

REFLECTIONS ON THE BUNDLE OF RIGHTS

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The modern legal understanding of property ownership in the United States is expressed through a metaphor as a “bundle of rights” or a “bundle of sticks.” This is an abstract notion that analytically describes property as a collection of rights vis-à-vis others, rather than rights to a “thing,” like a house or a piece of land. It is a legal construct that has evolved to describe the rights as well as the responsibilities that attend ownership quite independently of whatever “thing” is owned. The bundle of rights also demonstrates the many ways in which ownership can be divided. In this sense, the concept works to illustrate both tangible and intangible property equally well—for example, 100 acres of land or 100 shares in a corporation.

In recent years, an academic debate has raged about whether the bundle of rights is a correct or useful way of thinking about property rights. Whatever its faults or inadequacies, the bundle of rights is the dominant legal paradigm for the courts and the theory of property that is taught to American law students.

Although the bundle of rights concept grew out of a long-standing and serious philosophical debate about legal rights and legal liberties, the bundle of rights as a theory of property did not present a new normative idea, but an analytical and descriptive one. Whatever social value choices were made as the various property rules evolved—rules that preserved the institution of private property—were made long before the bundle of rights came along to reconceptualize how we think about rights in property. This lecture discusses the history and meaning of the bundle of rights as a concept of property law, as well as two recent landmark decisions of the United States Supreme Court that have interpreted the government’s constitutional authority to intrude upon the bundle of rights, *Lucas v. South Carolina Coastal Commission* and *Kelo v. City of New London*. The intersection of governmental authority and private owners’ rights is one of the more interesting contexts in which to think about the viability of the bundle of rights. It is also the context in which American expectations about liberty and land ownership have been most seriously challenged.

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Property law comes from three sources: the common law, statutes, and the Constitution. Common law principles are the primary source of property law. These are principles that have been developed by judicial decision in the United States, starting with the adoption of the common law of England at the beginning of our history. Courts have continued to develop these principles over the last two hundred plus years. Property law is a creature of state law because it is state courts that develop the common law as courts of general jurisdiction. Although property principles are generally the same throughout the United States, state courts are not always entirely consistent with one another. State courts vary in their application of law to fact, as well as in their recognition of certain principles or doctrines. This is an inherent feature of a common law system in which each state is a sovereign in its own right. Practically, it means that property owners may be subject to different common law rules in each state in which the property owner has property. For example, water-rights law differs between western states and eastern states because water is a scarce commodity in the western part of the United States. The law in those states may reflect a social value of fair distribution. States with many miles of ocean coastline may have developed different rules with respect to common law nuisance in an effort to protect eroding shoreline. So, even though there is nuisance law in every state and the general principles may be the same, the law may reflect different social values in which unique geography plays a role.

Although the existence of fifty separate jurisdictions in the United States means that there will be variation in the meaning and application of property principles, an important feature of the common law system is its reliance on precedent. A common law system emphasizes consistency and predictability, while also allowing for modification of rules when necessary. No state law decision is binding on any other state, but it is common practice for state courts to look to other state courts as persuasive authority. Such decisions can be very influential, especially when the facts presented are similar.

Statutes provide the second source of property law. State statutes apply only within each sovereign state, and statutes enacted by the U.S. Congress apply in all states. Statutes are subject to interpretation by the courts. Like the common law, statutory interpretation will vary from jurisdiction to jurisdiction, even when courts are considering identical or nearly identical statutes. Statutes are important because statutes can modify the common law by determining the distribution of property rights, such as the right to water, rather than leaving the question of right to the courts' discretion.

The third source of property law is the Constitution of the United States, as well as the constitutional law of each individual state. Through the Due Process Clause of the federal constitution, the government has the authority to take property for public use. This authority trumps a property owner's bundle of rights. When such "takings" occur, the owner has the corresponding right to just compensation for the value of what has been taken.

Other sources influence courts, although they are not strictly law and therefore do not control the decision of any court. Commentators periodically distill principles of property law into treatises, which are compendiums of case analyses that bring organization and doctrinal harmony to the principles. Treatises are not independent sources of law; they are more like learned encyclopedias, developed by academics who are interested in the theory of the law. They play a role in the development of the common law, in that they can influence judges' opinions. Academic writing often plays the same role as treatises, and in this particular field, we will see that academics were quite influential in the development of the bundle of rights.

Another source of influence on the development of the common law is the American Law Institute, or ALI, which is an association of lawyers, judges, and academics who are invited to membership, and who discuss and publish so-called Restatements of Law. The Restatements are like treatises in that they collect cases and purport to state the law as it exists in the United States. The ALI has been in operation for many years. It has probably tackled every major subject of common law, including property law, and has revised many of its Restatements two or three times. In the 1930s, it adopted the bundle of rights concept of property as a set of legal relations among people. The ALI has undertaken many property law Restatements on discrete subjects, like future interests, but its early work adopting the abstract notion of property as rights and responsibilities still stands. Courts rely on Restatements in the same manner as treatises, as impartial, scholarly reviews and criticisms of the law as it is or, in some cases, as it should be. In that sense, they can be an important influence on state court decisions.

The bundle of rights metaphor was intended to signify that property is a set of legal relationships among people and is not merely ownership of "things" or the relationships between owners and things. Today, lawyers take the metaphor for granted as illustrating these relationships, but before the twentieth century, this conception of property law was not the way in which laymen or legal professionals thought about property. Property in a "physicalist" sense was based on categories of things, "with the nature of

each thing determining its treatment at law.” If it was “real property,” that is, land and things attached to the land that were essentially not movable, it was subject to different rules from those affecting “personal property,” such as furniture, horses, jewelry, and money, or things that were movable. Today, we still classify property as either real or personal.

The physicalist definition of property was one of “absolute dominion”—the exclusive right of possessing, enjoying and disposing of a thing. William Blackstone, the English legal writer of the eighteenth century, whose *Commentaries on the English common law* were widely used in the United States in the early days of its history, defined property as a “sole and despotic” relationship between a person and a thing. In this classical liberal definition, the only function of private property was to secure freedom and autonomy for individuals; the only obligation was to do no harm to others in the exercise of one’s rights. People viewed ownership of land as the path to wealth, autonomy, and status. Ownership provided a circular justification for property rights that were themselves seen to naturally flow from ownership.

By the end of the nineteenth century, Blackstone’s conception of property had become outdated. Interests in land were no longer the principal objects described by the law of property. The physicalist notion could not express all sorts of new property interests that were coming into being, especially intangible property such as business goodwill, trademarks, trade secrets, and shares of corporations—things that nobody could see or touch. A reconceptualization of property was in order, and it came from two sources, one intellectual and one social.

On the intellectual front, academics known as Legal Realists and Legal Pragmatists engaged in a common enterprise of critiquing the classical conception of property as defined by Blackstone. These were not writers who were organized in any formal way, or who agreed on any particular philosophy. Matters of social justice and the role that private property played in structuring social relationships concerned many of these writers. They saw property as power, and they wanted American law and politics to adapt to changing economic and social conditions to achieve social justice. They were writing in the first half of the twentieth century, a time of great economic and social upheaval in the United States—times of economic boom as well as the Great Depression, a time of increasing industrialization and concentration of economic wealth, increasing class conflicts, and two World Wars.

From these writers, we can discern two major objections to the classical liberal conception of property. The first was that Blackstone’s description of property was simply inaccurate in that it wrongly suggested a

property owner had complete and absolute freedom in the use and control of his property when, in fact, this was not true. It failed to take into account that full exercise of one person's rights could cause harm to others, even though the law did not always recognize it. The second objection was that Blackstone's conception *masked* the political function of property as power. Legal Realists and Legal Pragmatists wanted to develop a notion of property that *exposed* the social and political character of private property.

One of the most important contributors to a new theory of property rights was a professor at Stanford Law School in California, Wesley Newcomb Hohfeld. He published a now-famous article in 1913 entitled "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning." In the article, Hohfeld argued that property does not consist of things, but rather fundamental legal relations between people. He categorized these relationships as four legal opposites and four legal correlatives. Hohfeld's theory conveys the idea that one who has a right is opposed by another who has "no-right," and that these opposites are a set of legal relations that can describe any kind of property. These legal relationships are sets of claims and entitlements in tension with each other, held by people against one another. For example, a person who has a right to possession of property has a right to exclude others from trespassing, and if he chooses to exclude others, those persons have a corresponding no-right to enter upon the property. The person who has the right is supported by the state because he may enforce his right in court. The person who has no-right has a duty to stay off the property and can be sued for trespass.

Hohfeld's analytical tool identified eight basic legal rights, but Hohfeld characterized them as rights, powers, privileges, and immunities. A privilege is permission to act without being liable for damages to others and without being subject to state power to prevent those acts. A power is the ability to change legal entitlements held by oneself or others and to enforce those changes at law. An immunity allows one to be secure in his own entitlements and to prevent them from being changed by others. Each right was opposed in this framework by a negative right, or the absence of the entitlement that was embodied in the positive right.

Hohfeld's analysis revealed that ownership is not the simple and non-social relationship between a person and a thing that Blackstone described. "Ownership [i]s a complex set of legal relations in which individuals [a]re interdependent." "Because ownership is relational, no person can enjoy complete freedom to use, possess, enjoy, or transfer" their assets; conflicts and interferences with rights are unavoidable. The real question in every case is how courts make the value choices about which interferences with rights should be prohibited or permitted.

Hohfeld maintained that the answer to the question did not follow from any logic inherent in the rights themselves; rather, whatever policies society decided to promote dictated the answer. He wanted “to highlight and clarify the social and political dimensions” that underlie legal decisions that recognize, or fail to recognize, a privilege or a right in any person. Put another way, his method of analysis exposed that the legal rules surrounding property are not a matter of neutral deductive reasoning that followed from the fact of ownership itself, but from a policy determination forced by a conflict between competing interests. Hohfeld did not challenge the policy determination itself, that is, his construct did not give the answer as to which side should be preferred when competing interests conflict; he was more interested in having courts acknowledge that judges were making policy choices that reflected social values. In that sense, Hohfeld was not as interested in the normative discussion as other writers were. His work was less obviously politically motivated, but his analysis represented a breakthrough in reconceptualizing property law in the United States.

Many other academic writers built upon Hohfeld’s work. In the 1930s, the ALI adopted his conception of property as a set of social relations. According to the Restatement of 1936, “[T]he totality of rights, powers, privileges and immunities which” one could have with respect to a “thing” are “complete property in [the] thing.” The totality may vary in time and place because common law and statutes change, but at any one time, a person who holds complete property in a thing is deemed the owner. The Restatement also made clear that one may hold less than every single interest in a thing and still be considered its owner. For example, a person who owns the totality of property interests in a piece of land and then mortgages it to a bank is still considered the owner, subject to the mortgage. The owner would still be considered the owner if, in addition to the mortgage, he has given away possession of the property by allowing his mother to live there for the rest of her life. The owner may also have given an easement or license to cross the property to his next-door neighbor. None of these parts of ownership that he has given away would deprive him of ownership because he would still have many rights left. At the same time, the people to whom the owner has given a piece of the property also own interests in that property. These interests are more limited and are less than complete ownership, but they are all rights that are secured by law and can be enforced against the owner, if necessary. This illustrates the Hohfeldian notion that rights in property may be divided into many smaller segments or interests. This is the essence of the bundle of rights concept.

No one is quite sure where the terms “bundle of sticks” and “bundle of

rights” came from, but we can identify the sticks or rights that make up the bundle. In the early 1960s, A. M. Honore wrote an essay on ownership in which he attempted to list the incidents of ownership that have come to be known as the bundle of rights. Honore claimed that his list of incidents of full ownership were “common to all ‘mature’ legal systems.” The list below provides general definitions. They are subject to variations, qualifications, and limitations on scope that come from common law rules, statutes, or private agreements that the owner has entered into, like the example I just discussed.

1. The right to possess—the right to “exclusive physical control of the thing owned. Where the thing cannot be possessed physically” because it is intangible, “possession may be understood metaphorically or simply as the right to exclude others from the use or other benefits of the thing.”
2. The right to use—the right “to personal enjoyment and use of the thing as distinct from” the right to manage and the right to the income.
3. The right to manage—the right “to decide how and by whom a thing shall be used.”
4. The right to the income—the right “to the benefits derived from foregoing personal use of a thing and allowing others to use it.”
5. The right to capital—“the power to alienate the thing,” meaning to sell or give it away, “and to consume, waste, modify, or destroy it.”
6. The right to security—“immunity from expropriation,” that is, the land cannot be taken from the right-holder.
7. The power of transmissibility—“the power to devise or bequeath the thing,” meaning to give it to somebody else after your death.
8. The absence of term—“the indeterminate length of one’s ownership rights,” that is, that ownership is not for a term of years, but forever.
9. The prohibition of harmful use—a person’s duty to refrain “from using the thing in certain ways harmful to others.”
10. Liability to execution—liability for having “the thing taken away for repayment of a debt.”
11. Residuary character—“the existence of rules governing the reversion of lapsed ownership rights”; for example, who is entitled to the property if the taxes are not paid, or if some other obligation of ownership is not exercised.

It is not necessary to hold all eleven of Honore’s incidents to be

considered a *per se* owner of property, but some incidents are clearly more important than others. Although it is often said that the right to possession is one of the most important rights, it is not necessarily more important than the right to capital, which is the right to alienate or dispose of the property. Honore's incidents are also naturally subsets of other incidents. If one has a right to capital, or to exercise dominion over property, he also has a right to use, unless he has exercised his power to give it away temporarily to a tenant. One might own the right to receive the income from a piece of property, but not own the property itself because one lacks the right to dispose of it. The combination of some incidents can add up to ownership rights, depending on the context, and without all the incidents being present. Ownership can be shared in an almost infinite variety of ways. Thus, the concept of the bundle of separate sticks, with different "owners" holding different sticks, meant that property ownership was a very flexible concept, largely unconcerned with the object itself.

Honore's incidents of ownership demonstrate Hohfeld's concept of property rights as "different sorts of rights and rights-correlatives" that may aggregate in many different ways to explain ownership. For example, the right to capital is a legal right that is enforceable against others. If I own the right to capital, I can convey or sell the property to somebody else; I can waste it by refusing to maintain it and letting it fall into disrepair; I can destroy it by razing a building on my land. These rights are not unlimited, however, because laws affect how I may convey the property, how I waste it, or how I destroy it.

Limitations from common law obligations or statutes protect other societal interests, like the environment, or the public health and safety. For example, I may not have the right to fill in a wetland so that buildings can be erected on it because various state and/or federal laws exist that require wetlands to be maintained in their natural state. I may not have complete freedom to harvest the forest on my land without complying with applicable environmental regulations. But to the extent that I have a right to do these things, such a right is legally enforceable. The prohibition of harmful use, on the other hand, is a duty. I have a duty not to use my property in a way that interferes with the rights of others. If, in the act of destroying my property, I cause a flood on my neighbor's property, I will have created a nuisance. So the list of incidents in Honore's bundle, like the Hohfeldian equation, describes property ownership as entailing both rights and obligations.

American property law cases in which competing rights were decided have frequently articulated various specific property rights included in Honore's list of incidents. There are cases involving air rights, or the right

to use the air above a piece of property; lateral support rights and surface rights, which might compete when different entities own subsurface and surface rights; water rights of riparian property owners, or the right to divert subsurface water; and all of the rules about use, exclusion, and alienation regarding estates in land, future interests in land, easements and licenses, the right to quiet enjoyment, the bar against controlling land indefinitely after one's death by certain legal devices, the law of tenancies, and so forth.

Academic discourse in the early part of the twentieth century fueled acceptance of the bundle of rights. But other social influences also supported the concept, and it was perhaps the combination of vigorous academic debate and social, economic, and political influences that created acceptance for the bundle of rights. The United States economy was changing in a manner that demanded a new conception of ownership that took into account complex legal and financial relationships. In the nineteenth and twentieth centuries, the economy changed from an agrarian-based economy to an industrial one, and then to an information-based economy. A theory of property had to take account of intangibles, and it had to disaggregate ownership into a variety of interests held by many stakeholders. It had to work well for an economy promoting value, trade, and security in capital investments in all kinds of business enterprises. Property law could not remain stuck in a physicalist, land-centered theory that was irrelevant to or inadequately accounted for new forms of property.

Moreover, in the twentieth century, there were dramatic changes in the social and political realms that led to the rise of the regulatory state. New pressures confronted the government, caused by urbanization, scientific and technological advances, rising standards of living, demands for environmental and consumer protections, racial unrest, and other matters. These pressures called for an adaptable concept of property that could be defined according to social needs and values. A concept of property that allowed absolute control by a private individual did not allow for what many saw as essential governmental regulation. Therefore it was pragmatic to conceive of property ownership as a bundle of rights that was infinitely malleable and adaptable, unhindered by formalistic restraints or narrow conceptions. It could change with the times to accommodate limitations or impose obligations by the government to advance important social policies.

The civil rights movement provides a prime example. The movement began to attack legal segregation in America, law by law, from the desegregation of public accommodations, which included hotels, restaurants and businesses open to public trade, to the desegregation of the private housing market. Eventually, civil rights laws were passed that affected what owners of private property could do with their land. If an owner

operated a restaurant, he could not refuse to serve people on the basis of race. If an owner of a house exercised his right to dispose of it, he could not refuse to sell to a person solely on the basis of race. These are examples of how government regulation diminished the absolutist view of ownership as complete dominion and control.

It would be inaccurate to suggest, however, that one day the physicalist notion died and the bundle of rights rose up to take its place. It is more accurate to say that they coexisted, with the bundle of rights increasingly becoming the dominant paradigm in law. The academic debate has been far from static since the 1960s, when Honore published his version of the bundle. Other writers have entered the fray and pushed to expand the bundle of sticks or to criticize it as an inadequate theory. Many in academia are now struggling with new concepts of property altogether. Much of the struggle, however, focuses on normative discussions that attempt to justify property rules or to urge alteration of them based on the writer's preferred social values. Following is an overview of some of the current theories being advanced as they relate to the concept of the bundle of rights.

For some writers, property law should promote environmental values. These writers seek a definition of property that promotes a shared sense of stewardship of land because of its unique role in the health of an ecosystem. These writers want to move back toward a physicalist notion of property so that environmental values can be respected. One writer suggests that the metaphor of the bundle of sticks should include a piece of "green wood" because green wood is alive and rooted in the earth. The stick of green wood represents "the duty of environmental context" defined as a mandate that the basic environmental context of land be preserved in accordance with environmental ethics. Thus, the rights of a person who owns a piece of land abutting the seashore would be curtailed by the interdependence of that piece of land with its ecosystem.

Another environmental writer suggests that the bundle of sticks, with its emphasis on rights and correlative tensions, does not allow for an adequate understanding of property as shared interests in an object. In this writer's vision, the various "stakeholders" or "rights-holders" should be recognized not merely as enjoying certain entitlements, but also as being subject to various duties and responsibilities. Recognizing that humans are part of the ecological community implies a duty to nature. According to this ethic, landowners owe as much to future generations as to other current stakeholders.

Another theorist argues that there should be a "personhood" concept of property, one that recognizes that "things" in the physical world are important to the "development of human identity and the security of human

freedom.” Property that is bound up with a person’s identity should be protected more than fungible goods, which are replaceable. In this theory of property, the emphasis is on things, rather than the bundle of rights, and the need to categorize and recognize, in law, that certain things cannot be “alienated” or transferred.

On the other end of the spectrum, the law and economics movement treats property exclusively from a market perspective. The market perspective treats all resources that have market value, defined as exchange value, as property. From this perspective, the social value question is why the law prohibits markets in certain goods and not others. For example, why do we prohibit the sale of babies or human organs, but not the sale of other things that have exchange value? To the law and economics people, the critical issue in any system of property rights is that rights must be freely transferable.

Because the bundle of rights recognizes that many individuals can have simultaneously existing, legally recognized interests, it is essential to an economic analysis of property. The commodification of property law, by which value is measured by whether a thing can be bought and sold, is consistent with the bundle of rights concept. Since the United States is currently in the grip of law and economics theory, it is probably safe to assume that the bundle of rights concept, despite its many critics, will remain in use for the foreseeable future.

Thus far, we have been talking about property rights as relations between people or entities in the context of private rights, that is, property rights as rules that resolve the conflict between competing private interests. But the most significant impact on various incidents of the bundle of rights has come from the contest between private rights and the public interest. This is a contest of constitutional dimension because it involves the Fifth Amendment to the United States Constitution, which is a part of the Bill of Rights. The Fifth Amendment prohibits the taking of private property for public use without just compensation. Two important cases in recent history involve this so-called Takings Clause of the Fifth Amendment and private property rights. The first decision implicates directly the bundle of rights and the common law property rules that make up the bundle in each state. The second decision is about the meaning of “public use.” Many commentators view it as threatening the very foundations of private property—in Honore’s list, it would be the right to security or the defense against expropriation. These two cases invite a discussion of the physicalist notion of property, the more flexible bundle of rights concept, and why the two concepts continue to exist. What is interesting about these cases is how much the Justices who decided them were rooted in both legal concepts. At

the same time, the Justices were also influenced by what we might call the popular or traditional understanding of private ownership in the United States, which might be summarized in the expression, “my home is my castle.”

The government has the inherent power to build the infrastructure that citizens rely upon to support the general welfare of society—highways, bridges, schools, government buildings and so forth. In the United States, if the government has to acquire private land to carry out a public purpose, it may do so through a doctrine known as eminent domain. Eminent domain is a necessary attribute of sovereignty inherent in the power of the federal and state governments. The power of eminent domain is limited by the Fifth Amendment to the Constitution, which requires the federal and state governments to pay the landowner the fair market value of land that the government takes for a public purpose. The property owner is entitled to contest the public purpose for taking the land, as well as the compensation, but the government, if it is acting reasonably in the public interest, is likely to prevail. These kinds of cases in which a physical piece of property is actually taken from the owner are the clearest examples of takings cases under the Fifth Amendment.

In the exercise of its inherent police power, government also undertakes many actions that control land use by regulation rather than acquisition. Police power is the power of government to regulate human conduct to protect or promote public health, safety, and welfare. An example of this is zoning—redrawing the acceptable uses for certain areas of a city, limiting some areas to commercial, some to residential, and some to industrial. Another example is the government’s right to shut down a business that is causing a health hazard or nuisance. No compensation may be due if the government is acting pursuant to its inherent police power, unless the regulation goes “too far.”

On the compensation spectrum, what is too far? On one end is a physical taking where compensation is always due, and on the other is an indirect effect on property from a general law of broad applicability for which no compensation is due. Between these two opposites, one must locate the meaning of “too far.” This is the law of regulatory takings. The issue in a regulatory takings case is whether the government has to pay somebody even though there is no physical invasion of the property itself, and even though it is acting legitimately pursuant to its police power. The first case I will discuss, *Lucas v. South Carolina Coastal Commission*, decided in 1992, is an example of a regulatory takings case.

The *Lucas* case involved an owner who purchased land on the Isle of Palms, a barrier island east of Charleston, South Carolina, for the purpose

of building beachfront houses. Lucas, a residential developer, had been developing property on the Isle of Palms since the late 1970s. This was a fragile coastal area that had been extensively regulated for many years. In 1986, Lucas bought two lots in a residential subdivision and intended to build two single-family homes similar to those of his neighbors. At the time he bought the lots, there were no restrictions on building single-family houses in this area. Other houses had already been built on the beachfront.

South Carolina barrier islands, like the Isle of Palms, have miles of sand dunes, so that the shoreline erodes and accretes from year to year, depending on tides, storm surges, hurricanes, and normal erosion. South Carolina is regularly subject to hurricanes of varying severity. In 1988, the South Carolina legislature passed the Beachfront Management Act to preserve the natural operation of the dune system, which acts as a barrier to provide storm breaks, and to prevent harm to human life, property, and wildlife. The Act effectively precluded construction of homes too close to the shoreline because development undermined the dunes. To implement the legislation, the South Carolina Coastal Commission created a protected beachfront zone in which no building was allowed. The boundary lines were set based on scientific evidence of beach erosion rates.

Unfortunately for Lucas, his two lots were in the protected zone, so he could not realize his development plans for the lots. Lucas went to court asking for compensation for the lost economic value of his land. He did not challenge the state's authority to act under its police power, but merely alleged that the Beachfront Management Act had deprived him of all of his property's value. In other words, despite a valid exercise of the police power, this regulatory taking had gone "too far," and Lucas argued he was entitled to just compensation. The trial court agreed with Lucas, making a finding of fact that Lucas had been deprived of all economic value of his land and awarding him approximately \$1.2 million dollars. The South Carolina Coastal Commission, which was responsible for the line-drawing on the beach and which had denied Lucas a permit to build, appealed to the South Carolina Supreme Court.

The state supreme court reversed the trial court, relying on previous jurisprudence of the United States Supreme Court under the Fifth Amendment. It was critical to the state supreme court that Lucas did not challenge the legislative findings, or statement of purpose, of the Beachfront Management Act. This allowed the court to find that Lucas had conceded the beach and dune area of South Carolina shores was an extremely valuable public resource and could be regulated under the police power. The court located Lucas's case at the no-compensation end of the spectrum.

The United States Supreme Court granted certiorari and reversed, finding that “when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good . . . he has suffered a taking.” Justice Scalia wrote the opinion, concluding that “total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation.” According to Justice Scalia, it was as if the South Carolina Coastal Council had actually taken title from Lucas. This “total taking” located Lucas’s deprivation on the other end of the spectrum from the police power cases, and thus required the government to pay compensation no matter how compelling the government interest asserted. In fact, under these circumstances, the government interest was irrelevant. This was a major departure from prior law, where the regulatory takings claim was subject to a multi-factor balancing test that considered the nature of the government interest against the economic effect on the landowner and interference with his reasonable investment-backed expectations. Justice Scalia took all that balancing out of the equation by viewing this case as a “total deprivation.”

Justice Scalia then created some exceptions to his categorical rule. He acknowledged that there were some areas of legitimate regulation of land that would *not* require the government to pay the owner, regardless of the degree of economic loss suffered. The Justice was referring to the “noxious use” or nuisance-like cases that had been considered legitimate exercises of the police power in the past, and on which the state supreme court had relied in denying compensation. Justice Scalia did not see Lucas’s case as presenting such a “noxious use” because he refused to accept what the legislature said when it passed the Beachfront Management Act about how much the coastal regions needed protection. He stated, in effect, that unless the legislative staff is stupid, it can write a piece of legislation justified by preventing harm to the public good. Whether the threat of harm truly exists is another matter; indeed, he stated that the “distinction between ‘harm-preventing’ and ‘benefit-conferring’ regulation is often in the eye of the beholder.” Justice Scalia reasoned that although the Beachfront Management Act was phrased in terms of harm, it could just as easily be seen as a benefit to the ecosystem. Therefore, he refused to rely on legislative justifications of harm because they no longer provide the desired “objective, value-free basis” for upholding a regulation.

Instead, Justice Scalia stated that the question must turn on citizens’ historic understanding of the bundle of rights that they acquire when they take title to property. So, if the state wants to avoid compensating landowners for regulatory takings, the state cannot enact any more restrictions than those that already exist in the owner’s bundle of rights.

This would require an inquiry into the nature of the owner's title and the "background principles of the state's law of property and nuisance" as a threshold matter. Essentially, the use of background principles may be summarized this way: if a landowner could not put the property to a certain use under state law at the time he took title, then a regulation that later prohibited the same conduct took nothing from him. Because the government would not be taking anything, the government would not have to pay the landowner even if the property were rendered "valueless" by the regulation. Applying the new principle and the exceptions to Lucas's case, to take the property without compensation, the Coastal Commission would have to show that Lucas's proposed development was a common law nuisance under South Carolina law.

Justice Blackmun dissented, saying, "Today the Court launches a missile to kill a mouse." What Justice Blackmun meant was that the majority had created a major new categorical takings rule to fit a narrow group of cases—ones in which a general law of broad application deprives the landowner of 100% of the value of his land—in case where even that finding was highly suspect. Although the majority was concerned with the nature of the landowner's rights, it considered only the economic value to be gained from development of the property. Justice Blackmun argued that there was more to the bundle of rights than just the economic value of property. The bundle included other rights that had value, such as the right to exclude others and the recreational value of the land.

Justice Blackmun also took issue with Justice Scalia's failure to defer to the state legislature when it characterized the harm to the public interest from undermining the operation of the ecosystem of the dunes. He thought the common law doctrine of nuisance was a weak reed on which to rest Justice Scalia's new rule. Justice Blackmun argued that common law principles of nuisance are not "value-free" because state courts would be required to make exactly the same decision that the South Carolina legislature made—whether the use proscribed by any regulation is harmful. In fact, Justice Blackmun even suggested that there are no real principles in nuisance doctrine other than that an owner should not use his property in a manner that harms others. This leaves a lot of room for social value choices to resolve competing public and private interests. Justice Blackmun thought that elected officials, i.e., state legislatures, were just as capable of making those choices as judges.

Although there were other opinions in the case, what is interesting about the majority and the Blackmun dissent is how each opinion invoked the bundle of rights. The trend in takings law describes the bundle of rights in market terms, sometimes described as the "commodification" approach

to defining property rights. The majority in *Lucas* took another step in that direction. If an injury to property, like the development restriction here, can be defined as a stick in the bundle, then it is easy to conceptualize that government is taking only one stick. The focus then is on the market value of the stick. This is essentially how the majority viewed the taking in *Lucas*—compensating Lucas for the loss of that stick, which happened to be his preferred use of the property and the most economically intense, but completely ignoring the rest of the bundle. As the dissent pointed out, Lucas retained the right of exclusion, the right of access, the right to alienate, and a reduced right of use. Yet these “sticks” were valueless to him as against that interest that was defined by the market as most valuable (i.e., the economic interest to develop your land), which was so valuable that it was as if the government had taken title to the whole piece of property.

Justice Scalia also turned to the bundle of rights when requiring courts to determine what was in each landowner’s bundle as a threshold issue in any regulatory takings case. By insisting that state regulatory restrictions not go beyond whatever restrictions were present in the owner’s bundle of rights, or the state would have to pay, the decision created a high hurdle for states seeking to enact aggressive environmental regulations. Clearly, in the *Lucas* case, nuisance law would not have prohibited the proposed development because there were already houses built in the same area where Lucas wanted to build. It would not have been considered a nuisance at common law to do exactly what everybody else in the neighborhood was doing.

One can also view Justice Scalia’s opinion as being rooted in the physicalist notion of property. One commentator characterized this notion as the “castle” model of ownership. According to the castle model, “within the borders of one’s land, the owner is supreme and can do whatever he wishes,” limited only by the obligation not to harm the interests of his neighbors. Under the castle view, as applied by Justice Scalia, harm to neighbors is judged by the owner’s rights at common law, unchanged by evolving social values or new science. So, even though Lucas’s building plans might cause harm to the ecosystem outside his property boundaries, the castle model would not recognize it as a legal harm for which Lucas would be responsible at common law. Under the castle model, as long as Lucas was not doing harm in the common law sense, the government regulation that took away Lucas’s ability to build infringed upon his basic right to do with his property what he wished, so full compensation was required. This approach resembles the classical liberal view of property, which focuses on the right to exercise absolute dominion and control within

the physical borders of the property itself, and allocates power to landowners based on a fixed set of rights. It reflects an underlying normative choice about who wins when there is a conflict between the government and the private property owner. As we see in *Lucas*, this liberal view of property remains viable, no matter how much we also conceptualize property rights as a bundle of sticks.

At the time of the decision, *Lucas* was hailed as a victory for private property against government interference by regulation. In fact, just the opposite has happened—the case has been a victory for government. So much so, in fact, that one commentator has referred to the post-*Lucas* decisions as demonstrating the law of unintended consequences. What has happened post-*Lucas* is that state courts are not interpreting “background principles” of state law quite as narrowly as Justice Scalia might have wished. As a result, state governments faced with claims for compensation in regulatory takings cases have successfully established defenses based not only on nuisance, but on a variety of other background principles that have existed from the beginning of our history. For example, the public trust doctrine protects the right of the public to use the beach between high and low water marks. This was once an attribute of the English Crown that then became a right of the Republic. Thus, using the public trust doctrine as a background principle might allow the government to regulate beachfront property without compensating the landowner.

Can the Supreme Court do anything about this? Remember that Justice Scalia deferred to state court judges to decide these issues, rather than state legislatures. Because state judges are interpreting principles of state common law, these decisions are virtually beyond review by the United States Supreme Court. Moreover, these defenses are now being raised in a broader range of takings cases, including ones that do not involve “economic wipeouts.” Interestingly, in subsequent takings cases, the Supreme Court has rejected Justice Scalia’s bright-line categorical approach. Instead, the Court returned to the government/landowner-interests balancing test in effect prior to the *Lucas* decision. In short, the *Lucas* decision, both hailed and reviled at the same time, has actually spawned a very different jurisprudence from that originally expected.

The second takings case to discuss is *Kelo v. City of New London*. Decided in 2005, it is more recent than the *Lucas* case, and perhaps even more controversial. The *Kelo* decision is considered controversial because the Court allowed a municipal government to take away the homes of ordinary people, under the power of eminent domain, for the purpose of economic redevelopment. Here, the City tried to take a depressed area and implement a plan of urban renewal. Unlike *Lucas*, the case is not about

compensation for loss of expected profits because the City of New London was actually taking title to the properties. Therefore there was no question that compensation must be paid under the Constitution. The issue in *Kelo* was whether the government should be able to take the property by eminent domain in the first place; that is, whether economic redevelopment qualifies as a proper “public use” under the Takings Clause in the Fifth Amendment. The decision has been viewed as threatening the very notion of private property itself—the right to be free of expropriation except under very limited circumstances. For our purposes, *Kelo* has a connection to the *Lucas* case in that the absolutist or “castle view” of property, especially with respect to residential real estate, was very much in evidence, both as a legal and a popular concept.

In *Kelo*, the City of New London, Connecticut, a New England state on the Eastern seaboard, approved a development plan for a depressed area of the city known as Fort Trumbull. The comprehensive plan intended to create more than 1000 jobs, increase tax and other revenues, and revitalize the city economically, including its downtown and waterfront areas. The New London Development Corporation (NLDC), a private nonprofit entity, was designated to implement the development plan. Developers intended the redevelopment to coincide with the construction of a \$300 million pharmaceutical research facility operated by Pfizer Inc. that would be located adjacent to Fort Trumbull. The hope was that Pfizer’s facility would draw new business to the area and serve as a catalyst to the revitalization plan. NLDC conducted public hearings to educate the people of New London, and the development plans went through several levels of state and local administrative review.

The NLDC purchased most of the property from willing sellers, but some property owners were not willing to sell. For these properties, the City proposed to use eminent domain to condemn the property in exchange for just compensation. Susette Kelo, the first named plaintiff in a lawsuit challenging the City’s right to condemn, was among those nine property owners who refused to sell. Combined, the nine petitioners in the *Kelo* case owned fifteen properties in Fort Trumbull. Ten were used by an individual or a family; the other five were held as investment properties. These were not “hold-outs” trying to increase the compensation owed them by the government. They were mostly residential owners who simply did not want to give up their homes. Petitioner Wilhelmina Dery had been born in her house and had lived there her entire life, since 1918. Her husband, also a petitioner, joined her in the house, and they had lived there for the duration of their over sixty years of marriage. Their son lived next door in a house they gave to him as a wedding gift. There was no allegation that these

houses were “blighted” or in disrepair in any way; they were condemned merely because they were in the path of redevelopment of Fort Trumbull. At the same time, there was no allegation of an improper purpose or lack of good faith on the part of the City, nor any intent to prefer any particular private developer or corporation. No municipal official was going to make money from the project. It was simply urban renewal.

But the critical fact in the *Kelo* case was that the particular properties being taken were not going to be used by the public after the renewal project was completed. Some of the properties were located in what was planned as office space that would be owned by a private developer. The other properties were designed to be used as park or marina support, which developers envisaged as either a parking lot or retail services that might be used by the public. Therefore, the government could not argue that the properties were being taken for a specific public use, but only for a broader public purpose.

At the time, the laws of the State of Connecticut provided that “the taking of land, even developed land, as part of an economic development project was a ‘public use’ in the ‘public interest.’” Therefore, the Connecticut Supreme Court upheld the taking as lawful. The petitioners appealed to the United States Supreme Court on the ground that the Fifth Amendment prohibited the taking because “economic development” is not a proper “public use.”

The Supreme Court upheld the taking in an opinion by Justice Stevens. He began his opinion with the proposition that all American landowners know and believe in their hearts that the government “may not take property of [landowner] A for the sole purpose of transferring it to another private party B, even though A is paid just compensation.” This is the general rule. Recall that this is Honore’s incident in the bundle known as the “right to security.” On the other hand, Justice Stevens said that it was equally true that the government could “transfer property from one private party to another if future ‘use by the public’ is the purpose of the taking,” using the condemnation of property for a railroad or other common carrier as a familiar example. Justice Stevens concluded however, that “neither of these propositions . . . determines the disposition of [the *Kelo* case].”

Instead, Justice Stevens recited a long history of court precedent in which “public purpose” had evolved as a more logical limitation on the right of the government to take private property than whether the expropriated parcel would be open to public use. In reviewing the City of New London’s plan, he emphasized the broad public purpose of the plan, its comprehensiveness, its lack of improper purpose, and the fact that it was not adopted to benefit any particular class of identifiable individuals. As

such, even though the specific pieces of property might end up in private hands, the plan satisfied the public purpose requirement. Justice Stevens granted great deference to the City and its legislative body to decide what public needs justify the use of the takings power. He relied on the Court's precedents over the last 50 years to hold that economic development is a function of government. He noted that sometimes, as the Court held in the past, public purpose is best implemented through private parties, and that "public ownership is [not] the sole method of promoting the public purposes of community redevelopment projects." Therefore, he rejected a bright-line rule that economic development that transfers property A to private owner B is per se unconstitutional.

Although Justice Kennedy joined in Justice Stevens' opinion, he also wrote a separate concurring opinion. Because his vote was necessary to make up a majority in the 5-4 decision, what he had to say will likely prove to be more important than Justice Stevens' opinion. Justice Kennedy advocated that when an economic redevelopment project transfers property to other private property owners, courts should give the plan at least some heightened level of scrutiny to make sure that nothing improper is occurring. If it is clear that there are no improprieties, then deference should be given to the local authorities to decide whether the planned use is beneficial to the public.

The surprise came from Justice O'Connor. On her way to retirement, Justice O'Connor delivered the most passionate dissent of any she has written in her twenty-five years on the bench. It had to be passionate because Justice O'Connor departed from the court's previous decisions, including one she had authored herself which was consistent with the result reached by the *Kelo* majority. Justice O'Connor attempted to distinguish the previous cases and characterize the *Kelo* holding as an unwarranted expansion of the meaning of public use. She did acknowledge, however, that "this troubling result [meaning the majority opinion] follows from errant language" in previous cases that had equated the breadth of the state's police power with its eminent domain power. She dismissed the "errant language" as dicta and took a completely different stance—that the police power and public use cannot always be equated. In other words, the City's power to take property, even for a legitimate exercise of the police power, should be subject to some constraints that should be reviewed by courts. Because the City of New London was taking property from owner A and giving it to another private owner B, according to Justice O'Connor, it was unconstitutional, even if it satisfied a broader public purpose.

Most importantly, Justice O'Connor raised the temperature of the case by stating that now "the specter of condemnation hangs over all property."

“Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.” These words have provided the rallying cry for private property rights and are the best expression of what was bothering Justice O’Connor. She was concerned that if the property interest being taken away was not harmful or producing a public nuisance, then it was unfair for the government to take it away so that it could be put to a more productive economic use by somebody else. She harkened back to Justice Scalia’s point in *Lucas* that only a “stupid staff” would be incapable of articulating a public use for an economic development project. Therefore, she was unwilling to abdicate what she saw as the Court’s responsibility to review, without deference, the constitutional question of whether the public use was truly public.

After the case was issued, the backlash began in the media and the halls of Congress and state legislatures. Conservatives, liberals, and libertarians combined to express outrage that the Court had taken an unwarranted step against private property that was an activist departure from precedent. One disgruntled libertarian petitioned local officials in New Hampshire to take Justice David Souter’s home and replace it with the “Lost Liberty Hotel.” Editorials were written about the horrendous result of taking the homes of citizens to give the property to private developers. Most people complaining probably did not understand that the *Kelo* decision was very consistent with precedent; this was not the first time the Court had permitted property to be taken for redevelopment. It was actually the dissenters who were breaking new ground and retreating from the Court’s decisions of the last 50 years, just as the majority had in *Lucas*. Even if the case had been accurately and fairly reported, I am not sure it would have made a difference to the opponents of the decision.

At this point, we are too close to the *Kelo* decision to determine what its effects will be. As we saw with *Lucas*, the hysteria surrounding the decision does not always result in accurate predictions. The focus of the debate has shifted to the states, and we may not see another significant condemnation case coming from the Supreme Court for a while. It will be ironic if the bright-line rule rejected by the Court wins acceptance in state legislatures. State legislatures are not entitled to overturn constitutional decisions of the U.S. Supreme Court, but they can define what they mean by public purpose in the exercise of eminent domain, and they can eliminate redevelopment as a public use. Under the present majority opinion, the Court would defer to that statement of public purpose. So, in some respects, the *Kelo* plaintiffs may have lost the battle, but won the war.

The interesting question is why did *Kelo* cause all this fuss?

It is the castle view of property writ large. Home ownership is the

embodiment of the “American Dream,” and your home is your castle. Home owners have certain expectations that come with home ownership—status in the middle class, privacy, in the sense that others can be excluded, complete dominion to do with their property as they wish, and the belief that their property is secure, in the sense that it cannot be taken away and given to somebody else. These expectations may not always be fully consistent with legal reality—there are, in fact, significant limitations on ownership rights—but they are true enough in most cases to have considerable force in how ordinary people think and feel about their property. People do not see their property simply as a bundle of rights that has exchange value. They see their property as a “thing,” and it is the “thing” that matters. If that “thing” is one’s home, the public’s conviction is that it is unfair to intrude upon it. This world view has enough force to influence the normative question about who should win when competing rights conflict.

This is especially true when private ownership rights compete with government, as we saw in *Lucas* and *Kelo*. Then it is a case of individual rights and liberty, which are so much a part of the American psyche. These rights have been bound up with the preservation of private property and landed interests from the revolution forward. Early in its history, the United States rejected feudalism in favor of allodial ownership; a person could freely own land in his own right and owe no duties to a sovereign lord. Ownership of property was seen as an important source of status and power. Until 1870, only white male property owners could vote in national elections. Private property ownership is still equated with liberty, so when it conflicts with governmental interests, and governmental interests win, as they did in *Kelo*, the predictable reaction will be swift and hysterical.

In the end, whether or not a takings case is framed as a liberty interest, the decision always comes down to a fairness question. In *Lucas*, the question was whether it was fair to make Lucas bear the brunt of years of ill-considered development on the South Carolina coast, without paying him for the loss of his reasonable investment expectations when he tried to do what everybody else had done. Certainly, there was another way to look at this social value question—that Lucas should have expected that the fragile coastal area where he had been developing property and that had been subject to extensive regulation for years would be subject to further regulation; that it would be irrational to argue that the legislature should not be able to act on developing knowledge about the critical importance of preserving the dunes; and that any reasonable view of the police power should permit environmental regulation to prevent harm to the ecosystem without government having to pay. Clearly, by making government pay to

regulate, the Court picked the castle view favoring private property rights.

In *Kelo*, the question was whether it was fair to make the plaintiffs bear the burden of relinquishing their property for the economic improvement of the city as a whole. If the *Kelo* properties were being taken for a specific public use, like a public park, the decision would not have caused a national controversy. But to give the properties to another private owner, even if it was in pursuit of a legitimate broad public purpose, added insult to injury. Although the arguments on the public side of the case were persuasive enough for the City to win, the question was difficult, the case was close, and the intensity of the dissent reflected the popular sense of outrage at such a taking.

Returning to the bundle of rights, we have seen that the concept has its utility in flexibility and adaptability; it is not a set of social values, but it can be useful to promote different value systems, such as the castle view or the commodification of property where property is defined by its exchange value. As an analytical concept, it does not resolve what a complete theory of property law would do, which is to resolve conflicts on a normative level—it does not resolve the fairness question when rights conflict. A more complete theory would define rights and obligations in property according to the social values that we want to promote, assuming that we, as a society, could agree on them. Using the bundle of rights concept, those who have property will continue to hold it and be supported in their rights and obligations by state power, with an emphasis on their “rights.” In the United States, we are far from changing the general distribution of property to achieve social justice. The vast majority of people do not want to outlaw private property; those who do not have it want it, and those who have it want more of it. So, while we may view property rights as a set of interdependent relations among people, legal decisions are still influenced by the normative choices of long ago. This is essentially where Professor Hohfeld started.

Any substantial change to the notion of strong private property rights will have to come from a societal threat of monumental proportions. It is possible that an increasing recognition of our collective effect on the world’s ecosystem and the advancing destruction of our climate may force us, and our courts, to accept restrictions on our “castle view.” As the environmental writers have emphasized, we need to have a system of property rights that recognizes the obligations of the social compact and good stewardship of the land. At some point, we will have to limit what we can do with fragile coastal areas, like Lucas’s property in Isle of Palms. Or we will have to say no to emission-producing coal plants and increasingly rely on conservation to reduce usage of electricity.

There may be non-environmental threats that will cause us to reevaluate the nature of our individual rights to property, like the high rate of unemployment that forced the City of New London to develop an urban renewal plan in *Kelo*. Whatever those threats may be, it is apparent that courts cannot be fixed in what was essentially a post-feudal notion that private property rights must be supported at all costs. Professor Hohfeld brought legal jurisprudence a long way by giving courts the analytical tools to understand property as a set of interdependent relations that involved both rights and obligations. That work evolved into the bundle of rights, but there has been much more emphasis on the rights, and less on the obligations. Any new theory of property rights has to emphasize broader obligations, as well as rights, if we are to confront the fairness question.

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