

ARTICLES

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Private Property and the Takings Issue: Enhancing the Position of Ecological Values in the Supreme Court’s Constitutional Calculus

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INTRODUCTION

This paper explores the major decisions of the Supreme Court in developing a “takings doctrine” based in large measure on how the early American experience viewed private property and how the right to own property was originally protected by the Constitution. This paper further explores the linkage between our protected property rights and how those rights may be affected by government regulation seeking to protect environmental values. Finally, the paper advocates a modification of the Supreme Court’s current takings doctrine to account for an ecological realism that must be incorporated into our “bundle of rights” of property ownership in order to establish a new rationale for takings claims based on an awareness that man and nature must be in balance.

The presentation is divided into six sections: First, I will review the intellectual history and institutional protection of private property as they have evolved from English common law into the American experience. Second, I will document the key components of the takings issue, as enunciated through judicial decisions that have involved the constitutional protection of private property rights in juxtaposition to government regulations to protect the public interest. Third, I will look at the rights of man and the rights of nature. Fourth, I will discuss the infusion of ecological values into the law. Fifth, I

will review the concept of a land ethic and an ecological imperative. And finally, the paper will lay out the parameters by which to fashion a new takings doctrine that is predicated on developing an *ecological use theory of property*.

I

PRIVATE PROPERTY: AN INTELLECTUAL AND HISTORICAL PERSPECTIVE

Through the ages, Western civilized man has constructed a number of philosophical theories about property and systems of property rights. These have ranged from the right of the individual to own private property as a basic “natural right” to the condemnation of private property as an instrument for the oppression of the many by the few. Regardless of which theory has been in vogue at any time in history, a clear pattern has been established—how a society uses its land is directly related to its history, cultural development, and institutional rules.

A. Natural Law, Natural Rights, and Private Property

It is important to recognize at the outset that in colonial America, men of learning were well read in the classics: literature, history, and philosophy, as well as theology. To them, the term “natural law” had developed over centuries and was “used in the sense of expressing laws which are descriptive of human nature, of natural processes, and of the principles of social and political relationships.”¹ Natural law gave legitimacy to natural rights, which was especially appealing to Enlightenment thinking in England, France, and America where the rights of man were becoming more closely accentuated with the role of government. Generally, the natural rights doctrine rested on two philosophical premises: First, it was based on moral laws, which needed no proof. Second, its “effectiveness . . . as a slogan in political struggles militated against its continuing theoretical refinement.”²

To use the term “property” in seventeenth century England and eighteenth century America was to “speak of civil rights as private

¹ BENJAMIN FLETCHER WRIGHT, JR., *AMERICAN INTERPRETATIONS OF NATURAL LAW: A STUDY IN THE HISTORY OF POLITICAL THOUGHT* 331 (1931).

² Charles Frankel, *The Philosophy of the Enlightenment*, in *A HISTORY OF PHILOSOPHICAL SYSTEMS* 266, 269 (Vergilius Ferm ed., 1950).

property.”³ In this usage, “[a] personal civil right claimed as a birthright or an inheritance, although truly property in the same sense as was land, chattels, and inchoate obligations, was a higher kind of property as it was a species of civil liberty and personal rights.”⁴ As a result, this conceptualization of rights and liberties as “individual property” was “simply the way rights were explained, a theory of antithesis between the authority of kings and the personally owned rights of the subject.”⁵

The American intellectual experience, before the adoption of the Constitution in 1787, was not so much unique as it was an extension of both English Common Law and eighteenth-century natural law philosophy. As a point of political pragmatism, it was necessary that America’s institutional development be predicated on “old-world precedent and authority.”⁶ This would facilitate the creation of a new government that would evolve from already understood ideas and ideals of natural law and natural rights. It was this philosophical environment that prompted Samuel Adams to proclaim that John Locke was “one of the greatest men that ever wrote.”⁷

B. Locke’s View of Private Property as a Natural Right

When John Locke completed his *Two Treatises of Government* in 1690, he was seeking to justify the newly won supremacy of the English Parliament over the Crown in the “Glorious Revolution” of 1688. There was, according to Locke, a state of nature in which men enjoyed complete liberty; that men will create government, an authority superior to their individual wills; and that government thus created will manifest certain specific powers, above all the protection of property—the natural rights of man. While these natural law assertions were not original to Locke, they “were transmitted to Americans chiefly through his writings . . . [as] principles . . . universal in scope . . .”⁸

³ 1 JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 103 (1986).

⁴ *Id.*

⁵ *Id.* at 106.

⁶ 1 VERNON LOUIS PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT: THE COLONIAL MIND 237 (1927).

⁷ *Id.*

⁸ JOHN C. MILLER, ORIGINS OF THE AMERICAN REVOLUTION 170 (1943).

Locke's theory of the right to private property was analogous with natural rights. According to Professor Sabine, "[i]n the state of nature, Locke believed, property was common in the sense that everyone had a right to draw subsistence from whatever nature offers."⁹ Locke's assertion stretched to the use of private property in that "man has a natural right to that with which he has 'mixed' the labor of his body, as for example by enclosing and tilling land."¹⁰ Locke wrote that "God gave the soil to mankind at large, but as no one enjoys either the soil or that which it produces unless he be owner, individuals must be allowed the use, to the exclusion of all others."¹¹

Property was therefore a basic human right, necessary to one's existence and the foundation of liberty. "Americans of the founding generation understood property in this broad Lockean sense, which we have regrettably lost."¹²

C. Private Property as the Hallmark of American Liberty

The relationship between natural rights and private property as a natural right was to have an undeniable importance as the American Constitution began to take shape. In fact, the natural rights-private property doctrine that was to become uniquely American was that "[i]ts distinctive characteristics are its emphasis upon rights instead of functions, and its identification of property with individuality."¹³ Ownership of private property was considered one of the essential human rights. Clearly, the "American leaders were convinced that rights of property were as indispensable as any other rights of the

⁹ GEORGE H. SABINE, *A HISTORY OF POLITICAL THEORY* 527 (3d ed. 1961).

¹⁰ *Id.* In 1776, the year the Declaration of Independence was signed, Adam Smith published *An Inquiry into the Nature and Causes of the Wealth of Nations*. Smith's reliance on the individual's self interest becomes manifest by man's industrious use of his own labor in enjoying use of his property. Therefore, hindering a man from employing his labor by improper government regulations is unjust. See ANDREW REEVE, *PROPERTY* 57–63 (1986) (providing an interesting comparison of the Lockean and Smith views).

¹¹ 1 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 2.05 (Michael Allan Wolf ed., 2013), available at LexisNexis.

¹² LEONARD W. LEVY, *SEASONED JUDGMENTS: THE AMERICAN CONSTITUTION, RIGHTS, AND HISTORY* 18 (1995).

¹³ David Fellman, *The European Background of Early American Ideas Concerning Property*, 14 *TEMPLE L.Q.* 497, 502–03 (1940).

individual and formed a root of the Tree of Liberty without which that tree would languish.”¹⁴

D. Blackstone and the Law of Property

The first comprehensive law book printed in the American colonies was Sir William Blackstone’s *Commentaries on the Laws of England*.¹⁵ This multivolume work, which was originally published in England, had a great influence on the colonial intelligentsia, who were busily formulating a new government.¹⁶ Professor Charles Haar has remarked that Blackstone’s “emphasis on natural law fitted in with the peculiar environment of law in America. Because of the *Commentaries* English common law became also the common law of the United States.”¹⁷

In Blackstone’s construct, “[t]here is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”¹⁸ Haar calls Blackstone a “system-builder” in that he skillfully brought together centuries of laws and unified them as a “statement of the eighteenth century’s ideas and assumptions as applied to the ordering of society through law. They are perhaps the supreme exposition of law as being founded in the law of nature or the law of God.”¹⁹

To Blackstone, “[p]rivate ownership began as an institution of the law of nature; civil societies were organized to secure the rights of property which had already been created; but civil societies were also

¹⁴ A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEADE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 333 (1968).

¹⁵ 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND: OF PUBLIC WRONGS* (Robert Malcolm Kerr ed., Beacon Press 1962) (1765–69).

¹⁶ Professor of law John C.P. Goldberg discussed the impact of Blackstone’s work as the *Commentaries* were probably as significant in the new republic as in England. . . . the lawyer-elite of the founding era knew their Blackstone. . . . American law on basic matters such as property, crime, and procedure largely tracked English law and, in the absence of widespread access to law libraries, the *Commentaries* served as an invaluable comprehensive, yet portable survey of that law.

THE OXFORD COMPANION TO AMERICAN LAW 68 (Kermit L. Hall ed., 2002).

¹⁷ Charles M. Haar, *Preface* to 4 BLACKSTONE, *supra* note 15, at xxii–xxiii.

¹⁸ *Id.*; see also 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND: OF THE RIGHTS OF THINGS*, ch. 2 (Edward Christian ed., Oxon 1982) (1765–69).

¹⁹ Haar, *supra* note 17, at xxvii.

empowered to abridge or extend these natural rights.”²⁰ In essence, the right to use and dispose of property in the Blackstone context could be said to have been a precursor to what would much later become government regulations as land use controls.

E. An Emerging Constitutional Doctrine

Professor Schlatter, in his important survey of how property has been viewed from ancient times to the nineteenth century, succinctly states that as “each age has, and will have, to manufacture a theory appropriate to its own needs, it is also true that thinking about property, has always moved within the framework of certain forms and general ideas.”²¹ One of the key elements that needed resolution, as an essential underpinning of American constitutional doctrine, concerned how private property ownership would be recognized and protected.²²

While it may simply be a curiosity of history, the Preamble to the Constitution did not mention property. It mentions liberty, justice, and domestic tranquility.²³ However, the framers did ensure within the body of the Constitution (as originally ratified and subsequently amended) provisions for the protection of property rights in several of its key clauses. These include: Article I, Section 10, which prohibits states from impairing the obligation of contracts;²⁴ Article IV, Section 2, which provides that citizens of each of the states are entitled to all privileges and immunities in any other state;²⁵ the Fifth Amendment,

²⁰ RICHARD SCHLATTER, *PRIVATE PROPERTY: THE HISTORY OF AN IDEA* 167 (1951).

²¹ *Id.* at 10.

²² See Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 703 (1938) (“Under no legal system can it be doubted that possession is the normal manifestation of ownership. But possession is visible, ownership a mere concept. Consequently, the elements constitutive of a possession which the law will protect tend inevitably to become the test of ownership.”); see also Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927) (“[A] property right is not to be identified with the fact of physical possession. Whatever technical definition of property we may prefer, we must recognize that a property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things.”).

²³ See Michael Kammen, *The Rights of Property, and the Property in Rights; The Problematic Nature of ‘Property’ in the Political Thought of the Founders and the Early Republic*, in *LIBERTY, PROPERTY, AND FOUNDATIONS OF THE AMERICAN CONSTITUTION* 1, 1 (Ellen Frankel Paul & Howard Dickman eds., 1989).

²⁴ U.S. CONST. art. I, § 10.

²⁵ *Id.* art. IV, § 2.

which states that private property shall not be taken for public use without compensation;²⁶ the Fourteenth Amendment, which prohibits the states from abridging the privileges and immunities of any citizen;²⁷ and both the Fifth and Fourteenth Amendments, which prohibit governments from depriving persons of life, liberty, or property without due process of law.²⁸

The early American intellectual understanding of the term “property,” as we have reviewed, embraced what James Madison called the “larger and juster meaning,” defined as “every thing to which a man may attach a value and have a right,” rather than in the more restricted sense that would solely depict land.²⁹ Yet, as history would unfold, property would envelop the more narrow meaning and refer to man’s possession of land, as well as personal property including furniture, paintings, and stock.

From the beginning of the earliest Supreme Court decisions, the use of natural law and natural rights had to do with the rights of private property. For example, in 1795 Justice William Patterson, one of the framers of the Constitution, set the theme for later Court decisions by proclaiming in *Van Horne’s Lessee v. Dorrance* that “it is evident . . . that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man.”³⁰ In addressing the subject of the case, he said, “[t]he legislature, therefore, had no authority to make an act divesting [sic] one citizen of his freehold, and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice, and moral rectitude.”³¹

In 1829, Justice Joseph Story’s refrain in *Wilkinson v. Leland* continued the judicial recognition of the importance of property rights when he said

[t]hat government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of the legislative body, without any restraint. The fundamental maxims of

²⁶ *Id.* amend. V.

²⁷ *Id.* amend. XIV.

²⁸ *Id.* amends. V, XIV.

²⁹ James Madison, *Property*, PHILA. NAT’L GAZETTE, Mar. 29, 1792, quoted in LEVY, *supra* note 12, at 20; see 1 REID, *supra* note 3, at 44.

³⁰ *Vanhorne’s Lessee v. Dorrance*, 2 U.S. 304, 310 (1795).

³¹ *Id.*

a free government seem to require that the rights of personal liberty and private property should be held sacred.³²

F. Defining Property: Going Beyond Natural Law

The shift from natural law as a justification to guarantee property rights to positive law—embodied in statutes or common law—was inevitable as a new nation began to experience new realities and a growing mercantile spirit in a changing world. In a real sense, the eighteenth-century association of property rights with liberty—each considered natural rights—were relegated “more as broad, ‘atmospheric’ concepts than as terms of legal precision.”³³

The long line of court decisions that were to come would frame new dimensions for both the use of property and how government would be allowed to regulate it. But what is this entity that would be addressed and regulated? Land, ownership, or both? Is it an intangible natural right or just a piece of the earth? Let us, for the sake of future discussion, accept Professor Felix Cohen’s definition of private property as “a relationship among human beings such that the so-called owner can exclude others from certain activities or permit others to engage in those activities and in either case secure the assistance of the law in carrying out his decision.”³⁴

Property could be defined in a number of ways, but I have selected this one since it embodies three variables that will be utilized in the remaining sections of this paper: relationships, activities, and the law. In this context, I will be specifically concerned with man’s relationship to land as this embodies the notion of use, not so much ownership.

Moreover, we cannot be so naive to think that property exists in isolation. As Professor Sax remarked, “[p]articlar parcels are tied to one another in complex ways, and property is more accurately described as being inextricably part of a network of relationships that

³² *Wilkinson v. Leland*, 27 U.S. 627, 657 (1829).

³³ Glen O. Robertson, *Evolving Conceptions of ‘Property’ and ‘Liberty’ in Due Process Jurisprudence*, in *LIBERTY, PROPERTY, AND GOVERNMENT: CONSTITUTIONAL INTERPRETATION BEFORE THE NEW DEAL* 63, 71 (Ellen Frankel Paul & Howard Dickman eds., 1989).

³⁴ Felix S. Cohen, *Dialogue on Private Property*, 9 *RUTGERS L. REV.*, 357, 373 (1954).

is neither limited to, nor usefully defined by, the property boundaries with which the legal system is accustomed with dealing.”³⁵

The crux of the relationship between man and property is the belief that the nature of man and the existence of property are inextricably bound together. This raises a question that I will explore later: how can we use our land in ways that are compatible with the nature of man?

II

THE USE OF PROPERTY: PRIVATE DECISIONS VERSUS PUBLIC RESPONSIBILITIES

A. *Overview*

As we review the major U.S. Supreme Court decisions affecting the use of private property, we can gain an important perspective as to how judicial decisions have or have not been socially responsible in protecting the health, safety, and welfare of both individuals and communities. The case law that we have come to rely on has been built, in large measure, on precedent. It has recognized the importance of historic continuity, but has also been open to assimilation and accommodation. For any issue that must be decided by judicial authority, one could ask, is there an ideal justice that will hold a universal truth through all time or is there a relative justice that will be pertinent only for a particular time?

The history of the development of American society—its towns, cities, the hinterland, and the frontier—has been one of continued growth and expansion. Our national history has been one of exploration and settlement, of striking out for new inventions and creating new means to reach an end. Towns and then cities have grown and declined; suburban areas have mushroomed out of vast open spaces and farmland. Our story is one of increasing opportunities for consumption. The great trilogy of the Declaration of Independence, “Life, Liberty and the pursuit of Happiness,” seems to have given way to a more contemporary motto—conformity, status, and the pursuit of affluence.

While the basic needs of man have not changed over millennia, we have witnessed changing attitudes, as well as societal expectations.

³⁵ Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 152 (1971).

And we have placed new and greater demands on ourselves, to produce new goods for consumption and to seek new methods to conquer our surroundings and master our natural resources. Have we, as Barry Commoner wrote, “broken out of the circle of life”?³⁶ Are we stuck in the “paradoxical role we play in the natural environment,” which as both participant and exploiter has given us a distorted perception of it?³⁷

B. Issues of Property Rights, Property Use, and Public Purpose

From the vantage point of today, we should not only look back to historical events and judicial decisions affecting property rights and use but also make an assessment as to the appropriateness of previous interpretations of the law and how such interpretations might serve a continually evolving society. In this regard, four issues can be defined in order to delineate a framework to address property rights and public responsibility issues in the future: (1) individual rights of property as protected by the Constitution; (2) the right of an individual to the enjoyment of private property free from the unreasonable interference of his neighbor; (3) governmental restrictions on an individual's use of property and how far restrictions can go before there is a constitutional violation of one's rights; and (4) the struggle to find an equitable balance between the rights of the individual property owner and the right of the public to a healthy environment and a livable community.

The first three issues will be the focus of the next two sections, while the fourth will be addressed in Parts V, VI, and VII.

C. The Challenge to Protect Private Property Rights

The protection of private property rights finds its strongest legal safeguard in the Fifth Amendment of the Constitution, which says, in part, “nor shall private property be taken for public use, without just compensation.”³⁸ This established a rationale that would eventually create a compensation justification by which government could exercise the power of eminent domain so long as a private property

³⁶ BARRY COMMONER, *THE CLOSING CIRCLE: NATURE, MAN, AND TECHNOLOGY* 299 (1971).

³⁷ *Id.* at 14.

³⁸ U.S. CONST. amend. V.

owner was properly compensated. Professor William Stoebuck points out that the constitutional framers were not clear about “public use.”³⁹ Consequently, what has evolved as the “public-use doctrine” would allow property to be taken only if used by the public.⁴⁰ He maintains that

[e]minent domain poses no special threat to the individual that would require special limitations on the occasions of its exercise. It is not black magic, but merely one of the powers of government, to be used along with the other powers as long as some ordinary purpose of government is served.⁴¹

A corollary to the right to hold private property is the responsibility to refrain from using it in a manner that would cause harm or injury to abutting or neighboring property owners. The emergence of the “police power” doctrine during the 1850s and formalized in the Fourteenth Amendment, while ensuring an individual due process and equal protection, did convey certain governmental prerogatives in establishing regulations to protect society.

Under our system it is the states that exercise the police power as a means to promote the health, safety, and welfare of the public. In essence, the notion of nuisance plays into the property rights equation in that absolute and uncontrolled use of one’s property has never been considered a protected property right. As a result, state and local governments in exercising the police power may regulate private property, permitting defined land uses and the extent to which those uses may flourish through the adoption of land use controls.

Following from the above, since there are distinctions among the constitutional provisions that protect private property rights, there are two factors that have raised legal issues concerning the utilization of these protections under the government’s role in protecting the public interest through land use controls.⁴² First, “[I]and owners complain that, under the guise of environmental laws and land use regulations,

³⁹ See William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972).

⁴⁰ *Id.* at 589–91.

⁴¹ *Id.* at 597.

⁴² This distinction between the eminent domain and police power as distinct powers of government has been discussed this way: “Legitimately exercised, the police power requires no compensation. Thus, if public use is truly coterminous with the police power, a state could freely choose between compensation and noncompensation any time its actions served a ‘public use.’” Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 70 (1986).

public officials too often display gross insensitivity to constitutionally protected private property.”⁴³ The second factor is that “[d]isputes have involved questions about the amount of compensation offered, and occasionally about whether the purpose sought to be achieved by government is sufficiently ‘public,’ rather than about government’s basic authority to take private property.”⁴⁴

Part of the dilemma that the history of judicial decisions has encountered is that “[p]olice power and eminent domain are pictured as though they were on a continuum. If a police power regulation goes too far in the direction of eminent domain, by depriving an owner of too much control over the property owned, it is unconstitutional.”⁴⁵ One way to distinguish between regulation and takings is to analyze the purposes of the government action. By briefly reviewing the decisions of the Court, under the rubric of the “takings issue,” we can more fully understand both the dimensions of the dilemma described above, as well as the changing philosophy that has developed the way our governments shape the way we use our property.⁴⁶

⁴³ Jerold S. Kayden, *Private Property Rights, Government Regulation, and the Constitution: Searching for Balance*, in *LAND USE IN AMERICA* 295, 295 (Henry L. Diamond & Patrick F. Noonan eds., 1996).

⁴⁴ *Id.* at 297.

⁴⁵ ELLEN FRANKEL PAUL, *PROPERTY RIGHTS AND EMINENT DOMAIN* 5 (1987).

⁴⁶ Cf. NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, 3 *AMERICAN LAND PLANNING LAW* §§ 5:1 to :7, available at Westlaw (discussing the history of land use law in the twentieth century being roughly divided into five periods that have reflected changing attitudes toward property rights and property use). “[In the first two decades] before the zoning principle was generally accepted, the courts recognized the traditional power to deal with nuisances However, . . . attempts to go further were held invalid” *Id.* § 5.2. The second period began with the Supreme Court’s decision to uphold zoning in 1926, which gave legitimacy to land use controls and, in appropriate cases, government “could (for example) take away the commercial and industrial development rights without compensation.” *Summary* to WILLIAMS & TAYLOR, *supra* note 46. The third period, during the 1950s and 1960s, “the courts went to the other extreme, tending to uphold anything for which there was anything to be said.” *Id.* The fourth, period from about 1970 to the mid-1980s, was influenced by the growing environmental protection movement and an increasing interest in quality of life issues. This was a time in which the emphasis was made “to balance the various interests, with a more sophisticated understanding of the forum in which the various claims were presented.” *Id.* Beginning in 1986, the Court began “to require a mandatory damage remedy,” representing a shift back “towards the philosophy and practice of the second period.” *Id.* A good analysis of the judicial variables that the Court has dealt with from the beginning of takings litigation is found in Jonathan E. Cohen, *A Constitutional Safety Valve: The Variance in Zoning and Land-Use Based Environmental Controls*, 22 *B.C. ENVTL. AFF. L. REV.* 307 (1995). A thorough discussion

D. The Supreme Court's Evolving Doctrine on the "Takings Issue"

As America became more industrialized in the nineteenth century, local governments began to enact new laws and regulations that increasingly imposed restrictions on private property in order to protect the public health and safety. This opened up inevitable challenges that government was moving too far to restrict property rights. When landowners sought compensation, the Court was usually unsympathetic.

In 1887, the Court held in *Mugler v. Kansas* that when the state acts under its police power to ban a "noxious" use that the state determines is injurious to the public health, no compensation is required.⁴⁷ In *Hadacheck v. Sebastian*, the City of Los Angeles had banned brickmaking because the operation spewed "fumes, gases, smoke, soot, steam, and dust" into the air and infringed on surrounding residential neighborhoods.⁴⁸ The factory owner argued that a taking had occurred because he had been in the "neighborhood" before residential development and he had been entirely deprived of the use of his property.⁴⁹ The Court rejected the argument and held that the City was promoting a legitimate public need.⁵⁰

By 1922, the distinction between a physical taking of property and a regulatory taking had its first important resolution in *Pennsylvania Coal Co. v. Mahon* when the Court accepted the principle that governmental regulations can cause a taking even if there is no physical invasion of the property.⁵¹ The Court needed to evaluate the appropriate uses of the state's police power that regulated the noxious use of land in order to prevent harm to society.⁵² The case prompted Justice Holmes to state, "[t]he general rule . . . is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."⁵³ This point would establish the essential principle that would guide regulatory takings jurisprudence to the

of the history of the takings issue as it relates to the purchase and transfer of development rights is contained in LINDA A. MALONE, ENVIRONMENTAL REGULATION OF LAND USE § 14:6 (2012), available at Westlaw.

⁴⁷ *Mugler v. Kansas*, 123 U.S. 623 (1887).

⁴⁸ *Hadacheck v. Sebastian*, 239 U.S. 394, 408 (1915).

⁴⁹ *See id.* at 405–08.

⁵⁰ *Id.* at 410.

⁵¹ *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

⁵² *Id.* at 416.

⁵³ *Id.* at 415.

present time as the lower courts were left to “tinker with the bare words of the Just Compensation Clause and Justice Holmes’ gloss to govern property rights versus government regulation disputes.”⁵⁴

In disagreeing with the harm/benefit conclusion of the majority, Justice Brandeis stressed that forbidding coal mining is “merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The state does not appropriate it or make any use of it. The state merely prevents the owner from making a use which interferes with paramount rights of the public.”⁵⁵ This view was to re-emerge in later legal scholarship and judicial analysis as will be discussed below.

Thirty-nine years after *Mugler* in the first test of the validity of zoning in *Village of Euclid, Ohio v. Ambler Realty Co.*, the Court ruled on due process and equal protection challenges to a comprehensive zoning ordinance.⁵⁶ Despite the fact that the ordinance reduced the economic value of the plaintiff’s property by prohibiting industrial uses in residential districts, the zoning of land to restrict use was upheld as a valid exercise of the police power.⁵⁷

By 1978, the Court reaffirmed the accepted takings ruling that an owner must be denied all reasonable use of a property for a taking to occur. In *Pennsylvania Central Transportation Co. v. City of New York*, the Court concluded that takings cases must be decided by a three-part test.⁵⁸ First, “the economic impact of the regulation on the claimant”; second, “the extent to which the regulation has interfered with distinct investment-backed expectations”; and third, “the character of the governmental action.”⁵⁹ The most noteworthy precedent established by *Penn Central* was that economic considerations would be a crucial test in determining all takings claims. Since the takings question “‘necessarily requires a weighing of private and public interests,’ the balance cannot be accurately and

⁵⁴ Kayden, *supra* note 43, at 298.

⁵⁵ *Penn. Coal*, 260 U.S. at 393 (Brandeis, J., dissenting).

⁵⁶ *Village of Euclid, Ohio v. Amber Realty Co.*, 272 U.S. 365 (1926).

⁵⁷ *Id.* at 397. In the two years following *Euclid*, the Court continued to uphold the regulatory power of local government to enact zoning districts and restrict land uses. *See, e.g.*, *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Gorrie v. Fox*, 274 U.S. 603 (1927); *Zahn v. Bd. of Pub. Works of L.A.*, 274 U.S. 325 (1927).

⁵⁸ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

⁵⁹ *Id.* at 124.

efficiently struck when the value of the claimant's remaining interest is determined in an artificial vacuum that fails to reflect the marketplace."⁶⁰

The *Penn Central* case marked a turning point in the Court's position on the takings issue. "The decision precedes a period in which the Court continued to uphold land-use regulations despite their economic impact on certain property owners, while also taking on cases in which the Court would affirm the existence of inviolate spheres of property interests."⁶¹ In effect, the Court would "begin to engage in more frequent and more demanding scrutiny of the legislative and administrative details of land-use regulation."⁶²

Cases beginning in the 1980s and extending into the next decade brought under sharper focus the concerns of state and local planning authorities relative to their exercise of police power and the circumstances regulations enacted under that power would be viewed as "going too far" to incite a takings claim. Since the 1970s, many communities, states, and the Federal government had enacted regulations more in the name of environmental protection. There was a growing concern about the impact of land use activities and their connection to human actions and the public health. Air and water pollution, the disruption or destruction of wildlife habitats, and infringement on sensitive natural areas all received attention through land-use controls and regulations. Not surprisingly, real estate and development interests fought to change or weaken such regulations, with the main argument centering on economic issues and the violation of private property rights.

The first significant case in the 1980s was *Keystone Bituminous Coal Association v. DeBenedictis*.⁶³ Here, the Court rejected a takings claim by a consortium of coal companies in a situation similar to the *Pennsylvania Coal* case. The State of Pennsylvania had enacted a mining safety act to protect the public from environmental and economic loss from surface uses when the mining companies

⁶⁰ MALONE, *supra* note 46.

⁶¹ Cohen, *supra* note 46, at 318. Two years after *Penn Central* the Court rejected a takings claim to a local zoning ordinance that limited development but did not deny all viable economic use of the plaintiff's property. *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *abrogated by* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

⁶² Cohen, *supra* note 46, at 318.

⁶³ *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

removed the subsurface coal.⁶⁴ The law required the coal companies to leave fifty percent of the coal underground to provide surface support.⁶⁵ The coal companies claimed a taking and the Court rejected the argument since the regulation did not deny all economically viable use of the land.⁶⁶ The majority dismissed the precedential value of *Pennsylvania Coal* in *Keystone*, and referred to it as merely “advisory” and not relevant to the facts at hand.

In 1987, the Court decided two cases brought by landowners, which involved the takings issue. In *First English Evangelical Lutheran Church v. County of Los Angeles*, when the County of Los Angeles enacted a floodplain ordinance, an affected property owner was not allowed to rebuild in the area, which had previously been destroyed by a severe flood.⁶⁷ The Court held that if a “taking” had occurred, the landowner was entitled to just compensation, even if the taking were temporary, but remanded the case to the state courts to determine whether a taking had in fact occurred.⁶⁸ The state court later held that it had not.⁶⁹

The second decision was *Nollan v. California Coastal Commission*, where the Court called for an increased level of scrutiny of the “nexus” between land-use restrictions and the purpose of those restrictions.⁷⁰ Again, the Court focused on the relationship between public needs and the condition imposed on permission for a land development project.⁷¹ The Coastal Commission required that the property owner grant a permanent public easement along the beach frontage of his ocean front property as a condition to receiving a building permit to construct a vacation home.⁷² Even though the Court upheld development restrictions or “exactions,” the specific

⁶⁴ *Id.* at 481.

⁶⁵ *Id.* at 476–77.

⁶⁶ *Id.* at 499.

⁶⁷ *First English Evangelical Lutheran Church v. Cnty. of Los Angeles*, 482 U.S. 304, 307 (1987).

⁶⁸ *Id.* at 321–22.

⁶⁹ *First English Evangelical Lutheran Church v. Cnty of Los Angeles*, 258 Cal. Rptr. 893, 905 (Cal. Ct. App. 1989).

⁷⁰ *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

⁷¹ *See id.*

⁷² *Id.* at 831.

restriction imposed on Nollan was in no way related to the purpose of the restrictions.⁷³

A highly publicized case, *Lucas v. South Carolina Coastal Council*, involved the regulation of development in a coastal hazard zone in 1992.⁷⁴ This matter involved the adoption of strict shoreline regulations before the devastating hurricane, Hugo. When Lucas acquired the land, residential building was allowed; yet, under the new regulation, he was prevented from building.⁷⁵ Moreover, there was no allowance in the regulation that would give Lucas any relief or variance from the regulations.⁷⁶ The decision, written by Justice Scalia (who also wrote the prevailing opinion in *Nollan*), held that damages are due in the “relatively rare situations” in which a government entity deprives a landowner of “all economically beneficial uses” of the land.⁷⁷ In *Nollan*, the lower court had found that such a complete denial of all economically beneficial use had occurred.⁷⁸

As the *Lucas* decision established a stricter test for “total takings,” the Court did make two exceptions in situations where the restriction arises out of “background principles of the State’s law of property and nuisance.”⁷⁹ In filing a dissenting opinion in *Lucas*, Justice Stevens provided a potentially important view when he addressed the growing issues and awareness of environmental matters and how this understanding might lead state legislatures to revise the definition of property and the rights of property owners, similar to what was done in the case of slavery.⁸⁰

In 1994, the Court was presented with the case, *Stevens v. City of Cannon Beach*.⁸¹ The City of Cannon Beach, citing zoning and beach access regulations, denied a permit to construct a seawall on the dry sand portion of the owners’ beachfront lot.⁸² The owners took their

⁷³ *Id.* at 841.

⁷⁴ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

⁷⁵ *Id.* at 1008.

⁷⁶ *Id.* at 1008–09.

⁷⁷ *Id.* at 1026.

⁷⁸ *Id.* at 1009.

⁷⁹ *Id.* at 1029.

⁸⁰ *Id.* at 1068–69 (Stevens, J., dissenting).

⁸¹ *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994).

⁸² *Id.* at 451.

appeal to the Oregon Supreme Court, which upheld the City.⁸³ The Oregon Court applied the “nuisance exception” from *Lucas* and ruled that the owners did not suffer a taking since—under the state’s common law doctrine—when they did take title, they were on notice that the “bundle of rights” did not include exclusive use of the dry sand part of the property.⁸⁴ The Supreme Court denied the plaintiffs’ petition for a writ of certiorari. In his dissent, Justice Scalia claimed that *Stevens* represents a “land grab,”⁸⁵ which brought the critique that “*Stevens* illustrates both the flaws in the *Lucas* test for total takings and the consequent need for a new total takings test.”⁸⁶

The Court revisited *Nollan* in 1994 in the case, *Dolan v. City of Tigard*, and emphasized that there must be a demonstration of “rough proportionality” between the regulatory purpose to protect the public interest and development conditions.⁸⁷ When Dolan—whose land was partially within a hundred-year floodplain—wanted to expand her business, the City agreed as long as she dedicated the floodplain portion as a greenway for public use.⁸⁸ The opinion was delivered by Chief Justice Rehnquist and reaffirmed the essential “nexus” test from *Nollan* that must be found between the legitimate state interest and permit conditions, as well as the degree of connection between the exactions of the conditions and the projected impact of the proposed development.⁸⁹

In 2001, the Court ruled that Anthony Palazzolo had the right to challenge the state’s ban on development of his coastal wetlands property, even though he took title to the property after the state implemented its restrictive regulations.⁹⁰ In *Palazzolo v. Rhode Island*, even though the trial court had determined that Palazzolo’s proposed development in the wetlands would have significant environmental impact and was in conflict with the state coastal resources management plan—and he still had development potential

⁸³ *Id.* at 460.

⁸⁴ *Id.* at 456.

⁸⁵ *Stevens*, 510 U.S. at 1207 (Scalia, J., dissenting).

⁸⁶ Peter C. Meier, *Stevens v. City of Cannon Beach: Taking Takings Into the Post-Lucas Era*, 22 *ECOLOGY L.Q.* 413, 415 (1995).

⁸⁷ *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

⁸⁸ *Id.* at 379–80.

⁸⁹ *Id.* at 386–91.

⁹⁰ *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

with an upland portion of the property—the Supreme Court determined that a taking had occurred.⁹¹ The case was sent back to the state courts for an analysis of compensation under the guidelines established in the *Penn Central* case.⁹²

I conclude this analysis (and chronological summary) by saying that while the Supreme Court generally will not construe government regulations that involve property use a taking, there are four situations that would be considered a taking: (1) where the property owner is denied all economically viable use of the land; (2) where the regulation forced the property owner to allow someone else to enter the property; (3) where the regulation imposes costs or burdens on the property that do not have a reasonable relationship to the impacts of the use on the community; (4) when government can achieve an equally valid public purpose through regulation or through a requirement of dedicating property, then the least intrusive regulation or requirement is preferred, and anything more is a taking.

Where does our review of the key elements that have evolved as the current takings doctrine leave us today relative to the increasing awareness and implementation of governmental regulations to address environmental conditions? On this note, it has been said that “[w]hile the Court’s rhetoric may from time to time burnish the mantle of private property rights, its actual rulings give ample breathing room to government regulations in furtherance of land use and environmental goals.”⁹³ However, a more critical view has found that “[t]he regulatory takings doctrine is a pernicious mess The current rules are a hodgepodge that the Court has been unable to explain. But worse, the doctrine protects economic interests in the development of land against otherwise valid enactments of the democratic process, thereby inhibiting experimentation with new environmental initiatives.”⁹⁴ For sure, “[t]he ‘Takings Issue’ has moved to center stage in legislatures around the country, along with limitations on administrative regulations and the pruning back of some of the

⁹¹ *Id.*

⁹² *Id.* at 632.

⁹³ Kayden, *supra* note 43, at 304 (footnote omitted).

⁹⁴ J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGY L.Q.* 89, 90 (1995).

nation's basic laws that limit private activities adversely affecting the environment."⁹⁵

The next challenge as we face new realities in the twenty-first century will be for judicial attitudes to catch up and recognize that the economic value to protect private property cannot be separated from the ecological value of that same property. The time has come for the Supreme Court to open up a new door and prescribe a new constitutional calculus in deciding cases involving the private property/takings issue question. It is time for the Court to acknowledge that the ecological values attached to private property cannot be held hostage to economic supremacy.

E. Changing Judicial Attitudes and the Future

Beginning an assessment to address twenty-first century challenges will be, as in the past, to ascertain if some public purposes are more important than others. We might ask if there are degrees of importance in government's regulation of property in order to advance or protect the public interest; and as importantly, does the assessment of the public interest change over time? What might be considered a socially, or politically, responsible position at one point in history may not be considered important at a later time. Of course, social responsibility is one thing, judicial history may be quite another. There is a constitutional base and a path of case law, both state and federal, that will, in all likelihood, continue to juggle public rights and public purposes.⁹⁶

It is generally held that the judicial branch does not engage in policy making since this is the purview of the legislative branch. But the law and the judgments about the law do establish both individual and public guides that shape the conduct of our actions and relationships. In the final analysis, the Supreme Court "blends orthodox judicial functions with policy-making functions in a

⁹⁵ John C. Keene, *When Does A Regulation "Go Too Far?"—The Supreme Court's Analytical Framework for Drawing the Line Between an Exercise of the Police Power and an Exercise of the Power of Eminent Domain*, 14 PENN ST. ENVTL. L. REV. 397, 401 (2006).

⁹⁶ Professor Sax pointed out that "Few legal problems have proved as resistant to analytical efforts as that posed by the Constitution's requirement that private property not be taken for public use without payment of just compensation." Sax, *supra* note 35, at 149.

complex mixture.”⁹⁷ Acknowledging that the Court does indeed provide a leadership function, Professor Carl Brent Swisher, in discussing “the goal of judicial endeavor” says that the Court “succeeds in leading largely to the extent of its skill not merely as a leader but as a follower.”⁹⁸ He continues, saying that

the effectiveness of the Court’s leadership is measured by its ability to articulate deep convictions of need and deep patterns of desire on the part of the people in such a way that the people . . . will recognize the judicial statement as essentially their own. The Court must sense the synthesis of desire for both continuity and change and make the desired synthesis the expressed pattern of each decision.⁹⁹

Defining structure, precedent, and case law decisions that influence our actions and our lives all operate within the framework of society’s historical development. This is for sure a unique attribute of our democratic system of justice. At this juncture in our history, we need to probe further in a continuing quest to find a new balance for the use of our land relative to our protected property rights under the aegis of our constitutional heritage. We must ask how, in a rapidly developing culture, we should address very real concerns about the manner in which we are judicially permitted to use our private property. Is society best served by a judicial doctrine that relies on calculating a balance between private rights and public purpose coupled with an institutionalized supremacy of personal economic security? Or is society better served by a judicial doctrine that can envelop the full aspirations of human desires, needs, and wants—a doctrine that strives to change, adapt, and invent, as Professor Haar prescribed.¹⁰⁰ Lewis Mumford said that “[e]very culture attaches different estimates to man’s nature and history; and in its creative moments, it adds new

⁹⁷ ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 20 (Daniel J. Boorstin ed., 1960).

⁹⁸ CARL BRENT SWISHER, *THE SUPREME COURT IN MODERN ROLE* 179 (1958).

⁹⁹ *Id.* at 179–80. It has also been said that “[w]ithin the American tradition, the normative aspect of contextual legitimacy seems to depend on whether the system as a whole adequately contributes to a more orderly and just society in light of contemporary circumstances and evolving notions of justice.” STEVEN J. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* 202 (1985).

¹⁰⁰ CHARLES M. HAAR, *LAND USE PLANNING: A CASEBOOK ON THE USE, MISUSE, AND REUSE OF URBAN LAND* 22 (2d ed. 1971).

values that enlarge the human personality and give it new destinations.”¹⁰¹ This is the reality we must face in our present time.

As we live in a period of continued change and increased environmental awareness—an awareness that speaks of the survival of the human species—we must be critically concerned about the inextricable relationship between the private use of land and how its use impacts the greater whole. The singular question that needs to be posed is, can the law, in all of its intellectual complexity and procedural rigor, transcend the decision of the moment and project what the moment will mean to the future? Can the law embody a soul that will, in the judgment of those who make judgments, allow us to reach the full potential of the human condition—the apotheosis of man on earth?

III

THE RIGHTS OF MAN AND THE RIGHTS OF NATURE

Most, if not all, questions involving property rights, as litigated under the takings, due process, and equal protection clauses of the Constitution, have involved—at their base—economic issues. If, through government action, a person's property is made economically valueless or is so restricted that it cannot be developed for an economically viable use, then an individual can claim a constitutional infringement on property rights. But what happens when acts of God—nature—infringe on the use of private property?

Each year, almost without fail, we read in the popular press about naturally occurring events throughout the country that cause great damage and loss of property. Take, for example, major floods. Many neighborhoods in older communities, as well as newer suburban developments, have been built along waterways in order to have access, scenic, or recreational advantages. During periods of heavy storms and concomitant flooding, many property owners have suffered severe economic loss because of their location. While it is an established fact that floodplains are a necessary feature in the hydrologic transportation system of a flood, development within their bounds opens up the potential of reduction or deprivation in the use of property. Not through the acts of others or by government activities

¹⁰¹ LEWIS MUMFORD, 7 *WORLD PERSPECTIVES: THE TRANSFORMATIONS OF MAN* 221 (Ruth Nanda Anshen ed., 1956).

but through uncontrollable natural events. We should not forget Justice Holmes' point that "[a] river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it."¹⁰²

Of course, we recognize that police power holds the justification for government to regulate the use of land to protect the public interest. But this regulatory thrust is to minimize the potential infringement of one property use on another. The brilliance of our constitutional framers did not give us an institutional protection of our property rights against acts of nature. And, not surprisingly, our legal system has not had the case, *John & Jane Doe v. Nature*.

Would it not follow, from our example of the flooding river, that nature has, notwithstanding our guarantees to private property, exercised a right that violates our rights? But of course, government has a responsibility to protect the health, safety, and welfare of its citizens and can exercise that responsibility to place restrictions on the use of property. If, in a situation such as the flood, a property loss ensues, cannot the owner seek compensation from government for not protecting his property rights?

In the matter of our river flood, government did not cause the flood. Therefore, we should not be able to extract compensation from government. Nature, while abundant in incalculable resource wealth, does not have a monetary means to pay compensation claims. What is the property owner to do? There is only one alternative—turn back to government.

Since the flood plain can be regulated, to prevent or limit development that would otherwise be threatened if located there, the limitations placed by government cannot go so far as to deny all economically viable use of one's property. But, what if one said, "look, my property is just a little piece of this entire floodplain; surely what I do with it won't have any impact on my neighbor, or for that matter, on the river. Why can't I use my property the way I want?!" Because the delegated responsibility to regulate land use lies largely at the local level, and since the landowner oftentimes perceives that the small decisions do not really matter, there is no accountability for the accumulation of a myriad of small decisions, over time, that create problems that nobody really wants, or expected.

¹⁰² *New Jersey v. New York*, 283 U.S. 336, 342 (1931).

The “tyranny of small decisions” as advanced by economist Alfred Kahn, is directly related to how we use our land.¹⁰³ If, for example, one has uncontrolled or unrestricted use of a parcel of land, say on the river and in the floodplain and decides to fill the low area to make this seemingly inconsequential piece of property more usable, who could argue that there would be any irreversible impact on the entire river system? But the adjacent neighbors make the same decision, and so on up the river. Before long, the entire reach of the flood plain will be altered. When the next flood happens, everyone’s property will be impacted. The resultant impact, a flood that would damage all property owners, can have far ranging and costly results.

A corollary to the tyranny of small decisions is the “Tragedy of the Commons” as purported by ecologist, Garrett Hardin.¹⁰⁴ As individuals continue to exploit common resources for their own benefit, it may work for a while; but, since resources are limited, a day of reckoning will eventually come. “Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.”¹⁰⁵

The point then is that small, individual decisions on the use of land are important because of their inevitable relationship to aggregated, undesirable consequences, which in all likelihood cannot be anticipated. And this is precisely where the government must intervene, as the regulator of land use, so that in the long run both the individual and the general public will not lose.

¹⁰³ Alfred E. Kahn, *The Tyranny of Small Decisions: Market Failures, Imperfections, and the Limits of Economics*, 19 KYKLOS 23 (1966). Ecologist William E. Odum makes the transition from economics to environmental issues when he writes the following:

No one purposely planned to destroy almost 50% of the existing marshland along the coasts of Connecticut and Massachusetts. In fact, if the public had been asked whether coastal wetlands should be preserved or converted to some other use, preservation would probably have been supported. However, through hundreds of little decisions and the conversion of hundreds of small tracts of marshland, a major decision in favor of extensive wetlands conversion was made without ever addressing the issue directly.

William E. Odum, *Environmental Degradation and the Tyranny of Small Decisions*, 32 BIOSCIENCE 728, 728 (1982).

¹⁰⁴ Garrett Hardin, *The Tragedy of the Commons*, in *MANAGING THE COMMONS* 16 (Garrett Hardin & John Baden eds., 1977).

¹⁰⁵ *Id.* at 20.

Our discussion of the river flood, as an act of nature, and its impact on adjoining lands which are privately owned, illustrates a not very complex irony: that the rights of nature (in this matter to create the flood) violate and overpower our individual rights to the use of private property. If then, this is an inescapable fact of life, how can we be best protected? Should we not seek a situation sanctioned by government intervention, through regulation, to protect our rights? And would this not open the door to acknowledging that man's rights and nature's rights need to reach a new understanding and level of computability in judicial proceedings?

IV

THE INCLUSION OF VALUES IN JUDICIAL DECISIONS

A. Rules of Law and Stomach Jurisprudence

As our society has developed from the earliest days of European exploration, through colonial settlement and finally to expansion from agricultural dependence to technological achievement, how we have used our land has been the direct result of a dominant value system that has maintained the sanctity of private property rights. Our judicial system has institutionalized our values by legitimating our actions among individuals and between individuals and government. In a sense, we are constrained by this institutionalization of values if those values are strictly wedded to historical precedent. Are we to be guided solely by the view of Justice Holmes that "the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity"?¹⁰⁶

For the most part, our laws reflect society's values as effectuated through public policy. And it would be expected that as society's values change, so too would public policy. It would probably be fair to say that in the last twenty-five years, although the public has become more aware of environmental issues and the unity of nature—that man and nature do form a bond—"legal institutions have not come to that realization."¹⁰⁷ As environmental laws have been

¹⁰⁶ OLIVER WENDELL HOLMES, *Learning and Science*, in COLLECTED LEGAL PAPERS 138, 139 (1920).

¹⁰⁷ Kenneth A. Manaster, *Law and the Dignity of Nature: Foundations of Environmental Law*, 26 DEPAUL L. REV. 743, 746 (1977).

formulated, based on the advice from a wide range of multidisciplinary experts, interpretations of those laws fall directly to the legal profession. If judicial interpretations are only made by “analyzing separate parts of a problem, rather than the whole,”¹⁰⁸ we will be confined to very narrow judgments that will not come to grips with future consequences.

We might distinguish between two kinds of attitudes in thinking about the law, as Professor Williams has portrayed: “rules of law”—that for every given fact situation, there is one fixed rule of law which will control, and which the courts can be counted on to follow; and “stomach jurisprudence”—that the decision in any case depends in large part on how the judge feels about a particular situation, in light of various preconceptions and social attitudes.¹⁰⁹ It is this second “attitude” that falls within the purview of including social concerns and changing values into legal judgments.

The juxtaposition of these two attitudes poses something of a dilemma when it comes to the use of private property in view of an increasing recognition of the importance of environmental conditions. This problem has been described as “doctrinal schizophrenia” which arises “in the courts’ willingness to permit eminent domain doctrines to ossify in order to protect private rights, while simultaneously widening the police power to effectuate the public interest in resource protection.”¹¹⁰

B. Should Trees Have Standing?

Perhaps the most poignant example of the “attitude” dichotomy is contained in the argument advanced by Professor Christopher Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*.¹¹¹ In the early 1970s Stone, a professor of law at the

¹⁰⁸ *Id.*

¹⁰⁹ WILLIAMS & TAYLOR, *supra* note 46, § 4:1.

¹¹⁰ John J. Costonis, “Fair” Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021, 1047 (1975).

¹¹¹ CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING?: TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS (W. Kaufmann Inc. 1974). Cf. Clarence Morris, *The Rights and Duties of Beasts and Trees: A Law Teacher's Essay for Landscape Architects*, 17 J. LEGAL EDUCATION 185, 190 (1964) (“The presumption in favor of the natural should not be only a debating stance against those who propose change; it calls for legal action developing safeguards affirmatively creating nature’s legal rights . . .”).

University of Southern California, had been “thinking about the interplay between law and the development of social awareness.”¹¹² As students were skeptical in discussing the prospect that nature should have legal rights, Stone needed to find a concrete example where such a vague notion could be tested. He found one in *Sierra Club v. Morton*, a case that had been recently decided by the Ninth Circuit Court of Appeals.¹¹³ The U.S. Forest Service had granted a permit to Walt Disney Enterprises to develop Mineral King Valley, a huge complex of motels, restaurants, and recreation facilities in a wilderness area in California’s Sierra Nevada Mountains.¹¹⁴

The Sierra Club brought suit for an injunction, claiming that the project would adversely affect the area’s aesthetic and ecological balance.¹¹⁵ The District Court had granted the preliminary injunction, but the Ninth Circuit reversed the decision.¹¹⁶ The crux of the Ninth Circuit’s opinion was not that the Forest Service had been right in granting the permit but that the Sierra Club had no “standing” to bring the matter to the courts.¹¹⁷ The reasoning was that the Sierra Club itself “does not allege that it is ‘aggrieved’ or that it is ‘adversely affected’ within the meaning of the rules of standing The right to sue does not inure to one who does not possess it, simply because there is no one else willing and able to assert it.”¹¹⁸

Stone’s strategy was to present a position that would “get the courts thinking about the park itself as a jural person—the way corporations are ‘persons’—the notion of nature having rights would here make a significant operational difference. . . .”¹¹⁹

Stone’s view was succinctly presented:

It is not inevitable, nor is it wise, that natural objects should have no rights to seek redress in their own behalf. It is no answer to say that streams and forests cannot have standing because streams and forests cannot speak. Corporations cannot speak either; nor can

¹¹² Garrett Hardin, *Foreword to STONE*, *supra* note 111, at xii (quoting professor Stone).

¹¹³ *Sierra Club v. Morton*, 405 U.S. 727 (1972).

¹¹⁴ *Id.* at 729.

¹¹⁵ *Id.* at 730.

¹¹⁶ *Id.* at 731.

¹¹⁷ *Id.*

¹¹⁸ *Sierra Club v. Hickel*, 433 F.2d 24, 32 (9th Cir. 1970), *aff’d*, *Sierra Club v. Morton*, 405 U.S. 727 (1972).

¹¹⁹ Hardin, *supra* note 112, at xiii (quoting Professor Stone).

states, estates, infants, incompetents, municipalities or universities.
Lawyers speak for them. . . .¹²⁰

He called for “a new theory or myth . . . of man’s relationships to the rest of nature.”¹²¹ He used myth “in the sense in which, at different times in our history, our social ‘facts’ and relationships have been comprehended and integrated by reference [into] the ‘myths’ that we are co-signers of a social contract . . . [or that] all men are created equal.”¹²² He continued that “[w]hat is needed is a myth that can fit our growing body of knowledge of geophysics, biology and the cosmos . . . to regard the Earth . . . as one organism, of which Mankind is a functional part. . . .”¹²³

The outcome of the case was that the Supreme Court upheld the Ninth Circuit Court’s ruling.¹²⁴ Although Stone’s thesis did not have validity in the majority opinion of the Court, written by Justice Stewart, an important judicial recognition did occur in the dissenting opinion written by Justice William O. Douglas. It had been part of Stone’s original intent to have his law journal article read by the one Justice “who, if anyone on the Court, might be receptive to the notion of legal rights for natural objects.”¹²⁵ In framing his dissenting argument, Justice Douglas referred directly to Professor Stone’s position. In a direct and concise manner, Douglas was paving the way for a new “myth” to be developed:

The voice of the inanimate object, therefore, should not be stilled. That does not mean that the judiciary takes over the managerial functions from the federal agency. It merely means that before these priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard.¹²⁶

Justice Douglas opened up a new level of judicial consciousness and somewhat unceremoniously offered a “stomach jurisprudence”

¹²⁰ STONE, *supra* note 111, at 17.

¹²¹ *Id.* at 51.

¹²² *Id.*

¹²³ *Id.* at 51–52.

¹²⁴ *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972).

¹²⁵ Hardin, *supra* note 112, at xiv (quoting Professor Stone).

¹²⁶ *Sierra Club*, 405 U.S. at 749 (Douglas, J., dissenting).

that could be infused with the “rules of law.”¹²⁷ Perhaps he reached what has been called the “inner morality of the law” that meets the demands of human energies that are “directed toward specific kinds of achievements and not merely warned away from harmful acts.”¹²⁸ He understood, in the visionary sense, both the value of the environment and the loss to society if advocates for protecting that environment do not have standing in the eyes of the law of the land.

V

A LAND ETHIC AND AN ECOLOGICAL IMPERATIVE

A. *Can We Survive Ourselves?*

As long as we think of ourselves as the supreme species on earth, endowed by our creator to conduct our present lives and actions without a conscious awareness of consequences for our future existence, we will not survive. “We see ourselves as the culmination and the end,” wrote Loren Eiseley,

and if we do indeed consider our passing, we think that sunlight will go with us and the earth be dark. We are the end. For us continents rose and fell, for us the waters and the air were mastered, for us the great living web has pulsated and grown more intricate.¹²⁹

We have a long history of viewing the world in definable anthropocentric terms. Man is the ruler, all else is subservient. Nature is here for our benefit. We can mold and shape this benefit to fit our will and purpose. It has been said that

“[t]he writers of history have seldom noted the importance of land use. They seem not to have recognized that the destinies of most of man’s empires and civilizations were determined largely by the way land was used. While recognizing the influence of environment on history, they fail to note that man usually changed or despoiled his environment.”¹³⁰

We can only hope that American society does not fail to understand this reality of history.

¹²⁷ See WILLIAMS & TAYLOR, *supra* note 46, § 4:1.

¹²⁸ LON L. FULLER, *THE MORALITY OF LAW* 42 (rev. ed. 1969).

¹²⁹ LOREN EISELEY, *THE IMMENSE JOURNEY* 41 (Norman P. Ross ed., Time Inc. 1962) (1946).

¹³⁰ VERNON GILL CARTER & TOM DALE, *TOPSOIL AND CIVILIZATION* 7 (rev. ed. 1974).

Failure is not agreeable to the American psyche that promotes growth, development, and progress. In large measure, we continue through cycles of growth and decline only to reach a new synthesis of more growth. We suppose that we have gained new knowledge that will increase the potential for new opportunities. But we need to be mindful of what Rene Dubos said: “Knowledge is more effective as a generator of possibilities than as a guide to choice and as a source of ethics [T]he management of the Earth must be value conscious and value oriented.”¹³¹

Contemporary American society seems to have become entangled in an upward, never-ending cycle of growth and development. We are striving for new heights in community-living patterns as we spread into new places. Our population keeps expanding while our natural resources do not. We have not come to a universal acknowledgment that there are limits to nature because these would place limitations on man. Finally, we have allowed our institutionalized system of private property rights to have supremacy over the rights of nature. We need, at this juncture in our history, to infuse a new property theory into our thinking that can be judicially tested and ultimately sustained. To do this, we need to consciously meld our desire for a livable environment with action to make it happen. We must begin by embracing a new land ethic.

B. Starting with a Land Ethic

When *A Sand County Almanac* was first published in 1949, Aldo Leopold gave us a clear direction that a land ethic changes the role of man “from conqueror of the land-community to plain member and citizen of it. It implies respect for his fellow-members, and also respect for the community”¹³² For Leopold, the community is everything that we know as the environment—water, earth, and sky—and all of the creatures that abound, with man simply being one member of the community. He was not the first to excoriate us for not abiding by an ethic that achieves a balance with nature, but he was the first to posit an obligation to develop an ecological conscience as “an

¹³¹ RENÉ DUBOS, *THE WOOLING OF EARTH* 153 (1980).

¹³² ALDO LEOPOLD, *A SAND COUNTY ALMANAC* 204 (2d prtg. 1950).

internal change in our intellectual emphasis, loyalties, affections, and convictions.”¹³³

Can the leap be made from the concept of a land ethic, in the way Leopold thought of it, to a legal construction that could be embodied in Supreme Court decisions about private property? It can be done, as Christopher Stone has shown; but we are still bound to the institutionalized and judicially reinforced behavior pattern of being separate from and above nature vis-à-vis our attitudes about property rights. Professor Freyfogle spoke about the status of legal scholarship being “particularly prone to undervalue ethical impulses and intuition” and that “legal scholars as much as others need to speak from the heart.”¹³⁴ What we need in the end is to have “a vocabulary that gives to right and wrong as much room as it gives to efficiency and entitlements.”¹³⁵

The stark reality is that a land ethic does not just reflect some utopian ideal or romanticized conceptualization of nature. Rather, it is the necessary value base that will allow us to come to grips with rights, responsibilities, and survival. A land ethic is as necessary as an ecological imperative.

C. The Ecological Principle in Using Land

When Ian McHarg published *Design with Nature* in 1969 both the nation and the world were given a bold new direction to undertake land-use development within a sensitive and responsive balance with nature.¹³⁶ What emerged from this milestone work was that the notion of ecological planning was crucial if we wished to continue to develop and not to destroy our environmental resources and amenities. The notion, simply put, is that “natural phenomena are dynamic interacting processes, responsive to laws, and that these proffer opportunities and limitations to human use.”¹³⁷ The McHarg method, as it has been called, was a complete categorization and assessment of all elements of the environment—from bedrock geological forms to surface hydrology to soils and vegetation to

¹³³ *Id.* at 210.

¹³⁴ Eric T. Freyfogle, *The Land Ethic and Pilgrim Leopold*, 61 U. COLO. L. REV. 217, 254 (1990).

¹³⁵ *Id.* at 255.

¹³⁶ IAN L. MCHARG, *DESIGN WITH NATURE* (1969).

¹³⁷ *Id.* at 79.

climatic activity—in order to find the most suitable locations for land-use development. By determining the most “propitious” locations, based on natural features evaluations, man could adapt the environment to his needs and use with the least negative impact on his total habitat.

The importance of the ecological planning approach is that it identifies those lands that are most suitable for development. It is therefore the “right” of the land to determine its suitability based upon its resource value as a given creation of nature. Of course, the question concerning private ownership is not part of the equation in making the determination of land use suitability. Professor McHarg was mindful of the issue of ownership and the economic variables involving costs and consequences in land development using ecological planning principles. He said, “[i]t seems clear that laws pertaining to land use and development need to be elaborated to reflect the public costs and consequences of private action.”¹³⁸ An extension of this concern is that through resource destruction, costs will be incurred by the public, which should ultimately be allocated to the landowner.

D. Building a New “Myth”

If we utilize the land ethic and ecological planning principles as a means to recognize and advance the inextricable relationship between man and the land, we will open up an enlightened prospect to enunciate a new “myth” or theory about private property rights as they interface with property use.

Theory building is, to a great extent, based on criticism of both the existing and the expected. Endemic to the intellectual process of new theory building is the realization of potential. The questions, ‘can we do it better’ or ‘can we find a more meaningful way,’ have as their underpinning a search for improvement. Even though social and political views will be the essential shapers and promoters of any new theory or “myth,” the ultimate test for institutional legitimacy will rest with the courts.

¹³⁸ *Id.* at 65.

VI TOWARD FASHIONING A NEW TAKINGS DOCTRINE

A. An Ecological Critique of the Current Takings Doctrine

The laws that govern us and their judicial interpretations, particularly those that have shaped our coveted right to private property, have evolved as a set of acceptable and unwavering social and economic priorities. Generally, our attitudes toward land, including its ownership and use, have not shaken loose from the early views of our constitutional founders.

While it is true that the protection of natural resources through federal and state statutes has been accomplished over the years, there has been no major paradigm shift to address the function of private property as an ecological component of the total environment. The first major environmental law became effective in 1970 and ushered in a new era of environmental and resource protection. The National Environmental Policy Act (NEPA) stressed that it was national policy to encourage harmony between man and the environment.¹³⁹ The most notable feature of NEPA and its regulations is the requirement of an environmental assessment to be conducted for all major, federally-sponsored development projects significantly affecting the environment.¹⁴⁰ NEPA was followed by the Clean Air Act,¹⁴¹ the Clean Water Act,¹⁴² and the Endangered Species Act,¹⁴³ each focusing on specific environmental and resource concerns under their respective titles.¹⁴⁴ Even though from a public policy point of view, there has been an increasing awareness of the environmental impact from man's activities, a missing link still exists between environmental protection, as a declared goal in the public interest, and the potential of private property violations that would invoke a takings claim.

All of our environmental laws have imposed restrictions on our freedom of choice and conduct, and they have mirrored a social

¹³⁹ National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2012).

¹⁴⁰ 42 U.S.C. § 4332; 40 C.F.R. pt. 1502 (2013).

¹⁴¹ *See generally* 42 U.S.C. §§ 7401–7671 (2012).

¹⁴² *See generally* 33 U.S.C. §§ 1251–1387 (2012).

¹⁴³ *See generally* 16 U.S.C. §§ 1531–1544 (2012).

¹⁴⁴ *See* W. JACK GROSSE, *THE PROTECTION & MANAGEMENT OF OUR NATURAL RESOURCES, WILDLIFE, & HABITAT* (2d ed. 1997) (documenting a comprehensive account of the history and function of national regulations to protect environmental resources).

concern for maintaining environmental integrity. But the laws of nature, not enacted by any legislative body, are fixed—they are imposed on us by the natural world. This forms the basis of an ecological imperative as it reflects our use of private property. Scientific study of the natural processes and the relationship of living organisms within a natural system has time and time again warned us of how human activity has been directly responsible for environmental degradation. Simply put, natural laws will continue to function and our well-being is in direct proportion to the manner in which society utilizes its natural resources.

There are three points that encompass an ecological critique of the takings doctrine: First, that each parcel of private property is a piece of the ecosystem; second, the relationship between ownership and economic supremacy; third, that land left in its natural state does have economic value.

The first point of the ecological critique emphasizes the fact that everything is connected and that all individual parcels of land are related—related to their geographical location as well as to their surrounding resources, the water, and the air. This is consistent with and follows from the above discussion of the concept of a land ethic and the ecological principle in using land. The Court needs to face the interconnectedness factor, which the decisions involving takings have not done.

While it is true that environmental legislation does place restrictions on land use, the insistence on making sure that regulations do not go too far to inhibit economic benefit, overrides any projected aggregated public environmental consequences of an individual's protected land use prerogatives. This attitude alone militates any reconciliation of judicial decisions with reality.¹⁴⁵

The second point in the ecological critique of the takings doctrine revolves around the function of land as a commodity within a free market system. According to Leopold, “[o]ne basic weakness in a

¹⁴⁵ We could think that it is axiomatic that

[o]ur knowledge of the social, economic and environmental relationships of various uses of land has become increasingly sophisticated and complex, but unless this knowledge is brought to the attention of the courts and legislatures they will make decisions on the basis of outmoded concepts dating from a simpler age.

FRED BOSSELMAN ET AL., *THE TAKING ISSUE* 287 (1973) (commissioned by the Council on Environmental Quality).

conservation system based wholly on economic motives is that most members of the land community have no economic value."¹⁴⁶ Only when one of these "non-economic categories" is threatened do we give it economic value. The key point that Leopold makes is that we falsely assume that "the economic parts of the biotic clock will function without the uneconomic parts."¹⁴⁷

David Hunter, in a stimulating essay, proposed that one of the shortcomings of judicial decisions in takings cases, in the context of the current economic view of property is that

even if the courts incorporated the social costs of development into their decisionmaking, much of the land's value to the ecological community is not cognizable in the language of economics. Most environmental amenities cannot adequately be monetized, not because they are not valuable, but because they are not supplied through a market.¹⁴⁸

A corroborating view that pushes the argument even further is that "[a]fter examining how natural systems function and considering their vulnerability in the context of incomplete property rights and market failure, we can identify several justifications for a public ownership interest in the ecological integrity of a natural resource."¹⁴⁹ This position relies on many of the factors discussed earlier that focus on the vulnerability of natural systems and how a degradation of ecological integrity affects each and all.¹⁵⁰

Finally, can a landowner accrue an economic benefit by leaving land in its natural state? And can the importance of ecology be recognized in a takings claim? In 1972, the Wisconsin Supreme Court did exactly that in *Just v. Marinette County*.¹⁵¹ Beginning in 1961, the landowners bought thirty-six acres of land along a lakefront in Marinette County, which they added to over the years.¹⁵² In 1967, the County adopted a shoreline-zoning ordinance to protect navigable

¹⁴⁶ LEOPOLD, *supra* note 132, at 210.

¹⁴⁷ *Id.* at 214.

¹⁴⁸ David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311, 335 (1988).

¹⁴⁹ Alison Rieser, *Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory*, 15 HARV. ENVTL. L. REV. 393, 418 (1991).

¹⁵⁰ *Id.* at 418-21.

¹⁵¹ *Just v. Marinette Cnty.*, 201 N.W.2d 761 (Wis. 1972).

¹⁵² *Id.* at 766.

waters that prohibited the filling of wetlands without a conditional use permit.¹⁵³ The landowners proceeded to fill a portion of the wetlands on their property without applying for the permit.¹⁵⁴ They were charged with violating the ordinance, and they subsequently filed a claim of taking without compensation.¹⁵⁵

What makes this case unique was not so much that the court recognized the ecological role of wetlands but that a theory of property based on the natural character of land was put forward. In part, the court stated, “[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as [to] use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.”¹⁵⁶ The court, in reconciling its position with general takings law, concluded that there would be no loss of economic value to the owner by leaving land in its natural condition:

The Just’s argue their property has been severely depreciated in value. But this depreciation of value is not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.¹⁵⁷

After *Just* we could say that the door has been opened, only by a small, but potentially monumental crack, to pierce the economic supremacy veil that surrounds our conventional acceptance of the economic perspective of loss and gain in a free market to one that prescribes ecological considerations. The challenge is to make such a modification compatible with our private property rights insofar as the takings doctrine is involved and to emphasize the individual’s welfare (in this case economic). But where does this leave the issue of protecting the public’s resource base?

¹⁵³ *Id.* at 764–65.

¹⁵⁴ *Id.* at 766.

¹⁵⁵ *Id.* at 766–67.

¹⁵⁶ *Id.* at 768.

¹⁵⁷ *Id.* at 771; Hunter, *supra* note 148, at 353–57 (discussing “post-*Just* cases” in the states of Florida, South Carolina, North Carolina, and especially New Hampshire that have relied on the Wisconsin experience to advance a “natural use theory”).

B. Protecting Ecological Values: The Public Trust Doctrine

For a number of years, legal scholars have been examining the public trust doctrine as an example of protecting public resources in light of their ecological value.¹⁵⁸ Briefly put, the public trust doctrine “is that the state holds the public lands of the state in trust for the public and that any attempt to sell these lands to private interests, or to otherwise divert them to private use, will be viewed with skepticism.”¹⁵⁹ The interest in the doctrine is that it “permits the states to avoid traditional takings inquiries when they are merely fulfilling their obligations as trustees of the public’s interest in private lands.”¹⁶⁰ This is seen as having great potential for incorporating a land ethic into property law. In advancing this argument, three cases are cited which suggest that there is a judicial inclination to at least recognize the importance of ecology as a public benefit.

The California Supreme Court in *Marks v. Whitney* proclaimed that

[t]here is a growing public recognition that one of the most important public uses of the tidelands . . . is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.¹⁶¹

A second California case, *National Audubon Society v. Superior Court* (known as the “Mono Lake” case) reiterated the ecological protection language of *Marks*.¹⁶² It continued that protecting the ecological integrity of the land was one of the purposes of the public

¹⁵⁸ See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); see also Hunter, *supra* note 148; Rieser, *supra* note 149, at 393;

¹⁵⁹ Donald W. Large, *This Land is Whose Land? Changing Concepts of Land As Property*, 1973 WIS. L. REV. 1039, 1067 (1973). A refinement of the definition is that the Public Trust Doctrine provides that title to tidal and navigable freshwaters, the lands beneath, as well as the living resources inhabiting these waters within a State is a special title. It is a title held by the State in trust for the benefit of the public, and establishes the right of the public to use and enjoy these trust waters, lands and resources for a wide variety of recognized public uses.

DAVID C. SLADE ET AL., *Executive Summary* to PUTTING THE PUBLIC TRUST DOCTRINE TO WORK, at xvi (David C. Slade ed., 1990) (prepared under contract with the Connecticut Department of Environmental Protection, Coastal Resources Management division).

¹⁶⁰ Hunter, *supra* note 147, at 367.

¹⁶¹ *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971).

¹⁶² *Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty.*, 658 P.2d 709 (Cal. 1983).

trust.¹⁶³ The Supreme Court at least recognized one kind of ecosystem in a 1988 ruling in *Phillips Petroleum Co. v. Mississippi & Soga Petroleum U.S., Inc* when it found that non-navigable and tidal waters “are connected to the sea.”¹⁶⁴ The Court continued, “[p]erhaps the lands at issue here differ in some ways from tidelands directly adjacent to the sea; nonetheless, they still share those ‘geographical, chemical and environmental’ qualities that make lands beneath the tidal waters unique.”¹⁶⁵

The relationship between the public trust doctrine and the takings issue is that no interests are affected through the state’s exercise of its public responsibilities. No takings occur since no private rights were ever conveyed. But the doctrine has established an important legitimacy of the concept of ecology as a valuable protection of the public interest.¹⁶⁶

C. Fashioning a New Doctrine: An Ecological Use Theory of Property

The achievements of our society have been unparalleled in the history of the world. The arts and humanities have allowed us to reach new levels of awareness and creativity. The sciences have opened up new avenues of exploration and understanding. Through our system of government, we strive to discover more responsible institutions for our social arrangements. There seems to be in practically everything we do the quest to continually make progress. Julian Huxley noted that “[t]he idea of progress is a mere anthropomorphism. Man happens to be the dominant type at the moment, but he might be replaced by the ant or the rat.”¹⁶⁷

One of man’s greatest capacities is the ability to engage in conceptual thought. With this ability, we are fully endowed to contemplate a condition of our own existence in view of our feelings,

¹⁶³ *Id.* at 719.

¹⁶⁴ *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 470 (1988).

¹⁶⁵ *Id.* at 481 (quoting *Kaiser Aetna v. United States*, 44 U.S. 164, 183 (1979) (Blackmun, J., dissenting)).

¹⁶⁶ In addition to the public trust doctrine, courts are also interpreting other common law doctrines that recognize public property rights in natural resources. See Lynda L. Butler, *Environmental Water Rights: An Evolving Concept of Public Property*, 9 VA. ENVTL. L.J. 323 (1990).

¹⁶⁷ Julian S. Huxley, *The Uniqueness of Man*, in *THE BOOK OF NATURALISTS* 395, 396 (William Beebe ed., 1944).

goals, and aspirations. We operationalize these contemplations by our living arrangements and through the creation of relationships, between ourselves and others, and between ourselves and our community. If we accept the premise that we exist as part of an interactive community, then man is simply one element of his surroundings. There can be no rational denial that nature exists and that man is within, not apart from nature.

In order to effectuate an existence of harmony and growth, we have invented social systems that, in their truest ideal, attempt to bring each and all of us to a realization of our full potential. Our American social system, in the broadest sense, allows us to engage in individual growth while also imposing constraints in order to avoid conditions that would be deleterious to both our individual welfare and to the society as a whole.

At the base of American liberty is the right to own private property. That right will, in all likelihood, never be changed. The right to use private property and the extent of that use has been determined by government regulation and either upheld or denied by court decisions. However, the judicial history, as written by the Supreme Court, has not made a decisive linkage between the value of private property and how it functions as part of a larger natural system. This failing, as ecological analysis has confirmed, will do ultimate damage to both the environment and man himself. It appears that what is needed is a new recognition of property rights, as these rights are embodied in both a conceptual and practical utilization of the traditional takings doctrine. We need to enunciate what I shall call an *ecological use theory of property*.

The precepts of this theory are based on four components: (1) The acceptance of the undisputed value of a land ethic as an acceptable social and political norm, (2) a recognition of an ecological imperative in the way we plan for the future use of our land, (3) an expansion of the noxious use principle that establishes legal parameters for private use that will create public harm, and (4) finally, the takings doctrine would be modified so that a property owner would be denied a right to destroy property of ecological integrity.

I have established a basis for the first two precepts through the previous discussion in Part VI, sections B and C, which will now allow us to turn to a discussion of operationalizing an ecological use theory of property as proposed by precepts 3 and 4 above.

The common law nuisance concept was promoted at a time when the idea of environmental impact was not a consideration. However, the purpose upon which it is based, “that no one should have a right to use his property to the injury of his fellows, could furnish the basis for a more ecologically sensitive takings theory.”¹⁶⁸ An explanation of the expansion of the nuisance concept was provided by Professor Sax when he originated the “spillover” theory of taking.¹⁶⁹ The key element of this proposal in determining if a particular governmental regulation is a legitimate exercise of the police power or a compensable taking is the extent to which the use (existing or proposed) has a “spillover or inextricable effect on other property.”¹⁷⁰ He describes three categories of spillover effects: First, the manner in which one uses land may result in a physical restriction of the uses that may be made of other lands—for example, coal mining, which could result in drainage on lower-lying land.¹⁷¹ Second, a spillover effect can occur in the use of common resources to which many landowners have an equal right—for example, the dumping of industrial effluent into a stream, which a downstream landowner depends on for water supply.¹⁷² Finally, the use of property that impacts the health or well-being of others—for example, the depositing of toxic materials that results in the death of wildlife or the use of property that imposes an obligation on the community, such as residential development in a remote area that would require the provision of police protection.¹⁷³

What Sax hopes for is that the courts would adapt “the nuisance concept to public rights in environmental quality.”¹⁷⁴ After all, he insists, “[t]here is no good reason why we should hesitate to adopt a theory of public rights to environmental quality, enforceable at law, nor is there any reason to think we cannot adjudicate the reasonable

¹⁶⁸ Michael B. Metzger, *Private Property and Environmental Sanity*, 5 *ECOLOGY L.Q.* 793, 813 (1976).

¹⁶⁹ Sax, *supra* note 35, at 161–62.

¹⁷⁰ *Id.* at 161.

¹⁷¹ *Id.*

¹⁷² *Id.* at 161–62.

¹⁷³ *Id.* at 162.

¹⁷⁴ JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* 160 (1971).

accommodations needed to protect against unnecessary threats to the environment.”¹⁷⁵

This brings us to the fourth precept: modifying the current takings doctrine to include an ecological use theory of property. To begin, Sax’s spillover theory is a consistent extension of the ecological principle of classifying land according to its capability to sustain certain uses based upon natural resources constrains. Thus, levels of impact on the natural resource base could be assigned to categories of land use. This could be done similar to how performance standards are applied to measuring land use impact.

Regarding the takings doctrine, the Court would need to recognize the value of such a procedure, much as the Wisconsin Supreme Court did in *Just*. This would necessitate that the Court would “refuse to recognize a property right on the part of any landowner to use his property in a manner for which it is inherently unsuited due to its physiographic nature.”¹⁷⁶ Moreover, by incorporating ecological considerations into the takings doctrine, a redefinition of both private and public rights relative to use would be based on the objective findings of the environmental sciences.

D. The Court’s Constitutional Calculus: A Hypothetical Preview

How would the Court determine if a taking had occurred under the ecological use theory as proposed? The Court, in reviewing the extent of a government regulation, would uphold the regulation “if it finds that the regulation merely prevented the land owner from destroying the existing environmental character of the land.”¹⁷⁷ Similarly, the Court would uphold the regulation if it finds “that the public was merely asserting its right to the ecological integrity of the land pursuant to expanded versions of the navigation servitude or public trust doctrine.”¹⁷⁸

The outcome is the same, whether the Court is concerned with limiting private rights or protecting the public interest. A two-part inquiry would be undertaken: first, is the regulation “reasonably related to the protection of ecologically important land?”; and second, “does the land in question have the environmental qualities protected

¹⁷⁵ *Id.* at 161.

¹⁷⁶ Metzger, *supra* note 168, at 817.

¹⁷⁷ Hunter, *supra* note 148, at 380.

¹⁷⁸ *Id.*

by the legislation?"¹⁷⁹ If both inquiries are answered by the Court affirmatively, then the regulation would be upheld.¹⁸⁰

A modification of the current takings doctrine, as proposed by an ecological use theory of property, would not promote collective ownership; rather, it would be construed as an extension of rights in the "bundle of rights" of private ownership. In this sense, it would be a higher right of private responsibility that will avoid the tyranny of the small decisions, which ultimately leads to the tragedy of the commons—in both cases negatively affecting us all.

CONCLUSION

From the early days of our nation's beginnings and the establishment of a unique form of democratic government, natural law and natural rights became the undisputed guides to insure liberty and to direct the aspirations of a new American society. Our constitutional heritage has served us well. It has preserved our liberties and it has been responsive to social changes in many ways. Yet, how far government can regulate the use of private property in protecting the public interest possesses inherent trouble for the sustenance of our society if the Supreme Court's current takings doctrine is not changed.

We live in a different age than our founders. And we must face the knowledge that the rights of man must be more profoundly integrated with the rights of nature. If man is truly a part of nature, we must fully recognize that when we infringe on nature's balance we also infringe on ourselves and our individual property rights. That is the inevitable reality.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

