Lucas v. South Carolina Coastal Council and Justice Scalia's Primer on Property Rights: Advancing New Democratic Traditions by Defending the Tradition of Property

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LUCAS V. SOUTH CAROLINA COASTAL COUNCIL AND JUSTICE SCALIA'S PRIMER ON PROPERTY RIGHTS: ADVANCING NEW DEMOCRATIC TRADITIONS BY DEFENDING THE TRADITION OF PROPERTY

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I. INTRODUCTION: THE TRADITIONAL DUALITY OF PROPERTY

Free speech, a free press, and freedom of religion have a common aspect. Our jurisprudence generally presumes that the social and dialectical benefits of conversation, publication, or revelation disappear as soon as they are invaded by the oppressive presence of a state licensor or, if you will, a governmental voyeur. The law consequently protects these associational liberties with a theory of constitutional absolutism and, therefore, with definitions of protected speech and religion to which the state is constitutionally subordinate.

Private property, in contrast, is generally thought by our

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1 Justices Brandeis and Holmes, for example, believed that the First Amendment generally prevents legislative majorities from suppressing or manipulating the free speech of minorities and other individuals that could not otherwise be protected by democratic laws. See Whitney v. California, 274 U.S. 357, 375-76 (1927). They believed that majoritarian laws usurping the speech of unprotected individuals could become instruments of tyranny by enforcing a “silence coerced by law—the argument of force in its worst form.” Id. at 375-76. Accordingly, Brandeis and Holmes contended that the First Amendment was adopted to protect individuals from the “occasional tyrannies of governing majorities.” Id. at 376. Because prohibiting even “evil counsels” would detract from the pursuit of truth occasioned by public discourse, Brandeis and Holmes wrote that “[o]nly the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, Congress shall make no law . . . abridging the freedom of speech.” Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting).

constitutional jurisprudence to have little value to either society or to individuals unless the state acts perpetually as both licensor and voyeur to protect property. To protect private property interests, the state perpetually defines, records, approves, and defends it against the acquisitive designs of individuals and communities that our laws have always deemed hostile to private property. Anglo-American definitions of the property protected by law consequently rest on traditional statism, by which the state uses its law and public treasure to define the same private property interests that it also resolves to protect from presumptively hostile individuals. However, protected property’s traditional statist definitions also rest on an opposing tradition. Unless absolutist definitions of private property (that the state cannot redefine or manipulate at will) restrain property’s statist definitions, the constitutional property protected by the Fifth Amendment of the Bill of Rights would be a mere and easily manipulated legal fiction. Accordingly, our laws have attempted at times to define the constitutional property of the Fifth Amendment’s Takings Clause with absolutist definitions, to which all democratic and majoritarian regulation is theoretically subject.

Since the time of Magna Carta, protected property’s legal traditions in England, and subsequently in America, have originated in both the statism underlying state power and the absolutism underlying meaningful

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3 The Supreme Court has repeatedly stated that excluding presumptively hostile individuals and communities from protected dimensions of private property is generally “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” Kaiser v. Aetna, 444 U.S. 164, 176 (1979). See, e.g., Dolan v Tigard, 512 U.S. 374, 384 (1994); Ruckelshaus v. Monsanto, 467 U.S. 986, 1011 (1983).

4 Allowing Congress or the Executive to define and redefine the meaning of discrete constitutional liberties would, in the words of Justice Robert Jackson, allow majorities to eviscerate the Bill of Rights’ purpose of withdrawing certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. Board of Education v. Barnette, 319 U.S. 624, 638 (1943).

5 Perhaps the most famous formulation of an absolutist conception of constitutional property is that of Justice Oliver Wendell Holmes. Holmes wrote that, even where legislatures qualify the Fifth Amendment’s protection of private property by using their police powers to protect public health and safety, “the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.” Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
constitutional restraint of the state. The Supreme Court’s definitions of constitutional property, however, have often abandoned private property’s traditional origins in both statism and potentially absolute restraint of the state. At different times the Court has applied three competing models of protected property. Since the late nineteenth century, the Supreme Court’s definitions of constitutional property have rested on: deferential statism, by which democratic states define protected property by majority decree; theoretical absolutism, by which states are restrained in theory by definitions of constitutional property that they cannot manipulate; or ad hoc balancing.

6 The Magna Carta provides one of the earliest Anglo-Saxon examples of protected property’s traditional statist and absolutist duality. See SOURCES OF OUR LIBERTIES 1-3 (Richard L. Perry & John C. Cooper eds., 1959). The Magna Carta was impelled and drafted by a powerful coalition of clergymen, London merchants, and armed barons who viewed King John’s royal government as having usurped “ancient laws and customs of the realm” by confiscating church land, increasing taxes, and imposing new feudal obligations on baronial landowners to expand royal power. Id. at 3 n.7. Accordingly, Magna Carta subordinates the royal government to an absolutist definition of property derived from fundamental traditions. See MAGNA CARTA, 9 Hen. 3 (1215). It prohibits the state from imposing certain exactions on property unless they had been imposed “of old and rightfully.” Id. at c. 23. The Magna Carta, however, also defines property according to competing notions of statism: it recognizes that individuals and manors could be “dispossessed” of property by the positive laws of state instrumentalities. For example, land in England could be dispossessed “according to the law of England,” and Welsh land could be dispossessed “according to the law of Wales.” Id. at c. 56.

7 In Mugler v. Kansas, 123 U.S. 623 (1887), for example, the Supreme Court deferred to protected property’s statist traditions without also recognizing constitutional property’s traditional existence as a potentially absolute restraint against unrestrained state power. The Court held that a state legislature could completely destroy protected property retroactively, and without constitutional restraint, merely by establishing a connection between rational legislative definitions of “public morals” and destroying protected property. Id. at 668.

Conversely, in Penn Central Co. v. New York City, 438 U.S. 104 (1977), the Supreme Court did not define constitutional property be either deferring to rational legislative powers or recognizing that property protected in the Bill of Rights exists necessarily to restrain legislative or other state power. Instead, the Supreme Court defined constitutional property as the inchoate outcome of a balancing test, by which the Court balances a private investor’s “expectations” with both the “character” of a government decree or regulation impairing protected property and the degree of harm to property occasioned by this regulation. Id. at 124.

8 At times, the U.S. Supreme Court has come close to determining that no definition of constitutional property is sufficiently absolute to restrain rational state laws. In Mugler the Court held that a state legislature could destroy the value of private property without violating the Constitution by determining, retroactively but also rationally, that this property was inconsistent with public morals. See Mugler, 123 U.S. at 668-69.

9 In contrast, Justice Oliver Wendell Holmes determined that the state’s police power to advance public morals or public safety was subordinate to absolutist traditions of property
tests that do not define protected property as the law of democratic states, an absolutist restraint on democratic laws, or a coherent combination thereof. Accordingly, and as the Supreme Court’s definitions of constitutional property under the Fifth Amendment have oscillated over time, the Court has confused litigants with its sequential jurisprudence.¹⁰

In Lucas v. South Carolina Coastal Council,¹¹ Justice Antonin Scalia and his brethren clarified much of this jurisprudential confusion and, in the process, assisted and empowered individuals by reconciling protected property’s statist and absolutist traditions in a single, comparatively understandable jurisprudential rule.¹² Before the United States Supreme Court decided Lucas in 1992, its decisions enforcing the Fifth Amendment’s command that the government cannot take private property “for public use, without [remitting] just compensation”¹³ never reconciled or distinguished between constitutional property’s statist definitions and its absolutist or ad hoc definitions.

Under Justice Scalia’s analysis, property cannot be defined under the Fifth Amendment without referring to the “historical compact” and legal texts underlying “our constitutional culture.”¹⁴ Many of these texts celebrate private property because it embodies fundamental social traditions that our

because, if it were not, legislative power would be extended “until at last private property disappears.” Pennsylvania Coal, 260 U.S. at 415 (1922). Justice Holmes, however, never defined the particular degree to which state power could permissibly or impermissibly diminish the value underlying constitutional property. Unlike the majority decisions in Mugler and Pennsylvania Coal, Justice William Brennan did not define protected property with either its statist or absolutist traditions. Instead, Justice Brennan defines constitutional property as a byproduct of balancing investor expectations with both the “character of the government regulation” that allegedly harms this property and the degree of financial harm occasioned by the disputed regulation. Penn Cent., 438 U.S. at 124.

¹⁰ Justices Oliver Wendell Holmes and William J. Brennan fashioned two of protected property’s most famous ad hoc definitions. In Pennsylvania Coal Justice Holmes held that “[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” Pennsylvania Coal, 260 U.S. at 415. Justice Holmes never defined the point at which government regulation would go “too far,” except to observe that two factors—the extent of the financial “diminution” occasioned by the regulation and the “public interest” behind it—were worthy of “consideration in determining such limits.” Id. at 413-14. In Penn Central Justice Brennan used but did not clarify these two factors. Instead, he added a third layer of abstraction, a property owner’s “distinct investment-backed expectations,” to Justice Holmes’s ad hoc matrix. Penn Cent., 438 U.S. at 124.

¹² See id. at 1027.
¹³ U.S. CONST. amend. V.
¹⁴ Lucas, 505 U.S. at 1028.
democratic laws necessarily reflect.\textsuperscript{15} Likewise, Justice Scalia defines constitutional property in \textit{Lucas} according to the “background principles” of the state or federal laws existing before a particular individual acquires property.\textsuperscript{16} Because these laws exist before a given individual acquires constitutional property, they necessarily shape his “understandings” about the extent to which the law will or will not permit desired uses of property.\textsuperscript{17}

Under \textit{Lucas}, therefore, the state cannot take the beneficial uses of property that are permissible under its laws when an individual owner acquires property because this individual “necessarily expects” that these traditional uses are both lawful and traditionally his.\textsuperscript{18} But where the laws that precede a given owner’s acquisition of property preclude his desired uses, it is the restriction or prohibition that preceding state or federal laws impose, not the owner’s desired use, that define the traditions of property about which he either knows or can readily discern. In these situations, the state need not compensate an individual owner because the law or regulation itself, not the particular uses desired by him, was “part of his title to begin with.”\textsuperscript{19}

For the first time in the Supreme Court’s construction of the Takings Clause, \textit{Lucas} provides both individual owners and their governments with an accessible basis for verifying what the state may and may not do at a given time to constitutional property. The state is not required to compensate individual owners for prohibitions or limitations that environmental or other regulations imposed before these owners acquired property.\textsuperscript{20} This “pre-existing limitation” of property under \textit{Lucas} is virtually the same thing as property itself. Because the statutory or common law may impose these pre-existing limitations without compensating individuals, \textit{Lucas} defers to the state’s traditional power to define private property with fundamental societal traditions that can change as society changes.\textsuperscript{21}

\textit{Lucas} also defers to protected property’s absolutist traditions: because property is an absolute restraint against overreaching government, the state cannot manipulate constitutional property at will. Accordingly,

\textsuperscript{15} See supra text accompanying note 6.
\textsuperscript{16} \textit{Lucas}, 505 U.S. at 1031.
\textsuperscript{17} See \textit{Lucas} v. South Carolina Coastal Council, 505 U.S. 1003, 1027-29 (1992).
\textsuperscript{18} \textit{Id.} at 1027-28.
\textsuperscript{19} \textit{Id.} at 1027.
\textsuperscript{20} Even the state’s “permanent physical occupation” of land will be permissible and not compensable if it is part of “a pre-existing limitation upon the landowner’s title” imposed by statutory or the common law. \textit{Id.} at 1028-29.
\textsuperscript{21} See \textit{id.}
government must remit "just compensation" if it takes legal traditions of property of which individual owners knew or could have discerned as "background principles" of state or federal law. Where individual owners establish that desired uses of property are consonant with the laws preceding their acquisition of it, *Lucas* requires government to compensate these owners if it physically occupies all or part of their property permanently, takes "all economically beneficial" uses of it, or otherwise takes uses of property that render it valuable.

On this fundamental ground, individuals have new knowledge and, therefore, new power to plan their ownership of property rationally, according to the same democratic traditions by which law-abiding citizens necessarily organize the rest of their private lives. The revolution in *Lucas* is that the traditions underlying democratic laws at the particular time in which individual owners acquire property simultaneously empower and restrain both the owners themselves and their democratic states. At and after the time that individual owners acquire property, they are empowered, and the state is restrained, by democratic traditions about which these owners either know or could be discerned in advance. Likewise, the state is empowered, and individuals are restrained, by the democratic laws that the state imposes before a given individual acquires property.

II. PROTECTED PROPERTY’S TRADITIONAL STATIST AND ABSOLUTIST DUALITY UNDERPINS OUR CONSTITUTIONAL CULTURE

The texts underlying constitutional property are often much clearer about property’s purpose than its jurisprudential definitions. Anglo-American jurisprudence often praises private property because it is a source of political power that serves as a counterpoise to potentially oppressive state power. The Framers viewed the power transmitted by property as salutary because, by empowering competing individuals with different "faculties" for coveting and amassing it, private property restrains overreaching governments. As such, the extent to which law defines property by

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22 See id. at 1028-29.
24 See id. at 1027-29.
25 See id.
26 James Madison viewed the power derived from multiple property interests as essential to defending individual liberty against the oppressive governments and individuals that he equated with a "uniformity of interests." *The Federalist*, No. 10, at 42 (James Madison) (Max Beloff ed., 2d ed. 1987). Madison recognized that the oppressive power underlying
deferring to either statism or absolute restraints of the state defines who has and who loses power under laws necessarily imposed by those in power. Attempts by governments to define property with old or new traditions are therefore fraught with social strife and warfare.

Absolutist definitions of property in the Magna Carta and the U.S. Constitution, for example, were precipitated by opposition to the particular statism of King John and King George, respectively. At Runnymede, a meadow near London, an armed cartel of barons and clergymen surrounded King John on June 15, 1215.27 They were rebelling against the Crown’s usurpation of traditional property rights, including its confiscation of church lands and abridgment of feudal privileges of land ownership and control. In their negotiations with King John and his supporters, these individuals justified their prerogative of rebelling against state power as a defense of ancient custom,28 including the “laws and ancient liberties” recognized by previous English kings.29 In its inception, therefore, Magna Carta attempted to define property according to absolutist tenets: much of the property rights enumerated in it consist of traditions preceding King John that a given king or baron could not create or eviscerate by himself.30

Justifiably, King John viewed the Magna Carta as a revolutionary document. Although couched in the language of ancient customs and traditions, it subordinates the King to particular traditions that his subjects chose to define and defend with force.31 For this reason, when King John read the traditions enumerated in Magna Carta, to which the Crown was

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27 SOURCES OF OUR LIBERTIES, supra note 6, at 1-3.
28 See id. at 3 n.7.
29 See id. at 6 n.13.
31 Magna Carta was written to defend revolution and orthodoxy at the same time. Fundamental rights of the realm were defined as the embodiment of orthodox tradition: they consisted of the “concessions and liberties” previously granted by the crown or recognized as traditional. At the same, political revolution was recognized as lawful if it defended orthodoxy: if an act of the crown or its agents “revoked or diminished” traditional liberties, that act was “invalid and void” and, therefore, could be set aside by armed force. MAGNA CARTA, 9 Hen., c. 61 (1215).
deemed expressly subject, he was reported to answer contemptuously, “Why do not the barons, with these unjust exactions, ask my kingdom?” Magna Carta consequently equates protected property with fundamental traditions. Because these absolutist traditions existed “of old and rightfully,” they are necessarily independent of, and superior to, states attempting to usurp them.

Statist traditions also define traditional property in the Magna Carta. Individuals could either receive property from—or be “dispossessed” of property by—state instrumentalities, according to the law of the land. Magna Carta defines this law as Welsh law for property in Wales and English law for property in England. Accordingly, Magna Carta both describes and embodies property’s traditional absolutist and statist duality. The state is absolutely subordinate to property’s fundamental traditions; however, state instrumentalities, such as English law, Welsh law, and previous charters recognized by previous kings, also define the societal traditions comprising protected property itself.

The Framers recognized the kinship between Magna Carta and the Constitution and, therefore, between the statism of King John and King George. Just as the rebellious barons enshrined traditions that they defined as absolute against the Crown, the Framers often portrayed themselves as defending the same traditional liberties that their ancestors had defended against previous kings. George Washington derisively accused the British of attempting to enslave the colonies by usurping these traditional rights, inasmuch as “our lordly Masters in Great Britain will be satisfied with nothing less.” Washington described these American freedoms, to which he believed the most powerful country in Europe at the time was subordinate, as inherited traditions “derived from our Ancestors.”

32 SOURCES OF OUR LIBERTIES, supra note 6, at 3. See also Holt, supra note 30, at 318.
33 MAGNA CARTA, supra note 6, at cc. 23, 61.
34 See id.
35 See id.; SOURCES OF OUR LIBERTIES, supra note 6, at 1-3, n.7, 6 n.13, 9.
36 In addressing the Constitutional Convention, for example, James Wilson compared the necessity of memorializing traditional and natural rights in Magna Carta with America’s need for both “bills of rights” and the Constitution itself. Referring to King John’s view that all rights and liberties derive from “the gift or grant of the king,” Wilson wrote that “under the influence of [this] doctrine, no wonder the people should then, and at subsequent periods, wish to obtain some concession of their formal liberties by the concessions of petitions and bills of rights.” 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 383-84, 430 (Merrill Jensen et al. eds., 1976)
37 See 2 WRITINGS OF GEORGE WASHINGTON 500-01 (J. Fitzpatrick ed., 1931-44).
38 Id. at 500.
39 See id. at 501.
Similarly, and quite ingeniously, Thomas Jefferson argued that, by acceding in Magna Carta and other charters to the tenet that the Crown was itself subordinate to the realm’s fundamental traditions, Great Britain recognized natural rights that also legitimized the American Revolution as a defense of both tradition and natural law. Jefferson also recognized that the fundamental traditions to which the state was subject also could be reflected in a democratic people’s legislative assemblies. Where, for example, the king’s veto dissolved colonial legislatures, sovereign power reverted to the people, the ultimate repositories of tradition. As Jefferson put it, “[f]rom the nature of things, every society must at all times possess within itself the sovereign power of legislation.” Jefferson consequently defined the right of property and other natural rights according to the same duality underlying the property protected in Magna Carta: natural or traditional rights of property not only exist independently of the state, “in the laws of nature,” but are also present in “the sovereign power of legislation.”

James Madison was less concerned with justifying property merely as an old or new tradition than as a traditional bulwark against the “uniformity of interests” that he equated with an oppressive government’s power. He defined the rights of property as originating not in a physical thing, but in the “diversity in the faculties of men” for acquiring property.

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40 Before the Revolution, Jefferson served in Virginia’s House of Burgesses. In a resolution written by him and eventually passed by this body, Jefferson wrote that British parliamentary proceedings commenced “to deprive [colonists] of their ancient legal and constitutional rights” were illegitimate. WILLARD STERNE RANDALL, THOMAS JEFFERSON, A LIFE 173 (1993). Jefferson also revered the life and work of John Locke. In 1789, he wrote John Trumbull that Locke was “one of the three greatest men that have ever lived, without any exception.” Letter from Thomas Jefferson to John Trumbell (Feb. 15, 1789), in 14 THE PAPERS OF THOMAS JEFFERSON 561 (Julian P. Boyd ed., 1950). For this reason, many scholars believe Jefferson’s “fundamental claim that revolution is justified if the existent rulers demonstrate systematic disregard for the rights of their subjects certainly originated with Locke.” JOSEPH ELLIS, AMERICAN SPHINX, THE CHARACTER OF THOMAS JEFFERSON 57 (1997).


42 Id. at 132.

43 Id.


45 Id. Because Madison’s right of property originates in the diverse talents of individuals for beneficially acquiring and using it, his definition of constitutional property transcends its mere physical possession to include uses that are coterminous with the unique talents of individuals. Similarly, in United States v. General Motors Corp., 323 U.S. 373 (1945), the Supreme Court defined property’s “vulgar and untechnical” aspect as “the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand,
As the power from property combined with these diverse "faculties," it also empowered and impelled different types of property or "factions." These different factions protected individual liberty from oppressive power, just as a "multiplicity of [religious] sects" secured religious freedom. To protect both these factions and their varying "faculties" for beneficially amassing property, "from which the rights of property originate," the "first object of government" was ensuring that these proclivities created a "multiplicity" of powerful factions. To Madison, therefore, the property protected in the Constitution was an instrumentality for forestalling a "uniformity" of oppressive state power, just as a republican government was an agency for defending and defining the creative "faculties" underpinning private property rights.

Unlike the rebellions preceding the Magna Carta and the Constitution respectively, the Administration of Abraham Lincoln did not fight the Civil War to subordinate a national government or colonial empire to older, local, or self-governing traditions of property. Instead, President Lincoln used the power of statism to subordinate the South's traditional and local state governments to new or newly discerned traditions that his national government advanced. In the famous Lincoln-Douglas debates, for example, it was Judge Stephen Douglas himself who justified slavery because it was supported by established state and local self-governing traditions that, in Douglas's view, the national government could not invade: the power of certain states to define slaves as property, decree that they were not property, or regulate them as a type of property.

In response, Abraham Lincoln did not deny that the Southern states were exercising a traditional state power to both define black Americans as slaves and regulate them as property. Instead, Lincoln argued that there

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46 THE FEDERALIST, supra note 44, at 324.
47 Id. at 42.
48 Id., Nos. 10 at 42-43 and 51, at 267-68. For similar reasons, John Adams wrote that "[p]roperty must be secured or liberty cannot exist." 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1850).
50 See id. at 503-05.
51 See id. at 503.
52 See Abraham Lincoln's Speech in the First Joint Debate with Senator Douglas (Aug. 21,
were fundamental national traditions, epitomized by the Declaration of Independence, to which localized traditions of self-government were subordinate where federal power and federal law enforced national traditions. Therefore, Lincoln argued that the federal government itself should enforce the "natural right" of equality manifested in the Declaration of Independence by excluding slavery's expansion into the new territories, regardless of whether territorial governments desired or opposed slavery. In response Douglas contended that the Framers did not intend in the Declaration of Independence to extend the right of equality to non-whites because the Constitution later recognized certain types of slavery as lawful.

Lincoln did not reply to this argument by construing the Declaration's text and context per se. Instead, Lincoln appealed to fundamental national traditions, as exemplified by the Declaration of Independence, and the Constitution's recognition of the right of equality for all men, regardless of race. He argued that the Framers intended to apply the natural right of equality to all Americans, not just whites. If the right of equality did not apply to blacks, Lincoln believed that the Framers would have achieved the anomalous and irrational object of enforcing the same illegitimate power previously wielded by King George and condemned in the Declaration of Independence: the power of one King, one Parliament, or one class to oppress individuals by arrogating their labor and ingenuity.

Lincoln asked his audience to consider whether, if Douglas's various arguments for denying equality under law to black Americans were successful, they would

rub out the sentiment of liberty in the country, and ... transform this Government into a government of some other form ... . What are those arguments? They are the arguments that kings have made for enslaving the people in all ages of the world ... [Kings] always bestrode the necks of the people, not that they wanted to do it, but because the people were better off for being ridden. That is their argument . . . .

Lincoln’s arguments against Douglas's view of the Framers' intentions were supported by the text and context of the Declaration of Independence and the Constitution. By appealing to these national traditions, Lincoln aimed to establish a precedent that would protect the rights of all Americans, including blacks, under the law.

1858), in LINCOLN, supra note 49, at 806.
53 See id. at 512, 514-15.
54 See Abraham Lincoln’s Speech in the Seventh Debate with Senator Douglas (Oct. 15, 1858), in LINCOLN, supra note 49, at 806. In his famous debates with Abraham Lincoln, Stephen A. Douglas never disagreed with Lincoln’s argument that all governments were subordinate to the natural rights and traditions manifested in the Declaration of Independence. See Senator Douglas’ speech in the Third Debate with Abraham Lincoln (Sept. 15, 1858), in LINCOLN, supra note 49, at 598. Instead, Douglas simply asserted that the Framers had no reference to the Negro whatever when they declared all men to be created equal. They desired to express by that phrase, white men, men of European birth and European descent, and had no reference either to the negro, the savage Indians, the Fejee, the Malay, or any other inferior and degraded race, when they spoke of the equality of men.

Id. In contrast, Lincoln believed that the natural right of equality under law, recognized in the Declaration of Independence, applied to black and, indeed, all other Americans. See Abraham Lincoln’s Speech at Chicago, Ill. (July 10, 1858), in LINCOLN, supra note 49, at 457. If it did not, Lincoln believed that Framers would have achieved the anomalous and irrational object of enforcing the same illegitimate power previously wielded by King George and condemned in the Declaration of Independence: the power of one King, one Parliament, or one class to oppress individuals by arrogating their labor and ingenuity. See id. Lincoln asked his audience to consider whether, if Douglas’s various arguments for denying equality under law to black Americans were successful, they would

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Id. at 456-57.
traditions which, although they were reflected in the Declaration of Independence, were also immediately accessible to his countrymen. In other words, Lincoln opposed the argument that equality under law should be denied on grounds of race not because the Declaration repudiated it by name or in a particular sentence or fragment of language, but because this argument was

the same old serpent that says you work and I eat, you toil and I will enjoy the fruits of it . . . I should like to know [where] taking this old Declaration of Independence . . . and making exceptions to it [will] stop? If one man says it does not mean a negro, why not another say it does not mean some other man?

As President, therefore, Lincoln used national power and law during the Civil War to subordinate the Confederate states' perpetuation of slavery as a form of purported property to new national traditions. He also began a process by which the federal government used its legislative power, in the form of the Reconstruction statutes, to shape the self-governing traditions evolving after the war. Ultimately, this process eradicated slavery and its constitutional incidents with the ratification of the Thirteenth and Fourteenth Amendments, adopted while the Southern states were under military occupation. The Lincoln Administration consequently epitomizes the extent to which national and statist legal traditions can collide with older legal traditions purporting to define property, supplant those traditions, and replace them with new absolutist traditions in the Bill of Rights, to which states are subordinate.

Likewise, United States Supreme Court jurisprudence defining constitutional property reflects, at least in its totality, the same statist and absolutist traditions that underpin protected property in Magna Carta, the Constitution, and the Bill of Rights. Until Lucas was decided, however, the Supreme Court never defined the particular time or times at which property's traditions in state power and absolute restraint of the state necessarily crystallize into constitutional property. Instead, each seminal case decided

56 See Abraham Lincoln's Speech at Chicago, Illinois (July 10, 1858), in LINCOLN, supra note 49, at 457.
57 Id.
59 See id. at 838-40; WILLIAM S. McFEELY, GRANT, A BIOGRAPHY, 260, 368-69 (1981).
before *Lucas* has obfuscated protected property's dual traditions by defining them alternately with statist definitions by themselves, absolutist traditions, or, alternatively, with ad hoc balancing tests. On the alternate occasions that the Supreme Court has defined constitutional property as consisting entirely of statism, theoretical absolutism, or ad hocism, it has neither defined nor specifically precluded private property's opposing traditions.

*Mugler v. Kansas*\(^{60}\) began the jurisprudential confusion. Mugler and his partners brewed beer profitably in Kansas for several years and were licensed and taxed accordingly.\(^{61}\) In 1880, however, several years after Kansas had first licensed and taxed Mugler's brewery, Kansas adopted a constitutional amendment prohibiting the sale of "intoxicating liquors" henceforth and "forever."\(^{62}\) This new amendment destroyed the brewery's value because, as the Supreme Court recognized, a brewery was of "of little value" without a market for beer.\(^{63}\) Analogizing from traditions of property embodied in social compacts since Magna Carta, if societal tradition defines protected property, and if preceding democratic laws in a democracy necessarily embody those traditions, then Kansas's affirmative licensing and taxation of Mugler's brewery epitomizes traditional property.

The Supreme Court nevertheless deferred to statist traditions of property without mentioning the extent to which these traditions were or could ever be subordinate to constitutional property's absolutist traditions. It held that Kansas could use its police power "for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community" to retroactively destroy previously lawful uses of property without compensation.\(^{64}\) Regulation of this type "cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."\(^{65}\) *Mugler* does not address one of the threshold issues of protected

\(^{60}\) 123 U.S. 623 (1887).

\(^{61}\) See id. at 654-57.

\(^{62}\) Id. at 655.

\(^{63}\) Id. at 657.

\(^{64}\) Id. at 668-69.

\(^{65}\) Id. at 662, 668-69. Because this decision was decided under the Fourteenth Amendment's Due Process Clause, it requires a "real or substantial relation" between a use of the police power and, in this instance, "public morals." Approximately ten years after it decided *Mugler*, the Supreme Court applied the Takings Clause of the Fifth Amendment to the states through the Fourteenth Amendment. *See* Chicago Burlington & Quincy R. R. Co. v. Chicago, 166 U.S. 226 (1897). In its subsequent decisions, the Supreme Court has affirmed Mugler under the Fifth Amendment in numerous cases, including *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022, 1026 n.13 (1992), and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1977).
property: the extent to which constitutional property has an absolutist meaning independent of democratic statutes. If constitutional property has an absolute constitutional meaning independent of the state, then democratic states cannot be truly subordinate to that meaning if they can retroactively eviscerate by statute the same property that the law had previously defined as traditional, on grounds that the legislature has now changed tradition and its majoritarian counterpart: "public morals." Mugler and its progeny consequently do not explain why legislatures could not use their asserted power to define constitutional property with public morals to also use public morals to define free speech, free religion, and the other liberties protected in the Bill of Rights. By definition, the power to define public morals encompasses all statutes for which there is a moral and majoritarian impetus. Accordingly, a police power to exclude property from constitutional protection on grounds of majoritarian morality, expressly enunciated in Mugler, is nothing less than nearly unrestrained statism: the power to use mere legislation to define a traditional liberty that the Bill of Rights supposedly protects against the designs of majoritarian government.

In Pennsylvania Coal Co. v. Mahon, Justice Oliver Wendell Holmes addressed virtually the same type of police power to which Justice Harlan deferred in Mugler: the legislative power to retroactively prohibit a use of property that the state had previously deemed lawful, on grounds that this use was injurious to the community. The public injury which the Pennsylvania legislature attempted to abate in Mahon was at least as serious as the threat to public morals occasioned by beer drinking that the Kansas legislature abated in Mugler: Pennsylvania prohibited certain types of underground mining and consequent subsidence that endangered dwellings used "as a human habitation." As Kansas did in Mugler, Pennsylvania acted retroactively. Before the Pennsylvania legislature enacted its prohibition of mining, the defendant coal company severed its estate by conveying its surface rights while reserving a mineral reservation. This reservation gave the mining company a property right under Pennsylvania law to precipitate the same type of mining subsidence that the Pennsylvania legislature subsequently forbade.

66 Mugler, 123 U.S. at 662, 668-69.
68 260 U.S. 393 (1922).
69 See id.
70 Id. at 411.
71 See id. at 412-14.
72 See id.
As a threshold matter, Justice Holmes determined that, on its face, the statute purported to protect the public from dangerous subsidence. However, Holmes also found that this statute, for no apparent reason, did not protect the public from dangerous subsidence of the same type where it was caused by an individual or entity owning both the mineral reservation and the surface estate. Justice Holmes consequently held that Pennsylvania's public interest was "limited" because, on the statute's face, Pennsylvania did not protect all members of the public who could have been harmed by the same dangerous subsidence it was purportedly regulating. Holmes also found that the subsidence at issue would not harm anyone or anything except the "single private house" of the person to whom the mining company had sold the surface estate. Accordingly, Justice Holmes concluded that any harm abated by the Pennsylvania statute did not amount to a nuisance because it was not "common or public."

On these grounds, the Supreme Court had a clear basis under Mugler to conclude that Pennsylvania's police power was irrational—and therefore contrary to due process—because it would be used against some, but not all, of the entities supposedly endangering the public. Curiously, Justice Holmes did not mention Mugler but, nevertheless, virtually reversed it. Contrary to Justice Harlan's analysis in Mugler, Justice Holmes defined protected property by referring in part to its absolutist traditions. Holmes determined that, to be protected from the machinations of governments ultimately subordinate to the Bill of Rights, constitutional property must have a protected sphere that state police powers may not take without

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73 See id. at 412.
74 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 412 (1922).
75 Id. at 413-414.
76 Id.
77 Id. at 413.
78 In Mugler the Supreme Court recognized that police power regulation was unconstitutional if it was pretextual or if there was "no real or substantial relation" between it and "the public morals" or "public health." Mugler v. Kansas, 123 U.S. 623, 661-62 (1887).
79 I am indebted to my colleague, Professor Robert Brauneis, for generously refining my knowledge of Holmesian jurisprudence. Professor Brauneis reminds us that "[a]fter Mahon was handed down, Justice Holmes wrote Harold Laski about the case. 'I have always thought,' he remarked, 'that old Harlan's decision in Mugler v. Kansas was pretty fishy.' Robert Brauneis, The Foundation of Our "Regulatory Takings" Jurisprudence: The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon, 106 YALE L.J. 613, 683 (1996) (quoting Letter from Oliver Wendell Holmes to Harold Laski (Jan. 13, 1923), in 1 HOLMES-LASKI LETTERS 338, 473 (Mark DeWolfe Howe ed., 1963)).
compensating individual owners.\textsuperscript{80}

Holmes consequently wrote that where the "seemingly absolute protection" to property provided by the Fifth Amendment is qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.\textsuperscript{81}

Therefore, Holmes held that, although regulations imposed by the police power may regulate property "to a certain extent, if regulation goes too far it will be recognized as a taking."\textsuperscript{82} Under this standard, Justice Holmes concluded that the Pennsylvania statute was unconstitutional because it did not manifest a "sufficient" public interest to justify rendering the mineral reservation "commercially impracticable."\textsuperscript{83}

Before balancing these public and commercial interests, Holmes acknowledges that the relevant mineral reservations embodied "previously existing rights of property and contract."\textsuperscript{84} However, he gives neither states nor individuals a basis in law for determining whether state regulation has taken property by going "too far," except to mention that the extent of the property's "diminution" in value and the weight of the public interest are worthy of "consideration."\textsuperscript{85} Justice Holmes does not describe a palpable mechanism by which property that, in his words, "is recognized" by the state can also be protected if a state withdraws or changes its recognition.\textsuperscript{86}

If the definition of a given property interest merely depends on whether a desired use of it is or is not "recognized" by a state, then a state may redefine or abolish property interests at will by alternately extending and withdrawing its recognition of them. Therefore, Justice Holmes does not

\textsuperscript{80} Justice Holmes did not believe that there were precise lines of demarcation between these spheres of protected property and otherwise lawful uses of the state's power to both regulate and define property itself. Although Holmes believed "that standing positive law defines the property protected by the Constitution, [he also believed] that the constitutional protection afforded property is protection against drastic changes in principles embedded in that positive law." \textit{Id.} at 641.

\textsuperscript{81} Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

\textsuperscript{82} \textit{Id.}

\textsuperscript{83} \textit{Id.} at 414-15.

\textsuperscript{84} \textit{Id.} at 413.

\textsuperscript{85} \textit{Id.} at 413-14.

\textsuperscript{86} \textit{Id.} at 414.
provide an accessible analytical basis for verifying at a given time that property previously created, "recognized," and regulated by the state is or is not constitutional property independent of the state. Nevertheless, and at least in part, Mahon expressly rests on absolutist traditions of property because Justice Holmes describes a theoretical sphere of constitutional property into which rational police powers cannot enter without also compensating individuals.

In *Penn Central Transportation Co. v. New York*, Justice William Brennan, unlike Justices Harlan and Holmes in *Mugler* and *Mahon* respectively, did not anchor property to statist or absolutist standards *per se*. Instead, he used an ad hoc balancing formulation. Unlike Holmes, Justice Brennan did not expressly use his ad hoc rule to advance constitutional property's absolutist traditions or, for that matter, its statist traditions. But the tradition that Justice Brennan actually favored in *Penn Central* is clear from both his construction of *Mahon*’s holding and his attribution of legal reasoning to Justice Holmes in *Mahon* that Holmes never used.

In *Penn Central*, a transportation company challenged a historic preservation regulation that prohibited it from constructing an office tower on top of Grand Central Station. Justice Brennan cited *Mahon* repeatedly in *Penn Central*, but not for its actual holding or its primary rationale: regulations imposed by the police power that neither occupy nor physically destroy protected property can violate the Fifth Amendment by eviscerating the property's financial value. Justice Brennan's failure in *Penn Central* to mention one of Justice Holmes's fundamental purposes in deciding *Mahon* is as curious as Justice Holmes's failure in *Mahon* to mention or distinguish *Mugler*. The regulation at issue in *Penn Central* did not empower the government to occupy physically or touch Grand Central Station. Therefore, the regulation at issue in *Penn Central* is precisely analogous to the police power regulations in *Mugler* and *Mahon*.

Justice Brennan ignored the language in *Mahon* in which Justice Holmes stated that the purpose of the holding is to secure constitutional property's "seemingly absolute" protection against unrestrained uses of the legislature's police powers. Presumably, Justice Brennan refrained from

89 See id. at 107.
90 See id. at 124, 127-28.
91 See Mahon, 260 U.S. at 415.
92 See Penn Central, 438 U.S. at 110-14.
mentioning this purpose because he desired to advance property's opposing tradition: statism. This hypothesis can be tested by examining the legal reasoning that Justice Brennan attributes erroneously to Justice Holmes. Aspiring perhaps to capture and encapsulate Holmes by praising him for language and reasoning that he never used, Brennan opined that *Mahon* "is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'"94

This determination is demonstrably wrong for two reasons. First, Justice Holmes did not find in *Mahon* that the Pennsylvania statute prohibiting mining subsidence furthered "important public policies."95 Instead, he determined that the public interest underlying it "is shown by the statute to be limited," in part because the statute failed to protect relevant individuals from harm that was purportedly "common or public."96 Second, Holmes neither mentioned "investment-backed expectations" nor otherwise analyzed the extent to which Pennsylvania's mining prohibition frustrated any expectations, let alone those that were "investment-backed."97 Instead, and as mentioned above, Justice Holmes determined that balancing at least two considerations or factors—the weight of a regulation's public interest and the extent to which government regulation diminished property's value or commercial utility—would be useful in determining whether a given regulation had gone "too far."98

Justice Brennan used these two balancing factors in his own three-part balancing test without attributing them to either *Mahon* generally or Justice Holmes in particular.99 Two of the three parts of Brennan's proffered balancing test, the "economic impact of the regulation on the claimant" and the "character of the governmental action,"100 are mere restatements of the two considerations that Justice Holmes first used to determine if a regulation went too far: the degree to which the disputed regulation diminishes property's "value" or commercial practicability and the nature of the "public interest."101 The third of Justice Brennan's three factors, "the extent to which

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95 Mahon, 260 U.S. at 414.
96 Id. at 413-14.
97 Penn Central, 438 U.S. at 127.
98 Mahon, 260 U.S. at 414.
99 See Penn Central, 438 U.S. at 124.
101 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).
the regulation has interfered with distinct investment-backed expectations,""102
is the same factor that Brennan erroneously attributes to Holmes. None of the
decisions that Brennan cites as having analyzed "investment-backed
expectations" either mentions these expectations or otherwise distinguishes
them from Justice Brennan's first factor, the regulation's "economic
impact.""103

Justice Brennan consequently engrafts the ad hoc consideration of
"expectations" onto both Fifth Amendment jurisprudence generally and
Justice Holmes's balancing rule in particular. Although Justice Holmes
justifies his own rule as being compatible with the Fifth Amendment's
"seemingly absolute protection" of property,104 the two factors Holmes uses
in Mahon to determine whether a regulation goes "too far" correspond neatly
to a balance between property's statist and absolutist traditions. For example,
Holmes's first factor, the "public interest,"105 can be readily shaped by the
state. In contrast, Justice Holmes's second factor, the extent to which a given
regulation precipitates a "diminution" in private property's value, protects
individuals from palpable economic harm occasioned by an overreaching
state.106 At first glance, therefore, the third factor that Justice Brennan adds
to this Holmesian matrix, investment-backed expectations, upsets its balance
by ostensibly protecting individual investors.

In fact, and to the extent that this factor can ever make a logical
difference, it should always have the opposite effect. Unless an individual is
insanely self-destructive or divinely altruistic, he will not invest in property
with the "investment-backed expectation"107 that his investment will ruin

102 Penn Central, 438 U.S. at 124.
103 Id. Justice Brennan cites two Supreme Court cases to support his proposition that the
extent to which a given regulation impairs "investment-backed expectations" is and was an
identifiable part of the Court's previous balancing tests—citing Goldblatt v. Hempstead, 369
Neither of these cases used the word "expectations" or the phrase "investment-backed," or
otherwise analyzed expectations as a factor that is distinct or different from the two factors
used by Justice Holmes in Mahon: the disputed regulation's "character" and the economic
harm it imposes on a property owner. Penn Central, 438 U.S. at 124, 127.

For example, in Goldblatt, the Supreme Court cited Mahon as it both repeats and
expressly adopts Justice Holmes's balancing formulation. See Goldblatt, 369 U.S. at 594-95.
Without analyzing or even mentioning investor expectations at all, the Court balanced
the nature and character of an otherwise "valid police regulation" against "a comparison [of
the property's] values before and after" the alleged taking. Id. at 594.
104 Mahon, 260 U.S. at 415.
105 Id. at 413-14.
106 Id.
him. Accordingly, the only situation in which individual expectations will mean something different from Holmes’s and Brennan’s first factor, the "economic impact" on the individual, is when the state uses its positive law before or during an individual’s ownership of property to create an "expectation" that government will destroy or impair that property. Assuming Justice Brennan understood that positive law can shape and even manipulate “investment-backed expectations,” then he succeeded once again in adroitly assembling an effective judicial coalition from disparate ideologies. Although couched in the purported protection of individual property owners, investor expectations actually advance state power whenever they differ logically from Justice Holmes’s and Justice Brennan’s other factors. For this reason, Justice Brennan successfully nudged the jurisprudence in Penn Central away from Justice Holmes in Mahon and back toward Mugler’s statist traditions.\(^{108}\)

Viewed philosophically, the Supreme Court’s oscillating definition of constitutional property—from Mugler’s express statism to Mahon’s theoretical absolutism to Penn Central’s surreptitious statism—may be less significant as a jurisprudential failure than as a symptom of a societal schism. As distinct legal traditions and traditional polarities, statist and absolutist property rights schools are strong enough to coexist perennially, but never strong enough to dominate a given line of precedent for long. Viewed from this perspective, many legal academicians mimic the Supreme Court by immersing themselves in one side, avoiding the other side, or simply obfuscating all sides of constitutional property’s traditional polarities.

The writings of Professor Richard Epstein exemplify protected property’s absolutist traditions. He argues that the essence of the property protected by the Fifth Amendment is its particular value in the market before the state allegedly takes it.\(^{109}\) Professor Epstein has described situations in which government regulation diminishes, but does not entirely destroy, private property’s value as “partial takings.”\(^{110}\) He believes that governments should remit just compensation for all or most partial takings, including

\(^{108}\) After Penn Central was decided, for example, the Supreme Court and other courts have repeatedly held that pre-existing statutory or regulatory restrictions shape the independent expectations or “understandings” comprising property itself. See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005-07 (1983); M & J Coal Co. v. United States, 30 Fed.Cl. 360, 368-69 (1994), aff’d 47 F.3d 1148 (Fed. Cir.), cert. denied, 516 U.S. 808 (1995).


\(^{110}\) See id. at 1369, 1377, 1387-88, 1392.
situations in which government regulation diminishes the value of property in small increments. Accordingly, Epstein criticized Justice Scalia for not overruling previous jurisprudential rules, by which the Supreme Court usually will not impose liability on the government for merely diminishing the value of property in increments. In doing so, Epstein has necessarily rejected property’s statist traditions, by which the state can change the value of the thing it also creates with its decrees.

In contrast, Professors Sax and Blumm epitomize constitutional property’s statist traditions. Professor Sax believes that the law should deem many forms of property, especially undeveloped land in “a state of nature,” as “already in public service” because “certain public uses have a peculiarly public nature that makes their adaptation to private use inappropriate.” In these situations, Sax has contended that property rights should not be divorced from the state’s power, as a kind of public trustee, to protect our natural resources by defining property’s legal status as a “public trust.” According to Sax, courts are more willing to protect both concrete investments in private property and the commensurate expectations of individual owners than the “diffusely held” expectations underlying the public trust. Accordingly, he has criticized courts for being “less willing to take ultimate responsibility for public trust claims.” Professor Sax did not explain how his model of constitutional property can protect individuals against governmental overreaching if it gives governments the power to define the “public trust” comprising protected property itself. Accordingly, his public trust theories rest more on constitutional property’s statist than its absolutist traditions.

Professor Blumm believes, in contrast, that the Fifth Amendment never protected “development rights,” which he has defined as the right to develop property’s commercial utility. Instead, he posited that the Fifth Amendment right of protected property, just like the First Amendment rights

111 See id. at 1387-88.
112 See id.
115 Id.
116 Id.
of free speech and free religion, protects a common right of "privacy" and "private autonomy" that underpins the Bill of Rights. According to Professor Blumm, because the property protected in the Fifth Amendment merely embodies a right of privacy, it only prevents the government from physically occupying constitutional property, just as the First Amendment prevents the government from invading or occupying speech generally, a particular church, or religion generally.\footnote{See id. at 916.} But even if protected property were synonymous with a right of privacy underpinning our civil liberties, Professor Blumm did not explain why these privacy rights only protect individuals from the government’s physical occupation of their property without also including the right to exclude governments by inventing or making something in privacy, either alone or with other consenting individuals. For this reason, Professor Blumm’s definition of constitutional property rests on deferential statism, to the exclusion of a more absolutist restraint of democratic states.

From the perspective of these “tangled” academic and jurisprudential definitions of protected property,\footnote{See Epstein, supra note 109, at 1369.} the Lucas court examined the same disputed traditions of constitutional property about which Professors Blumm and Epstein strongly disagree: does the Fifth Amendment create a constitutional right to be compensated if government regulation entirely divests a particular tract’s development rights,” where those rights are both indisputably lawful and specifically understood as such when the owner at issue acquired the disputed property? This question distills the legal and factual dispute at issue in Lucas v. South Carolina Coastal Council.

When David H. Lucas, the plaintiff in Lucas, acquired his disputed beachfront lots, all relevant laws allowed him to do precisely what the owners of the immediately adjacent lots had previously done: erect single-family homes on them. However, approximately two years after Mr. Lucas acquired his beachfront lots, South Carolina enacted a statute that prohibited him from constructing dwellings on his lots.\footnote{See Lucas v. South Carolina Coastal Council, 503 U.S. 1003, 1007 (1992).} The trial court found that the state’s prohibition rendered these parcels “valueless.”\footnote{Id. at 1006-09.}

In holding that South Carolina had violated the Takings Clause under these circumstances, Justice Antonin Scalia defined constitutional property with the same statist and absolutist traditions that define traditional property in Magna Carta, the Constitution, and the “historical compact recorded in the
Takings Clause."\textsuperscript{122}

III. CAN \textit{LUCAS} SERVE AS THE BASIS FOR RECONCILING THE SOCIETAL SCHISM BETWEEN STATIST AND ABSOLUTIST PROPERTY?

Neither the Constitution's text nor context gives express power to the legislative or executive branches to define free speech, free religion, private property, or the other liberties in the Bill of Rights to which they are constitutionally subject. If the Constitution did this, then the Bill of Rights, at best, would be nothing but comfortable fiction: governments and majorities aspiring to invade a given constitutional liberty would merely "redefine" and undermine this liberty instead of overtly usurping it.\textsuperscript{123} Nevertheless, contemporary academic discourse seems to resound at times with theories and legal stratagems for allowing governments to define constitutional property "flexibly [according] to changing circumstances and social values without compensating property owners," especially where older definitions of property collide with the new tradition in our society of environmental law.\textsuperscript{124}

There does not seem to be an equivalent outpouring of academic support for giving government the same power to define free speech and free religion "flexibly," even where those liberties conflict with environmental

\textsuperscript{122} \textit{Id.} at 1028.
\textsuperscript{123} James Madison believed that, without a Constitution or Bill of Rights to protect property rights, majorities would use their legislative powers to augment their own property and wealth by reducing the value of property held by discrete individuals, inasmuch as "it would be the interest of the majority in every community to despoil & enslave the minority of individuals; and in a federal community to make a similar sacrifice of the minority of the component states." 9 \textit{PAPERS OF JAMES MADISON} 141 (Robert A. Rutland ed., 1975). Similarly, John Marshall campaigned in Virginia for ratification of the Constitution, in part, because he believed it would restrain majorities from seeking "relief from their debts, usually through their influence in the state legislatures." \textit{Jean Edward Smith, John Marshall: Definer of a Nation} 115-16 (1996). Gouverneur Morris also believed that the Constitution should protect property owners from legislative bullying: he equated majoritarian price regulations with a coercive "invasion of [the] rights of property," just as Madison argued that majoritarian attempts to depreciate paper currency would have the same effect on the "rights of property as taking away equal value in land." \textit{Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism} 22-23, 72-74 (1990).
laws or other majoritarian values.\textsuperscript{125} Instead, much of the controversy at the moment between those who would define constitutional property according to either statist or absolutist models originates in the debate between environmentalists and their property rights opponents.\textsuperscript{126} On the environmentalist side, many supportive scholars suggest that the Fifth Amendment does not protect private property where the legislature uses its "police power" to police public health, protect the environment's "natural condition," or prohibit uses of property deemed "prejudicial" to either public morality or the general welfare.\textsuperscript{127}

As prominent academic advocates of these and similar theories, Professors Sax and Blumm certainly represent property's democratic and statist traditions. But they failed to meaningfully address Anglo-American property's opposing tradition, absolutism, exemplified by the Framer's decision to protect constitutional property in the Bill of Rights. Neither proffers a persuasive method for protecting private property from majorities seeking to take it by divesting the economic and political power created by property. For example, according to Professor Sax, courts should not protect private property unless desired uses of it advance "public expectations" that property in its natural or pristine state is held by governments in "trust" to protect the public from unexpected environmental despoliation.\textsuperscript{128}

In the context of the Constitution's ratification, however, the Framers never justified property rights because they embodied a public "trust," by which the public was protected against unexpectedly ruinous development.\textsuperscript{129} Instead, the Framers believed that individual liberty could not be protected without also protecting the power that private property transmits to individuals.\textsuperscript{130} Accordingly, they described a new tradition of property in the Fifth Amendment. Because the Framers believed that property was the same thing as an individual's independence and independent power, they required governments taking protected property to supply individuals with its practical equivalent in power: money or "just compensation."\textsuperscript{131}

\textsuperscript{125} See generally id.
\textsuperscript{126} See id. at 10,523–10,526.
\textsuperscript{127} See id. at 10,525; Sax, supra note 113, at 379.
\textsuperscript{128} Sax, supra note 113, at 342.
\textsuperscript{130} See id. at 290-97.
\textsuperscript{131} U.S. CONST. amend. V. William Penn, for example, equated private property with the practical power that kept individuals free and independent from both government and other individuals. See RAKOVE, supra note 129, at 294-95. Penn distilled the liberties that the
Professor Sax does not define property as synonymous with the independent power that it confers on individuals. Instead, he defines property as the corpus of a "public trust." Therefore, if a regulation advances the public trust, it does not take property and, therefore, the government need not compensate individuals. The problem with Sax's analysis is that the "public trust," much like majoritarian morality, necessarily underpins most if not all democratic statutes. Accordingly, Sax's "public trust" theories allow legislative majorities to do precisely what the Fifth Amendment and the Bill of Rights generally prohibit them from doing: take the property and corresponding power of individuals outside the majority without returning commensurate power to them.

In contrast, Professor Blumm believes that private property is the same thing as a right of privacy or autonomy underpinning all civil liberties. On this basis, Professor Blumm believes that all rational environmental regulation of property should be sustained except that which physically dispossesses individuals from the property within which they seek privacy and solitude. The problem with this analysis is that it confuses the fact that many owners seek privacy within property's physical dimensions with the reason for protecting property in the Bill of Rights.

Consider for example, the reason for protecting the privacy underlying freedom of religion in the First Amendment's Free Exercise Clause. Would Professor Blumm argue that the First Amendment allows the state to use its taxing or other powers to compel behavior offensive to a church's fundamental tenets, provided the state did not erect the church, occupy it, or physically write its creed? Assuming that Professor Blumm

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132 See Sax, supra note 114.
133 See id. at 342.
134 See id. at 379, 381.
135 See Blumm, supra note 117, at 916.
136 This proposition is manifestly different from the actual tenets of the Free Exercise Clause. Protected religion embodies more than the body of a physical church; it also includes sacred behavior. In Wisconsin v. Yoder, 406 U.S. 205 (1972), for example, the Court construed the First Amendment as prohibiting Wisconsin from requiring Amish children to attend school beyond the eighth grade. The Court concluded that this requirement was "undeniably at odds with fundamental tenets of [Amish] religious beliefs, their consequent "mode of life,"
would disagree with this proposition, then shouldn’t the property right to contemplate Walden Pond in privacy that he favors also include the right to develop it alone or with other consenting individuals, given the Framers’ tradition of protecting property precisely because using it made individuals more powerful and independent?

The Framers never justified property rights merely because they were coterminous with physical privacy or the related physical, sensual, or intellectual pleasure of touching or feeling property in seclusion. Instead, they justified constitutional property because of what it does for political liberty: provide a source of power, independent of government, which individuals may use either to defend their liberties or to pursue pleasure and happiness. Two of the most prominent Framers, James Madison and Thomas Jefferson, illustrate well this view of property. Madison wrote that the power of property would impel “faction” and thereby protect society from authoritarian governments imposing a “uniformity of interests.”137 Similarly, Jefferson did not justify property rights merely as a repository for experiencing land in its natural state.138 Instead, Jefferson justified property rights according to what using property actually does for individuals.139 He wrote that “the fundamental right to labour the earth” always devolved to individuals, even when they were “unemployed.”140

Sir Edward Coke, the legal scholar considered by many historians to have authoritatively influenced the Framers’ formal legal training, wrote “for and the “protection of values promoted by the right of free exercise.” Id. at 217, 218, 221. 137 THE FEDERALIST NO. 10, at 78-79 and No. 51, at 324-25 (James Madison) (Max Beloff ed., 2d ed. 1987). The violence and military strife underlying Magna Carta, the Constitution succeeding the American Revolution, and the Civil War Amendments demonstrate the truth of Madison’s observation that property is synonymous with power because it empowers “faction,” the source of formidable political power. Each of these social compacts was impelled by an armed insurrection or its defeat; each victorious government or insurrection derived its power from factions sustained by distinct types of private property; and each succeeding social compact advanced the cause of human freedom. See Robert J. Cottrol and Raymond T. Donovan, The Fifth Auxiliary Right, 104 YALE L.J. 995, 1015 n.85 (1995). 138 See Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), in 8 THE PAPERS OF THOMAS JEFFERSON (Julian P. Boyd ed., 1953). 139 See id. 140 Id. at 681-82. Jefferson’s view that private property rights were synonymous with the fundamental right to labor on and actually use property has been well-supported by the Supreme Court. The Court has held repeatedly that protected property rights transcend property’s mere physical possession by also encompassing its dynamic and profitable use by individuals. See, e.g., Lucas v. South Carolina Coastal Commission, 505 U.S. 1003, 1029 (1992); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003 (1984); United States v. General Motors Corp., 323 U.S. 373, 373-78 (1945); Near v. Minnesota, 283 U.S. 697, 707 (1931).
what is the land but the profits thereof?" Therefore, like Madison and Jefferson, Coke equated protected property with its profitable or utilitarian use. On these historical and textual grounds, Professor Sax's and Professor Blumm's property rights models are untraditional because they do not provide an effective remedy against the state when its environmental regulation takes the power and independence that private property transmits to individuals.

On the property rights side, epitomized by Professor Epstein, much supporting scholarship rests on property's absolutist traditions, to which the state is constitutionally subordinate. Plainly, the state and its political branches are necessarily subordinate to the constitutional property protected in the Bill of Rights, and Professor Epstein certainly is compelling when he points this out. But from the heights of this constitutional absolute, he embarks on an unjustified intellectual leap that ends in an implosive descent.

As mentioned above, Professor Epstein argues that the Fifth Amendment should impose liability for takings of property that are "partial" because they diminish property's value without entirely destroying it. Epstein's analysis collapses under the weight of several practical contradictions.

As a threshold matter, Professor Epstein seems to recognize that the Fifth Amendment, by using the word "just" in requiring the state to pay "just

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1 Edward Coke, The First Part of the Institutes of the Laws of England, ch. 1, 1 (1st Am. ed. 1812). Many historians view Coke, the seventeenth century lawyer and attorney general, as the first English scholar to equate the traditional rights enumerated in Magna Carta with liberties that individuals traditionally may enforce against the state. In using Magna Carta to justify American liberties, many Framers of the U.S. Constitution relied on Coke's writings. See SOURCES, supra note 6, at 9; Holt, supra note 30, at 318-19, 321. In a letter to James Madison, for example, Thomas Jefferson praised Coke's treatise on Magna Carta, the laws of property, and other English laws as the "universal elementary textbook" for "our lawyers." 1 THE WRITINGS OF THOMAS JEFFERSON 169-70 (Andrew A. Lipscomb ed., 1904).

Justice Holmes agreed with Coke that property rights are coextensive with economic power and profitability. He concluded in Mahon that what makes a mineral reservation "to mine coal valuable is that it can be exercised with profit." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922). Similarly, Chief Justice Hughes wrote that a property owner "cannot constitutionally be deprived of his right to a fair return because that is deemed to be of the essence of ownership." Near v. Minnesota, 283 U.S. 687, 707.

See, e.g., Epstein, supra note 109 at 1376-78.

See Epstein, supra note 109, at 1377. Professor Epstein persuasively argues that the Framers would not have protected property in the Fifth Amendment if they did not intend to protect individuals from a "form of governmental abuse that the Bill of Rights was designed to control." Id.

See id. at 1369-70, 1374-75.
compensation” for taking private property, encourages judges to use jurisprudential calculus in awarding compensation.\textsuperscript{145} Jurists, for example, often compare a given regulation’s social benefits with the costs incurred by complying with it. Professor Epstein consequently has suggested that an alleged partial taking would not violate the Fifth Amendment if the regulation “maximizes the joint utility of the parties ex ante.”\textsuperscript{146} In theory, and in the plain language of its utilitarian calculus, the “joint utility” or “joint welfare” standard is certainly admirable.

As a practical matter, however, Epstein did not explain why his joint utility standard for imposing partial takings liability would be materially different in practice from the Fifth Amendment jurisprudence preceding \textit{Lucas}. In this jurisprudence, for example, Justice Holmes defined compensable property according to whether a given restriction of it secures “an average reciprocity of advantage that has been recognized as a justification of various laws;”\textsuperscript{147} Justice Brennan defined it as the extent to which individual owners are “solely burdened and unbeneftited” by government regulation;\textsuperscript{148} and Justice Rehnquist defined compensable property according to whether a disputed regulation of it forces “some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”\textsuperscript{149} None of these standards forecloses imposing liability for the partial or incremental takings favored by Epstein.\textsuperscript{150}

Professor Epstein’s “joint utility” standard also shares an important characteristic with the ad hoc rules of Justices Holmes, Brennan, and Rehnquist.\textsuperscript{151} For both individuals and society, each standard requires an

\textsuperscript{145}See \textit{id.} at 1377-82.
\textsuperscript{146}Epstein, \textit{supra} note 109, at 1383.
\textsuperscript{147}Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
\textsuperscript{149}First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 318-19 (1987).
\textsuperscript{150}Professor Epstein takes Justice Scalia to task for supposedly foreclosing Fifth Amendment liability for “partial” takings. Professor Epstein is wrong. \textit{Lucas} does not prevent courts from imposing liability where government regulation diminishes some but not all of property’s value. Assuming that individual owners do not propose uses for their property that were unlawful when they first acquired it, then liability for partial takings may be imposed under Justice Holmes’s and Justice Brennan’s balancing tests. By their terms, these rules compare a disputed regulation’s social utility and “character” with the extent of the financial harm occasioned by it. \textit{See} Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 n.8; \textit{Penn Central}, 438 U.S. at 124. \textit{Cf.} Epstein, \textit{supra} note 109, at 1374-75.
accepted valuation methodology to quantify the value of both government regulation and its protection, for example, of clean air or clean water. However, accepted methodologies that value natural resources such as clean air and clean water are either generally unavailable or not within the domain of a particular discipline for which there is a technical or scientific consensus. For this reason, and given the obvious difficulties in identifying and measuring the "joint utility" of the environmental regulations for which majorities vote, there is little practical difference in how courts will behave if they use Professor Epstein's calculus for maximizing "joint utility," Justices Holmes's, Brennan's, or Rehnquist's standards for measuring the reciprocity of social advantages and individual detriments; or Justice Holmes's more mundane suggestion that courts compare the weight of a regulation's "public interest" with the extent that it diminishes the value of property. Each of these valuation standards will be as unpredictable and inaccessible to individuals as the next.

Professor Epstein points out that, under these ad hoc tests, it is often difficult for judges to impose liability on the state for "partial takings." This is true, but not for the reason suggested by Epstein: the Supreme Court's alleged intent to validate a "blueprint for confiscation" of virtually all of property's value except its complete value. Instead, Lucas, Penn Central, and Mahon merely reiterate a tradition of protected property: the Supreme Court has never imposed liability for merely diminishing the underlying profit, profitability, or value of property per se. By applying this tenet repeatedly, the Court has attempted to reconcile constitutional property's

152 The courts have neither agreed upon, nor applied, a settled standard for valuing natural resources. For example, the District of Columbia Circuit has noted that, from the perspective of Congress and the public generally, it is "skeptical of the ability of human beings to measure the true 'value' of a natural resource . . . . [N]atural resources have value that is not readily measured by traditional means." Ohio v. United States Dept. of Interior, 880 F.2d 432, 457 (D.C. Cir. 1989). In contrast, several economists have suggested that natural resources could be valued by (1) their "use values," the monetary value of human activities conducted on them or (2) their "nonuse values," the particular value that individuals ascribe to—or would pay for—maintaining a given natural resource in its natural state. See generally Raymond J. Kopp, Paul R. Portney, and V. Kerry Smith, Natural Resource Damages: The Economics Have Shifted After Ohio v. U.S. Department of Interior, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,127-28 (1990).

153 See Epstein, supra note 109, at 1383.

154 See id. at 1376-77, 1383.

155 Id. at 1377.

absolutist traditions, secured against governmental overreaching, with protected property’s traditional inception in state power.¹⁵⁷

Logically, the Supreme Court cannot define constitutional property according to its absolutist and statist traditions if, in deferring to either side of property’s duality, it eviscerates the other side. Therefore, the Supreme Court has never imposed Fifth Amendment liability on the state for “partial takings” that merely diminish the value of property in increments because, as Justice Holmes reminds us, “[g]overnment could hardly go on” if the courts deemed each incremental decline a discrete taking.¹⁵⁸

Instead, our jurisprudence has traditionally analyzed the effect of incremental declines in disputed property’s value on the wealth and commensurate power that constitutional property confers on individuals.¹⁵⁹ This approach allows judges to defer to protected property’s statist traditions by not finding partial takings merely because otherwise lawful regulation diminishes property’s value in increments. But it also allows jurists to protect the primary emolument that constitutional property confers on individuals: independent power to influence and avoid either government itself or other individuals. Therefore, where individuals possess protected property, and where democratic regulation divests them of its “economically productive” or “economically beneficial uses,” the state must compensate individuals with constitutional property’s equivalent in transferable power: money.¹⁶⁰

Second, and even more fundamentally, Professor Epstein’s standard of Fifth Amendment liability for partial takings does not supply individuals or government with an accessible definition of compensable property itself. Professor Epstein has not disputed that, in democracies as in other societies, governments often retain traditional powers to define and redefine the nature of the property rights that they necessarily enforce with state power. Yet he never defined the changes in property rights that democratic law may accomplish without compensating individuals.¹⁶¹ Notably, Professor Epstein has never referred to a particular point in time at which bodies of law may permissibly change a previously settled relationship of property.¹⁶²

¹⁵⁷ See Lucas, 505 U.S. at 1019-20 n.8; Penn Central, 438 U.S. at 124-25; Mahon, 260 U.S. at 413.
¹⁵⁸ Mahon, 260 U.S. at 413.
¹⁶⁰ See, e.g., Lucas, 505 U.S. at 1019, 1030; Nollan, 483 U.S. at 834; Agins, 447 U.S. at 260.
¹⁶¹ See generally, Epstein, supra note 109, at 1373, 1376-79.
¹⁶² See id.
he criticizes Justice Scalia for defining property according to individual "understandings" or "expectations" and, in response, defines protected property as "property" or "private property."

Plainly, defining property as property begs the fundamental question of what property is. Traditionally, the degree to which our laws will or will not enforce private covenants and easements against third-parties, to which Professor Epstein often analogizes in analyzing property rights, depends on both the state's preceding laws and the attendant expectations of individuals about the relevant restrictions of the covenant or easement. In our jurisprudence, the state has always exercised its power to define and redefine these property interests freely, provided its definitions are deemed consonant with fundamental tradition and its antecedent in "the law of the land." Accordingly, Epstein's property rights model is untraditional. It does not define constitutional property with bodies of democratic law at discrete times, discernible individual expectations, or indeed with any standard except maximizing "joint utility," a social science term that will be as difficult for most individuals to grasp in its application to property as the intricacies of calculus itself.

If Professor Epstein occupies the absolutist side of protected property's traditional polarities, and Professors Sax and Blumm occupy its statist side, then Justice Scalia represents a synthesis of constitutional property's traditional duality. As a preliminary matter, this synthesis can be demonstrated by a compelling anecdote. Criticizing Lucas, Professor Blumm accused Scalia of being "intellectually dishonest" because he "relied heavily"

161 Id. at 1370.

164 See, e.g., Robert C. Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls, 40 U. CHI. L. REV. 681 (1973). Cf. Epstein, supra note 109, at 1370, 1383. Similarly, in his study of Justice Oliver Wendell Holmes, Professor Robert Brauneis reminds us that individual expectations are fundamental to the property rights jurisprudence of many jurists, including Justice Holmes, because they allow judges to determine whether "degrees of change from preexisting positive law" are "drastic changes" that will unduly harm or disrupt the lives of individuals. Brauneis, supra note 79, at 641-42.

165 SOURCES OF OUR LIBERTIES, supra note 6, at 17 (citing Magna Carta ch. 39). The Supreme Court has often equated constitutional property interests with traditions and corresponding expectations that are discernible to individual owners. In doing so, the Court frequently decides whether a disputed government regulation has taken property by determining whether this regulation contravenes traditional or reasonable expectations. In Penn Central, for example, the Court held that government regulation causing substantial economic harm did not violate the Fifth Amendment because it "did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant." Penn Cent. Transp. v. New York City, 438 U.S. 104, 124-25 (1977).

166 See Epstein, supra note 109, at 1383.
on Professor Epstein’s amicus brief. At the same time, Professor Epstein criticizes \textit{Lucas} for being analytically “dead before it [was] born” because “it invites the form of governmental abuse that the Bill of Rights was designed to control.”

At least by reciprocal anecdotes, then, the jurisprudence of \textit{Lucas} would seem to be a friendly haven for anyone aspiring to traverse the schism between Professor Epstein’s absolutism and the statism of Professors Sax and Blumm. But there is more to the synthesis embodied in \textit{Lucas} than the easy argument that Justice Scalia, like Franklin D. Roosevelt, should be respected precisely because the left and the right have vilified him simultaneously. Before Justice Scalia’s opinion in \textit{Lucas}, no Supreme Court jurist had reconciled the lines of precedent and polarity between \textit{Mugler’s} statism and \textit{Mahon’s} theoretical absolutism.

Accordingly, and if only for the sake of historical accuracy and long-overdue civility, those occupying opposite sides of property’s traditional duality might do well to concede that the opposing side also represents a fundamental tradition of constitutional property. Advocates of protected property’s statist or absolutist traditions should recognize that \textit{Lucas} is practically and jurisprudentially advantageous to either tradition. By predicating \textit{Lucas} on constitutional property’s traditional duality, Justice Scalia attempted to preserve as much of property’s traditional statism and absolutism as possible without eliminating the opposing constitutional tradition.

Having considered the legal and historic texts, including the relevant “historical compact recorded in the Takings Clause that has become part of our constitutional culture,” Justice Scalia apparently concluded that he lacked authority to divorce constitutional property entirely from its societal and statist traditions. In a democratic society, after all, democratic traditions necessarily include democratic laws. From Magna Carta to \textit{Penn Central} to \textit{Lucas}, property has always been shaped and changed by both the traditional “law of the land” and the “expectations” and corresponding “rules or understandings” shaped by changes in traditional law. Therefore, \textit{Lucas}
defines protected property according to its "logically antecedent" basis in the laws preceding its acquisition. Democratic laws are "logically antecedent" to a judicial inquiry "into the nature of the owner's estate" that will determine if an individual's desired use of property was or was not "part of his title to begin with." 172

Professor Blumm complains that this definition often gives those owning economic "development rights" the right to receive just compensation under the Fifth Amendment. 173 He is correct, provided that Justice Scalia's "logically antecedent" inquiry establishes that an individual's desired use of property was permissible when he acquired it. 174 But even in situations where, for example, an environmental regulation prohibits all beneficial uses of property, and thereby completely destroys its value, Lucas does not mandate compensation if preceding laws precluded these uses at or before the time of the relevant owner's acquisition of property. In this situation, imposing Fifth Amendment liability would be anomalous and impermissible because it would compensate the developer for restrictions that "inhere in the title itself." 175

Individual owners, in other words, are deemed to have bought their property subject to the democratic traditions that pre-existing environmental or other laws embody. Therefore, Professors Blumm and Sax receive an important part of the benefits that they seek from their statist and associated environmentalist property rights theories. Over time, and assuming that existing environmental regulations are retained or strengthened, more environmental laws will be immune from Fifth Amendment liability because more owners will acquire property after these laws are enacted.

Professor Epstein receives much of what he wants as well. For the first time, the Supreme Court has supplied property owners with an accessible definition of the constitutional property that, at a given time, the government may not take without also remitting compensation. 176 Where

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172 Lucas, 505 U.S. at 1027.
173 Blumm, supra note 117, at 907-08.
174 Lucas, 505 U.S. at 1027.
175 Id. at 1029.
176 See generally id.
laws existing before a given individual owns property do not preclude desired uses of it, Justice Scalia determined that takings liability will be imposed without exception in two "categorical" situations: where the government either permanently occupies land, "no matter how minute the intrusion," or categorically destroys all "economically viable" uses of property.177

In these categorical situations,178 and without applying Penn Central’s or Mahon’s balancing tests, the Lucas court concluded that protected property will necessarily be taken under the Fifth Amendment, regardless of whether the legislature invokes new police powers or some other power to justify either permanently occupying property or precluding its beneficial uses.179

Under this standard, the Lucas court held that South Carolina had effected a "categorical" taking of Mr. Lucas’ two beachfront lots.180 Because no preceding law had prohibited Mr. Lucas from building dwellings on his beachfront lots, and because South Carolina had enacted a new law after he acquired those lots that rendered them "valueless," the Supreme Court imposed Fifth Amendment liability without applying its various balancing tests.181

This constitutional mechanism for protecting individuals against the state’s retroactive divestiture of their private property’s previously beneficial uses is not present in Mugler, Mahon, or Penn Central. In each of these cases, the Supreme Court fails even to define the particular constitutional property under the Fifth Amendment that the state may not take at a given time with its rational legislative powers.182 Accordingly, these cases fail to

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178 See id. at 1028-29. The Lucas court distinguished between the "categorical" situation before it and "non-categorical" situations in which the government neither permanently occupies private property nor precludes its economically viable uses. Where preceding laws in non-categorical situations do not prohibit a given owner’s desired use of this property, the Supreme Court continues to apply Mahon’s and Penn Central’s balancing tests: it will balance the regulation’s “character” with its effect on both the regulated property’s value and the relevant owner’s expectations. See id. at 1019-20 n.8; Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124-25 (1978).
179 See Lucas, 505 U.S. at 1028-29.
180 See id.
181 See id. at 1007, 1028-29.
182 In Mugler, Justice Harlan expressly upheld a state legislature’s right to retroactively destroy the value of a brewery if its retroactive destruction was consonant with a rational definition of "public morals." See Mugler v. Kansas, 123 U.S. 623, 662, 668 (1887). In Mahon, and except for Justice Holmes’s description of the precise facts before him, Holmes never defined the circumstances under which or the particular time at which Pennsylvania’s legislature could not retroactively destroy the value of the disputed mineral reservations. Instead, Holmes determined that the “statute does not disclose a public interest sufficient to
vindicate one of the most basic reasons for imposing laws: providing individuals with a secure, predictable basis in accessible rules to govern their lives and property.

In contrast to the Supreme Court’s previous ad hoc balancing tests and other judicial rules, it would be comparatively easy for individuals at a given time to predict under *Lucas* whether they owned or did not own compensable property. Unlike the situation presented by Professor Epstein’s “joint utility” standard, for example, individual owners would not have to determine whether they owned compensable property by mastering econometric analysis. Instead, they need only ascertain whether their desired use of property was limited or prohibited by the pre-existing laws underlying “existing rules or understandings.” Plainly, this process is also easier for individuals to comprehend than Justice Holmes’s and Justice Brennan’s balancing tests. To truly understand these tests, individuals must predict how a given judge will construe and balance their nebulous, uniquely subjective terms, such as “investment-backed expectations,” the government action’s “character,” the “extent of the financial impacts,” and the particular degree to which a discrete regulation “goes too far.”

*Lucas* also protects law-abiding individuals from the only category of government regulation to which they cannot adapt or avoid rationally: regulations and concrete prohibitions that were not embodied in law when these individuals first acquired their property. By defining constitutional property with the laws existing when a given individual acquires property, *Lucas* protects individuals from discrete regulations that they cannot warrant so extensive a destruction of the defendant’s constitutionally protected rights.” Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922). Similarly, Justice Brennan held in *Penn Central* that New York City could retroactively prohibit a fee simple owner from building an office building on top of a train station because this regulation’s “character” was properly balanced with both the degree of financial harm occasioned by it and the relevant owner’s “investment-backed expectations.” *Penn Central*, 438 U.S. at 124, 129-31.

183 See generally Epstein, supra note 109.


185 Justice Holmes’s definition of the property that states cannot take is almost entirely relativistic: under Holmesian analysis, protecting constitutional property in the future requires judges to determine if a given regulation of it “goes too far” in either advancing the “public interest” or in reducing property’s financial value. *Mahon*, 260 U.S. at 413-15. Similarly, Justice Brennan defines what is “too far” in *Penn Central* by considering the “character of the [governmental] action” and the “nature and extent of the interference with rights in the parcel as a whole.” *Penn Central*, 438 U.S. at 124-25, 127-28, 130-31. For one fundamental reason, Justice Brennan’s definitions do little or nothing to clarify the jurisprudence: his definitions are broader than the Holmesian abstractions that preceded them.
specifically anticipate. Similarly, by specifically defining the title of constitutional property to include pre-existing laws, *Lucas* gives the private market something that the Supreme Court's previous balancing formulations—which never take a concrete position on this issue—cannot give: a stronger incentive to respond to regulatory encumbrances by lowering the price of encumbered property relative to unregulated properties. This diminished relative price will protect individuals by allowing them to choose between (1) paying less in comparative terms for property encumbered by the pre-existing laws defining constitutional property under *Lucas* and (2) paying more for properties that are unregulated but otherwise comparable.186 *Lucas*

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186 The economic analysis of law, advocated at times by Judge Richard A. Posner, also suggests that *Lucas* will benefit both absolutist and statist property rights advocates. Under this analysis, the absolutist traditions of the Fifth Amendment and other parts of the Bill of Rights have an "anti-monopoly" purpose: limiting government's power to either "intimidate opponents" or enrich majorities by imposing "particularly harsh and costly forms of wealth redistribution." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 83, 620-21 (1992). Posner predicted that, unless government imposes legal changes that are "unanticipated" by the private market, the costs of pollution control and other regulations will be reflected in the price paid for regulated properties and, therefore, will not alter the wealth or commensurate power of individuals. See id. Accordingly, *Lucas* imposes Fifth Amendment liability on the state at the precise time that Posner's economic analysis suggests individuals otherwise would transfer their wealth involuntarily to the government: the time that "unanticipated" regulation, imposed after these individuals acquire property, divests the value or possession of their property. See id.

In response to the Posnerian justification for absolutist property rights, Professor Sax pointed out that rapidly changing property rights, occasioned by "unexpected and sweeping changes, such as the industrial revolution," are often beneficial to society because they are coterminous with desirable scientific, economic, or social innovations. Sax, supra note 114, at 381. For this reason, he criticized property rights models that compensate individuals for rapid majoritarian changes because, as a result of such compensation, beneficial change "becomes less desirable." Id. Accordingly, Sax has advocated property rights models that reward and "value human adaptability." Id.

Judge Posner's economic analysis suggests that *Lucas* would encourage the adaptive behavior sought by Professor Sax. See Posner, supra, at 83. By definition, the pre-existing laws for which *Lucas* does not impose takings liability are anticipated by the relevant owner. Accordingly, the costs and risks imposed by these preceding laws will be reflected in the price that this owner paid for the property. See id. Assuming the government decides to regulate the particular uses of property that the market deems the most valuable, then the price of the regulated property will drop in comparison to unregulated but otherwise equivalent properties. See id. In response, rational individuals can adapt to the regulated property by (1) paying its lower relative price and thereby incurring the higher costs or risks of government regulation or (2) deciding to pursue a different property altogether, for which there may be less government regulation, more desirable risks, and a higher return and relative price. See id. Accordingly, *Lucas* yields
consequently protects property owners from the same evil from which the Fifth Amendment also protects them: involuntary transfers of property or its commensurate power from individuals to the state. Generally, involuntary transfers of this type are deemed pernicious by our laws.\footnote{87}

In contrast, neither Professor Epstein’s joint welfare standard nor the balancing rules of Justices Holmes and Brennan can really warn individuals against much of anything except the inchoate risk that the government may take their property without compensation if a given judge, applying a given balancing test, decides that this indeed would be a good thing. That well-meaning jurists and scholars have generously attempted to define a good thing as the maximization of “joint utility,” or as expectations deemed “reasonable” in light of a statute’s “character” and consequent financial harm is undisputed.\footnote{88} These friendly terms, however, cannot obscure the fact that most prescient individuals will be unable to predict how the terms will be construed or balanced, unless they happen to be among the judges deciding the relevant case.

In sum, by defining constitutional property with both its statist and absolutist origins, Lucas has disappointed purists of the absolutist and statist property rights schools simultaneously. Nevertheless, these Fifth Amendment theoreticians should revisit and reconsider Justice Scalia’s unsentimental view of constitutional property’s texts. For the first time in the Supreme Court’s jurisprudence, Justice Scalia and his brethren have defined constitutional property with democratic laws and corresponding traditions that crystallize at a particular point in time: the time that a given individual acquires property. Under Lucas, the state cannot retroactively take the beneficial uses of property that are permissible under law as of that time.
Lucas consequently uses accessible laws to define a sphere of constitutional property at given times into which the government cannot invade, regardless of the rationale for its powers. Because the laws with which Justice Scalia defines constitutional property are comparatively accessible to law-abiding individuals in a democracy, Lucas provides these individuals with an accessible basis in democratic traditions to own property and plan their private lives.

IV. Why Does Lucas Give Legislatures More Prospective Power to Define Protected Property Than They Have Under the Constitution to Define Protected Speech and Religion Prospectively?

In Lucas, Justice Antonin Scalia was at once audacious and traditional. Traditionally, Justice Scalia began with an almost self-evident constitutional proposition: the property that the Bill of Rights protects from majoritarian overreaching cannot be protected if majorities can take the productive uses underlying private property with an "unbridled, uncompensated" application of their police powers. Audaciously, however, Justice Scalia defined the constitutional property that he protects from overreaching democratic majorities with democratic laws, provided that these laws exist when a given owner acquires property.

Justice Scalia consequently began his invocation of protected property’s statist traditions by defining constitutional property with a democracy’s most accessible government power: law. He explained that laws are a fundamental part of what the individual “necessarily expects” from the State’s traditional power to define the “bundle of rights” comprising property itself. At the same time, however, Justice Scalia also deferred to constitutional property’s tradition as an absolute restraint against the state. Governments must pay for retroactively taking the very traditions of property that they themselves recognize in the “background principles of the State’s law of property and nuisance.” With these terms, Justice Scalia returned protected property to its statist and absolutist origins.

Property rights advocates raise an important question when they inquire about the basis in Lucas and other cases for subordinating

190 See id. at 1028-29.
191 Id. at 1027.
192 Id. at 1029.
constitutional property more to the manipulation of future legislatures than protected speech or religion. They argue that because the Bill of Rights protects free religion, free speech, and private property separately and compartmentally, private property should be protected co-equitably with the other constitutional liberties. This logical proposition requires a logical response. For modern Fifth Amendment jurisprudence to be justified, there must be a distinction in our legal traditions between constitutional property and other civil liberties. This distinction must enable courts to defer more to changing democratic traditions in defining protected property than in defining, for example, free speech or free religion.

The salient distinction in our jurisprudential traditions between protected property and free speech or free religion is that, for private property to be owned, defended, and enjoyed, government must systematically exclude communities and individuals that our laws deem inherently hostile to property from protected property itself. In contrast, the law generally presumes that governments themselves, not individuals, are inherently hostile to free speech and free religion. Accordingly, it deems most individuals capable of seeking and enjoying speech and religion without needing state power’s systematic application to either define or exclude other private individuals from these liberties. Therefore, the law celebrates free speech and religion not because they empower individuals to be powerful by themselves, in excluding all others, but because protecting speech and religion enables individuals to freely associate in a mutual pursuit of either truth “through public discussion” or revelation.

In his famous celebration of the First Amendment, for example, Justice Brandeis praises free speech because it protects and magnifies “the power of reason as applied through public discussion.” For Brandeis, coerced privacy and passivity are antithetical to free speech. Free speech is contrary to both the silence of “an inert people” and the “silence coerced by law—the argument of force in its worst form.” Accordingly, Brandeis and

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193 Professor Epstein is one of this school’s most prominent exemplars. He has argued that modern Fifth Amendment jurisprudence is illegitimate because, by defining constitutional property with individual expectations, it allows democratic states to take property at will by enacting new laws and decrees that necessarily shape those expectations. See Epstein, supra note 109, at 1377, 1387. For this reason, Professor Epstein criticized Justice Scalia for providing “an effective blueprint for confiscation that budget-conscious state legislators will be eager to follow to the letter.” Id.


195 Id.

196 Id.
others celebrated free speech not because it empowers individuals in narcissistic isolation, but because it nurtures their predisposition to strive for truth in consensual or competitive associations and discourse.\textsuperscript{197}

In contrast, our jurisprudence does not celebrate private property because it allows individuals to approach civic or religious truth by sharing it with others. Instead, constitutional property is generally celebrated as a basis for individual power and liberty, not dialectical truth \textit{per se}. As a sphere for individual power and liberty, property benefits individuals precisely because it is a natural refuge from the natural or presumed associations underpinning speech and religion. Accordingly, jurists with philosophies as diverse as those of Justice Rehnquist, Justice Blackmun, and Blackstone distill private property's essence under law as an individual’s right to exclude others from what he owns. In their view, using the force of law to exclude others from property is generally “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”\textsuperscript{198}

\textsuperscript{197} Similarly, Justice Holmes praised the First Amendment for allowing individuals to exchange ideas freely in mutual or mutually competitive discourse, thereby enriching society by a concomitant pursuit of truth. Abrams v. United States, 250 U.S. 616, 630 (1919). Although individuals would naturally favor the domination of their own ideas, “the ultimate good desired is better reached by free trade in ideas; the best test of truth is the power of the thought to get itself accepted in the competition of the market.” \textit{Id.} at 630.

Free speech is often instrumental to evaluating governments, voting after doing so, and thereby engaging in rational self-government. Therefore, some scholars view speech as synonymous with self-government itself:

The reason for this equality of status in the field of ideas lies deep in the very foundation of the self-governing process. When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger ... [It] is that mutilation of the thinking process of the community against which the First Amendment [is] directed. The principle of the freedom of speech [is] not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by [the franchise].

\textsc{Alexander Meiklejohn, Free Speech and Its Relation to Self-Government} 15-16, 24-27, 39 (1948).

\textsuperscript{198} Justice Rehnquist used this language in \textit{Kaiser Aetna v. United States}, 444 U.S. 164, 176 (1979) and in \textit{Dolan v. Tigard}, 512 U.S. 374, 384 (1994). Quoting \textit{Kaiser Aetna}, Justice Blackmun relied on this language in \textit{Ruckelshaus v. Monsanto}, 467 U.S. 986, 1011 (1983). Blackstone comes perhaps the closest as any commentator to romanticizing the proprietary and territorial aspirations of individuals to both own property and eject others from it. He defines property as that which “generally strikes the imagination, and engages the affections of mankind ... that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.” \textsc{2 William Blackstone, Commentaries} \textsuperscript{2}.
This distinction between free speech as a haven for cooperative and competitive associations, and constitutional property as a refuge for an individual's practical power, antedates our constitutional jurisprudence. Blackstone, for example, believed that society would benefit if the public purse and public laws kept the community away from private property. 199 Valuable technology and products would never be created, or would gradually disappear, if an individual, "as soon as he walked out of his tent or pulled off his garment, the next stranger who came by would have a right to inhabit the one, and to wear the other." 200 For this reason, Blackstone believed that "[s]o great . . . is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community." 201

But Blackstone also believed that the desire of competing individuals to exclusively keep or arrogate property was so pervasive that it posed a threat to social order unless government acted as a powerful instrumentality for "steadily pursuing that wise and orderly maxim, of assigning to everything capable of ownership a legal and determinate owner." 202 "Otherwise," Blackstone says, "innumerable tumults [would arise], and the good order of the world [would be] continually broken and disturbed, while a variety of persons were striving [as to] who should get the first occupation of the same thing, or disputing which of them had actually gained it." 203

Underpinning the individual right to exclude the community from private property, then, is the assumption that other individuals will assiduously covet both the same valuable property and a corresponding right to exclude others from it.

This presumed hostility of individuals to the possession by others of constitutional property is antithetical to the presumptively consensual associations underlying free speech. Our laws presume that speech, in contrast to the process of acquiring and coveting private property, will flourish in the absence of governmental laws "abridging" 204 it or, as Justice Brandeis put it, in the absence of "silence coerced by law." 205 Just as the Constitution protects other civil liberties to which individuals are generally presumed to aspire without systematically invoking or needing government

199 See I WILLIAM BLACKSTONE, COMMENTARIES *139.
200 BLACKSTONE, supra note 198, at *4.
201 BLACKSTONE, supra note 199, at *139.
202 BLACKSTONE, supra note 198, at *15.
203 Id. at *4.
204 U.S. CONST. amend. I
power, such as free religion or the right to be secure in their persons and papers, it also protects free speech by divorcing speech from state power: "Congress shall make no law respecting an establishment of religion...or abridging the freedom of speech." With these plain commands, the First Amendment protects free speech by making it independent of state law and state power.

In contrast, the Fifth Amendment presumes that constitutional property can and will be “taken for public use” by governments and, therefore, requires government to remit “just compensation” when it does so. Our laws also presume that the same recording and registration statutes that are antithetical to the presumptively consensual conduct underlying free speech are essential to protect private property from individuals predisposed to invade it. Similarly, whenever private actors attempt to arrogate and profit from the free speech of others, or render speech coerced instead of consensual, the law does not protect free speech as speech per se. Instead, the law protects arrogated or coerced speech as private property, protected by patents and copyrights, or as conduct protected by criminal and tort laws, such as battery or assault. Therefore, where speech is coerced or arrogated

206 U.S. CONST. amend. I (emphasis added).

207 In contrast, and because the law is the only civilized instrumentality for enforcing an individual’s right to eject others from his land, our jurisprudence often views the power of law as coterminous with the right of property. For this reason, the Supreme Court has repeatedly held that property only consists of those rights “which have the law back of them.” Kaiser Aetna v. United States, 444 U.S. 164, 178 (1979); United States v. Willow River Power Co., 324 U.S. 499, 502 (1945); Shanghai Power Co. v. United States, 4 Cl. Ct. 237, 241 (1983).

208 U.S. CONST. amend. V.

209 The Supreme Court, for example, has reiterated that the “struggle for the freedom of the press was primarily directed against the power of the licensor.” Lovell v. Griffen, 303 U.S. 444, 451 (1938). In contrast, all states require the recordation and registration of real estate interests.

210 In contrast to laws protecting copyrights, trademarks, and patents, for example, the First Amendment’s text protects speech by securing “freedom of speech” by itself, without implicating, referring to, or creating concomitant property or other rights for and against individuals. Therefore, constitutional speech cannot protect private individuals from having their speech arrogated or coerced by other private individuals. Instead, the First Amendment necessarily imposes liability not on individuals, but on governments for enacting laws “abridging the freedom of speech.” U.S. CONST. amend I.

211 For example, if the number of lawsuits commenced in the United States District Courts in 1998 are aggregated, approximately 26,155 cases were filed in which individuals alleged: that they or others were assaulted; that property was taken; or that property rights were violated. See STATISTICS DIVISION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS—ANNUAL REPORT OF THE
by private actors, the law does not view it as a unique constitutional value, but as an extension of either private property or our bodies.\textsuperscript{212}

The Framers’ distinction between constitutional property and constitutional speech is eminently logical. If the purpose of protecting property under the Fifth Amendment is providing individual owners with a sphere of practical power against both the state itself and other individuals, then there is no reason why the state itself cannot take property if it also uses the public purse to return commensurate power to these owners. But if the First Amendment’s purpose is the pursuit of truth through free “public discussion,”\textsuperscript{213} then the state could never achieve this purpose by paying for or coercing speech. Instead, government would replace true “public discussion” with state monies, viewpoints purchased with money, or official speech’s monologue and “coerced” silence.\textsuperscript{214}

Unlike free speech, therefore, protected property consists of a bundle of rights by which individuals systematically petition the state to exclude others from a constitutional liberty to which the community, without enlightened government, is generally deemed hostile. In exchange for surrendering government power to the service of a petitioning individual, the state demands a price: it and its judges define, at least in part, that which the government also protects with disproportionate force and public monies. Benjamin Franklin described this arrangement as a doctrine of reciprocal social obligations.

Private Property ... is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing; its Contributions therefore to the public Exigencies are not to be considered as conferring a Benefit to the Public, entitling the Contributors to the Distinctions of Honour and Power, but as the return of an Obligation previously received, or the Payment of a just Debt.\textsuperscript{215}

\textsuperscript{212}See id.

\textsuperscript{213}Whitney v. California, 274 U.S. 357, 375 (1927).

\textsuperscript{214}See id.

\textsuperscript{215}Benjamin Franklin, Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania, in 10 The Writings of Benjamin Franklin 59 (Albert H. Smith. ed. 2000).
Franklin's definition of private property as being valuable precisely because of its societal origins and consequent social obligations is so traditional in our jurisprudence that it transcends the particular opinions of a given Framer or Supreme Court jurist. It recurs in the writings and official acts of such ideologically diverse individuals as Franklin himself and Justices Oliver Wendell Holmes, William Brennan, and William H. Rehnquist. Justice Holmes defines compensable property according to whether its restriction secures "an average reciprocity of advantage that has been recognized as a justification of various laws;"216 Justice Brennan defines this property according to whether individual owners are "solely burdened and unbeneftited" by government regulation;217 and Justice Rehnquist defines it according to whether the regulation of property forces "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."218

These standards describe a broad universe of individual and social obligations by which the state defines the types of property that it defends systematically with public power. Because our jurisprudence presupposes that individuals are generally more hostile to private property than to free speech, protected property requires government to keep more people away from it. Private property consequently requires more government coercion than free speech. However, and in contrast to the need of most property owners for government's systematic intervention and protection, comparatively few in our society want or need government registration or recordation of their beliefs, conversations, or religious practices. Therefore, instead of requiring government to act systematically, free religion and free speech generally require it to refrain from acting and thereby manipulating or coercing "public discussion."219

The concept of protecting property under law is analogous to the protection by the government of a private home. To prevent both individuals and itself from entering and robbing this home, the government defines the house's boundary, provides at least some of its locks, and patrols the streets. Unlike private property, however, free speech and free religion generally require government to be absent and benign, not perennially active and

1907).
powerfully present in defining, measuring, or registering discrete speech and approved religions. Accordingly, the liberties of free speech and free religion generally require the government to stay away from the premises instead of locking the house or patrolling pews and chat rooms.

In sum, the state's obligation to defend constitutional property by acting systematically requires more government power than its general obligation to protect free speech by refraining from acting at all.\textsuperscript{220} Therefore, the doctrine of reciprocal social obligation, celebrated by Americans as diverse as Benjamin Franklin, William H. Rehnquist, and William J. Brennan, is nothing but the necessary price that individuals pay for systematically harnessing the state's power to keep others from taking the private property underpinning their private lives.

V. Who Defines the Terms of the Social Arrangement by Which the Individual Holds, and the State Defines and Defends, Private Property From Those Coveting It?

The irony and duality of protected property is that, since at least Magna Carta, fundamental social tradition has defined it as both independent of the state and uniquely dependent on state power for its definition and defense. Theoretically, even totalitarian governments, but especially democratic governments, may accurately reflect and embody traditions of property held by the community. But, as King John, King George, King Louis XIV, the so-called Confederate States of America, and the leaders of

\textsuperscript{220} This fact is intuitively true: more individuals and potential criminals aspire to stealing wallets, arrogating trademarks, or hijacking cars than invading pews or suppressing speeches. It is also empirically true: when alleged violations of property rights are compared to alleged violations by the government and by individuals of constitutional or civil rights, offensive and defensive invocations of property rights dominate the civil and crime statistics of the United States District Courts. For example, if all civil and criminal cases commenced in 1998 are aggregated and divided by the nature of the suit or major offense, plaintiffs alleged constitutional or civil rights violations in approximately 17,609 federal district court cases. See COURTS ANNUAL REPORT, supra note 211, at 145-47, 210-11. Plainly, these 1998 figures substantially overstate the number of lawsuits predicated on alleged First Amendment violations because they include virtually all constitutional or civil rights lawsuits except those pertaining to employment, voting rights, housing, and welfare. See id. Nevertheless, the number of federal cases in which property rights were invoked exceeds the 17,609 civil rights or constitutional lawsuits, specified above, by approximately forty-nine percent. See id. In 1998, plaintiffs alleged that their real and personal property, copyright, patent, or trademark rights were invaded, stolen, arrogated, embezzled, or otherwise taken in approximately 26,155 federal cases. See id. at 210-11.
the coup against Boris Yeltsin and Mikhail Gorbachev learned to their
 detriment, governments in the long run exist only to the extent that they
 reflect or do not seriously offend the traditions of those who ultimately
 enforce national power.

If constitutional property's meaning and definition ultimately reside
in fundamental societal tradition, then what is this tradition and what are its
signatures? Ultimately, Magna Carta, other social compacts, and the
Constitution teach us that literate societies necessarily write fundamental
traditions down in revered documents or social compacts. These compacts,
often born of violence and social turmoil, describe the rules and customs by
which those comprising society will tolerate each other without violence or
rebellion. Because our society's fundamental written compacts, like any
other act of writing, rest on organizing and limiting the subjects chosen, our
social compacts necessarily reflect less than tradition in its entirety. As such,
they "are shaped not only by the elite cultures of jurists and legal
commentators but by prevailing custom and folk tradition as well."

Repeatedly, the Framers justified private property as a fundamental
right by referring to fundamental tradition. By definition, these traditions
are not the same thing as the state, especially an oppressive state. At the
same time, fundamental social traditions are uniquely dependent on state
power for their definition and enforcement under law. Before the Revolution,
George Washington could not justify his rebellion against the British with
any written compact, save the charters establishing Virginia as a colony or
otherwise recognized in the past by Great Britain. Nevertheless, it was
enough for him to refer to the "law of nature and our constitution" to justify
defending private property and other fundamental liberties.

[T]he Parliament of Great Britain hath no more right to put
their hands into my pocket, without my consent, than I have
to put my hands into yours for money; and this being already
urged to them in a firm, but decent manner by all the colonies,

221 As Professors Robert Cottrol and Raymond Diamond remind us, Magna Carta, the
English Declaration of Rights of 1689, and the U.S. Bill of Rights, each of which limit
government power and set forth individual rights to which government is subordinate, "were
the products of insurrections by armed populations." Robert Cottrol and Raymond
222 Id. at 1016.
223 See supra notes 36-44 and accompanying text.
224 Letter from George Washington to Bryan Fairfax (July 20, 1774), in 3 THE WRITINGS OF
GEORGE WASHINGTON 233 (John C. Fitzpatrick ed., 1934-44).
what reason is there to expect any thing from their justice?\textsuperscript{225}

His early discontent hinted at the revolution that was to come.

At a time when our Lordly Masters in Great Britain
will be satisfied with nothing less than the deprecation of
American freedom, it seems highly necessary that some thing
shou’d be done to avert the stroke and maintain the liberty
which we have derived from our Ancestors.\textsuperscript{226}

During and after the Revolution, Washington looked less to the traditions
underpinning local and state governments and more to a new national
government, with its supreme law and expanded powers, to defend traditional
liberties against sectional passions and strife.\textsuperscript{227}

James Madison, attempting to engraft new traditions onto those of
England, did not justify traditional property solely by referring to preceding
social compacts. Instead, he believed that, if the government protected “the
different and unequal faculties of acquiring property,” then the power of
property itself would create a “multiplicity” of factions that would protect
society against the “uniformity of interests” underlying oppressive
governments.\textsuperscript{228} But Madison also believed that republican government could
be threatened and destabilized if these multiple factions converged into a
smaller number of mutually hostile economic and sectional interests, such as
those that either opposed or advanced slavery.\textsuperscript{229} Accordingly, Madison

\textsuperscript{225} Id.
\textsuperscript{226} Letter from George Washington to George Mason (April 5, 1769), in 1 THE WRITINGS
OF GEORGE WASHINGTON 500-01 (John C. Fitzpatrick ed., 1934-44).
\textsuperscript{227} During the Revolution, George Washington believed that an inefficient and needless
factional rivalry among the states had come close to destroying his army’s ability to fight by
denying it necessary food and supplies. See 19 THE WRITINGS OF GEORGE WASHINGTON, 
supra note 224, at 32, 70-71, 130-32, 135-36. Accordingly, he wrote that, without a strong
national government, the country would become “a many headed Monster . . . that never will
or can steer to the same point. The contest among the different States now, is not which shall
do the most for the common cause, but which shall do the least . . . .” Id. at 132 (emphasis
added).

At the end of his second term as president, Washington’s views about the national
government’s primary importance remained unchanged. In his Farewell Address, he wrote
that a strong and unified national government is a “main Pillar . . . of your tranquility at
home; your peace abroad; of your safety; of your prosperity; of that very Liberty which you
so highly prize.” 35 THE WRITINGS OF GEORGE WASHINGTON, supra note 224, at 218-19.
\textsuperscript{228} See THE FEDERALIST No. 51 at 358-59 (James Madison) (Benjamin F. Wright ed., 1961).
\textsuperscript{229} See id. at 132-33.
strongly supported the new Constitution because he believed that a strong national government was needed to protect the republic against regional and sectional fragmentation. Because the new national government would exercise expanded federal powers at the same time that its two houses of Congress substantially increased the multiplicity of factions represented in one supreme government, sectional schisms would remain “but not in the same degree [as] at this time; and every day would tend towards an equilibrium” of destructive factions.

American jurists have struggled mightily to explicate the traditional concept that property exists as both a tradition of and a restraint against democratic states. The difficulty of defining property in any democratic republic is inevitable. Traditions cannot be fundamental unless they are widely or commonly understood. Democratic laws often epitomize fundamental traditions because they necessarily embody the accessible traditions of democratic majorities. However, because the traditions of property derive from the “law of nature,” they necessarily existed “of old and rightfully,” before the British government that the Framers resisted and the new republic that they created.

For these reasons, it is often extraordinarily difficult for our judges to distinguish between fundamental traditions of property that democratic majorities can express solemnly in democratic law and the traditions that the Framers considered superior to mere democratic laws. Palpable laws and regulations at least have the advantage of being real and commonly understood, if not necessarily fundamental. In contrast, the constitutional property of the Framers, which Justice Scalia reminds us is necessarily fundamental in our “constitutional culture,” is not as readily understood because the Framers did not define protected property by referring to a given body of laws or regulations. If, however, jurists simply define constitutional property according to what democratic laws permit and prohibit, then they arrogate to legislatures the power to define a constitutional right by majority decree. In the words of Justice Story, that type of a government “can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint.”

In the face of this traditional polarity between property’s statist and

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230 THE FEDERALIST No. 10 (James Madison).
232 See supra notes 6, 32, and 220-222 and accompanying text.
absolutist traditions, many jurists retreat into the ostensibly safe confines of ad hoc balancing tests. These rules certainly maximize the discretion that judges retain to define property in constitutional adjudication. As the Supreme Court has stated on occasion, the concept of compensable property under these standards has been interpreted so broadly as to include “every sort of interest the citizen may possess.”

Because the ad hoc tests devised by Justices Holmes and Brennan rest on balancing the meanings of abstract terms such as “investment-backed expectations” and the “character of the government regulation,” they are premised on the Supreme Court’s inability or unwillingness to define constitutional property with an absolute standard. Therefore, these rules cannot tell actual or potential litigants much except that the Supreme Court will balance future government powers or regulations, yet to be applied, with concepts of compensable property that the Court ultimately refuses to define. The outcomes of these balancing tests consequently will be as difficult to predict in their permutations as the particular places that grains of sand occupy over time in a sand bar shifting with the tides.

For Justice Brennan, constitutional property’s statist traditions are embodied in the “character of the governmental action.” The traditional “character” of government regulation, of course, includes all conceivable majoritarian values, such as police power regulations and other regulations governing public morals, public intoxicants, public safety, historic preservation, beach access, bicycle paths, and environmental law generally. But Justices Holmes and Brennan also define the protected property that is theoretically independent at times from these majoritarian values by comparing the “character” of the government regulation at issue with the “extent of the diminution” in value occasioned by the regulation itself. Therefore, Justice Holmes’s and Justice Brennan’s ad hoc rules are both inherently opaque and perpetually malleable because their outcome

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237 See, e.g., Dolan v. City of Tigard, 512 U.S. 374, 379-80 (1994) (involving a city requirement that a landowner build a bike path on her land in exchange for receiving a new zoning permit); Nollan v. California Coastal Council, 483 U.S. 825, 828, 835-36 (1987) (treating a state agency regulation requiring landowners to convey an easement across their beachfront lot to the general public in exchange for a coastal development permit); Mugler v. Kansas; 123 U.S. 623, 657, 662-63 (1887) (dealing with state retroactively destroying the value of a brewery by prohibiting commercial brewing, on grounds that the legislature’s definition of public morality and public health had changed).
238 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).
necessarily varies with each arithmetic increment by which a given regulation can diminish the value of property, from just under one hundred percent to zero percent.\footnote{See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 n.8 (1992).} For individuals deciding to acquire or not acquire property, navigating by reference to these oscillating standards is as potentially perilous as Ulysses’s voyage back to Penelope and Ithaca.

Other jurists, perhaps sympathizing with those seeking to plan their lives rationally around accessible legal rules, have expressly defined constitutional property rights with accessible democratic laws. Some decisions seem on the surface to address squarely at least part of compensable property’s definition in positive law: they intone that only those interests “which have the law back of them” are property rights.\footnote{United States v. Willow River Co., 324 U.S. 499, 502 (1945), quoted in Kaiser Aetna v. United States, 444 U.S. 164, 178 (1979).} Others, epitomized by Mugler, authorize sweeping legislative powers to take property almost at will by defining a rational nexus between majoritarian laws and “public morals.”\footnote{Mugler, 123 U.S. at 657, 662-63.} Ultimately, however, these rules create as many legal issues as they purport to resolve. By defining property with the uses and restrictions authorized by democratic law, they ignore the salient issue of when and how, if ever, democratic laws defining property crystallize under the Fifth Amendment into constitutional property that majoritarian laws cannot take without compensation. Is the state, for example, free throughout the period in which a given individual owns property to prohibit uses of property that it had previously deemed lawful? Or must the state pay for retroactively taking uses of property deemed lawful before the individual acquired it?

Still other jurists, perhaps equally suspicious of both balancing rules and national or uniform definitions of property, define protected property according to “existing rules or understandings that stem from an independent source such as state law.”\footnote{Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972), quoted in Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984).} These understandings, however, are at once as real and elusive as a rainbow: they can be imagined and seen, but, as soon as prospective litigants attempt to touch or define what they imagine or see, their understandings disappear. Theoretically, however, defining property according to independent understandings “such as state law”\footnote{Id.} at least gives individuals a place to begin searching for constitutional property.

But defining constitutional property with independent understandings that can be defined by state law does not address the fundamental issue of...
how and when these understandings vest under law as constitutional rights that the state may not take. This definition also does not explain why, if property is defined solely as a creature of state law, federal law cannot take or change it with impunity because the Constitution presupposes that federal law is "the supreme Law of the Land."\textsuperscript{244}

Perhaps even more fundamentally, decisions defining constitutional property as originating in individual understandings having an "independent source" do not define the particular entity from which these understandings must be "independent."\textsuperscript{245} Is this entity the individual and, therefore, should the understandings defining constitutional property merely be different from an individual's subjective expectations by themselves, perhaps by also being present in democratic laws? Should these understandings be deemed to crystallize into compensable property at a particular time, such as the time that a given owner acquires disputed property or the period thereafter when he uses it?

In any event, and at least in theory, rules defining protected property with independent understandings shaped by state laws at least allow individuals to begin verifying whether they hold or do not hold constitutional property. Undeniably, individuals will always hold "understandings" as to what property is and what types of it the state will enforce. Therefore, if the compensable understandings of individual owners are deemed to originate in distinct bodies of law, then it will be much easier for courts to verify the existence of these understandings by construing palpable laws than by attempting to fathom the "subjective" expectations of discrete owners.\textsuperscript{246} Unlike the Supreme Court's previous balancing tests and other standards, \textit{Lucas} defines the particular time at which the democratic laws underpinning protected property's traditions and corresponding expectations in a democracy crystallize into the constitutional property to which the state must

\textsuperscript{244}U.S. CONST. art. VI.

\textsuperscript{245}See Roth, 408 U.S. at 577, quoted in Ruckelshaus, 467 U.S. at 1001.

\textsuperscript{246}The courts have often distinguished between an individual owner's subjective expectations, which can never comprise compensable property by themselves, and objective understandings that either underpin preceding laws or are otherwise deemed reasonable. "Subjective evaluations of what the law requires . . . cannot form the basis for a legally cognizable right in a takings analysis. A contrary finding would place in the hands of the individual the power to create rights recognized by society. Our form of democracy does not permit such a result." M & J Coal v. United States, 30 Fed. Cl. 360, 368 (1994), \textit{aff'd}, 47 F.3d 1148 (Fed. Cir.), \textit{cert. denied}, 516 U.S. 808 (1995). \textit{See also} Penn Central Transp. Co. v. New York City, 438 U.S. 105, 124-25 (1978) (holding that to comprise compensable property, interests must be "sufficiently bound up with the reasonable expectations of the claimant").
be subordinate.

VI. HAS JUSTICE SCALIA IMPERILLED OR EMPOWERED INDIVIDUALS BY USING DEMOCRATIC TRADITIONS TO DEFINE PROPERTY AS A CONSTITUTIONAL ABSOLUTE?

Constitutional jurisprudence has defined protected property as having three definitional composites that, until *Lucas*, were never reconciled or distinguished by the Supreme Court. Constitutional property has alternately been defined as: the distinct uses permitted by rationally engineered police power regulations; traditional uses that are theoretically absolute and independent of the state if its police power regulation "goes too far;" and the bundle of uses that judges can both protect and obscure prospectively by balancing terms such as "distinct investment-backed expectations" and the "character of the governmental action." In contrast, *Lucas* defines

247 The Supreme Court has also used a variant of its balancing tests to address a specialized situation in which the government engages in a pretextual use of police powers, which otherwise would not give rise to a taking, to accomplish the same object as a traditional condemnation of private lands. The Court has determined that the government's police powers can effect the same object as a traditional condemnation in two situations: where government regulation mandates a permanent physical occupation of private land and where regulation precludes the "economically viable use" of land. See *Lucas* v. South Carolina Coastal Council, 505 U.S. 1003, 1015-17 (1992); *Nollan* v. California Coastal Council, 483 U.S. 825, 834 (1987); *Agins* v. Tiburon, 447 U.S. 255, 260 (1980). The Supreme Court has also recognized that the government's police power to subordinate private development to the conditions imposed by scenic zoning, residential zoning, or related building permits does not generally give rise to a taking. See *Agins*, 447 U.S. at 260-61; *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395-97 (1926).

However, where conditions imposed by police powers accomplish the same result as a traditional condemnation, the Supreme Court has modified its balancing tests to protect individuals from the pretextual imposition of police powers, in situations where the purpose of the government's imposed conditions "is avoidance of the compensation requirement, rather than the stated police-power objective." *Nollan*, 483 U.S. at 836-37, 841. In these situations, the Court has required regulatory conditions to which landowners are asked to accede, and that have the same effect as a traditional condemnation, to have the same purpose as the government's police power to prohibit the landowners' proposed developments altogether. *Id.* at 836-37. To establish that the purpose of imposing a regulatory condition is the same as that of imposing the government's police powers without that condition, the government must use particularized facts to show that its contingent exactions are both reasonably related and proportionate in their relative severity to the state's rationale for using police powers in the first place. *See id.; Dolan v. City of Tigard*, 512 U.S. 371, 391, 395-96 (1994).

In *Nollan*, the Supreme Court applied this standard to California's decision to deny a
protected property as a bundle of rights that includes both governmental powers to define impermissible uses of property and absolute restraint against state power.

Under *Lucas*, laws preceding the acquisition of property by a given individual define the independent “understandings of our citizens” that comprise compensable property itself. Justice Scalia defined these “pre-existing” state or federal laws to include three separate bodies of law: the law of property generally, the law of private nuisance generally, and specific federal or state servitudes, “inher[ing] in the title itself.” With these servitudes, the state either protects a dominant use of property to the exclusion of others or uses its power to “abate nuisances that affect the public generally.” Any ambiguity as to whether duly enacted environmental or other federal laws that precede a given individual’s acquisition of property can supersede older definitions of property under state law has been resolved in both *Lucas* and its progeny.

Justice Scalia defined compensable property with the pre-existing laws and servitudes of “the State,” which he expressly capitalizes instead of referring to the particular state at issue, South Carolina. He also relied on Supreme Court precedent for the principle that pre-existing federal navigational servitudes are generally not compensable under the Fifth Amendment because these servitudes supersede state law property rights. There is no distinction in *Lucas* between the two types of pre-existing federal servitudes and corresponding federal laws to which Justice Scalia’s case

building permit for a proposed beach house unless the landowners agreed to convey a beachfront easement across their lands to the general public. See *Nollan*, 483 U.S. at 827. The Court determined that the purpose of enforcing California’s police power to simply deny the building permit without imposing any condition was to facilitate the public’s view of the beach by prohibiting the beach house’s construction. See *id.* at 831-32. The Court also determined that this purpose, underlying the permit’s threatened denial, was materially different than the purpose of granting the permit and imposing the condition: allowing the beach house to be built, allowing the view of the beach to be obstructed by it, and allowing the public nevertheless to walk to the ocean by walking around this obstruction and across private land. See *id.* at 836. Therefore, the *Nollan* court concluded that, because the permit condition did not “serve the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but ‘an out-and-out plan of extortion.”’ *Id.* at 837 (quoting J.E.D. Associates, Inc. v. Atkinson, 432 A. 2d 12, 14 (N.H. 1981)).

249 *Id.* at 1029.
250 *Id.*
251 See *id.*
252 See *id.*
authority refers: those impelled by Congress's constitutional power to regulate commerce and those impelled by federal statutes within the authorized scope of that constitutional power. Each of these pre-existing federal servitudes governs subsequently asserted state law property rights, to the extent that federal and state laws conflict. Therefore, there is no

253 Justice Scalia cited two Supreme Court cases that address the extent to which Congress's constitutional power to regulate commerce may supersede desired uses of private property that otherwise would be compensable under both state law and the Fifth Amendment: Scranton v. Wheeler, 179 U.S. 141, 163 (1900), and Kaiser Aetna v. United States, 444 U.S. 164, 178-180 (1979). Each of these cases recognizes that a statutory or other governmental power to regulate navigation is necessarily derived from Congress's pre-existing constitutional power to regulate commerce, inasmuch as "[c]ommerce includes navigation. The power to regulate commerce comprehends the control for that purpose . . . For this purpose, [navigable waters] are the public property of the nation, and subject to all the requisite legislation by Congress." Kaiser Aetna, 444 U.S. at 173 (quoting Gilman v. Philadelphia, 3 Wall 713, 724-25 (1866)).

Justice Scalia cited Wheeler for the general proposition that federal servitudes imposed under Congress's power to regulate commerce by also regulating navigation are not compensable under the Fifth Amendment. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992). In light of this pre-existing constitutional power to regulate commerce, riparian property rights otherwise protected by state law are embodied in "a qualified title, a bare technical title" that does not encompass private uses contravening "the public right of navigation" derived from the Commerce Clause. Wheeler, 179 U.S. at 163.

Justice Scalia cited Kaiser Aetna to illustrate a situation in which a particular application of the government's power to regulate commerce is compensable under the Fifth Amendment. See Lucas, 505 U.S. at 1029. In this case, a corporation acquired a shallow lagoon and attempted to develop it into a marina and subdivision by dredging and cutting a channel into the bay and ocean. See Kaiser Aetna, 444 U.S. at 165. Although the U.S. Army Corps of Engineers arguably had authority to require a permit for this development under the Rivers and Harbors Appropriation Act of 1899 ("RHA"), 33 U.S.C. § 403 (1994), the Corps notified the developer that no permit was needed. See Kaiser Aetna, 444 U.S. at 168-69. Several years later, the Corps decided that, by reason of the dredging to which it had previously acceded, the developer had transformed its shallow lagoon into a navigable water of the United States. See id. Accordingly, the government decided that RHA prohibited all future construction and dredging in the marina unless the developer agreed to grant the general public the same access to its marina for which its private customers paid "an annual $72 regular fee." Id. at 178-80.

Justice Rehnquist noted in Kaiser that he did not have "the slightest doubt" that, if the government had decided to protect or promote navigation before the developer began dredging in the first place, the Corps could have accomplished this object by using its power to either prohibit dredging altogether or attach conditions to a subsequently issued permit. Id. at 179. However, the Court concluded that the government's previous acquiescence to the developer's dredging and construction, combined with the financial harm occasioned by the Corps' retroactive decision to prohibit the same dredging that it previously authorized, had not only "lead to" and created, but also violated "the fruition of a number of
meaningful distinction between the preceding federal servitudes that limit desired uses of property in the cases cited by Justice Scalia and, for example, pre-existing environmental laws that Congress enacts to either "abate nuisances that affect the public generally" or prescribe uses of property that are antithetical to supreme federal laws regulating commerce. 254

In M & J Coal Company v. U.S., 255 one of the earliest trial and appellate constructions of Lucas, two mining companies claimed that government regulation had taken mineral reservations conveying a traditional property right under West Virginia law to destroy private homes and other buildings by mining and precipitating destructive subsidence. 256 All of these traditional mineral reservations had been created by preceding fee simple and surface estate owners. 257 By deed and for money, these owners had relinquished the right to protect their surface estates from destruction. In its briefing, the government relied primarily on two arguments. 258 First, it contended that a pre-existing federal power to prohibit dangerous mining subsidence under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA") 259 superseded an older West Virginia property right, conveyed by plaintiffs' mineral reservations, to cause the same dangerous subsidence that SMCRA prohibited. 260

Plaintiffs acquired these mineral reservations after Congress enacted SMCRA. 261 Their asserted West Virginia property rights to destroy and subside surface structures, however, antedated SMCRA because they were conveyed through the mineral reservations' lengthy chains of title. Therefore, the United States also relied on a second argument: it contended expectancies embodied in the concept of 'property.'” 254 Id. at 179. The Court consequently held that the government could not retroactively require “free access to the dredged pond” without also paying just compensation. 255 Id. at 180.

Therefore, in both Wheeler and Kaiser Aetna, and now in Lucas, the Supreme Court held that pre-existing federal laws and concomitant constitutional powers define or limit the expectancies embodied in the concept of property itself. See Lucas, 505 U.S. at 1027, 1029-30.

254 Id. at 1028-29.
256 See id. at 361.
257 See id.
258 See id. at 361-62.
that SMCRA’s undisputed powers to abate dangerous subsidence were also compatible with West Virginia’s traditional power under its laws of property to abate nuisances. With these two arguments, the United States contended that the right to cause dangerous subsidence, expressly conveyed by the West Virginia mineral reservations, was not compensable under SMCRA, federal law generally, or West Virginia’s law of property. Applying Lucas, the court declined to consider West Virginia’s property or nuisance laws. It held instead that SMCRA itself could prohibit the dangerous mining—otherwise permitted under the West Virginia mineral reservations—because Congress had enacted it before plaintiffs acquired these mineral reservations.

The Court held that plaintiffs’ state law mineral reservations, although older in their chain of title than SMCRA itself, were also subject to that statute because plaintiffs acquired them after Congress enacted SMCRA. Accordingly, this pre-existing environmental law defined the compensable understandings underlying plaintiffs’ mineral reservations. Because plaintiffs could not claim that the government’s “execution of existing regulations was unforeseeable at the time they made their investment,” the court concluded that plaintiffs’ only “cognizable expectation” under the Fifth Amendment was that the federal government “would act within the scope of its regulatory authority” in enforcing SMCRA. The court consequently dismissed plaintiffs’ Fifth Amendment claim because they did not have a property right to violate provisions of SMCRA that preceded their acquisition of property.

Lucas and subsequent cases such as M & J Coal consequently have done what no other Supreme Court definition of compensable property has done before. Justice Scalia has defined constitutional property at any given time with identifiable bodies of democratic law. Desired uses of property

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262 See Defendant’s Motion at 43-47.

263 See id.

264 See M & J Coal, 30 Fed.Cl. at 368.

265 Id. at 368-69.


267 See id. at 371.

268 Approximately one year after M & J Coal was upheld unanimously by the United States Court of Appeals for the Federal Circuit, M & J Coal Co. v. United States, 47 F.3d 1148 (Fed. Cir. 1995), the Supreme Court denied certiorari, M & J Coal Co. v. United States, 516 U.S. 808 (1995). Applying Lucas, the Federal Circuit agreed that the “existing rules or understandings” of which constitutional property is comprised “may also stem from federal law.” M & J Coal, 47 F.3d at 1153. Accordingly, the Federal Circuit held that, because plaintiffs acquired their mineral reservations after Congress enacted SMCRA, plaintiffs “knew or should have known” that their contrary mining rights were “subordinate to the
are compensable under the Fifth Amendment if preceding bodies of state or federal laws do not prohibit them. These pre-existing laws define the traditional "understandings" that underpin constitutional property at the time that a given owner or owners "obtain title to property." Therefore, Justice national standards that were established by SMCRA and enforced by [the Department of the Interior]." *Id.* at 1154. *Lucas*'s "antecedent inquiry" into the scope of constitutional property has also been defined as using preceding state property or nuisance law, in conjunction with federal law, to define limitations of property that are not compensable because they "inhere in the title itself." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). *See M & J Coal*, 47 F.3d at 1153-54. *See also*, e.g., *Good v. United States*, 39 Fed.Cl. 81, 95 (Fed. Cl. 1997) (holding that denial of permits to fill wetlands and access to navigable waters in residential development was not a taking), *aff'd*, 189 F.3d 1355 (Fed. Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3367 (U.S. Nov. 24, 1999) (No. 99-881).

Where pre-existing federal programs or policies, but not preceding federal laws or regulations per se, prohibit or impair desired uses of property, the United States Court of Appeals for the Federal Circuit has determined that federal policies by themselves do not limit the existence of compensable property itself. In *Avenal v. United States*, 100 F.3d 933 (Fed. Cir. 1996), for example, the Federal Circuit examined whether preceding federal "concerns and plans" to assist the oyster industry had taken property by authorizing a freshwater diversion in the Mississippi delta that subsequently destroyed the value of plaintiffs' oyster bed leases. *Id.* at 936-37. The court held that the relevant issue was not whether preceding federal programs had defined or limited the "constitutionally protected property interest" itself. *Id.* Instead, the salient issue was whether these federal programs had actually "taken" constitutional property under Justice Brennan's three-part "analytical tool" in *Penn Central* for balancing a disputed regulation's character, any consequent financial harm, and the relevant owner's investment-backed expectations. *Id.* at 936-37.

*Avenal* consequently does not detract from *Lucas*'s and *M & J Coal*'s holdings that pre-existing federal laws can define the compensable expectations underlying constitutional property. The federal law at issue in *Avenal* cannot be deemed to have preceded the plaintiffs' property interest because Congress enacted it approximately five years after plaintiffs acquired their oyster bed leases. *See id.* at 935-36. Therefore, there was no pre-existing federal servitude, preceding federal law, or preceding state law that prohibited or impaired plaintiffs' desired use of their leases. For this reason, both *Lucas* and *M & J Coal* expressly allowed the *Avenal* court to decide whether a taking had occurred by analyzing the effect of plaintiffs' admitted knowledge about imminent freshwater diversion projects, found to exist when they acquired their leases, on their "distinct investment-backed expectations." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), *quoted in Lucas*, 505 U.S. at 1019 n.8, *cited with approval in M & J Coal*, 47 F.3d at 1153.

In analyzing whether these preceding federal programs had taken private property, the Federal Circuit held that there was no taking because plaintiffs "well knew or should have known that, in response to widely-shared public concerns, including concerns of the oystering industry itself, government actions were being planned and executed that would directly affect their new economic investments." *Avenal*, 100 F.3d at 937. *Lucas*, 505 U.S. at 1027. Approximately four years after the Supreme Court decided *Lucas*, and approximately two years after the Federal Circuit decided *M & J Coal* in a
unanimous decision, the Federal Circuit re-examined Lucas’s and M & J Coal’s determination that pre-existing federal laws can define the individual understandings comprising constitutional property. In an en banc decision, and with language at least as unequivocal as that of Lucas and M & J Coal, the Federal Circuit held that pre-existing state or federal laws could define or prohibit the particular uses embodied in protected property. *See* Presault v. United States, 100 F.3d 1525, 1539-40 (Fed. Cir. 1996). The court determined that the “historically rooted expectation of compensation” underlying protected property is not derived from subjective expectations, but is “law-created” by hierarchies of democratic law itself: “the Constitution, legislation, and [the] common law.” *Id.* (quoting Loretto v. Teleprompter CATV Corp., 458 U.S. 419, 441 (1982)). Therefore, the Federal Circuit concluded that “no one has a property right to violate otherwise valid laws controlling social conduct.” *Id.* at 1539.

The Presault court also addressed an issue that neither Lucas nor M & J Coal addressed: the particular time at which pre-existing laws that are usually general in their application to individuals can be deemed to prohibit specific uses or estates desired by a particular individual. *See id.* at 1539-40. The court determined that pre-existing federal or state laws regulating a given individual’s “social conduct” cannot be deemed to prohibit a given use of property, and thereby preclude a just compensation obligation, until after the time that it was first possible for a preceding owner in the property’s chain of title to challenge the government’s prohibition in court. *Id.* at 1537-40.

The court applied this principle to the discrete estates at issue: the “unfettered possession” by plaintiffs of fee simple estates under Vermont law that were subject to easements for railroad purposes that their predecessors in title had previously conveyed to a railroad. *Id.* at 1537. The court held that, until 1986, no fee simple owner in the chain of title could have challenged the government’s eventual decision to prevent the reversion of all possessory interests to the fee simple owners by prohibiting the abandonment of the railroad easements. *See id.* at 1538. In 1986, an administrative order of the Interstate Commerce Commission (“ICC”) prohibited the abandonment of the various easements held by the railroad and, instead, mandated that the railroad’s unused rights of way be converted to a public trail. *See id.* Plainly, the Federal Circuit could not deem the ICC order a preceding federal servitude on, or limitation of, protected property because the ICC promulgated it after all plaintiffs acquired their fee simple estates. *Id.* at 1537-38.

The Presault court also examined two federal statutes that preceded the ICC’s 1986 order, each of which also preceded the plaintiffs’ acquisition of their fee simple estates. One of the statutes, the Transportation Act of 1920, ch. 91, 41 Stat. 456, did not purport to regulate any private or social conduct except the unique transactions of railroads, such as creating and terminating railroad service in a given community. *See Presault*, 100 F.3d at 1537. The second statute, the Rails to Trails Act, 16 U.S.C. § 427(d) (1994), conferred a discretionary power on the ICC in 1976 to mandate that railroad easements, which otherwise would have reverted to the underlying fee simple owners, would be sold to the public instead in a sale for public purposes. *See Presault*, 100 F.3d at 1538. However, the ICC could not exercise this discretionary power until it decided in the future to “convert an unused right-of-way to a trail” and select “an appropriate public agency to operate the trail.” *Id.* The court consequently held that the government first prohibited plaintiffs’ desired use of their fee simple estates by promulgating its ICC regulation in 1986. *See id.* The court also determined that if plaintiffs or their predecessors attempted to protect their estates by
Scalia returned property to the traditions embodied in Magna Carta and the compacts succeeding it: society protects, defines and invades property according to fundamental societal traditions that a democratic society can embody in its laws.\textsuperscript{271}

\textit{Lucas} consequently anchors protected property's definition to the civil traditions that are "logically antecedent" to the essence of property.\textsuperscript{272} On this basis, \textit{Lucas} may be judged by the extent to which democratic tradition is not merely demonstrably humane, but also capable of being restrained meaningfully by the Bill of Rights. Demonstrably, even bad democratic tradition is more humane than that which is antithetical to it: arbitrary power. By definition, citizens cannot rationally anticipate the outcomes of despotic or totalitarian power because they can neither plan their lives around nor rationally consent to that which is arbitrary or coerced. The

challenging the federal statutes enacted in 1920 and 1976 they "would [have] run afoul of established requirements" of ripeness and exhaustion of administrative remedies. \textit{Id.} at 1537-38.

\textsuperscript{271} In \textit{Presault}, the United States Court of Appeals for the Federal Circuit held that a duly authorized administrative prohibition, derived from a discretionary power under pre-existing federal and state statutes, violated the Fifth Amendment by prohibiting the reversion of certain easements to their fee simple owners. \textit{See id.} at 1539-40. The Federal Circuit concluded that the government prohibition was compensable in an action by the fee simple owners because the government promulgated the disputed administrative rules too late for these owners' predecessors in title to have challenged them in court. \textit{See id.} In dicta, Justice Scalia has suggested that he agrees with \textit{Presault}.

For example, in \textit{Nollan v. California Coastal Commission}, Justice Scalia addressed the same type of pre-existing statute at issue in \textit{Presault}: a statute that conferred a discretionary power on the government to either deny or allow an individual's desired use of property. \textit{See id.} at 828-29. When the plaintiffs in \textit{Nollan} acquired their beachfront property, they knew about the California Coastal Commission's discretionary power to prohibit beachfront houses by denying the requisite building permit, unless their owners agreed to transfer an easement to the general public across their beachfront lots. \textit{See id.} at 828. However, to impose this condition on or otherwise deny a building permit for a particular lot, the Commission had to determine in the future that the proposed construction "would have a direct adverse impact on public access to the beach." \textit{Id.} at 828.

Neither the plaintiffs nor their predecessors in title could have challenged, let alone known about, this hypothetical administrative regulation until the Commission decided to apply it to plaintiffs after administrative fact-finding. Accordingly, the \textit{Nollan} court determined that the plaintiffs could not have challenged or otherwise known about either the Commission's condition that they grant an easement or the particular administrative prohibition that the Commission otherwise would impose on their lot until after plaintiffs acquired this lot from their predecessors in title, inasmuch as "the Commission could not have deprived the prior owners of the easement without compensating them." \textit{Id.} at 833-34 n.2.

\textsuperscript{272} \textit{Lucas}, 505 U.S. at 1027.
savagery and systematic murder of the French Revolution, Hitler, Stalin, and Pol Pot remind us that even objectively bad democratic traditions are preferable to the arbitrary power either to impose bad values or replace bad traditions with ostensibly better rules.

Democratic tradition is preferable primarily because it is more accessible to individuals than other legal traditions. Property owners, for example, have the same freedom under *Lucas* to organize their lives around traditional environmental regulations, such as those governing clean air or clean water, that they have to avoid bad regulation, such as the state’s retroactive destruction in *Mugler* of an otherwise lawful brewery. If an individual owner acquires property after Congress lawfully enacts a given body of environmental laws or regulations that prohibit this owner’s desired use of property, then the concrete prohibitions of these laws cannot take his property, regardless of their public rationale. However, if Congress enacts such laws and regulations after this individual acquired property, then it cannot take his property without compensation because these regulations supplant the “fruition of expectancies” and traditional understandings comprising constitutional property itself. In either case, *Lucas* provides individuals with a practical basis for planning their private lives. To plan their private lives rationally under *Lucas*, individuals need only acquire the same protected property that they “necessarily expect” the state to defend because preceding democratic laws do not prohibit their desired uses of it.

This proposition can be tested by expanding *Mugler*’s facts, applying *Lucas*’s analysis to them, and comparing the probable outcome to that of other jurisprudential rules. Assume that Kansas uses its police power once again to police “public morals” and “public safety” by enacting a new statute that retroactively prohibits beer drinking and thereby destroys the value of Mugler’s lawful brewery. Undisputed facts establish that the value of the brewery’s underlying property is now worthless because, given its cost basis, it would be prohibitively expensive to convert the machinery to other possible uses, such as dispensing milk or soda pop. Licenses first issued by Kansas when Mugler acquired his brewery provide only that breweries shall be licensed each year and that licenses shall be renewed unless the brewer

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275 *Lucas*, 505 U.S. at 1027.
276 See *Mugler*, 123 U.S. at 657, 662-63.
JUSTICE SCALIA'S PRIMER ON PROPERTY RIGHTS

had imperilled "public morals." When Mugler bought his property, he paid a high price for it, and also invested his life savings in it, because the market viewed breweries in Kansas as generally quite profitable. Since frontier times, Kansas's numerous breweries have been deemed expressly taxable by statute. Similarly, Mugler and his neighboring brewers have grown accustomed to pro forma licensing of their breweries each year, provided they paid their taxes and didn't sell to minors.

Under the *Mugler* court's holding, of course, Kansas has virtually absolute discretion to retroactively destroy the same brewery with its rational police powers that it had previously recognized and taxed as lawful. When Mugler acquired his brewery, he had no notice under the law of Kansas that the state would suddenly eliminate the market for beer. Because the private market considered beer-brewing quite lucrative, Mugler also had no notice from the price of the brewery, either, that Kansas would suddenly eliminate the market for his beer. The brewer consequently had no practical basis in law or social tradition for anticipating that Kansas would suddenly destroy his brewery. Because *Mugler* subordinates protected property to the state's power to define and re-define public morality retroactively, or at any other time, it also subjects the hapless brewer to the antithesis of tradition: unpredictable state power whose imposition at a particular time cannot be rationally anticipated by a given rule or standard.

Under the United States Supreme Court's ad hoc definitions of protected property, the brewer's prospects are nominally better than they were under the holding in *Mugler*. Undeniably, *Mahon*’s and *Penn Central*’s holdings do not expressly sanction, as did *Mugler*, a retroactive destruction of previously lawful property. Under each of these ad hoc tests, however, there is no discernible method for our brewer to ascertain at a given time whether he possesses constitutional property that the state cannot take at will. Neither *Mahon* nor *Penn Central* defines the particular time at which a given body of law comprising property becomes constitutional property that governments may not use their rational police powers to take without paying just compensation. Therefore, under each of these ad hoc rules, Mugler has no accessible basis for determining under law that the brewery to which he devoted his life savings is or is not constitutional property.

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278 See id. at 662-63
279 See id. at 671, 677.
The outcome of each ad hoc rule will depend on the Justice’s or judge’s particular predilections in construing Mahon’s and Penn Central’s abstract terms and malleable balancing tests. On its face, Justice Holmes’s test is at least neutral between statist and absolutist traditions: he will balance the public interest in prohibiting the social evils occasioned by beer against the destruction of the brewery’s value. But there is no accessible criterion in Mahon for individuals to understand or meaningfully approximate their constitutional rights in advance. Under Justice Holmes’s reasoning, it will depend on whether he will view the “disorder, pauperism, and crime” occasioned by beer drinking as either a nuisance common to the public, as a public safety threat, or as a threat to the general public interest. According to Holmes, all of these situations would or could justify the state’s complete, uncompensated, and retroactive destruction of the brewery’s value.

If it were possible to worsen Mugler’s confusion about his constitutional property rights, Penn Central succeeds in making things worse. Justice Brennan’s balancing test will confuse this brewer even more by expanding the level of abstraction in Mahon’s balancing formulations. On top of the ambiguity created by Justice Holmes’s attempt to determine whether a given police power had gone “too far” by balancing the police power’s “public purpose” with its consequent financial harm, Justice Brennan adds the uniquely malleable criterion of “distinct investment-backed expectations.”

Under the preceding facts, a judge could rationally define Mugler’s “investment-backed expectations” to advance either of two opposite outcomes under Penn Central. Because the licenses that Kansas began granting when Mugler acquired his brewery included language protecting “public morals,” a rational judge could view the brewer’s “investment-backed expectations” as being shaped by the language of the licenses, to which Mugler had acceded each year. In that event, because Mugler’s licenses had always been contingent on the protection of “public morals,” this judge could logically find that Kansas’s new law prohibiting beer drinking may permissibly destroy the brewery’s value without compensation.

Alternatively, another rational judge would have an equally compelling basis for reaching the opposite decision. On at least three factual

282 See Mahon, 260 U.S. at 413-14.
283 Mugler, 123 U.S. at 662.
284 See id.
285 See Mahon, 260 U.S. at 413.
286 Penn Central, 438 U.S. at 124.
grounds, this judge could easily find “distinct investment-backed expectations” that the state could not retroactively destroy: previous state laws allowing the consumption of licensed beer before the brewer purchased his brewery; the regulatory tradition of pro forma licensing of breweries; and Kansas’s special rules for taxing breweries.

Lucas’s probable outcome under these facts would be demonstrably more humane than that of Mugler, Mahon, or Penn Central. Unlike Mugler, Lucas would categorically prohibit, not expressly sanction, the retroactive destruction of a previously lawful brewery. Under Lucas, Kansas could neither categorically destroy the value of Mugler’s brewery nor otherwise prohibit its economically beneficial uses because Kansas’s new police power to prohibit beer-drinking was never a prohibition under preceding state or federal laws. Therefore, Kansas must compensate Mugler under the Fifth Amendment because its new police powers “were not part of his title to begin with” and, consequently, could not “inhere in the title itself.” Instead, Kansas’s new statute violated a tradition of protected property described in the previous statutes and regulations by which beer brewing had been taxed and licensed.

Lucas would achieve the humane outcome of protecting Mugler’s

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287 Professor Brauneis observes perceptively that if I vary my hypothetical’s facts by assuming that Mugler also owned valuable land surrounding the land and fixtures underlying the brewery that Kansas destroyed, the holding in Lucas does not necessarily require compensation. Professor Brauneis is correct. Justice Scalia observed in a footnote that the Supreme Court has not resolved the problem of precisely defining the denominator in its “deprivation” fraction, by which the Court delineates the value before the alleged taking of either a given parcel’s physical parameters or a given property right’s legal dimensions. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016-17, n.7 (1992). Likewise, and in the numerator of this fraction, the Court determines the value of the disputed parcel or property immediately after the alleged taking, thereby achieving an arithmetic encapsulation of the extent to which a given regulation has destroyed or diminished the value of constitutional property. See id.

Because the Lucas court accepted the South Carolina courts’ findings that the relevant statute “left each of Lucas’s beachfront lots without economic value,” Justice Scalia wrote that “[r]egrettably, the rhetorical force of our ‘deprivation of all economically feasible use’ rule is greater than its precision, since the rule does not make clear the ‘property interest’ against which the loss of value is to be measured.” Id. at 1046. Therefore, Justice Scalia concluded that, where preceding state or federal laws do not prohibit an individual’s desired use of property, the balancing tests of Mahon and Penn Central would remain applicable to government regulation that stops “one step short” of precluding “all economically beneficial uses.” Id. at 1017. In this situation, both the economic harm occasioned by this regulation and its effect on investor expectations remain “keenly relevant to takings analysis generally.” Id. at 1019 & n.8.

288 Lucas, 505 U.S. at 1027-29.
business from being retroactively destroyed without resorting to the inchoate, unpredictable outcomes of *Mahon’s* and *Penn Central’s* balancing tests. By defining constitutional property according to the traditions and prohibitions of the laws that exist before a given owner acquires property, *Lucas* gives individuals an accessible basis in tradition to ascertain their constitutional rights. The holding also enables the state to change property’s traditions gradually over time. Without incurring a just compensation obligation in our hypothetical, for example, Kansas could prohibit the operation of future breweries by using its new police and other legislative powers prospectively, before a prospective owner acquires a brewery.²⁸⁹

For this reason, the state’s power to avoid Fifth Amendment scrutiny by encumbering both property and its prospective owners with prospective regulations is more express in *Lucas* than in any other Supreme Court decision except *Mugler*. Therefore, the risks of acquiring property in a highly regulated sector or industry will probably be greater in the long run under *Lucas* than under *Mahon* or *Penn Central*. Because individual owners in these highly regulated industries could not receive compensation under *Lucas* for a prohibited use of property that pre-existing laws or regulations also prescribe, the relative price of their properties could drop appreciably, compared to unregulated properties. In itself, this would provide another basis for rational individuals to use accessible traditions, in the form of prices, to manage their lives and property. In addition to using the preceding democratic laws by which individual owners “necessarily expect” to plan their affairs, these individuals would pay less in relative prices for their regulated properties.²⁹⁰

Justice Scalia used rhetorical understatement to observe that it “is surely unexceptional” under the Fifth Amendment to not compensate individuals for desired uses of property that were previously “proscribed by . . . ‘existing rules or understandings.’”²⁹¹ Although he described this proposition as a self-evident Fifth Amendment tenet, Justice Scalia’s tenet is neither mentioned in nor accommodated by *Mahon’s* and *Penn Central’s* balancing tests. *Mahon* and *Penn Central* do not require courts to defer at any particular time to democratic laws or regulations, regardless of whether a given owner acquired property before or after the state’s imposition of them.

*Mahon* and *Penn Central* consequently do not prohibit courts from

²⁸⁹ See id. at 1027.
²⁹⁰ See id. at 1030.
²⁹¹ Id at 1030.
simply ignoring either protected property's traditional definitions or its
traditional limitations, all of which can be exemplified by preceding federal
or state laws. Neither of these balancing tests distinguishes between a
situation where individuals acquire protected property after the enactment of
a statute prohibiting their desired uses and a situation where the government
imposes its regulations after these individuals acquired property in the first
place. In each of these situations, *Mahon* and *Penn Central* do not
necessarily require jurists to either protect constitutional property or defer to
the state. Similarly, nothing in either *Mahon* or *Penn Central* requires judges
to consider whether the restrictions of a particular regulation allegedly taking
property are either equivalent to or different from restrictions that other laws
imposed before a given plaintiff acquired it. Instead—and with or without
Justice Brennan's "investment-backed expectations" as an extra ad hoc
criterion—judges are generally required to balance the challenged law's
"public interest" with any consequent financial diminution of protected
property's value.292

*Lucas,* in contrast, expressly requires courts to define the extent to
which democratic laws enacted after an individual acquired disputed property
impose the same pre-existing restrictions that the laws of public or private
nuisance had previously imposed on that property.293 Unlike *Mahon* and
*Penn Central,* *Lucas* also defines the point in time at which disputed property
interests ripen or do not ripen into constitutionally protected property. If
individuals challenge a regulation that imposes restrictions on property
equivalent to those imposed by state or federal law before they acquired it,
then "the Takings Clause does not require compensation [because] an owner
is barred from putting land to a use that is proscribed by those 'existing rules
or understandings' . . . ."294

*Lucas* consequently achieves a humane result precisely because these
"rules and understandings" represent the same thing to law-abiding citizens
as law itself. Unlike previous rules, *Lucas* allows individuals to plan their

293 See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992). Even if the
federal statute or regulation is imposed retroactively, and even if it mandates the disputed
property's physical occupation or complete destruction, the regulation at issue cannot
contravene the Fifth Amendment if it does "no more than duplicate the result that could have
been achieved in the courts—by adjacent landowners (or other uniquely affected persons)
under the State's law of private nuisance, or by the State under its complementary power to
abate nuisances that affect the public generally, or otherwise." Id.
294 Id. at 1030 (quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577
(1972)).
holdings of property according to the same pre-existing democratic traditions that govern the rest of their lives and bodies. 295 *Lucas* will necessarily fail, however, as a decision construing the Bill of Rights if it merely allows democratic majorities to define the meaning of constitutional property by defining or re-defining majoritarian morality, as Kansas did in *Mugler*.

In its concrete protection of individual rights, *Lucas* is demonstrably superior to previous Fifth Amendment jurisprudence. *Mugler* does not bother to define, but instead virtually precludes, protected spheres of constitutional property into which rational legislative and police powers cannot invade without compensating individuals. 296 Therefore, *Mugler* cannot be seriously defended under our constitutional traditions because it confers a police power on legislatures to construe part of the Bill of Rights with legislative definitions of public morals. *Penn Central*, although couched artfully in elusive abstractions, fails by the same standard. Unlike Justice Holmes, who recognized that the Fifth Amendment must be protected from legislative proclivities to aggressively expand the police power "until at last private property disappears," 297 Justice Brennan does not assign a purpose to his own ad hoc rule, let alone to the Fifth Amendment.

Instead, Brennan refers to *Mahon* repeatedly without mentioning one of its fundamental tenets: unless jurists subordinate government power to the protections of the Fifth Amendment and its definition of constitutional property, the property also protected by the "contract and due process clauses [will be] gone." 298 But Justice Holmes's and Justice Brennan's balancing tests do not specifically balance anything except two broad considerations that are extraordinarily difficult for individuals to comprehend before acquiring property: the "public interest" of a statute that may not even be enacted as of yet and the extent of the financial harm that this hypothetical statute may occasion in the future. Therefore, the *Mahon* and *Penn Central* balancing tests ultimately disappoint individuals seeking to verify that what they own or want to buy is or is not protected property.

The holding in *Lucas*, unlike *Mugler*, *Mahon*, or *Penn Central*, defines a domain into which legislative power at a given time cannot go. 299 Because the *Lucas* court defines this domain with a rule that rests on other accessible laws, it is as accessible to average citizens as most jurisprudential

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295 See *id.* at 1027.


298 Id.

rules can ever get.\textsuperscript{300} The government may not retroactively take property interests that have been settled by previous statutes or common law rules.\textsuperscript{301} Where these democratic rules define or allow beneficial uses of property that the state later takes retroactively, after a given owner acquires this property, then Fifth Amendment liability is automatic in two situations: where the state physically occupies the property permanently or destroys its value entirely.\textsuperscript{302} Where states do not take constitutional property in either of these respects, then they remain potentially liable under Mahon’s and Penn Central’s balancing tests.\textsuperscript{303}

With these standards, Justice Scalia finally reconciled property’s dual roots in statist and absolutist traditions. The Lucas decision, therefore, stands for the proposition that courts will generally defer to the prohibitions of preceding statutes and their accompanying democratic traditions unless the state attempts to retroactively divest those traditions. It is much more difficult, however, to evaluate the extent to which Lucas protects constitutional property from what democratic majorities might do to change property in the future. By defining property with pre-existing bodies of law, does Lucas give both states and the federal government virtually unlimited power in the future to redefine, contract, or supplant private property? Again, to borrow liberally from Justice Holmes, would a “natural tendency of human nature” expand the legislature’s prospective power to define and redefine property “more and more until at last private property disappears?”\textsuperscript{304}

The prospective power of legislatures under Lucas to change protected property’s definition is a power that they also have under previous jurisprudential rules. For example, Mugler, Mahon, and Penn Central do not define constitutional property with particular bodies of law at particular times. Accordingly, none of these jurisprudential rules prevent legislative majorities from redefining or contracting private property with new democratic laws. But the fact that Lucas is similar to previous jurisprudential rules because it does not necessarily prevent legislatures from redefining constitutional property in the future does not demonstrate that these legislative powers are proper under the Fifth Amendment. Undeniably, the future traditions shaped by democratic laws, regardless of whether they are imposed retroactively or prospectively, are not necessarily the same thing as

\textsuperscript{300} See id. at 1030.

\textsuperscript{301} See id.

\textsuperscript{302} See id. at 1029-30.

\textsuperscript{303} See id. at 1019 n.8, 1028-29.

\textsuperscript{304} Pennsylvania Coal. Co. v. Mahon, 260 U.S. 393, 415 (1922).
the constitutional traditions embodied in the Bill of Rights. Even the most well-intentioned democratic laws that regulate a particular property interest do not always protect the minority owners of this interest from the legislative majority that has just outvoted them. By definition and design, these minorities are protected by the Fifth Amendment, just as minorities are protected generally by other provisions of the Bill of Rights.

Ultimately, therefore, Justice Scalia's decision to define constitutional property with the laws existing when a given individual acquires property must be evaluated by whether it protects individuals from usurpations of a constitutional liberty. Paraphrasing George Washington, are the standards expressed in Lucas, by which prospective and otherwise lawful democratic laws can contract or eradicate property, contrary to fundamental traditions of "liberty which we have derived from our Ancestors?"\textsuperscript{305} Similarly, and paraphrasing Magna Carta, should a democratic statute’s prospective regulation of property, necessarily embodying democratic traditions, be deemed “invalid and void” under the Fifth Amendment because it violates fundamental traditions held “of old and rightfully”\textsuperscript{306}

The Lucas court suggests an answer that the courts, as of yet, have not addressed conclusively. Lucas defines the scope and limits of a given property interest with two types of laws. First, the Court will generally protect settled property rights from being taken by laws to which individual owners could not have adapted because they were enacted after these owners acquired property.\textsuperscript{307} Second, the Court will generally defer to the prohibitions or limits of laws that have been either enacted before a given individual acquired property or newly enacted by the state but that nevertheless include the “pre-existing limitation[s]” and “background principles” of preceding laws.\textsuperscript{308} Justice Scalia defined constitutional property not only with the unified laws of an indefinite and indefinitely capitalized “State,” but also with distinct bodies of state law and federal servitudes.\textsuperscript{309} In our federal republic, the law of a unified state necessarily comprises federal and state laws, each of which create “background principles” with different intergovernmental origins.\textsuperscript{310}

As sovereigns, federal and state governments can either unite in unified bodies of law or potentially separate and diverge with conflicting

\textsuperscript{305} Letter from George Washington to George Mason, \textit{supra} note 226, at 500-01.
\textsuperscript{306} MAGNA CARTA, 9 Hen. 3, 23, 61 (1215)
\textsuperscript{308} \textit{Id.}
\textsuperscript{309} \textit{See supra} notes 248, 250, and 266 and accompanying text.
\textsuperscript{310} \textit{See Lucas}, 505 U.S. at 1027-30.
decrees. Under Lucas, therefore, a particular federal regulation’s prospective limitation on property, imposed before a given individual acquires it, is always part of this property’s constitutional definition—and therefore not compensable under the Fifth Amendment—where it is also compatible with preceding state laws. Prospective limitations of property imposed by a given environmental law become part of property’s constitutional tradition where they are either advanced or not lawfully opposed by the separate governments, electors, and property interests comprising our federal and state governments.\footnote{Even a government regulation that destroys the “economically beneficial use of land” is not compensable under Lucas if it merely duplicates “the result that could have been achieved” under state law in abating public or private nuisances. \textit{Lucas}, 505 U.S. at 1029.}

Under Lucas, therefore, all of the otherwise lawful federal environmental laws preceding a given individual’s acquisition of property are necessarily part of constitutional property’s “title to begin with” if they are also reflected in parallel bodies of state law.\footnote{\textit{Id.} at 1027.} Virtually all of the federal environmental laws regulating air, water, and minerals have this federalist component by which states may either administer the statute primarily or accede to exclusive federal administration of it.\footnote{The Supreme Court has held that, although the Constitution does not give the federal government power to “compel the States to enact or administer a federal regulatory program,” it does permit “the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes.” \textit{New York v. United States}, 505 U.S. 144, 188 (1992). Numerous federal environmental laws authorize the concurrent or primary enforcement of environmental standards by state laws and state regulations. \textit{See}, e.g., \textit{Clean Air Act} § 107(a), 42 U.S.C. § 7407(a) (1994) (explaining that states with approved implementation plans have “primary responsibility” under the Clean Air Act for enforcing and achieving national air quality standards); \textit{Federal Water Pollution Control (Clean Water) Act} § 306(c), 33 U.S.C. § 1316(c) (1994) (explaining that states with approved programs have concurrent authority under Clean Water Act to “apply and enforce” national water quality standards).} State governments that oppose these environmental laws can elect not to administer them under state law.\footnote{\textit{See New York v. United States}, 505 U.S. at 188.} Similarly, state governments supporting these federal laws will desire to participate in their administration.

By this standard, virtually all of our federal environmental laws have precipitated parallel bodies of state law.\footnote{\textit{Id.}} Under Lucas, therefore, prohibitions imposed by these environmental laws cannot take property acquired after their enactment because these laws constitute the “background principles” and consequent expectations comprising constitutional property
By precipitating convergent bodies of state and federal law, these environmental laws come as close to constitutional property's fundamental tradition under *Lucas* as anything, save the Fifth Amendment itself. Desired uses of property, contrary to these preceding laws, "were not part of [its] title to begin with."317

To what extent, however, does *Lucas* protect individuals from the opposite situation, in which a pre-existing federal standard precipitates divergent, not convergent, bodies of state and federal law? Consider a hypothetical situation where Congress uses its power to regulate interstate commerce under the Clean Water Act to prohibit the discharge of a particular type of suspended or settleable solid into our nation's waters.318 Under this hypothetical, the Commonwealth of Virginia, also administering the Clean Water Act with parallel state laws, decides that the new federal settleable solid regulation needlessly prohibits discharges that are merely and insignificantly "muddy." Therefore, Virginia declines to recognize the new federal standard.

Continuing this scenario, assume that Virginia instead, under the same body of state regulations under which it administers the Clean Water Act, subsequently promulgates an exception to this new federal standard. With this exception, the state reaffirms a traditional common law property right of those owning riparian water rights in Virginia to discharge the same settleable solids now prohibited by the Clean Water Act. After the federal government promulgates its new settleable solid standard, and after the Virginia regulation subsequently reaffirms its contrary riparian property right, an entrepreneur purchases this property right. This individual knows that his factory will fail unless he can discharge settleable solids into the James River—the very action that the new federal regulation prohibits. For this reason, the entrepreneur expressly relies on Virginia's common law riparian right permitting this discharge while quietly ignoring the Clean Water Act's contrary standard. Under the Fifth Amendment, and under *Lucas*, should just compensation be paid to this individual?

Our hypothetical entrepreneur acquired his contrary state law water rights with the express object of violating a pre-existing federal law. Some property rights theorists might conceivably posit that all constitutional

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317 Id. at 1027.
319 The Clean Water Act prohibits "the discharge of any pollutant" unless it is deemed to comply with federal water quality standards. 33 U.S.C. § 1311(a)-(b) (1994).
property stems from state law and that, because Virginia's common law water right was an older tradition than the Clean Water Act, the Virginia entrepreneur should be compensated. This theory, however, is tantamount to arguing that individuals should be compensated by the federal government for knowingly violating a duly enacted federal law. As such, it would sever the traditional connection between the government's power to defend and define private property rights, presumed necessary by our laws in a world deemed hostile to private property, and protected property's partial origination in state power. Compensating individual owners for violating preceding federal laws would also legitimize a type of constitutionalized anarchy against the federal government: individual owners would receive compensation from the public purse for violating the prohibitions of the very federal laws about which they knew in advance.

Lucas does not protect individual property owners by ignoring constitutional property's statist traditions. Instead, Justice Scalia returned constitutional property to its traditional origins in both state power and absolute restraint of the state. Unlike the Supreme Court's previous decisions, Lucas rests on two concepts that are distinctly accessible to a law-abiding citizenry: preceding laws and linear time.

For perhaps the first time in the history of the Fifth Amendment's collision with environmental law and other police powers, an individual can verify that he possesses or does not possess protected property by determining if his desired uses of it are also part of one of his most accessible democratic traditions—laws. Subsequently, to confirm that his desired use is sufficiently traditional to crystallize into protected property under the Fifth Amendment, the same individual need only consult a second, equally discernible concept: the point in linear time at which he acquired the property.320

If desired uses of property are not prohibited by state or federal laws at that point in time, then the owner possesses constitutional property that governments cannot take without remitting just compensation.321 By anchoring property's constitutional definition to accessible laws at distinct points in time, Justice Scalia significantly expands the freedom of individual owners and their governments to govern themselves rationally, according to concrete laws at concrete times. Without implicating a just compensation obligation, federal and state governments now have a predictable basis in democratic laws to change protected property's civil traditions by imposing

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320 See Lucas, 505 U.S. at 1027.
321 See id. at 1028-29.
their laws prospectively.

*Lucas* also provides commensurate protection for law-abiding property owners that no other Supreme Court decision has provided before. It empowers individuals by using their most immediate legal traditions, preceding laws and the constitutional powers authorizing them, to define protected property. These laws, erected on pillars of tradition that are accessible because they are democratic, necessarily comprise that which democracies establish "of old and rightfully." As such, these laws empower individuals by extending a hand in discernible tradition to help them through the Supreme Court's confusing matrix of ad hoc rules and proffered social science terms.

*Lucas* does much more to protect individual owners than delineate when the state, without paying compensation, can or cannot prohibit their desired uses of protected property. The essence of *Lucas* is that, although it defines constitutional property with the democratic traditions that precede its particular acquisition, governments can never divest those traditions from individual owners without remitting "just compensation." Where government takes traditions of property with regulations or prohibitions that law-abiding individuals cannot discern in pre-existing laws, *Lucas* requires the state to surrender that which individuals otherwise would have had to acquire by revolution or civil strife: money and concomitant power from the public purse. The power of *Lucas* is that, by defining constitutional property with accessible traditions, it enables average citizens to adapt to new democratic traditions, escape from them, or replace them in their private lives. With these traditional and comparatively simple concepts, *Lucas* gives individuals a secure basis in accessible laws to plan steadfast lives around, and thereby change or successfully avoid, the traditions of property that their society holds dear.

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322 *Magna Carta*, 9 Hen. 3, c. 23 (1215).
323 In defining constitutional property with democratic traditions, Justice Scalia's jurisprudence rests on a philosophy similar to that of Justice Holmes. For Holmes, "[t]he 'property' protected by the Constitution is not a theorist's ideal, but the actual, established practice of a particular legal tradition." Brauneis, *supra* note 79, at 648.