

8 When Property Regimes Collide: The “Takings” Problem

We have seen that various property regimes – individual, common, and public – may be vested in a single resource or resource amenity at the same time; or they may be vested in different resources or resource amenities that overlap. For example, publicly-owned waters or wildlife may cross privately-owned lands. In these circumstances, property regimes may come into conflict. When they do, it becomes impossible to enforce one set of rights in the resource or resource amenity without violating others.

The most prominent example of the type of problems that can arise when property regimes collide is the so-called “takings” claim.¹ Section I of this chapter provides a summary introduction to the law of takings. Section II reframes takings disputes as conflicts between existing public and private property regimes. And Section III briefly considers the implications for takings doctrine and public policy.

In contrast to the preceding chapters in this book, the analysis in this chapter is almost entirely legal and heavily doctrinal. Takings doctrine does, of course, carry social and economic implications. The purpose here, however, is not to assess the social value of takings law but more simply to highlight a neglected problem in takings doctrine and jurisprudence, which relates to issues discussed throughout this book.

I. An Introduction to Takings Law

Governments in most countries possess the power of *eminent domain*, which literally means *highest ownership of land*. According to *Webster’s New Collegiate Dictionary* (1975), the phrase “eminent domain” refers to “a right of a government to take private property for public use by virtue of the superior dominion of the sovereign power over all lands within its jurisdiction.” The constitutions of most, but not all, countries, require the government to provide compensation when it takes land from private owners by eminent domain. The Fifth Amendment to the U.S. Constitution, for example, provides: “nor shall private property be taken for public use, without just compensation.”

For more than a century after the Fifth Amendment was enacted in 1891, the Takings Clause was of minor importance, coming into play only when the federal government or state² took title to private property for, usually uncontroversial, public uses such as road-building. Few cases were litigated under the clause (see Bosselman,

¹ Richard Lazarus first pointed out to me the fact that takings cases typically arise where property regimes collide.

² The 5th Amendment’s Takings Clause applies to the states through the 14th Amendment.

Callies, and Banta 1973, Ch. 7), and there was no such thing as a “regulatory taking” – a claim for compensation based on government regulation of private land uses –, although state and local governments had been regulating private land uses, sometimes quite stringently, since the colonial era (see Treanor 1995; Hart 1996).

In 1922, the Constitution’s Taking Clause rose momentarily to prominence. That year, the Supreme Court ruled in *Pennsylvania Coal Co. v. Mahon*³ that government regulations of private land uses *could* constitute compensable takings, *if* the regulated land use does not amount to a nuisance *and* the government’s regulation deprives the landowner of nearly all of the value of his landholding. The *Pennsylvania Coal Co.* ruling was of little immediate consequence, however. The Court did not find another regulatory taking of private property for more than half a century, despite the continued proliferation of government land-use regulations. Finally, in the 1980s the Takings Clause returned to a more lasting prominence. It has remained ever since an active subject of litigation. Instead of detailed account of recent developments in takings jurisprudence,⁴ it is enough for present purposes to summarize, with a bit of interpretive commentary, where that law stands at the start of the twenty-first century. During the last 25 years, the Supreme Court has employed at least four distinct rules of taking law:

Permanent Physical Occupations

The oldest and most well-settled rule of takings law is that the government must compensate private owners when it permanently occupies their land or authorizes the permanent physical occupation of one person’s land by another. The Supreme Court reaffirmed this rule in *Loretto v. Teleprompter Manhattan CATV Corp.*,⁵ in which the Court held that a New York law requiring landlords to permit the installation of cable television facilities on their properties constituted a compensable taking. The Court, in an opinion by Justice Thurgood Marshall, observed that “we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred.”⁶

The Police Power/Nuisance Exception and Its Problems

When the government regulates or eradicates a nuisance, it acts pursuant not to its eminent domain power but its “police power.” Like eminent domain, the police power is an inherent power of government, not requiring explicit constitutional authorization (see Freund 1904, §§5 & 8). Unlike eminent domain, however, the Constitution imposes

³ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

⁴ Detailed accounts of the development of takings law can be found in Fischel (1995) and Laitos (1998), among others.

⁵ 458 U.S. 419 (1982).

⁶ 458 U.S. at 426.

no express compensation requirement for police-power regulations, where the government is regulating what amounts to an unlawful activity. This makes sense as a matter of both equity and efficiency. If the government had to compensate for restricting land uses such as prostitution and illicit drug-making, its regulations would lose their deterrent effect. By the same token, if the government had to compensate for pollution regulations, those regulations would fail to serve the purpose of internalizing externalities.

Whatever the formal and functional justifications for the police power/nuisance exception, the formal distinction between eminent-domain takings and police-power regulations has proven problematic in application. It can be extremely difficult for the courts to determine whether the government is exercising one power as opposed to the other. Ernst Freund (1904, §511) attempted to clarify the matter by distinguishing between government actions designed to *confer public benefits* – eminent domain – and those designed to *prevent public harms* – police power. As many authors (such as Michaelman 1967, pp. 1196-7 and Fischel 1995, p. 354) have noted, however, Freund’s distinction does not solve the problem. Almost any activity that confers public benefits can be described as preventing public harm, and *vice versa*. When the government restricts development of a pristine area in order to preserve a scenic vista, for example, it is conferring a public benefit by preserving the scenic vista *and* it is preventing public harm by restricting development that would destroy the scenic vista.⁷

The problem of distinguishing between compensable eminent-domain takings and noncompensable police-power regulations is compounded by the structure of government decisionmaking. Under the police power, the legislature traditionally has had broad discretion to decide what constitutes a public harm to be regulated or eradicated. The legislative decision must not be arbitrary,⁸ but that is a minimal constraint. It would be very difficult for a court to find that any decision agreed to by a majority of several hundred legislators was “arbitrary?” For most of U.S. history, the courts have felt institutionally constrained to accept the legislature’s own determination of what constitutes a compensable eminent-domain taking, as opposed to a noncompensable police-power regulation. But as the “regulatory state” burgeoned, initially during the progressive era and even more rapidly following World War II, the courts became increasingly suspicious of legislative motives in regulating private land uses, and decreasingly reluctant to assert their own authority.

⁷ Justice William Brennan made the same point in his opinion dissenting from the Court’s ruling in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 652 (1981): “From the government’s point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property.” Similarly, Justice Scalia’s majority opinion in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1024 (1992), noted that “the distinction between ‘harm-preventing’ and ‘benefit-conferring’ regulation is often in the eye of the beholder.... the distinction between regulation that ‘prevents harmful use’ and that which ‘confers benefits’ is difficult, if not impossible, to discern on an objective, value-free basis.”

⁸ See *Reinman v. Little Rock*, 237 U.S. 171, 176 (1915); *Hadachek v. Sebastian*, 239 U.S. 394 (1915).

Oliver Wendell Holmes was among the earliest judicial skeptics of the state's police power. In his 1872 review of Thomas Cooley's *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (pp. 141-2), Holmes wrote that the police power "was invented to cover certain acts of the legislature which are seen to be unconstitutional, but which are believed to be necessary." Seventeen years later, as a Justice on the Massachusetts Supreme Judicial Court, Holmes authored the majority opinion in *Rideout v. King*,⁹ upholding a state statute that prohibited landowners from constructing fences higher than six feet. Holmes concluded that this prohibition was a proper exercise of the State's police power, but he expressly sought to limit the scope of the government's regulatory authority to "small limitations" designed to prevent "manifest evil." Larger limitations, he suggested, even those intended to prevent public harm, could not be justified under the police power, but required the exercise of eminent domain and payment of just compensation.

In his *Rideout* opinion, Holmes noted that the difference between "smaller" and "larger" limitations is a matter "of degree" (p. 392). This foreshadowed his opinion 33 years later, as an Associate Justice of the U.S. Supreme Court, in *Pennsylvania Coal*. By then, Holmes had grown even more distrustful of legislative motives. While still acknowledging that the legislature's judgment must be accorded "[t]he greatest weight,"¹⁰ Justice Holmes, in *Pennsylvania Coal*, expressed his concern that the police power was subject to abuse: "When the seemingly absolute protection [of private property] 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."¹¹

Justice Holmes's qualms about the police power were as nothing, however, compared to the hostility exhibited precisely 70 years after *Pennsylvania Coal* by Supreme Court Associate Justice Antonin Scalia in *Lucas v. South Carolina Coastal Council*: "Since ... a [police-power] justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff."¹² Scalia's unmistakable implication is that if the government can avoid paying compensation by describing its actions as police-power regulations, rather than eminent-domain takings, it will do so. Rational legislators have incentives to impose regulatory costs on a few discrete landowners, which is the case if they regulate without compensation under the police power, rather than on all taxpayers/voters, which would be the case if they took title to property by eminent domain and paid compensation. Because of their incentive structure, legislators simply cannot be trusted to honestly and sincerely distinguish

⁹ 19 N.E. 390 (1889).

¹⁰ Holmes was not disingenuous about this. He strongly opposed judicial meddling in legislative determinations of social welfare – witness his dissent in *Lochner v. New York*, 198 U.S. 45 (1905). Ironically, the majority opinion in *Lochner* (at 64) displayed a rather Holmesian distrust of the state's police power: "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare are, in reality, passed from other motives." Holmes did not address this point in his dissent.

¹¹ 260 U.S. at 415.

¹² 505 U.S. at 1025 n. 12.

between police-power regulations and eminent-domain takings.

In *Lucas*, the State of South Carolina may have merited Justice Scalia's distrust. The case arose after the State enacted legislation regulating beachfront development to prevent beach erosion. The law prevented Mr. Lucas from building on two beachfront lots he owned. The Court ruled that because the law completely wiped out Mr. Lucas's investment, it constituted a compensable taking.¹³ The State subsequently settled with Mr. Lucas, paying \$850 thousand for his two lots. It then sought to recoup the expense by selling the lots to the highest bidder *for development*. This alone does not necessarily imply that the State was acting in bad faith. A sense of fiscal responsibility, or even state law, may explain South Carolina's decision to recoup its expenses resulting from the Supreme Court's ruling – expenses which it arguably should never have been forced to bear. The Court's ruling in *Lucas* remains controversial. In the first place, the case arguably was not ripe for judicial review because Mr. Lucas did not exhaust his administrative remedies prior to filing suit.¹⁴ Also, there is reason to believe that Mr. Lucas did not suffer an extreme diminution-in-value, let alone a complete wipe-out, of his investment. According to one newspaper account (Charleston Post and Courier, Aug. 27, 1993, at 1-B), one of Mr. Lucas's neighbors, Andy Guagenti, bid \$315,000 for one of the lots, which he intended to keep undeveloped to preserve the unobstructed views from his house. This constitutes evidence, albeit after the fact of the Court's ruling, that Mr. Lucas's land held substantial economic value in its undeveloped state.

However, Mr. Guagenti's \$315,000 bid also constitutes evidence that the State of South Carolina merited Justice Scalia's distrust in *Lucas*. The State rejected his bid, which would have kept at least one of the lots undeveloped, in favor of a construction company's bid of \$785,000 for both lots. As Gideon Kanner (1996, p. 310) has scathingly remarked,

once it found itself picking up the tab, the state abandoned its claims of threats to life and property. It was unwilling to forego even \$77,000 to assure that one of Lucas's lots would remain vacant – precisely what the state told three levels of courts it wanted to accomplish as vitally necessary.

Whether or not the State of South Carolina merited Justice Scalia's distrust of legislative motives in the *Lucas* case, his distrust remains difficult to square with the regular behavior of other legislative bodies, such as England's Parliament. In contrast to American legislatures, Parliament is under no constitutional obligation to compensate landowners when it takes their property for public use. Parliament has nevertheless imposed upon itself, by legislation, compensation requirements from which it almost never deviates. It typically compensates for actual takings of private property, but not for regulatory takings (see Allen 2000, p. 21). Parliament must, of course, decide what

¹³ This decision is under the diminution-in-value test, which is addressed in the next subsection.

¹⁴ See 505 U.S. at 2906-7 (Blackmun, J., dissenting).

is and is not a compensable taking. But there is virtually no judicial oversight of its decisions, even in cases involving exactions (see Grant 1996). Legislators in England, therefore, have greater discretion than their American counterparts to determine what constitutes a police-power regulation, as opposed to an eminent-domain taking. Yet, Parliament *does* regularly provide compensation.

Like England's Parliament, several American states have imposed super-constitutional compensation requirements upon themselves by enacting takings statutes. In Texas, the state must compensate for any land-use regulations that reduce property values by 25 percent or more.¹⁵ Florida's takings law requires the state to compensate for any regulation that "inordinately burdens" the use of private property.¹⁶ A burden is "inordinate" if the landowner is "permanently unable to attain the reasonable, investment-backed expectations" for the property, or "bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large." Texas and Florida both exempt regulations of common-law nuisances, however, from the ambit of their takings laws.¹⁷

Such legislative remedies for regulatory takings raise questions about the increasing level of judicial distrust of democratically-elected legislators. There is no reason to suppose that legislative bodies in England, Texas and Florida are better able to distinguish between police-power regulations and eminent-domain takings than other American legislatures.¹⁸ It seems unlikely that they are, for institutional or cultural reasons, more trustworthy with private property rights. How then, can we explain their self-imposed compensation requirements for takings? Would Justice Scalia dare suggest that the Texas and Florida legislatures, let alone Parliament, offer compensation when their regulations substantially reduce property values simply because their staffs are "stupid"? Takings statutes in England, Texas, and Florida support William Fischel's (1995) argument that private property rights are, for most purposes, sufficiently protected through the political process.

Warranted or not, the judicial distrust of legislative motives, exhibited to different degrees by Justices Holmes and Scalia, has led the Supreme Court to enunciate a third takings rule, which delimits the nuisance exception.

The Diminution-in-Value Test for Regulatory Takings

In his majority opinion in *Pennsylvania Coal* (1922), Justice Holmes altered the focus of takings analysis from property *rights* to property *value*. In cases where the government purports to be regulating under the police power, it must pay compensation,

¹⁵ Tex. Gov't Code Ann. 2007.041, 2007.002.

¹⁶ Fla. Stat. Ann. 70.001(2), (3)(e).

¹⁷ Tex. Gov't Code Ann. 2007.003(b); Fla. Stat. Ann. 70.001(3)(e).

¹⁸ According to Allen (2000, p. 24), "[i]n England the supremacy of Parliament makes it unnecessary to distinguish between its sovereign powers over property. Hence, there has been no real need for the courts to refine the presumptions of interpretation to distinguish between the purposes that require compensation and those that do not." This is correct, so far as the courts are concerned. Parliament, however, requires some such distinction, in order to determine when and when not to offer compensation.

just as if it had taken the property pursuant to eminent domain, *if* (a) the regulated landowner's activity does not constitute an actionable nuisance and (b) the regulation greatly diminishes the value of the landowner's property. The government can still regulate nuisances out of existence; and it can still regulate non-nuisance-causing land-uses to "a certain extent," under its police power, without paying compensation. But if the regulation "goes too far" – when its effect on the economic *value* of the landowner's property "reaches a certain magnitude" – the government must pay compensation. The Court thus pares down what was formerly a general police-power exception into a more limited nuisance exception.

Justice Holmes's diminution-in-value test was an exercise in bald "judicial activism." The rule has no basis in either the text or original understanding of the Fifth Amendment's Takings Clause. He invented it out of whole cloth. As Bosselman, Callies, and Banta (1973, p. 124) put it, Justice Holmes's decision in *Pennsylvania Coal* constituted a "rewriting" of the Constitution. But to what end? As noted above, Justice Holmes distrusted legislative motives. But that cannot be the whole explanation because in 1915, just seven years before he invented the diminution-in-value test in *Pennsylvania Coal*, Justice Holmes voted with a majority of his brethren to uphold a Municipal Ordinance that shut-down a brick making operation in Los Angeles, as a legitimate nuisance regulation.¹⁹ Was the Los Angeles City Council somehow more trustworthy than the Pennsylvania legislature? If not, how might we explain Justice Holmes's votes in the two cases?

Justice Holmes created the diminution-in-value test in *Pennsylvania Coal* not only because he distrusted legislative motives but also because he was concerned with fundamental fairness. Towards the end of his opinion he wrote, "the question at bottom is upon whom the loss of the changes desired should fall."²⁰ In answering this question, Justice Holmes makes clear his sense that it would be unfair to impose the loss on the private property owner who had bargained and paid for resources later rendered nearly valueless by government regulation.²¹ In this respect, the diminution-in-value test is in the nature of an equitable gloss on the Constitution,²² akin to English common law's ancient concept of equity-on-the-statute (see Plucknett 1956, pp. 334-5; Manning 2001).

For centuries, England's common-law judges have been molding or adapting – sometimes to the point of rewriting – general Parliamentary enactments in order to do "justice" in individual cases. As Manning (2001, p. 8) explains, "English judges ... often

¹⁹ *Hadachek v. Sebastian*, 239 U.S. 394 (1915).

²⁰ 260 U.S. at 416.

²¹ Justice Holmes's expressed concern with fundamental fairness in *Pennsylvania Coal* is in stark contrast to his usual elevation of the public welfare over the interests of individuals. Consider, for example, his opinion in *Buck v. Bell*, 274 U.S. 200, 207 (1927), a ruling that upheld a Virginia statute permitting the involuntary sterilization of those deemed mentally incompetent. Holmes wrote, "We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices." But then, as Holmes's philosophical mentor Ralph Waldo Emerson (1909, p. 66) wrote, "a foolish consistency is the hobgoblin of little minds," and Holmes's mind was capacious.

²² On the concept of "constitutional equity," see Wedgwood (1994).

extended statutes beyond their plain terms in order to make them more coherent expressions of purpose, and cut back others to avoid inequitable results that did not serve the statutory purpose.” This is precisely what Justice Holmes’s did with the U.S. Constitution’s Takings Clause in *Pennsylvania Coal*.²³

In 1992, the Supreme Court reaffirmed and expanded on its *Pennsylvania Coal* ruling in the *Lucas* case. The *Lucas* Court was particularly concerned to clarify, as much as it could, the proper distinction between noncompensable police-power regulations and compensable eminent-domain takings. Justice Scalia, writing for the majority, refined Justice Holmes’s test as follows: When the government regulates private land uses, it must pay compensation, as if it had taken the property pursuant to eminent domain, *if* (a) the regulated landowner’s activity does not constitute an actionable private or public nuisance *under state common law* and (b) the regulation greatly diminishes or wipes-out the value of the landowner’s property. The key change is in the highlighted phrase, “under state common law,” which constitutes a further limitation of the nuisance exception. In contrast to Justice Holmes, who, despite his distrust of legislative motives, hardly limited at all the legislature’s authority to determine what constituted a nuisance, Justice Scalia, sought to limit the legislature’s ability to expand the scope of nuisance law:

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with....

Any limitation so severe [as to be confiscatory] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts – by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.²⁴

Justice Scalia’s expansion of Justice Holmes’s diminution-of-value test is

²³ The notion that the diminution-in-value test is in the nature of an equitable gloss on the Constitution is further supported by the Supreme Court’s decision in *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Court stated that the Fifth Amendment is “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” See also *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-9 (1987).

²⁴ 505 U.S. at 1027-9.

noteworthy, given the former's reputation as a strict constitutional constructionist. Justice Scalia has associated himself with both "originalism" (1989) – interpretation of the constitution based on what the framers intended when they wrote it – and "textualism" (1997) – interpretation of the constitution based on the "plain meaning" of the text. As noted earlier, however, the diminution-in-value test for regulatory takings has no basis in either the text or the original understanding of the Takings Clause. In his *Lucas* opinion, Justice Scalia makes a weak effort to support his conclusions with a textual analysis: "the text of the Clause can be read to encompass regulatory as well as physical deprivations."²⁵ But this is disingenuous. The text of the 5th Amendment says nothing about takings based on reductions in property *values*. In the *Lucas* case at least, Justice Scalia's jurisprudence is better described as "functionalist" or "instrumentalist," rather than "textualist" or "originalist."

A chief effect of the Court's rulings in *Pennsylvania Coal* and *Lucas* was to shift the final say about the source of government regulatory power – noncompensable police-power regulation or compensable eminent-domain taking – from the legislatures to the courts. This arguably constitutes a judicial usurpation of legislative authority under the constitution (see Humbach 1993). However, the Court is now the final arbiter of what is a legitimate police-power regulation and what is an eminent-domain taking.

Substantive Due Process Review for "Exactions"

The fourth and, so far, final rule of takings law applies only in highly specialized circumstances. This rule intermingles traditional takings analysis with a form of analysis developed under another provision of the Fifth Amendment: the Due Process Clause.

It has become common for state and local government agencies with land-use permitting and regulatory authority to require "exactions" of land – uncompensated conveyances of private property into public ownership – as a condition for approving large-scale land-development activities, such as new subdivisions (see, for example, Bosselman and Stroud 1985). Regulatory authorities typically justify these exactions as compensation for the increased pressure that new developments place on public services, including schools, roads, parks, police, fire, water and sewer. In some cases, however, public agencies have required exactions that seem out of all proportion to the pressure on public services resulting from the development. Land developers alleged that such exactions constituted takings of their property without just compensation. In the late 1980s, the Supreme Court began applying a novel form of takings analysis to resolve these disputes.

The takings rule governing exaction cases is currently as follows: A state- or local-government land-use permitting agency may require an "exaction" without paying compensation only *if* (a) the exaction substantially furthers a legitimate state interest,²⁶ *and* (b) the burden imposed on the developer by the exaction is "roughly proportional"

²⁵ 505 U.S. at 1028, n. 15.

²⁶ *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

to the public harm resulting from his land development activities.²⁷ Every exaction that does not meet these requirements constitutes, in essence, a permanent physical occupation requiring compensation.

Perspectives on Takings Law

Commentators of virtually all ideological stripes deplore the state of takings law. At one extreme, property rights advocates such as Epstein (1985) and Paul (1988) argue that *all* government regulations, except those narrowly tailored to deal with common-law nuisances, should be treated as compensable takings. From their perspective, the diminution-in-value test is insufficient because it allows the government to impose substantial burdens on private property owners. It requires compensation only if those burdens “go too far.” But why should the government be able to avoid compensating for regulations that affect property rights, just because those regulations reduce property values by only 50 percent, rather than 90+ percent? At the other end of the political spectrum, supporters of social-welfare regulation decry the Supreme Court’s recent takings jurisprudence for restricting the government’s ability, under the police power, to protect public values against the harmful effects of private development activities. Kendall and Lord (1998, p. 510), for example, see developments in takings law as part of a “a large and increasingly successful campaign by conservatives and libertarians to use the federal judiciary to achieve an anti-regulatory, anti-environmental agenda.”

In the vast middle ground between highly politicized extremes, scholars voice various complaints about takings law. Molly McUsic (1998, pp. 592-3) has concisely summarized their complaints:

how is one to understand a doctrine that provides compensation for losses of one dollar²⁸ but not for losses of millions of dollars,²⁹ that protects the right to bequeath property³⁰ but not the right to sell property,³¹ that finds a taking when the government requires landlords to allow installation of cable television³² but not when the government requires them to charge below market rents?³³ The literature offers a wide range of explanations for the Court’s inconsistencies – the Justices read the history wrong, they ignore words in the Clause, they cannot agree on what the purpose of property protection is, they select the wrong purpose, or perhaps they select the right purpose but do not pursue it diligently – and

²⁷ *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

²⁸ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

²⁹ *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

³⁰ *Hodel v. Irving*, 481 U.S. 704 (1987).

³¹ *Andrus v. Allard*, 444 U.S. 51 (1979).

³² *Loretto*, again.

³³ *Pennell v. City of San Jose*, 485 U.S. 1 (1988).

just as many suggestions for correcting Court mistakes.³⁴

Because of the seeming inconsistency of the Court's application of the Takings Clause, it has become increasingly difficult for parties, including government agencies *and* private property owners, to predict judicial outcomes and organize their behavior accordingly.

The Supreme Court has acknowledged these deficiencies in its takings jurisprudence. Justice Brennan, writing for the majority in *Penn Central Transportation Company v. New York City*,³⁵ noted that "this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.³⁶ Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." However, to the extent that regulatory takings law is an equitable gloss on the Constitution's Taking Clause, as I suggested earlier, rather than a conventional legal rule, this lack of consistency and coherence may be inevitable.

In addition to what Carol Rose (1984) calls the "muddle" of takings doctrine, some scholars complain about the increasing insinuation of the courts into the legislative/regulatory process. Humbach (1993), for example, argues that the Supreme Court has usurped legislative authority by taking upon itself the ultimate determination whether some government action is under the police power or the eminent domain power (also see Bork 1990, p. 229-30). Fischel (1995) offers a more nuanced version of the same general argument. He suggests that the courts should defer, more than they have done in recent years, to legislative determinations of compensable takings and noncompensable nuisance regulations because private property owners are generally capable of protecting their interests in the political process. This process-based claim is consistent with England's experience of substantial property rights protection in the absence of a constitutional just compensation requirement, as well as the recent proliferation of takings legislation in American states. Fischel would generally restrict judicial intervention to cases where the political process is likely to fail, something he believes is more likely to happen at lower levels of government.

There is one additional failing of takings doctrine that few scholars have recognized: Many, if not most, takings claims arise when existing public property regimes bump up against private property regimes. This presents an important boundary issue: Where do the private property rights end and the public rights begin? Unfortunately, the courts typically neglect this boundary question in their takings decisions.

³⁴ Some citations omitted.

³⁵ 438 U.S. 104, 124 (1978) (citations omitted).

³⁶ Also see *Palazzolo v. Rhode Island*, ___ U.S. ___ (2001), 121 S.Ct. 2448 at 2466 (O'Connor, J., concurring) ("The concepts of 'fairness and justice' that underlie the Takings Clause, of course, are less than fully determinate.").

II. Takings as Conflicts Between Public and Private Property Regimes

Takings are conventionally understood as government-imposed restrictions on pre-existing private property rights. But this is myopic. A cursory examination of actual takings cases reveals that disputes arise when existing public *and* private property rights collide. In many, if not most, takings cases, the government is not just imposing on private property rights but attempting to vindicate public property rights, for which no compensation should be required. This presents a boundary issue: where do private property rights end and public property rights begin?

Public and Private Property Rights in the Air

The notion of takings cases as conflicts between private and public property regimes is well illustrated by the demise the old common-law rule *Cujus est Solum, ejus est usque ad coelum*, according to which private property boundaries are deemed to extend upwards from the land to the heavens and downwards to the center of the earth (see Blackstone [1766] 1979, p. 18). In *U.S. v. Causby*,³⁷ the Supreme Court ruled that the U.S. military's use of airspace above the Causbys' farm constituted a compensable taking. The conflict arose during World War II, when the federal government leased for military use an airport near Greensboro, North Carolina. The glide path to one of the airport's runways passed directly over the Causbys' chicken farm. In fact, the runway was just 2,220 feet from their barn, and another 55 feet from their house. Military aircraft, including bombers, transports, and fighters, frequently flew over the Causbys' land, often "in considerable numbers and rather close together." When descending to land, the aircraft came close enough to "blow the old leaves off" the trees." The noise from the planes literally frightened the Caubys' chickens to death, so production "fell off." "The result was the destruction of the use of the property as a commercial chicken farm."

Causby was not a simple case of government trespass into privately-owned airspace. The Court did *not* rule that the government had to compensate the Caubys because of the *Cujus est Solum* rule. To the contrary, the Court expressly declared that the old common-law rule "has no place in the modern world".³⁸ The real issue in the case concerned the relative air rights of private landowners and the public. Landowners retained sufficient rights in the air above to protect their interest in the land below:

[I]t is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in

³⁷ 328 U.S. 256 (1946).

³⁸ *U.S. v. Causby*, 328 U.S. 256, 261 (1946).

case overhanging structures are erected on adjoining land. The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land.³⁹

But the landowner's rights are more limited than the old common-law rule recognized. A private landowner can still sue her neighbor for erecting an overhanging building or fence, but her property rights no longer extend all the way to the heavens. She cannot, for example, prevent civil or commercial aviation activities:

The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time what those precise limits are. Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.⁴⁰

Even more significantly for present purposes, the Supreme Court in *Causby* made clear that navigable airspace is of necessity public, rather than private, property:

The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.⁴¹

In other words, the costs of coordinating commercial aviation would be enormously high under private ownership of airspace. Conceived of as a "public highway," managed by the federal government, however, those coordination costs are much lower.

The real issue in *Causby* concerned the *extent* of public air rights as against the rights of the private landowner. The Court reasonably concluded that where the public use destroys completely the utility of the land, it is tantamount to a physical occupation of the land, and therefore constitutes a compensable taking. In other words, private landowners possess such rights in the air as are necessary to secure their land rights. Beyond that, the public "owns" the air.

³⁹ *Id.* at 264 (citation omitted).

⁴⁰ *Id.* at 266.

⁴¹ *Id.* at 261.

Where Private Lands Meet Public Waters

Many of the Supreme Court's most important recent takings decisions arose where privately-owned land met publicly-owned water. In *Lucas v. South Carolina Coastal Council*,⁴² for instance, the State regulated Mr. Lucas's land because it was beachfront property. The ostensible purpose was not so much to protect the State's interest in publicly-owned ocean resources as to control beach erosion. However, because the State owns the beds and banks of navigable waterways up to the mean high-tide line,⁴³ it possesses a significant ownership interest in the beach itself. The Court in *Lucas* said nothing about the state's ownership interest in the beachfront, focusing entirely on rescuing Mr. Lucas's investment in the two beachfront lots.

Likewise in *Nollan v. California Coastal Commission*, the Court ignored public property rights in the beachfront in deciding that the State of California had unconstitutionally taken Mr. and Mrs. Nollans' private property rights without just compensation. The State Coastal Commission had granted the Nollans a building permit, but on the condition that the landowners would allow public passage along the beach below a sea wall that separated their house from the Pacific Ocean. The Court treated this cursorily as a dedication of private land to public use, even though the State of California claimed in its brief that the land subject to the condition was state-owned to begin with because it was frequently below the mean high-tide line.⁴⁴ As Justice Brennan pointed out in his dissent from the majority decision, the Court simply ignored the State's ownership claim.⁴⁵ Rather than seriously attempting to determine the proper boundary between publicly- and privately-owned property where the land met the ocean, the Court focused exclusively on the private property rights and values at issue. Consequently, the Court's ruling may have had the perverse effect of requiring the State to pay for the privilege of preventing the Nollans from destroying State property.

Most recently, Justice Antonin Scalia, in a intemperate concurring opinion in *Palazzolo v. Rhode Island*,⁴⁶ labeled the government of Rhode Island a "thief" for preventing a private landowner from filling coastal salt marshes that the Court simply presumed were part of his property. The Court ruled that Mr. Palazzolo *might* have a claim for compensation against the government, *if* the trial court finds on remand that the State's wetlands regulations had too great an impact on his reasonable, investment-based expectations, or greatly diminished the total value of his property. Neither Justice Scalia nor Justice Kennedy, who authored the majority opinion, mentioned the possibility that the state might have retained substantial property rights in the coastal marshes that were subject to regular tidal flooding. To be fair, the issue was not properly before the Court

⁴² 505 U.S. 1003 (1992).

⁴³ See *Shively v. Bowlby*, 152 U.S. 1 (1894).

⁴⁴ See Government's Brief at 6, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (No. 86-133); Motion of Appellee California Coastal Commission to Dismiss at 3, *Nollan v. California Coastal Commission*, 233 Cal. Rptr. 28 (Cal. Ct. App. 1986) (Civ. B-004663). Also see Kendall and Lord (1998, p. 555).

⁴⁵ 483 U.S. at 847-55 (Brennan, J. dissenting).

⁴⁶ ___ U.S. ___, 121 S.Ct. 2448, 2468 (2001) (Scalia, J., concurring).

because it had not been a basis for the Rhode Island Supreme Court’s decision, which was on appeal. But the Supreme Court could have recognized at least that the issue was central to the determination of the case on remand. At the very least, Justice Scalia might have avoided prejudging the issue, as he seems to have done. Did the state *steal* Mr. Palazzolo’s property, as Justice Scalia suggests, or was it merely protecting the public’s own, preexisting property rights in coastal tidelands?

The argument for preexisting public property rights is straightforward. “It is well settled in Rhode Island that pursuant to the public trust doctrine the State maintains title in fee to all soil within its boundaries that lies below the high-water mark, and it holds such land in trust for the use of the public.”⁴⁷ In theory, the mean high-tide line “can be located wherever a tidal effect can be found” (Maloney and Ausness 1974, p. 207). In this case, the elevations recorded on the 1980 assessor’s plat “suggest that a substantial amount – if not most – of the property is below the mean high-water mark and thus belongs to the State rather than to petitioner.”⁴⁸

Justice Stevens’s dissent from the Court’s ruling in *Palazzolo* recognizes that public property rights are at stake in the case. He mentions the possibility that Mr. Palazzolo does not own the property alleged to have been taken: “the property issue at stake in this litigation is the right to fill the wetlands on the tract that petitioner owns. Whether either he or his predecessors in title ever owned such an interest, and if so, when it was acquired by the State, are questions of state law.”⁴⁹ Stevens did not, however, attempt to resolve the issue, which was not properly before the Court. His comments were in the nature of a hint to Rhode Island’s courts about how they might resolve the case on remand.

In contrast to the Supreme Court’s disregard for existing public property rights in *Nollan* and *Palazzolo*, consider *Just v. Marinette County*,⁵⁰ a takings case in which the Wisconsin Supreme Court took seriously the boundary issue. In 1961, the Justs purchased 36.4 acres of land fronting along the south shore of Lake Noquebay, a navigable body of water located in Marinette County, Wisconsin. They subdivided the land into several parcels, some of which they sold, and some of which they intended to retain for personal use. The local U.S. Geological Survey Map designated the Justs’ land as swamps or marshes, which brought the land within the local conservancy district as wetlands. Consequently, in order to fill in any of the marshes for development, the Justs had to first obtain a conditional use permit from the county zoning administrator.

⁴⁷ *Greater Providence Chamber of Comm. v. Rhode Island*, 657 A.2d 1038, 1042 (R.I. 1995); *Hall v. Nascimento*, 594 A.2d 874, 877 (R.I. 1991).

⁴⁸ Brief of the National Conference of State Legislatures, National League of Cities, National Governors’ Association, U.S. Conference of Mayors, Council of State Governments, National Association of Counties, and International City/County Management Association as Amici Curiae in Support of Respondents, *Palazzolo v. Rhode Island*, 99-2047, 1999 U.S. Briefs 2047, January 3, 2001, at 24. Also see Brief of Save the Bay – People for Narragansett Bay, Amicus Curiae in Support of Respondents, *Palazzolo v. Rhode Island*, 99-2047, 1999 U.S. Briefs 2047, January 3, 2001.

⁴⁹ 121 S.Ct. at 2472.

⁵⁰ 56 Wis. 2d 7 (1972).

In 1967, six years after the Justs had purchased their land on Lake Noquebay, Marinette County adopted a shore land zoning ordinance, the purpose of which was, in the words of the court, “to protect navigable waters *and the public rights therein* from the degradation and deterioration which results from uncontrolled use and development of the shore lands.”⁵¹ The Ordinance conformed with the State’s 1965 Water Quality Act and its Navigable Waters Protection Act, which was intended to “aid in the fulfillment of the state’s role as trustee of its navigable waters and to promote public health, safety, convenience and general welfare.”

Six months after Marinette County enacted its shore land zoning ordinance, Ronald Just filled in an area 20 feet wide and 600 feet long, including more than 500 square feet of designated wetlands, without first obtaining a conditional use permit. The County brought an action against the Justs, who countered that the County’s shore land zoning ordinance was unconstitutional because it took their land without just compensation.

The Wisconsin Supreme Court ruled that there was no taking. In his opinion for a unanimous court, Justice Hallows appropriately focused on the conflict between private property rights in the land and existing public property rights in the neighboring waterways and associated wetlands:

The exercise of the police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to *public rights* by limiting the use of private property to its natural uses....

This is not a case of an isolated swamp unrelated to a navigable lake or stream, the change of which would cause no harm to *public rights*. Lands adjacent to or near navigable waters exist in a special relationship to the state.⁵²

Among the more interesting features of the *Just* ruling is Justice Hallows’s response to Justice Holmes’s famous assertion in *Pennsylvania Coal*, that “a strong 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 damage”:⁵³

This observation refers to the improvement of the public condition, the securing of a benefit not presently enjoyed and to which the public is not entitled. The shore land zoning ordinance preserves nature, the environment, and natural resources as they were created and to which *the people have a present right*.⁵⁴

⁵¹ *Id.* at 10 (emphasis added).

⁵² *Id.* at 17-8 (emphasis added).

⁵³ 260 U.S. at 416.

⁵⁴ 56 Wis. 2d at 23-4.

More significant than which side prevailed in *Just v. Marinette County* is the fact that the Wisconsin Supreme Court treated the dispute appropriately as a boundary conflict between a private property regime and a public property regime. Whether or not the court achieved a proper balance between public and private rights is, however, another, inevitably contestable issue.

Public Wildlife on Private Lands

As with water resources, wildlife are for the most part public property, as we saw in Chapter 2. Whenever wildlife habitat exists on privately-owned land, a property regime conflict is likely to arise.

The U.S. Endangered Species Act⁵⁵ prohibits private landowners from using or developing their land in ways that harm endangered or threatened species of plants or animals known to be present.⁵⁶ This constitutes a potentially widespread limitation on land development for, as we saw in Chapter 7, most endangered species habitat is located on privately-owned lands. Although there are no recorded cases where landowners have been prevented from building houses on their land because of endangered species, implementation of the Act has led to a few takings claims.

Consider, for example, the case of Richard P. Christy, a herder who grazed 1,700 sheep on land he leased from the Blackfoot Indian Tribe near Glacier National Park in Montana. During a single eight-day period in 1982, grizzly bears from the park killed 20 of Christy's sheep, at a cost to Christy of at least \$1,200. On the eighth day, when two grizzly bears came out of the forest and threatened Christy's sheep, he shot and killed one of the bears. Mr. Christy knew, of course, that grizzly bears are protected from harm as a "threatened" species under the Endangered Species Act.⁵⁷ The government fined Christy \$2,500 for killing the bear/protecting his sheep. Christy subsequently claimed that the enforcement of the Endangered Species Act against him constituted a taking of his property (the sheep). Both the Federal District Court in Montana and the U.S. Court of Appeals for the Ninth Circuit rejected Christy's claim. As Judge Alarcon wrote for a unanimous appellate panel,⁵⁸ "[n]umerous cases have considered, and rejected, the argument that the destruction of private property by protected wildlife constitutes a governmental taking." More significantly, in light of this book's thesis that government regulation constitutes an assertion of public property rights over otherwise unowned resources, Judge Alarcon added, "[t]he federal government does not 'own' the wild animals it protects, nor does the government control the conduct of such animals."⁵⁹ For reasons set out in Chapter 2, Judge Alarcon's statement should not

⁵⁵ 16 U.S.C. §1538.

⁵⁶ See *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 867 (1995).

⁵⁷ 50 C.F.R. § 17.11(h) (1987).

⁵⁸ *Christy v. Hodel*, 857 F.2d 1324, 1334 (9th Cir. 1988), cert. denied 490 U.S. 1114 (1989).

⁵⁹ *Id.* at 1335.

be taken to mean that the public possesses no property rights at all in wildlife.⁶⁰ However, by declaring that the federal government does not “own” endangered species, the court avoided treating the case realistically as a conflict between public property in wildlife and private property in domestic livestock.

Most recently, in *Tulare Lake Basin Water Storage District v. United States*,⁶¹ the U.S. Court of Federal Claims, which specializes in monetary claims against the federal government, ordered the government to compensate California water users after it restricted their water rights under the Endangered Species Act. The U.S. Fish and Wildlife Service sought to prevent the extinction of two endangered fish species, the delta smelt and the winter-run chinook salmon, by restricting out-of-stream diversions in order to ensure sufficient instream flows. The plaintiffs, California water users, claimed that those restrictions violated the Fifth Amendment by taking without compensation their contractually-conferred rights to use the water, and the court agreed. This did not mean, however, that there were no public property rights in the water. The court noted that the California State Water Resources Board had the authority, under the doctrines of reasonable use and public trust,⁶² to alter the terms of plaintiffs’ contract-based water rights without compensation.⁶³ In other words, the State could require an increase in instream flows to protect the endangered fish species without committing a compensable taking. The implication is that the public property rights at issue in the case belong to the State of California, rather than the federal government.

III. Jurisprudential and Policy Implications

American society relies on multiple and mixed property regimes that are designed to serve a variety of objectives, on the theory that all property systems work better in some circumstances, for some purposes, than in others. The Supreme Court’s takings jurisprudence, however, presumes that only private property rights are at stake. The Court has been wilfully oblivious to the fact that many, though by no means all,⁶⁴ of the regulatory takings cases it decides arise where existing public and private rights collide. In *Nollan* and *Palazzolo*, parties specifically briefed the Court on the *public* property rights at stake, and argued that the government regulations at issue were designed to protect those existing public rights. You would never learn about those claims, however,

⁶⁰ Also see *Toomer v. Witsell*, 334 U.S. 385, 399 (1948), in which the Supreme Court observed that “fish and game are the common property of all citizens of the governmental unit and that the government, as a sort of trustee, exercises this ‘ownership’ for the benefit of its citizens.”

⁶¹ 49 Fed. Cl. 313, 2001 U.S. Claims LEXIS 72 (2001).

⁶² On the public trust doctrine, see Chapter 2.

⁶³ *Id.* at 39-40.

⁶⁴ Not all takings cases involve boundary contests between private and public property regimes. *Pennsylvania Coal* did not involve conflicting property regimes. Neither did *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) in which the Supreme Court found a compensable taking when Congress enacted a law that applied retroactively to require a defunct coal company to pay additional medical benefits to its former workers.

by reading the majority and concurring opinions in either *Nollan* or *Palazzolo*.⁶⁵ It is quite unusual for the Court simply to ignore potentially dispositive arguments that are explicitly raised in briefs, but that is precisely what the Court did in those two cases. This raises a question about the motivations and trustworthiness of the Court in takings cases that is every bit as relevant as Justice Scalia's concern about the motivations and trustworthiness of legislative bodies.

But what difference would it make if the Supreme Court seriously considered the boundary issue? Would the outcomes of actual cases be any different if the Court reframed its approach to takings cases and treated them as public-private boundary disputes? Potentially, yes. If the Court in *Nollan* had seriously considered the State of California's public property claim, the case might have been decided differently. Instead of a government "exaction" of private property rights, the Court might have found that the land-use condition imposed on the Nollans related only to land already owned by the State of California. There would have been no taking at all.⁶⁶ On the other hand, a serious consideration of public property rights in *Christy* might have forced the U.S. Court of Appeals for the Ninth Circuit to forthrightly confront the claims of private property owners for damages caused by publicly-owned wildlife.

To the extent, however, that takings cases are really about constitutional *equity* – who should bear the costs arising from land-use conflicts – rather than constitutional *law* – who possesses what rights – , an analysis of competing public and private property rights would be relevant only to the court's balancing of the equities. A private property owner might have a stronger equitable claim to compensation where no public property rights are implicated, but a weaker claim if the state is merely seeking to protect public entitlements.

In the *Christy* case, the fairness issue concerned who bore the costs of endangered species protection, the individual sheep herder or the taxpayers. Under current rules, individual property owners bear virtually all the costs of protecting endangered species on private lands, mostly in the form of reduced property uses and values. The Endangered Species Act, meanwhile, is designed to benefit all of society. This does not conform with traditional notions of equity, according to which those who receive the benefits from the law should share proportionately in its costs. That is the basis for the diminution-in-value test fashioned by Justice Holmes in *Pennsylvania Coal* and extended by Justice Scalia in *Lucas*. It was also the basis for Justice Byron White's dissent from the Supreme Court's decision not to grant certiorari in the *Christy* case. Even if the government does not "own" the grizzly bears as the Ninth Circuit maintained, Justice White wrote, that hardly means the government should be able to force Mr. Christy to sacrifice his property for the public benefit of preserving endangered species.⁶⁷ Justice White may be right about this as a matter of equity, but whether such payments should

⁶⁵ This is not to say that those arguments should necessarily prevail, but only that the Court should at least seriously treat those claims, as they do the private property claims at stake.

⁶⁶ *Palazzolo* is yet to be decided on remand, and it is entirely possible that the Rhode Island courts will ultimately decide that Mr. Palazzolo never had title to most of the lands affected by the state regulations.

⁶⁷ 490 U.S. at 1116 (White, J., dissenting).

be in the form of “compensation” for a taking under the 5th Amendment is another matter.

The conclusion that a “taking” has occurred presumes that the government’s scheme for protecting publicly-owned wildlife has interfered with some pre-existing private property “right.” Such a presumption might not be warranted, however. There is no reason to suppose that a private property owner’s bundle of rights includes the “right” to harm endangered species. If not, then no existing “right” has been taken when the government prohibits the private property owner from harming endangered species that wander onto his land. Even if no specific “right” has been taken, however, it is clear that Endangered Species Act regulations can and do seriously affect the value of private *investments* in land. This is why Justice Holmes’s shifted the focus in takings doctrine in *Pennsylvania Coal* from formal legal analysis of property *rights* to the equitable analysis of property *values*. The shift from law to equity embodied in the diminution-in-value test implicitly recognizes that formal legal analysis, focusing on “rights,” is incapable of effectively resolving property regime conflicts. But criticisms of the diminution-in-value test itself, recounted earlier in this chapter, indicate that it is not a very effective approach either.

Better mechanisms may lie outside the judicial/constitutional “takings” regime altogether. For example, private property owners, such as Mr. Christy, could be paid for assisting in endangered species preservation, though not as “compensation” for property rights taken. Instead, payments could be in the form of quasi-contractual consideration or even insurance. In an insurance scheme, the government could establish a fund, financed by taxes, to settle claims by ranchers and others who suffer property losses resulting from endangered species and habitat preservation efforts. Under such a system, Mr. Christy would have been able to file a claim for the lost market value of the sheep that were slaughtered by the grizzly bears. The economic risks created by endangered species regulations would then be spread among the whole of society, which benefits from those regulations.

Some non-governmental organizations, such as Defenders of Wildlife, have been experimenting with payment schemes designed to alter the incentives of landowners who come into contact with endangered species. In 1987, Defenders established a fund to pay ranchers for verified livestock losses resulting from wolf recovery programs. It established a similar trust fund to pay ranchers for grizzly-bear depredation ten years later.

Here’s how Defenders’ programs work. If a rancher believes a grizzly bear or wolf has killed livestock, he or she notifies the appropriate state, tribal or federal agency. A trained specialist, usually on the scene within 24 hours, investigates to determine if wolves or grizzly bears were responsible for the death of the livestock. They rely on necropsy techniques (all predators have unique styles for killing their prey) and the presence of tracks, hair or scat. If the investigator verifies that wolves or grizzly bears killed the livestock, a report is sent to defenders of Wildlife.

A Defenders’ staff member from the region then calls the rancher

to discuss the incident, explain our compensation program and agree on a payment amount.

In nine out of ten cases, Defenders of Wildlife pays what the livestock producer suggests. In case of a difference of opinion, the program relies on county extension agents to determine fair market value, but that rarely happens.

Defenders tries to send a check to the rancher within two weeks of receiving verification of a livestock loss.⁶⁸

Between 1987 and 2000, Defenders of Wildlife paid out more than \$206 thousand to ranchers for livestock lost due to wolf and grizzly-bear predation.⁶⁹

Bills have been introduced into Congress, but not yet enacted, that would achieve the same result of rewarding landowners for protecting endangered species, but without recognizing preexisting private property rights to harm them. In 1997, a bipartisan-sponsored bill to amend the Endangered Species Act was introduced into the Senate, which would have established a \$10 million federal fund to provide grants of up to \$25 thousand to private landowners for their assistance in implementing endangered species recovery plans.⁷⁰ Such policy innovations hold out the hope of a fairer and less antagonistic system of endangered species protection. They wisely avoid the need to reconcile legal conflicts arising from collisions between publicly-owned wildlife and privately-owned land, while resolving associated equity concerns.

IV. Conclusion

So long as society relies on multiple property systems and admixtures of property systems for environmental protection – likely a very, very long time – those systems will occasionally collide, raising issues about primacy – which system prevails over another – and who bears the costs arising from property regime conflicts. To date, the US Supreme Court has focused on the second issue, while completely ignoring the first. But ignoring the fact that takings cases often involve conflicts between property regimes will not make those conflicts go away. When deciding whether some public land-use regulation constitutes a taking of private property, the Court should at least consider the public property rights at stake.

⁶⁸ “Defenders Pays \$62,000 in Wolf/Grizzly Compensation During 2000,” available on the World Wide Web at <http://www.defenders.org/releases/pr2001/pr011801.html>.

⁶⁹ *Id.*

⁷⁰ A BILL to reauthorize the Endangered Species Act, S. 1180, 105th Congress; 1st Session (1997), §5.