PUBLIC USE LIMITATIONS AND NATURAL PROPERTY RIGHTS*

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** Assistant Professor of Law, Saint Louis University. Thanks to Adam Mossoff and the Michigan State College of Law for inviting me to participate in this conference. Readers should note that in *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), I co-authored a brief *amicus curiae* on behalf of the Claremont Institute, in which I covered many of the issues discussed in this Article. Brief of Amici Curiae The Claremont Institute Center for Constitutional Jurisprudence, Kelo v. City of New London, 843 A.2d 500 (Conn. 2004) (No. 04-108). This Article was also supported by a research grant from the Claremont Institute for Local Government.

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INTRODUCTION

A. *Hathcock* and the Meaning of "Public Use"

The constitutional term "public use" used to have simple meaning in many quarters: A use was public if the public used the property. In the last several decades, however, this view has faded into obscurity, as commentators have concluded that federal and state public use clauses are "dead letter[s]."[1] Cases such as *Berman v. Parker*,[2] *Hawaii Housing Authority v. Midkiff*,[3] and *Poletown Neighborhood Council v. City of Detroit*[4] have created a strong impression that state and federal public-use limitations allow governments to redistribute land between private owners, as long as they can show that the redistributions will increase tax revenues, employment, and other public indicators of economic vitality. Even more than 50 years ago, one commentator wrote an "advance requiem" for the federal Public Use Clause,[5] which concluded: "so far as the federal courts are concerned neither state legislatures nor Congress need be concerned about the public use test in any of its ramifications."[6]

If one keeps that requiem in mind, it is difficult to overstate the significance of *County of Wayne v. Hathcock*,[7] decided by the Michigan Supreme Court in 2004. In the course of sanctioning a taking for General Motors to build a new assembly plant in what had formerly been a Polish residential neighborhood, *Poletown* gave a generous endorsement to the most deferential tendencies in contemporary public-use law. Because *Hathcock* overruled and discredited *Poletown*, it symbolizes a new trend of judicial independence. In doing so, *Hathcock* has made it respectable for the United States Supreme Court at least to reconsider *Berman* and *Midkiff*, which it will

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1. Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 61 (1986).
2. 348 U.S. 26 (1954).
3. 467 U.S. 229 (1984).
4. 304 N.W.2d 455 (Mich. 1981).
5. "[N]or shall private property be taken, *for public use*, without just compensation." U.S. CONST. amend. V (emphasis added).
6. Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 613-14 (1949).
7. 684 N.W.2d 765 (Mich. 2004).

do this Term in *Kelo v. City of New London*.[8] Above all, however, *Hathcock* shocks with its doctrinal ambitions. As long as *Berman*, *Poletown*, and *Midkiff* have governed the law of public use, the dominant view has held that there is no way to craft a judicially-manageable approach to public use. To be sure, as this Article will show, the *Hathcock* decision has its limits.[9] In Hathcock, the Michigan Supreme Court challenged that view squarely when it tried to mark off clearly-defined categories of constitutional public use transfers. It shows the strains of compromise with contrary precedent, as well as some of the tensions that come when a court tries to swim against the tide of several long trends in law and legal theory. Nevertheless, the case raises a fundamental question: Is there a principled way to carry into effect the principle that the public must actually use the property it takes?

B. Natural-Rights Theory and "Public Use"

This Article applies American natural-rights and social-compact theory to propose legal answers to that question. Public-use limitations have a long association in political theory and constitutional law with natural-rights and social-compact ideas. Although these ideas do not answer all the problems raised by public-use limitations, they provide an excellent place to start. If we take seriously the thought of jurists who took public-use limitations seriously, perhaps we can appreciate the sweep of ideas like "public use" and "private use" better than we might on our own. At the very least, if we study natural-rights and social-compact context closely, we may shed ourselves of many of the anachronistic presuppositions that inform the conventional wisdom now.

When the law grounds public-use limitations in natural-rights and social-compact principles, two important consequences follow. First, it is quite easy to develop a principled account of the idea of a "public use." At a high level of generality, the government satisfies "public use" limitations only if the public actually uses the property it takes. The government may do so in one of two ways: Either the government keeps ownership of the property taken, or it assigns ownership to a private owner charged with providing the public a right of access subject to proper common-carrier regulations. By contrast, when the government assigns property to private owners not subject to a duty of public access and common-carrier regulation, it unconstitutionally takes private property for private uses.

Second, the hard questions in what we now understand to be "public use" cases are not really questions about public-use doctrine simpliciter. Modern

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8. 843 A.2d 500 (Conn. 2004).

9. In *Hathcock*, the Michigan Supreme Court challenged that view squarely when it tried to mark off clearly-defined categories of constitutional public use transfers.

law compresses into one doctrinal inquiry what natural-rights theory regards as two separate substantive and doctrinal questions: a public-use question and a "regulatory taking" question. The latter asks whether the condemnation under challenge may be excused from being a taking, subject to public-use limitations, on the ground that it was instead a *bona fide* "regulation" of property. Modern takings law tends to make regulatory-takings law an all-or-nothing proposition: If a so-called "regulation" condemns or physically occupies land, the owner is deemed to have suffered a *per se* regulatory taking;[10] if the regulation does not interfere with the owner's control over the soil, it is extremely difficult for the owner to prove that a taking has occurred.[11] By contrast, in natural-rights theory, *all* restraints on the free use, control, or disposition of property are examined under the same standards of judicial review, no matter whether the owner loses a narrow use right or her entire fee.

To justify a condemnation as a *bona fide* regulation, the government must satisfy intermediate scrutiny. The government must prove that the law passes muster under a framework quite similar to the showings of factual necessity and "rough proportionality" that must be made in exactions cases under the U.S. Supreme Court's decision, *Dolan v. City of Tigard*.[12] The government must then justify the ends for which it is condemning the affected land. Specifically, the condemnation must directly advance one of two ends: Either it must directly control a real threat to the public health, safety, morals or to the private property rights of a neighbor–in shorthand, it controls a nuisance–or it must secure to the condemned owners an average reciprocity of advantage.[13] This scheme of intermediate scrutiny, nuisance control, and reciprocity of advantage applies to many of the hard public-use cases, including blight laws and mill acts.

C. Implications

1. *Removing* Berman's *Blight over Public-Use Doctrine*

This natural-rights approach to public-use law deserves to be recovered for at least four reasons. First, this approach teaches that, if we really wanted to enforce a coherent doctrine of public use, we could. Public-use law has lacked coherent doctrinal standards for more than half a century. *Berman*,

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

11. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978). For further analysis of *Loretto* and *Penn Central*'s effects, see Eric R. Claeys, *Takings and Private Property on the Rehnquist Court*, 99 NW. U. L. REV. 679 (2005).

12. 512 U.S. 374 (1994).

13. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

Midkiff, *Poletown*, and other similar decisions have encouraged a trend toward extreme "rational basis" deference in public-use law: If a state or local government can show that a condemnation has any tendency to promote some public purpose, the condemnation passes muster as a taking for public use. As Thomas Merrill has explained,

> the cases suggest that courts have no theory or conceptual foundation from which meaningful standards for judicial review of public use issues might originate. Instead, the cases are filled with cliches regarding the "breadth" and "elasticity" of the "evolving" concept of public use, language indicating a dearth of theory–or perhaps a lack of any desire to develop one.[14]

However, as this Article suggests, nothing about public-use problems inherently requires that the law be so evolving, elastic, or deferential. These features of contemporary public-use law are in large part the product of a conscious policy choice in favor of Progressive political and Realist legal theory. Other factors probably contributed to the demise of natural-rights doctrine and the contours of contemporary doctrine, but Progressive-Realist normative ideas played an important contributing role in ushering out the old and sweeping in the new. As a result, we may not blithely assume that there is no principled way to mark off meaningful limits between public and private uses of land. The overriding question is not one of doctrine but of policy–whether, in practice, governments redistribute land badly (as natural-rights jurists warned), well (as the Progressives and Realists expected), or somewhere in between (as Merrill and many other contemporary commentators suggest). The rational-basis deference and compressed structure of contemporary public-use law both reflect a conscious policy choice in favor of the Progressive–Realist view. Modern observers should understand that this choice was made more than 50 years ago–and that they have the discretion to choose otherwise.

2. *Recovering the Original Meanings of Federal and State Public Use Limitations*

Natural-rights theory and social-compact theory are extremely relevant to the original meanings of state and federal public-use limitations. While *Hathcock* bucks the trend of interpretive methodology in public-use cases, most constitutional public-use opinions are extremely functionalist and policy-oriented. *Hathcock* insisted that "[t]he primary objective in interpreting a constitutional provision is to determine the text's original meaning to the

14. Merrill, *supra* note 1, at 63-64 (footnote omitted).

ratifiers, the people, at the time of ratification."[15] Surprisingly, however, very little scholarship considers the questions raised by that Court's originalist approach.[16] Even worse, the two most relevant articles are unreliable. In the 1940s, two commentators authored articles suggesting that public-use limitations gave governments extremely broad latitude to transfer private property between private parties.[17] These works deserve reexamination. They reflect a tendency typical of a great deal of New Deal originalist scholarship, namely to presume that constitutional terms gave governments extremely broad powers unless textual provisions unmistakably required otherwise.[18] Their approach contrasts with that of nineteenth-century jurists such as Justice Thomas Cooley (on whom the Michigan Supreme Court relied heavily in *Hathcock*[19]) or the "original meaning" analysis set forth by contemporary scholars such as Gary Lawson and Michael Rappaport.[20] Notwithstanding their differences, both of these approaches try to discern and to apply the most likely original public meaning of the constitutional text at issue. Neither incorporates the strong substantive preference for government action latent in 1940s-vintage originalism. This distinction in method makes a huge difference in the context of public-use limitations. According to the 1940s approach, as long as the phrase "public use" *could* mean an open-ended conception of "public usefulness" or "public utility," the phrase *should* take that broader meaning absent evidence that the phrase clearly and unmistakably meant that "the public needs to use the property." Under Justice Cooley's approach, or under the principles of recent original-meaning scholarship, there is no presumption in favor of one meaning or the other: The proper inquiry

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15. County of Wayne v. Hathcock, 684 N.W.2d 765, 779 (Mich. 2004) (citing People v. Nutt, 677 N.W.2d 1, 6 (Mich. 2004)).

16. The most helpful recent scholarship is Roger Clegg's analysis of the plain meaning of the federal Public Use Clause, in Roger Clegg, *Reclaiming the Text of The Takings Clause*, 46 S.C. L. REV. 531 (1995). However, Clegg focuses strictly on text, not on other relevant sources of original meaning.

17. *See* Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615 (1940); Comment, *supra* note 6; *see also* Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-called "Takings" Clause*, 53 HASTINGS L.J. 1245 (2002).

18. *See* Claeys, *supra* note 11; Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191, 237-39 (1997).

19. *See Hathcock*, 684 N.W.2d at 779 & n.45 (quoting Traverse City Sch. Dist. v. Attorney Gen., 185 N.W.2d 9, 14 (Mich. 1971)).

20. *See*, *e.g.*, Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997); Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 822-26 (1999).

asks which of the two meanings is more likely to capture the original public meaning of the phrase "public use."

The reader should note that this Article cannot and does not settle the original-meaning question dispositively. Public use clauses are worded differently in different constitutions. Some constitutions include declarations of natural rights, social-compact principles, or other language which provides important internal structural evidence suggesting how public-use clauses ought to be read.[21] Many public-use clauses, including the federal Fifth Amendment, raise difficult interpretive issues because their texts seem to require just compensation for public takings but no compensation whatsoever for purely private takings.[22]

Even so, the material presented here is extremely relevant evidence about the origins of and political theory behind the notion of a public use. The natural-rights and social-compact principles applied here provide important evidence suggesting that the original meaning of the term "public use" limits governments from taking property by eminent domain except when the public actually uses the property. Whatever the ultimate resolution of different original-meaning analyses for different provisions, the materials interpreted here make it more likely than not that the original meaning of various "public use" terms was supposed to require the government actually to use the property it took.

3. *A Personhood Approach to Public Use*

The natural-rights tradition in public use law should also be of interest to property theorists interested in developing an account of property based on equality and freedom. Although most contemporary property theory operates from utilitarian starting premises, Margaret Jane Radin and others insist that, "the personhood perspective can also serve as an explicit source of values for

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21. *See*, *e.g*., MO. CONST. art. I, § 26 ("That private property shall not be taken or damaged for public use without just compensation."); MO. CONST. art. I, § 2.

> That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.

Id.

22. This problem has been addressed in different ways in DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 194 (2002); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

making moral distinctions in property disputes . . . ."[23] Natural-rights theory confirms that principles of personhood and freedom can create and apply principled moral distinctions in public-use law.

Now, one does not settle all the hard substantive questions in property law simply by preferring a personhood framework over a utilitarian framework. For example, in the specific context of takings, Radin's approach allows governments to redistribute property held in purely fungible goods, where the American natural-rights tradition did not.[24] Radin and the American natural-rights tradition disagree about the conditions in which the human person attains complete happiness. Nevertheless, the natural-rights tradition confirms that personhood theory can generate a plausible account of public-use law.

4. *Critiquing Utilitarian Justifications for Eminent Domain*

Finally, natural-rights theory ought to be of interest even to scholars who are more interested in efficiency–or welfare-oriented approaches to public-use law than in personhood–and rights-based approaches. The leading justifications for constitutional public-use limitations stay within a utilitarian framework. At one extreme lie Progressive and Legal Realist justifications for eminent domain. In this framework, property is a useful institution only to the extent that it comports with the public interest or designated public purposes. Eminent domain is useful because it helps government to reconfigure arrangements of property more efficiently to achieve those interests and purposes. In the Progressive and Realist conception, the term "public use" meant "public interest" or "purpose," and barely limited legislators and regulators. More recently, Frank Michelman has proposed a slightly less deferential variation on the same understanding: "public use" means "public benefit," and requires courts to double-check legislative or administrative cost-benefit analyses.[25]

This viewpoint dominates the law now, for it informs *Berman*, *Poletown*, and *Midkiff*. Even so, it has come under criticism from law and economics scholarship, particularly Thomas W. Merrill's 1986 article *The Economics of Public Use*.[26] Merrill agrees that eminent domain is a useful institution because it allows governments to solve "assembly" problems and to attack "hold out" problems. If the government or a private entity wishes to build an

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23. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982).

24. *See id.* at 1005-06.

25. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1175-76 (1967).

26. *See*, *e.g.*, Merrill, *supra* note 1, at 83-89.

obviously profitable railroad, he argues, they need some coercive tool to force individual owners from trying to hold up the assembly of a rail line for an inefficient share of the expected profits.[27]

On the other hand, Merrill fairly recognizes that there are many circumstances in which the eminent-domain cure is worse than the hold-out disease. Among other things, eminent domain can be slower and more expensive than market transactions; it can systematically undercompensate owners' subjective values; it can encourage interest groups to pressure governments to redistribute property to them; and it can encourage land buyers to prefer that the government acquire their land for them by eminent domain in cases in which they ought to be able to acquire it for themselves on an open market.[28] Merrill doubts that there is any "simple solution" to these competing risks: [29] Because economic theory cannot identify any broad and regular class of cases in which takings will be efficient, public-use law cannot follow regular doctrinal categories. Merrill thus predicts that courts will, and recommends that they should, approach public-use challenges on an *ad hoc* basis, taking special notice of whether the condemnations seem to contain any of the inefficiencies he identifies, especially rent-seeking and market distortion.[30] (James Krier's "public ruse" contribution to this conference draws on similar insights to generate a similar proposal.[31])

At the other utilitarian extreme lies Richard Epstein's critique of public-use doctrine.[32] Epstein argues for the narrowest conception of public use. Generally speaking, Epstein criticizes alternative utilitarian accounts of takings on the ground that they do not adequately account for the social value associated with individual freedom of action. In assembly cases, Epstein concludes, the government must protect and encourage individual freedom of action by giving ousted hold-outs a prorated share of the proceeds to be gained from the assembly. As a result, Epstein proposes a fairly narrow definition of public use. Normally, it requires that the good taken go to the public, go to a private common carrier, or be a pure economic public good. In these cases, the ousted owner partakes in the same social benefits as the public. In the private-on-private assembly transfers, however, Epstein applies an

27. *See id.* at 74-75; *see also* Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473 (1976).

28. *See* Merrill, *supra* note 1, at 75-76, 81-89.

29. *Id.* at 90.

30. *See id.* at 90-93.

31. *See* James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. ___.

32. *See* RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

understanding of "public use" that requires the government to prove that there exists a *bona fide* hold-out problem and that the ousted owners get above-market compensation.[33]

The natural-rights approach sides more with Epstein on the substantive property theory and more with Merrill on the doctrine necessary to achieve that substance. Natural-rights theory and Epstein's understanding of utilitarianism proceed from quite different understandings of the foundations of legal rights. The touchstone of the latter approach is social utility; the former stresses that welfare or utility cannot provide sound justifications for public action until it has been shown that what seems to be useful accords with human reason and the human moral sense. Even so, in practice, both understandings converge in the substance of public-use law. Both agree that the ordinary payment in an eminent-domain proceeding, namely fair market value, systematically discourages owners from using their property to its full potential commensurate with their personal goals.

On the other hand, natural-rights theory breaks with Epstein's understanding of law, economics, and politics, and sides more with Merrill when it comes to the structure of public-use doctrine. This shift is clearest again in the assembly/hold-out cases. While Epstein treats these cases as sounding in public-use doctrine, natural-rights theory sounds them in regulatory-takings law, specifically in the class in which the government claims it means to secure affected owners an average reciprocity of advantage. Because natural-rights theory focuses on regulatory-takings law, its prescriptions resemble, in many respects, Merrill's proposals that public-use law focus on the relation between means and ends for proposed takings.

D. Argument

Part I recounts basic principles of natural-rights and social-compact principles, stressing how they account for the powers to take and regulate property by condemning lots of land. Part II then explains why natural-rights theory and the history behind public-use limitations prescribe that the government take property only when the public will use the property. Part III then shows how American state courts carried this general conception of public use into effect in nineteenth-century cases. Part IV reconsiders the break from the natural-rights understanding of public use, focusing particularly on *Berman v. Parker*. Part V closes by considering how the law would need to change to restore the natural-rights approach into public-use law. Using the

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33. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 161-81 (1985).

Michigan Supreme Court's restatement of public-use law in *Hathcock* as a starting point, Part V shows how the natural-rights approach might apply to several of the most vexing problems in public-use law.

I. Regulation by Condemnation in Natural-Rights Theory

The concept of the social compact sets forth principles for understanding the proper ground for government action and individual obligation. The idea of the "social compact" builds a conception of government on the analogy of a partnership. Every citizen is expected to qualify his own freedom when doing so benefits the partnership of citizens, but the partnership cannot take actions that do not promote all citizens' interests in more or less the same way.[34] In other words, social-compact theory renders illegitimate some social actions that are legitimate in many versions of utilitarian theory. If an action contributes to the general welfare but dislocates a few individuals, utilitarian theory usually holds the action justified; social-compact theory does not.

Natural-rights theory adds to the social-compact theory by giving focus to civil society's objects. Specifically, natural-rights theory suggests that the interests individuals bring to the social compact are their freedoms.[35] The social compact's objects are therefore to protect, order, and facilitate the right ordering of human freedom. James Wilson, drafter of the Constitution, member of Congress, and U.S. Supreme Court Justice, referred to this state of ordered freedom in a 1791 series of law lectures as "natural liberty."[36] He defined "natural liberty" as a person's right "to exercise his powers for his own happiness . . . in such a manner, and upon such objects, as his inclination and judgment shall direct; provided he does no injury to others; and provided more publick [sic] interests do not demand his labours."[37]

The natural right to property applies this broad understanding of natural liberty to the specific case of property. Natural property rights take their shape because of two important insights. First, "property" recognizes that people share common connections between passions, reason, and moral sense that tie work to reward. Property is a "natural" right in large part because all people share common passions to acquire, work, and produce things to provide for their own needs and wants. James Kent, a New York state judge and an author of a leading nineteenth-century legal treatise, wrote that "[t]he sense of

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34. *See* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Cornell L. Rev. 1549, 1567 (2003).

35. *Id.* at 1610.

36. James Wilson, *Lectures on Law*, *in* 1 The Works of James Wilson 242 (Robert McCloskey ed., 1967).

37. *Id.*

property is graciously bestowed on mankind for the purpose of rousing [us] from sloth, and stimulating [us] to action."[38] Property orders these active passions so that each individual may use his own active and productive talents to provide for his own well-being. In perhaps the most comprehensive restatement of natural-rights takings principles, U.S. Supreme Court Justice William Patterson explained in the 1795 case *Vanhorne's Lessee v. Dorrance*:

> Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labor and industry.[39]

Natural property rights also take their character from a second "natural" insight–that different individuals apply these common passions to extremely different uses and purposes. As James Wilson explained,

> [m]any are the degrees, many are the varieties of human genius, human dispositions, and human characters. One man has a turn for mechanicks; another, for architecture; one paints; a second makes poems; this excels in the arts of a military; the other, in those of civil life. To account for these varieties of taste and character, is not easy; is, perhaps, impossible.[40]

As a result, no law of nature can say that some legitimate uses of property are intrinsically better than others. Indeed, better to let a thousand flowers bloom, Wilson explained, because "varieties of taste and character induce different persons to choose different professions and employments in life: these varieties render mankind mutually beneficial to each other, and prevent too violent oppositions of interest in the same pursuit."[41]

That insight has powerful consequences for the "regulation" of natural property rights. The object of natural-rights property regulation is "to 'make' property rights 'regular.'"[42] Since the institution of property recognizes that people put possessions to different uses, neither the laws of nature nor positive-law regulations can favor any legitimate uses of property over any others. The laws of nature merely prescribe that positive laws ought to protect in each owner a zone of freedom to decide what mix of uses will best suit her own individual tastes, talents, and goals. Kent confirmed the same when he concluded that "[e]very individual has as much freedom in the acquisition, use, and disposition of his property, as is consistent with good order, and the

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38. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 320 (O.W. Holmes, Jr. ed., 12th ed. 1896).

39. Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (1795); *see also* Claeys, *supra* note 34, at 1568-69.

40. Wilson, *supra* note 3, at 240.

41. *Id.* at 241.

42. *See* Claeys, *supra* note 34, at 1554 (citation omitted).

reciprocal rights of others."[43] When "property" is so conceived, it then follows that "regulations" are laws that protect and encourage the free use and enjoyment of property.

Specifically, some "regulations" define each person's equal share of rights, and then protect each individual from encroachments by neighbors who claim more than their equal shares. Other regulations reorder owners' use rights for their mutual advantage. Such rearrangements, however, must be justified in social-compact and natural-rights terms–the law should not force an exchange over the baseline unless both parties gain obviously enough that it becomes safe to deem them to have consented to the rearrangement.[44] These two conceptions of "regulation" explain, for instance, why James Kent spoke of the concept of "general regulations" as the power "to prescribe the mode and manner of using" property "so far as may be necessary to prevent the abuse of the right."[45]

These general principles lead to four specific doctrinal principles to apply in "regulatory takings" cases. First, whenever a law restrains the free use, control, or disposition of property, the restraint needs to be justified as a regulation to avoid being classified as a taking of property rights. The second and the third principles lay out the *ends* for which government may justifiably restrain property rights–either to define the substance of and then to protect natural rights, or to rearrange the rights so defined for the mutual advantage of the regulated owners. In regulatory-takings parlance, the former end is often described as harm prevention or nuisance control,[46] and the latter is often called securing an average reciprocity of advantage.[47] Fourth, to make sure that legislatures and administrators do not abuse their "regulatory" powers, courts need to apply principles of intermediate scrutiny. One nineteenth-century case stated the standard as a requirement that the government show "some relation" between the law's requirements and the goals of "protect[ing] the public health and secur[ing] the public comfort and safety."[48] The closest counterpart to this understanding in modern law is the scheme of "rough proportionality" established in exactions law by *Dolan v. City of Tigard*.[49] When a government requires a land owner to cede some land in return for government permission to develop the rest, *Dolan* requires the government to

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43. 2 KENT, *supra* note 38, at 328.

44. *See* Claeys, *supra* note 34, at 1570-73.

45. 2 KENT, *supra* note 38, at 340.

46. *See* Claeys, *supra* note 11.

47. Jackman v. Rosenbaum Co., 260 U.S. 22 (1922); Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

48. *In re* Jacobs, 98 N.Y. 98, 110 (1885).

49. 512 U.S. 374, 391 (1994).

make "some sort of individualized determination that the required [exaction] is related both in nature and extent to the impact of the proposed development."[50]

Let us turn to the special problems that arise when the government condemns and takes away from an owner land that he claims as his own. In one respect, the general principles apply the same whether the government condemns a single servitude or the entire fee. As a result, in principle, there are cases in which government may take the fee away from a landowner under the power of "regulation" without making any payment of compensation. Consider two wholly mundane sorts of laws–trespass laws and conveyancing laws.[51] Assume that *B* physically ousts *A* from her land and claims it as his own. *B* then persuades a court that *A* has trespassed, the court ejects *A*, and restores *B* to title. *A* might claim that the law *pro tanto* "took" his property to give to *B*. *B*'s claim seems specious because the law of trespass obviously "regulates" *A*'s and *B*'s rights, in the harm-prevention or nuisance-control meaning of "regulation."

Now consider a case in which *C* sells land orally to *A*, and then in writing to *B*. *B* then sues *A*, proves that *A* failed to follow the local statute of frauds, and again persuades the court to eject *A*. Again, *A* might claim that the local statute of frauds took his property to give to *B*. Again, his claim seems specious. The local statute of frauds "regulates" *A*'s and *B*'s purchases in the reciprocity-of-advantage understanding of "regulation." In the short term, statutes of frauds, title laws, and conveyancing laws seem to restrain property rights. They force sellers and buyers to spend extra money and time to pay surveyors, title insurers, title companies, notaries, and the local registrar of deeds to consummate a sale of land. Over the long term, however, such laws enlarge property rights. Behind the veil of ignorance, all potential land owners, sellers, and buyers must admit they are far better off with a clear and orderly–a regular–system for transferring land than they would be without it. Because of that reciprocity of advantage, statutes of frauds and other similar laws regulate the conditions under which land owners must transfer land if they wish to protect their rights.[52]

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50. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

51. I borrow these examples from Richard A. Epstein, *The "Necessary" History of Property and Liberty*, 6 CHAP. L. REV. 1, 2-3 (2003).

52. For another example, consider laws that authorize a city official to tear down a building, without just compensation, to slow or stop the onset of a fire. At least one nineteenth-century court considered such a law a *bona fide* "regulation" of property, because it "regulated" the exercise of the common-law privilege of private necessity. *See* Am. Print Works v. Lawrence, 21 N.J.L. 248 (1847). *Lawrence* is slightly exceptional because the idea of necessity does not fall within either the harm-prevention or reciprocity-of-advantage ground for regulation, but the case and the exceptional principle it announces still hew to natural-rights

On the other hand, this understanding of "regulation" makes it more difficult for governments to cite the police power to condemn land than contemporary law allows. If one sets aside trespass and conveyancing laws, it is normally an extreme to take an owner's fee from her. As a result, in many cases, even when there is a problem that demands some sort of regulation, the natural-rights approach requires the lawmaker to ask whether he can control the problem without taking away the fee. The means-ends requirements of intermediate scrutiny then acquires considerable force. Consider an anti-smog law, a classic nuisance-control "regulation." If a government can document that smog exists and that it creates unhealthy or extremely unpleasant air for neighbors, it may "regulate" the problem, by limiting the factory output that generates the smog. But under principles of intermediate scrutiny, the law can abate the pollution without stripping the manufacturer of his factory. A government would need to produce a convincing justification to explain why it needed to go beyond abating the pollution and go to the extreme step of reselling the factory to another owner.

This scheme of intermediate scrutiny, nuisance control, and reciprocity of advantage confirms and adds to the insights of Thomas Merrill's article *The Economics of Public Use*[53] and Nicole Stelle Garnett's article *The Public-Use Question as a Takings Problem*.[54] Again, Merrill proposes that public-use law incorporate a sliding-scale form of means-ends scrutiny.[55] Garnett focuses on this possibility in closer detail. She proposes a more fixed version of means-ends scrutiny, specifically "the kind of means-ends scrutiny employed" in *Dolan*.[56] Her argument, however, is analogical and doctrinal, not substantive; she refrains from showing that *Dolan*-style scrutiny applies to public-use problems "as a matter of deductive logic."[57] Garnett also acknowledges that her proposal does not fix all the problems in public-use review: "So long as courts continue to refuse to second guess the *ends* of government action . . . means-ends review will provide only a limited, but important, structural constraint on the power of eminent domain."[58]

Natural-rights theory supplies the needed connection between public-use and regulatory-taking principles. In contemporary "public use" litigation, the

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logic. *See* Claeys, *supra* note 34, at 1589-91.

53. Merril, *supra* note 1

54. Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934 (2003).

55. *See* Garnett, *supra* note 54. For Merrill's analysis of the relationship between public-use principles and regulatory-takings principles, see Merrill, *supra* note 1, at 69-72.

56. Garnett, *supra* note 54, at 936.

57. *Id.* at 937.

58. *Id.* at 982.

governing legal principles merge into a single doctrinal inquiry what natural-rights theory considers to be two separate issues–regulatory-takings analysis and true public-use analysis. If the government is going to cite the police power to condemn property, and if property has the personal and social value that natural-rights theory claims for it, then the government ought to show that the condemnation prevents a real problem in a direct way. Intermediate scrutiny protects property rights from specious "regulations" in two ways: It "put the government [of Detroit] to its proof,"[59] and it requires the government to explain why it is restraining property rights only as little as is necessary to accomplish its stated regulatory goals.

At the same time, natural-rights theory also confirms Garnett's warning that, by itself, means-ends intermediate scrutiny cannot prevent all abuses of the power to condemn land. If governments are free to set the goals for which they may "regulate" property, sooner or later they will hit on ends that justify whatever means they want to use. That is why natural-rights theory limits sound regulation to two focused ends: nuisance control and securing an average reciprocity of advantage. The former allows the government to define and protect the zone of free action within which different owners may apply similar productive passions to different talents and ends. The latter prevents the government from rearranging these zones except when doing so enlarges the rights of all affected owners.

Of course, when a government condemns land, it might choose to circumvent natural-rights limitations on the police power by proceeding instead under the eminent-domain power. But then the government would need to follow the limitations that natural-rights theory sets on the eminent-domain power, particularly the natural-rights conception of a "public use." It is to that issue that the next two parts turn.

II. PUBLIC USES IN NATURAL-RIGHTS THEORY

The history and the political theory behind the eminent-domain power provide strong reasons for concluding that the idea of a "public use" requires that the public actually use the property. In a republic dedicated to the social compact, government can force an owner to sacrifice his property rights for public objects, but only if those objects focus on the protection of the equal rights of all citizens, and only if the sacrifice goes to the "public" in the narrow sense of the word. In other words, the social compact treats government as a partnership, and a partnership would defy its organizing principles if it forced one partner to sacrifice his property for the benefit of another. Therefore, a

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59. *Id.* at 936.

government committed to social-compact and natural-rights principles can force citizens to surrender their property for just compensation only on the proviso that they yield it to the entire partnership and not to any one partner.

To appreciate this view, one must understand how the term "eminent domain" evolved in European and American usage. The term came into widespread use through seventeenth century treatise writers who systematized European constitutional and international law. While the following passages do not provide an exhaustive account of how the continental treatise writers understood the power of eminent domain, they do highlight several features that are important for understanding why the Americans adopted the term "public use." In 1625, Hugo Grotius explained that a monarch may: "take away from his subjects . . . [property] by the power of eminent domain. In order to do it by the power of eminent domain, first, the public welfare must require it, and, second, compensation must be made to the loser, if possible, from the public funds."[60]

In 1673, Samuel von Puffendorf wrote in his *Second Book on the Duty of Man and Citizen* that:

> The third right [of the ruler] is that of eminent domain, consisting in this, that, when urgent necessity of the state demands, any subject's property which the immediate situation especially requires, can be seized and applied to public purposes, even if the property far exceeds the proportion which he was bound to contribute to the expenses of the state. But for this reason the excess ought to be refunded to that citizen from the public treasury, or by contribution of the other citizens, so far as possible.[61]

In 1737, Cornelius van Bynkershoek distinguished his position from that of Grotius, whom, he wrote

> [i]s satisfied merely with *utility*, saying that in order to deprive subjects of an acquired right "by the power of eminent domain, there is required in the first place public *utility*, and next that if possible compensation at the common expense be made to him who has lost what was his."[62]

Finally, in 1758, Emmerich de Vattel described the eminent-domain power as "[t]he right which belongs to the State, or to the sovereign, to make use of all property within the State for the public welfare in time of need."[63]

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60. 2 HUGO GROTIUS, 2 THE LAW OF WAR AND PEACE 164 (Loomis, trans., Walter J. Black 1949) (1625).

61. SAMUEL VON PUFENDORF, DE OFFICIO HOMINIS ET CIVIS, Book II, ch. XV (James Tully ed., Michael Silverthorne trans., Cambridge Univ. Press 1991) (1673).

62. CORNELIS VAN BYNKERSHOEK, QUAESTIONUM JURIS PUBLICI LIBRI DUO, Book II, ch. XV (Tenney Frank, trans., W.S. Hein 1995) (1737).

63. 3 EMMERICH DE VATTEL, LE DROIT DES GENS, OU PRINCIPLES DE LA LOI NATURELLE: APPLIQUES A LA CONDUITE ET AUX AFFAIRES DES NATIONS SOUVERAINS § 244

These excerpts highlight several important features about eminent domain.[64] The power of eminent domain was clearly understood as an incident of sovereignty, reserved to the arm of the state with supreme authority. It was often associated with the prerogatives of kingship. Especially important, the continental treatise writers disagreed about what showing the sovereign needed to justify invoking the power of eminent domain. All agreed that the sovereign could not invoke eminent domain merely at his whim or pleasure, but they proposed different standards. Vattel and Grotius set forth a fairly lenient one, "public welfare." Puffendorf proposed a fairly strict one, "urgent necessity," and Bynkershoek criticized Grotius for setting the standard at what Bynkershoek understood to be the relatively lenient "public utility." At the same time, since all of the treatise writers presupposed that the sovereign would keep the property he took, none of them directly confronted the question of "public use" in a direct way.

English political theorists critiqued, qualified, and refined this conception of eminent domain on social-compact and natural-rights grounds. John Locke generally approved of eminent domain, but he warned that "the Supreme Power cannot take from any Man any part of his Property without his own consent."[65] Locke explained,

> [T]he preservation of Property being the end of Government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should have Property, without which they must be suppos[ed] to lose that by entering into Society, which was the end for which they entered into it, too gross an absurdity for any Man to own.[66]

Locke thus reformed the power of eminent domain on social-compact and natural-rights grounds. Since people entered into the social compact to protect and enlarge their property, government ceased to claim any sense of obedience when it acted in a manner that took their property.

Similarly, in 1758, English natural-law jurist Thomas Rutherforth warned that the power of eminent domain:

> is not a right to take the whole, or indeed any part of it, from them causelessly or arbitrarily. The preservation of each mans property is one of the ends, which he

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(James Brown Scott, ed., Carnegie Institute of Washington, 1916) (1757).

64. For a separate interpretation of these writings, see Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use,"* 32 SW. U. L. REV. 569, 571-72 (2003).

65. JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 138 (Peter Laslett ed., Cambridge 1988) (1690) (emphasis removed).

66. *Id.* (emphasis removed).

> proposed to himself in entering into civil society. But it is absurd to suppose, that he would give up the whole of his property for the sake of preserving it.[67]

Again, Rutherforth recognized that government could invoke the power of eminent domain, but only as long as it did so in a manner consistent with its basic commitment to protecting natural property rights.

William Blackstone carried Locke's and Rutherforth's reservations one step further. He anticipated the American notion of a "public use" by reconceiving of the act of eminent domain as a bargain between the state and an individual. Blackstone's argument is also significant because he also attacked the conception of eminent domain that prevails now, that "public use" allows the government to take property when "public necessity," "public utility," or a "public purpose" so requires.[68] Blackstone proceeded from natural-rights and social-compact principles. He described private property as "[t]he third absolute right, inherent in every Englishman."[69] Property's origins, he said, were "probably founded in nature," but the positive laws that secure them "are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty" upon entering into civil society.[70]

Blackstone's emphasis on individual rights and social compact led him to construe the power of eminent domain narrowly:

> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law.[71]

Blackstone also recognized a place for the power of eminent domain as long as the property went to the state. He acknowledged that "the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce" in a condemnation.[72] But the legislature did so "[n]ot by absolutely

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67. 2 THOMAS RUTHERFORTH, INSTITUTES OF NATURAL LAW 48 (Cambridge 1756).

68. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 134 (University of Chicago Press 1979) (1765); *see infra* part IV.

69. 1 BLACKSTONE, *supra* note 68, at 134.

70. *Id.*

71. *Id.* at 135.

72. *Id.*

stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification."[73] Most important, when the legislature forces such a taking and indemnification, "*[t]he public is now considered as an individual*, treating with an individual for an exchange."[74]

Blackstone's discussion is extremely revealing evidence as to the meaning of the phrase "public use" as a constitutional term of art. Blackstone's understanding of eminent domain left little or no room for the notion of "public usefulness." He specifically rejected the idea that "the good of the individual ought to yield to that of the community" as well as the suggestion that any "public tribunal" could be the judge of what was "expedient" enough to strip a man of his property rights. Blackstone rejected these ideas because he conceived of the "public good" in social-compact terms–"the protection of every individual's private rights." If government is committed to the protection of every individual's private rights, it is has no principled basis for reassigning private lots of land to the developers and businesses that it guesses will contribute the most to the local economy. Rather, its job is to secure the conditions in which all people may choose for themselves how to use their own lots to secure their own preservation and happiness.

On the other hand, Blackstone's understanding parallels and anticipates the conception of "public use" as "use by the public." To contribute to the "public good" as conceived of in social-compact terms, the public needs to benefit from eminent domain as partners benefit when their partnership acquires property and uses it on their behalf. That is why Blackstone regarded "the public" during eminent domain "*as an individual*, treating with an individual for an exchange."[75]

With this context in mind, the term "public use," as used in the United States and the first state Constitutions, is more likely to have meant "use by the public" than "public usefulness." To begin with, the former meaning better captures "public use's" plain meaning based on contemporaneous usage. At that time, the primary definition of the adjective "public" was "[b]elonging to a state or nation; not private."[76] The primary meaning of "use" as a noun was "[t]he act of employing any thing to any purpose."[77] This definition tracked "user's" primary meaning of "use" as a verb: "[t]o employ to any purpose."[78]

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73. *Id.*
74. *Id.* (emphasis added).
75. 1 BLACKSTONE, *supra* note 68, at 135.
76. 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (AMS Press 1967) (1755).
77. *Id.*
78. *Id.*

Of course, plain meaning analysis cannot eliminate any ambiguity about the meaning of "public use," for the noun "use" also had, as one of several secondary meanings, a definition of "[c]onvenience" or "help."[79] But that ambiguity raises a question about how to proceed with original-meaning interpretation. If the government gets the benefit of the doubt whenever a word has two significant and original meanings, then "public use" ought to mean "public usefulness." But if the object of original-meaning analysis is to identify the most likely meaning of a phrase at the time it was drafted and ratified, "public use" ought to track the primary meaning of use, "the act of employing any thing to any purpose." On this understanding, "public use" requires the public to *employ* the asset in question, and do so for *ends chosen by the public*. Equally important, this phrase has a meaning conceived in opposition to and in exclusion of "private use," which occurs when a private owner employs the asset, and does so for ends she chooses on her own without state supervision or control.

In addition, the phrase "use by the public" does a better job of capturing how the word "use" was used as a constitutional term of art than does the phrase "public usefulness." Consider how the term is employed in the federal Constitution of 1787, before the drafting of the Takings Clause and the rest of the Bill of Rights.[80] The Constitution of 1787 employs the term "use" twice, both times consistently with its primary dictionary meaning. Article I, section 10 anticipates that certain state taxes "shall be for the use of the treasury of the United States."[81] The U.S. Treasury is clearly meant to "use"–to own or direct the employment of–the tax levies. Similarly, article I, section 8 restrains certain "appropriation[s] of money to [the] use" of supporting armies.[82] Far more likely that the armies get to use the appropriations for their own support than that the money may be spent on purposes that are secondarily useful to the armies.

The third piece of evidence comes from state constitutions and organic statutes written in the period from 1776 to 1795–in essence, the first wave of state constitutions and fundamental statutes. Some state constitutions express some of the concepts in the federal Constitution in more discursive language. In many of these constitutions, the term "public use" reduces to a term of art Blackstone's idea that government ought to treat a dispossessed owner "as an individual, treating with an individual for an exchange."[83] Pennsylvania's first post-Revolution Constitution suggested as much by including a takings

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79. *Id.*
80. I am indebted for this insight to Roger Clegg, *supra* note 16, at 542.
81. U.S. CONST. art. I, § 10, cl. 2.
82. U.S. CONST. art. I, § 8, cl. 12.
83. 1 BLACKSTONE, *supra* note 68, at 135.

guarantee in a constitution expressly dedicated to social-compact and natural-rights principles. That constitution declared that

> all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety, [and that] government is, or ought to be, instituted for the common benefit, protection and security of the people . . . .[84]

As to takings, that constitution guaranteed that "no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives."[85] If natural-rights and social-compact principles were important enough to begin the constitution's declaration of rights, it is more likely that the term "public uses" meant to limit the government to taking property for the "public," conceived of as an individual entity, than that the term meant to encourage government to redistribute property between private parties whenever publicly useful.

The same relationship exists in Virginia's 1776 Declaration of Rights. Section 1 declared that "all men are by nature equally free and independent, and have certain inherent rights," specifically including "the means of acquiring and possessing property."[86] Section 3 declared "[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people . . . ."[87] Section 6 then specified that "all men . . . cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected . . . ."[88] When section 6 is read *in pari materia* with sections 1 and 3, the term "public uses" is more likely to have limited the government to acquiring property as an individual would than to have allowed the government to redistribute property between private parties when publicly useful.

Other Founding Era documents reinforced the narrower meaning of "public use" by using the term in contrast to a term synonymous with "public usefulness." For instance, Massachusetts' 1780 Bill of Rights provided that "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."[89] (Like Pennsylvania's and Virginia's constitutions, Massachusetts' Bill of Rights also guaranteed "[a]ll men . . . have certain natural, essential, and unalienable rights," including "that of acquiring,

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84. PA. CONST. of 1776, arts. I, V.
85. *Id.* art. VIII.
86. VA. CONST. of 1776, § 1.
87. *Id.* § 3.
88. *Id.* § 6.
89. MASS. CONST. of 1780, pt. I, art. X.

possessing, and protecting property," and pledged government to act "for the common good; for the protection, safety, prosperity and happiness of the people . . . . "[90]) Similarly, Article 2 of the Northwest Ordinance stated that "should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same."[91] The Massachusetts Bill of Rights contrasted "public exigencies" with "public uses"; the Northwest Ordinance contrasted "public exigencies" with "common preservation." Even if a government might have found it publicly exigent–publicly useful–to condemn private property, "public uses" or the "common preservation" imposed separate substantive limitations on what governments could do with the properties they took.

The last and most comprehensive piece of evidence about the meaning of "public use" comes from United States Supreme Court Justice William Patterson's circuit opinion in *Vanhorne's Lessee v. Dorrance*.[92] Vanhorne's Lessee was decided after the ratification of the federal Fifth Amendment and many state takings guarantees, and the narrow grounds for decision focused not on public use but on just compensation. Even so, Justice Patterson's sweeping opinion explained the political theory behind public use constitutional guarantees. Thus, even if *Vanhorne's Lessee* comes slightly after the ratification of the first wave of takings provisions, it is extremely revealing evidence as to the moral "common knowledge" out of which the idea of a "public use" emerged during the 1780's and 1790's.

Patterson interpreted guarantees in Pennsylvania's constitution to lock in a commitment to protecting private property rights consistent with natural rights and the social compact. He claimed that takings guarantees recognized that "the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man."[93] He insisted that "[t]he preservation of property . . . is a primary object of the social compact . . . . No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry."[94] Social-compact theory thus laid down principles that both justified and limited the State's power of eminent domain. On one hand, in a government pledged to securing the rights of every citizen, each citizen could in turn be required to sacrifice his

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90. *Id*. arts. I, VII.

91. An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, 1 Stat. 50, 52 (1789).

92. 2 U.S. (2 Dall.) 304 (1795).

93. Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (1795).

94. *Vanhorne's Lessee*, 2 U.S. (2 Dall.) at 310.

property for the good of the whole. "Every person ought to contribute his proportion for public purposes and public exigencies . . . ."[95]

At the same time, if the government was going to exercise this power, it needed to do so on two conditions–that the owner receive "a recompence in value," and that the taking be "for the good of the community."[96] Patterson then reinforced the same point by explaining that takings guarantees protect owners from government actions "laying a burden upon an individual, which ought to be sustained by the society at large."[97] Under either formulation, it is more likely that a "public use" occurs only when the "community" or the "society at large" uses the property taken, than whenever the community benefits secondarily by reassigning the property from one owner to another.

Justice Patterson confirmed the same point in another way when he attacked a broader and more wide-ranging justification for invoking the eminent-domain power. Patterson acknowledged and considered the conception of eminent domain from the seventeenth- and eighteenth-century continental treatise writers–he dryly called this conception "[t]he despotic power."[98] He conceded that this power "of taking private property, when state necessity requires, exists in every government," and that "government could not subsist without it."[99] At the same time, he attacked open-ended conceptions of "necessity." In a republic dedicated to securing natural property rights consistent with the social compact, necessity could not justify private redistributions of property:

> It is . . . difficult to form a case, in which the necessity of a state can be of such a nature, as to authorise or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen. It is immaterial to the state, in which of its citizens the land is vested; but it is of primary importance, that, when vested, it should be secured, and the proprietor protected in the enjoyment of it.[100]

This last passage accords with the basic thrust of natural-rights theory, as seen already in the writings of Wilson and Blackstone.[101] Natural property rights presume that few owners put their properties to similar uses, but that all share more or less the same productive and acquisitive urges to use their properties for their own ends. Within that framework, governments ought not to try to pick winning and losing uses of property. Rather, government's overriding job is to make sure that "when vested, [property] should be secured,

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95. *Id*.
96. *Id*.
97. *Id*.
98. *Id*. at 311.
99. *Id*.
100. *Vanhorne's Lessee*, 2 U.S. (2 Dall.) at 311.
101. *See supra* notes 37-44, 71-78 and accompanying text.

and the proprietor protected in the enjoyment of it."[102] The proprietor should then be left alone to decide how to use her own property in accordance with her own talents and for her own ends.

In Patterson's view, this understanding protected individual rights, but limiting government's ends in this manner also stabilized government and improved the people's character.[103] The best way to stop political life from degenerating into unbridled interest-group warfare was to force the government to throw the power to pick and choose property uses out of constitutional reach. Limit the government to passing laws leaving owners to direct and enjoy the uses of their property, and the law's "operation and influence are equal and universal; they press alike on all. Hence security and safety, tranquillity and peace. One man is not afraid of another, and no man afraid of the legislature."[104] Different politics would issue if the constitution were to "vest in the legislature so unnecessary, dangerous, and enormous a power" as "to divest one individual of his landed estate merely for the purpose of vesting it in another, even upon full indemnification:"[105]

> Omnipotence in Legislation is despotism. According to this doctrine, we have nothing that we can call our own, or are sure of for a moment; we are all tenants at will, and hold our landed property at the mere pleasure of the Legislature. Wretched situation, precarious tenure! And yet we boast of property and its security, of Laws, of Courts, of Constitutions, and call ourselves free![106]

III. PUBLIC-USE DOCTRINE IN THE NINETEENTH CENTURY

To appreciate how to carry the natural-rights understanding of "public use" into effect, it is worthwhile to consult the doctrines developed by American courts early in the nineteenth century. It is noteworthy that nineteenth-century courts were not entirely uniform in their treatment of public-use challenges. Different courts and different lines of precedent

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102. *Vanhorne's Lessee*, 2 U.S. (2 Dall.) at 311.

103. *Id.* at 309.

104. *Id.* at 312.

105. *Id.*

106. *Id.* at 316. Readers should note that Patterson's indictment here covered not only private redistributions but also a series of procedures for giving notice and providing just compensation in eminent-domain proceedings. Patterson thought the procedures for notice and providing just-compensation were grossly insufficient in the case before him, and those procedures provided the main grounds on which he declared the law under challenge to be unconstitutional. *See id.* at 316-20. Nevertheless, the indictment in text also covered private redistributions, as the quotation accompanying the preceding footnote makes clear, and as Patterson reinforced by doubting whether "the Legislature can take the real estate of A. and give it to B. on making compensation." *Vanhorne's Lessee*, 2 U.S. (2 Dall.) at 312.

debated whether "public use" limitations meant "use by the public," "public usefulness," or other meanings in-between.[107] However, many courts subscribed to the natural-rights understanding of property, regulations, and takings sketched out in the two preceding parts. Those courts' decisions provide excellent examples how to apply the natural-rights approach in practice.

Courts that subscribed to the natural-rights framework established three simple categories: public ownership, public control of a common carrier, and pure private ownership. If a taking fell into one of the first two categories, it qualified as a public use; otherwise, it was for private use and was therefore unconstitutional.

A. Public Ownership

Early American courts and commentators uniformly recognized that government takes property for a public use when it retains ownership of the property. In *In re Wellington*, for example, Massachusetts Supreme Court Chief Justice Lemuel Shaw upheld the appropriation by the highway commissioners of land already owned by the public as a military training field.[108] He explained that when the owners of the land granted it to the town of Cambridge in 1769, "the town became owners of the soil with full power, as such owners, to make any use of the property, which owners of land can make."[109] The U.S. Supreme Court provided examples of this understanding in *Kohl v. United States* when it approved of takings "for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses."[110]

B. Common Carriers

Nineteenth-century courts also recognized limited circumstances in which governments could take private property and turn it over to private owners–transfers to common carriers with a duty of access to the public. The public's right of access ensured that the public "uses" the property, even though a private delegate happened to own the property. This exception was best explained in *Beekman v. Saratoga & Schenectady Railroad*.[111] In

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107. *See* Lawrence Berger, *The Public Use Requirement In Eminent Domain*, 57 OR. L. REV. 203, 204-25 (1978).

108. *In re* Wellington, 33 Mass. (16 Pick.) 87 (1834).

109. In re *Wellington*, 33 Mass. (16 Pick.) at 99.

110. Kohl v. United States, 91 U.S. 367, 371 (1875).

111. 3 Paige Ch. 45 (N.Y. Ch. 1831).

Beekman, Chancellor Williams upheld the use of eminent domain for the construction of a private railroad because the railroad was a common carrier:

> The public have an interest in the use of the rail road, and the owners may be prosecuted for the damage sustained, if they should refuse to transport an individual, or his property, without any reasonable excuse, upon being paid the usual rate of fare. The legislature may also from time to time regulate the use of the franchise and limit the amount of toll . . . .[112]

Similarly, the North Carolina Supreme Court upheld a condemnation for the use of a private railroad company on the ground that "the [railroad] corporation . . . is a franchise, like a ferry or any other. As to the public, it is a highway, and in the strictest sense, *publici juris*."[113] Other cases applied this common-carrier public right of access to distinguish between roads taken for public and private uses.[114]

As these passages suggest, common-carrier regulation was bounded by several principles. Governments could not, willy nilly, declare private owners to be "common carriers"–either to burden them with the obligations under which regulated utilities labor, or to benefit them by delegating to them the power of eminent domain. Such owners needed to be, in the North Carolina Supreme Court's words, *publici juris*, "affected with a public interest."[115] While this phrase was not entirely free from ambiguity, in the main it applied to private beneficiaries of a state franchise or another form of state monopoly, or to companies that operated in conditions of natural monopoly.[116] If a private owner was *publici juris*, the state then had power to require it to provide the public with a right of access to its services, at rates the state could regulate to ensure their reasonability. That is why, in *Beekman*, Chancellor Williams inquired whether the railroad was liable for "refus[ing] to transport an individual, or his property, without any reasonable excuse," and whether

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112. Beekman v. Saratoga & Schenectady R.R., 3 Paige Ch. 45, 75 (N.Y. Ch. 1831).

113. Raleigh & Gaston R.R. v. Davis, 19 N.C. (2 Dev. & Bat.) 451, 469 (1837).

114. *See* JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 158 (3d ed. 1909) (citing cases).

115. BLACK'S LAW DICTIONARY 1266 (8th ed., 2003).

116. *See* Munn v. Illinois, 94 U.S. 113 (1877). For a historical perspective on *Munn* and the concept of *publici juris*, see Harry N. Scheiber, *The Road to* Munn*: Eminent Domain and the Concept of Public Purpose in the State Courts*, *in* LAW IN AMERICAN HISTORY 327, 338-55 (Donald Fleming & Bernard Bailyn, eds., 1971). For a policy perspective grounded in libertarian property theory substantially like the natural-rights approach, see RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH A COMMON GOOD 279-307 (1998). Note, however, that during the New Deal, the U.S. Supreme Court repudiated the distinction between purely private and *publici juris* owners, or competitive companies and common carriers, in *Nebbia v. New York*, 291 U.S. 502 (1934).

"[t]he legislature may . . . regulate the use of the franchise and limit the amount of toll" set by the railroad.[117]

C. Private Uses

By contrast, when the government redistributed private property from one private owner to another without establishing common carrier duties, courts that subscribed to natural-rights principles concluded that the taking was for private use and was therefore unconstitutional. Justice Chase, in the case of *Calder v. Bull*, regarded "a law that takes property from A. and gives it to B" as offensive in principle as an *ex post facto* law or a law altering contracts.[118] This motif quickly became a shorthand reference for the worst sort of constitutional violation. In 1829, U.S. Supreme Court Justice Joseph Story wrote:

> We know of no case, in which a legislative act to transfer the property of A. to B., without his consent, has ever been held a constitutional exercise of legislative power, in any state in the Union. On the contrary, it has been constantly resisted, as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced.[119]

Such a law was pernicious for "subverting the great principles of republican liberty, and of the social compact."[120]

Throughout the nineteenth century, courts routinely rejected–in extremely strong language–the proposition that legislatures could redistribute land between private parties. An Illinois federal court asked: "Can legislatures in this enlightened age, with written constitutions to restrain them, take from one and give to another his property with or without compensation? It is only necessary to state the proposition in its nakedness to meet refutation."[121] The Supreme Court of Maine warned that "[t]he private property of one citizen cannot be taken and given to another citizen, for private uses."[122] The Illinois Supreme Court warned that "private property cannot be constitutionally condemned and appropriated by the legislature to private uses."[123] The Ohio Supreme Court warned that the power to redistribute property from one private party to another "would be utterly destructive of individual right, and break

117. *Beekman*, 3 Paige Ch. at 75.
118. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.).
119. Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657 (1829) (footnote omitted).
120. *Wilkinson*, 27 U.S. (2 Pet.) at 645.
121. Arrowsmith v. Burlingim, 1 F. Cas. 1187, 1189 (C.C.D. Ill. 1848) (No. 563).
122. Jordan v. Woodward, 40 Me. 317, 323 (1855).
123. Nesbitt v. Trumbo, 39 Ill. 110, 114 (1866).

down all the distinctions between *meum et tuum*, and annihilate them forever, at the pleasure of the state."[124]

Moreover, in the cases that hewed to the natural-rights meaning of "public use," courts thought it was anathema to conflate the questions of public purpose and public use. These cases rejected that public "necessity" or "advantage" could ever justify eminent domain by itself. In one of the earliest eminent-domain cases after *Vanhorne's Lessee*, the North Carolina Supreme Court appealed to the same themes that had informed the thinking of Blackstone and Justice Patterson:

> [N]ecessity can never demand that the lands of A shall be taken and given to B . . . . It is immaterial to the State in which of its citizens the land is vested; but it is of primary importance that when vested it should be secured and the proprietor protected in the enjoyment of it.[125]

As a New York judge explained in *Bloodgood v. Mohawk & Hudson Railroad*,

> When we depart from the natural import of the term "public use," and substitute for the simple idea of a public possession and occupation, that of public utility, public interest, common benefit, general advantage or convenience, or that still more indefinite term public improvement, is there any limitation which can be set to the exertion of legislative will in the appropriation of private property.[126]

IV. THE PROGRESSIVE TURN: THE RISE OF PUBLIC PURPOSE AND THE DEMISE OF PUBLIC USE

Needless to say, modern law does not treat "public use" to mean "use by the public." Rather, cases such as *Berman*, *Poletown*, and *Midkiff* have dominated legal perceptions. As a result, "public use" is equated with "public usefulness" or, to use the term that the rest of this Article will use, "public purpose." To be sure, state courts have from time to time bucked the deference built into the "public purpose" conception of public use and declared extreme condemnations to be unconstitutional private takings.[127] Nevertheless, few if any of these cases were as ambitious as *Hathcock*; few if any tried to articulate a principled basis for a non-deferential and non-purposivist account of the public-use limitation.

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124. Buckingham v. Smith, 10 Ohio 288, 297 (1840).

125. Robinson v. Barfield, 6 N.C. (2 Mur.) 391, 421 (N.C. 1818).

126. Bloodgood v. Mohawk & Hudson R.R., 18 Wend. 9, 60 (N.Y. Sup. Ct. 1837) (Tracy, Sen.).

127. *See*, *e.g.*, S.W. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1 (Ill. 2002). Thomas Merrill canvassed these decisions through 1986 and estimated that roughly 15% of public-use cases follow this pattern. *See* Merrill, *supra* note 1, at 93-109.

Space prevents any exhaustive account here explaining why the use-based conception of public use fell by the wayside and the purpose-based conception became ascendant. No doubt, one of the factors was doctrinal. As Part I suggested and the next Part will confirm, for the natural-rights approach to work, judges must appreciate and apply two sets of doctrine that seem to overlap–regulatory-takings analysis and public-use analysis. That is a fairly tall order. There were also substantive pressures. Throughout the nineteenth century, state courts rejected a steadily increasing number of public-use challenges involving private roads, mill dams, and other large assemblies of land.[128] In many of these cases, courts concluded that "public use" meant "public usefulness" and allowed private owners to take neighboring parcels of land on a showing that the owners' projects would benefit the public.[129]

Nevertheless, the main reason for the shift was theoretical. Both the public-use and public-purpose understandings were in the case law as of the early twentieth century, but Progressive political and Realist legal theorists had a strong preference for the latter over the former. Political scientist Charles Merriam spoke for the Progressives in a 1924 history of American political thought. As of this day, he concluded on behalf of his colleagues, it was "fully conceded that there are no 'natural rights' which bar the way" to the Progressives' understanding of the proper objects of government: "The question is now one of expediency rather than of principle."[130]

When Merriam appealed to "expediency," he appealed to what we would understand as a fairly flat form of utilitarianism. In this understanding, the proper object of law is to promote social utility, understood as "the greatest good of the greatest number."[131] Some utilitarians, including Jeremy Bentham two centuries ago and Richard Epstein today, insist that social utility can and should rate government actions by the extent to which they encourage or discourage the acquisitive, industrious, and productive tendencies associated with the institution of property. By and large, however, Progressives did not rate government action in this manner; property was justifiable (only) to the extent that it contributed to the public's desired goals.[132]

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128. Lawrence Berger, *Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 208-12 (1978).

129. *See* Nichols, Jr., *supra* note 17, at 621; Comment, *supra* note 6, at 601; Berger, *supra* note 107, at 204-25.

130. CHARLES EDWARD MERRIAM, A HISTORY OF AMERICAN POLITICAL THEORIES 322 (A.M. Kelley 1969) (1903).

131. Oliver W. Holmes, Jr., *The Gas-Stokers' Strike*, 7 AM. L. REV. 582, 584 (1873). For the most famous usage of "the greatest good of the greatest number," see JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., Methuen 1982) (1789).

132. *See* Claeys, *supra* note 34, at 1624; Eric R. Claeys, *Euclid Lives? The Uneasy*

These Progressive tendencies are crucial because they became embedded in the thought of the Legal Realists. As Thomas Merrill and Henry Smith have explained, the Legal Realists sought to discredit the natural-rights foundations of a wide range of existing property law. If the Realists could show that "property has no fixed core of meaning, but is just a variable collection of interests established by social convention, then there [would be] no good reason why the state should not freely expand or, better yet, contract the list of interests in the name of the general welfare."[133] That tendency started to show in due-process property-rights cases of the 1920s. Most significantly, in *Miller v. Schoene*,[134] then-Associate Justice Harlan Stone upheld a law allowing apple growers to seek out and destroy cedar trees on their neighbors' property. On Realist grounds, Stone noted: The state validly regulates property "by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public."[135] In other words, there was no core of property independent from apple growing, residential dwelling, or cedar growing; the conflict presented a purely political choice about which land use the local legislative majority liked best.[136] In the same vein, Legal Realist Walter Hamilton defined "property" in the 1937 edition of the *Encyclopedia of the Social Sciences* as "'a euphonious collection of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth.'"[137]

These Progressive and Realist influences gradually chipped away at the natural-rights foundations in public-use law through the first half of the twentieth century. In *United States* ex rel. *Tennessee Valley Authority v. Welch*,[138] the Supreme Court insisted that "it is the function of Congress to decide what type of taking is for a public use."[139] Scholarship on public use from the 1940s reinforced the same conclusion.[140]

However, the Progressive/Realist view gained ascendancy in public-use law when the U.S. Supreme Court handed down *Berman v. Parker*[141] in 1954 which upheld a law that allowed local authorities to condemn "blighted"

Legacy of Progressivism in Zoning, 73 FORDHAM L. REV. 731, 751-53 (2004).

133. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 360 (2001).

134. 276 U.S. 272 (1928).

135. Miller v. Schoene, 276 U.S. 272, 279 (1928).

136. *See* Claeys, *supra* note 34, at 1641-44.

137. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 738 (1998) (quoting 11 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 528 (1937)).

138. 327 U.S. 546 (1946).

139. United States *ex rel.* Tenn. Valley Auth. v. Welch, 327 U.S. 546, 551 (1946).

140. *See* Nichols, Jr., *supra* note 17; Comment, *supra* note 6.

141. 348 U.S. 26 (1954).

land.[142] In his opinion for the Court, Legal Realist Justice William O. Douglas treated the owner's public-use challenge as identical to a police-power/regulatory-takings challenge, and both of these challenges as identical to a challenge to whether the blight laws promoted "the public interest." In Realist fashion, Douglas insisted that the scope of the "public interest" was broad and legislative: "The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[143] While *Berman* focused specifically on blight, it went out of its way to encourage local governments to redistribute property generally: "The public end may be as well or better served through an agency of private enterprise than through a department of government . . . ."[144]

Berman's broad statements about eminent domain and police powers have shaped public-use law, state and federal, for more than half a century. *Midkiff*, the U.S. Supreme Court's most recent pronouncement on public use, hailed *Berman* as the "starting point" for its analysis.[145] *Midkiff* concluded from *Berman* that governments may redistribute property from one private owner to another whenever "the exercise of the eminent domain power is rationally related to a conceivable public purpose."[146] Similarly, in *Kelo v. City of New London*,[147] the Connecticut Supreme Court followed the dominant trend among state courts and hailed *Berman* as a model for a "broad, purposive view of eminent domain . . . . "[148] The U.S. Supreme Court has granted *certiorari* to review the Connecticut Supreme Court's decision in *Kelo*; it remains to be seen whether this case will question *Berman*'s status as the leading public-use case of the last half-century.

There is nothing inevitable about *Berman*'s deferential and broad approach to public use. The decision shapes public-use law to conform to Progressive and Legal Realist policy sensibilities. In particular, *Berman* makes two overarching policy claims to break from the natural-rights approach. First, *Berman* breaks with the natural-rights approach about the proper objects of government. Again, *Berman* claims that the "purposes of

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142. Berman v. Parker, 348 U.S. 26, at 28-29 (1954).
143. *Berman*, 348 U.S. at 32.
144. *Id*. at 33-34.
145. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 239 (1984).
146. *Midkiff*, 467 U.S. at 241.
147. 843 A.2d 500 (Conn. 2004).
148. Kelo v. City of New London, 843 A.2d 500, 525 (Conn. 2004), *cert. granted*, 125 S. Ct. 27 (2004).

government . . . [are] neither abstractly nor historically capable of complete definition."[149] By contrast, as Parts I, II, and III showed, natural-rights theory claims that the purposes of government are both abstractly and historically capable of definition: Government's object is to secure natural rights, specifically by steering as much policy choice as possible to individual owners. By contrast, since Justice Douglas assumed that the purposes of government are not capable of definition, he assumed that *every* choice respecting the content of property rights was a policy choice.[150]

That break about the content of property led to a second break involving the relations between the different branches of the government. If property had to be defined in relation to specific and concrete policy choices, legislatures deserved much greater authority over the scope and regulation of property than did courts. After all, legislatures are the proper arm of the government to make fundamental policy choices. That assumption explains why Justice Douglas also said for the Court that "when the legislature has spoken," he insisted, "the public interest [is] . . . well-nigh conclusive."[151] Furthermore, like other Progressives and Realists, Douglas was comfortable deferring to the agencies that regulated property on the same terms as the legislatures that delegated such regulation.[152] Once a legislature has acted through "its authorized agencies," Douglas explained, "there is nothing in the Fifth Amendment that stands in the way."[153]

As Parts I through III suggested, however, public-use and other eminent-domain limitations reflected a different understanding of the relationship between legislatures and courts. In this understanding, constitutional property-right guarantees could set forth the proper objects of property regulation. The legislature must be involved in the regulation of property, for legislative rules can protect property far more comprehensively than case-by-case adjudication. At the same time, transient majorities may forget from time to time that they exercise the power to legislate only on condition that they secure, and not violate, citizens' natural rights. In other words, where the Legal Realists thought that legislation triggered a competition about which uses of property best comported with a legislative majority's understanding of the public interest, natural-rights jurists thought this was a corruption and abdication of legislative responsibility. Judges had the power and the responsibility to make sure that legislative actions comported with constitutional property-rights protections. Justice Patterson made this connection in *Vanhorne's Lessee*:

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149. *Berman*, 348 U.S. at 32.
150. *Id.*
151. *Id.*
152. *Id.* at 33.
153. *Id.*

> The constitution is the origin and measure of legislative authority. It says to legislators, thus far ye shall go and no further. Not a particle of it should be shaken; not a pebble of it should be removed. Innovation is dangerous. One incroachment leads to another; precedent gives birth to precedent . . . . Where is the security, where is the inviolability of property, if the legislature, by a private act, affecting particular persons only, can take land from one citizen, who acquired it legally, and vest it in another?[154]

In brief, *Berman* is problematic because it made the mistake captured in the old adage, "when you have a hammer, everything looks like a nail." Justice Douglas assumed that the main justification for government action was to promote social utility, without regard to the social utility created by the institution of property. Douglas then anachronistically projected his utilitarian understanding onto both the police power and the Public Use Clause. He assumed, as the Supreme Court had in *Miller v. Schoene*, that the "police power" was the power to order and control property to redound to the public purposes chosen by a legislative majority. He also assumed that "public use" meant the same thing as "public utility" or "public advantage," meaning that eminent domain allowed the government to redistribute property between private owners if doing so promoted public purposes favored by a legislative majority. For Douglas, the upshot was that the police power and eminent-domain powers were identical in all respects except one: The eminent-domain power required the government to pay just compensation, while the police power did not.[155]

By contrast, natural-rights theory marks off a very different understanding between public purpose, police power, and public use. By way of illustration, consider the challenge to the blight restriction in *Berman*, which arose under District of Columbia law and therefore under an act of Congress.[156] If one applies the original meaning of the Constitution to such a challenge, ideas about "public purpose," "police power," and "public use" come into play in different constitutional clauses. First, claims about a law's "public purpose" are not at all relevant to the question of whether there has been a public use. The law's purposes are part of the determination whether the law is "necessary" under the Sweeping Clause, which authorizes Congress to make "all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers,"[157] or "needful" for controlling D.C. or another federal territory.[158] The law's purposes are also one of several factors

154. Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 311-12 (1795).
155. *See Berman*, 348 U.S. at 31-32.
156. *Id*. at 31.
157. U.S. CONST. art. I, § 8, cl. 18.
158. *See id.* art. IV, § 3, cl. 2.

relevant in determining whether the law is a *bona fide* "regulation" excluded from the sweep of the Fifth Amendment for reasons explained below. But if the law aims to take property with the power of eminent domain, under natural-rights principles the law's policy goals have no bearing on the question of public use. This question focuses not at all on *why* the property has been taken, but rather on *who* keeps and uses the property.

Then, the police power is conceptually separate from the idea of a public interest or purpose. The doctrinal basis for a police power challenge would be the Takings Clause of the Fifth Amendment. Even though the Takings Clause does not expressly speak of the power to "regulate," the term "taken" tacitly excludes "regulation."[159] In Randy E. Barnett's restatement, when the Constitution uses the term "regulate," the term means something close to the definition "to make regular."[160] Indeed, the Constitution precludes *Berman*'s understanding of the power to "regulate," to set the ends for which an asset is used, for it uses the term "govern" to capture that meaning.[161] The narrower conception of "regulation" quietly informs the meanings of constitutional terms of art describing invasions of rights. For example, the Second Amendment protects the people from "infringements" of the right to bear arms even as it speaks of a "well regulated militia." The contrast makes no sense unless "regulations" codify the natural right to bear arms, encourage its free exercise, and prevent abuses of the right. "Infringements" are positive laws that restrain the right to bear arms for purposes not related to these specific ends.[162] What is explicit in the Second Amendment is implicit in many other terms of art throughout the Bill of Rights, including the "abridging" of free speech.[163] As Philip Hamburger has explained, in Founding Era discourse, the idea of "abridging" the freedom of speech presupposed and excluded

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159. The argument that follows in text was developed also in Claeys, *supra* note 34, at 1664-65. Even if it did not apply in the context of that article, which focused on the regulation of use rights, it surely applies in the context of this Article, to outright condemnations of land, for everyone agrees that the "private property" mentioned in the Fifth Amendment includes the right to exclude outsiders from one's land.

160. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 139 (2001).

161. *See* U.S. CONST. art. I, § 8, cl. 14 (vesting in Congress the power "[t]o make rules for the *Government and* Regulation" of the military) (emphasis added); *see also* Barnett, *supra* note 160, at 140; John Adams Wettergreen, *Capitalism, Socialism, and Constitutionalism*, *in* TO SECURE THE BLESSINGS OF LIBERTY: FIRST PRINCIPLES OF THE CONSTITUTION 244, 254-58 (Sarah Baumgartner Thurow ed., 1988).

162. U.S. CONST. amend. II; *see also* Barnett, *supra* note 160, at 141-42.

163. U.S. CONST. amend. I.

defamation laws, obscenity laws, and other laws that "regulated" speech to prevent its abuse and injury to other citizens' natural rights.[164]

That opposition between the invasion and regulation of a right informs the meaning of the term "taken" in the Fifth Amendment. As a result, if Congress were to pass a law codifying the rules of trespass for federal territories, the law would not "take" the property claims of trespassers; neither would a statute of frauds for federal territories. On the other hand, if a litigant challenged a blight regulation on police-power grounds, a court could not peremptorily dismiss the challenge on the ground that it promotes valid public purposes to attack blight, promote community, and common aesthetic values; rather, it would need to apply a scheme of intermediate scrutiny to inquire whether the law takes more of his property rights than necessary to define, protect, limit, and facilitate the enjoyment of property. This inquiry is fairly focused in contrast to *Berman*'s understanding of "public interest" and "police power."

Finally, assuming that the blight regulation was not a *bona fide* police "regulation," it would count as a taking, and the Public Use Clause would then apply, under the principles set forth in Parts II and III. Contrary to *Berman*, Congress could not simply determine that it would be useful to the public if developers acquired the condemned lots. Rather, the Public Use Clause would force Congress to condemn in the literal sense of "public use." Substantively, this limitation would protect owners by ensuring that they be forced to sacrifice property, and accept all the shortfalls that come with just compensation, only in those cases in which they gain access as members of the public to new public commons or services.

To be sure, this analysis of Congress's powers and limitations may not apply in all respects to all takings/public-use cases. Public-purpose, police-power, and public-use ideas inform different constitutions differently. Nevertheless, the basic point remains: *Berman* set an important and influential precedent for a utilitarian understanding of "public use" that natural-rights theory and the federal Constitution treat as three separate powers.

V. *HATHCOCK* AND THE FUTURE OF PUBLIC-USE LAW

A. *Hathcock's* Significance

Until even a year ago, it was safe to assume that *Berman*'s approach would continue to dominate public-use law, state and federal. *Hathcock* is a

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164. Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 948-53 (1993).

momentous decision because it reopens many of the questions *Berman* covered over. *Hathcock* is significant enough because it overruled *Poletown*. Moreover, *Hathcock* did not single out a largely-symbolic law, as have many of the U.S. Supreme Court's recent federalism decisions.[165] To the contrary, the case bites deeply into contemporary local-government practice when it suggests that general local economic advantages cannot suffice to support a finding that a taking is for public use.[166] Most ambitiously, *Hathcock* makes it respectable again for federal and state supreme courts to try to recover the original meanings of their constitutions' public-use limitations. *Hathcock* thus makes it possible, respectable, and even necessary to reconsider public-use law from first principles.

Accordingly, this Part closes by portraying how the law would look if the natural-rights approach applied to some of the more vexing issues in contemporary public-use law, using *Hathcock* as its standard for analysis. *Hathcock* represents the most systematic and ambitious attempt to clarify public-use law in decades. If we critique *Hathcock*, we may appreciate how far the law still needs to go to attain genuine conceptual clarity. The law may never reach this level of clarity, in Michigan or anywhere else for reasons of precedent or policy. Nevertheless, it is still a useful exercise to sketch out the theoretical extreme that rivals *Berman*, if for no other reason than to ensure that judges and other policymakers can appreciate the range of policy choice they truly enjoy.

Hathcock recognized three acceptable situations in which a government may assign condemned property to a private beneficiary without creating a purely private taking. Taking these out of the order in which the Michigan Supreme Court considered them, they include: (1) takings that go to a private entity that "remains accountable to the public in its use of that property";[167] (2) takings that occur "on the basis of 'facts of independent public significance'";[168] and (3) assembly-problem cases, or takings for private entities to generate "'public benefits whose very *existence* depends on the use of land that can be assembled only by the coordination central government

165. *See*, *e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (striking down a federal law federalizing the tort of sexual assault); United States v. Lopez, 514 U.S. 549 (1995) (striking down a federal gun-free school-zone act).

166. *See*, *e.g.*, County of Wayne v. Hathcock, 684 N.W.2d 765, 786 (Mich. 2004) ("To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain.").

167. *Hathcock*, 684 N.W.2d at 782 (citing Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 479 (Mich. 1981) (Ryan, J., dissenting)).

168. *Id*. at 783 (quoting *Poletown*, 304 N.W2d at 480 (Ryan, J., dissenting)).

alone is capable of achieving.'"[169] The first class of takings accords with the natural-rights conception of "public use," as long as the phrase "accountability to the public" is understood to refer to the principles of common-carrier regulation set forth in Part III.B. By contrast, the second and third classes of takings reflect *Berman*'s confusion. The facts that justify private-to-private transfers under these classes do so (if at all) not under public-use principles but under regulatory-takings principles.

B. Common Carriers

First, *Hathcock* allows government to transfer condemned properties to private entities "when the private entity remains accountable to the public in its use of that property."[170] The case requires that the beneficiary remain "subject to public oversight," or that "the public retain[s] a measure of control over the property."[171] This category of transfers accords with the natural-rights understanding of "public use," as long as "public accountability," "oversight," or "control" means the traditional principles of common-carrier regulation set forth in Part III.B. The Michigan Supreme Court's examples tend to confirm that it was speaking of traditional common-carrier regulation. It contrasted two previous decisions, *Portage Township Board of Health v. Van Hoesen*,[172] in which the taking to a water-power company was for private use, and *Lakehead Pipe Line Co. v. Dehn*,[173] in which a taking for the construction of a private petroleum pipeline was for public use. Factually, the main difference between the decisions centered on the fact that the pipeline operator in *Lakehead Pipe Line* was subject to regulation by the Michigan Public Service Commission, while the water-power company in *Portage Township* was under no corresponding regulation.[174] Doctrinally, the main difference focused on whether the property would "'be devoted to the *use* of the public, *independent of the will of the corporation taking it*.'"[175]

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169. *Id*. at 781 (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting)).
170. *Id*. at 782.
171. *Id*.
172. 49 N.W. 894 (Mich. 1891).
173. 64 N.W.2d 903 (Mich. 1954).
174. *See Hathcock*, 684 N.W.2d at 782.
175. *Id*. (quoting *Poletown*, 304 N.W.2d at 479 (Ryan, J., dissenting) (quoting Berrien Springs Water-Power Co. v. Berrien Circuit Judge, 94 N.W. 379, 380-81 (Mich. 1903))).

C. Facts of Independent Public Significance–and Harm-Prevention Regulations

The strains start to show in the other two classes of private takings, for in these classes *Hathcock* conflates sound public-use principles with sound regulatory-takings principles in the same manner as *Berman*. Consider the next class of takings, in which property is transferred to a private beneficiary after it is first condemned "on the basis of 'facts of independent public significance,' meaning that the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land, must satisfy the Constitution's public use requirement."[176] The Michigan Supreme Court evidently sought to reconcile with public-use law the practice of condemning land to "advance public health and safety" by "remov[ing] unfit housing."[177] This practice is called "slum clearance" or, more popularly, "blight." The United States Supreme Court's decision in *Hawaii Housing Authority v. Midkiff*[178] provides another example of a condemnation for a fact of public significance. *Midkiff* upheld, against a public-use challenge, a redistribution of land from seventy-two landlords, who owned 47% of the land surface of the state of Hawaii, to their tenants.[179] Even though the taking transferred reversions from private landlords to private tenants, it promoted a public policy that would count as a fact of independent public significance within *Hathcock*'s framework, namely "to reduce the perceived social and economic evils of a land oligopoly."[180]

Under the natural-rights approach, "blight" cases and *Midkiff* highlight the social costs that follow when takings law conflates regulatory-takings analysis with public-use analysis. *Hathcock* follows the Realist tendencies evident in *Berman* in the manner in which it categorizes blight. Like *Berman*, *Hathcock* does not distinguish different government actions depending on how the government acts. If the government cites public policies like "preventing crime or slums" or "fighting monopoly or oligopoly," the state must take those policies at face value, and give the government a substantial amount of leeway about how to promote them.

By contrast, the natural-rights approach limits government's power to "regulate" in several ways. In substance, these limitations prevent abuse of the power to regulate property. Government may certainly "regulate" property

176. *Hathcock*, 684 N.W.2d at 783 (quoting *Poletown*, 304 N.W2d at 480 (Ryan, J., dissenting)).

177. *Id*. (citing *In re* Slum Clearance, 50 N.W.2d 340, 343 (Mich. 1951)).

178. 467 U.S. 229 (1984).

179. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

180. *Midkiff*, 467 U.S. at 241-42.

rights by reconciling natural property rights with the natural rights to personal health and safety, the right to rear a family, the right to partake in a civil public life, and so forth. At the same time, however, property rights entitle owners to the fullest range of use, control, and disposition rights consistent with the rights of others. To mediate between these two prescriptions, natural-rights theory requires that the law first presume that owners enjoy the fullest freedom to use their property as they see fit. That presumption may be reversed, and the law may "regulate" property, only (1) if the law seeks to control a harm that counts as a *bona fide* invasion of another's natural rights, (2) if there is some proof that the owner's property will in fact create such a harm or make it significantly more likely, and (3) if the regulation restricts the owner's rights only to the extent necessary to control the identified harm.

Let us illustrate each of these limitations in turn, beginning first with the ends for which the government may regulate. *Berman* upheld blight condemnations for a wide range of purposes: preventing crime and the spread of disease, controlling immorality, and encouraging local aesthetic ideals.[181] Under natural-rights principles, the government may regulate property to prevent real threats of crime and disease to neighbors. Owners are entitled to property rights, but not to abuse those rights by creating invasions or likely invasions to neighbors' rights of personal health and safety. Under the same principles, the government may also regulate property to control sexual licentiousness, breaches of the peace, and open abuse of controlled substances, specifically to prevent public conduct that might disturb the public morals that encourage people to live with self-restraint.[182]

By contrast, government may not use the power to "regulate" to promote aesthetic ideals. However valuable and laudable aesthetic goals may be, they are not proper objects of natural-rights "regulation." Natural property rights rate land uses not by their intrinsic merits but by their tendency to make it easier or harder for owners to put their own land to their own preferred uses. On this spectrum, aesthetic ideals do not fare very well because the goals they set are high-maintenance. Owners who try to force their neighbors to conform to their own opinions about home design seem bossy for reasons similar to those why people who claim that their personal rights of bodily autonomy

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181. *See* Berman v. Parker, 348 U.S. 26, 32-33 (1954).

> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn.

Id.

182. *See* Claeys, *supra* note 34, at 1577-85.

entitle them to veto the clothes their neighbors choose to wear. In each case, the rights bearer enjoys a zone of free control and choice only on condition that she respect a corresponding zone of control and choice in her neighbors.[183]

As a result, if a city were to justify a blight restriction purely on aesthetic grounds, it would restrain the free use and control of property more than necessary for regulation. The restraint would count as a taking, not a police regulation. It could only pass constitutional muster if the use rights or land taken remained in public use under the principles set forth in Part III. If, as happened in *Berman*, condemned land went to a private developer, the taking would be for private use and, hence, unconstitutional. The regulatory-takings analysis protects the owners' freedom to enjoy her land from onerous restrictions; the public-use limitation does so by ensuring that they sacrifice their lands only in the rare situations in which the entire public (and they, too, as members of the public) will be able to enjoy the property taken.

Consider next the principle that, to regulate, the government must present some proof that there exists a real harm.[184] *Midkiff* illustrates. Natural-property-rights theory may well prevent monopolists from charging excessive prices or arbitrarily discriminating against would-be customers. If so, there are at least some situations in which governments may invoke antitrust regulatory principles to attack land monopolies. In *Midkiff*, however, Hawaii claimed to prove monopoly by showing that seventy-two land owners owned 47% of the land in the state.[185] But under standard antitrust analysis, seventy-two land owners are extremely unlikely to establish an oligopoly or monopoly.[186] Many applications of blight or slum-clearance codes also illustrate. Recently, *60 Minutes* documented that the town of Lakewood, Ohio was trying to condemn allegedly blighted property under a definition that defined a home to be blighted if it did not contain three bedrooms, two baths, an attached two-car garage, and central air conditioning.[187]

These two situations present cases in which the standard of review makes a great difference. *Berman* and *Midkiff* require courts to defer to state justifications under "rational basis" principles of review.[188] Under natural-rights principles, *Dolan v. City of Tigard*[189] better captures the mood of review.

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183. *See* Claeys, *supra* note 34, at 1615-18, 1630-31.

184. Again, in the narrow manner in which natural-rights property theory conceives of "harm."

185. *Midkiff*, 467 U.S. at 232.

186. *See* EPSTEIN, *supra* note 33, at 161-81.

187. *60 Minutes: Eminent Domain: Being Abused?* (CBS television broadcast, July 4, 2004) (transcript available at http://www.cbsnews.com/stories/2003/09/26/60minutes/main575343.shtml) [hereinafter 60 MINUTES].

188. *See Midkiff*, 467 U.S. at 241.

189. 512 U.S. 374 (1994).

Even if "[n]o precise mathematical calculation is required," a state or local government "must make some effort to quantify its findings . . . beyond . . . conclusory statement[s]."[190] If *Midkiff* had been decided on natural-rights grounds, a reviewing court should have asked how it would have decided the case if it were an ordinary antitrust prosecution and not a constitutional challenge. On the same grounds, a reviewing court would capture the spirit of judicial review better by treating the dispute as a nuisance case and not a constitutional challenge. In each case, the state would lack evidence showing that it was attacking a specific example of a generally-recognized harm, and it would therefore inflict a regulatory taking. Since the property taken in each case (the reversions of the Hawaii landlords, and the fees of the Lakewood residents) would go to private parties unencumbered by common-carrier regulations, the takings would be for private use and therefore unconstitutional.[191]

Finally, consider the connection between means and ends. Even when government can show that it is controlling a real problem, if it wants to go to the extreme step of condemning the land of the owner causing the problem, natural-rights theory requires it to show that lesser steps will not suffice. *Midkiff* illustrates one discrepancy between means and ends. While the U.S. Supreme Court focused on the fact that seventy-two owners owned 47% of the land in Hawaii, it did not stop to consider the implications of the fact that Hawaii and the federal government owned 49%.[192] If land scarcity provided a ground for "regulation," why not sell off public land rather than redistribute private land?

This connection between means and ends, however, matters even more in contemporary blight litigation. Again, natural-rights theory allows for "blight" regulation, as long as it focuses on fairly concrete threats to property and person, like crime, and as long as those threats are documented. Even then, however, the government may not condemn property to control blight without first showing why it would be futile to restrain owners' property rights in less restrictive ways. When blighted properties encourage crime and disease, they create nuisances. The ordinary remedy for a nuisance is to abate the nuisance, not to take away the noxious user's land. Under natural-rights theory, before a government could take the drastic step of condemning the land, a court would need to ask whether the government was condemning land regularly, and whether the government had considered and identified persuasive reasons for ruling out lesser alternatives like fines, compensatory damages, and injunctive relief. Now, perhaps a government could make such

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190. Dolan v. City of Tigard, 512 U.S. 374, 395-96 (1994).
191. *See* EPSTEIN, *supra* note 33, at 161-81.
192. *See Midkiff*, 467 U.S. at 232.

a showing, for instance as applied to an owner who had violated a locality's nuisance and blight laws on several occasions without cleaning up his property. But governments do not lay such records very often. For instance, in Lakewood, Ohio, the city's blight policy was applied extremely selectively. One city council member conceded that her home did not meet the city's definition of blight because it did not have two bathrooms or a two-car garage.[193]

Berman instructs courts not to examine the connection between means and ends: "Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete [it] rests in the discretion of the legislative branch."[194] Under the natural-rights approach, *Dolan* better captures the mood of judicial review: The government must "make some sort of individualized determination that the [condemnation] is related both in nature and extent" to the blight.[195] Under that standard, *Midkiff* would require a close examination about the costs and benefits of selling off public land for private ownership. And in blight cases, when the government cannot show that it is enforcing its policies relatively consistently, or that it condemns property only when fines and prosecutions have failed, blight condemnations restrict more property rights than necessary for sound regulation, therefore inflicting regulatory takings. If the condemned properties go to private developers or businesses without common-carrier restrictions, they violate public-use limitations.

D. Mill Acts, Assembly Problems, and Reciprocity of Advantage

Finally, *Hathcock* recognized a class of public-use cases for the "assembly" or "hold-out" problem. As the Michigan Supreme Court explained, "'the exercise of eminent domain for private corporations has been limited to those enterprises generating public benefits whose very *existence* depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving.'"[196] The Court offered as examples private "'highways, railroads, canals, and other instrumentalities of commerce." [197] The Court found private-to-private eminent-domain transfers

193. *See* 60 MINUTES, *supra* note 187.
194. *Berman*, 348 U.S. at 35-36.
195. *Dolan*, 512 U.S. at 391.
196. *Hathcock*, 684 N.W.2d at 781 (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting)).
197. *Id*. at 781 (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting)).

justifiable because, without the coercion of eminent domain, there would be a "logistical and practical nightmare."[198]

However, if one follows the natural-rights approach, *Hathcock* makes doctrinal and substantive mistakes. Doctrinally, *Hathcock* conflates public-use law with the other species of regulatory-takings law, the species for regulations that secure an average reciprocity of advantage. In the proper circumstances, reciprocity-of-advantage regulations can coerce a property owner to sacrifice some of his rights, without any showing that the owner's use of his property harmed his neighbor. But to justify a reciprocity-of-advantage regulation, the government must show that the regulation makes the ousted owner better off than he would have been in the comfortable and continued enjoyment of his property. In practice, either the regulation must guarantee the ousted owner compensation significantly above the fair market value of his rights, or it must give him an equitable interest in the mill, railway, or other project that the law is trying to assemble. By contrast, when this species of "regulation" is fused together with principles of eminent domain, the owner is only entitled to just compensation, the fair market value of his rights. Under natural-rights principles, that forced exchange invades the property rights of the owner. Because the natural-rights approach conceives of property as a manifestation of individual talents and energies, fair market value will almost always compensate ousted owners less than they deserve and discourage the productive and industrious tendencies that sound property laws should encourage.

Some nineteenth-century mill-act cases illustrate how natural-rights jurists saw the problems created in assembly cases. Most land-use lawyers today probably assume that mill-act cases ran contrary to the narrow, "used by the public" view of "public use" and supported the broad "public purpose" view from the beginning. In *Kelo v. City of New London*,[199] currently pending before the United States Supreme Court, the Connecticut Supreme Court cited *Olmstead v. Camp*[200] for principle that "'[p]ublic use' may . . . well mean public usefulness, utility or advantage, or what is productive of general benefit; so that any appropriating of private property by the state . . . for purposes of great advantage to the community, is a taking for public use."[201] My sense is that *Olmstead* probably represented the majority trend by the end of the nineteenth century, but a substantial minority of courts treated mill acts consistent with the principles set forth in this Article. For instance, in *Tyler*

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198. *Id*. at 782.

199. 843 A.2d 500 (Conn. 2004).

200. 33 Conn. 532 (1866).

201. Kelo v. City of New London, 843 A.2d 500, 522 (Conn. 2004), *cert. granted*, 125 S. Ct. 27 (2004) (emphasis omitted) (quoting Olmstead v. Camp, 33 Conn. 552, 546 (1866)).

v. Beacher,[202] the Vermont Supreme Court decided there was ample precedent to support its conclusion that a mill condemnation is not for public use when "there is no law to compel [the benefiting miller] or his heirs or assigns to grind for the public, or any part of the public, for any fixed toll or compensation, nor for any toll or compensation unless they choose to do it."[203] *Tyler* and similar cases can help us appreciate how natural-rights jurists approached the assembly and coordination problems caused by large construction projects.

Let us focus on two such decisions: The Michigan Supreme Court's 1877 decision in *Ryerson v. Brown*[204] and the U.S. Supreme Court's 1885 decision in *Head v. Amoskeag Manufacturing Co.*[205] *Ryerson* explains why the natural-rights approach keeps assembly cases *out* of public-use law; *Head* explains why and how to fit them in reciprocity-of-advantage regulatory-takings law. As the Vermont Supreme Court had in *Tyler*, in *Ryerson* the Michigan Supreme Court embraced the narrow "used by the public" understanding of "public use" to declare unconstitutional a mill-act statute. Chief Justice Cooley warned that, if a mill act allowed private riparians to build dams by ousting their neighbors, it was "essential that the statute should require the use to be public in fact; in other words, that it should contain provisions entitling the public to accommodations."[206] If the mill remained in pure private ownership, the owner could not satisfy Michigan's public use clause merely because the mill would "in some manner advance the public interest," as "every lawful business does this."[207]

Cooley justified this narrow reading of "public use" on several different policy grounds. First, Cooley insisted on drawing a distinction between condemnations of necessity and condemnations to promote economic convenience. Cooley was willing to recognize that railroad assemblies presented questions of "extreme necessity" because the "railway cannot run around unreasonable land-owners."[208] But he thought that mill dams presented

202. 44 Vt. 648 (1871).

203. Tyler v. Beacher, 44 Vt. 648, 650 (1871). *Tyler* cited: Crenshaw v. Slate River Co., 27 Va. (6 Rand.) 245 (1828); Burgess v. Clark, 35 N.C. (13 Ired.) 109 (1851); McAffee v. Kennedy, 11 Ky. (1 Litt.) 92 (1822); Shackleford's Heirs v. Coffey, 27 Ky. (4 J.J. Marsh.) 40 (1830); Harding v. Goodlett, 11 Tenn. (3 Yer.) 40 (1832); and Sadler v. Langham, 34 Ala. 311 (1859). One could also add to this list Scudder v. Trenton Del. Falls Co., 1 N.J. Eq. 694 (N.J. Ch. 1832) and Loughbridge v. Harris, 42 Ga. 500 (1871).

204. 35 Mich. 333 (1877).

205. 113 U.S. 9 (1885).

206. Ryerson v. Brown, 35 Mich. 333, 338 (1877).

207. *Ryerson*, 35 Mich. at 339.

208. *Id*. at 340.

questions "of comparative cost, expense of operation and probable returns."[209] "It will scarcely be claimed that any single branch of industry is dependent," he reiterated, "for either its establishment or support, upon the appropriation of property against the will of the owner in order to obtain water power."[210]

Separately, Cooley also warned against the possibility of seeing assembly cases as unilateral "hold out" problems. The term "hold out" suggests that the owners being asked to sell are the only ones being unreasonable. (Cooley would thus sympathize with Thomas Merrill's analyses of the situations in which developers, business, and other land-buyers might be expected to overuse the power of eminent domain.[211]) "In considering whether any public policy is to be subserved by such statutes," Cooley insisted, "it is important to consider the subject from the standpoint of each of the parties. What may be convenience and economy for the mill owner may be inconvenience and loss to his neighbor."[212] As for the neighbor:

> [i]t is reasonable to infer that he would part with [his property] for a fair price if he were not to be subjected to annoyance or inconvenience in consequence. It is true he may unreasonably refuse to part with his land; and possibly motives of hostility and malice may induce him to put obstacles in the way of a proper enterprise. But, on the other hand, the opportunities for unreasonable or malicious action are not exclusively on one side. A mill-dam is not always an agreeable or wholesome neighbor; it sometimes brings blight to a neighborhood and discomfort and sickness to the people. The fear of such consequences might be the controlling motive in refusing consent to the flowing of lands . . . .[213]

That concern pointed to a separate issue, property's role as a protector of individual interests. Again, the natural right to property presumes that different people put their property to different uses for different interests, but also that all owners exhibit a similar selfishness toward their own. This selfishness explains why Cooley suggested that, "[p]resumptively it always subjects a land-owner to inconvenience when his land is taken against his will,"[214] and why, even though Cooley conceded both "that the owner of a mill-site may be unreasonable and exclusively selfish in insisting upon an appropriation" and "that the owner of the lands desired [may] be unreasonable and exclusively selfish in refusing to sell," he doubted that "whether the one or the other is likely to be most unreasonable is not a consideration that can be conclusive."[215] These concerns explain why Cooley preferred to err on the

209. *Id*.
210. *Id*. at 341.
211. *See supra* notes 28-30 and accompanying text. [Intro, discussion of Merrill].
212. *Ryerson*, 35 Mich. at 340.
213. *Id.* at 340-41.
214. *Id*. at 340.
215. *Id*. at 341.

side of protecting freedom:

> it is always an invasion of liberty and of right when one is compelled to part with his possessions on grounds which are only colorable. A person may be very unreasonable in insisting on retaining his lands; but half the value of free institutions consists in the fact that they protect every man in doing what he shall choose, without the liability to be called to account for his reasons or motives, so long as he is doing only that which he has a right to do.[216]

Taking these concerns together, Cooley preferred a bright-line bar against using eminent domain. Even if the law and government officials could use the power of eminent domain to improve the public welfare in a few cases, Cooley took a view of the problem that stressed politics in the long term over expertise in the short term:

> Undoubtedly there may arise circumstances under which it would be convenient if a power to condemn lands for mill purposes might be exercised, but they are so rare that a stretch of governmental power in order to provide for them would be more harmful than beneficial. It would under any circumstances be pushing the authority of government to extreme limits; and unless the reasons for it were imperative, would be likely to lead to abuses rather than tend to the promotion of the general interest, and to breed discords where, in the absence of such legislation, moderate counsels and final agreement might have prevailed.[217]

Yet while Justice Cooley explained why natural-rights theory requires a narrow understanding of "public use," he did not consider a separate possibility, that the government might solve the mill-dam problem with reciprocity-of-advantage "regulation." The United States Supreme Court endorsed this possibility in the 1885 mill act decision *Head v. Amoskeag Mfg. Co.*[218] The challenged mill act first required dam-builders to prove to an independent commission that the mill would benefit the public and that condemnation was necessary. If a dam builder could make these showings, he could build and maintain the dam, on condition that he paid any riparians injured by the dam 150% of their actual damages.[219]

The U.S. Supreme Court approved this scheme as what we would now understand as a reciprocity-of-advantage regulation. The Court pointedly declined to consider whether the law under challenge could be justified as a taking for public use, warning that the issue was problematic and far-reaching enough that it would "not become this [C]ourt to express an opinion upon it, when not required for the determination of the rights of the parties before

216. *Id.* at 342.
217. *Id.* at 341-42.
218. 113 U.S. 9 (1885).
219. Head v. Amoskeag Mfg. Co., 113 U.S. 9, 10-11 & n.1 (1885).

it."[220] Instead, the Court upheld the law on the ground that it could be:

> considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all, and to the public good . . . . When property, in which several persons have a common interest, cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is thereby modified.[221]

Two factors contributed to make the New Hampshire mill act a reciprocity-of-advantage regulation. First, the state needed to coerce otherwise-unjustifiable transfers of land because it was dealing with land held in common. Riparian owners' relations are stickier and more interdependent than are those of the owners of dry land. This fact has long been appreciated in history and property policy. While Blackstone described property generally as a "sole and despotic dominion," he recognized that "some few things . . . must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had," specifically, "the elements of light, air, and water."[222] Riparian rights create a community of interest among fellow riparians that makes them resemble tenants in common more than the owners of fast and dry land.

Second, given that necessity, the mill act secured to fellow riparians a reciprocity of advantage. The New Hampshire law paid ousted riparians what the Court described as "equitable compensation."[223] If the law was going to "regulate" the transition from correlative rights to individual property by analogy to partitions of jointly-owned property, it needed to follow the principles that govern partitions, both bitter and sweet. On one hand, as the Court recognized, "equitable compensation" included the power to partition with owelty. If it is not practicable to subdivide estate physically, the law may "set it off to one and order him to compensate the others in money," in an owelty payment.[224] That principle entitled New Hampshire to use regulation to force riparians to give up the injunctive rights they might otherwise have had to shut down an annoying mill, or to exchange their riparian rights for money.

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220. *Head*, 113 U.S. at 21.

221. *Id*.

222. 2 BLACKSTONE, *supra* note 68, at 2, 14; *see also* 2 *id.* at 18. In *Head*, the Court cited Lord Coke, Chancellor Kent, and Massachusetts and New Hampshire co-tenancy and mill laws to confirm the same point. *Head*, 113 U.S. at 21-22.

223. *Head*, 113 U.S. at 21.

224. *Id*.

On the other hand, "equitable compensation" sets a higher standard for compensation than the "just compensation" to which owners are entitled in an eminent-domain proceeding. The latter guarantees ousted owners only the fair market value of their property; the former guarantees those owners a prorated share of the interest they held in the co-tenancy. The New Hampshire law passed muster because ousted owners were paid a reasonable approximation of that proration, 150% of their damages.[225] To be sure, this 150% figure is not the same as a payment proportionate to the mill builder's expected profits; but it strikes a reasonable compromise. Ousted riparians deserve compensation significantly above fair market value. Such compensation reflects the fact that they probably value and have more invested in their property than its fair market value. It also accords with the partnership principles inherent in the idea of a social compact, to which the *Head* Court referred when it spoke of a "due regard to the interests of all."[226] At the same time, it is hard and expensive for the law to determine those riparians' true individual values; ousted riparians could always overstate their attachments. Furthermore, the mill builder is entitled to most of the upside associated with his mill, for he undertakes most of the risk and investment associated with it.

At least two commentators have provided different glosses on the mill-acts and on the use of supercompensatory payments in eminent-domain cases. Richard Epstein endorses an approach that is similar in substance, but he proposes to shoehorn this approach into "public use" doctrine by conceiving of the mill builder and the riparians bothered by the mill as a miniature "public." A law may redistribute the riparians' rights, Epstein argues, only if it does so in a manner that is roughly as "useful" to them as it is to the mill builder.[227] Nevertheless, the principles of joint advantage to which Epstein appeals fit at least as comfortably within a natural-rights understanding of "regulation," particularly reciprocity-of-advantage regulation, as they do within Epstein's understanding of public use. On the other hand, *Head*'s understanding has one important advantage over Epstein's: It uses differences between eminent-domain doctrines to preserve differences in the policies that apply in public and private assembly cases. If one alternates between different renditions of "public use," as Epstein does, it creates strong political pressures to make the term even more plastic. Those pressures could push the law down the slippery slope toward *Berman*, for reasons similar to those that did in fact cause the slide toward *Berman* in the late nineteenth and early twentieth centuries. By contrast, *Head*'s understanding keeps doctrine more focused, for

225. Richard Epstein has also endorsed this insight of *Head*. *See* EPSTEIN, *supra* note 33, at 170-75.

226. *Head*, 113 U.S. at 21.

227. *See* EPSTEIN, *supra* note 33, at 170-75.

it treats public- and private-assembly cases as fundamentally different.

Separately, Thomas Merrill disagrees with *Head*'s and Epstein's approach for substantive reasons. Merrill calls the 150%-damage approach approved in *Head* "a judicially imposed bonus" which does not "fit comfortably within a legal structure premised on constitutional rights."[228] He also worries that the 150% damage payment "might not exactly measure the disutility from the exercise of eminent domain (lost subjective value and so on). In some cases it would undoubtedly provide the condemnee with a windfall."[229] Having made these criticisms, Merrill instead proposes a regime in which courts apply sliding-scale scrutiny to condemnations for private use depending on several factors. He recommends that courts regularly compare the costs and benefits to be realized by assembly condemnations. If the condemnation helps assemble a project that will create a huge economic surplus, he argues, that fact argues in favor of finding the taking as being for public use.[230] But if there are signs that the party seeking condemnation engaged in rent-seeking or appealed to the eminent-domain process before making a good-faith attempt to buy the land at issue on the real-estate market, those factors make the takings seem more like a taking for private use.[231]

While the following comments do not render any final judgment on the merits of Merrill's proposal, it is safe to say that the natural-rights approach withstands his criticisms. Let us consider first Merrill's claim that a mark-up does not "fit comfortably within a legal structure premised on constitutional rights."[232] Merrill insists that "judicial enforcement of the public use requirement proceeds on an either/or basis: either a taking violates a condemnee's constitutional rights or it does not," and also that "[t]he normative structure of constitutional adjudication seems to prohibit courts from declaring that the takings clause requires compensation equal to 100% of fair market value in some circumstances, and 150% of fair market value in others."[233]

In fact, the 150% mark-up does fit within the structure of takings law, as long as one understands the particular character of natural property rights. The difference in payments between these regulations and ordinary takings is not mere formalism; it reflects a deep difference in the objects of natural-law "regulations" and "takings." In takings for a public use, the law can tolerate it if the owner gets only fair market value. Those takings are fairly rare, and

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228. Merrill, *supra* note 1, at 92.
229. *Id.* at 91-92.
230. *Id.* at 85-89.
231. *Id.* at 92.
232. *Id.*
233. *Id.*

the ousted owner gains access to new public properties or services, both in his particular case and with other takings in the locale. But if government means to rearrange private property to solve a private assembly problem, it needs to remember that private builders may demand such condemnations much more frequently than the government does. Ousted owners no longer get in-kind compensation from enhanced access to public roads, railways, government buildings, and other public works. Mere 100% compensation creates strong incentives for private parties to seize each others' goods and short-change all the peculiar and individual factors that cause owners to value property differently. Hence, reciprocity-of-advantage cases set a much higher substantive standard, requiring the private winner to share his winnings with the private losers.

Merrill makes a useful point in his second criticism, that the 150% figure is somewhat arbitrary and may overcompensate some ousted owners in some cases.[234] All the same, this criticism is not fatal. One could vary the mark-up in different circumstances without running afoul of the natural-rights approach. In principle, for instance, it is at least possible that a legislature could survey situations in which private developers send out buying agents to acquire large tracts of land in secret, to preclude individual sellers from holding out. That survey could generate a different average measure of just compensation, or even a formula that pays compensation pegged to different relevant characteristics of different buyers. But assuming no such information exists, the important point is that the 150% figure is better than nothing. (Or, to be more precise, it is better than the obvious alternative, namely 100% of fair market value.)

If *Head*'s understanding of "regulation" is sound, it could be applied to contemporary land condemnation cases. First, the law would need to ask whether the developer or business petitioning for a condemnation could show that the condemnation was necessary. Granted, there would be some play in the joints about whether a given taking is "necessary" or merely "convenient." Petitioners could certainly make such a showing when the rights involved are correlative—like the water rights at issue in *Head* and other mill cases, or the air-pollution rights at issue in such complex nuisance cases as *Boomer v. Atlantic Cement Co.*[235] Land-assemblage cases would require more sensitive judgment. Private railroad and toll road builders could have an easier time making this showing, although they still would need to show why they could not build around hold-outs, and why they could not use buying-in-secret and other market mechanisms to acquire the land they need. By contrast,

234. Merrill, *supra* note 1, at 92.
235. 257 N.E.2d 870 (N.Y. 1970).

commercial developers would have a much harder time making this showing, for geography does not limit their choices where to build to the same degree that it limits the builders of rail and toll roads and other similar networks. The law could establish a *per se* restriction barring governments from taking land in assembly cases not tied to networks without doing much harm.

In cases in which the petitioner could make the requisite showing of necessity, the law would require the petitioner to make compensation to the ousted owners at some mark-up that conscientiously respects the principle that the owners need to be left better off after the condemnation than they were before it. The law could require petitioners to pay fair market value plus a fixed premium, like the 50% of market value mark-up in *Head*. Since the law at issue in *Head* partitioned correlative rights, however, it might be preferable to make the mark-up even higher, say to twice fair market value, in cases involving dry and exclusively-owned land. All the same, the law would not need to be tied to a 50% mark-up, a 100% mark-up, or any other specific figure. If a government could show, on the basis of reliable surveys or other studies, that a lower figure better reflected the prices at which virtually all local buyers would sell their lots voluntarily, that figure would suffice.

CONCLUSION

The dominant view in contemporary public-use law holds that it is difficult or impossible to draw principled distinctions between constitutional takings for a "public use" and unconstitutional takings for a "private use." The political theory that used to exert strong influence in eminent-domain law shows otherwise: Natural-rights and social-compact principles lay down principled understandings of the situations in which government may properly condemn one private owner's property and assign it to another private party. Under those principles, government may transfer property, under the power of eminent domain, to a private owner only if that owner operates the property subject to traditional common-carrier regulation, specifically the common carrier's duty of public access. At the same time, in special circumstances, natural-rights theory makes many of the cases now called "public use" cases into "regulatory takings" cases as well.

There are several reasons to appreciate and even recover this natural-rights approach. It is surely relevant to the original meanings of state and federal public-use limitations. It shows how one can establish a rather elaborate regime of property regulation based on personhood and freedom, not utility, efficiency, or social welfare. The natural-rights approach provides a way to critique many leading theoretical justifications for public-use law that sound in utility, for it warns that such alternatives do not sufficiently appreciate the social consequences that may follow when private takings

discourage people from fully enjoying and using their property. Most important, the natural-rights approach helps identifies the substantive commitments that drive contemporary public-use law–and shows what it would take to undo them.