TAKINGS, MORAL EVOLUTION, AND JUSTICE

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Requiring compensation for takings protects property from potential appropriation by executive power or democratic majorities, but in doing so it perpetuates any injustices that exist in the initial distribution of entitlements. When through an evolution in our moral understanding we begin to realize that a class of entitlements is unjustly held, courts may begin to deny protection to those entitlements before we reform their holding through legislation.

This pattern held in the past in slavery cases,[1] and it is at work today in the treatment of land and natural resources in takings cases. We are on the verge of an understanding that land and natural resources are the common heritage of humanity and must be managed in a way that provides equal benefits for all persons in all generations. In advance of the full recognition and expression of this understanding in our legal institutions, courts are removing the protection of claims to land and natural resources against significant diminutions in value through regulation. The vestiges of protection that remain for claims to land and natural resources can be seen as safeguards within our imperfect institutions against the potential excesses of executive power and selfish political majorities.

To analyze the effect of developing notions of morality on notions of property, Part I of this Article presents a conception of justice embodying four concerns: equality, stability, efficiency and authority. Part II applies this conception of justice to argue that advances in our understanding of the requirements of equality sometimes necessitate legislation that eliminates the value of claims and does not provide compensation. Change occurs foremost in constitutional amendments, but our impatience with the slowness of the amendment process leads us to accept the pursuit of justice through politics, despite misgivings about the susceptibility of politics to selfish impulses. It is because of these misgivings that we accept judicial oversight of the political process. Part III explains why land and natural resources must be regarded as our common heritage and why they are not properly subject to claims of private ownership. Part IV analyzes four recent Supreme Court decisions as instances of deferral to the not-yet-consciously acknowledged idea that land and natural resources are our common heritage. The Court will allow the value of claims to land and natural resources to diminish greatly through regulation, without compensa-

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1. See L. Smiddy, Slave Law in South Carolina: The Emancipation Decisions 1, 119, 135 (1988) (unpublished manuscript, copy on file at Columbia Law Review).

tion, provided that the actions taken are circumspect enough to avoid the threat of unbridled executive or legislative expropriations.

I. Government Action as a Matter of Justice

To the extent that it is accessible to human understanding, "justice" can be defined as the consensus that people reach about who should be disappointed when expectations are incompatible. This definition makes justice not absolute, but relative to the group that reaches a consensus and to the presuppositions of their discourse. The idea of justice evolves as we become aware that our definitions and presuppositions lead to difficulties that can be avoided by an alternative framework.[2]

There is also a conception of justice as an absolute, the consensus that people would reach if they possessed infinite wisdom.[3] But since we do not possess infinite wisdom, we are unable to make reliable assertions about the content of this conception of justice. While the psychology of our limited minds may induce us to feel that we have grasped the indubitable absolute, sober reflection should lead us to realize that this cannot be so, that we are unable to communicate or even to think without presuppositions that affect our conclusions. Thus, all that is lost by foregoing a claim to the absolute is a certainty that was never actually available.

While this lack of absoluteness might seem to make any definition of justice totally arbitrary, such is not the case. The validity of the definition that someone proposes is determined by whether people concerned with the meaning of justice find that the definition accords with their understanding of justice. Such a definition is not arbitrary because not every proposal can gain acceptance.[4] No particular credential—judge, lawmaker or scholar—is required for participation in the effort to find consensus. All that is required is that others involved in the effort attend to one's words.

The effort to identify a consensus definition of justice involves the sequential treatment of issues that arise in discussions of it. To be communicable and usable, proposals for dealing with issues must not be as amorphous as, "Maximize total utility." Instead they must describe observable conditions. The resulting sequence of observable conditions that characterizes a potential consensus can have the appearance of a lexical[5] ordering of values. That is, rather than being framed in terms

2. This is similar to the way that scientific knowledge is not absolute, but rather the consensus of scientists at a particular time. H. Brown, Perception, Theory and Commitment: The New Philosophy of Science 151–55 (1977).

3. These dual definitions are parallel to Brown's dual definitions of truth. Id. at 153.

4. Cf. id. at 154–55 (making a similar point about how the fallible consensus of scientists regarding scientific knowledge is not arbitrary).

5. I borrow from Rawls this more manageable contraction of "lexicographic."

of "balancing" or "trade-offs," the conditions will be developed in order of importance, with each condition entirely subordinate to any that precede it. Thus, even if people would be willing to sacrifice some attainment of one concern for the greater attainment of another, the agreement they reach on a specification of justice will not show this.

The most important foundation of any theory of justice is a recognition of equality. The American consensus on this point was expressed in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal . . . ."[6] The Constitution's recognition of equality is expressed most prominently in the equal protection clause of the fourteenth amendment.[7] The understanding that separate was inherently unequal was central to the Supreme Court's ruling that segregated schools were unconstitutional.[8]

While it is generally agreed that our acceptance of inherent equality requires such civil equalities as equal protection of the laws, equal liberty, and equal voting rights, there is less agreement whether justice requires some form of material equality. Some theories have no role for any form of material equality.[9] Others require equality of material resources, adjusted for differences in genetic endowments.[10] Thus while the content of the idea of equality that is seen to be required of justice varies, justice always and foremost reflects *some* concept of equality.

Second in importance to equality in this conception of justice are the two concerns of stability and efficiency. Stability is attained when reasonably formed expectations are satisfied. Efficiency is attained by maximizing the sum of human satisfactions, measured in money.

Our commitment to stability is reflected in the constitutional requirement that takings be compensated[11] and in the general sanctity of property rights, which may mean anything from the right to traverse a path[12] to the right to be employed in a particular job.[13] Economists typically express their concern for stability in terms of the idea that every government action should be a "Pareto improvement," a change that makes at least one person better off and no one worse off.[14] Such a rule of universal compensation permits one to declare a change to be an improvement without having to determine how benefits for some

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Rawls proposes a lexical ordering of his "liberty" and "difference" principles. J. Rawls, A Theory of Justice 61 (1972).

6. The Declaration of Independence para. 2 (U.S. 1776).

7. U.S. Const. amend. XIV, § 1.

8. Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

9. See, e.g., R. Nozick, Anarchy State and Utopia 232–33 (1974).

10. See B. Ackerman, Social Justice in the Liberal State 28, 31–68 (1980); Dworkin, What is Equality? Part 2: Equality of Resources, 10 Phil. & Pub. Aff. 283 (1981).

11. U.S. Const. amend. V (applicable to the states through amend. XIV, § 1).

12. See, e.g., Berkeley Dev. Corp. v. Hutzler, 229 S.E.2d 732 (W. Va. 1976).

13. See Board of Regents v. Roth, 408 U.S. 564, 576–77 (1972).

14. See, e.g., J. Graaff, Theoretical Welfare Economics 9–10 (1967).

people offset losses for others.[15]

The subordinate position of stability relative to equality is reflected in the fact that if the substantial satisfaction of what seems to be a reasonably formed expectation turns out to be inconsistent with the equality to which we are committed (for example, equal voting rights or equal protection of the laws), then the expectation must be sacrificed. Even Richard Epstein, a most ardent advocate of nearly universal compensation, does not endorse compensation for expectations based on the maintenance of a system of caste or segregation.[16]

There is no more agreement on the scope of stability required by justice than on the scope of equality. While Epstein argues that justice and the Constitution require compensation for virtually all government actions that have disproportionate, adverse effects,[17] Michelman argues that there are a variety of adverse effects that need not be compensated.[18]

Justice as efficiency involves the idea that whatever maximizes the total wealth of a society is just.[19] Efficiency appears to be lexically subordinate to stability, in that we would not take a thing from one person who reasonably regards it as his and give it to another, just to promote efficiency. However, the apparently subordinate position of efficiency can be explained by the fact that it is possible to achieve nearly all the stability we want at almost no cost in efficiency. We need only provide compensation for any disproportionately adverse effects of government actions. However, because we are unable to identify the magnitudes of adverse consequences precisely,[20] and because there are administrative costs of compensation that make us willing to ignore some adverse effects,[21] our pursuit of efficiency yields an unavoidable lack of complete stability. We are willing to impose some unanticipated costs on people, to tax them, to protect their entitlements by liability rules rather than property rules,[22] to reduce the value of their entitlements through regulation, but in our pursuit of efficiency we stop short of taking all of the value of a thing.[23] That would be considered unjust.

A positive interaction between stability and efficiency arises from

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15. V. Pareto, Manual of Political Economy 451–52 (1971).

16. See R. Epstein, Takings: Private Property and the Power of Eminent Domain 349 (1985).

17. Id. at 332.

18. Michelman, Takings, 1987, 88 Colum. L. Rev. 1600, 1614–21 (1988).

19. R. Posner, The Economics of Justice 60–76 (1981). Calabresi has suggested that what is seen to minimize accident costs may come to be seen as just. G. Calabresi, The Costs of Accidents: A Legal and Economic Analysis 294–96 (1970).

20. Calabresi & Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1105–10 (1972).

21. Id. at 1093–98.

22. Id. at 1105–10.

23. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1190–93, 1229–34 (1967).

the human propensity toward "rent-seeking." Rent-seeking is the name that economists have given to the effort to transfer benefits from others to oneself or costs from oneself to others.[24] Archetypically, rent-seeking is the effort to persuade a government bureaucrat to bestow upon oneself some privilege, such as an import license, that is desired by more people than will be permitted to have it. While there are some occasions when such efforts promote justice, such as when the person seeking the favor actually deserves it, the selfish motivation of these efforts means that they generally diminish equality, stability and efficiency. The defensive response to rent-seeking by those who would be harmed by its success represents a further inefficiency. Requiring compensation as a general rule for those who experience disproportionate adverse effects of government actions minimizes the incentives for rent-seeking.[25] When such compensation is required, no one is able to transfer benefits to himself from others, or costs from himself to others. "Offensive" rent-seeking expenditures become worthless, and defensive expenditures unnecessary. Thus, by reducing rent-seeking expenditures, the pursuit of stability promotes efficiency.

To the extent that there is disagreement over the content of efficiency, it would be over such questions as whether there is a measure better than money for comparing satisfactions, and whether such antisocial satisfactions as envy and spite should count as any other satisfaction.

The fourth value that enters justice, subordinate to equality, stability and efficiency, is authority, the determination by people properly assigned that role of whom to satisfy and whom to disappoint. While justice requires the parties in a dispute to abide by its resolution by proper authority, those in authority act justly only if their determinations defer to the prior requirements of a shared conception of justice, namely equality, stability and efficiency. Disagreements about the content of authority would involve questions of whether particular authority was in fact properly assigned to make particular determinations.

Consider how the four components of this conception of justice apply to the facts in *Nollan v. California Coastal Commission*.[26] In this case the California Coastal Commission told the Nollans that it would deny their application for a building permit to renovate a beachfront house unless the Nollans agreed to a public easement along ten feet of beach

24. Classic writings in the theory of rent-seeking are Krueger, The Political Economy of the Rent-Seeking Society, 64 Am. Econ. Rev. 291 (1974); Posner, The Social Costs of Monopoly and Regulation, 83 J. Pol. Econ. 807 (1975); Tullock, The Welfare Costs of Tariffs, Monopolies, and Theft, 5 W. Econ. J. 224 (1967). For a compendium of articles on the subject, see Toward a Theory of the Rent-Seeking Society (J. Buchanan, R. Tollison & G. Tullock eds. 1980).

25. R. Epstein, supra note 16, at 199.

26. 107 S. Ct. 3141 (1987).

between their house and the ocean.[27] The Supreme Court held that such a conditional denial of a building permit was invalid.[28] If the Commission wanted an easement, the Court said, they should purchase it from the Nollans.[29]

The concept of equality hovers in the idea that there is something special about beaches which implies that all people should have equal access to all beaches. This view is not so widely shared as to have controlled the decision, but it is likely to have been present in the conceptions of justice of the California Coastal Commission and the justices who sided with the Commission.[30]

The concept of stability is present in the idea that the Nollans had a reasonable expectation of being able to rehabilitate their house without having to tolerate strollers on the beach behind their house. A competing conception of stability would say that the Nollans should have known that their renovation plans would interfere with the public's reasonable expectation of being able to apprehend the beach beyond their house,[31] and that to alter the structures on a site in any way requires a permit for which there is no entitlement.

Efficiency is present in the question of whether the value of the easement to strollers is great enough to justify the cost of taking it from the Nollans.

Authority arises in terms of the question of what powers the California legislature delegated to the Coastal Commission, whether it was constitutional for the legislature to delegate those powers, and whether the various courts have jurisdiction to resolve disputes about such matters.

II. The Argument Against Universal Compensation

One of the foundations of the argument for universal compensation is the sometimes implicit assumption that for every contested interest, that is, for every strand in every bundle of rights called property, there is a person to whom that interest is properly assigned under the available facts, without resort to politics. Law assigns all property rights, and politics should not disturb the product of law without providing compensation.[32]

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27. Id. at 3143.

28. Id. at 3148.

29. Id. at 3150.

30. Id. at 3143–44 ("[T]he new house would increase blockage of the view of the ocean, thus contributing to the development of 'a "wall" of residential structures' that would prevent the public 'psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit.' ") (quoting Coastal Commission Staff Report on Application No. 4-82-90, *in* Joint Appendix, Vol. I, at 58).

31. Id. at 3153–54 (Brennan, J., dissenting).

32. Cf. R. Epstein, supra note 16, at 19 (suggesting eminent domain clause functions to preserve institutional arrangements ordained by Constitution).

The difficulty with this argument is that it rests on a presumption of static perfectibility of knowledge. It presumes that we can know enough to specify for all time what is a just claim. A consideration of the history of our beliefs should dispel such an idea. Only 125 years ago, our laws incorporated the idea that it was possible for one human being to own another.[33] Today virtually no one makes such a claim. The development of our moral knowledge periodically requires us to introduce discontinuities into the claims that we recognize, and the political process is the principal arena in which we decide what these discontinuities will be and when we will introduce them. While the courts may perform a supporting role in this process,[34] they cannot be the principal actors because the process used must provide substantially equal participation for all members of society.

The Paretian perspective which is so congenial to economists does not apply when there has been a change in moral understanding. When we discover that we have failed to confer to some class of people what we ought to have conferred to them, there is no way to rectify this without diminishing the holdings of some other class of people. Because equality (in whatever form commands our allegiance at a given time) is fundamentally more important than stability, rectification is necessary, and someone must bear its cost. Assigning the cost of such "moral accidents" to the holders of discredited claims puts investors on notice that before investing their wealth in any type of "property," they should ask themselves whether their society will discover these claims to be morally unfounded. If we were to make a practice of compensating the "owners" of slaves[35] and other discredited claims, we would give investors no incentive to be sensitive to an emerging moral understanding of the invalidity of the claims they might purchase.

One can draw an analogy here between new moral insights and new technological understandings. When we discovered, contrary to prior expectation, that the emission of chlorofluorocarbons (CFC's) into the atmosphere harms the ozone layer and therefore threatens living things, we made plans to cut down on these emissions. We could not design a change that made no one worse off than he or she expected to be because what we expected, the continued costless emission of CFC's, turned out to be impossible. We *could* have asked, "What change would make no one worse off than he or she would have been under the continued unrestricted emission of CFC's?" But we found that question irrelevant. Instead we restricted the emission of

33. For a discussion of one state's slave law, see Smiddy, supra note 1, at 15–67 (history of South Carolina slave law).

34. See Fisher, The Significance of Public Perceptions of the Takings Doctrine, 88 Colum. L. Rev. 1720 (1988).

35. When slaves of British colonies were freed in the 1830s, such compensation was provided. R. Fogel & S. Engerman, Time on the Cross: The Economics of American Negro Slavery 35–36 (1974).

CFC's without compensation.[36] We said to those who planned to emit CFC's or to produce and sell them to those who would emit them, "We have discovered that there are unanticipated costs to your plans. We cannot permit you to go ahead with your plans, and we shall not compensate you for the losses that result." In exceptional cases we may provide some compensation as a compassionate matter, but we would not acknowledge an entitlement to the expectations of the status quo ante, as would be necessary to give expression to the Paretian perspective. One risk of planning an activity is that it will be discovered to be injurious to others.[37] In the same way, when we come to understand that the perpetuation of historically accepted claims such as slavery is morally unacceptable, it is appropriate to impose the burden of adapting to the new understanding on those who planned to receive a special benefit from the continued enforcement of those claims. One risk of investing in a claim is thus that it will be discovered to be immoral.

If the effort to achieve political recognition for a new moral understanding is protracted, and if the "owners" of the claims being discredited lack moral sensitivity, they may take advantage of the temporary recognition of their claims to pocket what profit they can. In the case of pending freedom for slaves, this opportunity meant working slaves at rates dangerous to their health.[38] If the issue were whether natural resources were properly private or public, it could mean rapid depreciation of the natural resources. An expectation of being able to hold the owners of discredited claims retroactively accountable for abuses during the transition period would reduce this concern.[39]

An important difficulty with the new moral understanding argument against compensation is that the political process is such an imperfect arena in which to work out advances in our moral understanding. While the pervasiveness of moral arguments in politics is evidence that we mean for politics to resolve moral claims, any selfish desire of a political majority to take from a political minority can be paraded as a moral imperative. How can we know whether the redistributive consequences of a proposed government action represent an

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36. Crawford, EPA to Cut U.S. CFC Production to Protect Ozone in Stratosphere, 238 Science 1505, 1505 (1987).

37. See, e.g., Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 524, 370 P.2d 342, 348, 20 Cal. Rptr. 638, 644 (1962) (describing the "primary purpose of comprehensive zoning" as protecting the public from "uses of property which will, if permitted, prove injurious to them").

38. See R. Fogel & S. Engerman, supra note 35, at 36.

39. One can draw an analogy here to the concept of voluntary waste in property law. The owner of a discredited claim is analogous to the tenant whose tenancy ceases when the claim ceases to be recognized. The members of the public are the remaindermen, whose interests would be damaged if the owner exhausted the resource during his tenancy. Just as the tenant is liable to the remaindermen for committing voluntary waste by exhausting the resource, so too should an owner be made to bear responsibility for exhausting resources embodied in discredited claims. See J. Dukeminier & J. Krier, Property 180–81 (2d ed. 1988).

improvement in moral understanding or merely a partisan, rent-seeking effort of a political faction?

One way of trying to encourage takings that represent moral understanding while inhibiting mere rent-seeking is to permit constitutional amendments to take without compensation, but require compensation for all takings resulting from the regular legislative process.[40] Because of the extended time and greater majorities required for constitutional amendments, the amendment process is much less susceptible to rent-seeking. If rent-seeking does not influence the amendment process, then the distributional impacts of an amendment can be regarded as an appropriate determination of who should bear which costs. Since the Supreme Court does not pass on the constitutionality of constitutional amendments, our existing institutions permit an amendment to take without compensation. For example, the thirteenth amendment declares that slavery shall not exist in the United States[41] and the fourteenth amendment declares that "neither the United States nor any State shall assume or pay . . . any claim for the loss or emancipation of any slave."[42]

The extended time and greater majorities of the constitutional amendment process increase the likelihood that the measures approved will represent moral improvements rather than expropriations, but they do not guarantee it. While there is no infallible test, another indication of an improvement in moral understanding is the advocacy of the new view by disinterested people, and even by people whose financial interests are harmed by the new view.

Can the argument that compensation need not be provided be extended beyond constitutional amendments? Can a just reallocation of claims be achieved through ordinary political processes? To strive for justice through politics is to say that people will be regarded as having entitlements, not to the value of their benefits under the status quo, but rather to what legislative and bureaucratic processes assign to them. People can justly have the value of their claims reduced or eliminated if we determine through political processes that their claims are inconsistent with the concept of equality to which we are committed and are therefore unjust.[43]

The attraction of pursuing justice through politics is limited by the susceptibility of legislative and bureaucratic processes to rent-seeking. The tendency of voters to vote their pocketbooks, of special interests to find it worthwhile to invest in politicians, and of politicians to advance the financial interests of their supporters are all reasons to be pessimistic about the ability of political processes to identify and further justice.

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40. This idea is brought to mind, though not directly proposed, by Ackerman, Discovering the Constitution, 93 Yale L.J. 1013, 1039–43 (1984).

41. U.S. Const. amend. XIII, § 1.

42. U.S. Const. amend. XIV, § 4.

43. See supra notes 5–10 and accompanying text.

If political processes had a sufficiently high susceptibility to rent-seeking we would reasonably conclude that we must forego justice through politics and require compensation for all disproportionate adverse effects of government actions other than constitutional amendments. But this would mean that the value of any undeserved privilege that people received would have to be preserved until the Constitution was changed. Because of our aversion to the perpetuation of undeserved privilege and our impatience with the slowness of constitutional change, we accept the pursuit of justice through politics, subject to judicial oversight.

III. Our Common Heritage of Land and Natural Resources

Often in the development of legal doctrine, an unrecognized principle can in retrospect be seen to have determined the outcomes of cases long before it was stated, and sometimes even while it was being denied. Such a principle appears to be at work in takings cases, a principle that commands about as much support today as the principle that human beings cannot be property commanded in 1750.[44] The principle emerging as new content for the concept of equality in justice is that land and natural resources are our common heritage, to which we all have equal claims.[45] Land and natural resources are therefore not properly subject to claims of ownership in perpetuity, but must be managed in such a way that all people in all generations share their benefits. Claims to own land are as unsupportable as claims to own human beings.

But how can anyone properly use land if no one can properly claim to own land? A Lockean justification of claims to the *use* of land can be built from the famous proviso in the passage in which Locke assigns property in the products of human labor to those who labor:

> The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature placed it in, hath by this *Labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, *at least where there is enough, and as good left in*

44. It was not until 1758 that the Yearly Meeting of Quakers in Philadelphia condemned the slave trade and threatened to exclude from positions of responsibility within their society any members who participated in that trade. R. Fogel & S. Engerman, supra note 35, at 32.

The parallel between the freeing of slaves and the recognition of land as our common heritage is developed in H. George, Progress and Poverty 362–63 (1960).

45. See H. George, supra note 44, at 362–63.

common for others.[46]

While Locke's statement is primarily a justification of claims to the products of human labor, it also contains the seed of a justification of claims to land and natural resources: the use of these resources is proper provided that resources of the same value are left for others.

It might seem that no claim to land and natural resources can be consistent with Locke's proviso that there be "enough, and as good left in common for others," because the future will bring untold generations, and however little each person draws from the stock of what nature offers, the stock will eventually be exhausted. Locke himself appeared to believe that there was enough unclaimed land in America, when he wrote, for everyone to have as much as he or she could use, so that the proviso would not be an operative constraint.[47] Whether or not such a condition existed when Locke wrote, it is clear that it does not now. Since a spreading population is bound to claim all land eventually, any claim would be inconsistent with Locke's proviso.

The problem of eventual exhaustion of land does not inevitably arise if claims are made not upon the *stock* of land, but rather upon the *flow* of services from land. If each person makes a claim upon the *use* of land, of a value such that all other people alive at that time can make claims of the same value without exceeding what nature offers, then Locke's proviso is satisfied. While the finiteness of land makes all claims to *perpetual possession* inconsistent with Locke's proviso, *some* claims to the *use* of land are consistent with it.

Natural resources share with land the quality of being provided by nature, but differ from land in that they are exhaustible. Therefore the application of Lockean principles to natural resources requires separate treatment.

If the world will last indefinitely (or at least until the sun gives out in four billion years or so), then each person's share of these resources is infinitesimal. But to allocate them in such a way would make them virtually worthless. The value derived from exhaustible natural resources would be maximized while treating all people in all generations fairly, by selling the resources to the highest bidders, investing the proceeds, and paying a uniform annual dividend to all people in all generations. Any person's claim upon exhaustible natural resources is consistent with Locke's proviso if the value of the claim does not exceed a person's dividend under such a rule. Locke's proviso thus constrains the claims that people can make upon land and natural resources, but it does not impose impossible constraints. Nor does it imply that no one should ever use more than his or her share of these resources. What it does imply is that anyone who uses a disproportion-

46. J. Locke, Two Treatises of Government, Second Treatise § 27 (1960) (emphasis added in last two clauses); see also H. George, supra note 44, at 334–40.

47. See Locke, supra note 46, § 36, at 335.

ate amount of these resources has an obligation to compensate those who thereby have disproportionately less available to them.

Having advanced a justification for common ownership of land and natural resources, it is instructive to examine the justification of claims to private ownership. Advocates of private property in land speak of a principle of first possession,[48] but private titles to land nearly everywhere actually originated in a combination of force and rent-seeking. Examples of force creating private title are numerous and obvious: the Norman conquest in England, Cromwell's 17th-century conquest in Ireland, Indian wars in the U.S., the wars of Spanish Conquistadors in Latin America, and so on around the globe.[49] The rent-seeking occurs when people arrange to have themselves appointed, within the system installed by the conquerors or their successors, as the ones who control land or collect rent from it.

Unchallengeable force may provide an adequate reason for not resisting, but it does not provide an adequate reason for calling the result just. Where rent-seeking has generated a distribution of land titles that has not been too unequal, it has been possible to maintain democratic support for private ownership of land. This support can be attributed to a combination of general conservatism, a large number of people whose personal interests are served by perpetuation of private ownership, and a recognition that unprincipled squabbling about who gets what can squander all the benefits of resources in further rent-seeking.

But just as we eventually overcame our blindness and saw that we could not accept slavery, we are now coming to understand that land and natural resources are our common heritage.[50] This view is illustrated by four recent Supreme Court decisions in takings cases. These decisions are consistent with the Court's support for an emerging understanding that land and natural resources are common property whose benefits must be shared, an understanding tempered by a concern that the excesses of the pursuit of justice through politics be controlled.

IV. Recent Takings Cases

Indirect evidence of the Supreme Court's recognition that land and natural resources require different treatment than other assets in takings cases is provided by the rule that the frustration of "reasonable investment-backed expectations" is a taking that requires compensa-

48. See, e.g., R. Epstein, supra note 16, at 216–19, 346–50; M. Rothbard, The Ethics of Liberty 56–57 (1982).

49. See H. George, supra note 44, at 342.

50. See Blackmore, Community Trusts Offer a Hopeful Way Back to the Land, Smithsonian, June 1978, at 97 (describing projects in U.S. in which not-for-profit organizations buy land and lease it at low prices and long terms to individuals who will use it in ecologically sound manner).

tion.[51] While this rule is too new for us to be completely confident how it will be applied, it is noteworthy that the economic definition of investment is not "the purchase of an asset that is expected to yield its owner a return," but rather "an increase in the stock of capital (produced goods that are used to produce other goods)."[52] Thus land and natural resources are not components of capital.[53] From an economic perspective, the purchase of land or natural resources does not qualify as investment. This applies, for example, to the coal deposits at issue in *Keystone Bituminous Coal Association v. DeBenedictis*.[54] In this case the Supreme Court held that Pennsylvania could require coal companies, without compensation, to leave in the ground coal that supported surface structures, even though the coal companies had previously purchased (or had declined to sell to purchasers of surface rights) the right to mine coal without regard to the consequences for the support of surface structures.[55]

> The coal fields purchased by the coal companies in *Keystone* were not produced, but rather acquired from someone who acquired them from someone else . . . who obtained them by a combination of force and rent-seeking. Because these assets are not economic investments, their existence does not depend on an expectation of returns from owning them. Thus, the political reallocation of the support estates to the owners of the surface estates does not frustrate an investment-backed expectation and threaten to discourage investment generally. The only discouragement of investment is that any *uncertainty* as to whether the supporting coal will be required to be left in place adds to the uncertainty of the returns from the combination of purchasing and developing coal mines, and therefore reduces the attractiveness of investment in them.[56]

There are some true economic investments in the operation of coal mines, such as geological surveys and shaft construction, and a claim for compensation based on the loss of value of these is not subject to the same analysis. If government actions reduce their value, investment *is* discouraged. However, to the extent that these investments are

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51. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

52. See D. Greenwald, Encyclopedia of Economics 55 (1982).

53. Id. at 111, 113.

54. 107 S. Ct. 1232 (1987).

55. Id. at 1249–51. At first blush it seems bizarre that anyone would place improvements on land without owning the support estate. And yet it is not always irrational. If it is likely to be some time before the supporting coal is mined, it can be profitable to place improvements on the land even if their support is not secure. However, once the improvements are in place, those who own them can be expected to hope that the mining of the supporting coal can be deferred indefinitely, and then to look for ways to achieve this goal politically.

56. See Rose-Ackerman, Against Ad Hocery: A Comment on Michelman, 88 Colum. L. Rev. 1697, 1700 (1988) (advocating rules rather than balancing in taking, so that investment is not discouraged by uncertainty).

necessary whether or not the supporting coal is left in place, and the mines continue to yield positive returns before acquisition costs, the loss of value from the requirement that supporting coal be left in place can be attributed entirely to the mineral estates. No reduction in the value of investments is entailed. It remains to be seen whether courts will make the economic distinction between capital, which represents economic investment, and land and natural resources, which do not.

While the claim of the coal companies to compensation can be questioned, so can the claim of the owners of the surface estates. Having sold, or not having purchased, the support estates, what claim do they have to support for structures? There are two possible answers to this question. One is that people are so accustomed to relying on surface stability that they find it inconceivable that they would not be entitled to it, legal documents to the contrary notwithstanding. The Pennsylvania legislature and the courts find themselves unable to say to people, "It doesn't belong to you." The second possible answer is that the legislature has made an efficiency calculation that the support estates are of greater value when combined with the surface estates, and has judged that compensation of the coal companies by the owners of the surface estates involves administrative costs that are too great.

If the Pennsylvania legislature can reassign the support estates to the owners of the surface estates, why can't the California Coastal Commission in *Nollan* reassign an easement along the beach from the Nollans to the public? Brennan's dissent in *Nollan* seemed to be influenced by the idea that an easement along the beach ought to belong to the public, so that the Nollans should never have expected to retain the value of the absence of such an easement.[57] The majority, however, held that public officials charged with passing judgment on applications for building permits are not allowed to use that authority to require donations from owners for public purposes. The potential for abuse of such a power is too great.

In the opening paper of the takings symposium, Michelman offers an explanation of another recent takings case, *First English*,[58] that involves a similar abuse of government power: If elected officials pass an ordinance that prohibits people from ever making any use of their property, this is a taking that requires compensation.[59] Subsequent modification of such an ordinance to make it temporary rather than permanent does not undo the occurrence of a taking. The lack of a clear public purpose served by the County's action makes it particularly difficult to cloak this action with the mantle of land and natural resources belonging to all. It is hard to see how any public benefit is

57. *Nollan*, 107 S. Ct. at 3153–54, 3158–59 (Brennan, J., dissenting).

58. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378 (1987).

59. Michelman, supra note 18, at 1616–17.

secured by denying the First English Evangelical Lutheran Church the use of their land, even if it is subject to flooding.

In *Hodel v. Irving*,[60] the fourth takings case, there is possibly a hidden influence of the idea that land and natural resources are our common heritage. In the late 19th century Congress provided for an allotment of communal Indian lands among individual Indians to induce them to abandon their nomadic ways and to permit whites to lease lands that had been reserved for Indians. A later statute, applying in particular to the Sioux tribe, provided for an allocation of their lands conditioned upon the consent of three-fourths of the adult males. To insure that Indians did not dispose of their lands improvidently, the Sioux allotment act specified that the United States would hold the land in trust. With the passage of generations, these individual allotments were repeatedly divided until some of them were practically worthless. Still, the Supreme Court unanimously held that it would be a taking to require that these very small interests escheat to the tribe instead of being passed to the descendants of their owners. Parts of the opinion suggest that the Court was concerned that some of the affected interests were not actually so small,[61] but the Court's principal reason was the great importance of the right to pass property on to one's heirs.[62]

Another perspective on the situation in *Irving* is that the allotment laws have had the unfortunate effect of impoverishing Indians who happen to have prolific ancestors. One might wish that all revenue from leased land accrued to the tribe as a whole, for the equal benefit of all members of the tribe in every generation, but it would be hard to achieve that from the present circumstances. However, what possibility there is of achieving that state is enhanced by the perpetuation of the very small claims at issue in *Irving*. Their existence, and the costs of keeping track of them, increase the attraction of an agreement to abandon the old allotment and have all share equally in all revenues. The creation of a class of Indians with absolutely no claims to contribute to the restructuring would reduce the incentive for those with above-average claims to share so widely and would therefore make such a restructuring more unlikely.

CONCLUSION

The idea that land and natural resources are common property has had a hidden influence on recent takings decisions. Courts will be unable to employ this idea openly until it gains widespread public acceptance, for any unpopular rule that courts sought to impose would be seen as inconsistent with our traditions of popular government and

60. 107 S. Ct. 2076 (1987).

61. Id. at 2082 ("There is no question that the relative economic impact of § 207 upon the owners of these property rights can be substantial.").

62. Id. at 2084.

would be overturned by democratic processes. Courts can sanction moral evolution, but they cannot compel it. When it is widely understood that land and natural resources are common property, the natural way to give recognition to the idea will not be by seeking to allot land in parcels of equal value, but by collecting from each holder (not owner, for from this perspective land and natural resources cannot be owned) of title to land an annual payment equal to its rental value for that year.[63] These payments would finance some combination of public services, reductions in other taxes, and a guaranteed income. When the holders of title to land pay the value of their use of land into a common fund, the sale price of land will be next to nothing. This has led some to see the taxation of land as a taking that requires compensation. But with the understanding that land and natural resources are common property, the losses sustained by people who invested disproportionately in land deserve no more compensation than the losses of slave owners. Having come to a new understanding of the equality required for justice, the satisfaction of that requirement will take precedence over claims for compensation based on stability.

When we have achieved an understanding that land and natural resources are our common heritage, there will be no problems of governmental actions taking these things. There will be no private value to take. There will still be an allocation problem, but it will be a problem of the appropriate disposition of our collective assets rather than conflict between public and private values.

In *Keystone*, the Commonwealth of Pennsylvania would have taxed and regulated coal mining in such a way as to maximize the present value of the sum of receipts from taxes on the coal plus taxes on the rental value of surface rights. Since the mineral estates would not have had significant sale value, there would have been nothing to take. There could have been a breach of contract, if not a taking, if the Commonwealth had changed the rules under which mining could occur after receiving payments from the coal companies that presumed a different set of rules.

In *Nollan*, if the easement had reduced the Nollans' potential enjoyment of their house, it would also have reduced the rental value of their land, and hence their taxes. The issue of taking would have arisen only if an easement had reduced the value of an existing structure.

In *First English*, there would have been no question of Los Angeles County's taking anything from the Church because the Church's land would have had a negligible sale value in any case. Because the tax on the Church's land would have been much smaller if building on the land were not permitted, the County would have incentive to avoid unnecessary and excessive regulation to keep its tax receipts up.

In *Irving*, there would have been no dispute because all Indians

63. H. George, supra note 44, is the classic statement of this idea.

would have had equal claims in all land, irrespective of the prolificness of their ancestors.

In all of these cases, the claim of a taking concerned land or natural resources, things not produced by human effort. When their value is understood to belong inherently to the community, the possibility of their being taken by public action vanishes.