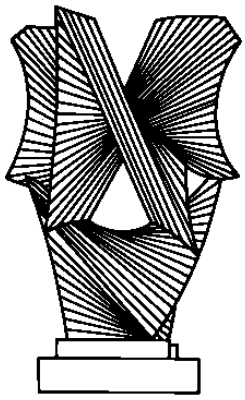
2001

In and Out of Public Solution: The Hidden Perils of Property Transfer

Richard A. Epstein

CHICAGO

JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 129
(2D SERIES)



In and Out of Public Solution: The Hidden Perils of Property Transfer

Richard A. Epstein

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

In and Out of Public Solution:
The Hidden Perils of Property Transfer

by
Richard A. Epstein*

I. Pervasive Factions

One obvious virtue of the United States Constitution, at least in its original conception, is its clear and articulated vision of the proper role of government. Although the drafters of the Constitution had not read Buchanan and Tullock's *The Calculus of Consent*,[1] they were fully cognizant of the dangers that factions posed to the operation of the political system. Madison defined faction to cover "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion or interest, adverse to the rights of the citizens, or to the permanent and aggregate interests of the community."[2]

This definition, in concise yet artful language reveals the massive challenge posed to any political order that is intent on combating these dangers. Madison rightly concluded that factions could constitute either a majority or minority of the population, such that they continue to operate no matter what the alignment of forces within the political community. In more operational terms, Madison's definition implies that faction arises whenever any group will maximize its own position by adopting a plan of action at cross purposes with the larger society of which it is a part.

Once he states the problem, however, Madison fails to advance any cure equal to its pervasive magnitude, relying somewhat lamely on the extended republic to eliminate the pettiness and parochialism of local politics. In large measure, he takes that position because the original Constitution relied largely on structural protections (separation of powers, checks and balances, federalism) to counter the risks of faction. A better approach to counter the risk of faction, however, lies in the creation and protection of property rights, of which the only hint in the unamended Constitution is found in the contracts clause.[3] Only the

---

* James Parker Hall Distinguished Service Professor of Law, The University of Chicago. My thanks to the participants of the Work-in-Progress Workshop at the University of Chicago for helpful comments, and to Robert Alt for his research assistance.

[1] James Buchanan & Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (1962).

[2] James Madison, The Federalist No 10, at 54 (James Madison) at 54 (Edward M. Earle, ed. 1937)

[3] No state shall . . . pass any . . . law impairing the obligation of contracts. U.S. Const. Art. I., § 10. Madison took a strong view that this clause operated as a bulwark against the abuse of private rights. "The sober people of America are weary of the fluctuating policy which has

adoption of the Bill of Rights, binding on the federal government, and of the Reconstruction Amendments, binding on the states, used explicit constitutional guarantees to protect private property against political expropriation. Thus the Fifth Amendment guarantee, "nor shall private property be taken for public use, without just compensation" and the due process guarantee of the Fourteenth Amendment no state shall "deprive any person of life, liberty and property, without due process of law." The creation of strong property rights limits the options available to government and thus the potential scope of factions. Property rights are thus good not only for the incentives that they give to individuals to develop the resources under their command: only those who sow should reap is an agricultural metaphor on the internalization of gain that does not lose it luster in an Internet economy. But it simultaneously limits the range of political action and thus the range of political intrigue. As ever the task is one of social improvement, not of social perfection. Constitutional guarantees of property rights do not negate use of legislative power, but only strip away at its excesses. The acid test is whether these property-based guarantees improve the ratio of well-designed legislative actions to misguided ones.

Toward that end, these guarantees first prohibit egregious forms of public misconduct that might prove politically unsaleable in any event. These include, most notably, the outright confiscation of land by government officials and the total invalidation of private debt by government decree. The imposition of protections confined to these extreme cases only invite the substitution of more subtle forms of political action that achieve large portions of the factional enterprise while insulating legislators and regulators from any constitutional check. A property owner may be left in possession of his land, but required to grant an easement over the property to another person or group in order to build an ordinary home;[4] or he may be subject to novel limitations on uses that disturb habitat for endangered species. The debtor may be required to pay the debt, but allowed an extension of time in which to pay off the obligation.[5] The task of constitutional regulation is not systematic unless some effort is made to control the close substitutes to which a crafty legislature may turn if the direct path to property confiscation or debt repudiation is blocked.

---

directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases involving personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more-industrious and less-informed part of the community." The Federalist No. 44, (James Madison), supra note 2, at 291. For my views on that subject, see Richard A. Epstein, "Toward a Revitalization of the Contract Clause," 51 *U. Chi. L. Rev*. 703 (1984).

[4] See *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (striking down ordinance that required the surrender of lateral easement across land in exchange for the right to build ordinary beach front home).

[5] On mortgage moratoria, see *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

The problem here is a familiar one, for often the shoe is on the other foot. Many state prohibitions on individual conduct make sense. Yet the individuals who chafe under these restrictions will resort to clever stratagems to defeat sensible systems of regulation. The early law of torts started with prohibitions against the direct use of force. It has always been illegal to kill a person by beating them with a club. Yet both Roman and common law found it necessary to amend the basic prohibition on killing to cover those close substitutes that fell, as it was called, within the "equity" of the statute. In functional terms, anyone who were barred from killing with sticks, knives and guns had to be barred as well from, setting traps and poisoning their victims.[6] A similar quandary is found in the law of patents, which of course deals with the creation and protection of intellectual property rights. The patent application covers at least the invention properly described within the patent. But the so-called doctrine of equivalents was developed to protect patent holders against erosion from a wide range of small, easily engineered, modifications of the basic design that would resourceful new entrants to evade the reach of the patent.[7]

In both these instances, the critical question is what sort of substitute counts as "close." Let the substitutes be imperfect and far removed, and the cost of preventing abuse cuts too deeply into legitimate transactions. Let the close substitutes be defined too narrowly and resourceful individuals can camp out at their edges. A priori, it is never quite clear how close the legal system can inch toward the ideal margin. The modern legal realist does not think that any coherent rules underlie the articulation of proximate cause rules once we move beyond the clear case of trespasses,[8] a conclusion with which I disagree.[9]

What is true of private individuals facing state regulation is equally true of governments facing constitutional restraint. Some legislation does improve the state of the world, measured against a baseline that looks to either the state of nature (and the war of all against all) or even to the distribution of rights as articulated and defined, not by nature, but by common law courts that follow the natural law theories of John Locke. It is therefore useful to begin by showing

---

[6] See, e.g., the explication of the Lex Aquilia (Justinian's Digest, IX, 2), found in F.H. Lawson, *Negligence in the Civil Law* (1950). For an argument about how the same techniques carry over to constitutional interpretation, see Richard A. Epstein, "A Common Lawyer Looks at Constitutional Interpretation," 72 *Bost. U. L. Rev.* 699 (1992).

[7] For the classical exposition of the doctrine of equivalents, see *Graver Tank & Mfg. Co., v. Linde Air Products Co.*, 339 U.S. 605 (1950): "To temper unsparing logic and prevent an infringer from stealing the benefit of the invention," a patentee may invoke the doctrine of equivalents against the producer of a device "if it performs substantially the same function in substantially the same way to obtain the same result." For an update, see *Warner-Jenkinson Co., Inc. v. Hilton Davis Chemical Co.*, 520 U.S. 17 (1997).

[8] See, e.g., Wex Malone, "Cause in Fact," 9 *Stan. L. Rev.* 60 (1956).

[9] See Richard A. Epstein, *Torts* § 10.11 (1999).

how a well-ordered state could use legislation to improve overall social welfare, and then to indicate when that mission is likely to founder.

In dealing with these issues, we have to consider two separate types of property regimes, each with its own structural weakness. Crudely speaking, we can divide property into two classes. Private property owned and held by one or more individuals for his (or their) exclusive benefit and use. Public property is held by the government for the benefit of the public it both governs and serves: the government entity could be a town, a state, or the national government, each with its own special constituency. In both of these settings, government can introduce legal rules to alter the underlying patterns of use, either individual or collective. The most obvious target for government use and regulation are public lands, such as highways and parks. It is easy for the state to open up some roads to general use, or to close them down; to allow for camping, while precluding hunting and fishing. Assets in the public domain also include intellectual property once the protection of the patent and copyright laws have run out. To understand the difficulties in controlling faction, it is useful to examine how government acquires and regulates both private and public property. It is also critical to pay special attention to the legal mechanisms used to secure the transition of property from private to public hands, or the reverse.

II. State Regulation of Private Property

In analyzing the role of private property, I shall take an unabashed consequentialist attitude, which asks whether government action or intervention improves the overall level of social utility by combating factional behavior. Stating the proposition in this form, however, raises one of the thorniest problems of property law, for societies, as complex aggregates of individuals , do not have "utility" as such. Utility is a measurement that can be attached solely to the well-being of human (or perhaps other sentient) beings. The only safe way to advance social welfare is by adopting government projects that advance the overall position of each group member, where utility is determined by his own estimation of the situation, and not by the estimation of some outsider.

But what of the distribution of the gains through collective social action? Two variations on the basic theme come quickly to mind. In the first, the government uses coercion to produce all winners and no losers in settings where private transactions could not achieve the same outcome. The intellectual case for consequentialism rests on one simple proposition: no one could object *in principle* to using force to obtain that new state of affairs even if the government practice did violate some libertarian norm of autonomy or property. One manifestation of this proposition relates to basic social contract theory that improves upon the state of nature. The legal regime requires everyone to surrender some liberty of action but imposes like restrictions on the actions of others. All persons value the increased (bodily) security more than the loss of initial liberty. If their initial

positions are identical, then no cash compensation is required, which now becomes the source of administrative waste. Properly executed, this system moves to a higher state of utility by overcoming the full panoply of holdout and bargaining problems that frequently thwart voluntary exchanges. The conceptual problems set in when different individuals receive differential gains, such that while all are better off than before, some are more so than others. In these nonprorata situations, the hard question asks whether it is appropriate to seek to equalize the gains from the government action, or better to simply let matters lie?[10]

The second situation arises when government action in and of itself generates an outcome with some winners and some losers. Now the soil is ripe for factional discord. For example, a given plot of land is taken from one person for a highway that operates for the benefit of all. Although the state action produces many winners, it still leaves one loser—the owner of the taken parcel—even if he shares in the benefits the road provides. Converting a "most win/one loses" into an "all/win" situation ideally requires a side-payment from general revenues. Those called upon to pay are better off with access to the public improvement less their fractional tax burden. The individual whose property is taken is better off with the compensation received for the loss of the property, plus his pro rata share of the gain from access to the improvement in question. The key point is that side payments are meant to insure that the overall gains are now evenly distributed throughout the group. Ideally, we seek a program of government exactions and private payments that results in some level of lockstep improvement for all persons involved in the system. The execution of program offers an effective antidote to the risks of faction. No one will propose a program that has overall negative consequences, because the putative winners would not pay the exactions needed to leave the losers at least indifferent to the adoption of the new project.

In analyzing these issues, I have long advocated looking at the world as containing two pies. The inner pie contains the rights that all individuals have to their liberty and property in a world in which the state imposes no collective exactions to preserve entitlements. The larger circle arises when taxation and regulation, imposed at some cost, enables government to help prevent private incursions by one citizen on his neighbor. Ideally all uses of government force should try, within the limits of the possible, to expand each piece of the pie without altering the relative share from the prior distribution. That condition is imposed in order to supply a focal point that limits the potential scope of faction. The prospect of a nonprorata division of gain could invite factional competition over surplus sufficient to dissipate the surplus created by government action.

---

[10] For my longish discussion of this issue, see Richard A. Epstein, *Bargaining with the State* (1993), which examines the distribution of gains from projects that government ought to undertake.

III. Obstacles to a Coherent Takings Law

The major challenge to this system stems from the high administrative costs needed to make it work. In the worst scenario, the administrative costs of arrangement forced exchanges exceed the potential gains. In those circumstances any effort to achieve a stable distribution of gains makes it unwise to undertake the project in the first place. Yet ignoring the compensation requirement has the unfortunate effect of inviting government initiatives that do not meet even the hypothetical compensation requirement. The hard task therefore is to fashion rules of eminent domain that work their way between the horns of this dilemma. I am sufficiently skeptical about the practical success of the constitutional program of forced exchanges to favor a sharp curtailment of the eminent domain process even when full compensation is paid. A complete analysis of the problem identifies three potential sources of government abuse. The first concerns occasions on which state coercion is exercised. The second concerns the level of compensation paid for the loss of a private right. The third, and novel concern, examines the use of the taking power that removes the property holder from the community altogether. I take these up in order.

A. The uses and dangers of government coercion

The standard constitutional model allows government to proceed in two separate ways in dealing with its citizens. First, it may enter into the voluntary market whereby it purchases the inputs it needs from various suppliers by contract. If the government needs to acquire land for new construction, or to buy or lease existing facilities, it may do so by entering the voluntary market like anyone else. Indeed, most of the specific assets needed for government operations are acquired in just this fashion, for usually it is easier and cheaper to buy property than to unleash the coercive power of the state. Eminent domain proceedings take time; litigation is costly, even for government. Why fight a legal war if a voluntary transaction reaches the appropriate outcome more quickly and cheaply?

Frequently, however, voluntary markets fail. A highway cuts through the land of multiple landowners, any one of whom could block its completion. Here the coercive power of eminent domain meets the holdout problem that would allow a single landowner to stop the transcontinental railroad. Just this situation militates against abolishing the eminent domain power altogether. Given this objective of the Takings Clause, a proper compensation formula could not award the landowner the holdout value derivable from the proposed railroad use: why then have the clause at all?

Analytically, it is helpful to distinguish between two components of the increments beyond market value: subjective or unique values to this landowner, and holdout value. In principle, all subjective values from current use should be

compensable in order to improve the odds that the use of government coercion will only result in win/win treatment.[11] In contrast, the proper response to the holdout values is far more problematic. The mere implementation of a takings program has as its raison d'être the elimination of the holdout position. It follows therefore that no sensible system of takings law could allocate all the surplus from condemnation to the private owner. It hardly follows, however, that none of it should be so allocated after all subjective and nonmarket values are taken into account. But the effort to figure out how much of that surplus should be so allocated requires some judicial determination of what that surplus is—no mean feat when multiple plots of land must be assembled to complete a single project. On balance therefore a respectable case supports the conclusion that all surplus over highest subjective or use value goes to the government.

Once those subjective values are ignored, then institutionally, government behavior will take advantage of the background legal rules. The eminent domain power thus allows the state to push hard so that the landowner will take a price which is greater than he would have gotten through condemnation (net of expenses) but lower than he would have taken in any voluntary exchange. The risk of faction remains evident. Yet the law offers no obvious doctrinal protection that allows landowners to push back against these government threats.

At this point, it is useful to identify a second possible source of government abuse in dealing with voluntary transactions: coercion that combines the implicit threat of condemnation with breach of existing obligations to the targeted landowner. Once again the same analytical framework applies to both public and private forms of coercion. As a general matter of contract law, the opportunities for coercion are far greater when two parties are linked together in some ongoing relationship than when they deal as strangers. To be sure, naked coercion, such as guns, could be used to obtain promises, property, or both, in either type of setting. But one stratagem, which cannot be invoked in stranger cases, is available in the context of ongoing relationships: the calculated refusal to perform obligations that have already been undertaken. The point has been well understood since Roman times in connection with a doctrine known, then as now, as duress of goods.[12]

Let us suppose that I leave my cloths to be cleaned with the tailor for an agreed upon price of $10. It is also understood that the value to me of getting back the clean garments on time is $100 because of some important social

---

[11] For discussion, see infra at section C, pp. 15–18.

[12] For one class account, see John Dawson, "Economic Duress—An Essay in Perspective," 45 *Mich. L. Rev.* 253-290 (1947); for my views, see Richard A. Epstein, "Unconscionability: A Critical Reappraisal," 18 *J. Law & Econ.* 293 (1975). See also, Benjamin Klein, Robert G. Crawford, and Armen Alchian, "Vertical Integration, Appropriable Rents, and the Competitive Contracting Process," 21 *J. Law & Econ.* 297 (1978).

engagement. What should I do if the tailor refuses to return the clean garments unless I pay a $50 charge (perhaps dressed up, falsely, as a claim for additional unanticipated expenses). If the tailor had demanded that $50 up-front, I could have taken my business elsewhere. But now that he possesses the goods, a competitive situation has been transformed into a monopoly holdout problem, where my humble tailor holds all the cards. Given the value of the garments, there is little if anything that I could do to persuade him to accept less than the inflated charges since he can simply hold on, and in the end resell the garments which are worth more than the $50 claimed.

If this scenario is correct, however, then why do we not see it played out all the time? One reason is that the law offers a remedy so that the extra money could be paid over and then recovered in suit, no matter what disclaimers have been provided. But in most cases the surer protection comes from social context. The tailor has multiple customers and depends on repeat business. Pull a stunt like this a single time, and those continuing relations will vanish like smoke into thin air. The tailor knows this risk, so that this ploy will be tried, if at all, sparingly, and often in disguise. But once again the amounts in question are usually too small to justify the effort necessary to pull of a scheme of this sort.

The ability to use this form of duress, then, depends on (1) the negative reputational fallout to third parties, (2), the potential gains from the maneuver, (3) the potential for retaliation by other parties similarly situated with the target, (4) and the ability of potential targets to obtain relief through the legal system. In repeat commercial settings, factors (1) and (3) militate against the practice, and they are supported in large transactions by the legal system.[13] The risks of these holdout games are, moreover, far greater in contexts without repeat dealing and the reputational constraints that come from dealing with multiple customers. It is not surprising therefore that holdout games of this sort can be played, for example, at some peril by small landowners who own that single plot of land necessary to complete the site for a large office building.[14] (All this does not guarantee that the strategy will work: go one step too far and the entire project can be canceled or relocated, at which point the gains from holding out plummet to zero, while the considerable costs of negotiation still remain.)

The great danger of government coercion comes precisely because the threat of breach is not effectively constrained by market forces. In this regard, those of us with eastern and city backgrounds do not understand well the drama that is often played out on western lands, but as a regular reader of email missives from

---

[13] *Austin Instrument, Inc. v. Loral Corp*., 272 N.E.2d 533 (N.Y. 1971) (holdup on delivery on components needed to fulfill navy procurement contract).

[14] For a discussion of the risks, see Lloyd Cohen, "Holdouts and Freeriders," 20 *J. Legal Stud.* 351 (1991).

the American Land Rights Network,[15] I have now gotten quite a different view of the overall situation. Very little is gleaned from the title "American Land Rights Network," because land is not part of any network. But the title of its sister organization, "The National Inholders Associations," has more descriptive bite. An inholding is privately-held land surrounded by government lands. Access to private inholdings has to take place over government lands. In the analogous private context, the courts will sometimes create easements by implication or necessity for the benefit of the landlocked parcel.[16] But in virtually voluntary transactions, the inholders can protect themselves from blockade by acquiring explicit rights of way over the surrounding property.

Nonetheless many complications lurk when good will toward inholders does not lubricate these transactions. The protection of rights of way and other forms of easements (such as those needed to install and maintain phone lines or electrical wires) only looks easy from a distance. It becomes far more complex when observed up close. Defining and enforcing the content of these rights is never easy, even for parties who act in good faith. What looks like an easement ends up being an incomplete treaty between two warring tribes. Suppose that the easement calls for the use of some dirt road. Exactly what kind of vehicles can be brought over the road? If the inholder needs to haul in heavy equipment to construct a house on the inholding, does that fall within or beyond the scope of the easement? If the inholder occasionally deviates from the easement, does that allow the government to shut it down? To collect damages? If the inholder needs to repair a wash in the road from a summer storm, to cut down weeds that overgrown the path, or to remove snow and ice during winter, is he allowed to do so? Or must he request that the government take action, and sue if they do not? If allowed to take action, at what time and under what government supervision? What should be done if the same easement services several different inholders who need to coordinate their activities? If the government needs to take out one road for one of its own improvements, can it require the inholder to take a more circuitous and bumpy route in exchange?

These examples can be multiplied ad infinitum, but the analytics of each of these examples boils down to one critical issue. The inholder is in the position of the customer without the reputational protection; the government is in the position of the tailor without the reputational constraints. It may be quite impossible for the government to condemn out the easement (without having to pay for the loss of value of the inholding), but it is certainly possible to make life miserable for the inholder in the day-to-day use of the easement. Squabbles of each and every one of these and other issues can take place on a daily basis, where the government takes the position that any violation of its conditions

---

[15] E-mail: alra@pacifer.com; http://www.landrights.org.

[16] Again, the basic problem is apparent even when the surrounding land is owned by another private party. See, e.g., *Othen v. Rosier*, 148 Tex. 485, 226 S.W.2d 622 (1950).

makes the inholder into a trespasser, subject to damage actions and injunctions. Here the government has little reason to worry about reputational concerns—and indeed its tough-nosed attitude could win the favor of many environmentalists who favor the expansion of private inholdings. The stakes could be quite large, and the ability to retaliate sharply limited since the government typically does not hold easements over the private inholdings in question.

The upshot is that the government can use low-level forms of coercion—that is low-level continuous breach of the express and implied conditions associated with the right of way—to wear down the resistance of the individual inholder. Once that softening-up takes place, then it becomes possible to acquire the land in a "voluntary" transaction, of course, for a small fraction of the value that it would have commanded if the rights of way and other easements had been scrupulously respected. Quite simply, the inholdings become the focal point of a guerrilla war between inholders and government, where the latter holds most of the high cards.

At this point, the line between voluntary and coercive transactions becomes murky to say the least. Litigation, like drama, works best when there is one defining incident (an accident, a bankruptcy), but far less well with a long and sinuous set of low-level events, each of which lends itself to conflicting interpretations. To give but one example, it may well be possible to prevent a township from downzoning land that it promptly condemns based on its reduced value.[17] The one discrete act becomes a sensible focal point for litigation. Yet just as guerrilla wars rarely have decisive confrontations, so too it is hard to bring these tug-of-wars between government and inholders to closure given the stream of continuous incursions by both sides. In these cases, therefore, the precarious nature of the inholders rights leads to a major inroad (no pun intended) to the constitutional protections afforded to private property, for which I see no obvious constitutional, legislative or judicial fix. The private, voluntary sales reflect the reduced values of the current holdings and the bleak prospects in a condemnation proceeding.

---

[17] See, e.g, *Riggs v. Township of Long Beach*, 109 N.J. 601, 538 A.2d 808 (1988). the defendant Township, which had long been desirous of purchasing Rigg's land, downzoned the property by increasing the minimum lot size for building from 5,000 square feet to 10,000 square feet. It purported to justify this amendment by the need to preserve open space, control population density, and prevent urban sprawl. Even though the New Jersey Court gave that zoning ordinance a presumption of validity, it looked through the township's ostensible police power objectives and struck down the ordinance saying: "The purpose of the zoning amendment was not to fulfill the master plan, but to enable the municipality to pay the property owner less than fair market value under the preexisting zoning ordinance." Id at 615, 538 A.2d at 815. That approach is in principle available in the inholding case, but far harder to achieve because of the absence of a precipitating event like the downzoning in *Riggs*.

This gap in the enforcement mechanism translates itself into a degradation of constitutional rights.[18] Any systematic effort to contain the abuse cuts too deeply into the system of ordinary ownership. First, even a prohibition against forced exchanges would not respond to the difficulties involved here. Nor would any prohibition against government purchases work either, for the close substitutes still remains: the pressure can be placed on the inholder until the land is sold to a third party that shares the government's vision of how the inholding should be used. And to prevent the sale of private inholdings categorically will insure that with time all these interests will be abandoned. So the problem remains an open wound at the boundary line between public and private property, one that increases the likelihood that government coercion will produce the factional gain that Madison feared.

B. Calculating just compensation

The second source of concern with the current takings model is that the just compensation owed in takings case is not correctly computed. Here the point matters not only for litigated cases, but also for cases settled in the shadow of the law. At this point, however, the problem is not one of the asymmetric risk of confiscation by littles. Rather, it is in the choice of improper legal standards by which the just compensation is determined.

The nub of the difficulty comes in an unexpected place, the ostensibly exacting requirement, first announced in *Monongahela Navigation Co. v. United States*,[19] in which lavish praise for the takings clause is followed by its narrow interpretation. On the former issue, the Court makes clear that one key uses of the clause is that

> it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.[20]

---

[18] Note, too, in principle it is possible for the exploitation to run in the opposite direction, whereby landowners make successive low-level incursions onto public lands. But to that point, there are several responses. The first, and most obvious, is that two wrongs do not make a right. Individuals who violate these laws should be prosecuted for their offenses. Yet even here, it is not clear that the inholders are the violators, and it is clear that the government is in a far better position to prosecute violations of public lands against and ordinary citizen, than the citizen is in suing the government under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. or its state law counterpart, which contains substantial protection for government actions including the exercise of discretionary functions, applicable "whether or not the discretion be abused." 28 U.S.C. § 2680(a).

[19] *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893)

[20] Id. at 325-326.

But the judicial follow-through falls short:

> There can, in view of the combination of those two words [just compensation], be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this just compensation, it will be noticed, is for the property, and not to the owner.[21]

As explicated, the object of compensation is "to put the owner of condemned property 'in as good a position pecuniarily as if his property had not been taken."[22] In principle, that measure might allow (depending on the reading of "pecuniarily") compensation for subjective values associated with the property—but these are difficult to measure. As a corrective against possible abuse, hornbook law provides that "the owner is entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking."[23] As such it does not provide any scheduled bonus value to condemnees for any subjective use value.[24] It does, however, allow for the possibility of compensation for future use values, which the landowner is under a burden to establish. [25]

These legal standards are symptomatic of a larger ill. Monongahela's use of the phrase "property taken" narrows compensation in light of what follows, that the compensation is only for the property taken, not for the loss of the owner consequent on that taking. In its restrictive formulation, the compensation rule does not make sufficient accommodation for the collateral or consequential losses that government action imposes on private landowners. To see why, compare that formula with the objective for compensation identified by Blackstone in explaining how the state takes private land for public use: "Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent of the injury thereby sustained."[26]

Monongahela ignores this element of subjective value, i.e. the amount above market value attached to the subject property. There is a good reason why "for sale" signs do not sprout from every front lawn in the United States. In a well-ordered society most individuals are content with their personal living or business situations. They do not put their property up for sale because they do not think that there is any other person out there who is likely to value it for a

---

[21] Id. at 326; see also, *United States v. Miller*, 317 U.S. 369, 373 (1943).

[22] *Olson v. United States*, 292 U.S. 246, 255 (1934)

[23] *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979), quoting *United States v. Miller*, 317 U.S. 369, 374 (1943).

[24] See Robert C. Ellickson, "Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls," 40 *U. Chi. L. Rev*. 681, 736-737 (1973).

[25] See Jan G. Laitos, *The Law of Property Rights Protection: Limitations on Government Powers*, § 17.03[C], noting that both present and future uses can be considered, with the presumption set so that the owner must establish the value of some future use, which might involve the removal of some current valid land use regulation.

[26] 1. W. Blackstone, *Commentaries on the Laws of England* 135 (1765).

sum greater than they do. In the normal case, use value is greater than exchange value, so the property is kept off the market.[27] The use of the market value standard therefore results in a situation in which the party who owns the property, even if he shares in the social gain generated by the project, is still left worse off than his peers. He is forced to sacrifice the subjective values associated with his property, values which almost by definition he could not recreate through his next best use of the funds received, even if he could negotiate a second set of transaction costs. In contrast, the Blackstone definition seems to include loss of subjective value as part of "the injury thereby sustained."

The current law, however, follows *Monongahela.* In *Kimball Laundry v. United States*,[28] Justice Frankfurter offered this rationale:

> The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, however, have a general demand which gives them a value transferable from one owner to another. As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use. In view, however, of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship."[29]

Frankfurter thus takes the view that the questions of valuation are always more difficult than the dangers from inappropriate government behaviors. His position stems from his clear pro-government bias that led to his constitutional blessing to all New Deal legislation. His position further presupposes that in all cases the subjective value depends on some peculiar and obscure landowner preference. But in many cases the subjective value attaches to a well-documented idiosyncratic use that cannot be replicated by others because they lack, for example, a special license or connection to engage in the task. At this point the unwillingness to sell provides in itself powerful evidence that current use value

---

[27] Remember that all prospective buyers do have the option of buying from those individuals who do wish to sell, that is, from the small segment which finds use value lower than sale value. As sale prices move upward, the fraction that cross this line may well increase, just as the number of buyers may be similarly reduced until the market comes back into equilibrium. In this connection it is useful to note that it is often regarded as somewhat bizarre behavior to knock on someone's door and to offer him then and there a price far in excess of market value, although that does happen in some overheated markets.

[28] *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) (per Frankfurter, J.)

[29] Id. at 5.

exceeds transferable value, often in ways that can be objectively measured. Yet the bias in favor of government action, all in the name of the duties of common citizenship, could lead to erroneous but easily monitored decisions. Note that Kimball Laundry itself involved the temporary condemnation of the owner's laundry facilities that resulted in the dissipation of his good will, which was held not compensable, because not transferred to, and hence taken by, the United States.

Similar shortfalls can be detected with consequential damages and collateral losses.[30] The individual who is forced to surrender property has to enter into an involuntary transaction with the government, one that requires him to expend resources to contest the condemnation (or valuation) itself; to move his personal belongings off his property, and to reestablish his personal relationships or business good will after the move has taken place. Thus in one case, state safety regulations prohibited the physical transfer of prescription drugs from one location to another unless they were reinspected for purity. The required tests cost more than the drugs themselves were worth.[31] Blackstone's test requires full compensation for the losses sustained when the drugs were rendered worthless. But the California State Supreme Court denied compensation under the Monongahela formulation because the government had not "taken" the drugs, but had only "destroyed" their value by regulation. The cleavage between what the state has gained and the individual has lost is thus enormous. In the usual private law case, the innocent tort plaintiff always recovers his loss even if it is greater than the cost to the wrongdoer. But the takings law, which supposedly seeks to put the plaintiff back in the position that he enjoyed before the taking, does not.

The same difficulties attach to the loss of locational good will generally, as in *Kimball Laundry*. The government wants the land, but it cannot use the good will, which the previous owner is "free" to take to the next location. But in some cases it is not possible reestablish the business at all; in other cases it will require additional expenditures of cash to inform customers of the change in location, and even then some fraction of them will decide to change businesses because of the added inconvenience of the new location.

A similar critique applies to the nebulous issue of "expectations". A tenant on a short term lease that has been renewed countless times in the past has the positive expectation (say, 0.95) that the lease will be renewed on attractive terms at the end of the next period, twelve months away. The potential surplus from this lease, given his site-specific investments could be substantial. No matter, the

---

[30] For my more extensive treatment of this subject, see Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 51-56 (1985).

[31] *Community Redevelopment Agency of Los Angeles v. Abrams*, 15 Cal. 3d 813, 543 P.2d 905, 126 Cal. Rptr. 473 (1975).

case law is clear that his renewal right only counts as a mere "expectation" for which no compensation is required when the government condemns the fee.[32] The expected value of the prospective relationship with the landlord was positive, precisely because the ongoing relationship itself had proved sturdy on multiple past occasions. The legal value attached to that relationship in condemnation proceedings is, however, rounded off to zero.

Unfortunately, by refusing to compensate all those losses that flow from government action, the takings ignores this fundamental precept: that the compensation in question should leave the owner indifferent between the property once possessed and the compensation tendered thereafter for its use. The inequitable treatment, of course, leads to profound allocative distortions: the lower prices stipulated by government lead to an excessive level of takings, which in turn increases the size of government relative to what it should be, and thereby alters for the worse the balance between public and private control. And these problems remain even if (as per our general formulation) the individual whose property has been taken shares in the public benefits generated by the improvement in question. Following Blackstone, level of compensation should be beefed up to cover subjective value and consequential damages except in those few cases where the problems of proof are genuinely daunting. But in light of the determined judicial resistance to that position, it is not likely that this reform will be achieved any time quickly.

C. Division of the surplus

The third question associated with governmental takings is more subtle perhaps, but of greater importance in some important institutional settings. One categorical proposal is that the government just ought to stay out of the takings business altogether: the danger of abuse is so great that we are in effect better off without a clear response to the holdout problem.[33] Constitutionally, that position has a faint echo in the public use provision of the takings clause which in effect delineates a class of takings (those for private use) for which the government power cannot be exercised at all. It is easy to see why everyone regards it as an abuse of power for the state to take land from A to convey it B, where both A and B are ordinary private parties. Unfortunately, even this strategy is routinely tolerated by the United States Supreme Court. In Hawaiian Housing Authority v. Midkiff[34] the Supreme Court sustained a scheme whereby the Hawaiian Housing Authority would purchase leasehold reversions from their owners and then, by prearrangement, resell them to the tenant in possession (and even here, there was some monkey-business in the valuation of the reversions). But before the state would engage in the condemnation it required the landowner to place the

[32] *United States v. Petty Motors*, 327 U.S. 372 (1946).

[33] See Ellen Frankel Paul, *Property Rights and Eminent Domain* (1987).

[34] 467 U.S. 229 (1984).

needed funds in escrow so that it could not be caught in a bind. The state thus took no business risk at all, but simply acted as a purchasing agent for the private holder of the property. It was not as though the land afterwards was devoted to public use. It did not go into public hands, and the landowner did not (as is the case with common carriers and many public establishments) allow the public to use it as it would. The property was as private in the hands of the new owners as it had been in the hands of the old ones.

The transaction represents a close substitute for the private taking that cries out for judicial nullification. Yet the Supreme Court upheld this transparent piece of derring-do on the ground that any "conceivable public use" would do, thus implying the low-scrutiny of the rational basis test to yet another constitutional provision. It then held that the oligopolistic structure of the land market justified the use of state power, even though most of Hawaiian lands are zoned to prevent any real estate development. Even if the land was not taken for a public use, the entire scheme was designed for some public purpose, albeit one that bears no relation to Madison's anti-factional program. It is doubtful, however, that the two particularistic features of this case (the holding of the reversion, and the large concentration of ownership in the Bishop Estate) count in any sense rigorous preconditions for the use of state power. Any political-charged action carries with it multiple consequences—some good, some bad—and it takes only a little imagination to point to one public consequence that could "conceivably" justify the use of legislative power. The broad use of the takings power certainly leads to a deviation from the social ideal to which forced exchanges should be addressed.

The larger question with regard to the public use requirement raises more profound difficulties because it arises with takings that meet any sensible definition of the public use test: the taking of lands for uses made available to everyone in the world. Here the problem is well illustrated by contrasting two different takings for public use. In the first, A owns a piece of land which is taken in its entirety for inclusion in the public park. In the second, B owns a piece of land, a strip of which is taken for use as a public highway that abuts his property. In both cases the state pays full and fair compensation for the land, taking into account subject value and collateral losses, just as Blackstone would have it. Under the current takings law, these two situations are treated alike: the state has met the full constitutional obligations in a world with forced exchanges.

Under the basic model set out above, the social and economic consequences of these two takings differ profoundly. In the highway case, there are no economic forebodings about the constitutional regime that is put into place. The owner gets both direct losses and shares in the social gains from the public project. Indeed, the increased value from the retained lands often proves far greater than the value of original plot (without road access). The owner who

surrenders the strip to the public free of charge is better off, so long as the state would commit itself to the extensive resources it takes to erect, maintain, and police a public road. It is for that reason that local communities often go into competition with each other to have state or national roads located near enough to them to secure favorable access, even if they would like, at least for residential properties in some urban settings, to have narrow buffer zone to insulate themselves from the noise and congestion associated with their operation.[35] We can therefore be confident that even in the best of circumstances some of the benefits of public roads will be competed away as parties vie to secure the optimal placement of these roads from their own local perspective. Once again, we see the risk of faction. Yet it seems that no manipulation of the compensation system could eliminate this source of social loss.

The second situation with the wholesale condemnation of land for public parks, however, carries with it much more dire consequences. The standard model of eminent domain indicates that the landowner receives two sources of benefit from the taking: the direct compensation for the land taken (which as noted, is usually calculated too low) and his pro rata share of the overall gains from the public project undertaken with the property so taken. But once state expropriation extends to the entire property of a given landowner, that second element of value is completely eliminated. All other individuals who remain in that community (or perhaps who enter thereafter) share pro rata in the gains. The party who loses his full holdings to the taking, however, loses both ways relative to his peers: inadequate compensation and no share of the social surplus.

It is for just this reason that the land acquisition battles that take place in the West are fought at such a pitched level. On the one side stand the conservationists who claim that large public appropriations should be directed to the acquisition of sensitive parcels of land (including those pesky inholdings) in order to preserve the natural condition of the land "forever." On the other side lie the beleaguered and outnumbered members of small farming and ranching communities who see in the appropriation of public moneys for land acquisition a deadly plot to destroy their lives and their livelihoods. The battle here is not dissimilar in form to those extensive urban renewal programs[36] that led to the

---

[35] Here the usual pattern is that the negative externalities from nearby highways decline quite rapidly with an increase in distance, while the positive externality of good access declines far more slowly. It is quite possible therefore that communities would seek to block the construction of roads that are quite close, but welcome them if located a mile away. Thus in Los Angeles, the Santa Monica and San Diego Freeways are both located near to but not in Beverly Hills.

[36] See, e.g., *Berman v. Parker*, 348 U.S. 26 (1954); *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981). For an account of the systematic failure that resulted in Washington D.C. from the urban renewal plan sustained in Berman, see James V. Delong, **XXX**, *The New Republic* (about five years ago). The actual consequences contrast sharply with Justice Douglas's optimistic rhetoric about government land use planning that led to the expansion of the public use requirement

wholesale destruction of neighborhoods in the name of urban renewal, most of which never quite took place. Right now, a parallel struggle is taking place over the question of the passage of the Conservation and Reinvestment Act (CARA),[37] which proposes to take some royalty revenues the Land and Water Conservation Fund and direct it toward the acquisition of public lands. As might be expected, the political battles over this appropriation legislation are fierce. Yet if the benign version of the eminent domain paradigm worked, then one should see little, if any, concentrated opposition to the proposed expansion. If the level of compensation made the condemnees indifferent between the lands that they held and the compensation that they received, then why would they spend huge private resources to ward off a set of takings whose consequences they truly dread? From the ground level, they have made the considered judgment that they are worse off by far from the takings with compensation, and the explanation lies, I think, in the three factors outlined above. Many of the voluntary purchases have been brought about by the constant tussles over rights of way and similar easements; the level of compensation offered is below the true costs of losing the land; and the public benefits, however defined, are not shared by the individuals who are forced out of the communities in which they live.

The consequences are quite sobering. Whatever the theoretical promise of the taking property only with compensation, that gain has been nullified in large measure by the troubled circumstances of its application. It is difficult to know how to fix the situation, although it seems clear that we should try to limit the incidence of forced exchanges to those holdout situations that justify its application. But here again, the question of what counts as a holdout or blockade is more difficult in practice that it is in theory, once we move away from the single foot of land that blocks the completion of a railroad between two towns. Does the typical inholder, for example, stand as a holdout against the government control of certain undeveloped lands? Surely if the goal is to keep public ownership of all contiguous property, each inholder counts a potential holdout. But if it is asked what gains the government obtains from acquisition, one would be hard pressed to find gains comparable to those of the completed railroad. The basic insight is that the takings power works best to weave the threads of infrastructure—highways, railroads, telephone easements, rivers and the like—and not for squarish plots of land used for other purposes. But what ratio and what set of uses determines what counts as thread and what as a square? It is hard question, for which there is no easily administrable answer. The upshot, however, is that all distortions cut in the same direction, so that in equilibrium there is too much public, and too little, private land.

[37] H.R. 701, S. 25. 106th Cong. (1999).

IV. The Regulation of Public Property

A. Concurrent Ownership as the Analogue to Public Property

The second half of the governance problem is every bit as intractable as the first, and perhaps more so. A well-ordered society does not have only private property. Rather, it will contain certain elements that are regarded as held in common by the public at large, so much so that these elements cannot be reduced to private ownership by either occupation or capture.[38] From the earliest times, the air and the sea have been regarded as part of the ius communis, which meant that it was open to all. In addition, the state routinely uses its eminent domain power or ordinary market transactions to acquire private property for use in roads and other forms of public works.

With that thumbnail sketch in place, it is possible to identify discordant rationales for treating certain resources as publicly owned. Certain things are treated as public property in the initial position in order to mount an effective social response to a holdout problem. In riparian systems, the privatization of public waters ends their use for transportation and destroys the aesthetic amenities of running river. The customary practice of keeping these waters open to all yields on average higher values than any decision to allow their partition under the rule of capture. The decision to treat these resources as part of the commons therefore represents a good effort to minimize the sum of the costs of exclusion and coordination. No one has exclusive ownership, but everyone has (a right of) access to the veins and arteries that link separate plots of (privately owned) land—or for that matter, water[39]—together. That same position requires some modification for highways, for unlike water, their location is not given in nature, but requires collective human choice. In contrast, when the road has to be created out of privately held lands, compensation (in cash or kind) is supplied to limit, and perhaps prevent, the arbitrary use of state power.

The second class of public property covers resources that are not part of some complex network arrangement. The lands in question may be operated, for example, as a public park. As noted earlier, that land may have been successfully owned in private hands, so that its public acquisition cannot be justified as part of a plan to complete some transportation or communication network. How should individual rights, if any, be assigned to property of this sort?

---

[38] For a discussion of the commons questions, see Richard A. Epstein, *Principles for a Free Society: Reconciling Individual Liberty with the Common Good* ch. 9 (1998). The historical rules are set out with clarity in Justinian's *Institutes*, Book II, Title I.

[39] See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (finding a taking where the United States demanded public access to a private marina as a condition for allowing access from the marina to public waters).

The first point to note is that this problem is not unique to property that is held in common in the public sphere. One common institution in the private law is that property may be held by multiple owners in common, with or without rights of survivorship. The practical difficulty arises because all of the tenants, taken together, do have exclusive rights to the property as against the rest of the world, but none of the tenants individually have exclusive rights against their cotenants. The problems of internal governance are at least as important as the right to exclude, which all the cotenants taken together hold as against the rest of the world.[40]

The institution of joint ownership usually works best between husband and wife because of the close parallelism of their objectives. But this body of private law does not respond well to nonprorata shifts in the patterns of use of the land which redistribute wealth between the parties. Thus when jointly owned land is leased to a single tenant, it is easy to divide the net rentals between the two cotenants, both of whom are out of possession. But matters become considerably more difficult when the two tenants no longer have prorata stakes in the property revenues. Thus a constant source of tension arises when one of two joint tenants takes sole possession of the property, which in general he is allow to do on a rent-free basis.[41] The party out-of-possession is thus relegated to the costly choice of seeking either partition or judicial sale. Likewise, the rules of joint tenancy have certain slack when one of two joint tenants in possession wishes to change the character of part of the premises, add improvements, or to lease part of them premises to someone who will.[42] Again the vast shifts of internal wealth undertaken by unilateral action are hard to cope with in any systematic fashion, even by a system that seeks in general to honor and enforce the respective shares of the two parties. Unavoidable redistributions among cotenants thus take place within the private sector, even when courts treat each cotenant as owning an aliquot portion of the whole. In order to respond to these difficulties, the law often provides for some general accounting to take place at the termination of the joint tenancy. The logic behind that decision is fairly straightforward. It is quite costly for courts to intervene with the small decisions in an ongoing relationship in which it is possible that the imbalance in one transaction is offset by the opposite imbalance in another. But once the relationship is terminated, the stakes become higher, and the prospects of reciprocal advantages diminish. At this point a once-and-for-all accounting may

---

[40] For a recent academic defense of the right to exclude as the central notion of property law, see Thomas Merrill, "Property and the Right to Exclude," 77 *Neb. L. Rev.* 730 (1998).

[41] See, e.g., *Spiller v. Mackereth*, 334 So.2d 859 (Ala. 1976), for a case that requires a complete ouster before the cotenant out of possession has a remedy short of partition against the party in possession.

[42] *Swartzbaugh v. Sampson*, 54 P.2d 73 (Cal. App. 1936) (sustaining the cutting down of walnut trees of leased portion of common premises).

help redress some interim imbalance (as when the improvements paid for by one are enjoyed by both), so that judicial interference becomes cost justified.

The legal position becomes only more attenuated when attention turns to public or common property. To the extent that private property analogies govern, public property should be treated as property held in common whereby the people of the locality, state, or nation, have the collective right to exclude the outsider, but share among themselves the rights in property as res communis. Using this approach would require a court to work out in the constitutional realm the nature of these shared access and use rights in ways that maximized the internal coherence and minimized the indefiniteness of the multiple ownership claims. The minimum condition for this venture is a rejection of the idea that individual members of the public have no access or use rights to public property at all. And in line with the joint tenancy, it would tend to focus judicial intervention to transitional situations when publicly held property is transferred to private hands.

Yet judicial thinking takes just the opposite view, chiefly by washing its hands of any supervision over public property. Justice Scalia penned a forceful but misguided statement of the basic proposition in *College Saving Bank v. Florida Prepaid Postsecondary Education Expense Board*:

> The hallmark of a protected property interest is the right to exclude others. That is 'one of the most essential sticks in the bundle of rights that are commonly characterized." That is why the right we all possess to the use of the public lands is not the 'property' right of anyone — hence the sardonic maxim, explaining what economists call the 'tragedy of the commons,' *res publica, res nullius* .[43]

The more accurate rendition of the point at hand should be *res publica, res communis.* Unfortunately genuine consequences attach to the inapt choice of Latin adjectives. The use of the term "nullius" implies that no one has any rights to anything. One unfortunate implication of this rule is that it would allow any person to take possession of the property in question, as with any other res nullius. The strict prohibition of such actions shows that the term res nullius is applied in an opportunistic fashion. More to the point, if public lands are (selectively) conceived as res nullius, then any alteration or elimination of the access rights of ordinary individuals may be done at will. So long as no legal rights are taken, then no compensation need be tendered. But let these rights be held in common, then their alteration could generate important consequences.

---

[43] *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 119 S. Ct. 2219, 2224 (1999).

B. *Res Nullius* versus *Res Communis*

How then do we decide which of these conceptions make sense for common property. Here we can take a leaf from the standard judicial methodology of determining what counts as private property under the takings clause. One possible approach is to allow the judges to determine what is meant by "private property" when they engage in interpretation of the takings clause. But that approach necessarily guts the clause by allowing the Supreme Court to deny the honorific title of property to whatever private interest it chooses not to protect. The only way to avoid this trap is to look outside the Constitution, typically to state law, so as to piggyback on definitions of property that the judicial chefs did not order up for the occasions.[44] In general the Supreme Court has been aware of the dangers of its excessive role, by taking the role of finder and not inventor of property rights:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlements to those benefits.[45]

These are not idle words. In a wide variety of contexts dealing with asserted claims to private property the Supreme Court will look to traditional bodies of state law, particularly to long-standing common law rules that do not present the prospect of legislative intrigue. To give but one example, in *Monsanto v. Ruckelshaus*,[46] the Court found that trade secrets were protectable property under the Takings Clause, adopting verbatim their definition in Section 757 of the Restatement of Torts.[47]

---

[44] For a discussion of this approach, see Thomas Merrill, *Constitutional Property* (mss.)

[45] *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (finding no property interest for renewal of one-year term contract).

[46] 467 U.S. 986, 1001 (1984).

[47] b. Definition of a trade secret. A trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know it. It may be a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device or a list of customers.

The topic of trade secrets was dropped from the Restatement (Second) of Torts. The newer definition is found in *Restatement Torts: Unfair Competition*, § 39: "A trade secret is an information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others." It seems clear that this definition was not meant to alter the earlier law, or to exclude from the coverage of trade secrets any of the items listed in comment *b* of *Restatement Torts* § 757.

What is striking is that this methodology is totally abandoned in working out the definitions of common property under the Constitution. Two types of cases illustrate the basic problem: water rights and public lands.

First, the common law of water rights has always involved a complex division of rights among various claimants to the water.[48] Riparians have rights of access from the riverbanks and limited rights to use the water in question. The public has the right to travel along navigable rivers. Different legal regimes govern the capture of fish that swim in the river and mussels, claims and other forms of sea life that burrow into the sand. Once these "usufructuary" rights are established by custom, individuals receive legal protection against those who would exclude them from the river or otherwise impair their rights. The fact that rights are held in common in complex ways has never precluded the recognition of private rights along the river. "For water is a moveable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein: . . . "[49] That said, the riparian system guaranteed all riparians rights of access to the river (just as landowners have rights of access to the roads). Yet a uniform line of Supreme Court decisions has held that the all-consuming navigation servitude allows the government to wipe out access rights without compensation.[50] The traditional versions of riparian rights give some relief against (unreasonable) interferences with the operation of established dams, but a long line of Supreme Court cases again holds that the heads of mills and power plants are not protected against government action even though they are protected against the like action of other riparians.[51]

The same attitude toward rights has been expressed in relationship with public lands. Thus in *Lyng v. Northwest Indian Cemetery Protective Ass'n,*[52] the Supreme Court gave its blessing to a decision of the United States Forest Service to build a road that cut through the sacred sites and burial grounds of three Indian Tribes (the Yurok, Karok, and Tolowa). The explanation was simple enough: "Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, <u>its</u> property.[53] The counterargument rests on the view that customary practices that

---

[48] For a convenient summary of the basic rules, see 4 *Restatement (Second) of Torts* 209-212 (1979).

[49] 2 William Blackstone, *Commentaries on the Laws of England* *18 (1766).

[50] See, e.g., *Scranton v. Wheeler*, 179 U.S. 141 (1900); *United States v. Commodore Park Inc.*, 324 U.S. 386 (1945); *United States v. Rands*, 389 U.S. 121 (1967). For my more exhaustive critique, see Richard A. Epstein, *Takings* at 67-73 (1985).

[51] See, e.g, *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913) (power plant on navigable river); *United States v. Willow River Power Co.*, 324 U.S. 499 (1944) (power plant at junction of navigable and nonnavigable rivers).

[52] 485 U.S. 439 (1985).

[53] Id. at 453 (italics in original).

can create group rights even on private lands—in this case easements and other prescriptive rights—that could be applied in accordance with the ordinary common law definitions.[54]

It is thus possible to identify two discordant principles for the constitutional superintendence of public property: the first carries over the private rules of joint ownership to government resources and uses them as a means to constrain political action. The second treats public property as a *res nullius* and thus sees no way to import constitutional constraints on political behavior. The total withdrawal of constitutional principle from regulation of public property does much to simplify the administrative burdens thrown on the judicial system. But at the same time it does much to unleash a wide range of destructive political forces.

The successful operation of joint ventures in the private sphere rests only in part on the legal rules that govern conflicts of interest. Much more depends on the ability of individuals to choose their business partners. That power of selection can allow people to choose partners whom they trust, and partners who have the same basic preference set. The first reduces the likelihood of illicit appropriation of common assets. The second reduces the likelihood of major standoffs on collective choice.

Neither of these protective mechanisms are available, however, with respect to property that is held in public hands, for here the joint tenants are, as it were, the citizens of a city, county, state or nation, as the case may be. They are thrown together against their will, and operate in large and anonymous settings. The element of trust among them may prove nonexistent, and their preference sets are likely to diverge wildly from each other. Yet they must choose from a broad spectrum of potential land uses, which can be mixed and matched with each other.

By way of contrast, highways have single uses that are compatible with the need to maintain the transportation network, and the prohibition on private uses is driven by that one dominant objective. No one may, for example, construct a permanent private improvement on public highways or waterways. Beaches in

---

[54] As suggested in Ira C. Lupu, "Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion," 102 *Harv. L. Rev.* 933 (1989). It is no accident that Lupu uses the same test that I have adopted in analyzing takings: "Whenever religious activity is met by intentional government action analogous to that which if committed by a private party, would be actionable under general principles of law, a legally cognizable burden on religion is present." Id at 935, 966. Thus compare his statement with the position I took in *Takings*:

> On Lockean principles the government stands no better than the citizens it represents on whether property has been taken, so a simple test determines, not the ultimate liability of the government, but whether its actions are brought within the purview of the eminent domain clause. Would the government action be treated as a taking of private property if it had been performed by some private party? Epstein, *Takings*, at 36.

contrast have a somewhat broader spectrum of uses, and there the usual rule for public beaches at least, is that private individuals may claim the exclusive right to a limited portion of beach only for a short period of time, say between sunrise and sunset. The beach chairs that mark a preferred location in the morning must be all removed come evening. The next day the cycle starts anew on a beach that by design has no history. On the Michigan beach that I frequent, the basic norm, unspoken but strictly observed, is that only the owner of the adjacent land may sit on his private portion of beach. Others may walk across the beach and collect seashells, but they cannot stop and camp out in front of someone's home without his permission, which is usually denied to strangers. In effect the beach is a form of mixed property—it is treated as common property with respect to movement, but remains a form of limited private property with respect to occupation, which itself is carefully circumscribed to beachfront owners. This partial commons works because the mixed set of allowable uses generates maximum value at that location. And no unilateral deviation in use patterns is tolerated which might upset the initial equilibrium once it is obtained.

The moment, however, the state takes over the operation of a public park the problem of choosing the use or mix of uses intensifies. In this context, however, the situation is more perilous than it is with private property because the class of citizen owners is likely to have widely divergent tastes which must be reconciled over a very broad class of potential uses. In this context, the blockage of permanent improvements can no longer be rationalized as a way to keep the arteries of transportation open. If private owners may erect extensive improvements on their lands, then why not a similar range of activities on public property? The government is thus put into the position of having to decide on who can make what kinds of uses of public lands, and also whether to sell or lease all or part of these land to private individuals. The state can allow the removal of minerals or oil and gas from private lands—through open bids or sweetheart deals. It can dispose of certain lands that it does not need to ordinary citizens—at public auction, or at bargain prices to the well-connected.

C. The Constitutional Oversight of Public Property

1. Gaps in the System. These government powers to regulate the use and disposition of public lands are subject to precious little explicit constitutional constraint. That indefiniteness of rights with respect to these assets greatly influences the political behavior in disputes involving public lands and waters. Large shifts in use patterns produce enormous shifts in implicit wealth. But since the underlying assets stay in public solution both before and after the shift takes place, no compensation is payable by any winner to any loser, which necessarily blocks the standard technique for making win/lose transactions into win/win transactions.

The gaps in the current institutional arrangements become clear when we apply the framework of analysis for private property to public property. In both settings we ask two questions about any shift in either the ownership or use patterns of public resources. The first is whether that shift results in some overall net social gain in the value of the resources in question. The second is whether those net gains are distributed in a fashion to all citizens to share in these public improvements. Neither condition is frequently satisfied.

Let us start first with the question of the shift in uses of public lands. Suppose for example that certain public lands have been left open for hunting and fishing. A new administration comes into power and decides to ban these traditional uses, or erect public roads that reduce the available amount of game, or construct dams that alter or reduce the number of fish available for capture, or, as in Lyng, build roads that cut through the sacred grounds of some Indian tribe. Each of these changes will benefit powerful groups and harm less powerful groups. Yet the usual method for dealing with massive distributional imbalances introduced by government is not available, because no provision of any constitution, state or federal, requires that any compensation be paid from winners to losers for the shift in legislative programs. The upshot is that compensation, when it comes, does so solely out of political compromise, where its amount is at best imperfectly correlated with any sensible social objective.

This omission of compensation is entirely understandable from an administrative perspective. Over a quarter of a billion people in the United States have at least some rights of access with respect to the properties that are in public solution. Any change in land use patterns will have no affect on large fractions of them, but profound effects, both positive and negative, on substantial minorities. Who then can determine who should pay how much to whom? To make matters worse, public management decisions run into an acute "baseline" problem. Let us suppose that the current regime of land uses allows extensive fishing and hunting. Once these are curtailed or eliminated by public edict, should we characterize that action as the rectification of a wrong done by some private actors (the destruction of wildlife or its habitat) or should we treat it as though it were the restriction on the common-law rights of all individuals to reduce wildlife to possession?

Answers to these questions depend on some prior account of rights, such as the rule of capture for wild animals. But once the capture takes place on public lands, it becomes far less clear whether the landowner (the state) or the individual entrant owns the animal upon capture. In part the difficulty stems from the analogous dispute within private law. The basic English rule is that the owner of the soil is entitled to the ownership of any wild animal that a trespasser captured on his property.[55] Yet the Roman law awarded ownership to the

[55] *Blade v. Higgs*, 11 H.L. Cases 621, 11 Eng. Rep. 1474 (1865).

trespasser, even if the landowner was entitled to bar his entrance.[56] But that private analogy does not quite work given that the state ordinarily cannot exclude any individual from public property on a whim, but must show cause for its decision. So once again the indefiniteness of the system of rights leads to enormous amounts of jockeying. The epic battles that one witnesses between the environmentalists and the westerners do not stop therefore when private lands are subject to public appropriation. They continue on unabated with each management decision of what forms of land use should be allowed and what should be prohibited.

To make matters worse, resources subject to public control are subject to more than simple decisions about use. The question always arises whether the government can, or should, charge for the use of facilities. In this context, the political dynamic favors the emergence of queues, as government officials are reluctant for political reasons to charge anything close to a market clearing price for use of public resources. It is better for individuals to wait outside Yellowstone Park for hours, engines running, than to raise the price to a market level, because the price might exclude someone who does not have sufficient wealth to back his utility preferences. The upshot of course is that individuals able to finance their use of public parks now, by queuing, must pay with time instead of cash, which in the effort to favor individuals of relatively low income, creates all the imbalance of any system that does not allow price to rise to clear queues. Yet because the land is within the public domain, no constitutional device can force the government to deal with its property as a rational private owner—to raise the price until the queues run away.

The situation here is representative of a larger difficulty in obtaining balance on public lands. At present it is easier to appropriate funds for the acquisition of public lands (often at bargain prices) than it is to appropriate public funds for the maintenance of lands that have already been acquired. There is thus a constant chorus of complaints about the run-down nature of public facilities and the erratic level of management on public lands. The ideal program matches acquisition with management, which requires that we either cut back on the acquisition or improve on the management, or do both in some combination. As between the two, I have little doubt that in the present situation, scaling back on acquisition, or even divesting public lands, is the preferred approach. The current pattern of acquisition is spurred on by compensation rules that do not take into account the full losses of condemnation, both on the condemnee and other members of his community. Yet the process removes lands from the tax rolls and invites a continuation of the erratic management practices which political concerns make it difficult to correct.

---

[56] Justinian's *Digest*, Book, 41, Tit. 1, **XXX**.

2. Transfers of Resources from Public to Private Hands. One question that remains is what constitutional constraints, if any, apply to the transfer of public to private property? At this point, the possibility for imposing effective judicial oversight improves. To begin with the private analogy, courts are rightly reluctant to order an accounting between cotenants for every expenditure that each makes on the common property. The administrative costs are quite high, and the dangers of making serious mistakes is quite large. But on the termination of the concurrent interests, it becomes feasible to make a once-and-for-all assessment of the various contributions, and this is commonly done by giving each joint tenant credit for the cost or the value (or perhaps, whichever is lower).[57]

A similar set of rules could be adapted to dispositions of public lands to private parties. Ideally, these transfers should follow the same norms applicable to takings transactions: No one should be left worse off and the public at large should be left better off.[58] One possible way to achieve that result is to conduct an auction so that public resources end up in the hands of the highest bidder, with the wealth in question coming to the government so that all individuals who have lost their share in a specific asset will receive in its place at least a pro rata share of the proceeds of sale. Even this strategy does not deal with differential intensities of preferences with respect to the lands moving out of public solution. If certain hunting land is sold off at bid, the environmentalists may be pleased by the identity of the ultimate purchaser, and thus gain two ways: a portion of the public funds, and ownership of the land by their preferred party. Or the distribution of benefits and burdens from the transaction could run in reverse. The sad truth is that even market-value sales will result in substantial wealth transfers from one group to another, and that fact alone is sufficient to set up the usual incentives for seeking political advantage.

The problem here is not confined to public lands, and, currently, the issue has been squarely raised with government distribution of two kinds of assets once located within the public domain. The first of course is the spectrum, which conceivably could be allocated in one of three ways. A first possession rule could allocate it to the party who first uses it. That system might have worked well at the onset of radio when the rate of occupation was relatively slow, but less well in the current setting where sophisticated parties could occupy the entire spectrum in the twinkling of an eye. The trivial gaps in time are too small to justify the absolute priorities they create. An auction works better than with land because no one can identify those groups who made more intense use of the spectrum before it was sold to private parties. Yet even if the recent auctions of

---

[57] For a more detailed statement of the rules, see 2 *American Law of Property* § 6 (1952).

[58] For my earlier development of this position, see Richard A. Epstein, "The Public Trust Doctrine," 7 *Cato J.* 411 (1987).

the broadband spectrum for high speed telecommunications, distributional objectives were allowed to creep into the process, namely, to insure some level of minority ownership in the successful bids.[59] But for the traditional allocation of broadcast frequencies, the spectrum is allocated through comparative hearings that invite large amounts of rent dissipation.[60] Here the object of the massive expenditures is often to gain the right to a license which the lucky recipient can then turn around (after one year's wait) and sell off to the highest bidder. Rent dissipation is then followed by a private auction that puts not a single dollar in the public purse.

A second giveaway of public resources applies to intellectual property, which often falls in the public domain. Thus the Copyright Term Extension Act[61] has extended the terms of existing copyrights for 20 years without exacting any corresponding quid quo pro from their holders. Copyright does not count as a natural right, but necessarily requires the power of the state to secure it, which is done under the United States Constitution by Art. I, § 8, cl 8: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[62]

---

[59] Congress ordered the FCC to act to "ensure that ... businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures." 47 U.S.C. 309(j)(4)(D). For a defense of the system, see Ian Ayres & Peter Cramton, "Deficit Reduction Through Diversity: How Affirmative Action at the FCC Increased Auction Competition," 48 *Stan. L. Rev.* 761 (1996). But once again the argument often seems odd, for it is unclear whether the objective is higher revenues or more minority participation. But it is wishful thinking to believe that the process can do both. The process can to some extent increase the price at which the asset is sold, by forcing the winning bidder closer to his reservation price. But in other cases, the subsidized bidder will win, reducing the money paid into public coffers. In addition, minority bidders often delegate in advance corporate control to the larger players with whom they team up in the bidding process. And the entire scheme depends on the untested hypothesis that minority owners (as opposed to owners that can hire skilled marketers) are better able to reach certain portions of the population. An outright sale of frequencies, with the time brokering by some network owners that did no care to supervise their content, would work far better. Naturally, time-brokering is explicitly banned under the current statute. See Cosmopolitan Broadcasting Co. v. FCC, 581 F.2d 917 (D.C. Cir. 1978).

[60] On which see, Ronald H. Coase, "The Federal Communications Commission," 2 *J. Law & Econ.* 1 (1959); Thomas Hazlett, "The Rationality of U.S. Regulation of the Broadcast Spectrum," 33 *J. Law & Econ.* 133 (1990).

[61] *Sonny Bono Copyright Term Extension Act of 1998*, (CTEA) Pub. L. No. 105-298, 112 Stat. 2827.

[62] The use of federal power came out of recognition of the inability to find a distinct locus for intellectual property. The national protection obviated the need for different and overlapping state regimes. That problem is not, however, on the international scene. For the denial of the natural right approach in the context of patents, see *Graham v. John Deere Co.*, 383 U.S. 1 (1966): "The patent system was not destined to secure to the inventor his natural right in his discoveries Rather, it was a reward, an inducement, to bring forth new knowledge." No less an authority than Thomas Jefferson agreed see VI *Writings of Thomas Jefferson* 180-181 (H.A. Washington ed.) The point extends to copyrights, which are yoked together with patents in the same constitutional clause.

A world that denies all protection for writings and inventors directs labor toward other less-productive endeavors. Yet a perpetual copyright or patent has the offsetting inconvenience of blocking the use of these writings and inventions, even though the marginal cost of their additional use is zero, or very close to it.

It is no easy task in the abstract to determine the optimal trade-offs between the incentive to create and the rate of dissemination of works once created. But it is tolerably clear that writings and other works of art are distinctive in ways in which inventions are not. The former tend to be unique creations, while the latter will usually be discovered in light of general knowledge and the prior art. Accordingly, the optimal term of years for patentable inventions should be, and is, far shorter (20 years for a utility patent), than for copyrights (life plus 50 years). Yet it is hard to see how any form of constitutional inquiry dictates the precise term of either.

That global structural judgment, however, hardly justifies the retroactive extension of a copyright term for writings that are about to go out from copyright. Now one side of the traditional copyright bargain has vanished, because the additional term adds no new incentive to create works already in creation. Yet the longer term restricts from treating the work as part of the public domain. Congress cannot grant copyright protection to works that have fallen into the public domain .[63] Yet it is hard to distinguish this case from one which extends a copyright that has only a single day to run. The analogy to the common law doctrine of estates gives, as it were, the public (which here means each member thereof) a remainder interest in the copyrighted material that vests in possession upon the expiration of the copyright term.[64] Once the bargain has been struck, then it should be as impermissible to lengthen the term of an existing copyright as it is to shorten it.

To see why, compare this transaction with other dispositions of public property. Suppose that the state has an easement over some private property that allows members of the public to reach a public beach. Should the state be able to surrender this easement to the servient tenant for nothing when the easement has value to its regular users? To take a corporate analogy, shareholders should be able to block any giveaway of corporate assets to insiders when nothing is received in return.

Unfortunately, our citizen/shareholders do not have comparable rights to block unilateral transfers of public assets to private parties when no adequate

---

[63] See *Bridge Publications, Inc. v. F.A.C.T. Net, Inc.*, 183 F.R.D. 254, 262 (D. Colo. 1998) ("Once a work enters the public domain, it remains there irrevocably.") This statement is perhaps too strong, but if it leaves the public domain, then the public should at the very least receive a quid pro quo in exchange.

[64] See, for a succinct and powerful statement of the arguments on copyright, plaintiff's brief at 52-62, *Eldred v. Reno*, 74 F. Supp. 2d 1 (D.D.C. 1999), as prepared by Professor Lawrence Lessig.

quid pro quo has been received in return. One clear obstacle to legal protection comes from the doctrine of standing, which insulates government decisions over public assets from judicial scrutiny. It is another version of *res publica res nullius.* Since no one has a large enough stake in the process, no one has "standing" to challenge it,[65] as the law now precludes "citizen" or "taxpayer" suits attacking some "'generalized grievance' shared in substantially equal measure by all or a large class of citizens."[66] The standing rule thus blocks the public equivalent of the corporate derivative suit.[67]

The argument seems misguided, for no one has satisfactorily explained the standing doctrine on either textual or structural grounds. The word "standing" does not appear in Article III of the Constitution, which notes that the judicial Power "shall extend to all Cases, in Law and Equity, arising under the Constitution, the Law of the United States, and Treaties made."[68] That language clearly excludes advisory opinions on the validity of legislation before it has been challenged. But a claim of both citizen and taxpayer is adverse to the state and thus raises "case" within the meaning of Art. III, § 2. The pragmatic justification offered in response asserts that the floodgates will open if the standing barriers are removed. But as with derivative suits, the real peril is the opposite, because individual litigants often lack the large stake needed to pursue such difficult litigation. But the standing barrier only aggravates this problem, for what is needed are rules to coordinate separate suits, or to allow class actions or permissive joinder (as with derivative suits). Once again sensible private analogies give the best guidance to the needed legal rules in the public realm. Standing then is little more than an arbitrary barrier to immunize legislative action over the use of public resources from constitutional oversight.

3. A Revival of the Public Trust Doctrine. "Standing" aside, should the public trust doctrine be brought to bear against the United States for assets that are transferred without compensation from the public to the private domain. Some years ago I suggested that the flip side to the takings clause provided "Nor shall public property be transferred to private use, without just compensation."[69] Inserting "transferred" for "taken" reflects the obvious fact that the government

---

[65] For a general statement of the standing doctrine, see *Warth v. Seldin*, 422 U.S. 490 (1975).

[66] Id.

[67] *Massachusetts v. Mellon*, 262 U.S. 447 (1923) (disallowing taxpayer suits to challenge public expenditures). The Mellon rule is subject to a narrow, if somewhat unprincipled exception for the case of transfers to religious organizations challenged under the establishment clause. See *Flast v. Cohen*, 392 U.S. 83 (1968). But there is good reason for the exception to become the rule as a means to combat sweetheart deals between government and favored organization. The fear is often expressed that the frequency of such suits will paralyze the courts. I suspect that the real risk here is that too few people will have the incentive to bear the private costs needed to stop such a transfer.

[68] U.S. Const. Art. III, § 2

[69] Richard A. Epstein, "The Public Trust Doctrine," 7 *Cato J.* 411 (1987).

cannot be compelled to surrender public property to private parties. That said, the parallel seems quite striking, and has received some Constitutional backing in *Illinois Central Railroad Co. v. Illinois*,[70] which authorized setting aside of the transfer of submerged lands from the state to private parties on grounds that no one can quite articulate. The public trust doctrine lacks a secure constitutional base over government-owned property. As was the case in Eldred v. Reno,[71] that textual gap has led courts to confine the public use doctrine to the submerged lands.

That judicial reticence is misguided for several reasons. First, in the analogous takings clause, the phrase, "private property" has been consistently applied to cover all forms of property, not just land. Most specifically, trade secrets, patents and copyrights are all forms of property that cannot be taken from their owners, without just compensation.[72] In addition, this case is still stronger than the property case. The decision to protect writings into copyrighted material necessary takes away not only the undivided public interest in the property as such, but it also necessarily infringes on the members of the public's common-law liberty to speak as they please. The Constitution not only has property protection but it also has speech protections, which are normally subjected to a higher standard of judicial scrutiny—intermediate scrutiny to be precise for restrictions that are not content based, which these apparently are not. And that position requires that one show that the restrictions on speech are sufficient to advance some important government interest. The initial protection of copyright counts of course as that interest, because in part it spurs public discourse and debate by offering incentives for parties to speak on matters of public interest and concern. But no such interest can be identified for the extension of protection of speech that has already been generated.

Again the pattern of litigation in Eldred shows how the government has managed to wiggle out of this standard speech power. In effect it skirts the question of serious justification by holding that the jurisdictional grant over copyright subjects the government to at most rational basis review: so long as any interest could be advanced on behalf of the statute, the copyright interest prevails. Deference to congressional decisions becomes the order of the day.[73] The government has been allowed to argue that removing copyrights from the public domain aids in their "dissemination" when in fact higher prices reduce public

---

[70] 146 U.S. 387 (1893).

[71] 74 F.Supp. 2d 1(1999). The decision was so brief as to be disrespectful of the issues raised.

[72] See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

[73] See, e.g. *Sony Corporation of America v. Universal City Studios*, 464 U.S. 417, 431 (1984): "Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology."

utilization.[74] In the absence of any discernible quid pro quo, the CTEA is just an old-fashioned giveaway of public assets, cloaked in a set of excuses that only extreme judicial deference would tolerate.

IV. Conclusion

One of the missions of a sound system of governance is to facilitate transfers of resources, both tangible and intangible, to higher-valued users. Frequently, voluntary contract encourages those exchanges even for assets that are owned collectively. Often government is a party to these exchanges, either by coercion, as through eminent domain, or by voluntary transaction. Yet in both contexts the task is to create positive sum transactions where all members of the public to the extent possible share pro rata in the distribution of the gains. Not only does that norm respond to a strong sense of fairness, but it also holds out the possibility of maximizing the gains from these transactions over the long run.

Equally clear, however, is the somber proposition that this regime cannot sustain itself. Transitions always spark danger, whether we speak of getting out of an automobile or changing property rights regimes. Transitions thus require the highest diligence, both legislative and judicial. Some knaves may slip through a well-constructed net, but those risks are multiplied when lax constitutional standards allow factional behavior to flourish. As Madison noted, transitions are difficult enough to counteract when legislative and judicial officials are conscious of the perils they pose. They become well-nigh impossible to counteract when these same officials refusal to acknowledge the perils they face. Yet today's massive slippage in the joints is not an inevitable fact of nature. In dealing with these issues, the basic attitudes toward government and property count for far more than the particulars of any system of property rights, public or private, tangible or intellectual. Those people who follow the good government model of behavior may take pride in republican virtue as a sufficient safeguard against political misbehavior. In so doing, they could endorse a low (or rational basis) standard of review under which anything goes. But those who recognize that public virtue is a scarce commodity should favor a higher level of judicial scrutiny of legislative action to improve the odds of securing limited government by Constitutional means.

---

[74] The other justifications offered fare no better. See S. Rep. No. 104-315, 104th Cong., at 11 (1996). For example, the Committee Report denies that the Act amounts to a perpetual term, but does not preclude a subsequent term extension. Finally, the 20-year extension, we are told, it meant to preserve the older objective to protect "the author and at least one generation of heirs." Thus the CTEA "merely modifies the length of protection in nominal terms to reflect the scientific and demographic changes that have rendered the life-plus-50 term insufficient to meet this end." But longer life expectancy (even with later marriage) means that the writer who dies in his 80s leaves children in their 50s. Longer life already offers greater copyright protection.

Readers with comments should address them to:

Richard A Epstein
James Parker Hall Distinguished Service Professor
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
phone: 773-702-9495
r-epstein@uchicago.edu

Chicago Working Papers in Law and Economics
(Second Series)

1. William M. Landes, Copyright Protection of Letters, Diaries and Other Unpublished Works: An Economic Approach (July 1991).
2. Richard A. Epstein, The Path to *The T. J. Hooper*: The Theory and History of Custom in the Law of Tort (August 1991).
3. Cass R. Sunstein, On Property and Constitutionalism (September 1991).
4. Richard A. Posner, Blackmail, Privacy, and Freedom of Contract (February 1992).
5. Randal C. Picker, Security Interests, Misbehavior, and Common Pools (February 1992).
6. Tomas J. Philipson & Richard A. Posner, Optimal Regulation of AIDS (April 1992).
7. Douglas G. Baird, Revisiting Auctions in Chapter 11 (April 1992).
8. William M. Landes, Sequential versus Unitary Trials: An Economic Analysis (July 1992).
9. William M. Landes & Richard A. Posner, The Influence of Economics on Law: A Quantitative Study (August 1992).
10. Alan O. Sykes, The Welfare Economics of Immigration Law: A Theoretical Survey With An Analysis of U.S. Policy (September 1992).
11. Douglas G. Baird, 1992 Katz Lecture: Reconstructing Contracts (November 1992).
12. Gary S. Becker, The Economic Way of Looking at Life (January 1993).
13. J. Mark Ramseyer, Credibly Committing to Efficiency Wages: Cotton Spinning Cartels in Imperial Japan (March 1993).
14. Cass R. Sunstein, Endogenous Preferences, Environmental Law (April 1993).
15. Richard A. Posner, What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does) (April 1993).
16. Lucian Arye Bebchuk and Randal C. Picker, Bankruptcy Rules, Managerial Entrenchment, and Firm-Specific Human Capital (August 1993).
17. J. Mark Ramseyer, Explicit Reasons for Implicit Contracts: The Legal Logic to the Japanese Main Bank System (August 1993).
18. William M. Landes and Richard A. Posner, The Economics of Anticipatory Adjudication (September 1993).
19. Kenneth W. Dam, The Economic Underpinnings of Patent Law (September 1993).
20. Alan O. Sykes, An Introduction to Regression Analysis (October 1993).
21. Richard A. Epstein, The Ubiquity of the Benefit Principle (March 1994).
22. Randal C. Picker, An Introduction to Game Theory and the Law (June 1994).
23. William M. Landes, Counterclaims: An Economic Analysis (June 1994).
24. J. Mark Ramseyer, The Market for Children: Evidence from Early Modern Japan (August 1994).
25. Robert H. Gertner and Geoffrey P. Miller, Settlement Escrows (August 1994).

26. Kenneth W. Dam, Some Economic Considerations in the Intellectual Property Protection of Software (August 1994).
27. Cass R. Sunstein, Rules and Rulelessness, (October 1994).
28. David Friedman, More Justice for Less Money: A Step Beyond *Cimino* (December 1994).
29. Daniel Shaviro, Budget Deficits and the Intergenerational Distribution of Lifetime Consumption (January 1995).
30. Douglas G. Baird, The Law and Economics of Contract Damages (February 1995).
31. Daniel Kessler, Thomas Meites, and Geoffrey P. Miller, Explaining Deviations from the Fifty Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation (March 1995).
32. Geoffrey P. Miller, Das Kapital: Solvency Regulation of the American Business Enterprise (April 1995).
33. Richard Craswell, Freedom of Contract (August 1995).
34. J. Mark Ramseyer, Public Choice (November 1995).
35. Kenneth W. Dam, Intellectual Property in an Age of Software and Biotechnology (November 1995).
36. Cass R. Sunstein, Social Norms and Social Roles (January 1996).
37. J. Mark Ramseyer and Eric B. Rasmusen, Judicial Independence in Civil Law Regimes: Econometrics from Japan (January 1996).
38. Richard A. Epstein, Transaction Costs and Property Rights: Or Do Good Fences Make Good Neighbors? (March 1996).
39. Cass R. Sunstein, The Cost-Benefit State (May 1996).
40. William M. Landes and Richard A. Posner, The Economics of Legal Disputes Over the Ownership of Works of Art and Other Collectibles (July 1996).
41. John R. Lott, Jr. and David B. Mustard, Crime, Deterrence, and Right-to-Carry Concealed Handguns (August 1996).
42. Cass R. Sunstein, Health-Health Tradeoffs (September 1996).
43. G. Baird, The Hidden Virtues of Chapter 11: An Overview of the Law and Economics of Financially Distressed Firms (March 1997).
44. Richard A. Posner, Community, Wealth, and Equality (March 1997).
45. William M. Landes, The Art of Law and Economics: An Autobiographical Essay (March 1997).
46. Cass R. Sunstein, Behavioral Analysis of Law (April 1997).
47. John R. Lott, Jr. and Kermit Daniel, Term Limits and Electoral Competitiveness: Evidence from California's State Legislative Races (May 1997).
48. Randal C. Picker, Simple Games in a Complex World: A Generative Approach to the Adoption of Norms (June 1997).
49. Richard A. Epstein, Contracts Small and Contracts Large: Contract Law through the Lens of Laissez-Faire (August 1997).
50. Cass R. Sunstein, Daniel Kahneman, and David Schkade, Assessing Punitive Damages (with Notes on Cognition and Valuation in Law) (December 1997).

51. William M. Landes, Lawrence Lessig, and Michael E. Solimine, Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges (January 1998).
52. John R. Lott, Jr., A Simple Explanation for Why Campaign Expenditures are Increasing: The Government is Getting Bigger (February 1998).
53. Richard A. Posner, Values and Consequences: An Introduction to Economic Analysis of Law (March 1998).
54. Denise DiPasquale and Edward L. Glaeser, Incentives and Social Capital: Are Homeowners Better Citizens? (April 1998).
55. Christine Jolls, Cass R. Sunstein, and Richard Thaler, A Behavioral Approach to Law and Economics (May 1998).
56. John R. Lott, Jr., Does a Helping Hand Put Others At Risk?: Affirmative Action, Police Departments, and Crime (May 1998).
57. Cass R. Sunstein and Edna Ullmann-Margalit, Second-Order Decisions (June 1998).
58. Jonathan M. Karpoff and John R. Lott, Jr., Punitive Damages: Their Determinants, Effects on Firm Value, and the Impact of Supreme Court and Congressional Attempts to Limit Awards (July 1998).
59. Kenneth W. Dam, Self-Help in the Digital Jungle (August 1998).
60. John R. Lott, Jr., How Dramatically Did Women's Suffrage Change the Size and Scope of Government? (September 1998)
61. Kevin A. Kordana and Eric A. Posner, A Positive Theory of Chapter 11 (October 1998)
62. David A. Weisbach, Line Drawing, Doctrine, and Efficiency in the Tax Law (November 1998)
63. Jack L. Goldsmith and Eric A. Posner, A Theory of Customary International Law (November 1998)
64. John R. Lott, Jr., Public Schooling, Indoctrination, and Totalitarianism (December 1998)
65. Cass R. Sunstein, Private Broadcasters and the Public Interest: Notes Toward A "Third Way" (January 1999)
66. Richard A. Posner, An Economic Approach to the Law of Evidence (February 1999)
67. Yannis Bakos, Erik Brynjolfsson, Douglas Lichtman, Shared Information Goods (February 1999)
68. Kenneth W. Dam, Intellectual Property and the Academic Enterprise (February 1999)
69. Gertrud M. Fremling and Richard A. Posner, Status Signaling and the Law, with Particular Application to Sexual Harassment (March 1999)
70. Cass R. Sunstein, Must Formalism Be Defended Empirically? (March 1999)
71. Jonathan M. Karpoff, John R. Lott, Jr., and Graeme Rankine, Environmental Violations, Legal Penalties, and Reputation Costs (March 1999)

72. Matthew D. Adler and Eric A. Posner, Rethinking Cost-Benefit Analysis (April 1999)
73. John R. Lott, Jr. and William M. Landes, Multiple Victim Public Shooting, Bombings, and Right-to-Carry Concealed Handgun Laws: Contrasting Private and Public Law Enforcement (April 1999)
74. Lisa Bernstein, The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study (May 1999)
75. Richard A. Epstein, Deconstructing Privacy: and Putting It Back Together Again (May 1999)
76. William M. Landes, Winning the Art Lottery: The Economic Returns to the Ganz Collection (May 1999)
77. Cass R. Sunstein, David Schkade, and Daniel Kahneman, Do People Want Optimal Deterrence? (June 1999)
78. Tomas J. Philipson and Richard A. Posner, The Long-Run Growth in Obesity as a Function of Technological Change (June 1999)
79. David A. Weisbach, Ironing Out the Flat Tax (August 1999)
80. Eric A. Posner, A Theory of Contract Law under Conditions of Radical Judicial Error (August 1999)
81. David Schkade, Cass R. Sunstein, and Daniel Kahneman, Are Juries Less Erratic than Individuals? Deliberation, Polarization, and Punitive Damages (September 1999)
82. Cass R. Sunstein, Nondelegation Canons (September 1999)
83. Richard A. Posner, The Theory and Practice of Citations Analysis, with Special Reference to Law and Economics (September 1999)
84. Randal C. Picker, Regulating Network Industries: A Look at *Intel* (October 1999)
85. Cass R. Sunstein, Cognition and Cost-Benefit Analysis (October 1999)
86. Douglas G. Baird and Edward R. Morrison, Optimal Timing and Legal Decisionmaking: The Case of the Liquidation Decision in Bankruptcy (October 1999)
87. Gertrud M. Fremling and Richard A. Posner, Market Signaling of Personal Characteristics (November 1999)
88. Matthew D. Adler and Eric A. Posner, Implementing Cost-Benefit Analysis When Preferences Are Distorted (November 1999)
89. Richard A. Posner, Orwell versus Huxley: Economics, Technology, Privacy, and Satire (November 1999)
90. David A. Weisbach, Should the Tax Law Require Current Accrual of Interest on Derivative Financial Instruments? (December 1999)
91. Cass R. Sunstein, The Law of Group Polarization (December 1999)
92. Eric A. Posner, Agency Models in Law and Economics (January 2000)
93. Karen Eggleston, Eric A. Posner, and Richard Zeckhauser, Simplicity and Complexity in Contracts (January 2000)
94. Douglas G. Baird and Robert K. Rasmussen, Boyd's Legacy and Blackstone's Ghost (February 2000)

95. David Schkade, Cass R. Sunstein, Daniel Kahneman, Deliberating about Dollars: The Severity Shift (February 2000)
96. Richard A. Posner and Eric B. Rasmusen, Creating and Enforcing Norms, with Special Reference to Sanctions (March 2000)
97. Douglas Lichtman, Property Rights in Emerging Platform Technologies (April 2000)
98. Cass R. Sunstein and Edna Ullmann-Margalit, Solidarity in Consumption (May 2000)
99. David A. Weisbach, An Economic Analysis of Anti-Tax Avoidance Laws (May 2000)
100. Cass R. Sunstein, Human Behavior and the Law of Work (June 2000)
101. William M. Landes and Richard A. Posner, Harmless Error (June 2000)
102. Robert H. Frank and Cass R. Sunstein, Cost-Benefit Analysis and Relative Position (August 2000)
103. Eric A. Posner, Law and the Emotions (September 2000)
104. Cass R. Sunstein, Cost-Benefit Default Principles (October 2000)
105. Jack Goldsmith and Alan Sykes, The Dormant Commerce Clause and the Internet (November 2000)
106. Richard A. Posner, Antitrust in the New Economy (November 2000)
107. Douglas Lichtman, Scott Baker, and Kate Kraus, Strategic Disclosure in the Patent System (November 2000)
108. Jack L. Goldsmith and Eric A. Posner, Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective (November 2000)
109. William Meadow and Cass R. Sunstein, Statistics, Not Experts (December 2000)
110. Saul Levmore, Conjunction and Aggregation (December 2000)
111. Saul Levmore, Puzzling Stock Options and Compensation Norms (December 2000)
112. Richard A. Epstein and Alan O. Sykes, The Assault on Managed Care: Vicarious Liability, Class Actions and the Patient's Bill of Rights (December 2000)
113. William M. Landes, Copyright, Borrowed Images and Appropriation Art: An Economic Approach (December 2000)
114. Cass R. Sunstein, Switching the Default Rule (January 2001)
115. George G. Triantis, Financial Contract Design in the World of Venture Capital (January 2001)
116. Jack Goldsmith, Statutory Foreign Affairs Preemption (February 2001)
117. Richard Hynes and Eric A. Posner, The Law and Economics of Consumer Finance (February 2001)
118. Cass R. Sunstein, Academic Fads and Fashions (with Special Reference to Law) (March 2001)
119. Eric A. Posner, Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective (April 2001)
120. Douglas G. Baird, Does Bogart Still Get Scale? Rights of Publicity in the Digital Age (April 2001)

121. Douglas G. Baird and Robert K. Rasmussen, Control Rights, Priority Rights and the Conceptual Foundations of Corporate Reorganization (April 2001)
122. David A. Weisbach, Ten Truths about Tax Shelters (May 2001)
123. William M. Landes, What Has the Visual Arts Rights Act of 1990 Accomplished? (May 2001)
124. Cass R. Sunstein, Social and Economic Rights? Lessons from South Africa (May 2001)
125. Christopher Avery, Crhistine Jolls, Richard A. Posner, and Alvin E. Roth, The Market for Federal Judicial Law Clerks (June 2001)
126. Douglas G. Baird and Edward R. Morrison, Bankruptcy Decision Making (June 2001)
127. Cass R. Sunstein, Regulating Risks after ATA (June 2001)
128. Cass R. Sunstein, The Laws of Fear (June 2001)
129. Richard A. Epstein, In and Out of Public Solution: The Hidden Perils of Property Transfer (July 2001)