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RICHARD A. EPSTEIN*

INTRODUCTION

It has been said on more than one occasion that the single most important pronouncement on the law of takings is contained in Justice Holmes's cryptic opinion in Pennsylvania Coal Co. v. Mahon.1 Exactly what Holmes stands for in Mahon has been addressed in numerous articles, many of which are referred to in Professor William Treanor's recent article on this subject, Jam for Justice Holmes: Reassessing the Significance of Mahon.2 The revived search for Holmes's meaning, moreover, is for Treanor no disinterested quest of historical scholarship. Rather, he is intent on showing that Mahon cannot serve as a credible cornerstone for any revival of the Takings Clause, such as that evidenced, however imperfectly, in recent cases of the United States Supreme Court.3 In Treanor's view, "Mahon is uniformly held to stand for the proposition that the judiciary should closely scrutinize economic legislation for potential unconstitutionality."4 Taking issue with the conventional wisdom, Treanor argues that in Mahon Holmes had rejected the various "categorical" rules that could govern takings cases—that is, rules that looked to one single element (e.g., physical invasion)—as a litmus test for whether compensation is required. In place of that rigid conception, he claims, Holmes consciously adopted a balancing approach featuring a fair measure of judicial deference to both federal and state regulation.5

From that observation, Treanor posits that two points follow. First, descriptively, the resurgence of judicial activism in takings cases cannot rely on Holmes's short opinion in Mahon, which shows "both a high degree of deference to majoritarian decisionmaking and a rejection of the various formalist, categorical rules for a balancing test weighted in favor of the government."6

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1. 260 U.S. 393 (1922).
4. Treanor, supra note 2, at 816.
5. Id.
6. Id.
Second, normatively, the new discordant notes in the takings debate should be muffled, and the business of government regulation, be it of land use or public utility rates, should continue as before, as a series of protracted political struggles, judicially constrained only in extreme cases, when process itself is suspect.7

Some readers might think that my outspoken position in Takings8 should oblige me to defend the conventional wisdom against Professor Treanor’s attack by reading Mahon as an antideferential decision on property rights. But I do not conceive my task along such partisan lines. In this context, the fundamental objective of academic inquiry is to develop a sound framework for determining what forms of government regulation of private property are permissible under the Constitution and why. Accordingly, Part I of this comment outlines my approach to meeting this challenge. The subsequent task, taken up in Part II, is to examine the extent to which Mahon, with its well-publicized disagreement between Holmes and Brandeis, is consistent with the sound theoretical formulation of the issues. Theory comes first; case law interpretation and practical politics only after the conceptual underbrush is cleared away.

I. THE THEORETICAL FRAMEWORK: COMPETITION, AGGRESSION, AND MONOPOLY

Before defending my theory of the Takings Clause, it will be helpful to clarify its general contours. The correct interpretation of the Takings Clause begins with a proper respect for the primacy of private property and liberty of action, but allows the government to respond by regulation to two major forms of private misbehavior. The first of these, aggression, is the chief form of behavior condemned by standard libertarian theorists.9 To be sure, if aggression were the only source of genuine social dangers, then constitutional law would be far simpler than it presently is. But, of course, it is not. Private property does not always lead to open competition. Unfortunately, monopoly power creates social losses and thus requires separate treatment precisely because force and fraud play no part in its creation and use. It too is a proper subject of regulation.10

Aggression and monopoly are similar in that both drive a wedge between individual and social welfare. In both cases, individuals prosper as a result of behavior that injures society as a whole. This is not to say, however, that these

7. Id. at 816-17.
8. Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985). I discuss Mahon briefly there, treating it as an “easy case” on the merits, which it is, but not falling into any of Treanor’s categories of scholars on its larger impact. Id. at 63.
9. For the purposes of this comment, it is sufficient to lump together two vices, force and fraud, under a single heading, aggression. In this context, it is unnecessary to spend much time determining the scope of the antifraud provision of the police power, except to say that I do not think it should receive an unduly narrow interpretation.
10. This list is not exhaustive. Laws that protect infants and incompetents from overreaching form a third class, but not one relevant to the disputes, such as that over child labor laws. See, e.g., Hammer v. Dagenhart, 247 U.S. 251 (1918). For a discussion of Hammer, see infra note 58.
two dangers are of equal magnitude, for the dangers of mass murder exceed those of monopoly pricing and exclusion. But we cannot ignore monopoly power simply because it is less potent than the unbridled use of force and fraud. Both risks require some social response, and in neither case is the sensible range of responses blocked by the Takings Clause.

This interpretive framework relies heavily on modern (but hardly novel) insights of social welfare theory that were not fully formalized, or at least widely disseminated, when Holmes and Brandeis voiced their disagreements in *Mahon*. Nevertheless, both men, along with their contemporaries on the bench, showed a strong intuitive appreciation of the basic framework articulated here. Treanor, ironically, has lost sight of this basic structure, even as he recounts with great vigor the key cases that marked its rise and fall. He is so anxious to limit the role of the Takings Clause in future Supreme Court jurisprudence that he fails to examine its interpretive foundations. But it is best to start by explaining and defending this basic framework, before moving back to *Mahon*.

A. OPEN COMPETITION: THE BACKGROUND LIBERTY PRINCIPLE

Ordinary individuals do all sorts of things, both good and bad, with their labor and their property. A sensible system of state regulation seeks to separate the good from the bad, by doing its best to prohibit (or punish) the latter while permitting (or facilitating) the former. The key task is to figure out which forms of human behavior fall into which category, and why.

Start with the simplest of behavioral insights. Individuals normally—which is not to say invariably—act to advance their self-interest, which includes benefits to those close to them, chiefly family and friends. From that simple observation stems the presumption that individuals should be allowed to do what they want. Any actor will benefit from his or her behavior; in consequence we can find at least one individual who is better off by virtue of the action undertaken. In all cases we have then at least one reason to favor the liberty of action: the more individuals who capture private gains, the better off we as a society shall be; each person's gains carry through to the societal bottom line. That liberty of action encompasses, moreover, not only the ability to use one's mind and body as he sees fit, but also the right to use one's property as he sees fit. It is for that reason that political theorists from Locke to the present have heralded life, liberty, and property as the common objects that sound governments should protect. The phrase runs through Locke, the Virginia Declaration of Rights, The Massachusetts Constitution of 1780, and the Due Process Clauses of the Fifth and Fourteenth Amendments.\footnote{11. John Locke's own phrase was "lives, liberties and estates." \textit{JOHN LOCKE, SECOND TREATISE OF GOVERNMENT} 72 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1689). To track the influence of Locke's phrase into the United States, see, for example, the Virginia Declaration of Rights, which begins Article I with the phrase "That all men are by nature equally free and independent, and have certain inherent rights . . ., namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." \textit{1 THE FOUNDERS' CONSTITUTION}}
Yet it is critical to understand the guarded nature of this defense of liberty, notwithstanding its historical pedigree. The respect for liberty of action is presumptive and not absolute because the same self-interest that leads individuals to benefit themselves often induces them to take actions that are hostile to the welfare of others. A complete defense of liberty has to reckon with the consequences that individuals’ actions have not only on the actors (and their families and friends), but also on the full array of third parties who might be harmed by their actions. How then should that harm be defined?\footnote{6-7, 11-23 (Philip B. Kurland & Ralph Lerner eds., 1987). The opposition between property (as a protected constitutional right) and safety (its police power limitation) is evident from the outset. For similar language, see Article I of the Massachusetts Constitution: “All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.” Id. at 11-23.}

One of the most important cases of potential harm to others arises from ordinary competition in the marketplace. Here it is easy to make the argument that the disappointed competitor counts as someone who is harmed by the activities of the successful one, and hence should be allowed to enjoin the behavior that hurts. Huge systems of regulation have often been erected on this dubious assumption: think only of the long history of airline rate regulation under the Civil Aeronautics Board.\footnote{12. For a longer discussion of these points, see Richard A. Epstein, The Harm Principle—And How it Grew, 45 TORONTO L.J. 369 (1995).} But a moment’s reflection should make it evident that appeals to competitive harms cannot overcome the initial presumption in favor of liberty of action, including the right to possess, use, and dispose of private property. The first argument that comes to mind is structural: if one disappointed competitor can enjoin a second, then why cannot the second enjoin the first? After all, the system of individual liberty speaks of equal or like liberties for all persons, as in the familiar Lockean claim that all persons are free, equal, and independent in the state of nature.\footnote{13. See Paul Stephen Dempsey, The State of the Airline, Airport & Aviation Industries, 21 TRANSP. L.J. 129, 133-42 (1992).} Competition by definition always leaves disappointed competitors. Any effort to eliminate one disappointment requires that equal efforts be made to eliminate other similar disappointments, resulting in the inability of any competitor to prevail over any other. It is as though no player could be cut from a professional sports team. The equality contemplated in this regime is hardly one of equal liberty. It becomes transmuted into one of equal immobility that stifles not only competition, but innovation and the gains from trade that mark ordinary commercial transactions.

Compared to this prospect of paralysis, the advantages of open competition are vast. The combination of price and product that reaches the marketplace under pure competition is better than that which reaches it under any rival order. It is therefore quite natural that the traditional libertarian has a strong affection for competitive markets and understands the idea of (actionable) harm nar-
rowly, so as to exclude competitive losses. The individual harm of the disappointed competitor is necessarily part of the social price paid for increasing the freedom and opportunities of all persons in the long run. Lest one have concerns about the disappointed competitor on distributional grounds, recall that markets are in continuous operation, so that no single person assumes the role of designated loser in all arenas of life. The system that operates to A’s particular disadvantage in one case allows him to enter the market in any one of a thousand other niches, new and imagined, the next time around. The dynamic properties of the system thus hold out powerful opportunities for all players, especially relative to any collective alternative with restricted entry: there the lack of the state’s calling card could block entry into all markets.

The defense of open competition is not tantamount to a legal regime in which anything goes. One sad truth about human behavior is that competition is not the only form of human interaction between strangers, which is why we need government in the first place. Yet the basic threats to the system are, first, aggression, and second, monopoly. I will address them in order.

B. THE THREAT OF AGGRESSION: FORCE AND FRAUD

Suppose that A is a successful competitor and B a failed one whose goods do not equal A’s for reasons of price, quality, or both. B might seek to keep his market position by taking and destroying A’s goods. Alternatively, he might intimidate A’s customers, or lie to them about the relative attractiveness of their goods. That conduct restores B to parity with A, but only at great cost to A and any third parties who would deal with either. Together the losses to A and his customers (and for that matter B’s unhappy customers) far exceed the gains to B. Furthermore, B, as an inefficient producer, makes less than A for the same goods, and the customers all suffer losses that are uncompensated by any gains elsewhere in the system. The same theory that praises competition condemns these forms of competition as unfair and illegal.\(^\text{15}\) Generally speaking, therefore, any action whereby B uses force or fraud to limit the opportunities of his competitors should be restrained by the state if the restraint can be implemented at reasonable cost. To handle such cases, we have to articulate some conception of the police power, understood to embrace at least those activities that the police ordinarily undertake to preserve the order necessary for competitive markets to survive. A state infrastructure, accordingly, is an important part of a system of laissez faire, and is not in opposition to it.\(^\text{16}\)

The risks of aggression, however, are not confined to the use of force or fraud between competitors. Sometimes a merchant will seek to sell spoiled or contaminated goods. Sometimes individuals will own animals afflicted by some conta-

\(^{15}\) For a classical exposition of the difference, see *Mogul S.S. Co. v. MacGregor, Gow & Co.*, 23 Q.B.D. 598 (1889) (Bowen, L.J).

\(^{16}\) For one clear recognition of the point, see Jacob Viner, *An Intellectual History of Laissez-Faire*, 3 J.L. & Econ. 45, 45 (1960).
gious disease that will spread to the animals owned by other individuals or, as with the recent outbreak of mad cow disease, to human beings as well. These cases of contamination, contagion, and public nuisance are matters that imperatively call for some form of government regulation, and huge portions of the early literature on the police power are directed to cases that are designed "for the protection of the community against the ravages of fire, the spreading of pestilence, and the prevention of other serious calamities."\(^{17}\)

There is no great novelty here. The risk of harm to others is the very sort of behavior condemned under tort and criminal law. The state power, when invoked in advance, is only intended to substitute prevention for compensation or punishment, as the case may be. That substitution is usually welcomed. No private individual is likely to bring suit against potential malefactors: individual plaintiffs receive only a fraction of the benefit but incur all the costs. The state can tax its potential beneficiaries and then act on their behalf, overcoming their endemic coordination problem. By acting promptly, it may entirely avoid the loss, and thus avert any need to identify who is responsible for what harm and whether that party is solvent. These actions do not benefit some abstract entity called society; rather, they protect all individuals from external danger. The question of compensation is utterly beside the point for actors whose conduct falls within the domain of this prohibition: A should not have to pay his neighbor not to infect his cows or his water supply any more than he should have to pay her not to be killed. The legal system works on the assumption that one pays for benefits conferred, not for harms withheld. Benefits conferred include only services rendered or property delivered. The classical police power simply follows and elaborates upon the traditional tort conception.

One key issue here is what happens when the state overshoots its mark and directs its power against individual behavior that does not in fact pose the peril for which the state action was designed. Holmes and the Massachusetts Supreme Judicial Court faced just that issue in *Miller v. Horton.*\(^{18}\) The defendants were members of the town board of health, who had ordered the destruction of plaintiff's horse, which the board believed in good faith to be infected by glanders. Subsequent examination revealed that this determination had been made in error: the horse was indeed fit. The question was whether the officials could be required to compensate the owner for the death of his horse. Its resolution turned on the construction of the applicable statute, which Holmes read with some difficulty to authorize compensation against the individual official (but not the township)—thereby side-stepping any constitutional doubts about the issue.\(^{19}\) In dissent, Judge Devens thought the statute did not require compensation, but that the refusal to compensate did not offend the constitu-

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18. *Id.* at 100.
19. *See id.* at 100-03.
tional prohibition against taking property without just compensation.\textsuperscript{20}

In order to reach his decision, Holmes had to distinguish \textit{Train v. Boston Disinfecting Co.},\textsuperscript{21} which examined a statute that required all imported rags be disinfected before sale. The \textit{Train} court had found that no compensation was owed for the disinfecting, even for rags that had not been infected.\textsuperscript{22} Holmes's response to that case was to evade its central challenge. He wrote: “Within limits it [the legislature] may thus enlarge or diminish the number of things deemed to be nuisances by the law, and courts cannot inquire why it includes certain property, and whether the motive was to avoid an investigation.”\textsuperscript{23} But so long as the conception of a nuisance imposes limitations on the scope of constitutional power, this ploy has to fail, for surely the designation could not apply to rags known to be free of infection, or to a scheme imposed when no imported rags had ever been found to impose an infection risk. The better explanation is that horses are inspected and rags are disinfected because one does not know whether they are infected or not, and, given the perceived risk, it is better to be safe than sorry. The prospective application of any statute carries with it some measure of uncertainty, and, in the name of public health, that uncertainty should be cast on the individual whose conduct poses the risk, not on the society that might suffer the consequences of that risk.

This point contains an enormous concession to state power under conditions of uncertainty. It also confirms the sad truth that any power granted to the state can be abused, and the police power is no exception to the general rule. The ostensible fire code is really a device to prevent new construction by potential competitors. The tests for diseased animals and vegetables are designed to protect local farmers from competition by superior goods imported from other states or foreign nations. A maximum hour law is designed to prevent small bakers from competing with larger establishments that use different work rules.\textsuperscript{24} A quarantine law is used to keep competitors from moving freely in public areas.\textsuperscript{25} Nestle promotional candies with toys inside can be driven off the market to protect the market for Mars Bars.\textsuperscript{26} This risk of abuse did not seem to be of great weight in \textit{Miller v. Horton}. But that happy fact does not justify a “see-no-evil” approach across the board. Legislatures and administrative bodies will behave well when subject to some external control. They may stray from their stated objective when that constitutional oversight is removed.

It is a close question how much scrutiny should be applied in these cases, and my own view is that intermediate scrutiny (to use the modern phrase) suffices. The presumption should be set in favor of police power regulation directed to a

\textsuperscript{20} Id. at 103 (Devens, J., dissenting).
\textsuperscript{21} 11 N.E. 929 (Mass. 1887).
\textsuperscript{22} Id. at 933-34, 937-38.
\textsuperscript{23} \textit{Miller}, 26 N.E. at 102.
\textsuperscript{25} See \textit{Jew Ho v. Williamson}, 103 F. 10 (N.D. Cal. 1900).
proper end. Once set, it can be overcome by showing that the regulation is selectively applied to individuals and groups within the same general risk class, or that it is prompted by some invidious motive, such as hostility to Chinese businessmen or Chilean grapes. The upshot is that one has to distinguish suppression of disease and pestilence from suppression of competition, knowing that in some cases the two elements might be intermingled. The motivation for this approach should be clear, even if its mechanics are daunting: competition is good, and disease is bad. A legal system that fails to distinguish between the two has lost sight of its social function.

C. THE THREAT OF MONOPOLY

The second major exception to the presumption in favor of liberty of action takes a different course. Often goods and services are not provided in competitive markets but by sellers who have a monopoly position. In some cases this monopoly is achieved by private collusion, in which case an antitrust response, by injunction or damages, requiring firms to compete with one another should be sufficient to restore the desired competitive equilibrium. But sometimes the state creates legal monopolies (as with customs offices), and sometimes natural monopolies arise out of the necessary conditions for the delivery of certain kinds of goods and services. Toward the end of the nineteenth century, and even before, the question of how to regulate common carriers and public utilities was very high on the social agenda. Because these firms could not be broken up into efficient competitive units, legislators had to devise ways to prevent the holders of these monopoly positions from exploiting their power, either by refusing to serve different customers, by engaging in price discrimination keyed to the demand of various groups, or by simply charging a uniform monopoly price.

At this point the story repeats itself. Rate regulation of public utilities offers real possibilities for social gains, but carries with it real risks of abuse. Judicial intervention into rate regulation has sought to find the middle path between two extremes: the dangers of monopoly pricing on the one hand, and the risks of disguised confiscation by state regulation on the other. Thus, the established rates must be low enough to counter the risk of monopoly pricing, but high enough to allow for a competitive rate of return on invested capital. The various methods proposed to move between these two extremes are all subject to major administrative difficulties, and could easily induce undesirable behavior from the regulated industry, its customers, or both.

It is important to note that the risk of monopoly pricing justifies rate regulation by the state only in limited settings; that is, when the danger of monopoly pricing actually exists. Accordingly, this justification does not apply to competitive industries—period. The firms in such industries already receive

only a competitive rate of return. A system of rate regulation imposes additional costs, and reduces the firm's revenue. The revised rate of return is necessarily lower than the rate achieved in the competitive environment, and the dislocations that follow are likely to be legion: firms will withdraw capital from underserved markets, new firms will refuse to enter the marketplace, queues and black markets will form as administrative costs and political intrigue balloon. So, once again, it becomes necessary to police the line between competition and monopoly to keep rate regulation consistent with its only coherent social end.

Viewed comprehensively, the case for regulation places competitive markets under siege from two directions: the power of the state to prevent aggressive behavior that is anticompetitive or causes a public nuisance, and the power of the state to prevent monopolies by setting rates. When does the regulation of public nuisances and similar negative externalities become the disguised regulation of competitive practices? And when does the ostensible regulation of monopoly become the suppression of competition? The proper goal of the legal system in both cases is to minimize the regulation of competition and focus state power against force, fraud, and monopoly. Ideally, one would like to have a system that regulates only the evils and not the desirable conduct. But given the uncertainties inherent in any system of state intervention, we must expect imperfect results. Some anticompetitive activity will escape detection; some principled competition will be squashed. The best we can do legally is to settle on some social practice that for any given level of resources controls as much of the private abuses, but restricts as little of private competition, as is possible.

Having said this, the forms of regulation used to respond to the monopoly problem differ dramatically from those applicable to aggression and public nuisance. Regulations of aggression deal with negative physical externalities for which prohibition is the appropriate legal response, and for which compensation is wholly inappropriate. Monopolies, by contrast, do not raise the specter of any physical externalities, and thus the object of the rate cases was not to eliminate compensation for the regulated industry, but to set it at the proper levels. This point poses difficulties for Professor Treanor's argument, in light of his insistence on collapsing a useful distinction by endorsing "Holmes's merging in Mahon of the two lines of cases . . . by . . . treating as relevant the post–World War I rent control cases, such as Block v. Hirsh." In practice, regulations of aggression and monopoly necessarily move in somewhat different directions, albeit in pursuit of a uniform theme. Each is designed to protect competitive institutions, but against different forms of subversion.

It is crucial, however, that regulation not become an end in itself. The entire program of state regulation becomes utterly incoherent in the absence of its proper end: unrestrained competition. Should regulators have any doubts about the primacy of competition, the entire system will necessarily fall of its own weight. There will be no prior established norm against which particular

28. Treanor, supra note 2, at 856.
institutional arrangements can be checked; the choice of institutional arrangements and objectives thus becomes a pure political play.

D. STATE REGULATION OF AGGRESSION AND MONOPOLY: THE CONSTITUTIONAL DIMENSION

The entire matter of state regulation under the police power lay at the center of debates over constitutional law when Mahon was decided, precisely because the boundaries between competition on the one hand and aggression and monopoly on the other were perceived to have major social importance. A few cases illustrate this point, turning first to the tensions between competition and aggression. Lochner v. New York\(^2\) today receives ritual denunciations as a part of the rite of passage into the higher realm of constitutional law.\(^3\) But it is a bum rap. Lochner considered whether a statute that imposed a ten-hour restriction on the hours of certain classes of bakers was inconsistent with the Federal Constitution. The initial question to the Court was whether this statute imposed a restriction on the liberty of contract protected under the Fourteenth Amendment—which, of course it did. This initial presumption of unconstitutionality, once established, could be overridden by showing that the statute was justified as an exercise of standard police power, namely, for the protection of health, safety, and morals. Here, the Holmes dissent—as scandalous in its brevity as it is elegant in its articulation—quickly concluded that the statute could be justified as a measure taken to protect the public health.\(^3\)

The real question posed by the statute at issue in Lochner, however, was whether this statute should be classified as a labor law, designed to suppress competition and thus outside the proper scope of the police power, or whether it was in fact a public nuisance statute, a legitimate exercise of the police power designed to protect workers' health. The case was one of mixed justification, but Justice Peckham, himself a New Yorker, saw through the ruse and struck the statute down, as well he should have done. The objections to the business arrangements were not advanced by any of Lochner's workers, but by the state in the form of a statute that imposed criminal sanctions. Its basic purpose was not to protect these workers, but rather to insulate the unionized bakeries that employed workers in two ten-hour shifts against competition from nonunion firms that deployed their workers in single twenty-hour shifts, and thus were caught by the statute. The statute's neutral facade concealed its

29. 198 U.S. 45 (1905).

30. See, e.g., Robert Brauneis, The Foundation of Our 'Regulatory Takings' Jurisprudence: The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon, 106 YALE L.J. 613 (1996). Brauneis takes the position that Mahon should be regarded as being cut from the same cloth as Lochner, of which he heartily disapproves. Id. at 677-78. Brauneis's own substantive due process thesis seems to me to be clearly wrong, except insofar as one might say that the Takings Clause is applied against the states through the Due Process Clause. See Treanor, supra note 2, at 856 (arguing that Mahon and Lochner are not alike, although Mahon is technically a substantive due process case).

31. Lochner, 198 U.S. at 75.
dubious motive and disparate impact. Why not strike it down for its anticompetitive effect?

The same danger of abuse arises under the monopoly prong of the takings analysis. In *Munn v. Illinois*, the Supreme Court provoked a full debate of this danger by introducing into American law the elusive concept of a business “affected with (clothed by) the public interest.” At one level, the *Munn* decision could be read to say that rate regulation is an appropriate response to monopoly. There are clear intimations of the connection between monopoly and rate regulation in the English materials cited by Justice Waite, most notably in the famous passage from Lord Matthew Hale, *De Portibus Maris* [Concerning the Gates to the Sea], and from *Alnutt v. Inglis*, which elevated Hale’s language into law. And at one other point, Justice Waite observes that the grain elevators subject to rate regulation operated as a “virtual” monopoly that fell within the narrow rule of the English precedents approving such regulation.

But *Munn* can easily be read as giving a far greater scope to state regulation of prices. Many parts of the opinion downplay the monopoly problem and take the view that state regulation may be appropriate wholly without regard to market structure. On this view, rate regulation could be justified entirely by the size and importance of the industry, or of the firms within it, even though the market structure is entirely competitive. Thus, Justice Waite defined “affected with the public interest” by reference to a theory of implied dedication: “Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.” According to this conception, an industry that is large and influential could be subject to rate regulation, regardless of its internal structure, free of serious constitutional restraint, and subject only to political pressures: “For protection against abuses by legislatures the people must resort to the polls, not to the courts.”

These two distinct conceptions of what threatens the public interest—monopoly, on the one hand, and the size or importance of the industry on the other—are utterly irreconcilable as to theory and result. Let the concern be with size and importance of the industry, and the number of alternatives available to consumers no longer matters. But when monopoly is the focus of concern, the size of the firm or industry is irrelevant so long as alternative sources of supply are available. With this basic ambiguity enshrined doctrinally by *Munn*, the

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32. 94 U.S. 113 (1876). For a history of the basic test, see Walton H. Hamilton, *Affectation with Public Interest*, 39 YALE L.J. 1089 (1930), whose ironic denunciation of the constitutional uses of the doctrine defies easy summarization.
33. See *Munn*, 94 U.S. at 127 (citing Lord Matthew Hale, *De Portibus Maris*, 1 Harg. Law Tracts 78, for discussion of the requirement that monopoly “duties must be reasonable and moderate” in wharfing context).
36. Id. at 125-26, 131-33.
37. Id. at 126.
38. Id. at 134.
courts had to weave their way through a definitional thicket in order to decide whether insurance, \(^{39}\) ticket sales, \(^{40}\) meat packing, \(^{41}\) gasoline sales, \(^{42}\) and other kindred activities were so affected with the public interest that Congress or, more typically, the states could subject them to rate regulation. The more limited account of the public interest—prevention of monopoly—was frequently denounced because the line between competition and monopoly did not seem intelligible enough to be worth preserving. \(^{43}\) Meanwhile, in the years between \textit{Munn} and \textit{Mahon}, the rival tradition that resisted any rate regulation in competitive industries continued to exert a powerful influence.

To be sure, Holmes did not explicitly refer to \textit{Munn} or any other “affected with the public interest” cases in \textit{Mahon}, although the phrase was invoked during oral argument. \(^{44}\) Doctrinally, however, \textit{Munn} and \textit{Mahon} are easily distinguishable on two grounds. First, \textit{Mahon} involved use restrictions, not rate regulation. Second, industries were often held to be “affected with the public interest” only when the public had some right to use their facilities, as with transportation and communication. \(^{45}\) But as Treanor has indicated, the monopoly cases could not be fully cordoned off from those involving property “affected with the public interest.” \(^{46}\) Indeed, Holmes had broached that topic just a year before when he upheld a group of rent control statutes (themselves a form of price control) as a proper legislative response to the short-term tight market brought on by World War I, which had allowed landlords to extract unconscionable rents from their hapless tenants (or so a legislature might find). \(^{47}\) Holmes’s approval of these statutes provides yet another illustration of how easily market power is confused with exogenous shocks to the market.

Holmes’s position was not unlike that of the just price theorists, who believed

\begin{itemize}
  \item \(^{39}\) German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 412-13 (1914) (holding that sale of fire insurance is affected with public interest, over strong dissent of Justice Lamar).
  \item \(^{40}\) Tyson & Bro. v. Banton, 273 U.S. 418, 439-41 (1927) (reasoning that theater ticket pricing not so affected).
  \item \(^{41}\) Charles Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522, 543-44 (1923) (reasoning that meat packing business not so affected).
  \item \(^{42}\) Williams v. Standard Oil Co., 278 U.S. 235, 240 (1929) (reasoning that sale of gasoline not so affected).
  \item \(^{43}\) Thus Hamilton wrote:
    \begin{quote}
      But the economic order is rapidly changing; as our knowledge of its structure and its operation grows, our conceptions of how it works are subject to amendment or replacement. A more intricate and better understood industrial world no longer is to be resolved by clear-cut lines into the provinces of competition and monopoly; elements of the two are combined in endless permutations in various businesses; in reference to any one of a dozen great industries it would be difficult to say whether monopoly or competition is the more appropriate word.
    \end{quote}
    Hamilton, \textit{supra} note 32, at 1108-09.
  \item \(^{44}\) \textit{Mahon}, 260 U.S. at 407.
  \item \(^{45}\) \textit{German Insurance}, 233 U.S. at 406-07.
  \item \(^{46}\) Treanor, \textit{supra} note 2, at 852.
  \item \(^{47}\) Block v. Hirsh, 256 U.S. 135, 156-57 (1921).
\end{itemize}
that government intervention in the markets should be confined to those cases in which natural disasters or other similar phenomena caused short-term dislocations in prices. But Holmes did not realize how quickly private markets would respond to these pressures, and hence underestimated how durable rent control would be once tenants (who vote) realized large gains from keeping a system of price controls for the sole benefit of sitting tenants. The right response, therefore, was not to confuse short-term necessity with monopoly power. The housing markets still had numerous sellers and free entry, and thus were very different from cases of true private necessity, such as that involving a dock owner who blocked out a ship owner during a storm, with potentially fatal consequences. The battle that Treanor recounts over the monopoly limitation to "the affected with the public interest test" was of stupendous intellectual importance. In my view, he attaches insufficient weight to that battle.

History, however, is not the only reason that the issues raised under this model require constitutional treatment. Another is that the problems posed by government regulation of private property require a structural, rather than a substantive response. Generally speaking, constitutional law can respond to future problems in two ways. First, it can establish institutional arrangements to respond to future problems as they arise. That is why, for example, we have a Congress and a President: to deal with crises at home and abroad. These sorts of crises are so variable and unpredictable that they could not possibly be remedied by substantive rules, so the wise Constitution tries to get the right set of decisionmakers in place in advance of the crisis of the day.

Second, recurrent problems may well admit substantive solutions. For example, we as a society believe strongly that no person should be a judge in his own cause, and that political dissent is necessary. Our Constitution therefore provides prohibitions against bias, and protections for freedom of speech. The latter, moreover, are not makeshift affairs but face the same ticklish questions implicated under the Takings Clause: is particular speech a call to debate or a call to arms? We have to decide whether the First Amendment insulates the press from the antitrust laws, and whether lobbyists have a right to work on behalf of cartels. Yet we face these complexities because we know that the substantive problems are permanent, and admit therefore of permanent solutions. We do not leave these issues for the legislature to sort out because we know that its interests, or those of its many members, often deviate from what a robust system requires.

The same is true with property and contract. We need the constitutional structure to preserve some measure of competition, because we know that some

49. See, e.g., Associated Press v. United States, 326 U.S. 1 (1945) (holding that First Amendment does not preclude application of Sherman Act to news-gathering and disseminating organization).
group will always work to obtain special preferences for itself. The alternative is to rely on the legislature to police the line between nuisance and competition, or that between monopoly and competition, and to hit only the appropriate targets for regulation. Holmes’s muddle was that he did not have his feet securely in either camp; he alternated between concerned constitutional structuralist and resigned political observer of popular democratic forces. On large political issues of the day—the labor legislation at issue in *Lochner*, for example—he thought that the majority had to have its way, or it would just seize it. On smaller questions he was prepared to impose constitutional authority. But at every critical juncture, Holmes shrugged off hard choices with the observation that “every hard question is a matter of degree,” thus treating an intellectual evasion as a judicial insight. The book on Holmes is therefore destined to remain mixed: he is at once a friend and a foe of the new revival of property rights. The sources of his ambivalence become evident, however, when we look at his fateful decision in *Mahon* paragraph by paragraph; as we shall see, his words cut both ways nearly at the same time.

II. *Mahon* Revisited

A. THE UNDERLYING TRANSACTION

Good constitutional law often begins with a keen appreciation of the transaction that underlies any particular dispute. The first stage of *Mahon*’s transaction took place in 1878, when Pennsylvania Coal sold the surface rights to its land subject to a reservation of its right to mine underground without having to support the surface or the buildings or roads constructed on it. It appears that these conveyances were made to a large number of private and public persons. It follows that at the time of the initial conveyances, Pennsylvania Coal valued its freedom from these obligations more than the surface owners valued the support rights—otherwise, this covenant would not have been included in the deal. The arrangement here also made sense only because all surface owners were bound; otherwise, support obligations to even a small number of surface owners would so limit the company’s freedom of action as to reduce the benefits it received from the other, similar covenants already in place. The uniform covenant thus eliminated the free-rider problem. No one forced any of the surface owners to buy. The transaction looks like a voluntary exchange in competitive circumstances—the kind that should be respected and enforced.

Forty-three years later, in 1921, Pennsylvania passed the Kohler Act. How did the original set of support obligations fare in the interim? The business

51. *Mahon*, 260 U.S. at 406; see also id. at 412 (noting both the date of the covenants and that Pennsylvania Coal started out as owner of the surface, a critical point, and not a small detail).

52. I set aside here the possibility that the buyers of the land might not have understood the bite of the covenant. The issue was not raised below; there were no efforts to undo the transaction shortly after it was consummated; and it is implausible to think that a large number of buyers were all lulled into the same false sense of security.
issues here should be evident: the value of rights obtained and surrendered under long-term contracts fluctuate. The value of both coal and land might have changed in the interim; the technology for removing coal might have improved so that smaller support columns would be sufficient to support the surface.\textsuperscript{53} It is easy to imagine a situation in which the original relationship between benefit and loss might reverse itself for most landowners. Perhaps in 1921 the support rights were worth more to the surface owners as a group than their negation was to Pennsylvania Coal. That inference could easily be drawn if the support rights had been conveyed to the surface owner for a price, leaving both sides better off.

Of course, no such movement took place in the voluntary market. Yet we cannot draw the converse inference from the parties’ inaction: they may have left the prior distribution of rights undisturbed because the freedom from support obligations was still more valuable to Pennsylvania Coal than to the surface owners. Or they might have done nothing because it was too difficult to negotiate their voluntary reassignment. In principle we would like to able to distinguish between these two cases, and use public force (if available at reasonable cost) only when necessary to overcome the transactional barriers of a voluntary market.

The reasons for state intervention here are vintage Coase.\textsuperscript{54} Even on the naive assumption that Pennsylvania Coal could make a sensible trade with any one surface owner in isolation, the firm does not operate in a competitive market, but must renegotiate its way through a bilateral monopoly problem with that one surface owner. The negotiations are costly and the price indeterminate. Worse still, no isolated bilateral renegotiation was possible because the arrangement only made sense for Pennsylvania Coal if its covenants with the surface owners were uniform. The sale of the single set of support rights could have inhibited mining under the entire surface, and that in turn would have meant that the loss to the coal company, system-wide, would in all likelihood have far exceeded the gains to the one surface owner. So the coal company would have had to deal with \textit{all} of the surface owners at once; a negotiation that would have raised a distinct coordination problem, in that all surface owners would have had to agree on the size of the slices as well as the total size of the pie. A breakdown in bargaining can take place in two dimensions, not just one. It is thus not likely that there could have been any renegotiation, however desirable such a step would have been.

So understood, \textit{Mahon} was not a case in which one person sought to inflict a nuisance on a stranger. The parties were in privity and had, by agreement, allocated the relevant risks among themselves. The difficulties that arose were akin to the bargaining issues that justify the regulation of common carriers and public utilities. What was needed, therefore, was not a public intervention


\textsuperscript{54} \textsc{R.H. Coase}, \textit{The Problem of Social Cost}, 3 J.L. & Econ. 1 (1960).
analogous to injunction and prohibition, but some public analogue to rate of return regulation. The coal company could have been forced to relinquish its support rights (the so-called "third estate," one between the surface and the mineral estates) at a competitive price. That purchase price, in turn, could have been raised from the taxpayers (as substitutes to the ratepayers) by a special assessment that measured the value of support rights to each plot of land located over the coal deposits. By 1920, the body of special assessment law was well developed for roads and other infrastructure improvements. Application of this body of law poses no conceptual problems here. Indeed, if the community could not raise the taxes to protect these interests, then there would have been good reason to think that the original allocation remained sound, and that the new one was not. That could very well have been the case, given that the coal companies habitually had taken steps to protect surface owners even though they were not obligated to do so. But for our purposes, the point is that democratic institutions should have been used to determine whether the cost of buying out the coal company's interest could be raised by taxing the persons who stood to benefit from the transaction.

Once the full system of special assessments is put in place, both bargaining problems can be resolved at once. The taxation system overcomes the problem of holdouts among the surface owners; the condemnation procedures overcome the threat that the coal company will hold out. If the system of special assessments is well run (and its difficulties are not trivial), then the reassignment of the support estate should take place only when it is warranted. This scheme does not ensure that the reassignment will take place whenever it is in principle desirable, for its own transaction costs might be high enough to preclude renegotiation. But so what? The most anyone can expect from balky institutions is improvement, not perfection. The system of special assessments could have generated a favorable result in at least some of the cases to which that system could apply.

The basic intellectual structure of the Mahon case was, however, missed by everybody at the time. If the correct analysis requires Mahon to be brought under the monopoly wing of takings analysis, the great John W. Davis (who represented the coal companies at the Supreme Court level) veered in the opposite direction in oral argument. He promptly distinguished the Kohler Act at issue in Mahon from the recent rent control acts previously sustained by the Court, on the grounds that they represented a response to the short-term run up in rents brought on by the war emergency. Davis did not distinguish between necessities that operate on competitive markets and those that operate in monopoly conditions. Nor did he appeal to the rate of return or special assess-

56. Fischel, supra note 53, at 37-47.
ment cases to make his case for compensation. He only sought to show why the police power cases that dealt with such issues as the child labor acts (which he had defended without success, as Solicitor General, in *Hammer v. Dagenhart*,58 some four years before) were sound applications. The point that Davis missed was also overlooked by Holmes, who on this point followed Davis's lead.59 Neither man saw how the monopoly argument could allow for the forced transfer from the coal companies without wiping out their claims for compensation.

B. THE LAW

Holmes's conceptual confusion has come to haunt the law. His short opinion lurches unhappily between brilliant insight and utter nonsense—precisely because his instincts are not disciplined by any overriding theoretical approach. It is no wonder, therefore, that Treanor splits off from other commentators on the question whether Holmes fits into the deference camp on takings issues.60 The sad truth is that the worthy Justice could not make up his own mind, even as he touched many of the issues that have remained staples in the law of takings to this day. The twists and turns in Holmes's exposition are best displayed sequentially. I shall therefore analyze the core of his opinion paragraph by paragraph.

Holmes starts on a grand note of high theory:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.61

Holmes's initial point is surely correct, but he offers only one piece of the overall explanation. He is right that the administrative costs of compensation would be so prohibitive that all reform of the general laws, good and bad, would

58. 247 U.S. 251 (1918). At issue in *Hammer* was a federal child labor act more stringent than the various state acts. Davis defended the federal action on the ground that it was necessary to overcome a coordination problem between the states: "Thus, if one State desired to limit the employment of children, it was met with the objection that its manufacturers could not compete with manufacturers of a neighboring State which imposed no such limitation." *Id.* at 254. He did not see the connection between the two situations. For the reference to child labor in *Mahon*, see *Mahon*, 260 U.S. at 396.
be blocked. But he fails to note that the principle of average reciprocity of advantage, to which he refers later, applies well only to general laws.\footnote{62} When such laws are expressed and debated in abstract and general terms, they are likely to be changed only when the average advantage favors the change. In the limiting case, in which everyone is in an identical position under the general law, no one has any private incentive to deviate from the ideal social solution. For example, if the new regime is worth $10 to each, and the old one only $8, it does not matter how many individuals are in the pool: all will support the change from which they can gain $2, and none will be able to leave that coalition because special rules (which always yield differential benefits) are systematically kept off the table. It is not possible to single out special persons for adverse treatment in the reform of such general laws as the statutes of limitation and the parol evidence rule.

The Kohler Act is quite different. We could characterize it as a general law because it applies to all land over anthracite coal. Or we could call it particular because it applies only to land over anthracite coal. But the issue of whether the Act is general or particular is only a loose and imperfect proxy for the real question, which is whether the statute works a redistribution of assets between various groups of individuals. Here, so long as coal companies are lined up on one side of the statute and surface owners on the other, the statute takes from $A$ and gives to $B$.

This change in general law has profound distributive consequences. It is not necessary to single out one individual in order to effectuate this forbidden kind of transfer. When all $A$'s are the same, and all $B$'s are the same, the astute legislature can redistribute assets on a mass scale. We know that surface owners have more votes in local elections than coal companies, even though the coal companies may have more financial clout. In the abstract, it is hard to predict whether dollars or votes would win. But in the case of the Kohler Act, the derby has already been run, and we know that the coal companies came in second place.

Because Holmes has no general theory of the Takings Clause, he takes his first wrong turn in trying to explain why general rules don't really call into question the takings problem.\footnote{63} His intellectual blunder is to make the law turn on the extent of the diminution in value—whether the regulation goes "too far." He thus focuses on the size of the loss in one individual case, and ignores any question of system-wide efficiency—for which substantial diminutions in value operate, at best, only as a one-sided social proxy. To be sure, in those cases in which one person does suffer that diminution in value, something is clearly amiss: someone is harmed without compensation. Presumptively, the proper procedure in such cases is to allow the program to go forward only if its winners compensate that loser for his big-time losses.

\footnote{62} Id. at 415.
\footnote{63} Id. at 414.
But Holmes's test is woefully incomplete. Even when the loss is borne entirely by a single person or entity, it is wholly unclear whether Holmes measures the size of the loss in absolute or relative terms. As an illustration of this point, compare two cases. In the first, Amy starts with land worth $10 and is left with nothing. In the second, she starts with $100 and is left with $80. Clearly, she would prefer to suffer the first loss of $10, rather than suffer the second loss of $20. But the "too far" test is wholly silent on whether the relevant test is dollar or percentage loss. Today it looks as though it is the percentage loss that counts, which is one reason that Holmes went along with the majority of the Court in *Euclid v. Ambler Realty*. Yet the perverse incentives that such a test creates are manifest: it encourages government to enact extensive systems of regulation that do not quite reach the percentage limit established by the Court, but that cause massive dislocations of assets nonetheless.

Holmes's test also fails because it does not accurately track diffuse social gains and losses. Many programs generate substantial social losses, even though they do not heap substantial losses on one actor. Suppose that a society in the initial position has 100 people, each with a net worth of $10. A new program comes along that increases the wealth of fifty percent of the population by one each, from $10 to $11, but reduces the wealth of the remaining fifty percent by two units, from $10 to $8. The overall effect is the loss of $50 overall (from $1000 to $950), but the broad distribution of the losses keeps the case outside the orbit of the Takings Clause as Holmes construes it. Yet if the new legal regime brought about the bankruptcy of ten individuals, with a gain of $1 to each of fifty individuals, leaving forty individuals unaffected, then the ten would have to be compensated.

In tabular form, the two cases look as follows:

<table>
<thead>
<tr>
<th>Scenario I</th>
<th></th>
<th>Scenario II</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Initial Distribution</strong></td>
<td>100 @ $10 = $1000</td>
<td>100 @ $10 = $1000</td>
</tr>
<tr>
<td><strong>Final Distribution</strong></td>
<td>(50 @ $11) + (50 @ $8) = $950</td>
<td>(50 @ $11) + (40 @ $10) + (10 @ $0) = $950</td>
</tr>
<tr>
<td><strong>Outcome</strong></td>
<td>No compensation</td>
<td>$100 Compensation</td>
</tr>
</tbody>
</table>

Holmes offers no clue why these two scenarios should lead to different payment outcomes, when the overall social losses are identical in both cases.

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64. 272 U.S. 365 (1926) (75% decline in value, from $800,000 to $200,000). Yet a wipeout of a $50,000 parcel gets more legal protection. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
One possible explanation is that the fifty losers in the first scenario have better chances to defend themselves in the political arena, and therefore are less likely to suffer even small losses. But whatever their chances of success \textit{ex ante}, the outcome reveals that they have lost \textit{ex post}, and that their private losses correlate with net social losses. So why not require that these persons be compensated before allowing the program to go forward? (And if compensation is required, the program will not go forward, which is, in fact, the desirable result.)

In response, it could be said that the small size of the individual losses in the first scenario means that the losses in overall social wealth are smaller than the individual losses in wealth, so that there is little reason to be concerned. But by the same token, this first scenario offers only small gains in wealth to the winners. And in the second scenario, unless someone knows the distribution of overall wealth for the winners and losers, it is not clear how the gains and losses caused by a single program square with any overall distributional objective. The short answer is that Holmes’s first cut at the problem—his embrace of the diminution of value test—allows legislative programs that generate very substantial social losses to fly safely under the radar. His opinion may have struck down the Kohler Act, but by equating “too far” with “total wipeout,” it has provided the theoretical justification for countless generations of misguided government programs. This first misstep is the most decisive to the overall flow of cases.

Holmes makes this error because he labors under the optimistic belief that rules of general application necessarily result in benign consequences. He is skeptical, moreover, of the proposition that programs with skewed distributions generate social losses. The move from this substantive skepticism toward some form of deference is virtually foreordained: after all, if a judge has no principled reason to condemn a program, then why not leave matters to legislative discretion? It takes judicial energy and moral conviction to intervene, and Holmes has neither. All in all, Holmes has touched grand themes at this initial stage in his analysis, but conceptually (as opposed to stylistically) he is off to a poor start.

His confusion is compounded in the next paragraph:

This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case. Rideout v. Knox, 148 Mass. 368 [(1889)]. But usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public. Wesson v. Washburn Iron Co., 13 Allen, 95, 103 [(1866)]. The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety. That could be provided for by notice. Indeed the very foundation of
this bill is that the defendant gave timely notice of its intent to mine under the house. On the other hand the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs. If we were called upon to deal with the plaintiffs' position alone, we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights.65

Holmes's initial sentence is designed to stress the opposition between the general laws he discussed in the previous paragraph, and the quite specific application of the law at issue in this case. In order to make this distinction, Holmes has to establish a conceptual severance between public and private losses. But he is most uneasy about the separation, and therefore backtracks in his second sentence by stating that there is a public interest "in every purchase and sale." Then, unhappy about his concession, Holmes alters his definition of public interest by claiming that the damage here does not constitute a "public nuisance," even if identical losses befall other houses. On this point at least, Holmes is technically correct in that the activities of the coal company do not obstruct or otherwise interfere with the use of public lands or waters, which remain open for the use of all. But the sense in which Holmes is correct depends upon his assumption that the word "public" refers only to facilities from which no person can be excluded, as in the usual economic accounts of public goods. In making this assumption, Holmes downplays that yawning possibility, which treats as "public" any set of actions, however distributed, that affect large numbers of individuals, as the Kohler Act surely does. The problem is not simply that one house might stand or fall. It is that large portions of the community will be affected in parallel ways by the creation or elimination of the support estate for surface lands. Holmes's narrow approach blinks at that reality, and ignores the coordination problems that arise when some collective response is needed to a set of parallel losses.

This is not to say that the homeowners' interests are the only ones at stake. On the contrary, we must be aware of how the new regulation affects all interested parties. The correct approach still asks whether, on net, the shift from the older system which removed support rights is better or worse for these landowners as a group than the newer system ushered in by the Kohler Act. This question drives the analysis back to system-wide comparisons that take into account not only the position of the surface owners, but of the coal companies as well.

At this point, Holmes again shifts ground and states that the statute does not have the public interest at heart because it does not apply to cases in which the coal company owns both the surface and mineral rights. But such cases of

unified ownership hardly cut one way or the other. As Brandeis noted in dissent, the individual who owns both sets of rights will have a clear incentive to take into account the loss to (his own) surface interest when he mines coal—after all, he bears both the gains and the losses that result from his activities, and if he cannot figure out which is worth more to him, what hope is there that any regulator could do the job? The bottom line is that removing these cases of unified ownership from the Kohler Act's application improves the fit between the law and the problem it was designed to address, by concentrating its fire on those cases in which a mining company's activities cause harm to others, which is where the coordination problems do arise.

Holmes's next sentence evinces yet another shift in attitude. He has described the case as one with substantial private diminution in loss, and next turns to the public side of the equation: is that loss justified by an appeal to public safety? It is evident from this, as Treanor observes, that Holmes has followed some kind of balancing approach. But the critical issue is not whether Holmes applied a balancing test: balancing is always required in every legal context. The common law judges who allow private parties to abate a nuisance by self-help have engaged in a form of balancing. State and federal judges who address the ability of the state to abate a nuisance necessarily make the same sorts of balancing calculations. In both cases, the key question is not whether balancing takes place, but how it takes place.

On that score, Holmes turns less deferential than he was just a paragraph earlier. He takes the sensible position that safety to an individual homeowner can be secured by requiring the coal company to give him notice of its intention to mine. Armed with notice, the surface owner has an opportunity to mitigate damages by moving off the premises, by shoring up his land, or by seeking to avoid or reduce his losses in some other way. That solution is in fact common in the case of lateral support, which requires a landowner to give notice of his intention to dig so that the neighbor can shore up his own buildings in advance. Unfortunately, Holmes does not address the question of whether more stringent measures could afford still better protection for surface owners. After all, mitigation only reduces losses; the Kohler Act tries to stop them altogether. Holmes is quite unwilling to confront the question of which outcome is better, and exposes himself to an effective Brandeis counterattack on precisely these grounds.

It is here that Holmes's lack of theory takes its toll. The right way to analyze this question is to defer initially to the state's judgment on the issue of whether the additional precautions are worth their cost. In making this judgment, the state must take account of the fact that, so long as the notice system is in place,

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66. Id. at 420 (Brandeis, J., dissenting).
68. Mahon, 260 U.S. at 420 (Brandeis, J., dissenting).
the losses from the current regime are effectively reduced. The purchase of the support estate is therefore worth less to the surface owners than it would be if the coal companies could commence mining without providing notice. The state should factor that reduced gain into the equation before deciding whether to use special assessments to buy support rights. The use of the compensation method therefore relieves the court of having to decide how much deference is owed to public officials in any particular case. The legislature can make the judgment for itself, so long as it pays for what it takes.

Holmes next turns to the facial challenge to the statute:

It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case, "For practical purposes, the right to mine consists in the right to mine it." Commonwealth v. Clearview Coal Co., 256 Pa. St. 328, 331 [(1917)]. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does.

Holmes thus returns to the private interest that is sacrificed by the Kohler Act. But he misidentifies the state's objection to the Coal Company's activities. Holmes claims that the Act effectively prohibits the Coal Company from mining its coal. In so doing, he ignores the very powerful contention of W.L. Pace, attorney for the state, that the Kohler Act "contains no provision requiring any mine owner to leave coal in place. If natural support other than coal be available, or if artificial support be provided, every pound of coal can be removed from the mines." John W. Davis, his opponent, had weakly anticipated the argument when he stated: "The theoretical right to remove the coal without disturbing the surface is, as a practical matter, no more available than was Shylock's right to his pound of flesh." The technical point here is that the statute does not identify which coal must be left in place in order to satisfy the statutory obligation. Holmes extracts from this regime the conclusion that whatever coal is left in place is taken by the state because it can no longer be removed with profit. His focus is on the pillar of coal that is left in place: that is the bit of property that is lost, and it is the state's requirement that this coal not be mined that goes "too far."

But in so doing, Holmes sidesteps the rejoinder that although the coal may not be mined by the company, it does not pass into the possession of the surface owner either. The surface owner exerts a defensive position, a kind of lien over the coal, so that it cannot be mined; but under no construction of the Act could

69. Id. at 414-15.
70. Id. at 410.
71. Id. at 395
the surface owner mine and sell that coal himself. At most some, but not all, of the rights in the coal are transferred. The point here is of no little concern, because the shift in rights makes it very difficult to decide (assuming we care) whether the statute works a physical taking of the coal or is a mere regulation that restricts its use. The truth of the matter is that neither characterization works well, given that the focus of the statute is on the support, not the pillar of coal used to maintain it. More generally, the case demonstrates the unprincipled nature of the modern distinction between physical and regulatory takings, terms that were introduced into the Supreme Court’s lexicon only as late as 1981.72

Yet once Holmes has nimbly skirted this statutory difficulty, he errs again. Because he is content to strike down the Act on its face, he never asks what compensation would have been required in order for the statute to pass constitutional muster. Given Holmes’s focus, it appears as though the coal miner should receive compensation only for the particular bits of coal that can no longer be mined. But that is the incorrect measure. Brandeis gets the better of this argument by insisting that, because the Act did not specify any particular pillar of coal, the correct measure of damages was the difference in the value of the subject mine before and after the restriction is imposed.73 That figure could be less than the fair market value of the coal if some coal had to be kept in place to protect the mine, its equipment, and its workers. Nothing in the record supports the assumption that all of the coal could be removed if the Act were repealed. Alternatively, the protection of surface owners could so drastically impede the operation of the mine that its value decreases by more than the value of the coal that has to be left in place to satisfy the statute. In sum, it is impossible to say definitively how much compensation is appropriate. But surely the test for compensation in this case should be the same as that followed whenever a covenant or easement is placed on land under the takings power: the coal company is compensated for the incremental losses to the entire operation, and not for the value of the (unidentified) pillar of coal.

This point sheds light on the great controversy over the role of numerators (the property taken) and denominators (the property from which it was taken) in takings law. Holmes’s view of the subject seems to be that the inability to mine the coal in the support pillars was a total loss of that limited amount of property:


73. In Brandeis’s own words,

[Values are relative. If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property. The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. The sum of the rights in the parts cannot be greater than the rights in the whole.

Mahon, 260 U.S. at 419 (Brandeis, J., dissenting).
the ratio of numerator to denominator is thus one to one. He might well have refused to offer compensation for the reduction in value of the mine attributable to the new restriction on its operation, for that would have been only a small fraction of the total value of the mine. Here, a small numerator over a large denominator might not go far enough in compensating the property owner, as Brandeis observed. Brandeis claimed that the landowner could not increase his right to gain compensation by dividing the coal from the surface. But his argument works equally well in reverse: the landowner should not be forced to sacrifice his right to compensation by any division of ownership that takes place either. In all cases, the law should limit the opportunities for strategic behavior by providing that in any private transaction, rights of compensation are presumed in both directions, not just one, as Brandeis posits.

At this point, the true tragedy of Mahon is revealed. Holmes and Brandeis both settle on the "too far" test as the ultimate standard, and then divide on the question of what "part" has been taken of what "thing." But neither confronts the point that any conceptualization of numerators and denominators bears absolutely no relationship to what is gained or lost by property owners as a result of the statute. Why should $1,000 in coal be compensated in full if $10,000 in market value of a $1,000,000 mine is left utterly uncompensated? The amount of compensation should always depend on what is taken from the owner. The more that is taken, the more that should be paid. The bill the courts hand to the state should depend only on the loss sustained, not on the ratio of the size of what is taken to the size of what is retained.

Holmes's confusion is our legacy. Professor Margaret Radin's familiar attack on the strong system of property rights rests in large part on the claim that Holmes relied on the dubious strategy of "conceptual severance," which "consists of delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that this particular whole thing has been permanently taken." The well-known turnaround from Mahon to Keystone Bituminous Coal Ass'n v. DeBenedictis relies on Justice Stevens's repudiation of that view of takings. But the whole exercise is a massive diversion. The only test for takings that matters is one that looks at the rights that were lost, and not their relationship, be it large or small, to the property that was retained. That test does not vary with the description of the underlying bundle of rights, and has the great virtue of linking the constitutional measures of damages to the actual economic losses triggered by the loss of individual

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74. See id. (Brandeis, J., dissenting).
75. Id. at 419 (Brandeis, J., dissenting).
76. Compare Mahon, 260 U.S. at 416 (Holmes, J.), with id. at 419 (Brandeis, J., dissenting).
79. For my earlier defense of this position, see Richard A. Epstein, Takings: Descent and Resurrection, 1987 SUP. CT. REV. 1, 16-19.
rights. The broader view of constitutional protection of property rights does not depend on any formalist vision of the subject. It depends on using the same standards for compensation in public disputes as in private ones. Professor Treanor is therefore wrong to chide Justice Scalia for his insistence that the Takings Clause be read to compensate each discrete interest as though it stood on its own base. The right criticism of Scalia is that he thought that takings analysis should turn on the size of the property interest taken in the first place, rather than the value of the rights that the property owner has lost. Unfortunately, the friends and foes of property rights both follow Holmes over a conceptual cliff. It appears that his initial false move in *Mahon* has condemned takings law to eternal incoherence.

Holmes does a bit better in his next paragraph:

> It is true that in Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 [(1914)], it was held competent for the legislature to require a pillar of coal to be left along the line of adjoining property, that, with the pillar on the other side of the line, would be a barrier sufficient for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water. But that was a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws.

In this section, Holmes shifts the inquiry from what has been lost to what has been gained in exchange. His point here is quite simply that in-kind compensation will meet the requirements of the Takings Clause. This pattern of reciprocal protection will achieve that result when the two mines are side by side. But we have no reciprocity at all between the surface owners and mine owners. The entire transfer (even after it is properly measured) goes in one direction. So we return to redistribution from mine owners to surface owners. In this case, a taking that is not justified under the police power is not saved by the presence of implicit in-kind compensation.

Professor Treanor insists that there is really little difference between Holmes and Brandeis because both are deferential to state operations. But judicial deference varies issue by issue, and on this point at least the difference between the two justices is palpable. Justice Brandeis concluded his opinion by stating that there is “no room” for dealing with the average reciprocity of advantage when the police power is at stake. He therefore gave great deference to state justifications with skewed distributional consequences. For those who think that implicit in-kind compensation is an essential portion of the overall constitutional scheme, this difference looms very large in the grand order of things.

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82. Id. at 422 (Brandeis, J., dissenting).
And, for the moment at least, Holmes is on the side of the angels.

But then Holmes veers off in another direction: he questions the support rights for public roads and highways that are also protected by the Kohler Act. Here, we certainly have the risk of a public nuisance to which Holmes referred earlier in his opinion. But Holmes rightly turns this issue against the constitutionality of the Kohler Act. He writes:

The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. Hairston v. Danville & Western Ry. Co., 208 U.S. 598, 605 [(1908)]. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

The power evident in this passage comes from Holmes’s intuitive appreciation of the dangers of strategic behavior. The state acquires surface rights only at time I, and pays a lower price for what it gets. Then it pleads its necessity as a reason at time II to take over the support rights by legislative decree. With a short delay in time, it gets the entire package for the price of only one of its parts. This short cut cannot be permitted, for otherwise the government has a massive incentive to engage in opportunistic conduct. The correct approach allows the state to time its purchase as it sees fit: it can lump its acquisitions at one time, or stagger them if it so chooses. But choice carries with it a responsibility: here, to pay the property owner full compensation, measured by the value of what is acquired when it is acquired. The Takings Clause power allows forced purchases for public use. But the police power cannot be invoked to defeat the compensation requirement when the necessity that justifies it is created by the state itself.

Holmes then offers his great summation.

The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do

83. See id. at 413-14; see also text following supra note 65.
84.Mahon, 260 U.S. at 415.
not stand as much upon tradition as upon principle. Bowditch v. Boston, 101 U.S. 16 [(1879)]. In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. Spade v. Lynn & Boston R.R. Co., 172 Mass. 488, 489 [(1899)]. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court. The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They went to the verge of the law but fell far short of the present act. Block v. Hirsh, 256 U.S. 135 [(1921)]. Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 [(1921)]. Levy Leasing Co. v. Siegel, 258 U.S. 242 [(1922)].

All the themes come together in this passage, but they do not cohere. Holmes reaffirms his initial, misguided threshold requirement that the regulation must not go "too far"—language that has been the salvation of the strong statists. He next addresses the takings issue in public necessity cases and shows the same commendable uneasiness about denying compensation as he did in his days on the Massachusetts bench. More generally, he stoutly reaffirms his view that the necessity can justify the intervention, but cannot excuse the state's obligation to compensate those whose property it takes. Holmes then returns to his basic theme, that the state which wants to make changes (as with support rights under public roads) has to pay for them—a sentence repeatedly quoted by the defenders of private property, only partly out of context. And then he states his deep conviction that these cases are a matter of degree. He is surely right that this is true of some of the questions that arise in takings cases: for example, how disparate an impact is needed to trigger the compensation requirement. But he overstates the point terribly given that there are some takings issues that are not a matter of degree, and that do admit of a principled answer: for example, that takings are takings whether or not they go "too far." Finally in this passage, he distinguishes the rent control statutes from the Kohler Act on the basis that the former were emergency measures, without recognizing the capacity of such measures to endure far beyond the emergency that calls them into existence.

The one large piece of the puzzle that remains is the role of consent in takings cases. Here Holmes takes a view that is quite similar to the tort-law concept of "assumption of the risk," which again sets him apart from Brandeis. He thus closes his opinion with this tartly worded paragraph:

We assume, of course, that the statute was passed upon the conviction that an

85. Id. at 415-16.
exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.\(^8\)

Holmes’s point is clearly correct as a matter of private law. At most the disgruntled landowners could have returned their land and recovered their costs. They could not have gotten the support rights for free, more than 40 years after failing to bargain for them as part of the initial transaction. But the reference to assumption of risk ignores the special assessment operation which might ease its effect.

By making clear that consent may obviate later invocation of the police power, the passage also points to a second disagreement between Holmes and Brandeis, who takes the position that the police power may in some instances override consensual transactions.\(^8\) Brandeis’s view marks an enormous alteration in the law’s approach to contract, for it holds that regulation trumps contract, rather than the other way around.

Brandeis had some imperfect support for his position in prior cases interpreting the Contract Clause. In *Chicago, Burlington & Quincy Railroad v. Nebraska*,\(^8\) a case that illustrates the overall pattern of the Court’s Contract Clause jurisprudence prior to *Mahon*, the railroad constructed a viaduct pursuant to a contract with the city of Omaha that placed certain duties of maintenance and repair on the city. A subsequent statute shifted these duties back to the railroad, without compensation of any kind to offset the increased costs. The railroad claimed that the new statute amounted to an impairment of its old contract and lost.\(^9\) The Court drew a sharp distinction between public and private contracts, and held that the rights of revision were far greater with the former than the latter.\(^9\) Holmes clearly would have been very troubled by this

\(^8\) *Id.* at 416.
\(^9\) *Id.* at 420 (Brandeis, J., dissenting).
\(^8\) 170 U.S. 57 (1898).
\(^9\) *Id.* at 58, 77.
\(^9\) As the Court stated,

Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject-matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the legislature when exercised to protect the public safety, health and morals, and that clause of the Federal Constitution which protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that when
decision, given the uneasiness he demonstrated in Mahon about public necessity as a justification for state regulation in the takings context. Whatever necessity might arise for reassigning work, none arise for the payment of money by one source or the other. But given that private contracts were always on a different footing, Holmes could ignore these precedents without so much as a word. Once again, I think that Treanor is wrong to write as though Holmes and Brandeis occupy the same ecological niche on the deference question. Holmes thinks that the Contract Clause has more bite than his rival.

CONCLUSION

This Cook's tour shows, I think, that Holmes's world view in Mahon does not reflect a consistent philosophy. In part the case is a prisoner of its precedents; in part it reflects the predilections of an author who continued to hold in the progressive era views that he formulated over thirty years earlier on the Massachusetts Supreme Court; in part it reflects the lack of a systematic approach that recognizes that monopoly and aggression present compelling, but different cases for state regulation. Having recognized these shortcomings, we should try to learn both from Mahon's insights, and from its blunders. Yet we should not labor under the illusion that it presents a clear conceptual road map for the future.

As already noted, Holmes did not think that his decision bore any relationship to the much vexed problem of "regulatory takings" with which his decision has been associated. It is difficult, and ultimately fruitless, to retrofit Mahon into this souped-up conceptual framework. What the statute at issue in Mahon did was give the surface owner a veto right over certain operations within the mine. Whether we call this realignment of property rights a "physical taking" (because a pillar of coal cannot in practice be mined) or a "regulatory taking" (because any particular bit of coal can be mined so long as support right is respected) does not address the question of whether compensation should be paid, or why. More generally, the coherence of takings law requires that we jettison distinctions such as this one, that give small points of difference the undue legal weight that they now receive. In all cases, the relevant inquiry asks what property rights have been taken, what justifications have been offered, what compensation has been offered for the taking, and whether the taking is for such contracts are entered into it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature.

Id. at 72.
91. See supra note 85 and accompanying text.
92. See supra note 72 and accompanying text (discussing San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 651 (1981)). The other new entrant under the Takings Clause is the very dubious phrase "investment-backed expectations" (expectations that are often dashed), which was introduced into the case law by Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978). Both phrases come from the pen of Justice Brennan.
a public use (an issue not fully addressed in *Mahon*). These issues require a normative approach that, for all its epigrammatic brilliance, *Mahon* does not articulate. In the end, therefore, this high-stakes game of constitutional interpretation will have to be battled out as a matter of legal principle, not as a matter of precedent and personality. For all his greatness, Holmes is no exception to this general rule as his erratic jurisprudence lurches from side to side.