered a spring on someone's land and diverted the water for public use. But what about a neighbor whose land did not contain the spring but who had enjoyed a stream drawing on that spring? Did he deserve compensation for loss of customary water flow? These were the facts behind *Gardner v. Newburgh*<sup>35</sup> in 1816. Chancellor James Kent ruled for the neighbor, giving him an injunction against the diversion, which would force the city to pay the neighbor if it wanted to use the spring.

Kent faced two separate issues. First, if New York had no takings clause, what was the basis for the plaintiff's claim that his property had unfairly been taken without compensation? Kent held that the just compensation principle was implicit in New York's constitution. He reasoned by analogy to other state constitutions and, especially, the federal Constitution. He also referred to continental treatises that spoke of a natural right to be compensated when the government took property. This discussion of natural rights has, however, led some scholars astray. They assume that Kent was signaling that property was defined by a body of natural rights.<sup>36</sup> Not quite. Arguably Kent believed that just compensation was a natural right when the government took one's property, though even here Kent leaned most heavily on the analogy to the Fifth Amendment rather than on the European treatises. When he invoked Grotius and Pufendorf as exemplars of a civilized conception of law, Kent was also making a play for power against the state legislature, holding it to higher standards of civilization, meaning the civilization of the Euro-

<sup>34</sup> See Treanor, *Takings Clause*, *supra* note 22, at 789-91.

<sup>35</sup> 2 Johns. Ch. 162 (N.Y. Ch. 1816).

<sup>36</sup> See, e.g., Eric Claeys, *supra* note 20, at 1569.

pean-based Atlantic empires. Kent and like-minded Federalist judges wanted to keep the U.S. within the pale of that civilization, so he was forever finding concordance between American law and the law of nations, and also arguing that American statutory law should not breach the law of nations. Therefore, Kent's use of natural-rights discourse helped justify his holding that there was an implied takings clause in the state constitution.

Kent did not, however, refer to natural rights when he defined the property right at issue. For this separate question, he referred to the English common law. The right to water flow in a stream was a traditional common law right, meaning that the common law had always provided a remedy to a riparian landowner when someone, like a neighbor, interfered with that water flow. In other words, to define the content of property rights in New York, Kent turned to Coke's old collection of writs rather than to natural rights. Remedy defined right. Those remedies came from the common law, and they created constitutionally enforceable rights.

Even if a court identified a recognized property interest, the state legislature could still regulate its use without compensation if the state acted under its police power. In the nineteenth century, broad statements about the inviolability of property coexisted alongside a robust tradition of local regulation documented in William Novak's book on the well regulated society of early America.<sup>37</sup> The vast majority of regulations were upheld, regardless of their effect on property value. In his *Commentaries on American Law*, written ten years after his decision in *Gardner*, Kent described the just compensation principle as "founded in natural equity, and . . . laid down by jurists as an acknowledged principle of natural law."<sup>38</sup> He then added that "though property be thus protected, it is still to be understood that the lawgiver has a right to prescribe the mode and manner of using it, so far as may be necessary to prevent the abuse of the right, to the injury or annoyance of others, or of the public."<sup>39</sup> Kent mentioned nuisances, unwholesome trades, burial grounds, steam engines, and gun powder deposits as examples of property uses that could be regulated. In a footnote, he approvingly cited a village ordinance in western New York that defined bowling alleys as nuisances.<sup>40</sup> Legislative declarations of nuisances were frequent and usually upheld.<sup>41</sup> Finally, Kent was careful in the way that he couched his exercise of judicial review in *Gardner*. For all his talk of natural equity, he presumed that the state legislature had not intended to deprive the plain-

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<sup>37</sup> WILLIAM NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

<sup>38</sup> 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* \*339 (Little, Brown & Co. 12<sup>th</sup> ed. 1873).

<sup>39</sup> *Id.* at \*340.

<sup>40</sup> *Id.* at \*340 n.b.

<sup>41</sup> A long list of regulated activities can be found in Novak's study and in John Hart's articles on early American land use regulation. NOVAK, *supra* note 35, at 3-6; John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099 (2000); Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996).

tiff of his water flow; he did not hold that the legislature had so intended *and* that it could not.<sup>42</sup>

Yet, as the conflicting antebellum cases striking down temperance regulations demonstrate, the takings principle did not have precisely the same bounds in each state. Some police regulations were upheld in one state while struck down in another.<sup>43</sup> And, again, there was a gradual trend at the end of the century toward judicial scrutiny of regulations that affected value, or profits in the modern sense, a trend that emerged and was strongest in the area of railroad rate regulation. As common law definitions receded, and property was increasingly identified with value, there were greater opportunities for judges to strike down legislation that curtailed use or value.

### III. "Public Use" in the Nineteenth Century

Third, and finally, the requirement of public use was strongly stated and liberally interpreted. Courts and commentators repeatedly declared that legislatures could not transfer property from one private party to another. James Kent stated the "general rule" that it was

in the wisdom of the legislature to determine when public uses require the assumption of private property; but if they should take it for a purpose not of a public nature, as if the legislature should take the property of A. and give it to B., or if they should vacate a grant of property, or of a franchise, under the pretext of some public use or service, such cases would be gross abuses of their discretion, and fraudulent attacks on private right, and the law would be clearly unconstitutional and void.<sup>44</sup>

The legislature was the primary judge of whether a transfer was in the public interest or not, but some courts claimed the power to review these legislative determinations.

Throughout the nineteenth century, state governments delegated the eminent domain power to corporations, which in turn expropriated property and paid compensation. Companies chartered to build highways, canals, and railroads were the easiest cases; they were seen as serving the public interest, and there was a long history of allowing such expropriations for the development of transportation networks in England and early America. These were seen as public uses because the public could use the roads or canals. Some historians call this way of achieving

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<sup>42</sup> *Gardner v. Trustees of Newburgh*, 2 Johns. Ch. 162, 168 (N.Y. Ch. 1816) (stating that "a provision for compensation is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property; and I am persuaded that the legislature never intended, by the act in question, to violate or interfere with this great and sacred principle of private right").

<sup>43</sup> Compare *Wynehamer v. State*, 13 N.Y. 378 (N.Y. 1856) (striking down state prohibition statute), with *State v. Wheeler*, 25 Conn. 290 (Conn. 1856) (upholding state prohibition statute).

<sup>44</sup> KENT, *supra* note 36, at \*340.

public goals "government on the cheap": the government would charter a corporation, grant it a monopoly privilege, and ask it to serve publicly beneficial ends.<sup>45</sup>

But what about a lone manufacturing mill? Could a state give a mill owner the right to take a neighbor's property, by, for example, building a dam to power a mill that flooded his neighbor's land? Was manufacturing itself a public use? The majority rule held that it was. The only variation came in identifying the sorts of mills that courts viewed as serving the public interest as opposed to those that did not. For example, some courts distinguished between grist mills, which produced food and thus directly benefited the public, from other manufacturing mills that did not directly benefit the public. But this was not a well articulated distinction or a convincing principle of limitation. In 1832, a Massachusetts court asked about a corn grist-mill, "Is it of no benefit to have corn ground near to the inhabitants [of the town], rather than at a distance?"<sup>46</sup> It probably was beneficial. When the grist-mill flooded a neighbor's land, it was, therefore, also a "public use." One could try to generalize some rule about the generality of effect of a regulation. But in the end, as one state judge lamented in 1876, "[n]o question has ever been submitted to the courts upon which there is a greater variety and conflict of reasoning and results than that presented [by] the meaning of the words 'public use,' as found in the different State constitutions."<sup>47</sup> Federalism bred confusion. More positively, the states were laboratories of experimentation in which judges and legislators together, sometimes in tension but usually in partnership, developed a variety of takings regimes.

There is a sense today that the public use requirement has been emptied of content.<sup>48</sup> Is it looser now than in the mill cases almost two centuries ago? It might have been even looser then and for a reason: the early states were part of a developing nation in all senses of the term "developing," including that they lacked capital and wanted to spur economic development. Pennsylvania's alteration of common law riparian rights, the flexible police power doctrine, and the delegation of the eminent domain power to corporations all fit the profile of a legal system serving a developing nation. Just about all the state courts embraced the just compensation principle, and they made big shows of their embrace. Like James Kent in New York, they spoke of how the federal government had such a clause, how the English usually paid compensation, and how the continental treatise writers equated the just compensation principle with natural law. All of these sources of law had positive associations in a new nation uncertain of its place in the Atlantic world. State

<sup>45</sup> OSCAR HANDLIN & MARY HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861*, at 139-40 (rev. ed. 1960).

<sup>46</sup> *Boston & Roxbury Mill Corp. v. Newman*, 12 Pick. 467 (Mass. 1832), cited in JOHN LEWIS, *A TREATISE ON EMINENT DOMAIN IN THE UNITED STATES* 248 (3d ed. 1909).

<sup>47</sup> LEWIS, *supra* note 43, at 248.

<sup>48</sup> The public reaction to *Kelo v. New London*, 125 S. Ct. 2655 (2005), exemplifies this point. See, e.g., Avi Salzman, *Homeowners Shown the Door*, N.Y. TIMES, Jul. 3, 2005, at CN14 (suggesting that *Kelo* has left the limits of the public use requirements uncertain); Jeff Jacoby, *Eminent Injustice in New London*, BOSTON GLOBE, Jun. 26, 2005, at D11 (stating that the public use clause has been eviscerated).

judges embraced these cosmopolitan ideals. They wanted to prove that the new Union was the equal of the colonies' former imperial master, and they wished to be accepted as legitimate by the other European powers. The collective embrace of the just compensation principle helped prove that the states formed a single nation and, together, belonged to what they viewed as the civilized legal world.

Yet the principle did not get in the way of development and interstate competition. Nor did this tension between transatlantic ideals and local practices generate disabling cognitive dissonance. It is not that the judges were deluding themselves. Most of them believed that property rights were important, even sacred. But for most of the nineteenth century, property was circumscribed within traditional common law categories of interest and remedy.

### Conclusion

Let me conclude this brief exploration of early nineteenth-century takings jurisprudence with a plea for more directed research. We know that there was a lot of property regulation in the nineteenth century, but we do not know enough about how those regulations varied region to region, state to state, and even locality to locality. Although many today celebrate federalism, we know surprisingly little about how it operated in its heyday in the first decades of the early Republic. In the area of takings jurisprudence, it appears that state law varied from state to state *and* within each state over time. Scholars search nineteenth-century cases in vain for coherent doctrine. I'm not sure that it can be done. I'm not sure it can be done even for cases coming after the Supreme Court started using the Fourteenth Amendment to review state property regulation. What was happening, for example, between *Penn Coal* in 1922 and *Penn Central* 56 years later? We do not know much about how the states and lower federal courts were handling takings claims during that period.<sup>49</sup> My hypothesis is that there remained a fair amount of variation despite Holmes's federal guidelines. There was probably local experimentation, regional regulatory traditions, and forum shopping by property owners who could afford to vote with their feet.

Rather than collecting data by keyword searches and attempting to squeeze diverse outcomes into the anachronistic categories of modern social science or old moral philosophy, and rather than trying to present some epic of the rise or decline of individual rights or state power, more work is needed to recover the persistent Antifederalist tradition in property law and the conception of the rule of law it

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<sup>49</sup> Since work began on this essay, Stewart Sterk has published an article broaching the same question and supplying a few cases supporting the thesis that takings jurisprudence continued to vary across the states in the twentieth century. Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L. J. 203 (2004). See also Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 93-102 (1986) (finding tougher scrutiny of the "public use" requirement in state courts than in federal courts between 1954 and 1986). For an examination of state environmental regulation that demonstrates the states' differing preferences for protecting property rights, see Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, HARV. L. REV. 553 (2001).

serves. Federalism was never just a doctrine modulating the vertical relationship between the federal government and the states collectively. It was also a horizontal doctrine that gave each state freedom to experiment with legislation. The irony is that a Supreme Court committed to reviving federalism, at least when it comes to protecting states from Congressional power, has over the past twenty years waged a campaign to eliminate that Antifederalist property tradition and to subject all local and state regulations to federal constitutional property rules

This federalization of property law has not gone unchallenged. One way to interpret the use of balancing tests in takings cases by the swing voters on the Supreme Court is that such tests preserve a large space for states and localities to negotiate their own property regimes.<sup>50</sup> It makes property law an "arena of conflict"<sup>51</sup> rather than an abstract code of rules. It keeps the focus in takings cases on state property law rather than on federal constitutional law, the local instead of the national, and administrative dispute resolution instead of abstract rulemaking. This, too, is a version of the rule of law, one that has deep roots in American legal history.

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<sup>50</sup> See Daniel J. Hulsebosch, *The Tools of the Law and the Rule of Law: Teaching Regulatory Takings after Palazzolo*, 46 ST. LOUIS U. L.J. 713, 727-28 (2002).

<sup>51</sup> See Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899, 930.