

THE USES OF HISTORY IN THE SUPREME COURT'S TAKINGS CLAUSE JURISPRUDENCE

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Supreme Court Justices have, in their analyses of Fifth Amendment Takings Clause¹ cases, frequently made a conscious choice to frame their arguments in a broad historical context.² These uses of history fall into two distinguishable categories, two discourses on history characterized by conflict both in the content of their historical arguments and in the purposes for which they are deployed. One discourse emphasizes history as dynamic, productive of change in the material conditions of society as well in the realm of normative values and interests. In this discourse, changes in societal conditions over time explain the need for, and ultimately justify, governmental action upon private property pursuant to legislatively determined public goals. A second, more recent discourse uses history as a means to identify an original normative understanding of the relationship between government and private property in which private property is viewed as sacrosanct and largely immune from government interference. This discourse argues that these values, by virtue of their historical provenance in early America, should control the application of Constitutional limits on government interference with private property and preempt economic or normative arguments that would lead to a result that violates the claimed historical norm.

This essay begins by examining a group of significant Supreme Court cases that implicate constitutional limitations on governmental power over private property generally, and the Takings Clause of the Fifth Amendment

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1. The Fifth Amendment of the United States Constitution states, in relevant part, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

2. This position is in contrast to the views of Professors Treanor and Epstein, who have both argued that historical arguments have not played a significant part in Takings Clause jurisprudence. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 29 (1985); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 803-04 (1995). I will argue that history-conscious arguments have played an important role in significant Takings Clause cases, and I will take issue with the historical inaccuracy of these arguments.

specifically. This essay identifies in these cases the two distinct discourses on history sketched out above. It then argues that the more recent discourse on history in the Supreme Court's Takings Clause jurisprudence is essentially ahistorical, a caricature of the rich and complex history of the relationship between private property and governmental power. Moving beyond the historical inaccuracy of this discourse, this essay argues that it has dangerous implications, both for the Court's ability to fulfill its responsibilities as the paramount interpreter of American constitutional law, and for society's ability to understand and define itself in relation to its legal-historical past. Because of these dangers, this essay contends that the recent discourse on history in the Supreme Court's Takings Clause cases, which reduces a complex history to a set of static norms, must be vigorously challenged by lawyers, academics, and judges alike.

I. THE USES OF HISTORY IN SUPREME COURT TAKINGS CLAUSE JURISPRUDENCE

As an initial matter, I define "the use of history" as meaning reference to trends and events occurring over time that are extrinsic to the specific facts implicated in the particular case before the Court. Until the 1990s, the Court used history in its Takings Clause jurisprudence to illustrate changes in society over time, both in material conditions and in societal norms and values.³ In the Court's traditional historical discourse on takings, changes in material conditions on the ground, new societal values, and shifts in the preference society accords to different interests justify novel forms of governmental intervention in the realm of private property interests.⁴ This discourse respects the role of state legislatures in recognizing societal change.⁵ Because of this, the Court takes a deferential posture with respect to the states' power to shape the contours of what it means to have rights in prop-

3. This is not to say that historical awareness has played a part in all significant Takings Clause cases. For example, the Court's opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), a seminal takings case, is devoid of references to extrinsic historical trends or events. The same is true for the more recent *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (defining the constitutional limits on exactions required by local government in exchange for zoning variances), and its logical antecedent, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

4. See, e.g., *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). These cases are discussed in more detail below. See *infra* text accompanying notes 14–46.

5. Each of these cases deals with legislative enactments by state governments or local governments that exercise power devolved unto them by the state. See *Midkiff*, 467 U.S. at 233; *Penn Cent. Transp. Co.*, 438 U.S. at 108–09; *Euclid*, 272 U.S. at 379–80.

erty and the states' ability to identify situations where governmental action on private property is desirable and legitimate.⁶

While this discourse remains a part the Court's Takings Clause jurisprudence, a fundamental shift occurred in the 1992 case of *Lucas v. South Carolina Coastal Council*.⁷ For the first time, a majority of the Court mobilized historical arguments not for the purpose of illustrating societal change, but rather to argue for the existence of a historical norm embraced by early American society.⁸ A majority of the Court held that this norm should transcend time and operate in the present to act as a limitation on the scope of legitimate government intervention in the realm of private property.⁹ Until recently, one could view this approach as an isolated anomaly. However, the *Lucas* discourse reemerged in the dissenting opinions of Justices O'Connor and Thomas in *Kelo v. City of New London* in June 2005.¹⁰ In their dissents, these Justices, joined by Justice Scalia and Chief Justice Rehnquist, argued that historical understandings at the time of the Constitution's ratification and in early America should control the Court's present-day Takings Clause interpretations.¹¹ As in *Lucas*, the *Kelo* dissenters use historical arguments to identify a norm that, by virtue of its historical pedigree, becomes a transcendent "first principle" of American society and more specifically of American constitutional law.¹²

Thus the conflict between these two discourses on history and constitutional interpretation is again a live issue, and the time is ripe for an interrogation of the historical underpinnings of the more recent discourse, which makes such strong historical claims about early American practices and property ideology. This Section identifies the competing historical discourses and elaborates on their conceptual content.

6. In each of these cases, the Court upholds a significant legislative interference with private property interests on the basis of the states' power to regulate for the public welfare. See *Midkiff*, 467 U.S. 229; *Penn Cent. Transp. Co.*, 438 U.S. 104; *Euclid*, 272 U.S. 365.

7. 505 U.S. 1003 (1992).

8. See *id.* at 1027–28.

9. See *id.* By arguing in favor of adherence to the "historical compact" of the Takings Clause, the Court in *Lucas* seems to advocate a jurisprudential approach in which subsequent changes in social and material conditions should not be allowed to trump the values allegedly manifested in the Fifth Amendment.

10. 125 S. Ct. 2655 (2005).

11. See *id.* at 2671, 2677 (O'Connor, J., dissenting); *id.* at 2680–82 (Thomas, J., dissenting).

12. See *id.* at 2671 (O'Connor, J., dissenting).

A. *The Dynamic Use of History as Justification for State Intervention with Private Property*

Three major Supreme Court cases illustrate the Court's traditional use of history to develop a theme of societal change over time as a justification for novel forms of regulation or other interventions in the realm of private property.¹³ A good starting point is the celebrated 1926 case *Village of Euclid v. Ambler Realty Co.*¹⁴ In *Euclid*, an owner of unimproved land challenged a municipality's zoning regulations on the grounds that the regulations violated the Fourteenth Amendment's Due Process Clause and amounted to an arbitrary exercise of governmental power to deprive him of the right to develop his property as he wished.¹⁵ A majority of the Court, in upholding the municipal regulations as a valid exercise of the police power,¹⁶ chooses to provide a historical context for its landmark decision, which it recognizes as a deviation from traditional doctrine.

Justice Sutherland, writing for the majority, explained:

Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. 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.¹⁷

13. Although three cases may appear to be a deceptively small sample of the total number of Supreme Court Takings Clause cases, each of the three cases is incredibly significant in the history of the relationship between government power and private property rights. *Euclid* was the first case in which the Supreme Court reviewed, and upheld, municipal zoning regulations, which have become a nearly universal facet of American life. *Penn Central*, discussed in detail below, *see infra* text accompanying notes 23–32, recognized that local governments could regulate the use of private property even to protect such intangible things as the historical and architectural significance of privately owned buildings. *Midkiff*, also discussed in more detail below, *see infra* text accompanying notes 34–46, dealt with perhaps the most radical state action on private property, upholding a state law that forced certain owners of significant amounts of real estate to sell fee simple interests in the property to their tenants. Consequently, I contend that it is not myopic to focus on these three cases because their great significance outweighs their small number.

14. 272 U.S. 365 (1926). Although this is not, strictly speaking, a Takings Clause case, the crucial issue present in many Takings Clause cases—the extent of state governments' power to regulate or otherwise interfere with private property interests—is at the core of the case.

15. *Id.* at 384–85.

16. *Id.* at 397.

17. *Id.* at 386–87.

Here the Court chooses to go beyond the specific facts of the case at hand to introduce an argument about a broader trend in society.¹⁸ The purpose of this historical reference is to illustrate societal changes over time: urban life has changed from “simple” to complex; regulations of property use are “now uniformly sustained” where once they would have been rejected.¹⁹ History, in this passage, illustrates the dynamism of societal conditions, and consequently of the rules that govern property.

The Court’s use of history in *Euclid* is also justificatory in that it uses the historical changes it identifies to justify a departure from traditional doctrine. Whereas the municipal ordinances once would have been considered invalid, the Court, in light of present conditions, is willing to sustain them.²⁰ Justice Sutherland makes this explicit when he writes that “while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise.”²¹ The historical dynamic the Court articulates to contextualize the controversy also

18. Later in the opinion, the Court recites further arguments for the desirability of zoning regulations that are predicated on a growing concern for the quality of urban life in America:

The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life, greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease noise and other conditions which produce or intensify nervous disorders, preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

Id. at 394–95.

19. *Id.* at 386–87.

20. *See id.* at 386–87, 397.

21. *Id.* at 387.

serves as a justification for the Court's upholding the ordinances: the Court is bringing property doctrine in line with changed circumstances.²²

The Court took a similar tack in *Penn Central Transportation Co. v. City of New York*, another landmark case dealing with zoning regulations and Takings Clause issues.²³ At issue in *Penn Central* was a landmark-preservation law enacted in New York City that imposed significant restrictions on the ability of the owners of specific landmark buildings to alter the buildings' properties in a variety of ways.²⁴ At the outset of his opinion for the Court, Justice Brennan writes that

[o]ver the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance. These nationwide legislative efforts have been precipitated by two concerns. The first is the recognition that, in recent years, large numbers of historic structures . . . have been destroyed The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all.²⁵

The Court's opinion in *Penn Central* is in many ways the analogue of its opinion over fifty years earlier in *Euclid*.²⁶ As in *Euclid*, the analysis begins with a historical claim about changes in society over time that is designed to contextualize all that follows.²⁷ Just as in *Euclid*, where the Court makes a claim about the increasing complexity of urban living conditions,²⁸ the Court in *Penn Central* claims that historic structures have started to be destroyed while a belief in the value of such structures to society at large has emerged.²⁹

Furthermore, as in *Euclid*, this historical claim becomes one justification for the Court's decision to uphold the ordinance, this time against a Fifth Amendment Takings Clause challenge. The appellants had argued that the landmark ordinance effected an unconstitutional taking in part be-

22. It is interesting to note that the Court seems somewhat uncomfortable with making what was, in reality, a significant doctrinal shift. This is exemplified by the mysterious statement that "while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract." *Id.* It is far from clear that the distinction between the unchanged "meaning" and the changing "scope of application" has any practical significance, because only when the meaning is applied to facts does the constitutional guarantee become operative.

23. 438 U.S. 104 (1978).

24. *See id.* at 109-15.

25. *Id.* at 107-08.

26. Indeed, the Court's opinion in *Penn Central* cites the zoning laws upheld in *Euclid* as the "classic example" of state police power trumping private property interests. *Id.* at 125. In all, *Euclid* is referenced four times in the opinion. *See id.* at 125, 131, 134-35.

27. *See id.* at 107-08.

28. *See* Vill. of *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-87 (1926).

29. *Penn Cent. Transp. Co.*, 438 U.S. at 107-08.

cause, unlike zoning ordinances, it targeted their structure specifically and placed the burden of a public benefit on their shoulders uniquely.³⁰ In response, Justice Brennan argues that placing the cost of a public benefit on a discrete set of individuals—the owners of New York City landmarks—is not unconstitutional because it is “reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to *all similarly situated property*.”³¹ While the connection is not made explicit in the opinion, this determination is contingent on the historical claim discussed above.

Justice Brennan’s argument that the ordinance applies to “all similarly situated property” is predicated on the existence of the category of “property possessing historical or landmark significance,” the emergence of which is established by the historical argument at the beginning of the opinion.³² In other words, in order to accept the argument that the regulation is constitutional because it applies to all property that has special value to the community as a historical landmark, we must accept that such a value exists in the first place. Therefore, Justice Brennan’s historical claim about the emergence of a class of property with historical or aesthetic value is essential to the Court’s ultimate conclusion. The historical argument here serves the same dual purpose as in *Euclid*:³³ to illustrate change in a dynamic society, and to justify the Court’s ultimate holding.

*Hawaii Housing Authority v. Midkiff*³⁴ presents a fascinating instance in which the Court employs history in a dynamic sense to contextualize and legitimate its holding while at the same time maintaining that it is consistent with a precedent as old as the United States itself. In *Midkiff*, the Court was called upon to decide on the constitutionality of an enactment by the state of Hawaii that provided that the state could condemn the property of certain large landowners and transfer the fee interest in that property to tenants holding leases on that land.³⁵ At issue was whether this exercise of the eminent domain power was in pursuance of a “public use” as required by the Takings Clause.³⁶

Justice O’Connor, writing for a unanimous Court, begins her analysis with a brief description of Hawaiian property history and its ramifica-

30. *Id.* at 133.

31. *Id.* at 134 n.30 (emphasis added).

32. *See id.* at 107–08.

33. *See* 272 U.S. at 386–87, 394.

34. 467 U.S. 229 (1984).

35. *Id.* at 233.

36. *Id.* at 231–32.

tions.³⁷ Reaching back to the initial settlement of the islands by Polynesian immigrants from the western Pacific, she describes an essentially feudal land tenure system in which title to all property was essentially vested in “one island high chief, the ali’i nui.”³⁸ She then writes that “beginning in the early 1800’s, Hawaiian leaders and American settlers repeatedly attempted to divide the lands of the kingdom,” but “[t]hese efforts proved largely unsuccessful.”³⁹ As a result of the persistence of traditional customs in the face of attempts to divide land ownership, “[i]n the mid-1960’s . . . the Hawaii Legislature discovered that . . . 47% [of the land] was in the hands of only 72 private landowners.”⁴⁰

While this historical account presents a picture of a largely unchanged system of concentrated land ownership, it also presents a dynamic aspect—a desire dating back to the early 1800s on the part of Hawaiians and American settlers alike to alter the traditional system and promote the diffusion of property ownership.⁴¹ Whereas *Euclid* and *Penn Central* emphasize actual societal change over time, in *Midkiff* the Court emphasizes a persistent stability and the long-term frustration of change.⁴² The Court also employs a historical discourse to legitimate that desire for change, as O’Connor writes that “[t]he people of Hawaii have attempted, much as the settlers of the original 13 Colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs.”⁴³

The Court goes on to uphold the act as compliant with the Fifth Amendment’s requirement that a taking of property be in pursuance of a public use, even though the direct effect of the act was to take title to real property from certain individuals and transfer it to others.⁴⁴ It justifies this non-obvious conclusion by deploying history. First, the historical argument—that an outdated system of land ownership persists even though it has long since become undesirable to native and settler alike—argues for a certain dynamic: an increasing desire for diffuse land ownership frustrated by inertia in the system. Second, the historical references, both to the long-held but frustrated desire for change⁴⁵ and the analogy drawn to the values of the Revolutionary generation,⁴⁶ are deployed in order to legitimate the

37. *See id.* at 232.

38. *Id.*

39. *Id.*

40. *Id.*

41. *See id.*

42. *See id.*

43. *Id.* at 241–42.

44. *See id.* at 245.

45. *See id.* at 232.

46. *See id.* at 241–42.

Court's holding that a forced transfer of title from one individual to another can be constitutional in the proper context.

Between these cases, which cover roughly sixty years' worth of Supreme Court jurisprudence on the extent to which government can modify or interfere with private interests in property within the boundaries of the Fifth Amendment, there is enough regularity to identify a loose but nonetheless coherent discourse. In each case, the Court chooses to make claims that are historical in nature, beyond what is required to state the specific facts of the case at hand.⁴⁷ The content of these claims is the existence of some dynamic of social change in the broader context within which the specific controversy is situated. Furthermore, in each case the strategy underlying the Court's choice to "use" history is to contextualize and legitimate the reason for its choice to hold as it does. Based on these regularities between the cases, we can identify a dynamic/justificatory use of history in the Court's Takings Clause jurisprudence that was deployed in significant decisions over the past eighty years.

B. Static Historical Norms as Reason-Preempting First Principles

In 1992, in *Lucas v. South Carolina Coastal Council*,⁴⁸ a new historical discourse emerged in the majority opinion by Justice Scalia. The majority's use of history in *Lucas* is in many ways diametrically opposed to the preexisting discourse identified in the previous Section. As employed in *Lucas*, historical arguments are marshaled to establish a static baseline of normative values, existing at some time in the past, that do not change with time.⁴⁹ Furthermore, these norms operate today to militate against governmental interference with, or regulation of, private property interests that cannot be squared with the putative historical understanding of the relationship between government and private property.⁵⁰ The discourse that emerged in *Lucas* emphasizes history as a place in which static first principles are waiting to be discovered, and argues that by virtue of their historical pedigree they preempt any discussion of the policy justifications

47. See *id.* at 231–32; *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 107–08 (1978); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386–87 (1926).

48. 505 U.S. 1003 (1992).

49. As Gregory S. Alexander describes it, "In his opinion for the Court, Justice Antonin Scalia relied on the supposed existence of a singular American tradition concerning the protection of private property." GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970*, at 7 (1997).

50. The emphasis in the Court's opinion, as I will discuss in the following pages, is on evaluating present-day government interaction with private property in light of the "historical compact" of the Takings Clause that lives on in American "constitutional culture." *Lucas*, 505 U.S. at 1028.

underlying governmental action which appear to transgress them.⁵¹ If the nature of historical discourse in the Court's previous Takings Clause cases was "dynamic" and its purpose was "justificatory," the newer discourse may be seen as emphasizing a "static" form of history and employing it for "reason-preemptive" purposes.⁵²

In *Lucas*, the Court was called upon to determine whether a taking of property without compensation in violation of the Fifth Amendment had occurred when a South Carolina enactment, designed to protect coastal ecosystems, had the effect of prohibiting Mr. Lucas from building anything on two parcels of land he had purchased for the purpose of residential development.⁵³ In holding that a taking that would require compensation under the Fifth Amendment had occurred, the Court was not required to reach very far for novel arguments. Indeed, the majority opinion makes it clear that there was ample support in the Court's precedents for such a finding: "[a]s we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'"⁵⁴ With such a body of case law⁵⁵ supporting both the proposition that a regulation that deprives a private property owner of all economic use of her land is a taking, and the finding that the regulation prevented Lucas from making any economic use of his property, the Court could easily have ended its analysis.

Rather than stopping here, however, Justice Scalia writes that "[w]e have never set forth the justification for this rule," and elects to undertake a thorough explanation of the underpinnings of the rule that a regulation that deprives the property owner of all economically beneficial use effects a taking.⁵⁶ The *Lucas* opinion dismisses the notion that competing policy concerns manifesting themselves in the legislative process—precisely the

51. The Court's mistrust in *Lucas* of legislative policy determinations about the use of private property is highlighted by the passage, discussed below, in which the Court rejects the notion that preventing a "noxious use" does not constitute a "taking," on the grounds that the determination of what is a "noxious use" cannot be made on an "objective, value-free basis." *Id.* at 1026.

52. I use the term "reason-preemptive" to describe a normative belief or commitment that prevents the holder of the belief from weighing arguments that would cause her to act contrary to that belief. For a discussion and critique of "reason-preemption" and normative commitments, see Richard Warner, *Rights, Rationality, and the Preemption of Reasons*, 79 CHL.-KENT. L. REV. 1091, 1097–99 (2004).

53. *Lucas*, 505 U.S. at 1007–09.

54. *Id.* at 1016 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

55. In addition to *Agins*, the Court supports its categorical rule on regulations depriving the private property owner of all economically beneficial use of her property by reference to *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), and *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264 (1981). See *Lucas*, 505 U.S. at 1015–16.

56. *Lucas*, 505 U.S. at 1017.

concerns that the older tradition of historical discourse in Takings Clause cases highlighted—can be the basis for interpreting the extent of the Takings Clause’s guarantees.⁵⁷ Rejecting the argument that a regulation depriving a property owner of economically viable use of her property does not effect a taking when it prevents a “noxious use,” Justice Scalia writes,

When it is understood . . . that the distinction between regulation that “prevents harmful use” and that which “confers benefits” is difficult, if not impossible, to discern on an objective, value-free basis[,] it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory “takings” . . . from regulatory deprivations that do not require compensation. *A fortiori* the legislature’s recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated.⁵⁸

This argument must be recognized for what it is: a rejection of the notion that the limits of governmental power over private property should be informed by policies and values understood in the context of a changing society,⁵⁹ and an embrace of a categorical rule that finds its justification somewhere other than in the nebulous and shifting world of contemporary opinion.⁶⁰

In justifying his categorical rule on takings, Justice Scalia writes that the Court’s rule in *Lucas*—that the State “may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with”—is consistent with a tradition in the Court’s Takings Clause cases of decisions “guided by the understandings of our citizens regarding the content of, and the State’s power over, the ‘bundle of rights’ that they acquire when they obtain title to property.”⁶¹ In the same paragraph, he further develops this theme of “understandings” held by the people: a rule that makes all private interests in land subject to the “‘implied limitation’ that the State may subsequently eliminate all economically valuable use is inconsistent with the *historical compact* recorded in the Takings Clause that has become part of our *constitutional culture*.”⁶²

57. *Id.* at 1026.

58. *Id.*

59. This is precisely the opposite approach to that taken by the Court in *Euclid* and *Penn Central*, in which the Court relied heavily on the significance of changed circumstances and attitudes in examining the validity of the challenged regulations. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 107–08 (1978); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386–87 (1926).

60. For an alternative discussion of the possible sources of this rule, see Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 318–24 (1993).

61. *Lucas*, 505 U.S. at 1027.

62. *Id.* at 1028 (emphases added).

This line of argument shows the Court rejecting a mutable, policy-based definition of the balance between governmental power and private property that is influenced by a dynamic vision of history, and embracing a new approach that would interpret the Constitution's limitations on governmental power over private property in light of the "understanding" expressed in a "historical compact" that forms the basis of a "constitutional culture."⁶³ But what is the content of this "understanding," or the "historical compact" of the Takings Clause? With respect to *Lucas's* "total taking" situation, Justice Scalia makes clear that he is referring to the common-law doctrine of nuisance: "[A]s it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends"⁶⁴ In other words, the limits of governmental power over private property—at least in the case of a regulation prohibiting all economically viable use—are to be fixed by reference to an understanding, expressed in the "historical compact" of the Takings Clause, the content of which is defined by the background principles of the common law.⁶⁵

With this final piece in place, the Court in *Lucas* initiates a new discourse on history in its Takings Clause jurisprudence. The older discourse discussed above employed a historical narrative to illustrate societal change and to justify governmental intervention in private property based on emergent values and policy considerations.⁶⁶ In *Lucas*, history is used to argue for a "compact" between the people and their government based on an "understanding" located sometime in the past, which does not change over time but rather remains a yardstick for measuring the legitimacy and lawfulness of present-day governmental interventions in private property.⁶⁷ The historical understanding is the marker of the boundary between legitimate and illegitimate, between lawful and unlawful, and it preempts a discussion of competing interests and policies that is seen as too malleable to form the basis of a constitutional guarantee.⁶⁸

63. *See id.*

64. *Id.* at 1031.

65. Thus the Court acknowledges that regulations depriving an owner of all economically valuable use are not takings if they merely prohibit in positive-law form what was "always unlawful" because the owner could have been enjoined from such use under the "background principles of nuisance and property law." *See id.* at 1030.

66. *See, e.g.,* *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). *See supra* text accompanying notes 14–46.

67. *See Lucas*, 505 U.S. at 1027–28.

68. *See id.* at 1026.

Recently, this discursive tactic was adopted by the dissenting Justices in *Kelo v. City of New London*.⁶⁹ In *Kelo*, the Court upheld an exercise of the eminent domain power by the city of New London, Connecticut, by which the city condemned land belonging to private homeowners in order to transfer it to a private development corporation for development as, among other things, an office and research complex.⁷⁰ The Court found that the city of New London's plan, which was intended to create benefits for the public by increasing the city's tax base, was pursuant to a valid public purpose and therefore not in violation of the Fifth Amendment's Takings Clause.⁷¹

The dissent by Justice O'Connor begins with the constitutional law chestnut *Calder v. Bull*, quoting from that opinion that "[a]n ACT of the legislature . . . contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."⁷² The dissent continues, "Today the Court abandons this long-held, basic limitation on government power."⁷³ Later in the opinion, Justice O'Connor references both Alexander Hamilton⁷⁴ and James Madison,⁷⁵ ultimately concluding that "the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result."⁷⁶

Similarly, Justice Thomas's dissent begins, "Long ago, William Blackstone wrote that 'the law of the land . . . postpone[s] even public necessity to the sacred and inviolable rights of private property.' The Framers embodied that principle in the Constitution. . . . Defying this understanding, the Court replaces the Public Use Clause with a 'Public Purpose' Clause . . ."⁷⁷ Justice Thomas continues, "Our cases have strayed from the Clause's original meaning . . ."⁷⁸ In support of his argument that the Fifth Amendment allows the taking of private property "only if the public has a right to employ it," Justice Thomas writes that "[t]he Constitution's com-

69. 125 S. Ct. 2655, 2671 (2005) (O'Connor, J., dissenting); *id.* at 2677 (Thomas, J., dissenting).

70. *Id.* at 2658–60, 2668 (majority opinion).

71. *Id.* at 2668.

72. *Id.* at 2671 (O'Connor, J., dissenting) (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798)).

73. *Id.*

74. "[The Fifth Amendment's requirements of 'public use' and 'just compensation'] serve to protect 'the security of Property,' which Alexander Hamilton described to the Philadelphia Convention as one of the 'great obj[ects] of Gov[ernment].'" *Id.* at 2672 (citation omitted).

75. "'That alone is a just government,' wrote James Madison, 'which impartially secures to every man, whatever is his own.'" *Id.* at 2677 (citation omitted) (italics omitted).

76. *Id.*

77. *Id.* (Thomas, J., dissenting) (citation omitted).

78. *Id.* at 2678.

mon-law background reinforces this understanding,” and he quotes Blackstone for the proposition 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.”⁷⁹ In the last prong of his historical argument, Thomas writes that “[e]arly American eminent domain practice largely bears out this understanding of the Public Use Clause,” and produces multiple examples of early American uses of the eminent domain power that, he argues, illustrate that, in practice, early Americans believed that eminent domain had to be justified by a public use of condemned land.⁸⁰

Taken together, the two dissenting opinions are a continuation and an elaboration of the historical discourse first employed by the Court in *Lucas*. Where the *Lucas* Court refers somewhat vaguely to “background principles” and “understandings” made manifest in a “historical compact” that became part of a “constitutional culture,”⁸¹ the dissents in *Kelo* fill out these concepts with more definite meaning. The relevant time, according to the *Kelo* dissents, is the time of the founding of the United States and “early America.”⁸² The content of the background principles is an ideology of private property as sacrosanct and largely off-limits to governmental interference.⁸³ This understanding attains the level of one of the “first principles”⁸⁴ of American society, and its function is reason-preemptive: if an enactment falls outside its boundaries, it is automatically unjustifiable and void. The combination of the historical arguments in *Lucas* and *Kelo* constitutes a fully-formed counter-discourse to the dynamic/justificatory historical discourse that had been prevalent in the Supreme Court’s Takings Clause cases. This newer discourse identifies normative values relating to the intersection between government and private property and argues that, by virtue of their historical positioning in a nascent American culture, these values lose their historical contingency and become static “first principles” that preempt policy or efficiency arguments that would lead to a result that contradicts them.⁸⁵

79. *Id.* at 2680 (citation and internal quotations omitted).

80. *Id.* at 2681–82.

81. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 (1992).

82. *See supra* notes 74–80 and accompanying text.

83. *See Kelo*, 125 S. Ct. at 2680 (Thomas, J., dissenting).

84. *See id.* at 2671 (O’Connor, J., dissenting).

85. Justice O’Connor vehemently rejects the idea that a weighing of costs and benefits to the public and the private property owner can be the touchstone for a legitimate exercise of eminent domain, writing that “[t]he specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory” in the name of putting property to a higher economic use. *Id.* at 2676.

II. GOVERNMENTAL INTERFERENCE WITH AND REGULATION OF PRIVATE PROPERTY IN EARLY AMERICA AND THE LIMITED SCOPE OF THE FIFTH AMENDMENT

The constitutional limitations on governmental power over private property espoused by the Court in *Lucas* and *Kelo* are premised on a normative claim based on a strong historical claim. The normative claim is that the “original understanding” or “background principles” that the Framers embodied in the Fifth Amendment’s Takings Clause should continue to define the boundaries of governmental power today, notwithstanding changes in material conditions or societal values.⁸⁶ The historical claim, as I have shown above, is that in the early American understanding of private property private interests in property were considered sacrosanct and largely immune from governmental regulations or other interferences.⁸⁷

However, the historical record compels quite the opposite conclusion: the history of Early America reveals that colonial and state governments possessed enormous power to regulate and otherwise interfere with private interests in property, and that they used this power frequently pursuant to legislative determinations of the public welfare.⁸⁸ Both before and after the ratification of the Constitution and the adoption of the Bill of Rights, the states, like their colonial predecessors, regulated and used their eminent domain powers broadly and deeply in a manner inconsistent with the putative Blackstonian “understanding” about the sanctity of private property.⁸⁹ The evidence suggests that private property rights were often subsumed to the “police power” of the state to act in furtherance of the public welfare and the promotion of economic development.⁹⁰

86. This normative claim is best illustrated by the Court’s opinion in *Lucas*. *Lucas* emphasizes that regulations on the use of private property (at least those which deny all economically beneficial use) must be consistent with the commitment embodied in the “historical compact” of the Takings Clause, which in turn requires that owners be compensated unless the prohibited use was already denied to the owner by common law principles. *Lucas*, 505 U.S. at 1030. This normative claim also emerges in the *Kelo* dissents, particularly in Justice O’Connor’s argument that land use regulations must be evaluated in light of the “first principles of the social compact” as they existed at the time of the founding. *Kelo*, 125 S. Ct. at 2671 (O’Connor, J., dissenting).

87. See, e.g., *Kelo*, 125 S. Ct. at 2677–81 (Thomas, J., dissenting); *Lucas*, 505 U.S. at 1028.

88. For the proposition that the regulatory activities of early American governments have been vastly under-recognized, see WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

89. See discussion *infra* Part II.A.

90. As Professor Alexander has written, one important strand of early American property ideology was “proprietary”—based on the belief that “the primary purpose of property is to maintain the proper social order,” and requiring government regulation of property because “the market cannot be relied on to create that order.” ALEXANDER, *supra* note 49, at 9–10.

Neither does the available historical record support Justice Scalia's contention that the notion of nearly inviolable private property rights protected by categorical, judicially enforceable limits on state interference was part of what he terms the "historical compact recorded in the Takings Clause."⁹¹ This line of argument contends that the Fifth Amendment's Takings Clause represented a national commitment to the principles of Blackstonian property, and that those principles—the right to use restricted only by common law nuisance principles,⁹² the privileging of private ownership claims over the needs of the community,⁹³ etc.—require us to apply the same standard today.

This argument faces insurmountable historical difficulties. The history of the amendment, as understood through the writings of its architect James Madison, suggests that the Takings Clause was intended to achieve a narrow purpose: to prevent a legislative majority on the national level from carrying out the wholesale destruction or redistribution of private property.⁹⁴ As William Michael Treanor has argued, nothing in the history of the Takings Clause suggests that it was originally meant to impose any kind of limitation on interferences short of total appropriation or destruction of property, or to define the legitimate purposes for the use of eminent domain.⁹⁵

In rejecting the notion that the Takings Clause was originally understood as a powerful constraint on state power over property, I do not contend that governmental interference with private property interests was completely unfettered by the Constitution. Certainly, the Framers were motivated at least in part by a desire to protect property. As Jennifer Nedelsky has argued, in the Framers' view, "[o]nly the effective protection of property from legislative infringement could prevent the instability that would ultimately destroy the republic."⁹⁶ Yet, the history of constitutional limits on state action upon private property shows that the constitutional provision which was invoked to place a limit on governmental action vis-à-vis private property was not the Takings Clause at all, but the Contracts Clause.⁹⁷ In case after case where states acted in a way that was arguably

91. *Lucas*, 505 U.S. at 1028; *see also* discussion *infra* Part II.B.

92. *See Lucas*, at 1028, 1030.

93. *See Kelo v. City of New London*, 125 S. Ct. 2655, 2680 (2005).

94. *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 25 (1990).

95. *See Treanor*, *supra* note 2, at 782.

96. NEDELSKY, *supra* note 94, at 27.

97. *See* discussion *infra* Part II.B.2. The United States Constitution provides that no State may pass any law "impairing the Obligation of Contracts." U.S. CONST. art. I, § 10.

better classified as a “taking” of property rather than an “impairment” of the “obligation” of a contract, the Supreme Court elected to invoke the Contracts Clause as the relevant limitation.⁹⁸

The final part of this Section will argue that the choice of the Framers to make the Contracts Clause applicable to the states and the Takings Clause applicable only to the federal government was not an accident. Nor was the decision by the Marshall Court to make the Contracts Clause the primary tool for protecting the rights of private property against state encroachment a coincidence. Rather, the choice reflects something fundamental about the distinction between rights in property and the rights created by contract. The scope and content of the right to property were defined by the states and subject to the limitation of the oft-exercised police and eminent domain powers.⁹⁹ Consequently, the meaning of “property rights” was impossible to define on a national level beyond a recognition that, whatever the contours of private rights in property, a total destruction of or appropriation of those rights was a “taking.” A federal protection against takings that was limited to total takings did not necessitate a federal definition of the specific interests that constituted property. Such a definition would be impossible given the amorphous laws, traditions, and customs at the state level, where property was defined.

By contrast, the Contracts Clause prevented the states from interfering only with those rights created by and embodied in contracts.¹⁰⁰ This was not problematic to define at a federal level, because the rights and interests that were protected were defined by a discrete, readily ascertainable set of rules—the terms of specific contracts. By protecting private property under the Contracts Clause, the Court was able to prevent state interference with specific rights and expectations created by contracts without having to define the broader category of “property rights” applicable to the population at large on a federal level.

In short, the Framers’ decision to apply the Takings Clause to the federal government and the Contracts Clause to the states, and the Marshall Court’s decision to protect private property against state interference by invoking the Contracts Clause rather than the Fifth Amendment, indicate something significant and damaging to historical underpinning of the recent static/preemptive historical discourse on takings: the early American un-

98. See, e.g., *Tr. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). These cases are discussed in greater detail below. See *infra* text accompanying notes 176–87.

99. See discussion *infra* Part II.B.2.

100. See U.S. CONST. art. I, § 10; see also discussion *infra* Part II.B.2.

derstanding, embodied in the Constitution, was that states, and not the federal government, were responsible for defining—through custom and tradition, common law, and legislative determinations about the police and eminent domain powers—the content of individual rights in property. Constitutional limits applied only to situations involving the total destruction or appropriation of whatever interests an individual possessed subject to state law—through the Takings Clause of the Fifth Amendment—or to state interference with clearly defined rights and expectations defined through the private “lawmaking” inherent in contracts through the Contracts Clause.

In sum, although the Framers were concerned with creating a constitutional framework that would inhibit legislative interferences with private property, the states left the bargaining table at which the Constitution and Bill of Rights were hammered out with huge discretion to define, modify, and otherwise intervene in the realm of private property. Property and its attendant rights remained highly malleable concepts that could be—and were—shaped by legislatively determined policy choices at the state level; only the prohibition on measures that impaired specific contractually defined rights operated as a constitutional limitation on this process. The “constitutional moment” was not a “Blackstonian moment” in which a rigid substantive definition of the rights of private property was adopted as a national norm.

A. *Government Power over Private Property in Early American Practice*

The notion of an early American tradition of private property as inviolable, or of private interests in property being largely outside the reach of governmental power, is a crucial component of the static/preemptive historical discourse in Takings Clause cases.¹⁰¹ This discourse argues that there was an original understanding in American society that private property interests were of paramount importance and were not to be altered or regulated simply to achieve the needs or goals of society identified through the legislative process.¹⁰² Whatever the normative appeal of this ideology today, this essay shows that state regulation of and interference with private property interests were pervasive in early American society from colonial times well into the nineteenth century. Therefore, I argue, early American practices provide no historical basis for the claim that a grudging approach

101. See, e.g., *Kelo v. City of New London*, 125 S. Ct. 2655, 2677–80 (2005) (Thomas, J., dissenting); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 (1992).

102. See *Kelo*, 125 S. Ct. at 2671 (O'Connor, J., dissenting); *id.* at 2680 (Thomas, J., dissenting); *Lucas*, 505 U.S. at 1028.

to state power over private property can be justified by reference to an “understanding” present in late eighteenth or early nineteenth century American society.

1. Colonial and Revolutionary Times

Colonial law and government was, unquestionably, influenced by both the common law of England, which had a strong tradition of protecting private property rights against governmental interference, and Lockean philosophy, which emphasized that property rights are a natural, pre-political attribute of human beings.¹⁰³ Nonetheless, conditions in America were quite different from the conditions that obtained in England; in particular, land was abundant, but development and infrastructure were needed.¹⁰⁴ As a result, Colonial lawmakers routinely implemented regulations that were intended to promote the public good by encouraging development of private land by removing or lessening the protection of interests in undeveloped land.¹⁰⁵ Moreover, these regulations did not express a solely economic preference for development over disuse. As Professor John F. Hart has argued, they also “reflected . . . a normative judgment that failure to develop and use private land unreasonably harmed the community.”¹⁰⁶

I will not undertake a detailed analysis of Colonial regulation and legislative interference with private property interests, which have been catalogued extensively by Professor Hart;¹⁰⁷ I will merely highlight them in broad strokes. Colonial legislatures acted to encourage the improvement and use of land. In Massachusetts, for example, a 1634 ordinance provided that failure to build on or improve land within three years could result in forfeiture of title, even if development was not a condition in the original grant.¹⁰⁸ A similar ordinance in New Netherland in 1663 provided for forfeiture within six months of any lands that the owner did not “fence in and improve.”¹⁰⁹ Taking a slightly different tack, the Virginia legislature enacted a statute in 1645 that provided for reassignment of improved lands

103. See JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 10 (2d ed. 1998) (“English common law provided the legal foundation for property ownership in the colonies.”); *id.* at 17 (“It is difficult to overstate the impact of the Lockean concept of property.”).

104. See *id.* at 10–25.

105. See John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1259–63 (1996).

106. *Id.* at 1259.

107. See Hart, *supra* note 105.

108. *Id.* at 1260.

109. *Id.* at 1260–61.

that had been “deserted” by their owners.¹¹⁰ These regulations show Colonial governments taking an active role in promoting development, not with the “carrot” of subsidies, but with the “stick” of property forfeiture should an owner fail to improve and utilize his property. This body of law allowing governmental interference with—or even termination of—a private interest in land goes well beyond the default limit recognized by Blackstone and the static/preemptive discourse, which emphasizes private nuisance as the only relevant limitation on a private owner’s right to use her land.¹¹¹ These laws did not merely proscribe uses that were harmful to other members of the community; these regulations sought to force owners to act affirmatively to improve the material condition of the community.¹¹²

Another exercise of Colonial governmental power over private property involved regulations that dictated the parameters within which private owners could use their land. In 1635, the General Court of Massachusetts Bay ordered that all homes in each town should be built within one-half mile from the town meeting house.¹¹³ Colonial legislatures also imposed restrictions on buildings in urban areas for the purposes of public safety, or for the general welfare, to ensure a pleasing and orderly appearance in the towns.¹¹⁴ Indeed, as Professor Hart has written, “The objectives of governance regarded as legitimate were not limited to preventing tangible harms—the kind of physical injury to other people or property associated with tort or nuisance doctrine.”¹¹⁵

Aside from regulation, Colonial governments also exercised the eminent domain power, largely for major public improvements such as highways and public buildings.¹¹⁶ In keeping with the pattern of broad governmental power over private property, the colonies did not always follow the Blackstonian maxim that government appropriation of private lands required remuneration: “In the early years the colonies compiled a checkered record with respect to the payment of compensation for land taken for roads.”¹¹⁷ Aside from this spotty application of the English com-

110. *Id.* at 1262.

111. *See, e.g.*, *Kelo v. City of New London*, 125 S. Ct. 2655, 2677–80 (2005) (Thomas, J., dissenting); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028, 1030 (1992).

112. *See* Hart, *supra* note 105, at 1260–62. This tends to undermine Justice O’Connor’s argument in her dissent in *Kelo* that the American traditions embodied in the Takings Clause call for a line to be drawn between acceptable regulations that address a property use that inflicts an “affirmative harm” on society and unconstitutional laws that are intended merely to increase productivity or generate wealth. *See Kelo*, 125 S. Ct. at 2674–75 (O’Connor, J., dissenting).

113. Hart, *supra* note 105, at 1273.

114. *See id.* at 1275–76.

115. *Id.* at 1281.

116. ELY, *supra* note 103, at 24.

117. *Id.*

mon-law requirement of payment, the colonies often exercised the eminent domain power pursuant to objectives that provided immediate, direct benefits for private individuals and incidental or secondary benefits to the public at large.¹¹⁸

The overall picture of the relationship between governmental power and private property interests that emerges from these aspects of the colonial period suggests a broad range of legitimate government purposes for interference with private property rights, ranging from economic development and public safety to less tangible goals such as aesthetic appeal.¹¹⁹ Furthermore, the power of the government in its areas of legitimate interest was great: colonies not only regulated, but also could bring about the forfeiture—sometimes compensated, sometimes not—of private property pursuant to their various prerogatives. As Professor Ely writes, “[T]he rights of property owners were not inviolate. Existing property arrangements were compelled to yield to the colony’s social and economic needs. Moreover, colonial legislators broadly defined the nature of the public purpose that justified the exercise of eminent domain.”¹²⁰ Therefore, if there is a historical basis for the putative American tradition of private property as sacrosanct and largely immune to governmental interference, it is not the practices of the Colonial legislatures in the 150 years preceding the American Revolution.¹²¹

2. The Early Nineteenth Century

We have seen that, in the Colonial period, government power over private property interests was both broad, with a wide range of purposes or goals that legitimated government intervention, and penetrating, because the extent of government power went beyond regulation to divestiture of property either through eminent domain or defeasance pursuant to statute.

118. *See id.* at 24–25.

119. This broad range of regulatory competence gives credence to the “proprietary” ideology of property that Professor Alexander has argued for in early America. *See* ALEXANDER, *supra* note 49, at 1–2. As Professor Novak has argued, albeit in reference to the nineteenth century rather than colonial times, the breadth of the government’s regulatory power suggests that regulation of private property was viewed as “a moral exercise for the promotion of public happiness in the good society.” William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061, 1083 (1994).

120. ELY, *supra* note 103, at 25.

121. Professor Treanor has written that “even originalists do not use history to interpret the Takings Clause.” Treanor, *supra* note 2, at 804. I believe that this statement is erroneous. *See supra* note 2. However, to the extent that Professor Treanor means that the positions taken by the Court in cases such as *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), are inconsistent with the early-American understanding of the private property/government interface, this is borne out by the facts. A more precise assessment might be that even the originalists do not use accurate history to interpret the Takings Clause.

But the Revolutionary War, and particularly the ideologies that developed in order to justify the Revolution, may have altered the relationship between private rights in property and government power in the period following the war and the ratification of the Constitution. This argument is made by Professor Ely: “Influenced by the Whig political tradition as well as English common law, colonial leaders assigned property rights an essential place in the evolution of revolutionary constitutionalism. . . . Accordingly, it was entirely logical that the right to property was among the highest social values in the new republic.”¹²²

If such an ideological shift had in fact taken place—if the rights of private property had emerged from the revolutionary/constitutional period endowed with a stronger position relative to government power in early American ideology—then we might expect that one result would be a diminished exercise of state power over private property interests in the early nineteenth century. This would seem to be necessary if the early nineteenth century were to serve as the temporal location of the popular “understanding” and “background principles” of sacrosanct private property and limited government intervention. However, the history of private property’s relationship to government power in the early nineteenth century does not support this contention. Rather, the picture that emerges is one of pervasive regulation and, beyond regulation, a widespread use of eminent domain unrestricted by a strict definition of “public use.”

In examining this period, two broad trends identified by prominent historians provide a useful framework within which the relationship of private property to governmental power can be understood. The first is William J. Novak’s articulation of the pervasive local and state regulation of society that characterized the nineteenth century.¹²³ Novak marshals copious evidence in support of his contention that, contrary to the conventional wisdom that the regulatory state is a relatively recent product of modernity, “[a] distinctive and powerful governmental tradition devoted in theory and practice to the vision of a well-regulated society dominated United States social and economic policymaking from 1787 to 1877.”¹²⁴

The other broad trend is what Morton J. Horwitz has described as the “emergence of an instrumental conception of law” in the early nineteenth century.¹²⁵ Horwitz argues persuasively that

122. ELY, *supra* note 103, at 41.

123. See NOVAK, *supra* note 88.

124. *Id.* at 1.

125. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780–1860*, at 1–30 (1977).

judges came to think of the common law as equally responsible with legislation for governing society and promoting socially desirable conduct. The emphasis on law as an instrument of policy encouraged innovation and allowed judges to formulate legal doctrine with the self-conscious goal of bringing about social change. . . . American law stood on the verge of . . . one of the great creative outbursts of modern legal history.¹²⁶

Thus, we see two broad arguments: that nineteenth-century local and state governments pervasively regulated for the general welfare, and that law was increasingly viewed as an instrumentality for promoting social change and desirable conduct. When combined, these arguments suggest the reason why, rather than a retreat from governmental interference with private property interests, we see an early nineteenth-century expansion of state power over private property as regulation and law were used as instrumentalities of societal progress.

Two examples are particularly instructive. In the area of riparian property rights, Horwitz illustrates how state legislation, in the form of Mill Acts,¹²⁷ was enacted to promote socially desirable economic behavior by mill owners and how that legislation used law as a tool to minimize the cost of compensating those whose property interests were damaged by this desirable activity.¹²⁸ These enactments sanctioned the invasion of private property interests due to flooding and imposed limitations on the damages paid to the injured property holder.¹²⁹ These facets of the legislation had the effect of forcing the injured party to subsidize, through his loss in property value, the activity of the economically active party.¹³⁰

126. *Id.* at 30 (internal quotations omitted).

127. Although they varied somewhat from jurisdiction to jurisdiction, the essence of a Mill Act was to statutorily limit the liability of a mill owner for damage to neighboring lands caused when water backing up from a mill dam spilled onto neighboring property. *See id.* at 48.

128. *See id.*

129. *See id.*

130. For another point of view on the Mill Acts, see EPSTEIN, *supra* note 2, at 170–75.

These acts, which were adopted widely in the states and territories,¹³¹ illustrate the interconnectedness of the trends that Novak and Horwitz have identified in nineteenth-century society. They represent, drawing on Novak's theory, positive action by state legislatures upon private property to promote the general welfare and bring about a "well-regulated society."¹³² The method by which they achieved this was what Horwitz has termed the instrumental use of the law, allocating rights and liabilities in a way that would bring about desirable behavior.¹³³ While the states that enacted such legislation did not directly appropriate private property for the benefit of mill owners, they did put in place a legal framework that altered the respective rights of property owners through augmenting the rights of the mill owner by lowering the legal and economic barriers to his flooding of neighboring property, and diminishing those of neighboring owners by making damages the exclusive remedy while at the same time imposing limits on the compensation to be paid.¹³⁴ This redistribution, moreover, was linked only theoretically to a public benefit; the direct beneficiary was the mill owner.¹³⁵

The Mill Acts represented a forced subsidy from some property owners (those whose lands were flooded) to others (those who did the flooding pursuant to their economically desirable activities). A similar situation existed with respect to outright takings of land through eminent domain, many of which continued to be uncompensated well into the nineteenth century.¹³⁶ In 1800, only three states had constitutional requirements of just

131. See *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 16–17 (1884). The *Head* Court stated, General mill acts exist in a great majority of the States of the Union. Such acts, authorizing lands to be taken or flowed *in invitum*, for the erection and maintenance of mills, existed in Virginia, Maryland, Delaware and North Carolina, as well as in Massachusetts, New Hampshire and Rhode Island, before the Declaration of Independence; and exist at this day in each of these States, except Maryland, where they were repealed in 1832. One passed in North Carolina in 1777 has remained upon the statute book of Tennessee. They were enacted in Maine, Kentucky, Missouri and Arkansas, soon after their admission into the Union. They were passed in Indiana, Illinois, Michigan, Wisconsin, Iowa, Nebraska, Minnesota, Mississippi, Alabama and Florida, while they were yet Territories, and reenacted after they became States. They were also enacted in Pennsylvania in 1803, in Connecticut in 1864, and more recently in Vermont, Kansas, Oregon, West Virginia and Georgia, but were afterwards repealed in Georgia.

Id.

132. See NOVAK, *supra* note 88, at 2.

133. See HORWITZ, *supra* note 125, at 30.

134. *Id.* at 48.

135. This is not to say that the ideology that made such legislation possible was not concerned with the common or public good. As Professor Novak has observed, one of the key tenets underlying early-nineteenth-century regulation of private property was "an overriding concern with common, rather than private goods and interests." Novak, *supra* note 119, at 1083. I mean only to highlight the fact that the more tangible and immediate benefit was to the individual mill owner rather than to the public at large.

136. HORWITZ, *supra* note 125, at 65.

compensation for takings of property.¹³⁷ Although the movement toward state constitutional amendments requiring compensation for takings grew throughout the century, so did a countervailing movement that sought to construe the requirement of compensation as narrowly as possible.¹³⁸ The uncompensated takings, or takings subject to limited compensation, were similar to the Mill Acts in that private individuals, through the loss of their property for less than its value, were essentially forced to subsidize legislatively-determined government ends.¹³⁹

The economic aspect of these legal regimes, the realization of public goals through forced subsidies levied against the private property of specific individuals (in the case of eminent domain) or classes of individuals (in the case of the Mill Acts), should not obscure the ideological framework that made these actions acceptable in the eyes of the citizenry. As Horwitz argues, the tendency toward limitation of the compensation requirement “drew upon a surprisingly widespread and powerful earlier view that all property was originally held at the sufferance of the sovereign.”¹⁴⁰ This ideology—the primacy of the sovereign power of the state over the individual interests of private property owners—is consonant with the overarching ideology of regulation that Novak has identified: the general welfare, determined through the representative legislative process, gave the state a powerful claim to legitimacy when it regulated and interfered—sometimes drastically—with private property.¹⁴¹

To summarize, the relationship between private property and the states in the early nineteenth century involve two overarching characteristics. First is the superiority accorded to the prerogatives of government, acting in furtherance of the general welfare of society, over purely private interests in property. Second is the use of laws promulgated by representative legislatures as an instrumentality of social change. State legislatures, through Mill Acts and un- or under-compensated eminent domain takings, took an active role in distributing the benefits and burdens associated with

137. Vermont, Massachusetts, and Pennsylvania. *Id.* at 64.

138. *See id.* at 65.

139. It should be noted that, whereas the state actually took title to land obtained through eminent domain, it does not appear that the mill owner who benefited from a Mill Act obtained any sort of property interest in the flooding of his neighbor's lands. (For example, the owner of the flooded land could erect a dike in order to hold back his neighbor's water without (legal) repercussions.) The effect of the Mill Acts was merely to limit the liability of the mill owner to the owner of the flooded land for the loss of value caused by the water's presence. For this reason, the effect of the Mill Act is best described in economic terms as a subsidy from the flooded land owner to the mill owner. For a nineteenth-century discussion of the distinction between the effect of an eminent domain taking and a Mill Act, see *Murdock v. Stickney*, 62 Mass. (8 Cush.) 113, 114, 116–19 (1851).

140. HORWITZ, *supra* note 125, at 66.

141. *See* NOVAK, *supra* note 88, at 1.

achieving public benefits. In so doing, they defined and redefined the parameters of the terms “property” and “ownership,” which were not at all fixed Platonic categories, but rather were constructs contingent on representative determinations of the public welfare.

Consequently, just as the Court’s historical discourse in *Kelo*¹⁴² and *Lucas*¹⁴³ failed to find historical grounding in the Colonial period, the historical discourse similarly fails to find a historical basis in the early nineteenth century. As in the Colonial period, private property was liable to be taken in furtherance of legislatively-determined public purposes. Beyond this, private property was subject to regulation—brought about by a new conception of law as an instrument of social change—that actually altered the content of private property ownership as a concept.¹⁴⁴ Property was, in early American practice, very much a construct of positive law that could be redefined in important ways by lawmakers, rather than the natural, pre-political concept that commentators such as Richard Epstein have inferred based on Locke’s philosophical influence on many revolutionary thinkers.¹⁴⁵

B. *The “Historical Compact” of the Takings Clause*

Neither the practices of the Colonial era nor those of the decades immediately following the ratification of the Constitution suggest a widely held, popular understanding of private property as sacrosanct and privileged against governmental regulation or other interventions. Notwithstanding the distinctly non-Blackstonian conception of property that was manifest in the exercise of governmental power over private property at the state level, the question remains whether the nation made an ideological commitment to such a conception when it adopted the Takings Clause as part of its fundamental law. If this were the case, then there would be a separate historical basis—a freestanding statement of first principles—for the arguments of Justices Scalia, O’Connor, and Thomas that early Ameri-

142. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

143. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

144. This seriously undermines the workability of the approach that the Court embraced in *Lucas*, in which regulations prohibiting all economically beneficial use of property either are or are not takings depending on whether the uses they prohibit would be considered nuisances under the “background principle” of property. *See id.* at 1030. The history of the Colonial period and the early nineteenth century illustrates that the “background principles” varied widely and were subject to change; this makes it difficult to find a static baseline of background law against which to measure regulations on property.

145. *See* EPSTEIN, *supra* note 2, at 29.

can ideology embraced a limited view of the powers of government over private property.¹⁴⁶

The history of the Takings Clause, however, simply does not support an argument that the Takings Clause embodies a commitment of the highest ideological order to a broad, substantive protection of private property against governmental interventions of whatever kind—a constitutional embodiment of Blackstonian property ideology. The story of the Takings Clause’s promulgation and its later application indicates that its range of application was quite narrow: it was intended as a safeguard against naked expropriation or destruction of private property at the national level; it was intended as a protection against large-scale punitive or redistributive schemes emerging from the class conflict that James Madison foresaw between those who owned property and those who did not.¹⁴⁷

1. The Takings Clause in Historical Context

The era that began with the outbreak of the Revolutionary War was a tumultuous period. Many states, driven by economic exigencies, class hostilities, and patriotic motivations, passed laws which had the effect of destroying or widely redistributing private property interests.¹⁴⁸ Among the most drastic of these legislative interventions in the sphere of private property were divestment acts and bills of attainder confiscating the property of citizens who remained loyal to the Crown; also drastic were statutes intended to relieve debtors by providing for the issuance of worthless paper money while requiring creditors to accept the valueless currency for the payment of debts (which had the effect of destroying the property interest in debts that creditors were owed).¹⁴⁹

The movement to replace the Articles of Confederation with a fundamental law that would provide for a stronger centralized government was in large part motivated by the desire to create a government capable of protecting property.¹⁵⁰ The new government was designed to achieve this end by curtailing the perceived excesses embodied in the confiscatory and redistributive legislative schemes being enacted by the states.¹⁵¹ Thus, the Framers sought to create a “more vigorous national government that could protect property rights, promote commerce, establish credit by paying the

146. See *Kelo*, 125 S. Ct. at 2671–77 (O’Connor, J., dissenting); *id.* at 2677–87 (Thomas, J., dissenting); *Lucas*, 505 U.S. at 1027–30.

147. See discussion *infra* Part II.B.1.

148. See Treanor, *supra* note 2, at 790.

149. See NEDELSKY, *supra* note 94 at 22–23; Treanor, *supra* note 2, at 790.

150. See ELY, *supra* note 103, at 42; NEDELSKY, *supra* note. 94, at 22–23.

151. NEDELSKY, *supra* note 94, at 24–25.

public debt, and suppress insurrection.”¹⁵² They built numerous restrictions into the Constitution that were intended to prevent states from enacting legislation that would have redistributive or confiscatory consequences for private property.¹⁵³ The prohibitions on state enactment of bills of attainder and import and export taxes, the prohibition on the issuance of paper money, and the Contracts Clause (which prohibited state legislation “impairing the obligation of contracts”), are all manifestations of this concern.¹⁵⁴

The Framers were undeniably concerned with establishing fundamental constitutional limitations on the power of state governments to interfere with private property interests. However, the historical record also shows that none of the Framers publicly argued for imposing anything like the limitation that would eventually become the Fifth Amendment’s Takings Clause on the states by incorporating it into the Constitution in 1787 along with the prohibitions on bills of attainder, import and export taxes, paper money, and laws impairing the obligation of contracts.¹⁵⁵ Furthermore, in the amendment process that led to the adoption of the Bill of Rights, no state petitioned Congress to adopt a just compensation provision.¹⁵⁶

Thus, the intent underlying the proposal that led to the Takings Clause is rather mysterious, as is the understanding of those who debated and ratified it as part of the Fifth Amendment. As Michael W. McConnell has noted, there is no written or spoken explanation by James Madison on record as to why he proposed what became the Takings Clause along with his other draft amendments in June 1789.¹⁵⁷ The preoccupation of the Framers with curtailing state legislation that destroyed or redistributed private property interests does not seem to explain the motivation for a restriction that applied, like the rest of the Bill of Rights, to the federal government alone.¹⁵⁸ Because the Takings Clause “was one of the least controversial provisions in the Bill of Rights, occasioning no recorded substantive com-

152. ELY, *supra* note 103, at 42.

153. *See id.* at 43–45.

154. *See id.*

155. Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 282 (1988).

156. *Id.* at 282–83.

157. *Id.* at 283.

158. Professor Treanor has suggested that Madison may have intended that the Takings Clause, while legally restricting only federal action, would have an educative effect, influencing state-level action upon private property. William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 710–11 (1985).

ment at all,” conclusions about what the clause was intended to do, or why it was adopted, are difficult to reach.¹⁵⁹

There is, however, some circumstantial evidence of Madison’s intent that suggests that his concern was with preventing large-scale property redistribution or confiscation on a national level by legislative majorities. Jennifer Nedelsky, who has provided significant insights into Madison’s property ideology, argues that one of the most troubling aspects of the pre-constitutional era for Madison was the way in which states had interfered with private property interests through the issuance of paper money and debtor relief laws that compelled creditors to accept the worthless currency as payment for debts.¹⁶⁰ She argues that Madison saw in these laws an embodiment of the potential for tyranny by a majority in a republican system: “In Madison’s eyes the popular attacks on property became proof that a majority as well as a minority could pursue injustice, violate individual rights, and undermine the public good.”¹⁶¹ In a sense, these legislative measures stood for a broader risk that Madison felt was inherent in a republic whose basic principle was representative democracy: “[P]roperty would always be at risk in a republic because it would always be vulnerable to the dissatisfaction of the (inevitable) propertyless majority; and the vulnerability of property rights revealed the nature of the republican threat to individual rights, oppression by the majority.”¹⁶²

Another possible explanation for the appearance of the Takings Clause as a limitation on the prerogatives of the federal government was proposed by St. George Tucker¹⁶³ in his 1803 edition of Blackstone’s *Commentaries*, which was the first to include additional material explicitly referencing the Bill of Rights. In Tucker’s view, the clause “was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war.”¹⁶⁴ The common theme in both of these explanations is a concern with the possibility of national governmental action driven by legislative majorities, motivated by antagonisms between broad classes of citizens (propertyless vs. propertied; patriots vs. Tories) that would bring about the total destruction or redistribution of private property

159. McConnell, *supra* note 155, at 283.

160. See NEDELSKY, *supra* note 94, at 22–23.

161. *Id.* at 23.

162. *Id.* at 25.

163. St. George Tucker was Professor of Law at the College of William and Mary beginning in 1790. His edition of Blackstone’s commentaries was completed in 1794, but difficulty in finding a publisher delayed the publication of the work until 1803. Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 11 (1996).

164. Treanor, *supra* note 2, at 791–92 (citation omitted).

interests. In other words, Madison was concerned about mass appropriation or redistribution of property at the national level in which the entirety of a private property interest was extinguished.¹⁶⁵ This would explain why there was no widespread outcry for a Takings Clause in the first place, and why it was not the subject of substantive debate: it was a provision that applied only to a very small class of potential situations—federal activities effecting wholesale destruction or appropriation of private property interests—that seemed unlikely to occur because of the very size and structure of the federal government.

Admittedly, the historical evidence of the original intent underlying the Fifth Amendment's Takings Clause is sparse.¹⁶⁶ That in itself would seem to indicate that the "historical compact" invoked by Justice Scalia in his opinion in *Lucas v. South Carolina Coastal Council*¹⁶⁷ did not include the strong, substantive protection of private property against a broad range of governmental interferences. Furthermore, the evidence of original intent that does exist points to a preoccupation—arguably arising out of state legislative actions, but not dealing with them directly—with preempting a specific class of legislation: total, uncompensated destruction or appropriation of private property interests by the federal government. None of the historical evidence suggests, as the Court's recent historical discourse on takings argues, that the Takings Clause was understood or intended to apply to anything less than *total physical* takings of private property interests (in the case of appropriation, as Tucker would have it)¹⁶⁸ or the *complete extinction* of intangible property interests (in the case of the debtor relief laws).¹⁶⁹ Nothing suggests that regulation or other action leading to a dimi-

165. See NEDELSKY, *supra* note 94, at 22–28 (describing the tensions between Madison's belief in a republican form of government and his concern that purely majoritarian government would threaten private property and lead to anarchy).

166. Further interpretive problems arise from the fact that the evidence that is available comes largely from Madison himself, rather than the other Framers or the conventions that actually ratified the amendments. The multiplicity of actors responsible for the Constitution and its amendments makes arguments about "original intent" difficult, to say the least. In this spirit, Larry Kramer has written:

To treat the intent of the Framers as authoritative is like relying on the understanding of the law clerk who drafted an opinion, the speech writer who wrote the President's State of the Union Address, or the lobbyist who was solicited by a member of Congress to formulate proposed legislation. They are not the lawmaking voices.

Larry Kramer, *Fidelity to History—and Through It*, 65 *FORDHAM L. REV.* 1627, 1644 (1997).

167. 505 U.S. 1003, 1028 (1992).

168. See *supra* text accompanying note 164.

169. This is a broader range of application than Professor Treanor finds in the "original" Takings Clause when he writes that Madison believed that compensation was required for physical takings but not for regulations. See Treanor, *supra* note 2, at 839. Rather than drawing a distinction between compensated physical takings and uncompensated regulations, I believe that Professor Nedelsky's evidence of Madison's intent compels the conclusion that Madison intended for all total deprivations of property—whether through physical taking or regulation—to be compensated, while regulations which

nution in the value of private property was contemplated as falling under the Takings Clause, nor that any substantive definition of the legitimate public purposes which would enable government interference with private property was intended.

2. The Contracts Clause as the Primary Protection of Private Property

This essay argues that the Takings Clause was not understood at the time of its adoption to contain a powerful, substantive protection of private property rights. First, the clause applied only to the federal government, while the states were the prime source of governmental interference with private property. Second, it appears that the Takings Clause applied only to the total appropriation or destruction of private property interests. Consequently, the clause did not provide any substantive definition of property rights: whatever “property” was, the clause only applied if the totality was taken, as in the case of a physical occupation or expropriation of land. Lesser intrusions do not appear to have been contemplated as falling under the Takings Clause.¹⁷⁰ This understanding is buttressed by judicial interpretations of the Takings Clause in antebellum America, which were summarized in an 1857 treatise by Theodore Sedgwick: “It seems to be settled that, to entitle the owner to protection under this clause, the property must actually be taken in the physical sense of the word”¹⁷¹

The relatively limited scope of the Takings Clause did not mean that private property interests were left unprotected from state-level action. Rather, in the first half of the nineteenth century, these interests were protected from state action by the Contracts Clause, which prohibited the states from enacting laws “impairing the obligation of contracts.”¹⁷² The Supreme Court, in a series of landmark cases, chose to protect private property from state interference under the Contracts Clause rather than the Takings Clause, even in cases where the governmental action was more

merely limited use or diminished values would be uncompensated. *See* NEDELSKY, *supra* note 94, at 22–28.

170. In a detailed, well-reasoned essay, Andrew S. Gold has argued that the original understanding of the Takings Clause encompassed indirect takings (through legislation that destroyed a property interest) as well as direct physical takings. However, he does not seem to argue that indirect “regulatory” takings that took *less* than the entire property interest were believed to require compensation. *See* Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis “Goes too Far”*, 49 AM. U. L. REV. 181 (1999).

171. THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 519–20 (New York, John S. Voorhies 1857), *quoted in* Treanor, *supra* note 2, at 792.

172. U.S. CONST. art I, § 10. For a discussion of the history and present problems in interpretation of the Contracts Clause, see Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984).

readily characterized as a taking of property than an interference with the obligation of a contract.¹⁷³ This essay contends that this non-obvious choice to apply one constitutional protection—the Contracts Clause—to state interferences with private property, while limiting the application of another constitutional protection—the Takings Clause—to federal interferences involving total appropriations of private property reflects an understanding that the federal government could not define the content of the category “private property rights” because such definition was squarely within the exclusive province of the individual states.¹⁷⁴

The first case in the development of this constitutional doctrine was *Fletcher v. Peck*, in which the Supreme Court was called upon to decide the constitutionality of an act by the Georgia state legislature that repealed an earlier land grant because the grant had been procured by bribing the previous legislature.¹⁷⁵ In principle, this action would seem to fit most naturally under the rubric of an uncompensated taking of property from the original grantees. In 1810, when the case was decided, there was no Supreme Court precedent to the effect that the Takings Clause only applied to the federal government.¹⁷⁶ Consequently, the Court’s opinion, written by Chief Justice Marshall, in theory could have invalidated the repeal on Fifth Amendment grounds. Rather than apply the Takings Clause, however, the Court held that, because the grant of land was a contract that implied that the grantor (the state of Georgia) would not retake the property granted, the repeal of the grants was invalid under the Contracts Clause because the repeal impaired the state’s own contractual obligation to the grantees.¹⁷⁷ The governmental interference was unconstitutional not because it abrogated some *general right* against the world inherent in property ownership, but because it destroyed the *specific contract-based rights* of the original grantees as against the state of Georgia.

A similar situation presented itself in the celebrated case of *Trustees of Dartmouth College v. Woodward*.¹⁷⁸ Dartmouth College, a private institu-

173. See cases cited *supra* note 98. For a discussion of the Supreme Court’s property jurisprudence under Chief Justice John Marshall, see James W. Ely, Jr., *The Marshall Court and Property Rights: A Reappraisal*, 33 J. MARSHALL L. REV. 1023 (2000).

174. It is interesting to note that, even as late as the Court’s decision in *Pennsylvania Coal Co. v. Mahon* in 1922, the Court seems to contemplate the challenged land-use regulation as potentially barred by the Contracts Clause. Justice Holmes, writing for the Court, writes that “obviously the implied limitation [that private property is subject to government regulation] must have its limits or the *contract and due process clauses* are gone.” 260 U.S. 393, 413 (1922) (emphasis added).

175. 10 U.S. (6 Cranch) 87, 87–91 (1810).

176. The Court would make this determination in 1833, in *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833).

177. See *Fletcher*, 10 U.S. at 136–37, 139.

178. 17 U.S. (4 Wheat.) 518 (1819).

tion, had been established by royal charter in 1769.¹⁷⁹ In 1816, the New Hampshire state legislature essentially attempted to convert it into a public school by statutorily amending its corporate charter to increase the number of trustees and authorizing the governor to fill the newly-created spaces with his own appointees.¹⁸⁰ As David P. Currie has argued, “The essence of the transaction, it seems, was an uncompensated taking.”¹⁸¹ Yet the Court, led by Justice Marshall, based its finding of unconstitutionality on the Contracts Clause, arguing not that the uncompensated legislative conversion of private property to a public use violated some generally applicable definition of property rights, but rather that the action by the New Hampshire legislature was unconstitutional because it impaired the specific rights and obligations created by the contract—the charter—under which the College had been formed.¹⁸²

A final case in this line is *Sturges v. Crowninshield*.¹⁸³ Unlike the previous cases, *Sturges* did not involve an appropriation of private property by the state, but rather it involved a state law that extinguished private property in the form of debt.¹⁸⁴ The New York legislature had enacted a law allowing state courts to discharge the obligations of debtors once the debtors had surrendered their property in accordance with a procedure established in the statute.¹⁸⁵ The practical effect of this statute was to destroy the property interests of creditors in the amount of debt that remained to be paid above and beyond the value of the debtor’s surrendered property. In other words, the statute had arguably “taken,” without compensation, a portion of the private property of the creditors for the purpose of debtor relief. Once again, the Court’s decision that the statute was unconstitutional did not rest on takings grounds, but rather on the grounds that the statute had impaired the specific obligations and rights of individuals created by their contractual relationships, violating the Contracts Clause.¹⁸⁶

This line of cases illustrates that state interferences with private property interests were not immune from constitutional challenges in the early nineteenth century. Rather, the relevant constitutional protection for private property against state interference was the Contracts Clause. As James W.

179. *Id.* at 626.

180. *Id.*; see also David P. Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801–1835*, 49 U. CHI. L. REV. 887, 905 (1982).

181. Currie, *supra* note 180, at 907.

182. See *Dartmouth College*, 17 U.S. at 650.

183. 17 U.S. (4 Wheat.) 122 (1819).

184. See *id.* at 128–29.

185. *Id.*

186. See *id.* at 208.

Ely has argued, “During Marshall’s time as Chief Justice, the Contract Clause served as the principal vehicle by which the Supreme Court defended property against state infringement.”¹⁸⁷ The question remains, why did the Court examine state interferences with private property under the Contracts Clause, finding legislative measures invalid because they transgressed specific rights and duties established pursuant to particular contracts? Why did the court not find them invalid because they transgressed generally applicable rights associated with the ownership of property? In other words, what was the reason for protecting property interests as contractual rights rather than protecting property rights *qua* property rights?

In a federal system of government, the responsibility for defining the contours and content of basic rights—such as the rights associated with property ownership—lies with the individual states rather than the federal government or the federal constitution.¹⁸⁸ The Framers of the Constitution and the Supreme Court, this essay contends, were constrained by this inherent difference between the powers of the federal and state governments. One consequence of this distinction between federal and state governments was the inability to provide, on the federal level, a national definition of the rights associated with property ownership. State governments, as we have seen, were quite actively shaping and reshaping the contours of the rights and remedies inherent in the ownership of private property in the nineteenth century.¹⁸⁹ Each regulation, each Mill Act, subtly altered the extent of each property owner’s rights to possess and use his property, as well as his remedies against those who interfered with his interests.¹⁹⁰ The federal government could impose a categorical limitation on “total” takings, because such a limitation was easy to define without specifying the rights contained in the concept of “property”—a total taking occurred when whatever interest a private individual possessed was extinguished. Similarly, the Supreme Court could protect property when the rights associated with that property were defined in a discrete contract with readily ascertainable terms.

What neither the Framers nor the Supreme Court were willing to do was formulate a definition of “taking” that had as a threshold anything less than a total appropriation or extinction of a private property interest. To do

187. Ely, *supra* note 173, at 1029.

188. A plurality of the Court recognized this fact in *Board of Regents v. Roth*, writing that “[p]roperty interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.” 408 U.S. 564, 577 (1972).

189. See discussion *supra* Part II.A.2.

190. See discussion *supra* Part II.A.2.

so would have required that they identify some rights associated with property ownership as essential, such that interference with those rights, while falling short of a complete extinction of a private interest in property, would constitute a taking. Neither could the early Supreme Court, consistently with the principles of the federal system, assess state interferences with private property interests in terms of a generalized idea of what it meant to own property.¹⁹¹ As a result, the Court employed the Contracts Clause to identify property interests that were defined by the terms of discrete contracts in order to avoid imposing a definition of the essential characteristics of property ownership on the states. The totality of the circumstances surrounding state interferences with private property interests in early America—the actual practice on the ground, the very limited scope of the Takings Clause, the Supreme Court’s decision to apply the Contracts Clause rather than the Takings Clause—indicates that the states possessed and used significant power to define and regulate private interests in property in early American society.

The purpose of this Section has been to interrogate the historical foundation of the cluster of historical claims about private property and governmental power in America that comprise what this essay calls the static/preemptive discourse in the Supreme Court’s Takings Clause jurisprudence. This Section shows that the documented history does not support these claims, which are superficial, if not facile, representations of what is actually a rich and complicated record. Rather, the historical discourse of *Lucas*¹⁹² and *Kelo*¹⁹³ is an example of a well-established discursive tradition in American legal culture: the tradition of “law office history,” which is characterized not by an intellectually honest attempt to examine the past, but “a stark, crabbed, oversimplified picture of the past, developed largely to plead a case.”¹⁹⁴ The ramifications of this “law office history” in the

191. Indeed, even in *Swift v. Tyson* (in which the Court held that federal courts exercising diversity jurisdiction could use federal common law as a rule of decision in matters of “general” law rather than state decisional law) the Court carved out a special place for property law, which it saw as so intimately bound up with a specific jurisdiction as to constitute “local” rather than “general” law:

In all the various cases which have hitherto come before us for decision, this Court have uniformly supposed, that the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character.

41 U.S. (16 Pet.) 1, 18 (1842).

192. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

193. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

194. Samuel Krislov, *The Amicus Brief: From Friendship to Advocacy*, in *ESSAYS ON THE AMERICAN CONSTITUTION* 77, 80 (Gottfried Dietze ed., 1964), quoted in John Phillip Reid, *Law and History*, 27 *LOY. L.A. L. REV.* 193, 197 (1993).

specific context of recent takings controversies is the focus of the next Section.

III. HISTORY, JUDICIAL ACTIVISM, AND THE GOALS OF CONSTITUTIONAL INTERPRETATION

The historical claims that form the basis for the Court's interpretations of the Takings Clause in *Lucas* and the *Kelo* dissents are unsupported by the available historical evidence of early American practices, as well as the Takings Clause itself as it was proposed and ratified and as it was interpreted by the Marshall Court.¹⁹⁵ Beyond examining the historical inaccuracy of these claims, this Section makes a few observations about why this use of history is particularly troublesome in the context of the Supreme Court's constitutional jurisprudence. This concluding Section argues that when the Court uses one-dimensional history to interpret the Takings Clause, there are at least two undesirable results. First, significant departures from preexisting doctrine may be obscured by an appearance of fidelity to historical norms. Second, by taking a reductive view of history, the Court fails to perform one of its essential functions: to explore with intellectual rigor the relationship between present-day societal norms and desires and the historical norms expressed in constitutional doctrine as it has evolved over two centuries.

A. *Judicial Activism as "Fidelity" to History*

To begin this examination of the negative ramifications of the *Lucas/Kelo* historical discourse, it is useful to contemplate the consequences of the Court's decision in *Lucas* as well as the consequences of the positions advocated in the *Kelo* dissents, had they won the support of a majority of the Court. As a result of *Lucas*, private property owners— notwithstanding any state common law, custom, or enactment to the contrary¹⁹⁶—gained a substantive right to be free from state legislation that deprives them of all economically beneficial use of their land, unless their proposed use would be enjoined as a nuisance at common law.¹⁹⁷ As Professor Michelman observed, the *Lucas* decision, by creating a substantive property right on the federal level, "nationalize[d] some aspects of the

195. See discussion *supra* Part II.

196. See U.S. CONST. art. VI. The United States Constitution, and by extension, its authoritative interpretation by the Supreme Court, is the "supreme Law of the Land . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

197. See *Lucas*, 505 U.S. at 1030–32.

law of property.”¹⁹⁸ In doing so, the Court drastically departed from the traditional conception of “bodies of property law maintained by the several States,”¹⁹⁹ as well as from the Court’s long-held position, articulated in *Board of Regents v. Roth*, that property interests are not created at the federal/constitutional level, but rather “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.”²⁰⁰ Justice Scalia’s positing of this substantive property right, which became in essence a federal common law of property, makes *Lucas* a landmark case for its departure not only from Takings Clause precedent, but from the Court’s general understanding of whence property law originates and the different powers of the federal and state governments.²⁰¹

The positions articulated in the *Kelo* dissents are perhaps more stunning, notwithstanding the fact that they failed to become law. Justice O’Connor’s dissent, informed by her understanding of the history of private property rights and governmental power, would limit the states’ eminent domain power to situations where “the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society.”²⁰² The effect of this rule, were it to become law, would be to prohibit state interventions in private property that are intended to promote or maintain higher levels of economically beneficial property use. These are precisely the types of interventions that have long historical precedent—as in the nineteenth century Mill Acts discussed above²⁰³—and have been upheld in previous Supreme Court cases, such as the landmark preservation regulations upheld in *Penn Central Transportation Co. v. City of New York*.²⁰⁴

Even more drastically, Justice Thomas’s dissent would enforce a strictly literal interpretation of the Takings Clause, informed by Justice Thomas’s understanding that the Fifth Amendment was intended to incorporate a Blackstonian property ideology into the Constitution.²⁰⁵ Had Justice Thomas, and his historical arguments, persuaded a majority of the

198. Michelman, *supra* note 60, at 304.

199. *Id.* at 309–10.

200. 408 U.S. 564, 577 (1972).

201. The categorical rule announced in *Lucas* (that regulations that deny a private property owner all economic benefit from her property constitute a taking unless the prohibited use would be enjoined under traditional common-law doctrines) implies that the right to benefit economically from property is inherent and essential to ownership in any U.S. jurisdiction. Such a rule seems inconsistent with the Court’s ruling in *Erie Railroad Co. v. Tompkins*, in which the Court rejected the idea that the federal courts were competent to expound a federal “general” common law. 304 U.S. 64, 78 (1938).

202. See *Kelo v. City of New London*, 125 S. Ct. 2655, 2674 (2005) (O’Connor, J., dissenting).

203. See *supra* notes 127, 131, 139 and accompanying text.

204. 438 U.S. 104 (1978).

205. See *Kelo*, 125 S. Ct. at 2677 (Thomas, J., dissenting).

Court, the new rule on takings would be that “the government may take property only if it actually uses or gives the public a legal right to use the property.”²⁰⁶ This rule would invalidate exercises of state power that have been practiced continuously since colonial times, and it would overrule an unbroken line of cases interpreting the Takings Clause requirement of “public use” to mean “public purpose” as defined by the legislature that dates back to 1896.²⁰⁷

The purpose of examining the actual or potential changes wrought by these opinions is to illustrate that each opinion deploys “law office history” in a way that would bring about major departures from traditional practices and Supreme Court precedent. This decision on the part of certain Justices to make a major departure from tradition and precedent in order to give effect to a normatively “better” policy is easily characterized as judicial activism, if that term is defined as the refusal to defer to tradition and precedent.²⁰⁸ The historical arguments marshaled by Justices Scalia, O’Connor, and Thomas are the major premise in the syllogism by which they arrive at radical results: a substantive property right protected by a federal common law of property; a categorical ban on state interventions with private property for the purpose of maximizing economically beneficial use; a requirement that the eminent domain power be used only when the public will actually have the right to use condemned property.

By presenting their decisions as being determined by fidelity to “historical” understandings, however, the Justices minimize the appearance of activism and efface both their own roles as judicial decision-makers and the role of normative or policy commitments as ideological factors leading to their conclusions. The *Lucas/Kelo* discourse, based on what is at best a reductive, one-dimensional interpretation of historical American property law and ideology, functions as a rhetorical device to give the impression that the Justices’ decisions are merely parts of an unbroken chain that stretches across the whole of American history, rather than radical departures from practice and precedent. In this way, fidelity to history (and an illusory history at that) obscures the radical, activist posture of the rule that is argued for, confirming Professor Reid’s argument that “[h]istory’s great attractiveness for judges occurs when they are indulging in judicial activ-

206. *Id.* at 2686.

207. Justice Thomas’s dissent frankly acknowledges that “the ‘public purpose’ interpretation of the Public Use Clause stems from *Fallbrook Irrigation Dist. v. Bradley*.” *Id.* at 2683 (citing *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 161–62 (1896)).

208. See Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 JUDICATURE 236, 241 (1983) (listing interpretive stability, “the degree to which a Supreme Court decision either retains or abandons precedent or existing judicial doctrine,” as a measure of judicial activism).

ism. History lets them be activists in the name of constitutional continuity.”²⁰⁹

Whether or not it is true that, as Joseph Singer once wrote, “[w]e are all legal realists now,”²¹⁰ it seems clear that judicial decision-makers—particularly when calling for a major departure from traditional practice or precedent—cannot legitimately make their case entirely by claiming fidelity to a history that has little basis in fact. Whether or not the results that Justice Scalia (in *Lucas*) or Justices O’Connor and Thomas (dissenting in *Kelo*) argue for are normatively desirable or represent good policy is not the issue. Rather, the issue is that it behooves the Court and ultimately the nation as a whole to have the normative or policy-based underpinnings of these opinions presented overtly rather than using a putative historical understanding with very little in the way of factual support as a proxy for present-day normative commitments. History has much to recommend it as an aid—perhaps an essential one²¹¹—in legal interpretation, but not when it is flattened to one dimension and used to obscure the bases on which decisions are being made.²¹²

This, then, is the first danger associated with law office history in general, and the static/preemptive discourse in Takings Clause law specifically: superficial, reductive historical claims become a rhetorical tool that allows the judicial decision-maker to obscure the contingent, normative determinations underlying legal conclusions by presenting the conclusion as a mere continuation of a historical tradition. The judge/author denies responsibility for her own choices, while at the same time legitimating them by placing them within a validating historical context. This tendency to veil normative judgments and substantive value choices as a passive application of historical norms must be opposed. Irrespective of their ideological predispositions with regard to private property, the people who have a stake in this argument are all who believe that actors in republican legal/political institutions need to labor toward consensus by developing “a language capable of both expressing and disciplining our normative com-

209. Reid, *supra* note 194, at 204 (internal quotations omitted).

210. Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988) (book review).

211. See Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998) (arguing that history is essential to Constitutional interpretation).

212. Christopher L. Eisgruber has argued that “there is too much history in constitutional interpretation.” Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 FORDHAM L. REV. 1611, 1622 (1997). He seems, however, to conflate all history with the “originalist” rhetorical tactic of using history to “authenticate” or “legitimate” judicial decisions. *Id.* at 1622–23. I see a greater range of uses for history in constitutional interpretation, and consequently, a need for more history, done properly, rather than less.

mitments, a language that allows us . . . to understand alternative social visions and to judge them.”²¹³

The historical discourse of *Lucas* and the *Kelo* dissents is not such a language. As Professor Singer has argued, “Our goal should be to generate competing visions of social justice . . . [and] to engage in a democratic process of mutual persuasion in light of our disparate visions.”²¹⁴ This applies to the Court, as a paramount institution of our nation, no less than the academy, and it must begin with a commitment to articulating openly the judgments and choices that underlie legal decisions.

B. *The Danger of One-Dimensional History as an Interpretive Tool*

To return briefly to the cases discussed in Section I, a second regularity appears among the opinions identified as examples of the Court’s traditional historical discourse—*Euclid*,²¹⁵ *Penn Central*,²¹⁶ and *Midkiff*²¹⁷—and the *Lucas/Kelo* discourse. In *Euclid*, *Penn Central*, and *Midkiff*, history is deployed to contextualize the judgments of state/local legislative bodies about what type of governmental interference with private property is both desirable and permissible.²¹⁸ The role of history in these cases is to portray the perceived needs and desires of contemporary society, as reflected in determinations of public policy by representative bodies, as rational responses to changed material circumstances and evolving societal mores. By contrast, history is invoked in *Lucas* and the *Kelo* dissents to delegitimize contemporary public aspirations by representing them as manifestly opposed to fundamental historical norms of American society.²¹⁹ Just as the Supremacy Clause of the Constitution²²⁰ establishes federal law as preempting conflicting state laws, the static/preemptive historical discourse posits its historical norms as a reason-preempting check on contemporary societal policies that deviate from the putative original or authentic American understanding of the relationship between private property and governmental power.

213. Singer, *supra* note 210, at 543.

214. *Id.*

215. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

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

217. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

218. *See id.* at 231–33; *Penn Cent. Transp. Co.*, 438 U.S. at 107–09; *Euclid*, 272 U.S. at 386–87.

219. *See Kelo v. City of New London*, 125 S. Ct. 2655, 2671–77 (O’Connor, J., dissenting); *id.* at 2677–87 (Thomas, J., dissenting); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 (1992).

220. “This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” U.S. CONST. art. VI.

Nietzsche once wrote that “[w]e want to serve history only to the extent that history serves living.”²²¹ A more contemporary and less sweeping articulation of this basic insight as it applies to the specifically legal sphere is David A.J. Richards’s assertion that “the task of legal interpretation is faithfully to account for a community’s self-consciously historical understanding of itself as a legal tradition.”²²² Each of these formulations implies that the orientation of legal-historical claims in legal interpretation should be forward-looking: history should be used to *explain and understand* the present perceived needs or desires of the community by reference to the past, faithfully acknowledging both continuities and discontinuities in ideologies and practices, rather than privileging the one moment or era in the past over the present and using ossified “historical understandings” to delegitimize the present. History need not be “controlling,” but we should not depart from our historical commitments without an awareness that we are doing so.

What is needed is an inclusive history, in which not just the Founding, or early America, but all eras of relevant material and ideological change are mobilized in order to “reconcile our deepest constitutional commitments, revealed by all of our constitutional history, with today’s preferences.”²²³ In this way, the Court can work to reconcile the facticity of contemporary aspirations as expressed in the pieces of positive law that it subjects to constitutional review, with the normative commitments expressed in the Constitution itself—what Larry Kramer has termed “the tension . . . between practice and theory, [the] ‘is’ and [the] ‘ought’” inherent in constitutional interpretation.²²⁴

This sensitive, inclusive approach is especially desirable in the context of the government/property interface generally, and the Takings Clause specifically, the history of which (as argued in Section II) does not lend itself at all to the discovery of an historical *urform* with respect to which we can classify any current practice as either a continuation or a deviation.²²⁵ The historical record reveals a balance between private property interests and governmental prerogatives that has been in a state of continual flux as competing ideologies as well as material circumstances caused

221. FRIEDRICH NIETZSCHE, *On the Uses and Disadvantages of History for Life*, in *UNTIMELY MEDITATIONS* 57, 59 (R.J. Hollingdale trans. 1983) (1874).

222. David A.J. Richards, *Interpretation and Historiography*, 58 S. CAL. L. REV. 489, 500 (1985).

223. Friedman & Smith, *supra* note 211, at 7.

224. Kramer, *supra* note 166, at 1638.

225. As Professor Alexander concisely states, “There is no single American traditional meaning of property in American legal thought.” ALEXANDER, *supra* note 49, at 7.

lawmakers, judges, and ordinary citizens to draw the boundaries differently in different times and different places.

Given the protean nature of private property rights throughout American history, and the overdetermined quality of the balance between private property and governmental power in any given time and place, the furthest we can honestly take historical arguments about the government/property interface is to try to contextualize present understandings and initiatives by reference to relevant aspects of a complex, polyvalent historical record. This describes the historical discourse that the Court has traditionally employed in cases like *Euclid*, *Penn Central*, and *Midkiff*, emphasizing history as a dynamic force, using a narrative of historical change to render contemporary interpretations of governmental power over private property legible in terms of the past.

The *Lucas/Kelo* discourse, by contrast, commits a double error. First, it privileges a specific historical moment not only over the present, but over all relevant intervening moments, as a source of legitimate understandings of the law.²²⁶ It insists that contemporary interpretations (in the form of positive law enacted by representative bodies) are only valid insofar as they recapitulate the static historical understandings it identifies with the Founding and, more generally, early America. This refusal to acknowledge the fact of material and ideological change over time as relevant to Constitutional interpretation is in direct contradiction to the stance that the Court took in one of its most developed explorations of the theme of historical change in Constitutional interpretation, upholding *Roe v. Wade*²²⁷ in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.²²⁸ Second, it collapses the diverse practices and ideologies that characterize the history of the government/property interface into a monolith, and thereby impoverishes legal history as a resource through which the contemporary community can understand or define itself in relation to the past.

It bears emphasizing once more that the conflict between the Court's traditional historical discourse on takings and the more recent, static/reason-preemptive historical discourse is, since *Kelo*, very much an

226. Thirty years ago, Thomas C. Grey provided a concise but nonetheless chilling catalogue of generally accepted constitutional principles that would have to be jettisoned if the only source of constitutional law were the text as understood at the time of the Founding. See Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 710–13 (1975).

227. 410 U.S. 113 (1973).

228. 505 U.S. 833 (1992). The Court in *Casey* recognized both that “[i]n constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations,” *id.* at 864, and that, whether or not the Court's decision in *Roe* was “right,” its incorporation into American constitutional culture meant that “the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case [cannot] be dismissed,” *id.* at 856.

ongoing issue. Although the *Lucas/Kelo* discourse has attracted a majority of the Court only once, in *Lucas*, it is highly possible that this will change as new membership, along with new leadership under Chief Justice Roberts, creates the potential for new directions in the Court's Takings Clause jurisprudence. The outcome of this conflict has significance beyond the realm of property law; it is as much about how our highest court adjudicates legal disputes, and how we define ourselves as a historically self-conscious society, as it is about legal doctrine. We need to demand intellectual honesty from the Court and defend American history as a rich, complex, polyvalent tradition capable of validating multiple points of view on the government/property interface. Above all, these factors call for a sustained critical interrogation of the historical discourse in the Supreme Court's Takings Clause jurisprudence.