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## Cover Page Footnote

The author thanks two professors at the University of College of Law: Stanley Ingber for his comments on earlier drafts of this article, and Julian C. Juergensmeyer for his encouragement and advice in this area of study. The author is also grateful to Nancy E. Hill, University of Florida College of Law, class of 1987, for editorial assistance.

# GENERAL PROPOSITIONS AND CONCRETE CASES: THE SEARCH FOR A STANDARD IN THE CONFLICT BETWEEN INDIVIDUAL PROPERTY RIGHTS AND THE SOCIAL INTEREST

DONALD C. DOWLING, JR.†

> In no other country in the world is the love of property keener or more alert than in the United States, and nowhere else does the majority display less inclination toward doctrines which in any way threaten the way property is owned.[1]

## I. Introduction: The Need for a Standard

### *A. The Issue at Stake*

Probably because the love of property is so great in this country, the law concerning government regulation of private property remains uncertain. Throughout American constitutional history, the clash between private property and the state's power over it has remained unresolved. Government has tried to compromise private property interests in an effort to further greater societal interests as diverse as winning a war,[2] preventing violence through racial segregation,[3] protecting major corporations,[4] and preserving old

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†The title refers to Justice Holmes's observation that "[g]eneral propositions do not decide concrete cases." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

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1. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 614 (J. Mayer & M. Lerner, eds. 1966). In the context of American fiction, a similar depiction of the strong American feeling for property appears in B. TRAVERN, THE TREASURE OF THE SIERRA MADRE 114 (Hill & Wang ed. 1967) (first published 1935):

> [T]he stranger appeared to be an honest gold-digger of the old, sturdy sort who would never commit a crime or steal even a nail, but would stand ready to commit murder at any moment to defend his claim against anyone who tried to deprive him of what he was sure was his rightful property.

2. *See, e.g.*, United States v. Pacific R.R., 120 U.S. 227, 239 (1886) (holding that "for injuries to or destruction of private property in necessary military operations during the civil war, the government is not responsible. . . .")

3. Buchanan v. Warley, 245 U.S. 60 (1917).

4. *E.g.*, Poletown Neighborhood Council v. City of Detroit, 410 Mich. 894, 304 N.W.2d 455 (1981).

buildings like Grand Central Station.[5] If some of these interests have changed over time, the overriding issue has remained constant: whether, or under what circumstances, individual property interests may be sacrificed to some greater, state-perceived good. This issue is complex. As the Supreme Court recently noted, "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[6]

Over the course of the last century, society's perception of the common good has evolved from an emphasis on conquering nature to a position of protecting it,[7] and this social attitude toward the environment affects the way government has controlled property. In "Main-street," a mid-nineteenth century American short story, Nathanial Hawthorne described the growth of a colonial village.[8] The story begins when the town is a mere "tract of leaf-strewn forest-land,"[9] and optimistically charts the path of development until the area becomes an established and well-populated business and residential district. The story abruptly ends when a blizzard, "the Great Snow of 1717,"[10] obliterates the frontier town. The thrust of Hawthorne's message is that although individuals will join together to acquire and improve property even at great cost to the environment,[11] their collective efforts are inconsequential against the power of nature.

In modern society, however, this idea seems to have given way to the need to protect the environment, an aspiration which contemporary fiction correspondingly reflects. For example, a 1982 novel by John Cheever, *Oh What a Paradise It Seems*,[12] begins with a winter scene much more serene than the blizzard that ends Hawthorne's "Main-street." Cheever's book opens with a sentimental

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5. *E.g.*, Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

6. *Id.* at 124.

7. *See* Scheiber, *Property Law, Expropriation, and Resource Allocation by Government, 1789-1910* in AMERICAN LAW AND THE CONSTITUTIONAL ORDER 132, 137-38 (L. Friedman & H. Scheiber, eds. 1978).

8. N. HAWTHORNE, TALES & SKETCHES 1023 (1982) ("Main-street" originally appeared in 1849).

9. *Id.*

10. *Id.* at 1049.

11. Hawthorne mentions that the "heavy tread" of the settlers ultimately found "its way all over the land; and that the wild woods, the wild wolf, and the wild Indian were [alike] trampled beneath it." *Id.* at 1028.

12. J. CHEEVER, OH WHAT A PARADISE IT SEEMS (1982).

old man ice skating on a picturesque pond in a small town which has retained much of its charm due to a computer error which caused it to be overlooked as a site for fast-food franchises.[13] Notwithstanding this, the town government soon converts the pond into a garbage dump, and the old man comes to battle local politicians, town planners, and lawyers in an effort to protect the pond. Yet all his efforts fail. The area is saved only when, in a farcical twist, a woman furtively poisons food on the shelves of a local supermarket and threatens to continue unless the dumping stops.

### *B. The Issue's Importance: The Government Control/Private Property Conflict*

The plots in Hawthorne's and Cheever's stories revolve around inherent conflicts in determining the most beneficial use of property, thereby presenting the issue of whether individuals or government can best decide how to use privately-owned scarce resources. The general legal rule derived from the "taking" area is that government may regulate private property by invoking the police power in a way consistent with the public use.[14] This means nothing, however, without at least workable standards for the key concepts involved: property, the police power, and the public use.

Without meaningful and realistic standards, government cannot know the extent to which it may protect society, and individuals cannot know how far they may extend their rights to use and acquire property. The overriding issue, whether the state can control private property for some greater good, is therefore vitally important, affecting Americans daily. The question of government regulation of property for the social good is an area of law reported as often in newspapers as in case reporters. Recent news stories tell of the problems involved as cities try to protect their architectural landmarks,[15] as large amounts of farm land are lost to development,[16] and as Florida tries to preserve the delicate environment of the Florida Keys in the face of complaints that protective legislation will destroy the value of the remaining undeveloped land.[17]

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13. *Id.* at 2.

14. *See* Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243 (1982). The present discussion will not directly address an issue which, in other contexts, is a crucial legal distinction: the difference between the federal government's eminent domain power and the states' police power.

15. Wall St. J., Feb. 19, 1985, at 32, col. 1.

16. Miami Herald, Mar. 3, 1985, at D-1, col. 1; Wall St. J., Oct. 24, 1980, at 1, col. 6.

17. Miami Herald, Mar. 10, 1985, at D-1, col. 2.

Property rights issues extend further to more mundane problems, such as whether Texas can prohibit selling toys on Sunday[18] or whether Chicago can keep lights out of Wrigley Field.[19] Moreover, these property concerns can overlap with entirely independent constitutional rights, such as the first amendment freedom of religion. For example, Oregon law severely limits urban development in rural areas, yet this rule allegedly interfered with the Rajneeshees, a group which had established a 7000-member religious colony on farmland it owned in Oregon.[20]

### C. *The Scope of the Discussion*

In order for government to enact valid regulations limiting property rights, the laws must serve a public purpose which, at a minimum, overrides the individual owner's interest in his property.[21] Accordingly, a primary issue in examining this area is the extent to which government has a legitimate interest in protecting society. From the opposing perspective, this is the question of the extent to which private ownership is absolute. Both "mature" and "primitive" legal systems have universally recognized that generally the individual may not use personally-owned property to harm society;[22] in the sense of the absence of social control, ownership has never been absolute.[23]

One thesis on this issue distinguishes "the prohibition of harmful exploitation," likely to be within government's power, from "the positive duty to exploit one's property in a socially beneficial way," which may intrude on private property interests.[24] This distinction can prove difficult. For various reasons American cases have both rejected mere prohibitions of use[25] and upheld affirma-

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18. Wall St. J., Feb. 4, 1985, at 25, col. 4.

19. N.Y. Times, Mar. 26, 1985, at B-7, col. 5.

20. *See* Korn, *Zoning For Paradise: Are Oregon's Strict Land-Use Laws Being Used to Persecute A Religious Group, or Are They Really Protecting the State?*, STUDENT LAWYER, Jan. 1985, at 28.

21. *See* discussion *infra* at Part II-C.

22. Honore, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107, 123 (A. Guest, ed., 1961). According to an 1867 decision, "[i]n all governments the right to take private property when required for the public use has been exercised; and in all enlightened and just governments the duty is recognized of providing, where it can be done, for compensation to the owner." Great Falls Mfg. Co. v. Fernald, 47 N.H. 444, 455 (1867).

23. Honore, *supra* note 22, at 144. For a discussion of these concepts in relation to the definition of property, see Siegel, *Interest on Lawyers' Trust Account Programs: Do They "Take" Property of the Client?*, 36 U. FLA. L. REV. 674, 698-720 (1984).

24. Honore, *supra* note 22, at 146.

25. *E.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1885) (striking down a fire ordinance which

tive requirements to dispose of private property.[26] As a result, American constitutional doctrine does not provide satisfactory guidelines regarding the extent to which government can control private property.

There seems to exist a "persistent temptation to hunt for the key to [this] puzzle in the nature or essence of 'property.' "[27] Nonetheless, the issue of the extent to which government can control private property for the social good will not likely be answered by philosophical reasoning alone. The unstable nature of the public interest and the vagaries of the case by case method of law are not adaptable to a single consistent rule. Notwithstanding that what constitutes the public interest has drastically changed since the nineteenth century[28] and that the case by case method in this area "has, with suggestive consistency, yielded rules which are ethically unsatisfying,"[29] these two factors, society and law, are the only means available to address the problem of the extent to which government can control private property.

The following discussion uses as a starting point the premise that although the cases provide no uniform solutions, they do propound fairly consistent standards, or ideals. The discussion is therefore a hypothesis-forming rather than hypothesis-testing[30] ex-

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prohibited laundries in wooden buildings).

26. *E.g.*, Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1983) (upholding a state statute which allows tenants to require their landlords to sell them fee title to their residences).

27. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1203 (1967).

28. *See* Scheiber, *supra* note 7, at 137-138 (arguing that in the nineteenth century, society and law protected the interest of business, while today they protect the environment).

29. Michelman, *supra* note 27, at 1171.

30. *See* W.O. WEYRAUCH, THE PERSONALITY OF LAWYERS 4-5 (1964). Probably the best, if not most extreme, example of a hypothesis-forming discussion is Descartes's *Meditations*, which begins:

> It is now some years since I detected how many were the false beliefs that I had from my earliest youth admitted as true, and how doubtful was everything I had since constructed on this basis; and from that time I was convinced that I must once for all seriously undertake to rid myself of all the opinions which I had formerly accepted, and commence to build anew from the foundation, if I wanted to establish any firm and permanent structure to the sciences . . . .Today, then, since very opportunely for the plan I have in view I have delivered my mind from every care (and am happily agitated by no passions) and since I have procured for myself an assured leisure in a peaceable retirement, I shall at last seriously and freely address myself to the general upheaval of all my former opinions.

Rene Descartes, *Meditations on the First Philosophy in which the Existence of God and the Distinction between Mind and Body Are Demonstrated, Meditation I*, in THE PHILOSOPHICAL WORKS OF DESCARTES 144 (E.S. Haldane & G.R.T. Ross, trans., 1967) (first Latin edition of the *Meditations*, 1641).

amination of the jurisprudential basis of the private property versus social good conflict. Confining itself to the context of American constitutional law, the discussion begins in Part I by examining the issue of government use of the police power to control private property for the public use. Within Part I the discussion considers the main concepts presented by this issue in an effort to isolate the central legal standards which govern these ideas. Next, Part II focuses on the environmental area, in which these concepts are applied in a specific manner. Ultimately, the discussion isolates the major theories emerging from this analysis and distills the operative legal concerns involved.

## II. General Propositions: Searching for a Standard

In American constitutional law the debate over the extent of government control over private property centers on the fifth and fourteenth amendments, which require that private property shall not be "taken for public use, without just compensation," and that property, along with life and liberty, shall not be taken "without due process of law."[31] According to case law, a "taking" requires only a dimunition of value and not a physical seizure;[32] therefore this fifth amendment issue "has proved to be a problem of considerable difficulty."[33]

### *A. Toward A Theory of Property*

Probably the major issue in the area of governmental control of property involves the question of what it is that government can control: that is, what is property? Without a well-defined concept of property, individuals can have no position from which to protect their private resources from government control. The competing interest here is that society cannot allow individuals to label too many interests as personal possessions, because government would

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31. U.S. Const. amend. V. This just compensation language applies to the states through the fourteenth amendment's due process requirement. Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 235-41 (1897); *see also Hawaii Housing Authority*, 467 U.S. at 229; *Penn Central*, 438 U.S. at 122. *See generally* Siegel, *supra* note 23, at 721-53 (summarizing the distinct doctrinal analyses of the taking issue).

32. *See* F. Bossleman, D. Callies & J. Banta, The Taking Issue 51 (1973) [hereinafter cited as Bossleman, Callies & Banta].

33. *Penn Central*, 438 U.S. at 123. The line of major cases which demonstrates how great a problem the taking issue has been ranges from Mugler v. Kansas, 123 U.S. 623 (1887) to Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, ___ U.S. ___, 105 S.Ct. 3108 (1985).

then have little power to regulate or protect citizens from one another. Because any regulation necessarily limits some interests at the expense of expanding others, government action would too often be constitutionally invalid as an interference with property.

### 1. What the Meaning of Property Signifies for Society

Granting the importance of a specific framework for the meaning of "property," it may be surprising that the common law has no single definition or even concept of "property" or "possession."[34] A specific definition of property seems essential to determine what society is willing to recognize as deserving of protection from government intrusion. While courts have stated some general guidelines meant to encompass the concept of property possession, these have been inconsistent. Various judges have subscribed to entirely different conceptions of property. Generally, two opposing theories of property exist: the "proacquisitive position,"[35] emphasizing the individual's personal wealth, and the "prosocial position,"[36] favoring the good of society. Of course, not every philosophy of property and possession fits under one of these two labels,[37] and various cases have resulted in a variety of positions, thereby complicating this area.[38]

The taking clause of the fifth amendment is worded as an absolute prohibition, but courts have not read it literally.[39] To a large degree, courts differ on how expansively they are willing to read the taking clause; a more open reading sacrifices individual prop-

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34. According to Viscount Jowitt of the House of Lords, "in truth, the English law has never worked out a completely logical and exhaustive definition of 'possession.'" United States v. Dollfus Mieget Company S.A. [1952] 1 All E.R. 572, 581 (H.L.), *cited in* Harris, *The Concept of Possession in English Law*, in OXFORD ESSAYS IN JURISPRUDENCE 69 (A. Guest, ed. 1961). Jowitt went on to say that "the English decisions preclude us from laying down any conditions . . . as absolutely essential for a judicial ruling that a man possesses something." *Id.* For a thorough examination of the link between property and the social phenomenon of possession, see Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985).

35. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 594 (1984).

36. *Id.* at 594-97 (also referred to as the "civic position.").

37. *See* Michelman, *supra* note 27, at 1202-13.

38. According to Justice Holmes, "[e]very opinion tends to become a law." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). For a recent comprehensive discussion of the elusive definition of property in American law in general and in the fifth amendment taking context specifically, see Ruckleshaus v. Monsanto Co., ___ U.S. ___, 104 S. Ct. 2862, 2872-74 (1984). For a general discussion of the difficulty of attaching the property label to intangibles, see Rose, *supra* note 34, at 83-88.

39. *Penn Central*, 438 U.S. at 142 (Rehnquist, J., dissenting).

erty interest in favor of some government policy. By 1887, the Supreme Court had adopted the prosocial phraseology that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."[40] According to another nineteenth century Supreme Court decision, government may regulate private property and all other rights so as to further "the safety, health, peace, good order, and morals of the community."[41] Later Supreme Court decisions have examined economic concepts, stating that in many contexts, "government may execute laws or programs that adversely affect recognized economic values."[42]

Concurrent with this rise of a prosocial position, other United States Supreme Court decisions have recited dictum generally favoring the proacquisitive approach, implying that the individual's property interest is "inviolable"[43] in all but extreme conditions. In 1917, not long after the Court had embraced the prosocial view in several leading cases,[44] the Court apparently changed the focus of its concept of property.[45] It found that "[p]roperty is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of" the property in question.[46] The Court emphasized that "[t]he Constitution protects these essential attributes of property."[47]

Since the time of this statement, the Supreme Court seems to have expanded its proacquisitive position to include "expectancies" connected with property rights.[48] In *Kaiser Aetna v. United States*,[49] the Court found a violation of the fifth amendment taking clause when a developer dug a channel to connect his private pond with the ocean and the federal government declared that the pond, now in effect a bay, became navigable water.[50] Basing its ul-

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40. *Mugler*, 123 U.S. 623, 665 (1887).

41. Crowley v. Christensen, 137 U.S. 86, 88 (1890). The passage continues: "Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will."

42. *Penn Central*, 438 U.S. at 124.

43. Slaughter-House Cases, 83 U.S. (16 Wal.) 36, 115 (1872) (Bradley, J., dissenting).

44. *See supra* notes 40-41.

45. *See, e.g.*, Buchanan v. Warley, 245 U.S. 60, 74 (1917).

46. *Id.*

47. *Id.* For an even clearer statement of this view, from a state court, see Gilmer v. Lime Point, 18 Cal. 229, 254 (1861), finding that "[i]t is a cardinal principle of our law that private property is sacred to the lawful uses and disposition of the owner; that it is his to do with as he pleases, to keep, to use, to sell, subject to a few simple qualifications."

48. Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979).

49. 444 U.S. at 164.

50. *Id.* at 167-68.

timate argument on the fact that the federal government Corps of Engineers had given the developer permission to build the channel, the Court held that this permission "can lead to the fruition of a number of expectancies embodied in the concept of 'property.' "[51] By defining property so broadly as to include these expectancies, the Court invoked a proacquisitive stance in order to protect an individual's "right to acquire, use, and dispose"[52] of his property, notwithstanding the federal government's contrary determination of the social interest, "the safety, health, peace, good order and morals of the community."[53]

### 2. Judicial Declarations on the Property Concept

Although the Supreme Court's varying conceptions of property do not seem to fall into any predictable pattern (i.e., they do not seem to evolve consistently over periods of time), the property concept would be at least understandable if the Court's concept of property always fell between the endpoints on the proacquisitive versus prosocial line. Yet courts have argued positions which do not fit anywhere on the line and have even maintained positions which encompass the entire line. Justice Holmes, while on the Supreme Court of Massachusetts, argued that society's interest in protecting people from an individual who uses his property to harm others should prevail over that individual's freedom to use his property as he chooses.[54] However, Holmes added that "the power to use one's property malevolently, in any way which would be lawful for other ends, is an incident of property which cannot be taken away even by legislation."[55] This ruling ostensibly means only that motive is not a deciding concern when assessing an individual's use of his property in a way which harms another. However, in order to delimit this private property interest Holmes in effect held that an individual can conceivably use his property lawfully to harm others. The state has a valid interest in stopping the individual, but Holmes suggests this is an interest which a state has no power to enforce.

Besides seeming to support both the proacquisitive and prosocial

51. *Id.* at 179.

52. *Buchanan*, 245 U.S. at 74.

53. *Crowley*, 137 U.S. at 89.

54. Rideout v. Knox, 148 Mass. 368, 372, 19 N.E. 390, 391 (1889) ("It is plain that the right to use one's property for the sole purpose of injuring others is not one of the immediate rights of ownership.").

55. *Id.* at 372, 19 N.E. at 392.

positions, Holmes's ultimate argument here also appears internally inconsistent because it incorporates the concept of lawfulness. Any definition of property based on lawfulness is circular since the question of what is property necessarily involves lawfulness. Property is a legal concept, and the basis of property law is legal entitlement. In a sense, without the law there is no property.

A 1945 Supreme Court case, dealing with a power company's property interest in a water flow, offers a much simpler but no more helpful conception of property than that offered by Holmes. In *United States v. Willow River Power Co.*,[56] the federal government built a dam which backed up a river's depth so drastically that it affected a private dam on a tributary thirty miles upstream.[57] The power company that owned this upstream dam claimed that it deserved compensation under the taking clause for its loss,[58] but the government argued that the company's lost "head" of water was not compensible because it was not property in the first place.[59] The Court responded that while "a head of water has value . . . not all economic interests are 'property rights.' "[60] As in the decisions in some earlier cases, the Court came close to defining property circularly, as an individual's legal rights in whatever he possessed.[61] However, the *Willow Power* Court went further; it held, basically, that property is whatever a court recognized it to be. Property rights are only those " 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion."[62] To this Court, a head of water "is not a right protected by law,"[63] that is, not protected by the Court's own decision. This reasoning cost the power company its case.

The *Willow Power* decision, in light of other judicial attempts to limit property, seems almost seductive.[64] Because someone must

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56. 324 U.S. 499 (1945).

57. *Id.* at 500-01.

58. *Id.* at 500-03.

59. *Id.* at 502.

60. *Id.*

61. The court said, for example, that interests rise to the level of property rights "only when they are legally protected interests." *Willow Power*, 324 U.S. at 503.

62. *Id.* at 502.

63. *Id.* at 511.

64. The *Willow Power* idea that property is simply what a decision maker decides it is may have become integrated into American society. For example, a recent news report discusses the rise of a fraternity problem at many universities. According to the report, Stanford University faces substantial pressure to bar fraternities. However, the alumni and the

establish a limit, perhaps courts, which always face concrete situations, are in the best position to define and redefine property as the need arises. After all, the main lesson of legal realism is that courts operate this way much more than traditional legal analysis allows.[65] However, the concept of property is far too important to resign to judicial anarchy; without a more definite standard, conceivably almost all rights—or almost none—could become property.[66]

The danger of an unstable definition of property is perhaps clearest not when individuals try to protect their property from government, but when society tries to repress individuals by imposing on them a concept of property which limits their civil or social rights. For example, in an essay called "The Need For the Right of Property in Surnames,"[67] one English legal scholar proposed that certain foreigners to England should not be allowed to adopt English-sounding names. As the title of the proposal suggests, the author wanted to impose a concept of property on others in order to limit their freedom.[68] At first this conception of property seems ridiculous, because even if a country were to prohibit the use of certain names, it would do so through a criminal law which would indeed curtail personal freedom, but would not really limit property. However, that this English author could plausibly

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national fraternity there are apparently more powerful than the anti-fraternity groups. Thus, "[l]argely because" of this alumni pressure, Stanford "administrators have had to contend with the fact that Greek houses . . . are typically the property of the fraternity, not the university—and [are] somewhat outside the university's purview." Tampa Tribune, Mar. 15, 1985, at D-5, col. 4. Of course, this statement is a *non sequitur*. Conceptually, whether the fraternity's property rights are sufficient to insulate the houses from university control is entirely unrelated to the power of alumni influence. But because the concept of property in society is sufficiently mutable, these university administrators, like the Justices in *Willow Power*, can invoke a definition of property which allows their problem to resolve itself, presumably resulting in the outcome they preferred.

65. J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 147 (1949) (legal realists "demonstrated that the legal rules . . . were by no means fixed and certain as they would be if the legend of the superhuman origin of decisions were true.").

66. *See generally* Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981) (discussing the importance of a constitutional standard for property).

67. S.B. CHESTER, ANOMALIES OF THE ENGLISH LAW 116 (London n.d. & photo reprint 1980).

68. This approach might be thought of as "negative property": the government imposes the "property" characterization *against* the individual, and the individual does not argue *for* any property right. Consider Nathanial Hawthorne's classic novel THE SCARLET LETTER (1850), in which society forced Hester Prynne constantly to wear the letter 'A.' Prynne might be said to have a "negative property" interest in the letter, under this analysis. Of course, this is antithetical to the usual legal standard of property rights as affirmative protections, but it is a useful way to characterize these freedom-limiting property arguments.

phrase his argument in terms of property is precisely the point; this is the danger of the *Willow Power* concept that property is merely what someone in authority says it is.

While the thesis that an open conception of property is susceptible to abuse in part because it allows the state to characterize property in a way which restricts individual rights may seem improbable, the Supreme Court used a variation of this approach to deny individual liberty in its *Plessy v. Ferguson* decision.[69] En route to holding that blacks had no general right to integrated facilities, the *Plessy* court summarily addressed an argument that Plessy, the "black" plaintiff who was actually seven-eighths white,[70] had a property interest in his alleged reputation of being a white man.[71] Without actually deciding that one's racial reputation is property, the Court held that the one-eighth of Plessy that was black prohibited him from being "lawfully entitled"[72] to this property.[73] Because the Court held that such a reputation was effectively not legal, it forced the stigma of being black[74] onto all blacks. Socially, being black became a property interest which the state used against the individual.

A concrete standard for the legal concept of property is therefore essential.[75] Without such a standard there could be no resolution of the conflict between the individual's interest in controlling his possessions and the state's interest in advancing the perceived greatest social good. Further, when no workable standard for limiting property exists, the individual is in danger of losing personal and civil rights, because the state can characterize particular rights, or the lack of them, as property so as to restrict personal

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69. 163 U.S. 537 (1896).

70. *Id.* at 541.

71. *Id.* at 549. Plessy argued that "in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is *property*. . . ."

72. *Id.* The Court said:

> [If Plessy were] a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.

73. Not surprisingly, the Court cited no law prohibiting a black person from having a reputation as a white person.

74. The court in *Plessy* forcefully claimed it did not see being black as a stigma at all, 163 U.S. at 543, but at least by 1954 the Court plainly admitted that the *Plessy* holding imposed a stigma on people, inasmuch as it deprived black people of their civil rights. Brown v. Board of Education, 347 U.S. 483, 494-95 (1954).

75. *See* Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1089-91 (discussing the need for a concept of property as a step in takings analysis).

liberty. Notwithstanding these ramifications, American constitutional interpretation has offered surprisingly little in the way of a specific definition of property; whether an interest rises to the level of a property right is still susceptible almost wholly to judicial preferences.

### *B. The Police Power: When Property May Be Regulated*

Once beyond the question of the characterization of something as property, the relevant issue becomes when or to what extent government can regulate private property. American law has phrased this issue in terms of the scope of the police power. Defining the police power adequately is a crucial step in determining the extent to which government can control privately-owned property, as the police power concept embodies the conflict between the arguments that private interests should be subordinate to the public good, and that society should bear the full costs of its own policy.

As with the concept of property, however, the police power has no clear definition. Yet the arguments surrounding the limits of police power may be less complex than those concerning property, since the police power issues tend to be more polar. The question of the breadth of the police power is simply one of degree. Nonetheless, like conceptions of property, police power concerns can become anarchic. Justice Holmes, for example, thought the term police power might have been "invented to cover certain acts of the legislature which are seen to be unconstitutional, but which are believed to be necessary. . . . [76]

#### 1. The Meaning of the Police Power in the Taking Context

The lack of a standard gives a government broad discretion in its bid to subordinate private interests to the public good. In another context, Holmes added that not only does the police power concept allow courts to interpret the strict property protection language of the fifth amendment loosely, but also "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears."[77] Yet this observation, however accurate, does not address the extent to which the police power

76. *Quoted in* BOSSLEMAN, CALLIES & BANTA, *supra* note 32, at 124.

77. Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922). *See also* Stoebuck, *supra* note 75, at 1057 ("The expansion of the government's role in an increasingly complex society occurs largely through greater use of the police power. Thus, the police power is a huge 'growth industry' in America today.").

can reach within the strict wording of the fifth amendment,[78] which acts as a limit on the police power.[79] This is simply the other side of the issue concerning what property interests the fifth amendment protects from the government's police power intervention.

The usual starting point when defining the police power is the concept that government may control property in order to promote the health, safety, and welfare of the community.[80] Because this health, safety, and welfare standard is so broad, some courts seem to have succumbed to that "natural tendency of human nature"[81] which Holmes described; dictum in several Supreme Court opinions considers the police power a license allowing government to pass whatever laws it deems necessary.[82] The license is necessarily broad because in order to regulate at all, courts have recognized that government must be in the position to decide what is within the police power.[83] In a sense, to allow government to function, courts must be able to presume that government has exercised its police power properly.

This view has reduced the judicial role to limiting the police power only in those cases which present some egregious constitutional violation.[84] As Holmes noted, this scheme allows government to rule in favor of a broad police power, which in turn drives affected individuals to allege constitutional violations. This dilemma raises what is likely the greatest analytical problem concerning the scope of the police power: when a citizen alleges that he is the vic-

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78. "The term 'police power' connotes the time-tested conceptional [sic] limit of public encroachment upon private interests." Goldblatt v. Hempstead, 369 U.S. 590, 594 (1961).

79. *See* Stoebuck, *supra* note 75, at 1057-58 (arguing that substantive due process and the takings clause are the two constitutional limits on the police power).

80. Examples of this language have been plentiful in American case law since at least the nineteenth century. The older cases include the concept of morals in the list. *See, e.g., Crowley*, 137 U.S. 86; *Mugler*, 123 U.S. 623.

81. *Pennsylvania Coal*, 260 U.S. at 415.

82. *See* Jacob Ruppert Corp. v. Caffey, 251 U.S. 264, 299 (1919) ("The police power of a state . . . is a single broad power to make such laws [prohibiting alcohol], by way of prohibition, as may be required. . . ."); *Buchanan*, 245 U.S. at 74 ("The authority of the State to pass laws in the exercise of the police power, having for their object the promotion of the public health, safety and welfare is very broad and has been affirmed in numerous and recent decisions of this court.").

83. A "presumption of constitutionality" exists which puts the burden of proof on the party alleging that government exceeded its power. Keys v. United States, 119 F.2d 444, 447 (D.C. Cir. 1941).

84. Berman v. Parker, 348 U.S. 26, 32 (1954) ("Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms wellnigh conclusive.").

tim of an unconstitutional taking, unless he can show a violation of substantive due process, he will have to rely on the fifth amendment taking clause to show government exceeded its police power.[85] Because this is the same provision under which the alleged injury itself arises, the police power argument really adds nothing to the citizen's taking allegation; the argument only restates the original complaint.

### 2. Judicial Declarations of the Police Power Concept

In this situation, the ultimate validity of both parties' arguments rests on a construction of the same constitutional provision, and nominally no external compelling interest is involved. This void allows prevailing societal attitudes to enter and rise to a level of constitutional importance. Therefore, predictably, a charting of the history of the police power parallels a history of general social attitudes.

For example, in 1871 a state supreme court said that "[u]nder the police power," if "[t]he people of [a] state have declared that they are opposed to the intermixture of races and all [racial] amalgamation," the legislature could validly pass laws furthering this policy.[86] Similarly, an 1887 United States Supreme Court decision upheld a state's exercise of the police power in prohibiting alcohol, because the court could not "shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks."[87] The Court based its decision on factors other than its knowledge of alcohol's effects; it also relied on "statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil."[88]

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85. Stoebuck, *supra* note 75, at 1057-58. For a detailed discussion, *see* Kelso, *Substantive Due Process as a Limit on Police Power Regulatory Takings*, 20 WILLAMETTE L. REV. 1 (1984).

86. State v. Gibson, 36 Ind. 389, 404 (1871). The United States Supreme Court cited this holding in *Plessy*, 163 U.S. at 545, stating that "[l]aws forbidding the intermarriage of the two races . . . have been universally recognized as within the police power of the State."

87. *Mugler*, 123 U.S. at 662.

88. *Id.* An equally surprising and somewhat more contemporary example of a court condoning a legislative use of the police power to further social mores appears in City of Milwaukee v. Piscuine, 18 Wis. 2d 599, 119 N.W.2d 442 (1963). In *Piscuine* the Supreme Court of Wisconsin upheld as a valid exercise of the police power an ordinance which prohibited female entertainers from standing or sitting at the bar in the place where they entertained. This ordinance was found to be for the public use:

These are examples of the social attitudes which seem to have continued to be a major factor underlying the scope of the police power. Notwithstanding this judicial deference to prevailing social moods, courts have never gone so far as to hold that the police power allows legislatures the final say concerning the fifth amendment taking clause. The Supreme Court once emphasized that "[t]he legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations."[89] When faced with the most difficult situations, the Supreme Court has ackowledged that "[a]n attempt to define" or limit the police power "is fruitless, for each case must turn on its own facts."[90] Just as the *Willow Power* court explained it had the power to define property,[91] this admission that any attempt to define and limit the police power is "fruitless" vests enormous power in the Supreme Court.

This power is so unlimited that it may sometimes seem arbitrary. In the Slaughter-House Cases,[92] the Supreme Court upheld as within the police power a state statute giving a private slaughterhouse in New Orleans monopolistic power over an entire metropolitan area.[93] Although the statute allegedly deprived a thousand people of property by confiscating their "right to use" butcher skills and meat packing facilities,[94] the Court held the statute was a valid exercise of the state's police power. The decision was not unanimous, and the dissent's main argument apparently was that the statute "is onerous, unreasonable, arbitrary, and unjust. It has none of the qualities of police power regulation. If it really were a police regulation, it would undoubtedly be within the

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> Ever since Eve, mankind has recognized that one thing may lead to another and if the city of Milwaukee common council chose to enact these restrictions . . . to reduce the fraternizing by female employees with patrons of these liquor establishments, we must hold that this ordinance is a reasonable exercise of the police power and that the regulations are directly related to preserving morals and the public welfare.

18 Wis. 2d at 618, 119 N.W.2d at 449-50. Furthermore, the court held that this ordinance did not violate the state statute which granted equal rights to women. *Id.*, 119 N.W.2d at 450. For a discussion supporting the *Piscuine* holding, *See* Bilek & Ganz, *The B-Girl Problem—A Proposed Ordinance*, 56 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 39, 40-41 (1965).

89. Lawton v. Steele, 152 U.S. 133, 137 (1893).

90. *Berman*, 348 U.S. at 32.

91. *See supra* text accompanying notes 56-64.

92. 83 U.S. (16 Wal.) 36 (1872).

93. *Id.* at 43. The area made up 1154 square miles and had a population of 200,000 to 300,000 people.

94. *Id.* at 55 (argument of counsel).

power of the legislation."[95] This argument is striking in its lack of any coherent definition of police power, and its consequent lack of any real analysis.

This dissenting Justice was obviously frustrated by a holding which was, by today's standard at least, blatantly unfair. Without a concrete police power standard, however, the Justice had to resort to an argument which says only that the statute is illegal because it is illegal. With this reasoning it is perhaps not surprising that this Justice failed to persuade a majority of the Court. This situation shows both the importance of a fixed standard for the police power and the problems which arise when no such standard exists. Because the police power concept in the taking context seems inextricably linked with the fifth amendment concerns central to the taking issue itself, the constitutional limits on the police power alone could never adequately resolve the conflict between private property rights and the state's interest in promoting the common good.

### *C. The Idea of Public Use*

The concept of the public use provides a limit on a government's police power because the public use is, at least conceptually, a standard for exercising the police power. Yet if the public use idea is too closely tied to the police power, the concepts may be mutually ambiguous, with neither adding much to the analysis of the other. Theoretically, the police power deals with what government can do (the extent to which the state can regulate the individual) and public use deals with how government can do it (what substantive areas the state has jurisdiction to regulate). Therefore, this public use element could prove a necessary tool for the task of defining the extent to which government can control private property.

#### 1. State Regulation of Private Property for the Public Use

More than a century ago the Supreme Court articulated the goal underlying the public use concept: "Legislation should be prompted solely from consideration of the public good, and the best means of advancing it."[96] Applying a similar notion to the specific powers of government, Vinding Kruse, a European legal

95. *Id.* at 119-20 (Bradley, J., dissenting).
96. Tool Co. v. Norris, 69 U.S. (2 Wal.) 45, 54-55 (1864).

scholar, recognized that all societies have had to impose "essential limitations" on property rights by reserving some power to expropriate property in times of emergency or for the public use.[97] The extent to which a society will exercise this power will depend on its concept of public use; in the words of a federal court opinion, "[w]hat is a public use under one sovereign may not be a public use under another."[98] Therefore, how a sovereign conceives of public use is vitally important, because the concept of public use in a society will predetermine the outcomes of specific cases.[99]

Consequently, the goal of ascertaining what public use means in American law remains crucial. On the most general level, dictum in American cases recognizes that "[t]he right of an owner to use his property is important, but it is not so absolute that he may at all times and under all circumstances use it as he pleases. . . ."[100] Courts, therefore, assess whether a public use exists by paying particular attention to current social and economic conditions.[101]

Yet even within a specific social and economic context courts need some kind of test or standard to determine whether a public use exists. Like property and the police power, "public use" is too ill-defined to sustain any specific, unambiguous test. Still, courts have attempted to isolate some standards in this area. As a starting point, when legislation is involved a court might consider whether a statute addresses a purpose so fundamental that even *not* passing the law in question necessarily would have been an exercise of a meaningful legislative choice.[102] The Supreme Court in *Miller v. Schoene*[103] held that "[w]hen forced to such a choice," government "does not exceed its constitutional powers" by making the decision which is "of greater value to the public."[104]

In *Miller* an epidemic of a tree disease, cedar rust, broke out in Virginia.[105] Cedar trees, which in Virginia served largely ornamen-

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97. V. KRUSE, THE RIGHT OF PROPERTY (1939) (P.T. Federspeil, trans.) (first Danish ed. 1929).

98. United States v. Certain Lands in the City of Louisville, 78 F.2d 684, 687 (6th Cir. 1935).

99. Scheiber, *supra* note 7, at 138.

100. Harris v. City of Louisville, 165 Ky. 559, 568, 117 S.W. 472, 476 (1915), *rev'd on other ground sub nom*; Buchanan v. Warley, 245 U.S. 60 (1917).

101. *See* Schneider v. District of Columbia, 117 F. Supp. 705, 716 (D.D.C. 1953) ("the term 'public use' has progressed as economic facts have progressed," and now the public use concept is broader than it was formerly).

102. Miller v. Schoene, 276 U.S. 272, 279 (1928).

103. *Id.* at 272.

104. *Id.* at 279.

105. *Id.* at 278.

tal purposes, carried cedar rust without being affected by it. The disease, however, killed apple trees which were vital to Virginia's agriculture. In upholding a Virginia law which authorized the state to cut down all cedars with the disease, the United States Supreme Court held that this situation involved a choice between cedar and apple trees; *not* legislating would have in effect chosen cedars.[106] The state's decision to protect the fruit industry at the expense of these ornamental trees was found to be a valid exercise of the police power for the public use.[107] Therefore, if a legislature were to pass a law on an issue in which the very act of not passing a statute would require an affirmative determination of public use, this *Miller* rule would elevate the decision to the level of prima facie evidence that the statute serves the public use.

Yet this is a threshold test; it does not alone define public use. Generally, public use does not have to be "a use general or common to all the people" of a given jurisdiction.[108] It may be a use "in which but a small portion of the public will be directly benefited . . . though it must be of such a character as that the general public may, if they choose, avail themselves of it."[109] Succinctly if not over simply, the conflict involves the difference between a public and a private use. A law which promotes "a public use or purpose is permitted," but one which furthers "a private use or purpose is forbidden."[110] This is the heart of the public use issue.

### 2. Judicial Declarations of the Public Use Concept

Much of the case law surrounding this issue concerns itself with a distinction between a full, unreimbursed taking and a taking for which the property owner receives "just compensation." However, this distinction, and the concomitant problem of defining "just compensation," is not integral to the present analysis. The "just

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106. *Id.* at 279.

107. *Id. But cf.* Just v. Martinette County, 56 Wis. 2d 7, 16, 201 N.W.2d 761, 767 (1972) ("The distinction between the exercise of the police power and condemnation has been said to be a matter of degree to the property.").

108. Gilmer v. Lime Point, 18 Cal. 229, 253 (1861).

109. *Id.* Further, "[i]t has also been seen that it is not essential to meet the requirement, that the use or benefit should be exclusively for the people of the State, or even a portion of those people." *Id. See also* Talbot v. Hudson, 82 Mass. (16 Gray) 417, 425 (1860) ("It has never been deemed essential that the entire community or any considerable portion of it should directly enjoy or participate in an improvement or enterprise, in order to constitute a public use, within the true meaning of these words as used in the Constitution.").

110. Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 632, 304 N.W.2d 455, 458 (1981).

compensation" issue does not arise until the state has acted to promote the public use. Discerning whether legislation promotes the public use is a threshold analysis, given the single fact that "just compensation" does not subjectively compensate the property owner adequately. If the government adequately compensates the owner there will be no taking problem, and the situation will never reach litigation. The public use issue only becomes important when the government exercises its police power to force a sale at a rate below the owner's perceived value of his property. From the viewpoint of the owner's property rights, then, the only difference between an unreimbursed taking and a litigated "just compensation" situation is the question of degree.[111]

In the case law, the public use/private use conflict arises when a legislature passes a statute which specifically addresses or benefits some single industry or small group. The law, of course, can be valid only if the government passes it for a public purpose. Recent cases have upheld legislation which seemed to encroach substantially on the "private use" side of the line. Most notably, the Supreme Court in 1984 upheld a state land use scheme under which certain residential tenants in Hawaii could force their landlords to sell them fee simple interest in their residences.[112] Hawaii had found it necessary to break up the large holdings of several landowners, and the Court found this purpose to be a valid public use.[113] While this holding certainly helped the residential tenants involved, such an expansive view of the public use might easily be used to support ideologically opposing results.

For example, the Supreme Court of Michigan recently held that the city of Detroit acted consistently with the public purpose when it exercised its eminent domain power to allow General Motors Corporation to buy an entire neighborhood as a site for a new plant.[114] Notwithstanding a neighborhood council's argument that this action largely furthered the private use of General Motors, the court held that Detroit's interest in furthering industry and employment was a valid public purpose under the Michigan Constitution.[115]

While some academic commentary on these decisions[116] suggests

111. *See Just*, 56 Wis. 2d at 16, 20 N.W.2d at 767.
112. *Hawaii Housing Authority*, 467 U.S. 229 (1984).
113. *Id.* at 234 (22 landowners owned 72.5% of the land).
114. *Poletown*, 410 Mich. 616, 304 N.W.2d 455.
115. *Id.*
116. *See* Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*,

that these and other recent cases have materially expanded the concept of public use, in fact these holdings do not seem to go as far into the private use area as did many decisions of the late nineteenth century. Many of these early decisions upheld a state's ability to protect private companies that relied on water power; courts often held that while the companies were private, allocation of the state's water supply was an interest sufficiently public to justify this protective legislation.[117] Yet some of these decisions ended up regulating more than water flow alone. In an 1860 Massaschusetts Superior Court case,[118] the state legislature had passed a water control act which allowed one property owner to alter a dam so as to "destroy or render of little or no value" the "water power, mills, and dam"[119] of anyone downstream. When a downstream party alleged "irreparable loss"[120] and claimed the act amounted to a governmental taking of property in violation of the taking clause of the Massachusetts constitution,[121] the court reasoned that the act would be legitimate only if it served a public purpose, but it said that "[t]here is no fixed rule or standard by which" to distinguish public from private use.[122]

To the court, this meant that if it could find any public use it would have to uphold the act.[123] From this affirmative stance, the court decided to uphold the legislation because "[i]t has never been deemed essential that the entire community or any considerable portion of it should directly enjoy or participate in" a govern-

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51 GEO. WASH. L. REV. 355 (1983). *See also* the discussion of William Safire's impassioned response to *Poletown* appearing in Michelman, *supra* note 66, at 1097-99.

117. *See* Talbot v. Hudson, 82 Mass. (16 Gray) 417 (1860) (upholding under the police power a legislative act which allows a private party to lower a dam, thereby flooding privately-owned land downstream); Cary v. Daniels, 49 Mass. (8 Met.) 466, 476 (1844) (holding that "[o]ne of the beneficial uses of a watercourse, and in this country one of the most important, is its application to the working of [private] mills and machinery; a use profitable to the owner, and beneficial to the public."); *Great Falls*, 47 N.H. 444 (1867) (upholding as a proper public use a state legislative act which gave a specific private company a qualified right to permanently flood certain land owned by other private parties).

118. *Talbot*, 82 Mass. (16 Gray) 417.

119. *Id.* at 419. Under the statute, "the waterpower, dam, and mills of the plaintiffs will be destroyed, or rendered of little or no value, and . . . they will thereby be subjected to serious and irreparable loss, for which the defendants would be unable to recompense them." *Id.*

120. *Id.*

121. *Id.* at 419-20.

122. *Id.* at 423.

123. *Id.* at 423-24 ("If any [public] use can be found, then we are bound to suppose that the act was passed in order to effect it.").

ment action in order to justify a public use.[124] Yet the court went even further, adding that the state may legitimately pass a law which directly benefits a private person and has only some "indirect benefit [to] the community."[125]

Just after this Massachusetts decision, the New Hampshire Supreme Court upheld a state law which gave even more government strength to a private company.[126] This law, called the "Act in Relation to the Great Falls Manufacturing Company," allowed the Great Falls company to build a dam which would permanently flood 1400 acres of privately-owned land.[127] The attorney for an affected landowner argued that a state cannot "authorize the taking of private property for *private* use,"[128] given that Great Falls, of course, was "in no sense a *public* corporation."[129] In rejecting this argument, the court found a public purpose, holding that improving water power was "a matter of such general public advantage that private property taken for that purpose is taken for a public use, within the meaning of that term."[130] In upholding that the public use of "manufacturing purposes"[131] is of sufficient public interest to justify government taking of private property, this New Hampshire decision is surprisingly similar to the Supreme Court of Michigan's ruling of 114 years later.[132] Whatever the definition of public use, it unquestionably has long included many of the interests of business.

Yet even in the area of government control of private property to promote business, the precise definition of public use is not en-

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124. *Id.* at 425.

125. *Id.* at 426.

126. *Great Falls*, 47 N.H. 444 (1867).

127. *Id.* at 444-45.

128. *Id.* at 446 (emphasis in original).

129. *Id.* (emphasis in original).

130. *Id.* at 458.

131. *Id.* at 461. *See also* Bowen v. United States, 263 U.S. 78 (1923) (holding that eminent domain power allows a state to acquire land which the state intends to sell to private citizens).

132. *Poletown*, 410 Mich. 616, 304 N.W.2d 455. Although *Poletown*, unlike the earlier New England decisions, might be characterized as a "just compensation" case, this distinction does not defeat the analytical similarity here because in all these cases the state used its police power to benefit a private corporation at the expense of a private owner of real property. Besides, for the present purposes "just compensation" taking cases are analytically similar to uncompensated taking cases, because in each the state is using its power to transfer ownership of property against the present private owner's will. If this were not so, the "just compensation" cases would not be litigated; the property would be freely sold. For a recent discussion of the constitutional limits of "just compensation" and related concepts, see Kirby Forest Industries v. United States, 467 U.S. 1 (1984).

tirely clear. For example, in 1905 and 1906, the United States Supreme Court considered two Utah statutes which gave substantial rights to private industries at the expense of private property.[133] In each case the Court upheld the statute as an exercise of the public use. However, the Court included some strict dicta which attempted to create a limiting standard. The court made clear that property-restricting legislation should benefit private individuals only in "those exceptional times and places in which the very foundation of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation which under other circumstances would be left wholly to voluntary consent."[134] The Court emphasized that its holding should not be misunderstood as "approving of the broad proposition that private property may be taken in all cases where taking may promote the public interest and tend to develop the natural resources of the State."[135] Unfortunately, the Court did not sufficiently explicate this ideal. As recent Supreme Court decisions demonstrate,[136] what makes up these "exceptional circumstances" and justifies government intrusion on private property on behalf of private concerns is uncertain.

## III. Concrete Cases: Applying the Standards in the Context of Governmental Regulation

### *A. Overview of the Conflict Between Individual Property Rights and Societal Interests*

The Supreme Court has recently admitted it cannot easily resolve the problems which arise when a government decides to use private property for the public good.[137] The overriding issue is the balance inherent in any allocation of loss; specifically, whether society must bear the costs of its own policies, or whether individuals may use their property in a way which thwarts the government-determined demands of society.

By confining the issue to this level and not examining more spe-

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133. Strickley v. Highland Bay Gold Mining Co., 200 U.S. 527 (1906) (upholding as a public use a statute which allows mining companies to invoke the state's eminent domain power to get easements across private property); Clark v. Nash, 198 U.S. 361 (1905) (upholding as a public use a statute which allows companies to enlarge irrigation facilities on private property).

134. *Strickley*, 200 U.S. at 531.

135. *Clark*, 198 U.S. at 369.

136. *Hawaii Housing Authority*, 467 U.S. 229 (1984).

137. *See Penn Central*, 438 U.S. at 104.

cific concerns such as just compensation, the context of fifth amendment taking law demands an initial focus on property, police power and the public use. However, the foregoing discussion of these three issues has only provided a framework; it has not resolved the underlying conflict between individual property interests and the government-perceived good.

Considering the vagueness of each component in the debate between individual property rights and the social interest, the overall issue would seem unsolvable. However, these components might be more useful when they operate together in a specific context. Because the components are analytically quite distinct, taken together they might yield some workable results. To test this hypothesis, this discussion will examine the issue of individual property rights versus the social good in a single context in which this issue constantly arises: government regulation of the environment. This contextual examination will be illustrated by a specific situation, that in the landmark taking case, *Pennsylvania Coal Co. v. Mahon*.[138]

### *B. The Conflict Between Development and Nature Preservation: The Pennsylvania Coal Case*

The context of environmental regulation exemplifies the conflict between individual property rights and societal interest because it encompasses two opposing but strongly held values in society. Environmental regulation pits the goals of protecting nature and natural resources against the ethic of physical development, which advances social progress and allows people to appreciate and use nature. This precise conflict appears in the facts of *Pennsylvania Coal*.[139]

Years before the litigation arose, the Pennsylvania Coal Company had conveyed land to a private citizen.[140] The deed reserved for the company full rights to mine the land without liability for any resulting damages.[141] Forty-three years after this original conveyance, the company notified the present owners of the land, the Mahons, that mining would begin shortly.[142]

Through a number of such conveyances, the coal company ended

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138. 260 U.S. 393 (1922).
139. *Id.*
140. Deed, in Record at 6, *Pennsylvania Coal.*
141. *Id.* at 7.
142. *Id.* at 6, 10.

up with the mineral rights to much of the anthracite coal region in Northeastern Pennsylvania.[143] This became a severe social concern, because when the company mined a parcel of land, it destroyed the land's residential use value. The mining caused cave-ins so severe that according to an amicus curiae brief filed by a Pennsylvania city, the area "bid fair to become a second Verdun, her buildings razed to the ground by shots from below."[144]

Along with its brief, the city submitted a packet of photographs, the captions to which depicted the problem as clearly as the pictures.[145] One of these shows "[t]he last resting place of a well known Scranton, Pa., woman, whose grave was torn open . . . . The casket is shown in the pit, torn asunder, and the hand of the corpse is seen protruding from the burial case."[146] Other photographs show the rubble from a collapsed house, street, and theater.[147]

Just before the *Pennsylvania Coal* case arose, the Pennsylvania legislature had passed the Kohler Act, which prohibited most mining that caused "surface subsidence," or cave-ins.[148] Even the Attorney General of Pennsylvania, who filed an amicus brief supporting the Kohler Act, conceded that the Act effectively prohibited the coal company from using its mineral rights in any economically feasible way.[149]

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143. *See* Brief on Behalf of the Attorney General of Pennsylvania *Amicus Curiae, Pennsylvania Coal. See also* BOSSLEMAN, CALLIES & BANTA, *supra* note 32, at 126-33; Rose, *supra* note 35, at 563-65. The Mahons became the party which fought this problem in the courts because H.J. Mahon, the husband, was apparantly a lawyer who fought his own battles. H.J. Mahon's name appears as a co-drafter of the briefs submitted to the Pennsylvania and United States Supreme Courts. *See* Mahon v. Pennsylvania Coal Co., 274 Pa. 489, 491, 118 A. 491, 491 (1922), *rev'd* 260 U.S. 393 (1922); Brief for Defendants in Error, at 77, *Pennsylvania Coal.*

144. Brief on Behalf of the City of Scranton, Intervenor at 5, *Pennsylvania Coal* (referring to the French site of a major World War I battle).

145. Exhibits in Connection with the Brief on Behalf of the City of Scranton, Intervenor, *Pennsylvania Coal.*

146. *Id.*

147. *Id.* For example, the caption to a picture of the rubble remaining from the collapse of a large building said: "The World Theatre, Scranton, Pa., wrecked by a mine cave shortly after the audience had been dismissed for the night. Had this occurred shortly before the time of the collapse of the building, hundreds of lives would have been sacrificed to the greed of mining operators, now seeking to avoid remedial mine cave legislation." *Id.*

148. 1921 Pa. Laws 1198 § 1.

149. Brief on Behalf of the Attorney General of Pennsylvania *Amicus Curiae* at 5-9, *Pennsylvania Coal.* The Attorney General explained the technique of "second mining," the technology prevalent at the time of *Pennsylvania Coal* which caused the surface subsidence. *Id.* at 6. Given this, the Attorney General conceded that "the effect of the Act is to prevent the owner of the coal from exercising his right to drop the surface on which structures of a

This litigation arose amid the favorable business climate of the Harding administration. The situation presents the private rights versus societal interest conflict clearly, because the potential cost to each side was so great. The political climate of the day favored the primacy of free enterprise, and the coal company's argument was based on its position as the economic owner of the unrestricted mineral rights.[150] Indeed, coal is an excellent example of a natural resource which is completely useless in its natural state, but is vitally important once mined. While the mining practices in Pennsylvania were responsible for deaths of innocent people,[151] it seems likely that in any given winter more people might have died from the cold had coal mining been banned. Even if mining had been merely restricted, the resulting rise in the price of coal might have devastated those least able to afford heat. Even under the *Pennsylvania Coal* facts the price for preserving nature at the expense of development was high.

Alternatively, the coal company's mining practices seem wasteful. Notwithstanding that the mineral reservations must have lowered the original purchase price of the land the company sold, the mining had a disproportionately high cost to the residents of the Pennsylvania coal region, because the mining destroyed people's homes. Further, the mining practice seems short-sighted; coal burns quickly, but a caved-in house will never right itself. The free market did not solve this problem because land owners did not protect their homes by buying the mineral rights from the coal company. The situation therefore went to the Supreme Court, which had to resolve the conflict between private property rights (the coal company's mineral deeds) and the social good (the lives and homes in the anthracite region).

Justice Holmes held for the coal company, finding the Kohler Act unconstitutional as an exercise of the police power which exceeded the taking clause because it wholly destroyed the company's mineral rights.[152] Holmes's reasoning was inexact in that he saw the question of taking as a matter of degree,[153] and found that

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certain character have been erected." *Id.* at 26-27.

150. Brief for Plaintiff in Error at 8, *Pennsylvania Coal.* This is paraphrased as referring to "Shylock's right to his pound of flesh" in *Pennsylvania Coal*, 260 U.S. at 395.

151. *See* Brief on Behalf of the City of Scranton, Intervenor at 5, *Pennsylvania Coal.*

152. *Pennsylvania Coal*, 260 U.S. at 413, 415-16. *But see* Siemon, *Of Regulatory Takings and Other Myths*, 1 J. LAND USE & ENVTL. L. 105, 110-24 (novel reading of Holmes's *Pennsylvania Coal* decision arguing that the opinion does not fundamentally rest on the fifth amendment takings clause).

153. *Pennsylvania Coal*, 260 U.S. at 415. Although he phrased the issue in terms of the

the Kohler Act went too far because it took the company's entire interest in its mineral deeds. This argument is not compelling because, as Justice Brandeis argued in his dissent, Holmes's preoccupation with the taking of an entire interest has no basis in logic or precedent.[154] Any interest might be said to be entire as long as the interest could be articulated as a whole. Hence, although the Kohler Act effectively took all the mineral rights, these rights might as easily have been termed a mere fragment of the fee simple interest in the land.

*Pennsylvania Coal* presents issues more clearly seen in terms of the fundamental analysis of property, the police power, and the public use. Turning first to property, the sides in the *Pennsylvania Coal* case become clearer when phrased in terms of the prosocial and the proacquisitive approaches. Holmes exemplified the proacquisitive approach when he said, in a letter explaining his *Pennsylvania Coal* opinion, that "the public only got on this land by paying for it and that if they saw fit to pay for only the surface rights they can't enlarge it."[155] That is, the fate of the coal company and residents was a function of their contractual relationship, and the state was not in a position to interfere. However, from the prosocial standpoint toward which Holmes had seemed to lean in

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police power, as had the Pennsylvania Supreme Court, *Mahon*, 274 Pa. at 497, 118 A. at 493, Holmes analyzed the case in terms of the taking issue. He began by noting that whether a taking exists is a question of degree; therefore, a court must look to "the extent of the diminuation" of the value in the property involved. *Pennsylvania Coal*, 260 U.S. at 413. Applying this, Holmes pointed out that *Pennsylvania Coal* dealt with "a single private house." *Id.*; therefore to uphold the Act, the public interest in this house had to balance against "the extent of the taking." *Id.* at 414. Of course, given that Holmes focused on the single house involved, he could not fairly weigh that against the vast acreage throughout the anthracite region which the Kohler Act effectively forbad the company to mine. Rather, Holmes focused on the company's interest in the Mahon's land. Because the Act took away the company's right to mine the lot, it took away everything the company had, its complete interest. Holmes held that the public's "limited" interest in the Act did not justify a taking this complete. *Id.*

154. *Pennsylvania Coal*, 260 U.S. at 418 (Brandeis, J., dissenting). Brandeis, in his forceful dissent, argued to uphold the Kohler Act against the coal company because "the right of the owner to use his land is not absolute;" a "restriction imposed to protect the public health, safety, or morals from dangers is not a taking." *Id.* at 417. To Holmes's argument that the Act caused a government taking because it destroyed the company's entire property interest, Brandeis answered that "[r]estriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put." *Id.* at 418. Brandeis insisted on measuring the public interest behind the Kohler Act against the alleged taking, regardless of how the property interest might be characterized.

155. HOLMES-POLLACK LETTERS 108-09 (M. Howe ed. 1941), *reprinted in* BOSSLEMAN, CALLIES & BANTA, *supra* note 32, at 244.

his earlier opinion in *Rideout v. Knox*,[156] the state has a legitimate interest, if not unlimited power, in preventing a private party from using property in a way which could harm others.[157] This view would apparently support the validity of the Kohler Act.

The police power concept switches the focus to the extent of governmental power. The issue becomes whether the *Pennsylvania Coal* legislation is within the public "health, safety, and welfare," under interpretive case law. This is actually a question of characterization; the mine subsidence phenomenon likely would be regulable under the police power, but the right of private parties to make contracts such as the land sale involved in *Pennsylvania Coal* would possibly be beyond the scope of restrictive governmental regulation.[158]

The issue of public use also clarifies the debate. First, *Pennsylvania Coal* would not fit under the *Miller v. Schoene* threshold test which allows the state to legislate in those situations in which a loss is unavoidable and the question is simply upon whom the burden must fall.[159] Of course, every litigated case involves a question of allocation of loss, but *Miller* involved losses caused by nature, not those arising from contractual relationships. Therefore, the public use issue in *Pennsylvania Coal* becomes a question of the degree to which the conflict is a fundamental interest to society. Taken broadly, in the public use decisions the court acts as a check on the legislature, scrutinizing the degree of social importance of the law in question. Legislation which severely interferes with private property interests is within the public use only if it addresses a fundamental interest in society.

## IV. CONCLUSION

This discussion alone does not yield a definitive solution to the *Pennsylvania Coal* situation, but it does attempt to put the debate in its proper context. That is, how a society perceives property, the

156. 148 Mass. 368, 18 N.E. 390 (1889) (*see supra* discussion accompanying notes 54-55).

157. *See supra* text accompanying notes 56-57.

158. The allusion here is to U.S. CONST. art. 1, § 10, cl. 1 ("No state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts. . . ."). An examination of the contract clause is beyond the scope of the present discussion. For a detailed recent treatment of this area, see Clark, *The Contract Clause: A Basis For Limited Judicial Review of State Economic Regulation*, 39 U. MIAMI L. REV. 183 (1985). *See also* Baker, *Has the Contract Clause Counter-Revolution Halted? Rhetoric, Rights, and Markets in Constitutional Analysis*, 12 HASTINGS CONST. L.Q. 71 (1984) (analyzing trends of recent Supreme Court contract clause cases).

159. *See supra* notes 102-11 and accompanying text.

police power, and public use will determine the outcome of cases. This tripartite analysis is therefore a necessary factor in predicting a society's values as they relate to the conflict between individual property rights and the social good. To arrive at a workable solution, these critical policy issues must be resolved before analyzing a specific case. The three-part framework can then serve as a forum which will resolve conflicts like that in *Pennsylvania Coal.*

Most of the foregoing discussion shows the danger, or at least the inherent anarchy, in deciding cases involving the government interest/property rights conflict purely on a case by case, court by court basis. This thesis, that the analysis should begin by addressing some predetermined set of social values, may not at first seem any more definite than the present case by case approach. However, this suggestion would lend more predictability and fairness to the taking area inasmuch as all judges do not subscribe to the currently prevailing social biases. This suggestion would address the determinative social value questions before a case could arise in a specific context which would cloud the underlying policy questions. This articulation of agreed-upon values, be it judicial, legislative, or executive, would provide a framework within which to enforce existing law, and it would help eliminate those discrepancies in constitutional rights of property which seem to depend on the litigants' geographic and political situation.

For example, the prevailing national social policy at the time of the *Pennsylvania Coal* decision which influenced the court in the area of property would likely have favored the proacquisitive over the prosocial approach; in the area of the police power it probably would have favored the characterization of contract over that of environmental problems; and in the area of public use it likely would have held environmental issues as subordinate to private contracts. The outcome of *Pennsylvania Coal,* therefore, is not at all unexpected.

Today, these social aspirations might easily be the reverse. Similarly, the Pennsylvanians of the 1920s, who were much closer to the mine subsidence problem than was the United States Supreme Court, probably had a stronger public use policy favoring environmental and safety concerns. This would explain the passage of the Kohler Act and its support from the Supreme Court of Pennsylvania.[160]

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160. Mahon v. Pennsylvania Coal Co., 274 Penn. 489, 118 A. 491, *rev'd,* 260 U.S. 393 (1922). For a discussion of how courts today treat Holmes's *Pennsylvania Coal* taking analy-

These considerations for determining the outcome of cases dealing with the conflict between individual property rights and the social good could probably be no more specific because, as *Pennsylvania Coal* demonstrates, social policies differ among societies within any society over time. In the environmental context alone, critical threshold issues arise, such as those dealing with how much a society values a growth over preservation of nature, how much a society values long term planning over short term gains, and whether decisions are best made in the market place or by experts in social policy.[161] The main lesson of the foregoing examination of the conflict between individual property rights and the greater social good is that once a society articulates its stance on these issues, it can resolve these problems and implement its policy through legal tools already developed. The judicial task of resolving taking cases thus becomes frustrated by the absence of enforceable standards.

Recent Supreme Court decisions such as *Penn Central*,[162] *Andrus v. Allard*,[163] and *Hawaii Housing Authority*[164] have articulated a policy which seems to defer to the prosocial standpoint of property and seems to favor a characterization of police power issues as environmental. Further, the decisions exhibit a substantial deference toward environmental matters in ascertaining what is within the public use. This trend mirrors a change in social attitudes, which manifests itself even in literature about the environment. For example, Hawthorne's nineteenth century "Main-Street"[165] had a markedly different attitude toward nature than does Cheever's contemporary *Oh What A Paradise It Seems.*[166] Given this shift, the question of when, if ever, individual interests may be sacrificed to the social good becomes easier to resolve in context. In the area of environmental regulation, this trend shows that social support for physical development will no longer go unrestrained as it did in *Pennsylvania Coal.*[167] Important environ-

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sis, see Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, ___ U.S. ___, 105 S. Ct. 3108 (1985).

161. *See generally* Rose, *supra* note 34, at 85-88 (treating this theme in the specific context of the role of the frontier environment on early American conceptions of property).

162. 438 U.S. 104 (1978) (upholding an urban historic preservation law).

163. 444 U.S. 51 (1979) (upholding federal legislation protecting endangered eagles).

164. 467 U.S. 229 (1981) (upholding a state law allowing certain tenants to force landlords to sell them title to their residences).

165. *See supra* notes 8-11 and accompanying text.

166. *See supra* notes 12-13 and accompanying text.

167. For example, a federal district court recently struck down the validity of a mining

mental decisions should now be within the power of the legislature under the public use, so the private property owner should be less able to make long-term decisions which will too strongly injure society. Yet, however sound this current policy may seem, it is just as subject to change as it ever was.

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statute, reasoning that the case was "on all fours with *Pennsylvania Coal.*" Virginia Surface Mining & Reclamation Ass'n v. Andrus, 483 F. Supp. 425, 441 (1980), *rev'd sub nom.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981). However, the United States Supreme Court reversed and upheld the law, carefully explaining how the standing of the litigants in the case distinguished the situation from *Pennsylvania Coal. Hodel*, 452 U.S. at 294.