REGULATORY TAKINGS: COHERENT CONCEPT OR LOGICAL CONTRADICTION?

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[O]nly those economic advantages are "rights" which have the law back of them . . . whether it is a property right is really the question to be answered.[1]

I. THE CONCEPTUAL CHALLENGE

This article starts from the premise that there is considerable benefit in a return to first principles in our consideration of the legal issues pertinent to a serious treatment of so-called "takings." This article proposes to do precisely that by raising fundamental questions that go to the philosophy and economics of the concept of takings. These issues are logically prior to a consideration of the legal issues germane to takings for the simple reason that the law as written—and as practiced—is a manifestation of prior actions, prior conflicts, prior expressions of individual and public purposes, and prior efforts to define and shape the future by drawing on the past. Present conflicts are the engine in this intertemporal redefinition of who we are and who we shall become. The law reflects the influence and interests of yesterday and, through its application, seeks to bind the future. The law is a compilation of the reflected interests from the past. Indeed, we might think of the law as a mirror on the past giving images of the future.

II. INTERESTS, CLAIMS, AND RIGHTS

We must start with the idea that individual citizens of a nation-state have certain interests they seek to advance. A nation-state is a unit of analysis that, by definition, seeks to accommodate those divergent expressions of individual interest. Of course, history teaches that nations often have little overall success, or may have selective success in this accommodation. Nonetheless, at the conceptual level, a nation-state acquires its

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1. United States v. Willow River Power Co., 324 U.S. 499, 502-03 (1945).

meaning—its *raison d'être*—from this idea. A nation-state is, in some important respects, a constellation of relational contracts that bind individuals together in some continuing process of thrust, parry, and compromise. A nation-state is the empirical manifestation of the collective desire to avoid the anarchy of the pre-civil state of nature popularized—and caricatured—by Thomas Hobbes.

Individual claims made within a Kantian *burgerliche Gesellschaft*[2] demand a response, and governments therefore become the agent of the political community we call the state. Let us keep in mind three distinct ideas: (1) states are political, economic, and social units; (2) governments are created to act as the agent of the members of the state; and (3) the government of the day—the momentary occupant of the enduring structure we call government—engages in governance. This governance is the mechanism whereby individual interests will be expressed as claims. The law at any moment, as part of the structure of governance, reveals whose interests will be given serious attention by the state.

Starting here allows us to consider the takings issue from a somewhat different perspective. Much of the traditional discussion of takings law starts with a dyadic view of the world. We are told that there is a property owner with rights—"property rights"—and there is this great force called government that if not necessarily evil, is at least too inclined to activism for the tastes of property owners.

From this dyadic perspective, it is easy to see how some commentators can miss the essential issues in property rights analysis, and so render flawed analyses of the takings problem. The fatal flaw in the extreme form of this dyadic view is that the existence and empirical content of property rights is simply assumed—or rather asserted—and the only job remaining is to determine the correct level of compensation whenever some governmental action interferes with the presumed property rights. As Professor Sax notes, this view is central to the prevailing "diminution-of-value approach" that presumes: (1) all legally

2. *See generally* IMMANUEL KANT, THE METAPHYSICS OF MORALS (Mary Gregor trans., Cambridge Univ. Press 1991) (1797).

existing economic values constitute property; and (2) although these values may be diminished somewhat, they cannot be diminished "too much" or a taking is said to have occurred.[3] It is not difficult to conclude that in its extreme form, this view sees no role for the courts at all. One simply appoints a tribunal of qualified real estate appraisers to determine the amount of the check to be sent to the aggrieved property owners, whenever government acts surpass this magical threshold and thereby diminish some apparently sacrosanct quantity called "property values."

However, if we start with the idea of the state as an arena of discourse for disparate interests, we are quickly reminded that certain interests are clearly going to conflict. Some of these conflicting interests concern abortion, smoking in public places, and smokestacks disgorging toxic compounds of dubious social benefit. Not surprisingly, some of these conflicting interests are found to entail one particular asset of great emotional content in the American experience. That asset is land.

Why land has taken on such emotive significance in America could—indeed does—fill hundreds of works by philosophers and social historians. Whatever the broad contours of this extensive literature, the constant analytical construct posits the individual landowner standing tall against some menacing force, variously described as either Leviathan or faceless bureaucrat.

This dyadic concept of American land use and land law does serious violence to the reality of both historical and contemporary land use. From the English Town and Country Planning Acts to the latest dispute over a planned fast food restaurant with a garish roof, one is defrauded if the debate is cast as some noble yet besieged landowner against a pestiferous government. A more coherent approach would reveal, instead, that a triadic schema is more suitable. This triadic approach liberates us to comprehend that the vast bulk of land use issues are properly characterized as conflicting interests among distinct members of the polity, who seek to use government to enforce their interests against the contrary interests of others. Each interest will make claims on

3. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 43-46 (1964).

government in the hope of having its position given that most wondrous and robust of all immunizations—a "right."[4]

Whatever we as individuals may think about governance and governments, there is only one force—other than physical violence—that can mediate conflicting interests and claims, and thereby bestow something defined as a right. Rights are not concepts by intuition—immediately apprehendible facts—but are rather concepts by postulation—they have no meaning apart from prior concepts about power, authority, and capacity.[5] It is not an issue of government interference in the dispute of the moment. We have, rather, an issue of whose interests the authority system shall protect.[6] Having agreed to come this far, the dyadist then might be expected to assert that what exists today warrants ultimate protection against all claims. Why today's institutional setup is somehow more compelling than yesterday's, or tomorrow's, is not addressed. The existentialist logic says that today's institutional structure is the norm against which government is duty bound to protect "property rights."

Perhaps the owner of Blackacre desires to drain it to build a large apartment complex, and thereby become rich, or at least richer.[7] Or, perhaps the owner of Blackacre seeks to construct a shopping mall, to the unalloyed horror of suburban neighbors. Or, perhaps the owner of Blackacre remains committed to his cedar trees even though they harbor pests of unhappy consequence for apple growers.[8] Or, perhaps the owner of Blackacre seeks to increase both wealth and cash flow by placing a very tall office structure atop an old midtown railroad station of some quaint sentimental value.[9] Or, perhaps the owner of Blackacre seeks to

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4. *See generally* DANIEL W. BROMLEY, ENVIRONMENT AND ECONOMY: PROPERTY RIGHTS AND PUBLIC POLICY (1991) [hereinafter ENVIRONMENT AND ECONOMY].

5. *See generally* F.S.C. NORTHROP, THE LOGIC OF THE SCIENCES AND THE HUMANITIES (1965).

6. Notice that for government (the authority system) to do nothing, or remain silent, in a particular dispute is, in fact, to side with the interest well served by the status quo ante. If this existing institutional setup is changed, some commentators would like to characterize this as an instance of "government intervention." To believe this is to misunderstand the implicit sanction of government should it decide not to act.

7. *See* Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972).

8. *See* Miller v. Schoene, 276 U.S. 272 (1928).

9. *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

extract virtually all of Blackacre to supply coal-burning electric generators.[10] Burning the entirety of Blackacre is thought optimal and justified even if those whose houses rest on Blackacre remain to be convinced.

How these examples become illustrations of some besieged owner of property versus a belligerent Leviathan owes more to political ideology than to clear thought.[11] Note that in each instance we see at work the interests of one party, the owner of Blackacre, aligned against the interests of other members of the polity. To say that the interest of Blackacre should and must prevail in each instance—where prevailing interests may include something called "just compensation"—is to reduce a complex social issue to the curious conclusion that landowners deserve legal protection and tax-based monetary relief against all other interests. There is no need in such a world for courts or legislatures. A panel of appraisers can do the job of declaring the magnitude of checks to be cut by various units of government.

There is certainly nothing in the language of the Constitution to warrant this hyper-Lockean outcome. Some observers, however, applaud that such compensation would have the allegedly beneficial effect of reigning in an overly activist government. If government had to pay for its "excesses," we are told,

10. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); *see also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

11. *See generally* Joseph L. Sax, *Takings*, 53 U. CHI. L. REV. 279 (1986) (reviewing RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985)).

there would be fewer of them.[12] Let us be reminded about the essence of property rights. Recall that:

> [A] right is simply a power which is secured by legal sanctions, "a capacity," . . . "residing in one man, of controlling, with the assistance of the State, the action of others," and a right should not be absolute for the same reason that a power should not be absolute. No doubt it is better that individuals should have absolute rights than that the State or the Government should have them; and it was the reaction against the abuses of absolute power by the State which led in the eighteenth century to the declaration of the absolute rights of individuals. The most obvious defense against the assertion of one extreme was the assertion of the other. Because Governments and the relics of feudalism had encroached upon the property of individuals it was affirmed that the right of property was absolute; because they had strangled enterprise, it was affirmed that every man had a natural right to conduct his business as he pleased. But, in reality, both the one assertion and the other are false, and, if applied to practice, must lead to disaster. The State has no absolute rights; they are limited by its commission. The individual has no absolute rights; they are relative to the function which he performs in the community of which he is a member, because, unless they are so limited, the consequences must be something in the nature of private war. All rights, in short, are conditional and derivative, because all power should be conditional and derivative.

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12. One commentator has even deigned that it is "perhaps too much to ask a court to understand the intellectual foundations of the [E]minent [D]omain [C]lause." Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 23. Epstein, however, has no doubt at all about the "correct" (his) understanding: "Only the need to compensate when property is taken can discipline the legislature." *Id.* Or, more to the point:

> The Takings Clause is best understood, not as some useless constitutional relic, but as part of a comprehensive effort to discipline the excesses of government by demanding that it pay when it takes private property for general public purposes. In so doing, the Clause forces the government officials to put their money where their mouth is when they assert that certain social gains are worth the private costs that they impose. If one believed that government officials were always virtuous, and private landowners always corrupt, then this added form of external discipline would be quite unnecessary. But our entire constitutional system . . . takes the opposite view of government behavior. People do not shed their self-interest when they assume positions of public trust and power.

Id. at 44-45 (footnote omitted). It would be difficult indeed to find a more explicit illustration of the flawed dyadic view of land use law than this allegory about virtuous but menaced private landowners facing self-interested and all-powerful bureaucrats who fail to put their money—or, more correctly, taxpayers' money—where their mouths are.

> They are derived from the end or purpose of the society in which they exist. They are conditional on being used to contribute to the attainment of that end, not to thwart it.[13]

This article suggests that the fundamental fallacy of American land use policy is the idea that those who own private property—and others who speak in their behalf—somehow imagine that, by virtue of this ownership, they own timeless and immutable rights. As Tawney makes abundantly clear, to have a right is to have the ability to require some authority system to act in your behalf—that is, to act so as to protect your particular interest against the interests of others. This is, above all else, a manifestation of power on the part of the right holder. A right is the capacity to call upon the collective power to stand behind one's claim to a benefit stream.

Notice that rights have effect only when there is some authority system that agrees to defend a right holder's interest in a particular outcome. If I have a right in some particular situation then it means that I can turn to some authority system to demand that my interest be protected. A right holder has the capacity to *command* the state to act in a certain way. The effective protection I gain from this authority is nothing other than a correlated duty or obligation for all others interested in my claim. A right is a triadic relationship that encompasses the object of my interest, whether a physical object or a stream of benefits arising from fortuitous circumstances, plus all others who have a duty to respect my right. Rights are not relationships between me and an object (the dyadic view), but are relationships between me and others with respect to that object (the triadic view). Rights can exist only when a social mechanism that gives duties and then binds individuals to those duties exists.[14] In the starkest possible terms, what I own is a function of what the other members of the polity say I own—*not what I say I own*. This brings us close to the Kantian idea of *intelligible possession* as distinct from *empirical possession*.[15] Intelligible possession requires the application of pure reason, and empirical possession

13. R.H. TAWNEY, THE ACQUISITIVE SOCIETY 50-51 (1948).

14. *See generally* ENVIRONMENT AND ECONOMY, *supra* note 4.

15. KANT, *supra* note 2, at 68-74.

entails only momentary physical control.[16] In this regard, Mulholland notes:

> A person has intelligible possession of something when, and only when, everyóne else, or in the case of a promise, some specified individual, has an obligation not to affect it without his consent. Intelligible possession of an external object is the right to control the object through controlling other persons' wills by obligating them with regard to the object.[17]

We see here clearly the triadic view of property rights—the object and its owner against the will of all others. This triadic relationship is supported by an authority system that gives, and takes away, rights by its willingness, or unwillingness, to agree to protect one's claims in something. In economic terms, property is the stream of benefits, and rights to property offer security over that benefit stream. When I purchase a piece of land its price is a reflection of the present discounted value of its future benefit stream. The nature and magnitude of that benefit stream depend upon how I choose to use the asset, and the bundle of rights that the collective says I have over that asset. By purchasing the land I am really purchasing the benefit stream. Although land is often called "property," the real property is the benefit stream that I now own, and that I know will be protected with the authority of some governance structure. If not protected, then my willingness to pay for it would be reduced to reflect its less secure status.

The interesting question concerns why these legal relations exist in a society. Some would have us believe that individuals are born with these rights. The influence of John Locke is prevalent in American political and legal history. Locke believed in the idea of natural rights, and was thus able to argue that individuals acquire land, or more correctly they acquire property rights in or to land, by mixing their labor with the land.[18] The natural rights notion of property in land served a useful purpose in the transition of land into a marketable commodity, over which

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16. *Id.*

17. LESLIE A. MULHOLLAND, KANT'S SYSTEM OF RIGHTS 241 (1990).

18. *See generally* LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS (1977).

the owner had rather complete control as against the monarchy and the church.

Of greater importance in the American experience, the Lockean appropriation doctrine was congenial to a new nation keen to have yeomen farmers tame the frontier. The appropriation doctrine—really Locke's "labor theory" of property—permitted European immigrants to mix a little labor with the land, and then claim, in all seriousness, that this justified stealing North America from the Native Americans who were here first. Private property may not necessarily constitute theft, as Proudhon insisted, but a good deal of theft has certainly ended up as private property.

Lockean ideology and doctrine is still strong, and often pervades the discussion of property rights and land use policy. Committed Lockeans imagine that they have some inalienable right to use their land as they wish. Against this fiction, consider a landowner who chooses to cultivate marijuana, or a landowner intent on opening a house of prostitution, or of child pornography. Immediately we see that the presumed imperatives of private property are tempered by the ends to which a particular piece of land is to be put. Why is it politically and socially acceptable to prevent the cultivation of marijuana, or prostitution and child pornography, on a parcel of American real estate, while a law to enhance the habitat for endangered flora or fauna, or a ruling to influence the nature and scope of development consistent with locally articulated norms, is seen as a fundamental invasion of someone's alleged "rights"?

The presumed sanctity of private property acquires its most extreme form when owners of land demand compensation for all manner of foiled plans and dreams. Down through the years, takings law has attempted to address this problem by suggesting that there is a difference between collective action that prevents some harm—called the exercise of the police power, and thus not compensable—and collective action that creates some public benefit, and hence compensable. Unfortunately, those who labor hard to determine the precise boundary between what is a compensable taking and what is the mere exercise of the police

power find it very difficult to locate that line.[19] The very idea of a clear boundary to be found if only we could be more clever derives from the mistaken belief that property rights are absolute, and therefore a surgeon's knife is required lest serious economic and moral damage ensue should one miss the precise juncture.

There is, and can be, no mystery to the idea that the community at large has a legitimate rôle in determining the uses to which land may be put. Were this not so we would still have, under the guise of land-based "property rights," slavery, child labor, prostitution at the corner bar, marijuana harvests in the corn belt, and so on. Much regulation that seems to create a benefit can be regarded equally as preventing a harm. Indeed, an economist would be inclined to point out that to fail to create a public benefit is to visit harm in the form of foregone benefits. To put it another way, to prevent a public harm is to create a public benefit.

Imagine that a landowner of some marshlands bordering a lake was prevented from filling that land to construct an apartment building, such prevention being justified by the local authorities so as to prevent irreparable damage to the lake and downstream rivers. The landowner, we may suppose, was seeking an enhanced income stream through modification of the land. However, the local authorities argued that the landowner possessed no right to alter the landscape from its natural state to reap higher income. The owners bought marshlands, and after the denial of the permit to fill the wetland they still owned marshlands. Government, acting as an agent for others, had not deprived them of any income stream that they had ever had. The restriction merely prevented them from enhancing their income through a modification of the natural environment. We can imagine a court supporting the governmental agency on the grounds that the owners did not really lose something they previously had. It is, perhaps, unfortunate that the landowner's hoped-for income enhancement could not be realized, but that

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19. *See* DANIEL W. BROMLEY, ECONOMIC INTERESTS AND INSTITUTIONS: THE CONCEPTUAL FOUNDATIONS OF PUBLIC POLICY (1989) [hereinafter ECONOMIC INTERESTS AND INSTITUTIONS]; Sax, *supra* note 3; Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983); Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1433-64 (1991).

must be laid at the feet of the owners in their entrepreneurial zeal, not to the pervasive interference of government.

This discussion concerns, in essence, the famous land use case of *Just v. Marinette County*, in which filling of a wetland was prohibited without compensation.[20] Predictably, Professor Epstein is disconcerted by this infringement on the alleged "rights" of the Justs.[21] As in all land use disputes, however, the pertinent issue is missed if one focuses on restrictions on the landowners. The issue is simply that one party was bound to lose in this instance of incompatible uses of the wetlands. If the Justs were free to proceed to fill the wetland, then those with an interest in wetlands and lake quality would have had to suffer harm. Because the Justs are enjoined from filling the land, they must bear unwanted costs. If the court had found in favor of compensating the landowners for this restriction, then impliedly they had a right to impose costs on others, and could only be enjoined if their loss was bought out. But if the landowners had been free to proceed in filling the wetland, who would have bought out the loss of the others? A large number of others would bear unwanted costs from the filling of the wetlands. It is not sufficient to protest that the Justs owned the land on which they wished to build. To do so is to beg the ultimate question of the social sanctions of ownership. Moreover, the actions on their land held non-trivial implications for others downstream—some of whom were also owners of land. We see, once again, that the relevant perspective is the social context of land ownership in the face of conflicting interests over the external effects of alternative land uses. What must be considered next is the economic dimension of this discussion about interests, claims, and rights, in the context of institutional change that is often characterized as "regulation."

III. THE ECONOMIC ANALYSIS OF INSTITUTIONAL CHANGE

The idea of "regulatory takings" rests upon a particular concept of the normative significance attaching to the status quo ante structure of institutional arrangements, and also to the

20. Just v. Marinette County, 201 N.W.2d 761, 769 (Wis. 1972).

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

economic opportunities emanating therefrom. Indeed, at its worst, the notion of regulatory takings requires an arbitrary freezing of social relations at a particular moment in the constant evolution of institutions. To accept, on prima facie grounds, the logic and coherence of "regulatory takings" presumes that what exists at this moment is both efficient and, more importantly, worthy of social commendation and protection, even through compensation if necessary. However, welfare economics reminds us that what is economically efficient bears only scant relation to what is socially optimal.[22] That is, for any particular structure of legal entitlements and wealth, there are infinitely many efficient allocations of resources. Of this infinity of efficient allocations, only a few correspond to an allocation that can be called socially preferred or socially optimal. Without definitive information on the weights in the relevant social welfare function, economists cannot pronounce social preference. In other words, economists are without analytical guidance about what is best to do when the "rules of the game" change while the game continues.[23]

Because the law is concerned precisely with defining property rights (and so endowments), the very foundation upon which economists might be inclined to discuss efficiency is elusive. If we understand new regulations to be concerned with the creation of new institutional arrangements—laws—that modify choice domains for atomistic agents in response to the existence of unwanted social costs in the absence of those regulations, then regulations modify production possibilities frontiers and utility possibilities frontiers in a way that makes all such changes Pareto non-comparable.[24]

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22. *See generally* ECONOMIC INTERESTS AND INSTITUTIONS, *supra* note 19; Daniel W. Bromley, *The Ideology of Efficiency: Searching for a Theory of Policy Analysis*, 19 J. ENVTL. ECON. & MGMT. 86 (1990); Mahlon G. Lang, *Economic Efficiency and Policy Comparisons*, 62 AM. J. AGRIC. ECON. 772, 772-77 (1980).

23. *See generally* Bromley, *supra* note 22. *See also* ROBIN BOADWAY & NEIL BRUCE, WELFARE ECONOMICS (1984); ECONOMIC INTERESTS AND INSTITUTIONS, *supra* note 19; ENVIRONMENT AND ECONOMY, *supra* note 4; Lang, *supra* note 22; E.J. Mishan, *How Valid Are Economic Evaluations of Allocative Changes?*, 14 J. ECON. ISSUES 143 (1980).

24. For elaboration of the welfare economics pertinent to these points, see BOADWAY & BRUCE, *supra* note 23. *See also* ECONOMIC INTERESTS AND INSTITUTIONS, *supra* note 19.

The analysis of takings issues starts with the venerable distinction that all institutional change either enhances economic efficiency or merely redistributes income.[25] If there is no evidence of an efficiency gain from regulatory action, then this approach suggests that the new institutional structure was merely taking income, or wealth, away from one party and giving it to another. In some cases one landowner will be said to suffer so that another, or perhaps many, may gain. In other cases, many landowners will be said to suffer so that many others might gain. Rarely, many landowners will be said to suffer so that one party may gain.

However, this conventional analysis of legal change—regulation—is conceptually flawed. In essence, although *partial* analysis has been applied, a full *general equilibrium approach* is more appropriate. Recall that the institutional arrangements of an economy—the "working rules of going concerns" to John R. Commons—undergo constant refinement. This institutional change is motivated by circumstances and conditions that cannot be understood and explained by a model that regards a new law as either contributing to economic efficiency or as simply redistributing income. Our understanding of the interface of law and economics will be enhanced only with a more careful consideration of the reasons for institutional change, with greater care given to the overall efficiency implications of that institutional change, and with careful consideration of the implications of institutional change, both for those who own property in land and those whose welfare is influenced by the actions of landowners.

Institutions are the rules and conventions, including laws, that define choice domains for individuals. John R. Commons suggested that such rules indicate what:

> [I]ndividuals *must* or *must not* do (compulsion or duty), what they *may* do without interference from other individuals (permission or liberty), what they *can* do with the aid of collective power (capacity or right), and what they *cannot*

25. Note that the efficiency implications of land use regulations encompass the much-discussed "demoralization costs." That is, if takings occur too often and are too arbitrary, then landowners will be demoralized and will shrink from making those private investments that contribute to overall economic efficiency.

> expect the collective power to do in their behalf (incapacity or exposure).[26]

Institutions: (1) define the choice sets of independent economic actors; (2) define the relationships among individuals; and (3) indicate who may do what to whom. The aggregate of institutional arrangements determines, at a particular moment, economic conditions. Essentially, a prevailing structure of norms, conventions, rules, practices, and laws shapes or defines the choice sets of individuals and groups in an economy. In a centrally planned economy, these are the quotas of inputs, the production plans, the accounting prices, the shipping schedules, the supply of dwellings, the availability of jobs, etc. These institutional arrangements define the "discretionary space" within which individuals and groups are free to exercise decision making.

In a market economy, institutional arrangements consist of a different constellation of constraints and opportunities—tax laws, wage rates, contractual obligations for workers, product liability for commodities, health insurance premiums and coverage, working conditions in factories, farms, and mines, etc. This bundle of norms, conventions, habits, practices, customs, laws, and administrative rules defines choice domains: I can change jobs, I cannot drive ninety miles per hour; I can build a house on a particular piece of land, I cannot build a cement factory there; I can hire workers for my factory, I cannot refuse to hire them only because they embrace an unfashionable religion.

So the institutional environment defines the choice domain—the opportunity set—within which members of a society may operate. But economic conditions also influence the structure of institutional arrangements. Patent and copyright laws create a particular environment within which intellectual behavior flourishes or suffers, and therefore technological change occurs or is stifled. When new technology and economic opportunity arise it is necessary for new institutional arrangements to emerge to

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26. JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 6 (1968). Notice the direct connection with the Hohfeldian scheme. *See* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) [hereinafter Hohfeld I]; *see also* Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) [hereinafter Hohfeld II].

foster development of those opportunities. New economic conditions, for instance a new technical possibility, create the demand for a new law—an institution—that in turn makes the economic environment conducive to large investments in the development of that particular technology. New economic conditions create a need for a new institutional form, and that new institutional form then creates the new economic environment.

Regulatory activities in a market economy are best comprehended as instances in which collective action results in new institutional arrangements whose purpose it is to alter existing choice domains of individuals and groups. New regulations arise to address the existence and incidence of unwanted social costs in the economy. Indeed, we might best think of regulations as redefining the parameters of the market; yesterday's "regulations" become fully integrated into, and define, today's market.[27] In this vein, let us consider the different ways in which new institutional arrangements—regulations—might come about, and the economic implications of these different sources of changes in the choice domain of individuals.[28]

A. New Relative Prices

Changes in relative prices—and so income opportunities—induce institutional change that permits the attainment of greater income flows within the larger economy. This class of institutional change is familiar. New relative prices bring about increased economic activity in an arena in which the institutional arrangements are not suited to this new level of economic activity. The new relative prices create new income possibilities that require institutional innovation. Consider the development of new mining law in the western United States analyzed by Gary Libecap.[29]

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27. This perspective will not come easily to those who imagine that "the market" (or worse yet, the "free market") is some divinely inspired construct given to us via revelation from on high, and that "regulations" somehow interfere with this secular version of the immaculate conception.

28. *See generally* ECONOMIC INTERESTS AND INSTITUTIONS, *supra* note 19.

29. Gary Libecap, *Economic Variables and the Development of the Law: The Case of Western Mineral Rights*, 38 J. ECON. HIST. 338 (1978).

As the price of certain minerals escalated and the new income opportunities became apparent, thousands of gold and silver miners rushed to the frontier. But, in the institutional vacuum of the times, there was great confusion regarding exact boundaries of various claims, there was uncertainty over enforcement of claims, and the enforcement costs were unnecessarily high. Each miner could gain by a more careful articulation of the property rights in minerals, even though a few of the more belligerent might have preferred the anarchy of the status quo ante. This institutional change would certainly qualify as a new "regulation" of the prevailing anarchy.

Institutional change of this sort finds its origin in the notion of conventions, and the coordination problem.[30] In such instances, most participants in an economic situation recognize that *some* system of property rights is preferable to no system, which is really a system of "might makes right." There were certainly norms and conventions of mining behavior, but as the potential economic gains from the new mining activity increased, the incentive to defect from such conventions became too much for many to resist. It soon became evident that a more definitive institutional structure was required; there was evolution into a structure of entitlements such that the rights and duties of each participant were clearly spelled out. Institutions as entitlements, that is, property rights, rather than as conventions, provided the solution to the problem of anarchy in the new mining area. The evolved institutional structure led to clear increases in production from the mines, an outcome that must be regarded as in the interest of overall economic efficiency.

In this situation of institutional change, general social attitudes about mining and mining conditions were not especially important. That is, neither consumers of the minerals nor citizens at large had preferences with respect to the conditions under which the minerals were mined. There was no larger "public good" pertinent to such conditions. Price signals for the minerals were a sufficient economic incentive to spur institutional change—new "regulations"—concerning the structure of mining

30. *See generally* DAVID LEWIS, CONVENTION: A PHILOSOPHICAL STUDY (1986); EDNA ULMANN-MARGALIT, THE EMERGENCE OF NORMS (1977).

law and to bring about a new production domain, and hence new relative prices for the minerals vis-à-vis other goods and services in the economy.

B. New Technical Opportunities

Sometimes, changes in technological opportunities induce institutional change to permit capture of new income streams. When this happens, factor and product mixes adjust to reflect new conditions of technical and price efficiency. In such circumstances, regulation—institutional change—is driven by new technological opportunities that can increase the total production of goods and services and also increase economic efficiency. Consider an individual weighing the choice between heating with oil or gas and the possibility of heating with roof-top solar collectors. At the time of making an investment choice, the individual would need to be cognizant of the relative technical and price efficiencies of the two possible systems. For an oil or gas furnace this is not difficult to determine. However, the technical efficiency of a roof-top solar collector is dominated by the institutional arrangements that pertain to the ability of neighboring landowners to allow trees to interfere with the sun's rays. That is, the technical efficiency of this new technology is preordained by the institutional arrangements that define the environment within which the technology is introduced. A regulatory change concerning trees interfering with solar collectors is an example of a new institutional arrangement.

In this instance, institutional change is driven by new economic opportunities arising from the availability of a new technology, photovoltaic cells. Collective action, undertaken by the manufacturers of solar collectors and those inclined to purchase this promising technology, is motivated by the same self-interest that drives regular economic behavior within existing institutional arrangements. Social attitudes may have changed to the extent that some view solar collectors as conserving on non-renewable fossil fuels, but other examples exist where the dominant motivation is less high-minded. Institutional change is driven in this instance by the prospect for new income streams by the manufacturers of solar collectors, and the prospect for homeowners to save on heating costs. The institutional change seems to be in the interest of economic efficiency to the extent

that solar collectors allow the use of a ubiquitous, renewable, and largely "free" resource. It is, of course, not entirely free since the owners of tall trees will suffer some losses as a result of more restrictive laws about tree height in the vicinity of solar collectors. Those tree owners so affected would be inclined to denounce intrusive "regulations" concerning their capacity to grow tall trees in the vicinity of solar collectors. It is doubtful if the owners, and would-be owners, of solar collectors would view the new institutional arrangement as such an intrusive regulation; they would be inclined to view the new institutional arrangement as liberating them from the interference of their neighbors. The point is an obvious one: liberation for Alpha is interference for Beta.

C. New Collective Attitudes About Relative Income Shares

Sometimes, changes in collective attitudes about income shares across segments of the population induce institutional change to modify income distribution directly. Relative prices and hence factor and product mixes change accordingly, but as *effects* of institutional change rather than as *causes*.

There are instances in which collective attitudes about the income shares of different segments of society change over time, resulting in institutional change to modify directly those relative shares. The Tudor poor relief efforts in the 1530s, but especially the subsequent Poor Law of Elizabeth's reign, signaled early efforts at institutional reform of this genre. The War on Poverty in the United States and progressive marginal income tax rates are other examples of institutional arrangements whose purpose is to alter the income position of various segments of the population. Though this sort of institutional change is not usually thought of as regulation, the purpose and the effect are similar.

D. New Collective Attitudes About the Social Consumption Set

The most prevalent arena for regulatory activity comes in the "social consumption set." The "social consumption set" means the full array of attributes characterizing life in a particular nation-state. As an illustration, how daily life differs across nations at varying levels of economic development provides some sense of

varying social consumption. Such disparate economies may produce some of the same goods and services, yet conditions in factories and homes—and the standard of living of their citizens—certainly differ. Indeed, economic development may be thought of as a process of improving the social consumption set of a nation. When a particular nation undertakes steps to modify its social consumption set, it is acting on changes in individual and collective attitudes about the nature and content of its existing social consumption set. Improvements in environmental quality, or in worker safety, are clear examples of changes in the social consumption set. When such changes occur, relative prices and hence factor and product mixes change accordingly, but as *effects* of this institutional change rather than as *causes*. Regulations certainly take into account efforts to redefine a nation's social consumption set.[31]

As an example, the early years of the nineteenth century saw a considerable profusion of institutional change in Great Britain, as the undesirable human effects of the Industrial Revolution became both more apparent and less accepted. In 1824, the Combination Acts were repealed with the intent of allowing workers to collaborate for their mutual defense against the powerful millowners. The Combinations of Workmen Act in 1859 made explicit the right of workers to engage in peaceful picketing. These institutional changes, and many more, reflected changing social attitudes about social welfare considerations. They manifestated the changing weight of social authority as between owners of capital, including land, and owners of labor. Was "property" taken without compensation? To be sure, efforts to restrict the length of the workday were opposed by capitalists on economic grounds and under some notion of rights to an income.[32]

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31. We can think of the activities of the Occupational Safety and Health Administration, the Food and Drug Administration, and the Environmental Protection Agency as prime examples of collective action through legislation and the courts to redefine the social consumption set.

32. The Oxford economist Nassau Senior gained a later notoriety—the kind one can do without—by using flawed economic logic to suggest that the shortened work day would take away all profits from manufacturers. That is, he argued that the first 10 or so hours of each work day were needed for the capitalist to cover all other costs. Therefore, it was only beyond the tenth hour of daily work per laborer that the capitalist could finally obtain a return on his efforts.

The working conditions in a coal mine represent the deliberate result of the expenditure of funds for that purpose, as opposed to funds spent only for the production of coal; with a given total expenditure, more spent on safety means less available for the extraction of coal. Greater concern for safety in coal mining implies a different family of social indifference curves in traditional welfare economics. Economists regard social indifference curves as derived from a social utility function of the form:

$$U = U(x, y, \ldots, m)$$

where (x, y, . . . , m) reflects the bundle of goods and services available in society. This bundle of goods includes, in addition to coal and other private goods, the constellation of collective (public) goods such as literacy, environmental quality, the net wealth position of different segments in society, the general state of human health, and work conditions of factories, farms, and mines. All of these constitute the general level of satisfaction of individuals in a society, and they comprise the social consumption set. The social indifference curves of welfare economics can be seen as a reflection of prevailing attitudes about this full consumption set. That is, citizens consume both private goods purchased through conventional transactions and collective goods "purchased" through collective action that results in institutional change to modify the nature of the society in which they live.

When social attitudes about child labor, slavery, or general safety conditions in mines are such that these situations do not represent much concern, then the economist would have one family of social indifference curves to consider. On the other hand, as attitudes change about these matters then preferences for safety and humane working conditions will change. Note that both outcomes are, by definition, Pareto-optimal points since they lie on society's production possibilities frontier. That is, both are productively efficient output combinations of coal and safety, as are all possible points along the frontier. Moreover, both points are socially efficient given particular social objectives as reflected in the two possible families of social indifference curves. Additionally, every point on the frontier, by being Pareto-optimal, is Pareto non-comparable. This means that we are unable to declare one point unambiguously better or worse than another.

However, once institutional change is carried out in response to new social attitudes—that is, once a new "regulation" concerning worker safety is in place—the price of coal responds to these new institutional realities in coal mining and a new overall economic optimum is attained. Note that relative prices *follow* this type of institutional change rather than *drive* it.

It should be recognized that the social utility function is a "collectivized" set of preferences based on the expression of choices through current collective mechanisms. Arguments in this function, and the weights attached thereto, are a reflection of the goods and services deemed pertinent by the citizenry. The mapping of two possible social indifference curves reflects a combination of two forces: (1) changing preferences about mine safety in the social consumption set; and (2) different weights assigned to miners vis-à-vis non-miners in the social welfare function. With respect to this second factor, at any moment the social utility function, U, reflects in commodity space what the social welfare function, W, reflects in utility space.[33]

It follows that judgments about the economic efficiency implications of institutional change, and this certainly includes regulatory activity by governments, require some general knowledge of the relevant social welfare function. The social indifference curves come from the social utility function of the prior equation, which is specified in terms of the bundle of goods and services; including public, or collective, goods. The social welfare function is specified in terms of the utilities of the members of society:

$$W = W(U_a, U_b, U_c, \ldots, U_i)$$

The social welfare function is a collective choice rule that aggregates the preferences of members in society, and it should be understood to have a very special role in the problem of collective choice. A.K. Sen specifies four types of issues that are relevant to social choice: (1) the aggregation of individual *interests* to arrive at collective *decisions*; (2) the aggregation of individual *judgments* to arrive at collective *decisions*; (3) the aggregation of individual

33. *See generally* ECONOMIC INTERESTS AND INSTITUTIONS, *supra* note 19; BOADWAY & BRUCE, *supra* note 23.

interests to arrive at *welfare judgments*; and (4) the aggregation of individual *judgments* to arrive at *welfare judgments*.[34] The use of a social welfare function is concerned with the fourth problem—the aggregation of individual judgments to arrive at a collective welfare judgment. That is, the nature of the social welfare function is a problem of deciding how to aggregate individual judgments of welfare into some collective welfare rule. This requires that collective judgments be made on the strength and relevance of judgments made by the individuals in society. To state it somewhat differently, the problem is to determine whose interests will count as the economist attempts to aggregate their respective judgments about welfare.

To recognize the conceptual role of the social welfare function in assessing the efficiency, and possibly optimality, of institutional change is not to deny the empirical difficulties in ascertaining its exact nature. But every society acts in ways that give implicit, if not explicit, structure to such an aggregating device. The political process is precisely about making these types of determinations. Regardless of which representation of the social welfare function is chosen, judgments concerning institutional change and economic efficiency cannot be made until that choice has been made, and the economist has some stylized concept of its position. Once a social welfare function has been defined based on the expressed and/or tacit actions of a polity, then one can work backward through the conventional welfare theory to derive the optimal allocation of factors of production, the optimal output bundle in society, and the optimal allocation of goods and services among individuals.

The problem is precisely one of knowing the appropriate social welfare function. That is what the political process is essentially about: determining whose interests shall be catered to, and indirectly whose judgments about their individual welfare carry the most weight in the aggregation process toward collective welfare judgments, and ultimately collective decisions about what it is "best" to do.

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34. *See generally* AMARTYA K. SEN, CHOICE, WELFARE AND MEASUREMENT (1982).

The regulatory change under consideration, where the driving force is one of new social attitudes rather than new relative prices or new technology, constitutes "the reallocation of economic opportunity."[35] The reallocation of economic opportunity is an ongoing process of modifying institutional arrangements, and thus redefining individual and group choice sets, in response to the changing nature of attitudes and preferences in society as a whole.[36] The reallocation of economic opportunity is not something driven by the relentless pursuit of productive efficiency for the simple reason that for any given structure of institutions there are infinitely many productively efficient points along production possibilities frontiers; there are infinitely many institutional possibilities as well. Judgments about whether a particular institutional change (say a regulation of land use activity) is socially preferred, let alone socially optimal, cannot be made without knowledge of the relevant social welfare function. And that is no mean empirical task.

E. Gaining New Economic Advantage

Opportunities sometimes arise in which a few economic agents, because of their inordinate capacity to influence the nature and scope of prevailing institutional arrangements, can obtain a new economic advantage. In such circumstances, unlike in the previous case, this institutional change is accomplished despite the absence of new collective attitudes, new relative prices, or both. It is important to differentiate this type of institutional change from the previous type, in which there is a reallocation of economic opportunity consistent with emerging social attitudes. The basic argument can be best presented as part of the general model of rent seeking.[37]

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35. *See* ECONOMIC INTERESTS AND INSTITUTIONS, *supra* note 19.

36. The approach follows that suggested by Peterson, in which a sequentialist model asks about the evolving nature of social tastes and preferences, and then asks whether the courts are acting in a manner that is consistent with those preferences. The courts simply try to reflect the changing moral consensus in society and then arbitrate side payments to those caught in this state of flux. *See* Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles*, 77 CAL. L. REV. 1299 (1989).

37. Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974).

The standard rent seeking model can be illustrated with the example of less costly Italian shoes, which are restricted from the market as a result of lobbying efforts undertaken by domestic shoe manufacturers. This type of institutional change is called a "redistribution of economic advantage."[38] Notice that the difference between institutional change that redistributes economic advantage, and that which reallocates economic opportunity, is to be found in the nature of the social utility function, and indirectly in the social welfare function. In the mine-safety problem there existed a family of social indifference curves that revealed social efficiency consistent with an emerging social preference for greater safety conditions in mines. In the matter of import restrictions on Italian shoes, there is no social utility function that reveals such restrictions to be socially desired.

The redistribution of economic advantage consists in the creation of new institutional arrangements—regulations on the import of Italian shoes—that find no support in the social welfare function nor in the social utility function. In effect, certain economic interests are able to use their special economic and political position to secure regulations that will redound to their particular benefit as against the harm inflicted on others. Rent seeking then becomes a description of the activity whereby economic agents compete for the economic rents created through the prior reallocation of economic advantage. Put somewhat differently, individual economic agents engage in political activities to redistribute economic advantage in their favor. Regulatory agencies, ostensibly concerned with protecting others against just such behavior, can exacerbate the situation by enhancing the flow of rents to the regulated sectors. In the regulation literature this is known as "capture" in that the regulated industry—in this case the American shoe industry—has managed to "capture" governmental regulators, and make it even more difficult to import Italian shoes.

38. *See generally* ECONOMIC INTERESTS AND INSTITUTIONS, *supra* note 19.

F. Maintaining Existing Economic Advantage

In this final illustration, existing institutional arrangements are regarded as inviolate by those who will be harmed by institutional change, and these individuals, or groups, are able to use the legislature and the courts to insulate themselves from threatened change. In a sense, small and well-organized interest groups are able to prevent regulatory intervention to preserve a favorable situation in the face of a collective consensus that they should not be so protected.[39] Note that in some instances the existing institutional setup is *presumptive* rather than *explicit*.[40]

Much of the litigation in land use matters seems to fit this category of institutional change. That is, a landowner has some general range of "acceptable" activities as articulated by zoning regulations, master plans, and the prior practices of others. But the outer limits of this presumption are often vague. This prevailing institutional setup, including the presumptive envelope of allowed activity, is taken as the norm against which institutional change in the form of new land use capabilities is regarded. When new institutional arrangements arise from a process in which new scarcities and new preferences are collectively recognized and given effect through the law, then those who claim to be harmed by the new institutional structure mobilize to prevent change. The language employed in land use matters is that the party is the victim of a "regulatory taking." The payment of compensation in the face of this alleged interference with some prior, though usually presumptive rather than actual, "right" is

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39. It might be suggested that the National Rifle Association is an effective instrument for those who seek to preserve existing unlimited access to a variety of lethal weapons—in spite of the apparent public support for some restrictions on certain types of guns.

40. An example of a *presumptive* institutional setup is that of smoking in public places before the success of efforts to prevent such behavior. Prior to public awareness of the harm of second-hand smoke, smokers were presumptively free to smoke when and where they wished. In Hohfeldian terms, smokers had the *privilege* against the *no right* of those offended or annoyed by smoke. *See generally* Hohfeld I, *supra* note 26; Hohfeld II, *supra* note 26. Recall that it was not written anywhere that smoking was permitted, it was simply presumed, and those who objected were forced to suffer in silence. With the passage of smoking laws, the legal setup changed to one of explicit entitlements. Now it is known precisely when and where public smoking may occur. In Hohfeldian terms, the *rights* and *duties* of smokers and nonsmokers are now clearly spelled out in terms of explicit entitlements and correlated obligations.

then demanded. In the extreme, we may consider such compensation as extortion.

"Extortion" is used to remind us that the pursuit of compensation in such instances is a demand to be paid for no longer being allowed to undertake activities now declared to be illegal.[41] Recall that when new institutional arrangements—"regulations" in the current context—are introduced, their existence manifests a new set of community values about certain aspects of economic life. Under other circumstances, that is, when land is not the object of regulation, it would certainly strike us as odd that some economic interests are able to demand compensation to forego violating these new laws. For instance, one could certainly argue that the asset value of American tobacco companies has been adversely affected by the anti-smoking sentiment of the past decade. Moreover, restrictions on smoking in airplanes, restaurants, and auditoriums have certainly not been favorable to the sale of cigarettes. Why do landowners have a presumptive claim on indemnification from the public purse when cigarette companies do not? Can one seriously imagine that the framers of the Constitution cared about the regulatory climate for landed property and dismissed as irrelevant the regulatory climate for all other productive assets?

We see, in the face of new laws—regulations—a particular linguistic trick called the "language of loss." This approach is used to immunize those currently well served by the status quo ante institutional setup so as to maintain their existing economic advantage in the face of social pressure for institutional change. Let us consider how the status quo ante entitlement structure leads to a particular *idiom of regulation* in which the language and concepts of economics—improperly used in "benefit-cost analysis"—carry unwarranted weight.

Imagine a debate over the alleged "losses" said to arise from the regulatory prohibition of certain agricultural pesticides. In discussing the probable impacts of various regulatory actions, it will be said that consumers face a "loss" of some magnitude.

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41. I am assuming that due process and equal protection considerations are not an issue here and that the "Takings Clause" in its narrower compensatory sense is the legal issue at stake.

There will be numerous suggestions of the "costs," the "impacts," and the "losses" that would emanate from a variety of restrictions on pesticides in agriculture.[42] This approach highlights the role of the regulatory idiom when institutional change is under consideration.

Discussing pesticide use in agriculture in this manner frames the debate about chemicals in a way that distorts the choices we face, and therefore, about the decisions that likely will be made. The framing of the issues rests on a particular concept of the *base* against which institutional change is to be evaluated, and it is that base that allows the analyst to talk of the "losses" from a ban on agricultural chemicals. Unfortunately, the status quo ante has a dubious claim on our analytical attention. To illustrate this point, a brief digression on technical change is required.

Technical change brings myriad opportunities to the modern economy, most profound among those opportunities is the prospect for the adopting entrepreneur to save money, thereby enhancing one's competitive position. It is well understood that early adopters reap the bulk of the economic windfall from technical change. If markets work reasonably well and if others also adopt the new technique, aggregate production increases, leading to price declines. Eventually, the extra-normal profit—"quasi rent"—is squeezed out of the sector as consumers benefit through lower prices. Consumers, not producers, are the real winners when technical change occurs.

Pesticides represent a classic example of technical innovation; farmers can control pests more effectively (that is, at a lower cost) with pesticides than with other methods. The only proviso, and the key here, is that the full costs of pesticide use are incorporated into the price farmers pay for pesticides. Environmental policy is precisely concerned with the reality that not all of the relevant costs of pesticide use are reflected in the price that a farmer pays for a unit of the compound. When this fact is brought to the attention of policy makers by those forced to bear the unwanted costs of pesticide use, new rules—institutional change—for

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42. A recent study, though well done in a technical sense, offers an illustration of the use of this regulatory idiom. *See* David Zilberman et al., *The Economics of Pesticide Use and Regulation*, SCI., Aug. 2, 1991, at 518.

pesticide use are the probable result. Those new rules may encompass taxes to make the per unit cost of chemicals more expensive to the user, thereby creating an incentive to reduce their total use. Or, there may be a ban on certain compounds.[43] Regardless, the effort is directed toward getting the price of chemicals "right" through getting the rules "right."

A new constellation of rules—new regulations—regarding pesticide use in agriculture must be understood as rectifying the temporary circumstances under which some producers and consumers managed to reap ill-gotten gains. Put somewhat differently, farmers will have to revert to some other technique for controlling pests. Some alternative to the banned pesticides will be found and agricultural production will continue.

The essential point here is that pronouncements about consumer and producer losses must be considered with great care. These are "losses" as measured against a status quo ante in which agricultural producers have been free to impose external costs on society at large. The former economic gains that now are referred to as "losses" have come at the expense of those forced to bear the unwanted costs of pesticide use. We have a simple case of the shifting of economic advantage among members of the populace. Producers and consumers of the affected products had a temporary windfall, and now it is being taken away. It is conceptually flawed to use "loss" to describe this new situation. Put in its most stark terms, the economic gains realized by producers and consumers since the introduction of the particular pesticides now considered for restriction constitute a form of theft. Indeed, the consumers (and producers) of those products have reaped a windfall at the expense of others. Now that the windfall is recognized as having come at the expense of those forced to bear unwanted costs, taking it away somehow gets characterized as a "loss."[44]

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43. Note that a ban on chemical compounds is analytically equivalent to a price so high that no producer would find it feasible to use that particular input.

44. The correct way to assess the impacts of a ban on pesticides is to compute the *future* economic situation in the food system with and without the particular pesticide. This analysis allows producers and consumers to adjust their production and consumption patterns without the pesticide. Current practice usually compares a future without pesticides against a past in which pesticides were prevalent.

We can relate this example to the domain of regulatory takings if we assume the ban on pesticides rendered Blackacre unsuited for the agricultural use to which it had previously been put, and that henceforth the land was suited only for a much less remunerative activity. Would the owner of Blackacre have a legitimate claim that a taking had occurred in the magnitude of the "lost" income owing to regulation? Of course not.

If the higher income potential of the land is dependent upon the application of pesticides—the use of which is now known to entail non-trivial offsite costs for others—then the higher land value was artificially inflated by the difference in annual net income made possible by the use of pesticides. When pesticides may not be used, the landowner is faced with the potential income stream that was possible without pesticides. We see here an instance in which false shadow prices of one or more factors of production, in this case pesticides, cause a distortion in the input mix in an economy and so give rise to artificially inflated income streams. Why now should the public indemnify those income streams?

We see that the idiom of regulation is a function of how the policy issue is framed, and that framing then leads to false claims of "losses." In environmental policy, many of the benefits are of an uncertain kind, or they become apparent in the future. Those who must bear the "cost" of a change in the status quo ante will mobilize to resist change, using the reality of nebulous benefits as against the claimed known "costs" of change. The language of loss is a false and misleading picture of the choices we face. As long as the idiom of regulation insists on labeling any change in the status quo ante as a "loss," we are prevented from reaching correct decisions.

IV. WHITHER REGULATORY TAKINGS?

The economic analysis of regulation, and by extension the idea of regulatory takings, must be undertaken in a general equilibrium framework in which prices and quantities adjust to new social norms and hence the new institutional arrangements that define socially sanctioned domains of individual choice and action. The conclusion here that the concept of a "regulatory taking" is a logical contradiction stems from a general equilibrium

model in which economic conditions are a function of existing institutional arrangements, and existing institutional arrangements are a function of prior economic conditions and prior collective attitudes about socially acceptable individual actions.

On this view of the regulatory scene, institutional changes—new laws or "regulations"—simply redefine a new constellation of choice sets from within which atomistic economic agents may choose their preferred course of action. There can be no economic losses of normative social significance from regulatory actions in a general equilibrium world since the foundation upon which such a world is based is a momentary calculation of economic gain by all actors with rather complete information about those opportunities most central to them. Unless one can make the case that land as a factor of production is somehow different from the other factors of production—capital, labor, management—compensation to landowners represents a misallocation of resources that reduces overall economic efficiency. All factors of production have their returns buffeted by new, and often unforeseen, circumstances. The owners of all factors of production, not just land, experience "windfalls and wipeouts" of varying magnitude much of the time.

For the owners of land to claim special standing before the treasury is to single out one particular factor of production for extraordinary treatment. More practically, why should taxpayers be compelled to issue checks to landowners who are prevented from imposing costs on the taxpayers, or who miscalculate when planning future land uses? The demand for "just compensation" represents *rent seeking behavior* on the part of those who own land and seek to increase their wealth either by the possible net revenue from new land uses, or by the compensation paid from being denied the chance to undertake those new land uses.[45] Or

45. It may be tempting, as in the case of the aggrieved landowner in *Lucas*, to express sympathy for the plaintiff who, by virtue of the new coastal zoning law, was denied "all economically viable uses of his land." Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895 (1992). One may be tempted equally to wonder how the plaintiff could have paid $975,000 for two parcels on a barrier island nine years *after* the South Carolina Coastal Council was directed by the South Carolina Legislature, in the Coastal Zone Management Act of 1977, to delineate a baseline of the landward-most points of erosion of the past 40 years. This line was fixed to the landward side of the plaintiff's lots. Then, in 1988, the South Carolina Legislature enacted the Beachfront Management Act in

if no new use is planned, some regulations may simply cease to allow certain traditional land uses to continue. Here, the owner seeks indemnification for an inability to continue to impose unwanted costs on others. But that is precisely the reason for the regulation in the first instance—to stop the unwanted visitation of costs on others.

Social efficiency is reached by stopping the visitation of external costs. However, compensating those whose actions were judged antisocial can find no support in economic theory, however compelling political arguments may be. That is, the social problem is to craft institutional arrangements that provide some degree of security for future-oriented activities, yet not so much rigidity that change is impossible or, via compensation, too expensive. The other side of this mandate is to create an institutional structure that is flexible, but not so malleable that anarchy prevails.

Some may believe that land deserves special treatment because it, among the factors of production, is immobile. However, an argument on mobility grounds confuses the locational specificity of a particular tangible object with the expectations and calculating facility of the owner who mixes other inputs with that particular object. To the extent that labor, capital, and managerial skill are mobile, and to the extent that land is merely the location for the application of labor, management, and capital, then the claimed "immobility" of land is a red herring. There are

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response to the earlier efforts to forestall erosion of coastal lands. Dissenting from the U.S. Supreme Court decision in favor of the plaintiff, Justice Harry Blackmun pointed out that Hurricane Hugo, in 1989, had caused over $6 billion in property damage and killed 29 people. *Id.* at 2904 n.1 (Blackmun, J., dissenting). These losses were magnified by uncontrolled beachfront development. *Id.* The very role of barrier islands is to buffer winds and tides, yet when they are filled up with houses, erosion is compounded, and the houses themselves become instruments of further damage to the land and adjacent buildings. *Id.* at 2905 n.1 (Blackmun, J., dissenting). Justice Blackmun also noted that the Lucas property was actually *under water* for six years between 1957 and 1963. *Id.* at 2905 (Blackmun, J., dissenting). Can one honestly say that this is a case of a buyer of land exercising reasonable care (caveat emptor) to ascertain its probable long-run feasibility for residential purposes? The previous owner, who sold to Mr. Lucas, certainly did very well indeed. On remand, the South Carolina Supreme Court held that the State was liable for compensation to Mr. Lucas. Lucas v. South Carolina Coastal Council, 424 S.E.2d 484 (S.C. 1992). Now, the taxpayers of South Carolina must bear the costs of Lucas' generous largess toward the fortuitous previous owner who probably bought low, but most assuredly sold high.

many substitutes for a particular piece of Cartesian space, and it is the job of management as entrepreneur to move among those Cartesian coordinates in a way that maximizes the present value of expected economic returns. Society at large owes no guaranteed economic return to management and other factors of production applied at any particular Cartesian point. Indeed, the prospect for such guarantees serves to subvert the constant search for socially efficient allocations of land to competing uses.

Social efficiency also is achieved if the citizenry is spared the waste of paying twice for certain things. To the extent that a large part of alleged "property values" are simply artifacts of prior public expenditures for roads, schools, parks, and general social infrastructure, then to tax local citizens to compensate someone whose "property values" are said to be diminished by collective action is to force the citizenry to buy once again what it has already paid for. It is of course a difficult empirical problem to determine the exact portion of "property values" due exclusively to those things we want to encourage—risk taking and individual initiative. Truth be told, however, the American experience is one in which any old fool, often by sheer accident, could have gotten quite rich through owning land, and of course many did and continue to do so. Small wonder that so many celebrate this particular lottery and seek refuge in the Constitution to preserve their odds of winning.

The land use decisions of the 1986 Supreme Court term—the so-called Takings Trilogy—have excited much interest, indeed emotion, in academe.[46] Much of that interest has concerned the

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46. The Takings Trilogy consists of First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), Nollan v. California Coastal Commission, 483 U.S. 825 (1987), and Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987). As an example of the emotional side of this academic interest, Richard Epstein's review of the land use decisions of the 1986 term is a rather sharp and severe defense of private property as he chooses to define that concept. For instance, he argues that "[t]oday there are many who are openly hostile to private property, and who would gravitate toward the pole that sharply limits its role in social, economic, or political affairs." Epstein, *supra* note 12, at 1. Although Epstein is vague on the role of private property in "social, economic, or political affairs," it seems clear that he is mixing grand notions of civil liberties with the interests of a landowning class of upright and hard-working citizens. *Id.* Left unsaid in this paean to Jeffersonian bliss is the vexing philosophical problem of the interests of those who own no land, or whose life is made miserable by those who do. One hesitates to be impertinent about such things, but it is a bit self-serving for those of us whose lives are best characterized by some considerable degree of comfort to devote our

probable future direction of a Supreme Court thought to be more prone to the "protection of property rights." That particular formulation of the problem, unfortunately, takes us back to the flawed dyadic view of the world dismissed at the outset. It is essential to understand that the fundamental question is not how one Supreme Court or another will "protect property rights." Rather, the pertinent intellectual question is one of how particular Supreme Courts choose to *interpret* the nebulous idea of rights in general, and of rights to land in particular. Lest it be misunderstood here, if the government occupies Blackacre for the construction of a highway there is little doubt that compensation is called for under the Takings Clause. And of course if the government occupies a steel mill on Blackacre to enhance the production of war machinery there is little doubt about the outcome under the Takings Clause.[47] Similarly, if the government confiscates a fleet of trucks to move war material the outcome is clear.

But to extrapolate the "public use" language of the Takings Clause so that landowners whose plans are dashed can compel compensation from the public purse is curious in the extreme. There is no basis for it in the philosophical foundations of the social contract stripped of any natural law origins. Nor is there a coherent economic argument for such compensation if a general equilibrium approach is followed. In commenting on the "unclear" part of takings law, Epstein laments that:

> No matter how hard or often it tries the Supreme Court seems unable to develop any coherent principles that mark either right or stable choices in that large middle ground.
>
> The results in three very important takings cases last term confirm anew that the Court's vacillations and indecisions have yet to run their course. The reason for the confused, and often contradictory, results is that the Supreme Court has never

careers to the celebration of the wonders of private property.

47. If this were a temporary expropriation, say during a national emergency, "just compensation" would be limited to the foregone net economic return to the factory during the period of occupation, plus any "excess" depreciation of parts of the fixed plant, minus any investment made in the facility during its control by government.

> been prepared to give the Takings Clause the *natural* reading that its text suggests.[48]

Not surprisingly, Epstein abhors *Keystone*[49] while he loves *Nollan*[50] and *First English*.[51] But what exactly is this "natural reading" of the Takings Clause that Epstein finds so enchanting? It is a fairly narrow one, quite consistent with the tendencies of those inclined toward strict constructionist notions. Here, the term "taken" would mean physical expropriation, and the term "public use" would mean exactly what the term "use" would imply, not the broader interpretation of "public benefit." On this more narrow (more "natural"?) interpretation, private landowners would be compensated when the government *expropriates or occupies* their land, but never beyond this. That this would constitute minimal brakes on a government, that is, according to Epstein, already too busy on such fronts, should be obvious. We must look elsewhere for the elusive appeal of a "natural reading" of the Takings Clause.

The reading Epstein would probably like comes from the Lockean natural rights view in which one acquired rights in land by mixing a little labor with the land. Conveniently, latter-day Lockeans like the first part of the labor theory, and overlook the second in which the no-loss condition requires that there be sufficient property, "enough and as good," so as not to impose any loss on others. Where would the surface landowners in *Keystone* stand with respect to the "enough and as good" should the mining operations begin to chew away at the support estate?

If one were to read the Constitution absent pronounced ideological predispositions, a literalist might imagine that the framers had something very simple and straightforward in mind. That is, when the government "takes" something from me for its

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48. Epstein, *supra* note 12, at 3-4 (emphasis added).

49. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

50. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

51. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

use, it had better pay me for it.[52] Regulations cannot "take" for the simple reason that there is nothing belonging to me to take. Were Gertrude Stein a jurist, she might well claim that "there is no there there."

The central flaw in much land use law is that land has been asked to take on too much work in the service of civil liberties. Our history is tied up, of course, with the centrality of the landowning classes as a bulwark against a range of ills. However, the contentious debate over environmental regulation and land use conflicts is an unnecessary and debilitating artifact of a society that has yet to come to grips with the fact that property rights are the *results* of a political and legal process rather than *starting points* thereto. To quote once again from Tawney:

> Property was to be an aid to creative work, not an alternative to it. The patentee was secured protection for a new invention, in order to secure him the fruits of his own brain, but the monopolist who grew fat on the industry of others was to be put down. The law of the village bound the peasant to use his land, not as he himself might find most profitable, but to grow the corn the village needed. . . . Property reposed, in short, not merely upon convenience, or the appetite for gain, but on a moral principle. It was protected not only for the sake of those who owned, but for the sake of those who worked and of those for whom their work provided. It was protected, because,

52. Epstein declares, with apparent authority, that "[t]he purpose of the [E]minent [D]omain [C]lause is surely to restrict government behavior, to prevent the form of interest group politics outlined above." Epstein, *supra* note 12, at 20. He further asserts that "[t]he purpose of the police power limitation is to justify state takings without compensation." *Id.* One might reasonably ask how Epstein is so certain about the purpose of the Eminent Domain Clause and the police power. Indeed, it would seem equally plausible to suggest that the Eminent Domain Clause is concerned with making sure that no one citizen bears the full brunt of land (or personal property such as trucks and factories) taken for public facilities or public activities. Compensation does precisely that. To imagine that the framers of the Constitution would resort to compensation as a clever device to restrict interest group politics pertaining to land—but to no other asset—is certainly charming, but far from compelling. Epstein also is wrong in alleging that the police power's purpose is to "justify takings without compensation." In fact, as should be obvious by now, the police power speaks not to property rights (and takings) at all, but to behavior that is not in the public interest and hence controllable without compensation. Regulatory activity under the police power is not a "taking without compensation" for the quite simple reason that it is not a taking.

> without security for property, wealth could not be produced or the business of society carried on.[53]

The social role of private property is as an inducement to undertake socially valued endeavors—nothing more. Private property provides some degree of certainty to owners so that investments can be made in the larger public interest. We as taxpayers owe no special financial obligation to those who own land and seek to use it in socially undesirable ways. Society at large must offer landowners some reasonable expectations for their actions, but it cannot be held financially accountable for all of the schemes they seek to implement, nor for their momentary affinity for a particular antisocial production regime, whether toxic chemicals in our food and drinking water, clangorous brick factories, odorous feedlots, sparking railroad engines, belching chimneys, or strip malls of dubious social virtue.

Land use and environmental policy is contentious precisely because it often joins claims of individual freedom and private property rights. Meaningful progress and calm analysis will not occur until the myth of the overarching sanctity of private property has been exposed. The public cannot continue to be held hostage to the extortion that often emanates from this view. There is no basis for it in economics, in philosophy, or in the law.

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53. TAWNEY, *supra* note 13, at 59-60.