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The Permit Power Meets the Constitution

Richard A. Epstein*

The proliferation of government regulations must count as one of the most obvious social trends of the past generation. The new wave of regulation works in many ways and across many different substantive areas. Sometimes it works by way of fines and inspections; sometimes by taxation; and sometimes it works by the issuance of permits. That last power—the permit power—is the subject of this essay. Although this power has become the focal point of enormous public discontent, it has received scant attention in the academic literature. In this case, however, silence is not golden. The frequent war stories about the number of permits necessary to construct everything from a dog house in the back yard to a nuclear power plant are so legion that they should not pass unnoticed in the rarefied groves of academe. It is important, therefore, to ask how the permit system should operate in principle, how it operates too often in fact, and what, if anything, could be done to improve the situation. Intelligent legislation to simplify the permit process is always welcome, for no provision in the Constitution compels the government to issue permits before allowing individuals to go ahead with their business. While we cannot (and should not) strive for a permit-free society, I think we should move much closer to that end than we presently are. Hence the question: Does anything in the broad contours of the Constitution push us in that direction?

One's attitude toward the permit power is heavily influenced by one's attitude toward individual liberty more generally. An old observation of the German system of freedom is that all which is not permitted is prohibited (which is at least better than what I take sometimes to be the modern American position that all which is not prohibited is required). The classical American view generally took the form that all that is not prohibited is permitted, which sets the initial presumption in favor of liberty—not in favor of government action. Even the choice between maxims, however, does not capture the full stakes of a responsible debate over the uses and limits of the permit power. The two maxims in question set certain presumptions of what may be done in the presence of

* This paper is a somewhat expanded version of the Fifth Hugh J. Tamisiea and Frank Tamisiea Lecture which I delivered at the University of Iowa College of Law on February 17, 1995. David Currie and Elizabeth Garrett offered helpful comments on an earlier draft of this paper.

1. For one such collection of anecdotes powerfully stated on all manner of social ills, see Phillip K. Howard, The Death of Common Sense (1994).
government silence. They act, therefore, as default rules that deal with the short-term problem of government inaction. They do not act as constitutional rules that correspond to what Congress or the states can do when they are primed for action. Hence, the question devolves to one of power, not one of inertia.

Surely, however, a close connection exists between setting the initial presumption and using the permit power. Knowing that the classical presumption in favor of liberty holds, for example, in the area of speech, one could easily infer that government efforts of prior restraint are destined to run afoul of the First Amendment, even if these restraints are not viewpoint specific. The initial political presumption transmutes itself imperceptibly into a substantive constitutional norm, which is played out as a prohibition against federal action. The presumption in favor of liberty, however, is far weaker with other kinds of permits, such as those regulating the ability of people to enter into various kinds of businesses, or to use their property as they think fit. Here, no one should be surprised to learn that the Constitution as construed gives the government virtually unlimited power to require permits before many forms of economic behavior are permitted.

When stated in this form, the issue has a nice doctrinal ring to it. Should the doctrine against prior restraint in speech cases, as developed in the formative constitutional era, be carried over to all permits generally, or should it limit government powers only in the area in which it arose? While I see a somewhat larger role for permits with business than with speech, this proper area is not as large as it might appear from consulting the current statute book. Requiring permits comes as easily to government as breathing under water does to fish.

This Essay proceeds in four stages. Part I compares tort damage under a strict liability system with the ordinary injunction, and shows why the latter is a far more potent remedy that has to be hemmed in with strong limitations, as it usually is in ordinary tort litigation. Part II then compares the private injunction with the public permit and shows that the latter is subject to none of the limitations that apply to tort injunctions, and that nothing in the special status of government requires a relaxation of these standard limitations in the regulatory context. Part III then makes the modest point that, though the permit power may be a valid legislative tool, it does not make the state a part owner of the regulated venture. Finally, part IV examines the recent decisions by the United States Supreme Court in Nollan v. South Carolina Coastal Council and Dolan v. City of Tigard.

insofar as they place some limits, whose contours are as yet undefined, on the power of the state to condition the permits that they grant on the willingness of the individual citizen to surrender otherwise protected rights. This entire discourse does not take place in a vacuum, but presupposes a strong theory of individual rights that form the backdrop for both private law suits and government regulations. In one sense, this Essay could be interpreted as an extended argument that Mr. Justice Holmes was wrong in *Lochner v. New York* when he said that the Constitution embodied no substantive theory of the relationship between the individual and the state.  

I. STRICT LIABILITY VERSUS INJUNCTIONS.

Before diving into such heady waters, I must explain why permit powers are prized by governments and feared by individuals subject to them. Consider, first, the private law analogue to the permit: the injunction, which is rarely issued, and when it is, usually appears in disputes among neighbors. The contrast between the injunction and tort damages, even under a strict liability system, demonstrates the injunction’s potency. *Turner v. Big Lake Oil Company*, a staple of the torts literature, neatly illustrates this distinction. At issue in *Turner* was whether the defendant was strictly liable in tort when water leaked out of a cistern located in the Texas desert. The water was needed for the drilling operations of the defendant’s business. The Texas court recoiled against the prospect of allowing damages under a strict liability system, fearing this remedy would shut down a necessary and profitable industry for the state. In doing so, the court made a Texas-size claim. By way of juxtaposition, an earlier New Hampshire case, *Brown v. Collins*, rejected the strict liability rule in tort—there when a horse bucked when frightened on a public way—by appealing to the Bible itself. Chief Justice Doe went so far as to say the rejection of a strict liability rule in tort was necessary for the preservation of civilization itself.

Today, in landowner disputes, the strict liability rule is in the ascendancy because of an increased concern with the preservation of the environment, yet civilization survives. The key element, here, however, is to

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7. 96 S.W.2d 221 (Tex. 1936).
8. 53 N.H. 442, 449-50 (1875) (citing Exodus for the Hebrew support of a strict liability system thought to be inappropriate for nineteenth century America).
9. Id. at 448:

Even if the arbitrary test [of *Rylands v. Fletcher*] were applied only to things which a man brings on his land, it would still recognize the peculiar rights of savage life in a wilderness, ignore the rights growing out of a civilized state of society, and make a distinction not warranted by the enlightened spirit of the common law: it would impose a penalty upon efforts, made in a reasonable, skillful, and careful manner, to rise above a condition of barbarism. It is impossible that legal principle can throw so serious an obstacle in the way of progress and improvement.
show how utterly exaggerated is any claim that the choice between strict liability and negligence has a pronounced effect on the well being of society.\textsuperscript{19} Strict liability has the advantage of defining clear boundaries between neighbors, at the cost of somewhat greater frequency of litigation. Negligence carries with it the mirror image of advantages and disadvantages. The dominant feature of both systems, however, is that they induce defendants to take only cost-justified precautions. The difference between the two systems in terms of the total cost to certain activities is relatively minor, and clearly civilization at any era of industrial development can do quite nicely with either of these rules. In switching from strict liability to negligence, or the reverse, it is not as though the common law courts had taken leave of their senses and decreed that the victim had to pay the injurer an amount equal to the damage it suffered at the injurer’s hands (a rule that would have the catastrophic effect that Chief Justice Doe attributed to Rylands).

The stakes get much higher when the choice is between damages under a strict liability rule and injunctive relief. In the Turner scenario, a strict liability rule means that a defendant pays somewhat more in tort damages and precautions, and somewhat less in legal fees. In contrast, the injunction, especially the unconditional injunction, shuts down operations altogether unless the defendant can bribe the plaintiff to release the injunction, perhaps for a figure far in excess of any possible damage that the plaintiff might suffer. Given this profound shift in the balance of power, injunctions are usually confined to situations in which there is an actual recurrent damage or an imminent threat of damage. Even when issued, such injunctions are normally structured to minimize interference with the defendant’s activities, while protecting the plaintiff’s land from harm inflicted by those activities. One can always protect a plaintiff by shutting down a defendant’s activities (or, for that matter, closing down all the oil fields in Texas). Usually, however, injunctions are issued to the point where damage is sharply reduced, not eliminated; allowing activities to continue so long as the defendant complies with certain stipulated conditions. Even here the conditions are usually related to the risk of external harm. Thus, a well-drafted injunction may instruct the defendant to keep waste within his land, but it will then allow him to figure out whether it is cheaper to not generate it at all or to capture it before it runs onto the plaintiff’s land. The wholesale injunction, however, stands in stark opposition to the strict liability tort action: The tort action is a somewhat higher tax on activities. The injunction shuts down the activity. With strict liability, industry profits may drop off by one or two percent, if that. With an industry wide injunction, industry profits drop off to zero. That difference is worth worrying about in both Texas and Biblical terms.

\textsuperscript{10} I have discussed this question at greater length in Richard A. Epstein, The Social Consequences of Common Law Rules, 95 Harv. L. Rev. 1717 (1982).
II. INJUNCTIONS VERSUS PERMITS

The injunction, therefore, is a potent device, but the permit is more potent still. It is worthwhile to attend to the differences between the two as instruments of social control. Before the permit power is asserted, the activity may be undertaken freely, though with potential liability in tort, even under strict liability. In an extreme case, a tailored injunction may issue to prevent the threat of imminent harm to neighbors; yet even here courts retain some discretion in the terms required in order to balance hardships between the parties. Permit powers, however, are rarely softened by the conditions routinely associated with private injunctions. Rather, the injunction, however potent, carries none of the clout associated with the routine grant or denial of a permit.

The first key difference concerns the burden of going forward. In an ordinary tort action, the injured party must step forward to claim that he is at risk from the defendant's activity. This simple rule means that the defendant does not need to obtain permission from any individual or group before it starts its original activity. Once started, that activity can only be brought to a halt when there is some clear and present danger of an invasion of the plaintiff's interest.

In most cases, the defendant will avoid taking that risky course of action for four related reasons, all of which apply with great strength to land use cases, in which permits today are commonly required. First, the informal restraints of neighborliness work as a powerful constraint against many forms of misbehavior. Pollution usually starts close to home and diminishes with distance. Neighbors are often friends, and even when they are not, they often move in the same social circles and thus are subject to a wide array of social sanctions when they deviate too far from community standards of good behavior. These standards, moreover, are capable of variation across different communities in different settings, so that local knowledge can be brought to bear in setting the right amount of pollution. Typically that level will not be zero, as the individual who complains about pollution in one case will benefit from its creation in the next. In these situations, "live-and-let-live" is a maxim not only of law, but also of good social sense.\(^1\) No one claims these sanctions are uniformly operative or obviate the need for legal restraints. A weaker proposition, however, is worthy of support: The stronger the social sanctions in place, the weaker the need for legal ones.

Second, the informal pressures on landowners to avoid nuisances are not only social, but often personal and physical. Usually, harm to a neighbor can only be inflicted by persons who first inflict harm on their own property. The pollution, erosion, or flooding of neighbors' property does not occur in a vacuum. Usually water or filth has to run for some length over a defendant's land before it reaches the plaintiff's. Wholly

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\(^1\) For the classic statement, see Baron Bramwell's masterful opinion in Bamford v. Turnley, 122 Eng. Rep. 27, 32-33 (Ex. 1862).
without any legal intervention, therefore, the defendant’s own land is hostage to the plaintiff’s well-being. While the level of care induced is admittedly below that which is optimal, the possibility of self-injury imposes an automatic loss to a defendant that no amount of legal maneuvering can avoid. This physical constraint, therefore, acts as a weak but useful buffer for the benefit of others in the neighborhood.

Third, in addition to the self-inflicted harm, the defendant always remains at risk of tort liability for damages he causes. Once again, this threat is more potent in the land use context than it might be with, for example, hit and run drivers. Land cannot move, and it is nearly impossible for a defendant whose conduct is a source of pollution, erosion, or flooding to conceal those offensive activities. Happily, the land itself offers a kind of security for the right of action, so that at the margin insolvency is a less pressing risk than it is in automobile accidents.

Fourth, injunctive relief under the tort system still offers a potent threat to neutralize the benefit of investments in ongoing operations. The defendant, therefore, has a strong incentive to avoid trouble under the law of nuisance or trespass, for the decision to shut down activities after the costs of investments are incurred has large adverse consequences. The decision, therefore, to delay the interposition of legal remedies until the threat of harm is imminent does more than simplify the process of adjudication. It removes the power of the state to blockade activities before they begin. All tort law is a balance between freedom of action on the one hand and risk to person and property on the other. No tort rule can simultaneously reduce both risks to zero. The best that can be done is to minimize the sum of the expected costs from both types of error, taking into account their anticipated frequency and severity. For the reasons stated, the risk of premature legal invasion is often far greater than the risk of tardy legal invasion. The common law rules on nuisance may not have been perfect, but they did come close to striking the proper balance.

Permits change this balance. Once the permit is required, the individual citizen becomes a supplicant before the government in all cases, whether or not any real threat of harm exists. Huge numbers of cases are necessarily brought into the system, only a tiny fraction of which would have resulted in a direct conflict of interest between neighbors. Yet government at all levels is allowed to hold up operations for an indefinite period of time, often on the slighestest grounds, because the all-too-frequent presumption of state benevolence imperceptibly eases the standards necessary to enjoin certain forms of private action. The permit may be denied by a state regulator who does not have to show that an applicant’s conduct puts other persons at risk, and, in fact, does not require any of the showings that are necessary for obtaining private injunctions.

In addition, the permit powers are strictly cumulative. The ability of the state to issue one permit with respect to one type of hazard in no way limits the power of the state to require a second permit for a different type of hazard arising from the same activity, and then a third, etc. Permits,
PERMIT POWER

unlike judicial decisions, are typically issued by specialized bodies which often have a strong ideological position on the issues that come before them time after time. No longer can one be confident of going before a judge who is selected not solely for his views on the question of, for example, wetlands and environmental damages. Rather, the ostensible expertise of agency personnel is little more than a pretext for a strong one-sided commitment which results in a complete inversion of the proper distribution of power within a legal system. Neutral judges have only limited powers to issue injunctions, but interested administrators have an absolute power to issue or deny permits. It is therefore a mystery why any court should defer to a process so rife with the possibilities of mischief. But that mischief has its clear consequences; the succession of permits required could easily consume resources that exceed the commercial value of the undertaking subject to the permit power.

The question then arises regarding what might justify the creation of this enormous power in the state. One possible explanation relates to one inherent weakness in the private injunction, which takes the form of a familiar collective action problem: Who should seek injunctive relief? In the simplest situation, conceive of a defendant whose pollution activities could injure one, some, or even all of twenty neighbors. If the pollution is discharged, the injured parties, once identified, have an incentive to bring suit for the harm suffered. But which of these parties is the obvious candidate to maintain a suit for injunctive relief before harm occurs? Acting individually each neighbor is likely to make a familiar self-interested calculation: “Why should I incur all the costs of providing for an injunction when the probabilities are that someone else will benefit from the prevention of harm?” That selfish calculation is generally correct. If the injunction costs $100 and provides $200 worth of social benefits to the neighbors, no individual neighbor whose probability of suffering that $200 of harm is under 50 percent would rationally seek that injunction himself. While in principle, it is possible to pool expenses to obtain that injunction, the familiar litany of coordination and holdout problems will likely scuttle that enterprise before it takes place.

This predictable impasse opens an opportunity for useful government intervention. The virtuous government will tax all the neighbors their pro rata share of the cost and then bring the suit for injunctive relief, if necessary. If it is lucky, it can recover its expenses and then use them to fund the next round of activity. In this optimistic scenario, the mere fact that a credible threat of legal action exists is likely to deter anyone from committing the harmful actions that might trigger it. I will ignore for the moment all practical complications in apportioning costs, setting tax levels, and setting a regulatory course of action. Even if one concedes that these may be done well, we still fall short of adopting the present permit system. The government power to tax allows many diverse citizens to act as one party. But if the appropriate balance in the simplest case—that with one potential defendant and one potential plaintiff—allows the plaintiff to obtain an injunction only on some showing of imminent peril, the state,
when acting for all citizens, should be in no better position. It too should have to show the same level of peril as the individual citizen. The basic task—to minimize the sum of over and under-enforcement of injunctive relief—does not disappear because the government has injected itself into substantive litigation. And that balance is not set by allowing the state the prerogatives that it typically claims for itself.

III. PERMITS AND OWNERSHIP

If the arguments set out above are correct, then the permit power should be far more circumscribed than it is today. Unfortunately, the alchemy of government intervention has led to a very different legal position, under which the permit power requires individuals and businesses to receive their government's blessing before they are allowed to act. This enormous power reserved to the state requires some elaboration, for no matter how generous a view one takes of the permit power, one still must distinguish between the state as regulator and the state as owner. Quite bluntly, the power to issue a permit does not—or at least should not—make the state a part owner of the property. It is always necessary to distinguish between a permit power and a (co)ownership right, although one suspects that, more often than not, government officials cannot tell the difference between them. While a permit gives the government a limited power to prevent certain kinds of use of property, it does not give the state the power to undertake its own use of the premises. (However, it is usually allowed to enter land without consent to ensure that the conditions of any permit, once issued, are respected by the parties to whom they are issued.)

To put the matter in this form is not to suggest that all is well with the permit power. The existence of these permits creates a real holdout problem for which there is no consensual solution. The government may not use the property, but it can freely block the use of property by its common law owner. So the next question concerns how that standoff can be resolved in a responsible fashion. To answer that question one has to look at the various risks associated with the permit power.

First, the permit power invites, indeed almost requires, an elaborate set of administrative procedures, which lays out the reasons for which the permit may be granted or denied and the set of procedures that must be followed in order to obtain the permit in question. In many cases, the state understands that there are ostensible substantive limits to the permit power. The state knows, for example, that it cannot tell landowners that they must get a permit simply to walk on their own land, and knows it could be subject to potential financial penalties if its refusal to grant permits results in the permanent deprivation of all economically viable use of the land.12 So astute administrators recognize that there are costs to

both blanket objections and to final decisions that open them up to judicial review. The net effect, therefore, is that the permit waltz takes place, in which the government officials act as close to owners as they possibly can without crossing that magic line by imposing controls on all possible uses of the land. One fine technique, therefore, is to grant permits, but to subject them to conditions that are in practice so onerous that it is not worth going through with the project in light of the restrictions on behavior.\footnote{13}

The second technique is to delay the issuance of the permit. In one of the Supreme Court’s least lucid moments, it stated that there is really no reason to be upset because a permit is denied so long as that decision is subject to review in the ordinary course of business.\footnote{14} More process is equated with\footnote{15} due process. Under the Court’s reasoning, the permit could ultimately be granted. So long as there is hope within the administrative system, the courts remain closed to those who must have a permit in order to proceed with their business. The Supreme Court makes it appear as though the internal administrative processes for getting permits were set by some extra-political forces in some finite and manageable fashion, so that there is always a final decision at the end of a speedy and responsive process. But there are no exogenous variables in the perpetual battles between permit provider and permit seeker. The government now finds to its delight that if its objective is to slow development, or to keep a new firm out of business, all it need do is extend the due process rights within the system\footnote{16} ad infinitum. If at one time a land use board did not have a procedure for variance, then that can quickly be added. The application can be allowed so as to keep the landowner or other claimant out of court, and then, when it is denied, an additional appeal can be afforded. This ensures that due process becomes a blanket to suffocate, not a route to speedy and prompt review in the courts. At each stage in the procedure, the government can manufacture delays by allowing additional time: additional time for argument, for permit administrative officials to take summer vacations, for site inspection, or to ask for further documentation of changed conditions since the last set of delays. Justice delayed is development denied and the status quo affirmed.

\footnote{13} Just this transformation took place in\footnote{14} Lucas, id., as the 1990 amendments to the Coastal Commission Act set up an obstacle course that, on its face, did allow some development to take place.

\footnote{14} See Williamson County Planning Comm’n v. Hamilton Bank, 473 U.S. 172 (1985) (requiring variances to be sought before allowing judicial review). The Court’s attitude toward its own quagmire is blase in the extreme. The Court has stated that, “[A]fter all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired.” United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985). The costs of delay are assumed to be zero, and this entire line of argument is in evident tension with First Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), which treats temporary takings of real property as compensable events under the takings clause.
This is a racket (no lesser word will do) whose dangers the Supreme Court fully recognizes in the context of free speech by private citizens and organizations. The law imposes a virtual prohibition on any prior restraints of free speech precisely from the recognition that the permit (or license) system exerts far more leverage than a damage action, which is tied to the level of harm suffered. But with occupational liberties, such as the effort to introduce new communications technology before the FCC, the dominant maxim repeats all too often, "better safe than sorry." The status quo receives a blessing that places entrepreneurial activities at risk.

A third feature of permits also calls for some attention. The correct operative principle should be that once a permit is granted it stays granted absent some powerful demonstration of changed circumstances that pose some imminent threat. In most cases, however, this is not the rule. The government that grants a permit reserves, expressly or impliedly, the right to revise that permit at will, even after people act in reliance on the government action. In one case from personal knowledge, a fire department allowed construction of a new school extension with fire doors that were not tied electronically to remote parts of the same large complex. The system was designed and constructed in ways that met all applicable safety standards. Three weeks before school began, the inspectors returned to the building and decided that a fully integrated system linking all doors in the building was required. After school began, the doors therefore could not remain open until the new connections were retrofitted at great expense. Yet the clanging of doors disrupted classrooms and posed a serious risk of injury to small children who could be hit by the large swinging doors operated by other children, whose first concern in hurrying down the corridors was not safety. Since none of those risks was within the purview of the fire department, the school was left to scramble and spend money in order to reduce the total risks that were increased by a change in permit standards.

Unfortunately, legal doctrine is not equal to the social problem, for the government, which created the permit power unilaterally, is allowed to reserve the right to revoke at will, contrary to the principles of detrimental reliance that dominate the law of contracts. That outcome is all the more questionable because the individual citizen does not voluntarily choose to subject itself to the permit power in the first place. In ordinary markets, if you don't like the terms that people offer, you can go elsewhere. But there is no effective exit right when the state asserts its permit power. The state, which has a stranglehold on individual behavior, must be told to relax its grip. It is hard to see why this is not required by

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15. For one application of this principle, see Wisconsin & Michigan Ry. Co. v. Powers, 191 U.S. 379 (1903) (Holmes, J.) (holding that a promised tax break could be revoked after the railway line had been built because the railroad had not obligated itself to build the railroad in the first place). The case turned on a narrow reading of the consideration requirement, which demanded that the undertakings on each side be "conventional inducements" for each other. Id.

16. For my analysis of this problem, see Richard A. Epstein, Bargaining with the State
the simple guarantee that no person shall be deprived of life, liberty, or property, without due process of law. Any standard that is consistent with the rule of law must be both known and stable. The current system requires neither.

The permit power in the hands of government is also dangerous for other reasons. One prominent risk is the utter lack of substantive standards by which permits can be denied. The need for the demonstration of any real harm is often dismissed as a relic of the old common law, and in its place, licenses and permits are granted or denied under a standard that asks whether or not the applicant's activity is in the service of the public interest. Yet it seems evident as one watches the mountains of paper that accumulate in the cabinets of the FCC that the public interest is rarely served by techniques that administrators use to measure it directly. This open free-for-all strongly contrasts with the much more focused inquiry used in ordinary actions for injunctions, in which the question is the crossing of some clearly demarcated boundary. Yet in the environmental area, the perimeters of state action are pushed back such that any alteration of the earth is regarded as a potential source of harm which has to be reviewed and scrutinized before it can occur. Often, however, the substantive standards under which permits are issued—the original contour requirements of the strip mining acts come to mind—increase the level of real environmental damage by forcing landowners to attempt the impossible without allowing them to respond forthrightly to old-fashioned risks of erosion or pollution of public and private lands and waters.

A fourth technique that draws the permit web ever more tightly is the large number of local, state, and federal permits routinely required for a simple project. That tripartite division of power creates a distinct obstacle in its own right and carries with it the immense potential for exhaustion and delay. Further, it also opens up for state agencies other forms of strategic behavior that threaten our basic fidelity to the rule of law. For instance, suppose that both federal and the state governments must issue permits for someone to fill in a wetland (or at least what some government official calls a wetland). This creates a nice sequencing problem. Each agency is tempted to say, "We will grant you a permit only after all your other permits are in line." After all, why should any government agency have to go through an unnecessary review when the new project may never get off the ground? The procedures translate into the area of administra-

17. For the early version of this critique, see Ronald H. Coase, The Federal Communications Commission, 2 J.L. & Econ. 1 (1959).
tive action the same "why me?" ritual that is par for the course in joint causation cases. Let A, B and C harm X jointly and each is able to say, "Don't blame me because it all would have happened even if I had done nothing." So A points to B, who points to C, who points to A, who is quite happy to continue to go around the circle a second time. If no one has to process a permit first, nothing need ever get done. To avoid this impasse, all permits should be considered on their own merit; the question of which is reviewed first and why should not be left to the unhappy citizen who has to struggle with them all. Hiding behind other permit requirements to avoid passing on a particular application should not be raised to an art form.

The situation may be far worse than this, for sometimes one gets the impression that the state and federal officials engage in cooperative behavior. Only one denial is needed to stop a project cold. It is, therefore, possible for officials to take turns with each other. First the state party can allow the action to go through and have the federal government stop it; then the roles can be reversed. The happy alternation allows each side to present a relatively impressive record of accommodation, even though the bottom line is that no project wiggles its way through the entire obstacle course. Notably, this situation is aggravated because one cannot chase after the federal officials in state court, while the federal courts are loath to review the action of state courts—since these can be reviewed in their home base. So not only is there a divided process of passing on permits, there is no obvious judicial forum which can see the full picture at one time. And so the cycle of delay continues uninterrupted.

This maze has grown ever more complex under the approving gaze of the federal and state courts. The protection of property against takings is quite limited in those areas in which there is no physical occupation, so that permits are not subject to much scrutiny by the courts. Often times the entire body of law can be summarized in the jurisprudence of "developer loses," which one thoughtful study treats as the major reason for the run-up in housing projects in California.25 The relaxed attitude of the Supreme Court allows the states wide latitude in defining the ends for which permits are granted, the means to achieve those ends, and the ability to assess the relative risks of moving too quickly (which are always great) and moving too slowly (which are always small). The only way to attack that permit system is for courts to impose far greater scrutiny on the selection of ends, on the choice of means to achieve those ends, and even on the relative hazards of over- and under-regulation. The Supreme Court has given some hints that it is willing to meet this challenge, but to date they are only hints that thus far have not been picked up and pursued with vigor by lower federal or state court judges, most of whom give the benefit of doubt to government action across the board.

IV. NOLLAN AND DOLAN

What hints did the Supreme Court drop, and what do they tell us about the permit problem? The Supreme Court's only indications of change come in connection with two land use cases: Nollan v. California Coastal Commission \(^{21}\) and Dolan v. City of Tigard. \(^{22}\) Nollan arose out of an act of defiance. The Nollans had applied for a permit to demolish a dilapidated beach house on land they had contracted to buy in order to erect a more modern home in the same place. The contract of sale was conditional on issuing a permit for the construction of the new house. The Coastal Commission was prepared to grant the permit, but only if the Nollans ceded a public lateral easement across the front of their property. In one sense, it was a good deal for the Nollans. They were better off with the combination of bitter and sweet from the state than they were with the status quo ante. They decided, however, that they were entitled to the sweet without the bitter. Unlike their more timid neighbors, they were undeterred when the requested building permit did not issue. After protracted negotiations and wrangling, they first obtained a writ of mandate from the trial court for the permit to issue without an injunction, which the Coastal Commission promptly appealed. While the case was on appeal, the Nollans took a major business risk. They completed the contract for purchase, ripped down the old bungalow and started construction of the new house, without a permit. As befits this saga, they lost in the California Court of Appeals. \(^{23}\) The case was not heard by the California Supreme Court, but the United States Supreme Court upheld their temerity, saying that the demand for the surrender of the lateral easement was a form of extortion that did not have to be paid. If the state wanted to take the lateral easement, it could condemn it for cold cash.

Why did the state think it had the power to deny the building permit in the first place, wholly without regard to the attached condition? This question is more troublesome than it seems. The Nollans's beachhouse was no different from any other in the neighborhood. By no stretch of the imagination did building it count as a common law nuisance. If the permit had to be denied for cause, then what kind of cause could be shown in this case? I can think of none, and thus would conclude that simply denying the permit was a taking of private property, in this case the development rights over the land in question. If the state does not possess those rights, then it is hard to see why it should be able to sell back to the landowners rights that it should not have taken from them in the first place. In this regard, the case is far easier than the usual case of unconstitutional conditions, whereby the state may have a right to veto

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certain transactions but nonetheless cannot allow them on certain kinds of conditions that allow the state to exploit its monopoly power.\footnote{For an explanation of how this might be so, see Epstein, supra note 16.}

So why might a building permit be denied? Here Dolan offers some clues. In this case, the landowner wanted to expand her plumbing supply store and the adjacent parking facilities. Arguably, this expansion could have two effects. First, the expansion of the impermeable parking area could increase the runoff of water into the creek, creating flooding risks for downstream neighbors. Second, the access rights to the store would be worth more because of the increased traffic that expansion would bring to the store. The City of Tigard, in order to pursue the objectives of its own master plan, sought to capitalize on these two features of Mrs. Dolan's proposed expansion. It therefore made her an offer she could not refuse. The city would give the permit for expansion, if Dolan would deed over to the city land for a bike path and a flood easement over a nearby creek. As in Nollan, she would be better off with the expansion subject to the conditions than she would have been if forced to make do with the status quo. The city, to its benefit, would not have to purchase either the flood easement or the bike path. It looked, therefore, like a case of mutual gain through contract.

The United States Supreme Court, however, held that the city did not have the power to impose this bargain, at least not without an explanation as to why these conditions should have been imposed. Thus, on remand, two issues remain. The first is whether the flood easement could be justified as a means to cope with any runoff from an expansion of the covered area. The second issue is whether the bike path is needed to cope with the expansion of traffic. On the strength of the available record, it seems that the city should lose on both of these disputed issues. And the reasons stem from a proper view of the permit power.

Start with the flood easement and the parking area. Without question, if the alteration of the ground cover increases the runoff into the creek, Mrs. Dolan runs the risk of liability, perhaps under the rule of Rylands v. Fletcher,\footnote{L.R. 3 H.L. 330 (1868).} which has been applied to dangerous activities in Oregon,\footnote{See McLane v. Northwestern Gas Co., 467 P.2d 635 (Or. 1970); Brown v. Gessler, 230 P.2d 541 (Or. 1951).} including the accumulation of water. And negligence theories of liability always remain available, even if Rylands does not.\footnote{Brown, 230 P.2d at 541.} This prospect of liability sets up the possibility of injunctive relief, just as if the city were a private owner. On the view taken here, however, the city must demonstrate imminent peril before the injunction can issue. That showing, of course, could not be made. Indeed, even under the more relaxed standard of intermediate scrutiny that appealed to the Supreme Court, the city still fails to make out its case to withhold the permit. The city's protected
interest is to stop the runoff; the choice for methods for preventing that runoff lies with the landowner. If she chooses under the circumstances of this case to use other methods—grading, culverts, etc.—to direct the water in a different direction, then the city’s interest is satisfied and its case for more control is at an end.

Likewise, with respect to the return traffic from the road, we do not deal with a question of harm prevention at all, but rather with a disguised restitution theory for benefits that the city’s actions conferred on Mrs. Dolan. But these benefits are largely to the people who ride past the plumbing and supply store in order to enjoy a day in the country, not to those who ride to the store. That change in traffic patterns hardly constitutes a specialized benefit that inures to Mrs. Dolan from the expansion. No one would make that claim if the city had wanted to take the bike path for nothing if Mrs. Dolan had not applied for a permit in the first place. Since the permit does not give the city any ownership position over her land, the city does not have the right to hold out for something better before awarding the permit. The holdout power is normally the prerogative of ownership, not regulation.

In this light, we can detect a simpler way to look at this case. The entire permit process is illegitimate. Mrs. Dolan should be able to build to her heart’s content, and then and only then should the city be able to stop her by showing some imminent peril of harm on the public way. This line of argument should quite neatly dispose of the flooding portion of this claim, but it is slightly less clear with respect to the entire question of traffic patterns. Here the usual common law rule is that all private owners have an access right to the street, just as all riparians have access rights to public waters. To push the water analogy one step further, an owner cannot use her access rights in water to impose a “surcharge” on the common resource. The same issue is surely raised with land use. If the expansion were to increase the traffic flow in and out of her store one-hundred-fold, then surely some serious issue of land management would come into play. The messy question of whether she should be charged some additional sums for highway expansion or additional traffic lights would be an unavoidable incident of urban growth and planning. On the facts of this case, however, we do not come within a country mile of that problem. Therefore, it is the better part of wisdom to leave the hard cases for a later time, secure in the knowledge that the law sometimes generates easy cases with which they can be contrasted.

A Modest Revolution

The particulars about Dolan permit some generalization. The cleanest way to attack the model of the bargain on which the City of Tigard relied is to make the obvious point that a permit power never gives a government body a property interest that it can sell to the landowner or to anyone else. At that point, the entire apparatus of the permit power falls down, so that the only remaining question is whether some permissible justification exists
that would allow the government entity to obtain injunctive relief, subject to the same limitations that are routinely applied to private plaintiffs.

The resulting shift in emphasis is enormous. Removed from the land use context, it implies, for example, that the Food and Drug Administration cannot hold up drugs indefinitely until it is satisfied that the drug under review is safe and effective. The right to buy and sell drugs is an ordinary incident of property and thus cannot be eliminated without justification or compensation. The correct procedure, therefore, is to permit all drugs to go on the market as of right, save only for the ability to remove from the market those drugs which are shown to pose an imminent peril to the population at large. The state can issue warnings to its heart's content, because such warnings can be freely ignored by persons who wish to run the risk or who think that they possess better information than the lumbering bureaucracies who have a hammerlock on health care. Private liability for the sale of new drugs remains possible under the law of contract, warranty, and fraud, but only on the principle of freedom of contract that is routinely disregarded under today's law of product liability.

A close examination of the statute books would quickly isolate thousands of other instances of the permit power that should be consigned to relative oblivion if this modest reformation of the law of permits is imposed. The Constitution provides explicit protection for private property; it does not provide for the government powers to limit its use or disposition on a whim. The only justifications for the limitation on private freedom are the protection of others against the use of force or fraud and the provision of a return benefit of equal or greater value to the regulated parties. Unfortunately, the current law does not contain the proper alignment between the Constitution and the permit power. Today the constitutional limitations come out second best in the battle with official discretion. The changes I have proposed all stem from the belief that ours is a government of limited powers, and thus are designed to reverse that priority and to give the Constitution its deserved pride of place. No one who surveys the current scene could deny the magnitude of the change in constitutional understandings. But these changes are consistent with the original constitutional design. These are changes for the better. Shrinking the size of government, and curtailling the mischief that it creates, are urgent and long overdue structural reforms that we as a people should not fear to make.