

# Metaphysical Right and Practical Obligations

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## I. INTRODUCTION

My task is to say what remains of property rights. My answer is: quite a lot. We have reason to be optimistic about the constitutional status of private property. To explain why, I will relate a short story about property jurisprudence in Anglo-American law. It is a story not merely about property, but also about ordered liberty. Thus, this story is not just for property scholars; it holds valuable lessons for scholars and jurists who are interested in other aspects of American constitutionalism as well.

Accounts of property rights often begin with the familiar treatise of John Locke.<sup>1</sup> My account does not start with Mr. Locke,

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1. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (C.B. Macpherson ed., Hackett Publ’g Co., Inc. 1980) (1690). Many of the landmark works in property theory over the last several decades have taken Locke as a primary guide. *See generally* STEPHEN BUCKLE, *NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME* 125–90 (1991); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND*

but with the writings of the great English jurist, William Blackstone. Unlike Locke, whose goal was to rebut the claim of kings to rule by divine right and who appealed to universal first principles, Blackstone set out to educate law students. He succeeded by declaring the structure and concepts of common law that make sense of the law of England, and by locating its parts within its whole. That English law includes the natural and civil rights that law scholars and students so often associate with Locke. But it also includes scores of particular rights and duties that arose organically in England and her colonies, including (of concern to us) British North America. Unlike those natural rights with which all humans are endowed by their Creator, and which therefore cannot be otherwise, the customary rights and liberties of the common law are partially contingent upon English and early American history. But they also are evidence of practical wisdom from which we can learn something important about rights generally. As I intend to show, rights are most secure when they are grounded in those concrete, ancient, practical duties.

## II. BLACKSTONE'S DOMINION

Late in the eighteenth century, Blackstone almost doomed the study of private property with extravagant praise in one of the most hyperbolic lines in legal education. "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property," Blackstone exclaimed, "or 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."<sup>2</sup> Blackstone made this pronouncement in the first chapter of the volume-long treatment "Of the Rights of Things" in his four-volume *Commentaries on the Laws of England*.<sup>3</sup> Reading it, the uninitiated law student might be forgiven for anticipating a drama worthy of Shakespeare, Sophocles, or maybe even the Coen brothers.

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THE POWER OF EMINENT DOMAN 7–18 (1985); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 3–9 (1974); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 137–252 (1988).

2. 2 WILLIAM BLACKSTONE, COMMENTARIES \*2.

3. *Id.*

In the first volume of the *Commentaries*, Blackstone ratified John Locke's political theory and listed the "right of private property" among the absolute rights of Englishmen.<sup>4</sup> Anticipation builds as the law student opens the second volume and Blackstone appears to settle in for the telling of an epic. "In the beginning of the world," Blackstone intones, before introducing his protagonist: *God himself*.<sup>5</sup> This is grand stuff! Yet, to the reader who is expecting a sweeping historical and philosophical narrative about the origins and justifications of property, something seems a bit off. Blackstone continues:

In the beginning of the world, we are informed by holy writ, the all-bountiful Creator gave to man "dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth." This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject.<sup>6</sup>

Early in this passage, the first suspicious sprouts of legalese intrude into the tale, and the alert law student begins to suspect a bait-and-switch. In just two sentences, Blackstone has replaced the sole and despotic right of property that fires the imagination with a dominion that, to those who are familiar with the "holy writ" in question,<sup>7</sup> seems suspiciously like stewardship, perhaps giving rise to

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4. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*126–28.

5. See 2 BLACKSTONE, *supra* note 2, at \*2–3 (citing *Genesis* 1:28).

6. *Id.*

7. The full passage from the Bible that Blackstone referenced reads:

Then God said, "Let us make man in our image, after our likeness. And let them have dominion over the fish of the sea and over the birds of the heavens and over the livestock and over all the earth and over every creeping thing that creeps on the earth."

So God created man in his own image, in the image of God he created him; male and female he created them.

And God blessed them. And God said to them, "Be fruitful and multiply and fill the earth and subdue it, and have dominion over the fish of the sea and over the birds of the heavens and over every living thing that moves on the earth." And God said, "Behold, I have given

certain fiduciary *duties* to a supreme Being. Next, dominion loses not only its airy metaphysical notions but also, for good measure, its fanciful writers. And as the philosophers and poets retreat from the room, the law student is left alone with Blackstone the law professor, true and solid and endlessly tedious.

Before the law student quite knows what is happening, Blackstone plunges him into a densely-vegetated landscape and leads him on a double-time march along a circuitous, twisting route through corporeal<sup>8</sup> and incorporeal hereditaments;<sup>9</sup> frank-tenement, socage, villenage, and seisin;<sup>10</sup> estates at sufferance and upon condition;<sup>11</sup> and a dizzying variety of rights, duties, and wrongs.<sup>12</sup> When he learns that he must consider at length those “estates defeasible upon condition subsequent”<sup>13</sup> in order to distinguish between and among “living pledge” and “dead pledge,”<sup>14</sup> “statute merchant” and “statute staple,”<sup>15</sup> the student might be tempted to staple a dead pledge to the forehead of the nearest living merchant and enroll in medical school.

Far from firing the imagination, Blackstone’s account of dominion seems designed to dampen enthusiasm. John Locke used the word “property” to signify the “lives, liberties and estates”<sup>16</sup> that humans enjoy (though without adequate security) in the state of nature

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you every plant yielding seed that is on the face of all the earth, and every tree with seed in its fruit. You shall have them for food. And to every beast of the earth and to every bird of the heavens and to everything that creeps on the earth, everything that has the breath of life, I have given every green plant for food.” And it was so. And God saw everything that he had made, and behold, it was very good. And there was evening and there was morning, the sixth day.

*Genesis* 1:26–31.

8. 2 BLACKSTONE, *supra* note 2, at \*16–19.

9. *Id.* at \*20–43.

10. *Id.* at \*44–119.

11. *Id.* at \*152–62.

12. John Finnis helpfully explains the relations between and among rights, duties, and wrongs in Blackstone’s jurisprudence. *See generally* 4 JOHN FINNIS, *PHILOSOPHY OF LAW: COLLECTED ESSAYS* 189–210 (2011) (explaining the relations between and among rights, duties, and wrongs in Blackstone’s jurisprudence).

13. 2 BLACKSTONE, *supra* note 2, at \*157.

14. *Id.* at \*157–60.

15. *Id.* at \*160–62.

16. LOCKE, *supra* note 1, at 66.

and made property the foundation of an entire political philosophy. Richard Weaver called private property the last metaphysical right.<sup>17</sup> A first-year law student who has suffered through Blackstone's discourse on property might call it the Last Rites<sup>18</sup> Before Death by Rule Against Perpetuities.<sup>19</sup> Yet Blackstone's survey of property dominion reveals something worth knowing: a complex organism in which ordered liberty has grown organically for hundreds of years. This organism holds the materials for restoring American law. One who learns Blackstone's lessons about property dominion, who endures to the end of his circuitous march through the woods, might just preserve the constitutions of our states and our nation.

Consider what property law is and where it comes from. The norms and institutions of property law emerge primarily from ancient customs, from judicial obedience to conscience and duty, and from acts of private ordering by millions of moral agents who solve real problems. Property law grows out of, is evidence of, and in turn nurtures ordered liberty. For example, Blackstone commended custom because it "carries this internal evidence of freedom, along with it, that it probably was introduced by the voluntary consent of the people."<sup>20</sup> Similarly, that owners, licensees, bailees, tenants, grantors, donators, testators, civil juries, and other agents of private ordering settle and specify the personal rights, duties, and wrongs of property, and that

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17. RICHARD WEAVER, *IDEAS HAVE CONSEQUENCES* 131 (1948).

18. Last rites are a ministration certain churches offer to the dying. *See, e.g.*, THE EPISCOPAL CHURCH, *THE BOOK OF COMMON PRAYER* 462–67 (2007).

19. A provision to limit the uncertainty of unvested future interests, the rule in its canonical formulation provides that no property interest is good unless it must vest, if at all, within 21 years of some life in being at the creation of the interest. *See* JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* 210 (Boston, Little, Brown, & Co. 1886). It is notoriously challenging to apply:

Arcane in origin, difficult to understand and apply, unintuitive, and seemingly random in its effect, the rule brings together many of the difficulties that students have in adjusting to the rigors of legal study. Students joke about it, have nightmares about it, and learn through rumor that the rule is so complicated that, when they are in practice, they will not be held liable for malpractice if they draft an instrument that is subsequently held void because of the rule.

Peter A. Appel, *The Embarrassing Rule Against Perpetuities*, 54 J. LEGAL EDUC. 264, 264 (2004).

20. 1 BLACKSTONE, *supra* note 4, at \*74.

those rights, duties, and wrongs *work*—that they solve practical problems within the bounds of reason—reflects a radical connection between complex property norms and a virtuous people who govern themselves.<sup>21</sup> And that judges are obligated to declare what the law is, rather than to make it up, means that the judicial reports contain all of that accumulated practical wisdom.

### III. DOMINION IN THE AGE OF MASS (LEGAL) PRODUCTION

Blackstone's complex and not-so-despotic dominion took root in the fertile soil of American law and flourished here for more than a century. Then came the Progressive reconstruction of private law. Oliver Wendell Holmes, Jr. swung the first axe. In his 1897 lecture, "The Path of the Law,"<sup>22</sup> Holmes provocatively and influentially admonished lawyers to wash the norms of common law "with cynical acid."<sup>23</sup> To study the law strictly from the perspective of the "bad man,"<sup>24</sup> who cares only about consequences, while ignoring the point of view of the law-abiding, virtuous man, "who finds his reasons for conduct . . . in the vaguer sanctions of conscience,"<sup>25</sup> is to see that rights and duties as such are illusions. A right or duty has no existence "apart from and independent of the consequences of its breach, to which certain sanctions are added afterward."<sup>26</sup>

Armed with Holmes's cynical acid and the precise chisels of analytical jurisprudence, the American Legal Realists set to work on the old growth, scrubbing and carving the living, organic forest of

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21. The relationship between property law and virtue is somewhat indirect insofar as property does not generally coerce virtuous conduct and is not primarily concerned with prohibiting wrongful harms. See Henry E. Smith, *Mind the Gap: The Indirect Relation Between Means and Ends in American Property Law*, 94 CORNELL L. REV. 960, 968–69 (2009); see also Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889, 916–17 (2009). Nevertheless, the rights and duties of property law are derived from and justified on the basis of principles of practical reason that conduce to human flourishing. ADAM J. MACLEOD, PROPERTY AND PRACTICAL REASON 20–36 (2015).

22. See generally Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

23. *Id.* at 461.

24. *Id.* at 459.

25. *Id.*

26. *Id.* at 458.

common law to render it functional, *useful*. Property fared little better in the Legal Realist era than did torts, contracts, conflicts, and due process.<sup>27</sup> The Legal Realists showed that, from the limited perspective of the social scientist who views juridical interactions from a point of view external to the right holders and duty bearers themselves, the idea of property as a pre-political right is a fiction.<sup>28</sup> In the Realist view, the owner does not have rights but mere expectations, which might or might not be vindicated in positive law as privileges. Legal Realists (and nearly all law professors who have succeeded them) view property as bundles of privileges—property professors call them a bundle of sticks—which can be arranged, rearranged, redistributed, and re-assigned. First, local planning officials in regulatory actions, and then courts in acts of judicial review, redistribute property privileges on the basis of putatively-expert evaluations of social utility. In these ways, they continually draw and redraw the boundaries between property estates and between each individual owner and the state.<sup>29</sup> What we call “property rights” Legal Realists and their successors view as mere products of public policy, though if a regulation goes too far in the judgment of the Supreme Court, then the government might owe compensation under the Takings Clause.<sup>30</sup> The variety and growth of property’s dominion having been leveled, property law was reconstituted and squeezed into the Fifth Amendment, becoming just another device in the machinations of public law. Legal Realists and legal pragmatists thus transformed property law into a product of mass administrative and judicial production.

The public ordering of property required a *summum bonum* to which all incidents and uses of property are reducible. Not

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27. See BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 189–200 (5th ed. 2009); ADAM J. MACLEOD & ROBERT L. MCFARLAND, FOUNDATIONS OF LAW 631–34 (2017); JAMES R. STONER JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 28–29 (2003).

28. E.g., MORRIS R. COHEN, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1928); FELIX S. COHEN, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 362 (1954).

29. See generally HENRY E. SMITH, *Emergent Property*, in PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 320, 326–27 (James Penner & Henry E. Smith eds., 2013).

30. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

surprisingly, this means money. In the twentieth century, the Supreme Court of the United States, often following the jurisprudence of Justice Brennan,<sup>31</sup> adopted this reductionism in key landmark Due Process clause and Takings clause decisions.<sup>32</sup> In Brennan's landmark *Penn Central* opinion, property regulations go too far and effect a compensable taking only when they interfere with an owner's investment-backed financial expectations.<sup>33</sup> The rights and duties of dominion do not enter this calculation, whether despotic or complex.

Also, not surprisingly, the public ordering of property requires public authority over property.<sup>34</sup> Government—not custom, conscience, or private ordering—determines property rules and specifies property rights. The quantity of a regulation's interference with investment-backed expectations is determined by a government official, either administrative<sup>35</sup> or judicial.<sup>36</sup> Because the owner's financial expectations are shaped and determined by the regulatory context in which the owner finds himself, some of the owner's expectations may lawfully be frustrated. For example, New York may deprive the Penn Central Transportation Company of its liberty to build an office tower above its railway station at Grand Central Terminal if the law by which it curtails the liberty “arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”<sup>37</sup> Liability for redefinition of property

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31. See generally *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

32. E.g., *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); *Agins v. Tiburon*, 447 U.S. 255 (1980).

33. *Penn Cent.*, 438 U.S. at 124.

34. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (“Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.”).

35. See *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348–49 (1986); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005–06 (1984).

36. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (“[The U.S. Supreme Court] has examined the ‘taking’ question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance.”).

37. *Penn Cent.*, 438 U.S. at 124.



rights is imposed not on the basis of the property rights at stake, but rather on the nature of the government's action.<sup>38</sup>

John Locke's right of private property offered no meaningful resistance to this project of deforestation and mass production. Public policy solves real problems; an airy metaphysical right does not. Does state legislation granting to a wrongful squatter the value of his improvements deprive the owner of vested rights?<sup>39</sup> Does a cooper have a vested right to the continued operation of his cooperage in a neighborhood that has grown residential around him?<sup>40</sup> Can a suburban municipality lawfully halt the advance of urban expansion by adopting *ex ante* limitations on the height and density of buildings?<sup>41</sup> The metaphysical right of private property does not address these questions. Common law did, but common law grows slowly. Rapid change seemed to require the rapid construction of new solutions. The Legal Realists' mass clear-cutting of the old growth supplied the necessary building materials.

That, of course, is an old account of the rise and fall of property rights. But it is, in the words of Paul Simon, a story seldom told.<sup>42</sup> Law professors squandered their resistance for a pocket full of mumbles;<sup>43</sup> such is legal pragmatism. When the average law professor speaks of "law," he no longer means by that term what the average *citizen* means by it.<sup>44</sup> For most law professors over the last century,

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38. *Penn Cent.*, 438 U.S. at 124; *Miller v. Schoene*, 276 U.S. 272, 281 (1928). Vested property rights are thus recast as "recognized real property interests." *See Penn Cent.*, 438 U.S. at 125.

39. *Soc'y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 768–69 (C.C.D.N.H. 1814) (finding unconstitutional a state law that retrospectively awards to a trespasser the value of his improvements).

40. *Harbison v. City of Buffalo*, 152 N.E.2d 42, 46 (N.Y. 1958) (concluding that, "[w]ith regard to prior nonconforming structures, reasonable termination periods based upon the amortized life of the structure are not . . . unconstitutional," notwithstanding that the termination deprived the landowner of a vested use).

41. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926) (finding the ordinance to be valid as against a facial challenge).

42. *See generally* SIMON & GARFUNKEL, *The Boxer, on BRIDGE OVER TROUBLED WATER* (Columbia Records 1970).

43. *See id.*

44. Regarding the difference between how practicing lawyers regard vested property rights and how legal scholars regard them, see Adam J. MacLeod, *Of Brutal*

law is not a source of real duty or moral obligation arising out of custom, conscience, and private ordering.<sup>45</sup> It is instead an expertly-engineered product, a means of predicting what courts and administrative agencies will do in fact, and what consequences they will assign to a particular action under particular circumstances.

#### IV. REDISCOVERING THE FOREST

The story does not end there. For, in the last two decades, the old growth of property law has enjoyed a revitalization as new growth in both legal scholarship and the Supreme Court's Fifth Amendment jurisprudence. Though some of the new growth arises from the garden boxes of labor theory<sup>46</sup> and cultivated variations of the metaphysical property "right,"<sup>47</sup> the most fruitful growth is emerging in the same old woods that Blackstone described: the common law.<sup>48</sup> This story is worth telling because it contains lessons that can help us to restore other foundational elements of American constitutionalism.<sup>49</sup>

In property scholarship the story begins with a book by James Penner, *The Idea of Property in Law*, which defends the view that "property is what the average citizen, free of the entanglements of legal philosophy, thinks it is: the right to a thing."<sup>50</sup> To mount that defense,

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*Murder and Transcendental Sovereignty: The Meaning of Vested Private Rights*, 41 HARV. J.L. & PUB. POL'Y (forthcoming).

45. See Robert P. George, *One Hundred Years of Legal Philosophy*, 74 NOTRE DAME L. REV. 1533, 1541 (1999).

46. E.g., Eric R. Claeys, *Productive Use in Acquisition, Accession, and Labour Theory*, in PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 13, 13–17 (James Penner & Henry E. Smith eds., 2013).

47. Edward Feser, *Natural Law, Natural Rights, and Private Property*, LIBR. L. & LIBERTY (Mar. 18, 2012), <http://www.libertylawsite.org/liberty-forum/natural-law-natural-rights-and-private-property/>.

48. E.g., Alan Brudner, *Private Property and Public Welfare*, in PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 68, 78 (James Penner & Henry E. Smith eds., 2013).

49. See generally Eric R. Claeys, *Blackstone's Commentaries and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan*, 45 SAN DIEGO L. REV. 777 (2008) (proposing a new method for interpreting the Fourteenth Amendment); John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010) (analyzing the constitutional foundation of tort law).

50. J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 2 (1997).

Penner addressed the concrete *duties* and *obligations* of Anglo-American property law.<sup>51</sup> He made his approach with a simple hypothetical.<sup>52</sup> Penner imagined a stroll through a car park, during which one has a “practical duty . . . which applies to the cars there.”<sup>53</sup> I have a duty not to enter or occupy the cars simply because others own them. That fact alone tells me what I should do, without the involvement of experts, without scientific studies, without advanced planning, without resort to state-of-nature thought experiments, and without countless qualifications and contingencies. Someone owns the thing; I am not that person; I must exclude myself from it.

Arising out of and correlating exactly with the non-owner’s duty of self-exclusion is the owner’s right to exclude. This right is one of those incidents of property ownership that is supposed to be an illusion on the Holmesian/Realist account. Yet there it is, as plain as day to any law-abiding person who has ever walked through a parking garage.

Penner’s scholarship precipitated a movement. An intact morality of property was perceived in the simple duty to exclude oneself from automobiles (and other things) that one does not own.<sup>54</sup> Since then, several property scholars, collectively known as the “New Essentialists,”<sup>55</sup> have rediscovered and cultivated to health much of the corpus of Anglo-American property law, still growing organically out of custom, conscience, and millions of acts of private ordering.<sup>56</sup> Scholars have accomplished this by focusing not on an abstract right but rather on the concrete duties and obligations of property law.

In recent years, the Supreme Court of the United States has also demonstrated a renewed interest in property as a binding source of obligation, and therefore as a taproot of ordered liberty. In the Court’s

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51. *Id.* at 2–3.

52. *Id.* at 75.

53. *Id.*

54. Thomas W. Merrill & Henry E. Smith, *Law and Morality: Property Law: The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1853–54 (2007).

55. This moniker was bestowed by Amnon Lehavi. AMNON LEHAVI, *THE CONSTRUCTION OF PROPERTY: NORMS, INSTITUTIONS, CHALLENGES* 46–49 (2013).

56. Some of this scholarship preceded Penner’s book. *See, e.g.*, ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 188–92 (1991); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986).

landmark decision in *Lucas v. South Carolina Coastal Council*,<sup>57</sup> the Court reset the baseline for the government's regulatory takings liability in certain cases, from the regulatory context to what the Court called the "background principles" of tort and property law.<sup>58</sup> Justice Scalia's opinion for the Court explained that a state cannot avoid takings liability by simply asserting that the prohibited use is contrary to public interest or law.<sup>59</sup> Instead, the state must show that the prohibited use was inherently excluded from the owner's title by the owner's own common-law duties.<sup>60</sup> A regulation is not a taking if it merely codifies the judgment that a neighbor or local government could have obtained in a civil action to abate a nuisance or to obtain a remedy for some other common-law wrong.<sup>61</sup>

Over the course of several years the Court flip-flopped back and forth between Brennan's pragmatic reductionism and Scalia's deference to the common law of rights and wrongs. In landmark decisions before *Lucas*, the Court allowed governments to define by their positive laws and regulations the extent of owners' reasonable investment-backed expectations, and thus the contours of property rights, for Takings Clause purposes.<sup>62</sup> Then in 2001, a majority of the Court rejected a state's argument that "postenactment purchasers cannot challenge a regulation under the Takings Clause."<sup>63</sup> The Court noted the predicate of the argument, that "[p]roperty rights are created by the State," and that "by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations."<sup>64</sup> The majority rejected that argument, reasoning, "The State's rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation."<sup>65</sup> That is an

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57. 505 U.S. 1003 (1992).

58. *Id.* at 1029.

59. *Id.* at 1025–28, 1025 n.12.

60. *Id.* at 1027–30.

61. *Id.* at 1029; MACLEOD, *supra* note 21, at 238.

62. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485–502 (1987); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005–14 (1984).

63. *Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001).

64. *Id.*

65. *Id.* at 627.

essential right of property at common law.<sup>66</sup> But only a year later, the Court ruled that a thirty-two month building moratorium does not constitute a per se taking, reasoning that the extent of interference with owners' investment-backed expectations is a question for courts to resolve on a case-by-case basis.<sup>67</sup>

Yet recently, Scalia has silently enjoyed the upper hand. In its rulings since 2012—*Koontz v. St. Johns River Water Management District*,<sup>68</sup> *Arkansas Game and Fish Commission v. United States*,<sup>69</sup> and two decisions in the case *Horne v. Department of Agriculture*<sup>70</sup>—the Court has, while not always expressly invoking the common law, consistently rejected arguments by the Obama administration and state agencies that property rights are whatever the government says they are. In none of those cases did the Court rule that the owner enjoys absolute rights to exclude, use, or dispose without limitation.<sup>71</sup> But in each case the Court insisted that the limitations of property rights laid down in law cannot be moved by fiat whenever a state or federal actor decides that those limitations should be drawn more restrictively.<sup>72</sup> In the *Arkansas* case, for example, the United States argued that it has the power to choose whose land to flood when it manages flood control, and that it must not be subjected to expropriation liability for exercising that power.<sup>73</sup> This argument left Justice Sotomayor “totally

66. *Id.* at 627–28.

67. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 341–42 (2002).

68. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599 (2013) (holding that the Fifth Amendment exaction requirements of substantial nexus and rough proportionality apply where a government denies a development permit and conditions future approval on the owner giving up property rights).

69. *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 26–27 (2012) (holding that government-caused flooding of owned land is not exempt from the Takings Clause even where the flooding is temporary).

70. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2427–28, 2433 (2015) (holding that the Takings Clause requires just compensation for takings of personal property just as for real property); *Horne v. Dep't of Agric.*, 569 U.S. 513, 515–16 (2013) (holding that federal courts have jurisdiction to hear takings claim of farmers whose produce was subject to a final agency order of confiscation).

71. *See* cases cited *supra* notes 62–70.

72. *Id.*

73. Oral Argument at 33, *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012) (No. 11-597) (Oct. 3, 2012),

confused” and prompted Justice Scalia to ask whether the government was attempting to “overrule the Takings Clause.”<sup>74</sup> And in *Horne*, the Department of Agriculture tried and failed to persuade the Court that personal property is not property for purposes of a government’s categorical duty under the Takings Clause to pay compensation for appropriation.<sup>75</sup> As the Court observed in rejecting that argument, personal property has always been property at common law, and taking personal property has always been a compensable wrong going “back at least 800 years to Magna Carta.”<sup>76</sup>

Much of the Court’s recent Takings Clause jurisprudence puzzles and concerns many of my colleagues who teach property in American law schools. The common law of wrongs does not strike most law professors as a plausible baseline for takings liability because they don’t believe such a thing exists apart from positive law. It is the job of legislative and regulatory officials to make and change positive law to promote health, safety, morals, and the general welfare, they assume. On this view, the successful claim for compensation by a property owner whose use rights are altered or abrogated by changes in positive law looks like a power grab at the expense of the political community. At a recent annual meeting of the Association of Law, Property, and Society, one of its most prominent members worried about a “new entitlement” emerging in the Court’s property jurisprudence, a right for property owners to litigate “to do something with your land that is not permitted.”<sup>77</sup> What so troubles this scholar is the “nascent but well-rooted movement” to question government’s absolute sovereignty to define property rights.<sup>78</sup> This of course is *not* a new right, it is very ancient. This right grows out of the dominion of property ownership, a growth this property scholar does not recognize.

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[https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2012/11-597.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2012/11-597.pdf).

74. *Id.* at 34–39.

75. *Horne*, 135 S. Ct. at 2425–28.

76. *Id.* at 2426.

77. Laura Underkuffler, *From Bailouts to Bogs—Shaking the Takings Money Tree* 11–12 (Cornell Law Sch. Legal Studies Research Paper Series, Paper No. 15-16, 2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2628344](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2628344).

78. *Id.*

## V. HOPE FOR AMERICAN CONSTITUTIONALISM

Herein lies our hope of restoring the foundations of American constitutionalism. What makes the Supreme Court's recent regulatory takings and exactions jurisprudence coherent is the unstated but well-grounded premise that the common law of wrongs is a discernable and workable baseline. The law of wrongs is largely determined and settled by practices and institutions of practical reasoning *before* legislative and regulatory officials act to change the law. These practices and institutions include custom, the civil jury, and the integrity of judges who cannot allow their offices to be used as instruments for the abuse of rights.<sup>79</sup> All this presupposes a belief in what Jeremy Bentham called "nonsense upon stilts," his derisive term for that part of natural law that is pre-politically specified as "natural and imprescriptible rights."<sup>80</sup> That the Supreme Court perceives property duties as having an existence independent of the regulatory activities of governments understandably troubles those whose faith rests in Bentham's reductionist dogma. The existence of just one pre-political obligation poses a radical threat to a Benthamite jurisprudential project.

Notice that it's not rights doing the work here. Rather, it is the existence of pre-positive *obligation*, the idea of *duty*. Rights arise out of and correlate with those duties. Here is the lesson to be learned from the success of the New Essentialists and from Justice Scalia's Takings Clause jurisprudence: the nurture and revitalization of property requires sustained attention to the identifiable duties and obligations of owners and non-owners. Viewing the jural correlative from the duty side responds directly to the Legal Realist challenge. Unlike a metaphysical right of property, concrete duties answer practical questions. At bottom, every practical deliberation addresses the question, "*what should I do (or not do)?*" Blackstone's dominion answers that question. The common-law property dominion is not an unfettered license to satisfy wants and preferences, and neither is it merely a permission slip from the regulatory state.

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79. MACLEOD, *supra* note 21, at 164.

80. Jeremy Bentham, *A Critical Examination of the Declaration of Rights*, in THE COLLECTED WORKS OF JEREMY BENTHAM 496, 501 (John Bowring ed., 1838).

So, in a sense, Richard Weaver was correct.<sup>81</sup> But he was right insofar as he had in mind a common-law property right. The lesson of the last three decades is that property is the last metaphysical *right* because and insofar as property *dominion* is the last pre-political source of *obligation*. The priority of property rights is rooted in the common law of *wrongs*. Because we have pre-political duties, we have pre-political liberties. Liberty grows out of a million discrete legal duties, each of those duties correlating exactly with the right of a human being, a moral agent, a possessor of practical reason, and a bearer of the image of God.

Within the thicket of property law other embattled liberties might take refuge. The common-law norms and institutions of property hold out the promise of an ordered liberty that does not owe its existence to government, plural domains of freedom under law and constrained within the boundaries of reason's duties. Within those domains, the other norms and institutions of American constitutionalism might once again flourish.

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81. WEAVER, *supra* note 17.