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Of mice and missiles: An Austrian School economic appraisal of Lucas v South Carolina Coastal Commission

Joseph Francis Becker
University of Nevada, Las Vegas

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Of mice and missiles: An Austrian School economic appraisal of
*Lucas v. South Carolina Coastal Commission*

Becker, Joseph Francis, M.A.

University of Nevada, Las Vegas, 1993
OF MICE AND MISSILES

An Austrian School
Economic Appraisal
of
Lucas v. South Carolina Coastal Commission

by

Joseph F. Becker

A thesis submitted in partial fulfillment of the requirements for the degree of

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in

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The thesis of Joseph F. Becker for the degree of Master of Arts in Economics is approved.

Chairperson, Murray N. Rothbard, Ph.D.

Examining Committee Member, Hans-Hermann Hoppe, Ph.D.

Examining Committee Member, Terry R. Ridgway, Ph.D.

Graduate Faculty Representative, Ira H. Peak, Jr., Ph.D.

Graduate Dean, Ronald W. Smith, Ph.D.

University of Nevada, Las Vegas
May 1993
ABSTRACT

This paper argues that to maximize the utility of society, a legal system must precisely define and strictly enforce property rights.

Chapter I provides a theoretical economic framework by which various policy and judicial decisions affecting property rights can be considered.

Chapter II examines the proper role for a legal system as well as the historical and United States Constitutional respect for property rights. Secondly, the devolution of this earlier respect for property rights is discussed by examining case decisions which tolerate to a greater degree, force with respect to physical property. Finally, the notion of the regulatory taking is considered.

Chapter III looks more specifically at a recent regulatory "takings" case heard by the U.S. Supreme Court; Lucas v. South Carolina Coastal Commission. It is discussed using the economic tools of analysis presented in Chapter I with references to the legal case history addressed in Chapter II.
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To my father,

for whom the subjective value of a college degree

was extremely high

and

Professors Hoppe and Rothbard,

to whom I owe a large

intellectual debt.
INTRODUCTION

Tell about the house George, Lennie begged...."Sure we'd have a little house an' a room to ourself...An' it'd be our own, an' nobody could can us. If we don't like a guy, we can say, 'Get the hell out,' and by God he's got to do it. An' if a fren' come along, why we'd have an extra bunk, an' we'd say, 'Why don't you spen' the night?' an' by God he would...We'd jus' live there. We'd belong there...An' when we put in a crop, why, we'd be there to take the crop up. We'd know what come of our planting."...Lennie said softly, "We could live offa the fatta the lan'."

In "Of Mice and Men," Steinbeck's two main characters, Lennie and George, lived and worked because deep within their hearts was a burning desire to acquire their own "place." A place where the freedom from answering to others existed. A place where they were forced to answer only to themselves. A state of self-reliance, if you will, where the freedom existed to "live offa the fatta the lan'" and keep the fruits of their own efforts.

In the opening statement of the dissenting opinion in Lucas v. South Carolina Coastal Commission, U.S. Supreme Court Justice Blackmun writes, "Today the Court

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launches a missile to kill a mouse." With this statement, he is minimizing the importance of property rights (the mouse) and criticizing the sweeping decision (the missile) of the Court's majority, in its attempt to protect those property rights.

Blackmun's "story" of mice and missiles is similar to Steinbeck's "Of Mice and Men" in that both are stories about men who, not surprisingly, are doing what they can to acquire or maintain private property. I say not surprisingly because the acquisition of property and the freedom that comes from employing it as one sees fit was as natural a human action in 1937 as it was in 1992.

Notwithstanding all declarations to the contrary, the vast majority of men aim first of all at an improvement of the material conditions of well being. They want more and better food, better homes and clothes, and a thousand other amenities.³

Only by having the complete control that a legal system should afford with ownership can a property be used, albeit subjectively, to its "best use." As such, complete control is preferred to a circumstance in which someone must compromise part of what is regarded as a utility maximizing use to a co-owner or an exogenous owner.

In Blackmun's 1992 "epic," David H. Lucas is not unlike Lennie, George, or Mises' "vast majority of men who aim first of all at...better homes..." However, unlike Lennie and George, who in Steinbeck's novel never quite saved the six

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²Slip Opinion, U.S. Supreme Court No. 91-453 (Subject to formal revision before publication in the U.S. Reporter)

hundred dollars necessary to acquire the little house in the orchard, Lucas purchased for 975 thousand dollars the beachfront property on which he intended to build a permanent home for his family.

Within two years of the purchase of this land and before Lucas had begun construction of his home, the state of South Carolina regulated away Lucas's right to build a permanent habitable structure on his property. In addition, the state did so without paying for the devaluation that resulted from this restriction of the physical uses that Lucas could put his property to.

This "legal" action is defined as a regulatory taking--leaving Lucas with the title to a piece of land greatly devalued by an action of the government's legal system. A legal system which according to Bernard Siegan, Professor of Constitutional Law, at its founding had as its purpose the protection of property rights:

Eighteenth-century political leaders were greatly concerned with safeguarding private property rights, and for this protection they looked to the judiciary, the government entity that was esteemed above all others as a counterweight to popular rule.4

The following pages contain a theoretical economic framework of a property rights system in the Austrian School tradition that maximizes economic utility and provides economic insight as to which actions with property should be encouraged by legal institutions. An historical examination of the devolution of the Court's respect for property rights is examined as well as the "regulatory taking" and its

inconsistency within that theoretical framework.

We must hope that Blackmun's "story" of mice and missiles is not the modern sequel to a formerly held Constitutional respect for property rights so economically vital to any society.
CHAPTER I
THE THEORETICAL FRAMEWORK

THE AUSTRIAN SCHOOL

The tool of analysis for this thesis is the economic theory of the Austrian School.

The Austrian methodology remains distinct from other schools of economic thought in its strict adherence to subjective value theory and its derivation of economic laws using deductive reasoning from *a priori* propositions. As well as being unique in its methodology, application of this Austrian theory often results in conclusions strikingly different from those of other economic schools of thought. These conclusions most generally favor free markets unfettered by government intervention as a means of maximizing society’s utility.

The modern Austrian approach to the study of economics developed along lines very different from those prevailing in the British Classical tradition. The major relevant difference...is the Austrian's adherence to an explicitly subjectivist methodology....Objectivists believe that reality is totally outside of human consciousness, although human reason can be a very accurate guide to that reality. Subjectivists argue that reality is not simply a collection of objects, standing apart from human consciousness, but a mixture of those objects and subjective perceptions of them...The Austrians were champions of free markets, arriving at that position from an entirely different methodological
framework than their British colleagues.\textsuperscript{5}

**ACTION**

Humans act in an attempt to improve their condition by using means or scarce resources to achieve ends or goals that provide higher levels of satisfaction. That humans act is undeniable. Any attempt to disprove this notion would be internally inconsistent because the very "attempt to disprove" by arguing against the notion, is in itself, an action.

The cost of any action is the highest valued opportunity foregone to act in such a manner. The additional satisfaction gained by choosing the highest ranking goal over that expected by the second most highly ranking goal is the psychic profit. Each individual actor hopes to gain this profit by choosing action he believes will accomplish his most important end.

**PROPERTY**

While the yearning for property and ownership demonstrated by men like Lennie and George as well as Mr. Lucas provide an indication that utility is commonly realized with land ownership, historical examples are inadequate in demonstrating the necessity and inevitability of private property in a free and humane society.

A strong philosophical case for the inevitability of the existence of private

property is made by Hans Hermann-Hoppe, Ph.D.:

...it is obvious...that...a property right in one's own body must be said to be justified a priori. Anyone who would try to justify any norm of whatsoever content must already presuppose an exclusive right of control over his own body simply in order to say "I propose such and such." And any one disputing such a right, then, would be caught up in a practical contradiction since in arguing so, one would already implicitly have accepted the very norm that one was disputing.6

By establishing the inevitability of a private property in one's self, Hoppe continues to do the same for those things necessary to support one's life.

...if a person did not acquire the right of exclusive control over such goods by homesteading, by establishing some objective link between a particular person and a particular scarce resource before anyone else had done so, but instead late-comers were assumed to have ownership claims to things, then literally no one would be allowed to do anything with anything unless he had the prior consent of all late-comers.7

Hoppe concludes that by being alive and formulating any proposition, one must accept the inevitability of private property.

If this were not so and the latecomers supposedly had legitimate claims to things...no one could possibly survive as a physically independent decision making unit at any given point in time, and hence no one could ever raise any validity claiming proposition whatever.8

ACTION AND PROPERTY

Action and property are individually inevitable but they are also inseparably linked. That action must involve property logically follows because man must, if

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7Ibid., p. 21.

8Ibid., p. 22.
nothing else, have a physical place to act even if that action is only one of standing. All action will involve the use of at least a minimal amount of property in addition to one's physical being.

Because "actors" use property or scarce resources in ways that can increase or decrease aggregate utility, it is important to be able to distinguish between actions that benefit society by increasing utility and those actions that do not.

**UTILITY**

Utility is the economic name given to the satisfaction an individual actor derives from achieving an end.

A common sense or intuitive approach toward maximizing composite utility in society would involve the measuring and summation of all individual utility levels and then taking steps toward increasing this sum.

What makes this "measurement" of utility problematic is its subjective nature. The subjectivity of utility makes it impossible to measure in a cardinal way. With no way to assign cardinal numbers to levels of utility, any actual summation is not possible.

It is vain to speak of any calculation of values...It can be sensed only by the individual. It cannot be communicated or imparted to any fellow man. It is an intensive magnitude.9

In addition, this non-cardinal measurability of utility also prohibits interpersonal comparisons of utility. We can make only ordinal judgments of utility

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and then only by observing demonstrated preferences by individual actors.

TIME PREFERENCE AND UTILITY

Although the subjectivity of utility limits utility analysis greatly, an additional point with respect to utility can be made.

Satisfaction of a want in the nearer future is, other things being equal, preferred to that in the farther distant future.\(^{10}\)

In other words, utility derived from a present good is necessarily greater than the present expectation of that good being realized in the future. It is from this fact of time preference that actors prefer present goods to future goods (of the same quantity), that the phenomenon of interest exists.

DIMINISHING MARGINAL UTILITY

Another law of utility that is logically true is that of its diminishing marginal nature. This law simply stated is that each additional unit of a good subjectively perceived as homogeneous and within the control of the same individual must necessarily have less utility to him than the previous unit. This is necessarily true because the first unit of a homogenous good will always be used to satisfy the most urgent need that can be satisfied with such a good.

So while we know that each additional unit is worth less than the previous unit, we once again cannot measure by how much less. Again, because of the

\(^{10}\)Ibid., p. 483.
inability to measure in cardinal terms, it necessarily follows that there can be no interpersonal comparisons of utility. This implies that the \( nth \) unit of a good (to include money) taken from one individual and transferred to another currently possessing some number of units \( less \ than \ n \) is not necessarily composite utility improving.

It is this condition of non-comparability of utility between individuals that limits the number of utility increasing actions involving property to only a few. These few actions are Pareto superior.

**PARETO SUPERIOR ACTIONS**

Pareto superior actions are defined as those actions by which "one or more people are better off (in terms of satisfying utility)...while no one is worse off."\(^{11}\) These actions move society toward a Pareto optimal state where no property actions can be taken without making someone else worse off.

Composite utility increasing property actions consist only of homesteading, self ownership, production without externalities (externalities are examined extensively in the portion of this thesis devoted to force and fraud), and voluntary exchange.

These [self ownership, homesteading, production, exchange] are the methods of acquiring goods...on the free market, and they include all but the method of violent or other invasive expropriation of the


We can determine that these actions are Pareto superior by considering the consequences of each of these actions.

Homesteading employs a resource that no prior actor has recognized as scarce or valued highly enough to put to use. The additional production and utility that results from employment of the new resource increases the utility of the homesteader without making any other individual worse off.

Self-ownership is, in a sense, a subset of homesteading. It can be thought of as the process by which a "spirit" which is specifically human "homesteads" a previously unused resource, namely the body.

Production of new goods using one's previously homesteaded or existing property results in combining less valued goods with the resource of time and labor to produce goods valued more highly than the inputs. If the producer did not value the newly produced goods (ends) more than the resources employed to produce them, they would not have been produced. Once again more highly valued goods are introduced into the economy making the producer necessarily better off and no one else worse off.

An exception to this premise that production is necessarily Pareto superior is the externality. An externality exists when the physical integrity of property owned by an individual other than the producer is affected by the process of production.
This is a legitimate objection that does indeed prevent production from being necessarily Pareto superior. For this reason, production is classified as Pareto superior only in the absence of externality.

Voluntary exchange also necessarily increases the utility of not only one but at least two individuals without making anyone else worse off. Because in order for two actors to exchange properties, both must value more highly what they are receiving over what they are giving in exchange. In this action, no one else can be made worse off as all other existing property is unaffected.

Due to the subjective nature of utility, only these actions with property can be classified as necessarily utility increasing or Pareto superior.

MONEY, PRICE, AND THE MARKET PROCESS

In even the most primitive of situations, division of labor occurs when physically stronger, generally male, members of society engage in actions necessary to survival that are most efficiently performed by strong individuals. At the same time, physically weaker members of society, typically female, engage in actions necessary to survival that do not require as much strength to perform. This specialization results in a higher level of total production and because more goods are preferred to less, society is better off.

Normally this specialization and division of labor begins within the family. As such, all goods are commonly shared and no formal exchange or "barter" takes place. As soon, however, as those who specialize in production produce more than is
necessary for consumption within the individual or family unit, a self serving interest in exchange between these producers of "surplus" goods will ensue.

It is this phenomenon that creates a demand for money. In self serving attempts to rid themselves of the "double coincidence of wants" problem, additional exchange for goods that are more easily marketable will result. This more highly marketable good which is easier to exchange for other goods over time becomes money or the commonly used medium of exchange.

Money's emergence results from a series of voluntary exchanges. Because it facilitates further voluntary exchange, both its emergence and use are necessarily Pareto superior.

Money serves another vital process in society. With money it becomes possible to express any good in terms of any other good. This allows for cost accounting or an adding together of inputs to compare with the various outputs that could be produced with the same inputs. This serves as a tool to evaluate and increase productivity as inputs are directed to their most highly valued uses.

These actions of production and voluntary exchange can both be considered utility-increasing. Information inherently produced by the use of money and the resulting markets can further enhance the number of utility-increasing actions. This must be true because this market generated information better indicates what types of production and exchanges will be most likely to generate profits by reducing scarcity.

The market is not a place, a thing, or a collective entity. The market is a process, actuated by the interplay of the actions of the various
individuals cooperating under the division of labor. The forces determining the--continually changing--state of the market are the value judgments of these individuals and their actions as directed by these value judgments. The state of the market at any instant in time is the price structure, i.e., the totality of the exchange ratios as established by those eager to buy and to sell.\(^{13}\)

Money prices are the basis for this price mechanism. They are an indication by which resources may be directed to the use that is likely to generate the most utility. As supply of a highly demanded good becomes scarcer, its price in terms of other goods rises. Identification of this price change provides the insight to producers to divert resources away from the goods whose prices reflect a lesser demand or a more than adequate supply.

Mises's pathbreaking and central insight is that monetary calculation is the indispensable mental tool for choosing the optimum among the vast array of intricately related production plans that are available for employing the factors of production within the framework of the social division of labor. Without recourse to calculating and comparing the benefits of costs of production using the structure of monetary prices determined at each moment on the market, the human mind is only capable of surveying, evaluating, and directing production processes whose scope is drastically restricted to the compass of the primitive household economy.\(^{14}\)

It is important to distinguish between price and value as these terms are by no means interchangeable. The price sends market signals as mentioned above. As is the case with any exchange, the actors necessarily value what they receive in exchange more than the price in money they relinquish. If this were not true, no

\(^{13}\)Mises, Human Action, p. 257.

exchange would occur.

EFFECTS OF UNCERTAINTY ON SAVINGS AND GROWTH

Growth and long run prosperity are increased, ceteris paribus, as savings and investment increase. A society which must devote all of its present resources to producing the consumer goods necessary to sustain life from day to day is necessarily stagnant and will enjoy no increase in prosperity. Only by producing more than it consumes, can it sustain itself during periods of production of higher order capital goods which once produced, can be used to produce consumer goods more efficiently.

Postponement of consumption makes it possible to direct action toward temporally remoter ends. It is now feasible to aim at goals which could not be thought of before on account of the length of the period of production required. ...Saving is the first step on the way toward improvement of material well being and toward every further progress on this way.¹⁵

Knowledge or education may be a necessary condition for production of some higher order capital goods but it is never a sufficient condition. Furthermore, only savings will sustain life during an actual process of education and the subsequent employment of this knowledge in the production of more efficient capital goods.

This process is easily demonstrable by considering a one man economy. Suppose Robinson Crusoe spends all of his time catching just enough fish to stay alive. He may have the knowledge (technology or education) necessary to build a casting net from the vines that surround him with which he could "net" (pardon the

¹⁵Mises, Human Action, p. 490.
pun) twice as many fish per hour. Until he can save enough fish to sustain his life during the time required to produce the net, he cannot improve his productivity and must spend all of his waking hours catching fish by hand just to prevent his own starvation. If he saves enough fish to sustain his life during the production of the net and then converts the savings to the net, only then can he can produce more fish.

He then can save this new surplus for yet another period during which the production of an even more efficient means of production can be produced.

Robinson might also engage in leisure activity as opposed to further capital production. This is dependent upon whether leisure or higher levels of consumption generates more subjective utility for Mr. Crusoe.

Uncertainty plays a major role in the utility increasing aspects of savings and investment. To the extent that savings are not possible to safeguard, a shift from savings to consumption invariably results and once again growth is curtailed.

This is easily demonstrable by returning to the example of the one man island. Suppose now that the island has become a one man--one bear island and regardless of where or how Crusoe attempts to secure his surplus fish at the end of the day, the bear eats the stored fish while Robinson sleeps. Here again the result is a stagnant economy in which no increase in the standard of living is possible.

To the extent that the bear is certain to eat the fish, Crusoe will either eat more or fish less but will certainly not save. In either case, this shift from a saving and investment economy to one of pure consumption will reduce his level of prosperity.
If the savings necessary for Lennie and George to purchase the utility increasing "place of their own" would have been subject to total expropriation, those saved up funds would have been quickly diverted to the "cat-house" according to Steinbeck.\textsuperscript{16} Money that might have been saved could have been quickly converted to consumption spending of a type regarded by many as the least productive.

Fortunately for humankind, man's ability to reason has developed over time and prevents animals such as Crusoe's bear from destroying "savings." As a result, man has moved from less efficient means of production to more efficient means of production. However, this superior reasoning ability does not eliminate the ugly menace of expropriation of savings and investment goods by other humans who engage in similarly forceful but far less excusable actions.

In addition to the negative effects on investment and savings, initiation of force has equally devastating economic effects when directed against those actions defined earlier as Pareto superior.

It is this human condition that is the basis for self-serving voluntary exchange actions entered into by individuals to protect themselves from such force. This is the natural response to the realization that such force reduces the utility derived by controlling property and having the economic liberty to use property in ways subjectively recognized as utility-maximizing in its most highly valued physical use.

\textsuperscript{16}Steinbeck, \textit{Of Mice and Men}, p. 179.
FORCE, FRAUD, AND EXTERNALITIES

The use of force or fraud to affect any actions mentioned above as Pareto superior make them necessarily non-Pareto superior.

Coercive intervention...signifies per se that the individual or individuals coerced would not have done what they are doing without the intervention...the coerced individual loses in utility as a result of the intervention...All instances of intervention, then are cases where one set of men gain at the expense of other men.¹⁷

Furthermore, tolerance or initiation of such force by society raises the level of uncertainty, results in relatively higher time preference levels, and increases present consumption which reduces investment and future production.

The forced exchange results in one trader being made worse off at the expense of the other. As it is with all forceful interferences, it is logically irrefutable that the actor employing the force (aggressor) is increasing his own utility or he would not have engaged in the forceful action. It is equally true that the recipient of the force (aggressee) is made worse off. Otherwise, no force would have been necessary to prompt the exchange. Another form of force that is doubly devastating is that of force initiated to prevent an exchange. In this case, once again the aggressor benefits but two other actors are made worse off because they are prevented from entering into an exchange in which both would necessarily have benefitted, albeit subjectively.

Forced homesteading would result in employment of a resource whose value

is either regarded as higher when left in a state of nature and unused or the cost of employment of that resource is more costly than the benefits to be derived from its use. If this were not the case, no force would have been required to bring the resource into production. Threat of force to restrict homesteading of a resource has an equally devastating utility reducing effect.

Force or forceful restriction in the area of self-ownership results in something between partial conscription and total slavery. The value of the individual is necessarily reduced if the voluntary physical uses one can make with one's own body are reduced in any way.

[When an owner]...can no longer decide on his own, undisturbed by others, to what uses to put his body, the value attached to it by him is now lower; the want satisfaction, the psychic income, that is to say, which he can derive from his body by putting it to certain uses is reduced because the range of options available to him has been limited.18

Forced or forcefully restricted production takes resources away from production of a more highly valued product and redirects them to a less desirable use or possibly a use not valued at all. Otherwise, once again no force would be necessary to initiate the change of usage.

Another aspect of the use of force needs to considered when examining the action of production. This is not force employed against the producer but rather force employed by the producer in the act of production otherwise known as "the externality."

The externality should be thought of as force initiated against and affecting the physical integrity of another individual's property. This force can be an actual physical invasion but must also include a threat of force that in any way limits the physical uses that an owner might make of his property. Any use that is, which would not result in an additional externality being imposed on another exogenous property owner.

The externality must not be defined to include any subjective devaluation of a property that has not suffered an interference in its physical integrity. This type of devaluation can occur any time the supply of a similar property increases or the demand for the property decreases.

Allowing this devaluation to be considered an externality would either require a limiting of someone else's physical use of his property or assume a right to control another's subjective valuation and thus his demand for one's own property. Insistence on a right to use one's own property as one sees fit while denying others that same right as in either instance mentioned above is an internally inconsistent position. The "necessary" condition of universalization for rights qualification is detailed in Chapter II of this thesis.

It is also easy to understand how fraudulent behavior destroys the utility maximizing characteristics of Pareto superior actions. Exchanges entered into while relying on false information knowingly provided by one of the exchangers results in the fraudulent actor gaining at the expense of the defrauded individual. This defrauded individual will have given up more than would have been necessary to
acquire what he received in the exchange. If the exchange would have taken place even without the misrepresentation, no fraud (force) would have been employed. Any fraudulent force is employed at a cost because the defrauder will then face an increased level of skepticism which will likely limit the number of utility increasing exchanges he can enter in the future.

In addition to initiation of force rendering otherwise Pareto superior actions non-Pareto superior, force, fraud, and externality have an additional indirectly devastating effect on the utility increasing ability of individuals.

This devastating effect results because force inhibits the utility enhancing market process and its resulting price mechanism. Force, as defined above, redirects resources to less valued uses and the entire value reflecting ability of the market process becomes distorted. As a result, future decisions affecting future resource allocation are negatively affected.

The market process is the adjustment of the individual actions of the various members of the market society...The market prices tell the producers what to produce, how to produce, and in what quantity...It is the center from which the activities of the individuals radiate.\footnote{Mises, \textit{Human Action}, p. 258.}

**COLLECTIVE FORCE**

Force engaged in by individuals in almost all modern societies is regarded as criminal action or activity. Theft, murder, and kidnapping while generally considered criminal in the common law can also can be considered "economically criminal" or
non-Pareto superior. While the illegality of such criminal actions as these are generally justified on moral and ethical grounds, Pareto optimal utility analysis would provide justification for their prohibition as well.

It would be a fallacy of composition to assume that utility, which cannot be increased other than by the Pareto superior activity of individuals, can somehow be increased by non-Pareto superior or forceful actions when initiated by groups of individuals. Only an individual can know the utility derived from one's own actions and resource use. The impossibility of interpersonal comparisons of utility prevent individuals from knowing the utility of another. Any utility increase through collective force relies on the false assumption that a chain is somehow stronger than its weakest "individual" link.

But this bizarre "leap of faith" is made by maintaining that utility destroying initiations of force by individuals identified above as criminal somehow becomes good for society when they are jointly initiated by a democratic majority. Utility losses and destructive market-process effects are identical whether initiation of force is undertaken by individuals or collectives (groups of individuals). Collective initiations of force are actually worse in the respect that the costs of avoiding such initiations of force will increase with the size of the collective group.

It is this above mentioned leap of faith, however, that underlies the utility destroying initiation of collective force employed by the democratic state in its pursuit of advancement and the "public good."

A variety of faulty arguments exist for employing this collective force to
improve the general welfare. Wealth redistribution schemes are chosen by some economic political factions in an attempt to achieve "equity" goals while others choose similar interventionary measures to correct alleged "market failures."

Regardless of the rationale chosen for the initiation of collective force, the consequences are always a non-Pareto superior redistribution of utility from one individual or group to another individual or group. The rationale chosen for intervention in the case of *Lucas v. South Carolina Coastal Commission* is primarily one of attempting to create a public good.

Because no so-called "public good" can ever serve a purely public need or benefit each individual equally, these "goods" necessarily benefit some individuals to a greater degree and some individuals to a lesser degree. Furthermore, because a "good" may be subjectively valued as a bad by another individual, public good provision may actually lower the utility of various individuals to different degrees. Herein, lies the non-Pareto superior redistribution in this variety of collective force.

**PUBLIC GOODS**

Under the standard theory of public goods, two factors are generally recognized as the criteria and justification for intervention to correct what are construed to be "market failures." If goods are "...nonrivalrous and nonexclusive," they are elevated to "public good" status. These factors allegedly account for the

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underproduction that exists in the "public goods" markets and serve as the rationale for "forced" funding of "public good" production.

Being nonexclusive means that one's consumption of it does not preclude another's consumption. Generally, public television is the textbook example of a nonexclusive good because one individual's watching of the local channel does not "exclude" another individual's enjoyment of the same privilege.

A good is nonrivalrous when the marginal cost of production is zero. Again, textbooks identify the cost of providing a public television broadcast to an additional viewer as zero.

In closer analysis, it becomes difficult to discover any goods that are purely nonrivalrous or purely non-exclusive. Furthermore, it is difficult to discover any goods that are purely rivalrous or purely exclusive.

The good old American hamburger is often chosen as the textbook example of an exclusive good. Does one's consumption of this hamburger actually exclude others from any benefit?! Given further thought, even the burger is not a totally exclusive good. By eating it, the ingester may be less of a grouch which benefits to some extent, however minutely, whatever public may happen to surround this individual. Even the very matter of whether a "good" is a good or a bad is a matter of purely subjective evaluation. This further invalidates the very notion of the "nonexclusivity" of a good. Even if every good has some nonexclusivity attached to it, does this mean that every good is underproduced and if so to what extent?!

It is also noteworthy that no good is purely nonrivalrous. The public television
station's signal is more costly to broadcast to additional recipients as more power is required to reach additional households. Only if individuals could occupy the same physical space could the cost of broadcasting to each additional recipient be zero. Granted that while the marginal cost for some products is lower than others, there is no perfectly nonrivalrous good.

Another aspect which makes classification of goods as nonrivalrous nonsensical is the impossibility of marginal cost calculation. The cost of any action is the highest valued opportunity foregone. This cost is subjective and not discernible.

If costs were a real thing, i.e., a quantity independent of personal value judgments and objectively discernible and measurable, it would be possible for a disinterested arbiter to determine their height....There is no need to dwell any longer on the absurdity of this idea. Costs are a phenomenon of valuation. Costs are the value attached to the most valuable want-satisfaction which remains unsatisfied because the means required for its satisfaction are employed for that want-satisfaction the cost of which we are dealing with.21

Since no good fits neatly into a category of purely nonrivalrous or purely nonexclusive, all goods must be thought of as falling on a continuum.

Understanding that this is the nature of all goods would require that an arbitrary point be chosen along the nonrivalrous--nonexclusive continuum at which forced production or consumption of a good is required for the public benefit. The argument being that without public production or subsidization of a public good

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21Mises, Human Action, p. 396.
"...too little of the good...[will] be provided."^22

Because all goods fall somewhere along this public versus private good continuum, consistency would require that each good be subsidized to the extent it approached the pure public good end of the spectrum. Because this point is in fact non-existent or at best unidentifiable, it is a point which would be impossible to measure from and in turn renders impossible the ability to bring each good to its so-called optimal level of production.

With such arbitrariness, the point chosen for any good's provision then becomes one of political struggle rather than one of Pareto superior choice.

Such a political struggle typically becomes one of interest group politics where those few who each stand to gain extensively will be better organized than the many who each stand to lose relatively less. Although the sum of utility losses may be much greater than the sum of utility gains, the legislative assembly responds to those that are better organized which may ultimately be to society's detriment.

Due to the necessity of utility preferences being voluntarily demonstrated through exchange in the marketplace, it is impossible to know outside the market mechanism precisely to what extent any good should be produced. The point at which the subjectively perceived private benefit for an individual outweighs the private cost is the point at which the individuals favor production of the good and as such would be optimal.

Also, given a fixed amount of factors of production, producing more of good

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^22Pindyck and Rubinfeld, *Microeconomics*, p. 663.
"X" necessarily means that less of good "Y" can be produced. The decision regarding which good's production will be curtailed also becomes a political struggle with those engaging in the production of good "X" benefitting at the expense of those producing good "Y."

In addition, because each individual realizes different utility (or maybe no utility) from the same good, the production of public goods is necessarily going to make some individuals worse off to the benefit of other individuals if everyone is forced to pay for the goods equally.

CONCLUSION

Described above are the tools for analyzing the utility-increasing and utility-decreasing actions in society. These tools can be used to consider judicial and policy decisions and their effects on opportunities for Pareto superior behavior and the resulting overall utility gains by society in its attempt to reach a Pareto optimal state.

Force initiated against Pareto superior activity warrants the self defensive and restitutive force necessary to return non-initiators of force to their formerly held positions. Such must be the basis for a legal system.

 Establishment of rights to property that are precisely defined and strictly enforced create the level of certainty necessary for savings, investment, and the growth that has been shown to result from their increase and do much in the way of optimizing human actions with property.

Laws inhibiting voluntary exchange or contracts between consenting adults can
only limit utility increasing actions. Laws non-respecting of property rights in one's self or production without externality also limit utility increasing behavior.

Chapter II begins by examining the proper role for law and the recognition of that role by the Constitutional framers. Secondly, the devolution of the U.S. Constitutional respect for property is considered.

Force initiated against Pareto superior actions are still generally regarded by courts as criminal when initiated by individuals. When agencies of the collective, namely government, undertake such actions the same courts have made the "leap of faith" to somehow regard these actions as in the public interest.

By examining cases that violate the Pareto principles identified above, it can be seen that an increase in the initiation of collective force against the utility increasing actions of individuals has occurred.

Over time, court decisions have tolerated force and externalities in the name of the "collective good" and "progress." These decisions have allowed minimum and maximum prices, forced or restricted contracts, and expropriation of wealth which have all taken their economic toll over time.
CHAPTER II
A LEGAL SYSTEM OF PROPERTY RIGHTS

HISTORICAL ORIGIN AND DEVOLUTION

Frederic Bastiat, in 1848 France wrote an essay entitled "The Law" in which he argued that:

Life, liberty, and property do not exist because men have made laws. On the contrary, it was the fact that life, liberty, and property existed beforehand that caused men to make laws in the first place.23

Bastiat made this observation to demonstrate that the purpose of the law's creation was nothing more than an efficient step taken to jointly protect property from expropriation. Any attempt by the group to collectively deprive the individual of his property would have been antithetical to this basis for the individuals entering into the property protecting "contract" in the first place.

Thus the principle of collective right--its reason for existing, its lawfulness--is based on individual right....The common force that protects this collective right cannot logically have any other purpose or any other mission than that for which it acts as a substitute. Thus, since an individual cannot lawfully use force against the person, liberty, or property of another individual, then the common force--for the same reason--cannot lawfully be used to destroy the person, liberty or

property of individuals or groups.\textsuperscript{24}

John Locke, who influenced Jefferson in his writings contained in the Declaration of Independence and the Constitutional Bill of Rights, argued that man had natural rights to life, liberty, and property bestowed upon him by God or a "Creator." In Locke's eyes, this "divine bestowal" made these natural rights superior to any imposed by the will of society or majority vote of society:

By Locke's view, the state itself does not furnish new or independent rights, qua sovereign, against the persons subject to its control. There is no divine right of kings which suspends the ordinary rules of right and obligation between individuals in the state of nature.\textsuperscript{25}

While the framers of the U.S. Constitution may have relied on Lockean theory and not Hoppe's philosophic inevitability of property as described in Chapter I, they were wise to value at least the conclusions of Hoppe, Locke, and Jefferson. As such, they attempted to protect economic liberties and property rights. James Madison, who is generally perceived as even less of a natural rights theorist than Jefferson wrote:

The term [property] in its particular application means "that dominion which one claims and exercises over the external things of the world, in exclusion of every other individual." In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; \textit{and to which leaves to every one else the like advantage}. [boldface and underline added]. In the former sense, a man's land, or merchandise, or money is called his property. In the latter sense, a man has a property in his opinions, and in the profession and practice dictated by them. He has a property very dear to him in the

\textsuperscript{24}Ibid., p. 7.

safety and liberty of his person. He has an equal property in the free use of his faculties, and a free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.[boldface and underline added]

This provides a sound definition of property that includes a property in the rights to engage in Pareto superior actions. Without property status, these rights to use property in the most subjectively valued ways can be legislated or regulated away without an actual taking of the title or a compensating of the owner.

An erosion of property rights of this type was a concern foreseen by the Constitutional framers as well. The judiciary was empowered to prevent the legislature from ignoring that the legislative and interest group tendency is to engage in non-Pareto superior economic redistribution from one group of the electorate to another:

Eighteenth-century political leaders were greatly concerned with safeguarding private property rights, and for this protection they looked to the judiciary, the government entity that was esteemed above all others as a counterweight to popular rule. Some of the earliest and most emphatic statements favorable to judicial review were directed toward legislative attempts to interfere with property rights.

Another important insight is provided within Madison's opinion which would appear to be a long lost consideration of modern "jurists" in ascertaining what is and what is not a right.

The boldfaced and underlined phrase from Madison above, "and which leaves


27Siegan, Liberties, p. 88.
to every one else the like advantage,\textsuperscript{28} is a vital notion which serves as a tool for discerning rights from preferences and pipe dreams. The notion is that of universality. An alleged right, economic or otherwise, cannot be a right unless it can be "universalized" or enjoyed by all individuals simultaneously without being internally contradictory.

The Pareto superior actions identified in Chapter I are amongst rights that are universalizable. These actions are universalizable by definition because they "...make no one else worse off." The right to life does not interfere with all other's rights to their own lives. The right to produce with one's own property does not preclude others from being productive with theirs at the same time. Likewise, voluntary exchanges do not limit others from seeking utility increasing voluntary exchanges with their respective properties.

Consider the somewhat different nature of so-called economic "rights" proposed by the 1960 Democratic Platform:

1. The right to a useful and remunerative job.  
2. The right to earn enough to provide food, clothing and recreation.  
3. The right of every farmer to raise and sell his products at a rate which will give him and his family a decent living.  
5. The right of every family to a decent home.  
6. The right to adequate medical care.  
7. The right to adequate protection from the economic fears of old age, sickness, and unemployment.  
8. The right to a good education.\textsuperscript{29}

\textsuperscript{28}Dorn, \textit{Judiciary}, p. 3.

Attempting to apply the notion of universality to these economic "rights" makes them rather suspect. Considering just the perennially popular but faulty argument for a right to health care, one must ask at whose expense this is to be provided.

If some men are entitled by right to the products of the works of others, it means that those others are deprived of rights and condemned to slave labor.30

Trying to universalize a right to income without work would necessitate that everyone could have income without work. Clearly this is internally inconsistent. For any person to have income would require that at least one person be engaging in Pareto superior behavior, namely work or productive efforts.

Those actions defined earlier as Pareto superior are universalizable and meet this test of rights to be protected ideally by a legal system. These rights of voluntary exchange (contract), self ownership, production, and homesteading were generally more respected by the higher courts until the middle of the nineteenth century.

In 1798, Justice Samuel Chase, signer of the Declaration of Independence, wrote in his opinion:

The people of the United States erected their constitutions of forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence [force]. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it...An act of the legislature (for I cannot call it a law), contrary to the first great principles of the social compact, cannot be considered a rightful [sic] exercise of legislative

30Ibid., p. 292.
authority...A law that punished a citizen for an innocent action...a law that impairs the lawful private contracts of citizens; or a law that takes property from A and gives it to B: it is against all reason and justice, for a people to entrust a legislature with such powers; and therefore it cannot be presumed that they have done it. The genius, the nature and the spirit of our state governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them.\footnote{Calder v. Bull, 3 U.S. 386, 387-388 (1798)}

A series of cases in the early nineteenth century further solidified a Constitutional basis for rights to economic liberties. This is not to say that the Constitution is divine but rather that the economic system of Pareto superior actions and property rights described as prosperity maximizing in Chapter I were originally recognized in the early interpretations of the Constitution.

In \textit{Fletcher v. Peck},\footnote{10 U.S. 87 (1810)} and \textit{Ogden v. Sanders},\footnote{25 U.S. 213 (1829)} Chief Justice Marshall strongly asserted that the contracts clause not only restricts the government’s power to interfere with contracts, but went on to argue that the right to contract is both original and natural:

\begin{quote}
Individuals do not derive from government their right to contract, but bring that right with them into society...this results from the right which every man retains to acquire property, according to his own judgment, and to pledge himself to a future act. These rights are not given by society but are brought into it.\footnote{Ibid., pp. 246-247.}
\end{quote}

Justice Story in \textit{Terret v. Taylor}\footnote{13 U.S. 43 (1815)} and \textit{Wilkinson v. Leland},\footnote{Ibid., pp. 246-247.} reaffirmed
Marshall's earlier opinion in his dissents:

The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming, that the power to violate and disregard them; a power so repugnant to the common principles of justice and civil liberty; lurked under any general grant of legislative authority or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being.37

Indication of the coming economic horrors could be foreseen by reading the work of Thomas Cooley. Cooley at the time was Dean of the University of Michigan Law School and had the reputation of being a great laissez faire jurist. However, after writing the treatise on constitutional limitation in 1868, he became the first chairman of the Interstate Commerce Commission. His treatise argued that private rights to property may be interfered with by any branch of government:

The chief restriction is that vested rights must not be disturbed; but in its application as a shield of protection, the term "vested rights" is not used in any narrow or technical sense, as importing a power of legal control merely, but rather as implying a vested interest which it is equitable the government should recognize, and of which the individual cannot be deprived without injustice.38

Economic rights and rights to property which should have been held sacred continued to erode in the early twentieth century as courts allowed governments to interfere with freedom of contracts "affected with the public interest." This, of course, opens the proverbial flood gates as special interests now begin to decide what

3627 U.S. 627 (1829)
37Ibid., p. 657.
38Siegan, Liberties, p. 46.
"affects" the public interest.

In *Wolff Packing Co. v. Court of Industrial Regulations*, Chief Justice Taft wrote that while the food business in question did not sufficiently affect the public interest so as to be denied freedom of contract, four categories of business did justify public regulation:

1. Those carried on under authority of a public franchise...e.g. common carrier or public utility.
2. Certain occupations regarded as exceptional...e.g. inns, cabs, and grist mills.
3. Businesses in which an economic monopoly exists or is likely to occur.
4. Businesses that are so important in the nation's economy that destruction or stoppage would endanger the public welfare.

The ambiguity with respect to "public goods" described in Chapter I and the fact that all goods have at least some public good traits makes Taft's rationale a dangerous interventionary wedge of government into the operations of the market.

In 1934, not long after Taft's decision that sustained the existing freedom of contract for the food industry, the U.S. Supreme Court, in a 5-4 decision, upheld the right of the New York legislature to enact a law to establish a minimum retail price for milk. This law was enacted after dairy prices were brilliantly "discovered" by a New York legislative committee (likely after substantial hints from the organized dairy producers) to have fallen below the costs of production.

Nebbia operated a small store in Rochester where he sold two bottles of milk

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39262 U.S. 522 (1923)

40Ibid., p. 538.
and a loaf of bread for eighteen cents and was charged with a misdemeanor as the minimum selling price by legislative edict was nine cents per bottle of milk. This decision ignored not only the Pareto superior action of voluntary exchange but in addition interfered with the market process and the price mechanism rendering market correction and the most efficient allocation of future resources impossible.

In criticizing the majority opinion in *Nebbia v. New York,* Justice McReynolds wrote in his dissenting opinion:

May one be convicted of a crime upon such findings? Are federal rights subject to extinction by reports of committees? Heretofore, they have not been....The exigency is of the kind which inevitably arises when one set of men continue to produce more than another set can buy. The distressing result to the producer followed his ill-advised but voluntary efforts. Similar situations occur in almost every business. If here we have an emergency sufficient to empower the legislature to fix sales prices whenever there is too much or too little of an essential thing....constitutional provisions may be declared inoperative. Not only does the statute interfere arbitrarily with the rights of the little grocer to conduct his business according to the standards long accepted...but it takes away the liberty of twelve million consumers to buy a necessity of life in an open market. It imposes directly and arbitrary burdens on those seriously impoverished with the alleged immediate design of affording special benefits to others. To him with less than nine cents it says—you cannot procure a quart of milk from the grocer although he is anxious to accept what you can pay and the demands of your household are urgent! A superabundance; but no child can purchase from a willing storekeeper below the figure appointed by three men at headquarters.

Justice McReynolds concluded the dissenting opinion in *Nebbia* with the economic insight that continues to be grossly lacking in decisions that have allowed

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41291 U.S. 502 (1934)
42Ibid., p. 548.
preferred production of some goods over others, wealth redistribution, government imposed price and wage legislation, and many other interferences with Pareto superior actions.

The legislature cannot lawfully destroy guaranteed rights of one man with the primary purpose of enriching another, even if for the moment, this may seem advantageous to the public. Grave concern for embarrassed farmers is everywhere; but this should neither obscure the rights of others nor obstruct judicial appraisement of measures proposed for relief. The ultimate welfare of the producer, like every other class requires dominance of the constitution of the Constitution. And zealously to uphold this in all its parts is the highest duty intrusted to the courts.\(^4^3\)

Justice McReynolds' reputation of being opposed to "democratic progress" because of his outspoken judicial attacks on Roosevelt's New Deal Policies has lasted through the present day. These attacks were launched in an attempt to preserve economic liberties in the tradition of Locke, Jefferson, and Bastiat. McReynold's constitutional views were those of Jefferson, as they had been transmitted to him by a father born in the heyday of Jacksonian democracy. The Jeffersonian view to which McReynolds adhered rested on a sound exposition of legal principles rooted in the precedents reaching back to the beginning of the American Republic. The Justice's voice thus echoed from the distant past, and it seemed outdated to twentieth century Americans. Yet he did see himself as the midwife, delivering the future still-born. He did not consciously seek to make the world safe for capitalism or the capitalist. He sought only to make it safe for the individual citizen to exercise his inalienable rights.\(^4^4\)

McReynolds was unable to prevent the court system's further disregard for

\(^4^3\)Ibid., pp. 558-559.

property rights as various courts over time have also sanctioned production externalities in the name of progress.

Before the mid and late nineteenth century, any injurious air pollution was considered a tort, a nuisance against which the victim could sue for damages and against which he could take out an injunction to cease and desist from any further invasion of his property rights. But during the nineteenth century, the courts systematically altered the law of negligence and the law of nuisance to permit any air pollution which was not unusually greater than any similar manufacturing firm, one that was not more than the customary practice of fellow polluters. These in effect said, "Sorry, we know that industrial smoke...invades and interferes with your property rights. But there is something more important than mere property rights: and that is public policy, the common good."[boldface added]

Such actions that allow the governing body to be the vehicle by which one producer benefits at the expense of another landholder's property being devalued by physical invasion, contrasts sharply with Bastiat's above mentioned proper limits of the law.

Madison's earlier quote with respect to the nature of property provides a guiding legal light in such matters.

In a word, as man is said to have a right to his property, he may be equally said to have a property in his rights. 46

Contrast Madison's elevated status of rights with the bundle of sticks analogy used in the present analysis of modern property law issues.

Whereas most individuals parade merrily through life (Lucas now excluded)

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46 Dorn, Judiciary, p. 3.
believing that justly acquired property embodies an irrevocable privilege of possession and disposal, the modern day court recognizes property only as a "bundle" of possessory privileges granted by and subject to revision by society.

The inherent danger of reducing rights of property usage to the level of the state issued driver's license makes property rights suspect and tentative at best. After all, property and human's actions with it are inseparable as discussed in the beginning of Chapter I.

One of the gravest dangers when a legal system fails to acknowledge that a "property in rights" must exist is that at least one Constitutional protection of property disappears.

Consider the fifth amendment's "takings" clause:

...nor shall private property be taken for public use without just compensation.47

Generally this is invoked in actual physical takings or eminent domain actions exercised by various levels of government. (Even eminent domain actions fail the test of Pareto superiority for several reasons which are discussed in the context of the Lucas case in Chapter III).

There is a real danger when we denigrate Madison's "property in rights" to "sticks in a bundle" or some other inept analogy. When a "property in rights" is no longer regarded as property, the courts are then allowing for a complete expropriation of property rights and property usage in the name of the public good

47U.S. Const. amend. 5
without the check embodied in the Fifth Amendment to the Constitution.

This check on government exists because eminent domain actions are limited to the extent that taxpayers can be bilked, money can be created, and deficits can be incurred. Each of these government actions can only be employed until the taxpayers begin to "cry uncle."

High taxes, the inflation that results from money creation, and the "crowding out" that results from budget deficits and ensuing debts are terribly unpopular politically. What is seldom unpopular is the provision of "things" by the government to an ever and anxiously awaiting populace.

Ignoring Madison's insight that there is a "property in rights" allows for such public provision to this populace without suffering from the political side-effects. In this way value is transferred without the nasty inconvenience of "just compensation" being paid. The likelihood that this process is resorted to increases as the echoes of those "crying uncle" in city hall grows louder.

THE REGULATORY TAKING

The regulatory taking to be examined closely in Chapter III is such an action. It is an action whereby a physical use of property is regulated away without a reassignment of its title. This initiation of force on these "properties in rights" results in the same utility-reducing effects, negative market distortions and uncertainty effects that occur with any other initiations of force on property.

Socialism fails due to the lack of an efficient allocation of resources which is
impossible without the market process and ensuing prices. This mechanism quickly disappears as capital markets are eliminated by socialized ownership of physical usage. The same resource allocation distortion results in market prices if the government reallocates property rights without compensation even if, as in the case of the regulatory taking, title or deed to the property remains with the original owner.

This is the action of government which brings Lucas to the U.S. Supreme Court and this thesis to Chapter III; consideration of the case of *Lucas v. South Carolina Coastal Commission*. 
CHAPTER III
LUCAS V. SOUTH CAROLINA COASTAL COMMISSION

In 1972, the United States Congress passed the Coastal Zone Management Act which was designed to provide states with money and incentives to carry out Congress' goal of protecting the public from shoreline erosion and coastal hazards. South Carolina implemented the directive by requiring permits for any construction in what was designated a critical area.

In 1986, David H. Lucas (LUCAS) paid 975 thousand dollars for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single family homes. In 1988, however, the South Carolina Assembly determined that the housing development was developed unwisely and enlarged its "critical area" to include the two lots purchased earlier by LUCAS. This action had the direct effect of barring LUCAS from erecting permanent habitable structures on his two parcels which in LUCAS’s opinion greatly reduced the value of his property.

The Assembly's rationale for enactment of the measures which ultimately barred Lucas from improving his lots included:

1) The beach dune system along the coast of South Carolina is
extremely important to the people of this state and serves the following functions:

a) Protects life and property by serving as a storm barrier.
b) Provides the basis for a tourism industry that generates approximately two-thirds of South Carolina's annual tourism industry revenue which constitutes a significant portion of the state's economy. The tourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute greatly to the state and local tax revenues;
c) Provides habitat for numerous species of plants and animals, several of which are threatened or endangered. Waters adjacent to the beach/dune system also provide habitat for many other species.
d) Provides a natural health environment for the citizens of South Carolina to spend leisure which serves their physical and mental well being.

2) The beach dune system vegetation is unique and extremely important to the vitality and preservation of the system.

3) Many miles of South Carolina's beach have been identified as critically eroding.

4) Development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is both in the public and private interests to protect the system from this unwise development.

8) It is in the state's best interest to protect and to promote increased public access to South Carolina's beaches for out-of-state tourists and South Carolina residents alike.48

LUCAS filed suit against the respondent state agency contending that even though the Act may have been a lawful exercise of the State's police power, the ban on construction deprived him of all "economically viable use" of his property and therefore effected a "taking" under the Fifth and Fourteenth Amendments and required the payment of just compensation.

The remainder of this thesis examines the economic effects of such an action

as well as the economic consequences of embracing the rationale of the judicial opinion writers in the case.

All these jurists are part of the very same legal system which earlier in history was regarded as the "government entity that was esteemed above all others as a counterweight to popular rule."49

This regulatory taking was not an outright condemnation and purchase of the property. Rather, it was a threat of force by the state limiting the physical uses LUCAS could make of his real property.

For economic analysis purposes, this collective initiation of force should be recognized as the forceful externality it is. As is the case here and is often the case when collective force is employed, the rationale for such action is pregnant with public good pomposity.

TRIAL COURT ACTION

The South Carolina Trial Court found that the Beachfront Management Act decreed a permanent ban on construction insofar as LUCAS's lots were concerned. Because the property was purchased without residential building restrictions and the act eliminated "unrestricted use," this prohibition rendered the property valueless. As such, this court decreed that "just compensation" was due.

As articulated later by the U.S. Supreme Court justices, the Trial Court's finding of the property to be valueless completely ignored the notion of subjective

49Siegan, Liberties, p. 88.
utility.

If one assumed that this was the final disposition of the case and considered it an eminent domain action in which private property is condemned to public use (condemned being a fitting as well as the proper legal term here), certain negative utility effects nevertheless result.

In the event that the bona fide owner of the property enters into the sale voluntarily, the utility affecting results are reduced. What is often the case, however, is that a "fair market price" is paid to the landholder because he prefers not to sell. This so-called "fair market price" cannot be considered such because by definition it does not originate in the market. Because only the subjectively evaluating owner knows what amount of money, if any, he values more highly than his property, no forced exchange can be utility enhancing. The price, as noted in Chapter I, is not a measure of value. It is only a signal originating from genuine market transactions. For such transactions to occur the money price received must actually be valued more than property relinquished in order for an uncoerced exchange even to have occurred.

The Trial Court's awarding of 1.2 million dollars to LUCAS is some consolation when compared to the monstrous lack of regard for his property rights by the South Carolina State Supreme Court. Nevertheless, market distortions are still present as a result of this action. While payment to LUCAS reduces the negative effect on LUCAS, the funds used to pay him do not originate in voluntary action. This means that in any eminent domain action, the newly and collectively gained
property has made at least some taxpayers (forced exchangers) worse off.

Holders of adjacent property uniquely similar to that "taken" from LUCAS enjoy a benefit. As the LUCAS property is barred from improvement, adjacent land holders with similar but already improved property, enjoy a capital appreciation in their land holdings as the supply curve marches leftward.

Furthermore, the fallacy of the public goods rationale makes all these negative market distorting effects economically unjustifiable.

It is interesting that while alleging a taking, LUCAS did not challenge the legitimacy of the police power in its action on his property. It may even be that the artificial demand engendered by tax dollars in the name of environmentalism was foreseen by LUCAS. This may have allowed him to forecast a capital appreciation that made purchase of this land a more profitable venture than it would have otherwise been under pure market conditions.

It is not unthinkable that land developers such as LUCAS purchase land knowing that they can enrich themselves by affecting the zoning status that is assigned to it. This is another opportunity for private gain using the force of government to intervene in the market process.

STATE SUPREME COURT ACTION

The South Carolina Supreme Court reversed the finding of the Trial Court holding itself bound, in light of LUCAS's failure to attack the acts validity, to accept the assembly's "uncontested findings" that new construction in the coastal zone
threatened a valuable public resource.

The court ruled under the *Mugler v. Kansas*\(^5\) line of cases that "when a regulation is designed to prevent harmful or noxious uses of property akin to public nuisances, no compensation is owed under the takings clause regardless of the regulation's effect on the property's value."

However, this additional government regulation would not have been necessary to prevent a public nuisance if in fact one actually existed. Tort action in nuisance or trespass adequately limits these negative effects on society (one group or individual aggressing against another group or individual) assuming private property rights are embraced. Over time, this tort action was disallowed by the courts as discussed in Chapter II.

The *Mugler* case itself could hardly be construed as one preventing a noxious use of property or nuisance. The state legislature simply banned the production of alcohol by an already existing brewery. Had the brewery used force or fraud to mandate ingestion by the citizenry of its "demon rum" it then could have been said that the brewery's action forcefully interfered with the physical integrity of exogenous owner's properties in self. As annotated in Chapter I, the acts of production without externality by the brewery and the voluntary exchange that led to consumption of Mugler's products could only have increased the level of utility amongst the people of Kansas.

The principal problem with the majority opinion in *Mugler* was the court's

\(^5\) 123 U.S. 623 (1887)
equating of nuisance and noxious use to the notion of externality without a clear understanding of what can and cannot be considered an externality. With no interference in physical integrity, a cause of action simply cannot be allowed to exist.

The dissenters on the South Carolina Supreme Court were much more astute in their analysis of the LUCAS case. They argued (incorrectly) that the precedent setting cases allow for taking without compensation when property use is noxious or "akin to public interest" but they did not accept that the chief purpose of this legislation was to prevent such a nuisance. Rather, the dissenters regarded the legislative act's purpose to be a "promotion of tourism" and "creation of a habitat for indigenous flora and fauna."

It seems the dissenters had difficulty equating the non-existence of "flora and fauna" to a real act of nuisance in which an actual physical invasion occurs.

Like the Trial Court, these dissenters concluded that the act's obliteration of the value of LUCAS's lot constituted a taking and as a result must be compensated.

While not articulate about the distinction that can be made between so-called public goods and genuine externalities, the dissenters at least realized that a difference somehow existed.

As further evidence that the so-called public good is not equally consumed, examining this case makes it quite easy to identify the utility gainers and utility losers. The environmentalists, those most associated with tourism, and the adjacent property holders whose parcels become scarcer goods all obviously gain. The losers include LUCAS, the most personally impacted, those taxpayers that do not enjoy
psychic income from an increase in the supply of "flora and fauna" yet are forced to pay for it, and the economy as a whole because the force initiated to accomplish this taking misallocates resources from a more highly valued use to a less highly valued one.

A rippling effect of this forceful action will negatively impact the market process itself as well as the relative demand for consumption and capital goods.

THE UNITED STATES SUPREME COURT

Because LUCAS was unwilling to accept what he believed to be total devaluation of a 975 thousand dollar land purchase, he appealed the South Carolina State Supreme Court's decision to the United States Supreme Court.

THE MAJORITY OPINION

Justice Scalia began the Court's majority opinion by discussing the issue of ripeness. Because the South Carolina Coastal Commission had created an "appeal for variance" process which LUCAS could have pursued, there was some question as to whether disposition of his property was final enough for the Court to hear the case and render a decision.

Because the legislative act deprived LUCAS of physical use of his land for at least some amount of time and because present goods are necessarily worth more than future goods, a taking of value was accomplished even if the "variance permit" procedure later restores the right of LUCAS to improve his land. In addition, the
variance seeking process would be an expropriation of LUCAS's time. Time spent in an effort to protect his property must be considered an expropriation because according to Bastiat, protection against a taking would have been LUCAS's purpose in supporting the State with tax dollars in the first place.

As to the question of whether this regulatory taking issue is "ripe" for review, the stench already created by invasion of property rights would make it a reasonably logical conclusion.

Prior to 1922 the U.S. Supreme Court held that takings could only be total physical appropriations or a "taking of the title" to property. However, in Pennsylvania Coal Co. v. Mahon, Justice Holmes recognized that "if the uses of private property are subject to unbridled, uncompensated qualification under the police power,...the tendency of human nature would be to extend the qualification more and more until private property was eliminated."52

This is a point well made by Hoppe. Hoppe argues that socialism by "conservative regulation" of property usage while leaving the title in the hands of the original owner, results in the same economic effects that reduced the Soviet Union to its poverty stricken state.

...Conservatism...too is a form of socialism. Conservatism also produces impoverishment, and all the more so, the more resolutely it is applied. From the perspective of the natural theory of property, the property arrangement of conservatism implies an aggression [force] against the rights of natural owners. Natural owners of things can do

51 260 U.S. 393 (1922)
52 Ibid., p. 415.
whatever they wish with them so long as they do not change the physical integrity of someone else's property.  

Holmes in deciding that "unbridled, uncompensated regulation" would likely result in too much taking of private property, forced the question of "How much is too much?!"

The answer to this question of course is solved once again by understanding the proper definition of externality.

When any physical use is regulated away, that is "too much." For seventy years the court relied on a vague, case-specific inquiry method and their own subjective brand of "cost-benefit analysis" to decide cases. While doing much to increase the demand for jurists and econometricians, this reduced the efficiency of the overall economy as uncertainty increased with this tentativeness of rights to property usage.

In 1982, the Court narrowed the amount of "vagueness" in deciding *Loretto v. Teleprompter Manhattan CATV Corp.* In this decision the Court ruled that any physical invasion no matter how small is a taking and as such needed to be compensated. This decision allowed the cable company to forcibly install cable in an apartment owners building but like all eminent domain actions forced an exchange action which in turn circumvented the market process and its subsequent utility gains.

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54 458 U.S. 419 (1982)
In 1987, the case of *Nollan v. California Coastal Commission*,\(^5\) further narrowed the "takings" vagueness in categorically treating as a taking to be compensated regulation which denies all economically beneficial or productive use of land which does not substantially advance state interests.

This rule is also terribly imprecise as the first stick removed from the "bundle of rights" may be the only "economically beneficial stick with value to the property owner.

In *Mahon*, which served as the precedent that only a direct appropriation constituted a taking, the court presumed the legislature's right to adjust as they saw fit the burden of economic rights in a "manner that secures an average reciprocity of advantage to everyone." Obviously this is not possible outside a market process in which people voluntarily pay as individual benefits exceed individual costs. The rationale used for this presumption of legislative power is exactly the rationale that should have been used to argue against it.

Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.\(^6\)

Once again, it is not diminished value but physical invasion that must be the touchstone.

Scalia argues against the *Mahon* rationale by recognizing that there is a heightened risk that private property will be pressed into public service under the

\(^5\)483 U.S. 825 (1987)

\(^6\)*Mahon*, p. 423.
guise of mitigating serious public harm. "Flora and fauna" and "increased tourism" demonstrate fulfillment of this "heightened risk" as the public good is "served" by benefiting private interests while socializing costs.

Scalia embraced the precedent of harmful or noxious use takings without compensation, but perceived the South Carolina Supreme Court as being too quick to conclude that this principle decides the present case.

He described the harmful or noxious use doctrine as the earlier Court's attempt to describe in theoretical terms why the government may affect property values by regulation without incurring an obligation to compensate. This reality is now recognized with respect to the full scope of police power as provided by *Penn Central Transportation Co. v. City of New York* \(^{57}\) "which reasonably concludes that [where] the health, safety, morals, or general welfare would be promoted by prohibiting particular contemplated uses of land, compensation need not accompany prohibition. This ruling provides a broad realm of legitimate state interests that justify such prohibition [boldface added]." \(^{58}\) *Penn Central* allowed the court to make the transition from "valuation effects" to that of "prohibition of contemplated uses of land."

Scalia went on to say that a transition from the noxious use basis for decisions to the "broad realm" reasoning was an easy one because harm-preventing and benefit-conferring is in the eye of the beholder. With this, the notion of subjective utility has

\(^{57}\) 98 S. Ct. 2646 (1978)

\(^{58}\) Ibid., p. 25.
apparently been discovered by Scalia and this discovery allows him to argue that "benefit conferring" could always equate to "harm preventing" and as such could always be used as a justification not to compensate takings.

Hence Scalia's justification for his own new ruling.

The Court ruled that compensation can only be withheld in a total taking when investigation reveals that "prohibited use" interests were not part of the landowners title to begin with. Of course, the question of what constitutes a total taking remains unidentifiable by the courts in light of subjective utility analysis and outside of the market mechanism.

In addition, Scalia adds that partial takings should be expected by the property owner over time by measures enacted by the legislatures in pursuit of so-called "legitimate" state interests.

Personal property (non real property), interestingly enough, is not afforded the same protection by Scalia and regulations affecting the physical use of this property is unlimited without compensation. He justifies this with the existence of prior regulations and a historical understanding of citizens that only real property is protected by the Fifth Amendment.

The case was then remanded to the South Carolina Supreme Court to provide them a second chance to prove residual value or invent a better argument to support their expropriation of LUCAS's property.

Subjecting real property to better rules of protection than personal property will likely shift ownership from personal property to that of real property over time.
and reduce efficiencies that might have been gained by using personal as opposed to real property. Capital investment necessary for growth can, of course, be of either classification.

While Pareto superior exchanges occur with both types of property, personal property exchanges can generally be made more easily. As personal property rights are diminished, a shifting away from these mutually beneficial exchanges is likely to occur resulting in utility reducing consequences from the shift itself.

Since the role of the judiciary should be to institute justice, one must ask "Is justice somehow served when a regulation devaluing a property by 100 percent is compensated fully while a regulatory taking devaluing a property by 95 percent is not compensated at all?!" This injustice is not resolved by choosing another percentage at which to compensate. In addition to the difficulty that exists in attempting to determine value taken outside the market, at no percentage other than zero can compensation be said to be just in any way.

As a result of the ruling, future taking agencies' efforts will be directed to proving some residual value in their targeted properties to allow actions similar to that of LUCAS to persist. As a result of this ruling, every stick in the bundle of rights except the last sliver of the last stick becomes the goal of the taking agency even though the actual taking of that first stick may have been the only stick subjectively valued at all by the owner.

The importance of property rights on savings, investment, and growth cannot be understated here. Each sliver removed from any stick in any bundle of rights
necessarily shifts savings to consumption and lowers growth potential. Each judicial
decision that tolerates such legislation encourages this shift.

Only by applying the economic tools of the theoretical framework presented
in Chapter I and eliminating the collective’s restriction of property’s physical uses will
efficient resource allocation and utility maximization be possible.

While the majority is remiss in not employing these fundamental tools of
economic analysis, the dissent written by J. Blackmun demonstrates an even lower
regard for property rights known to be so vital.

THE MINORITY OPINION

A sad commentary on the state of property rights in the modern day United
States is that dissenters Justice Blackmun and Justice Stevens applauded the
monstrous decision of the South Carolina State Supreme Court not to compensate
LUCAS.

In minimizing LUCAS’s million dollar loss of valuation analogically to a
mouse and then equating the massively devastating effects of a missile to the
majority's feeble attempt to preserve property rights, Blackmun opens his dissenting
opinion by arguing that "Today the Court launches a missile to kill a mouse."59

I suppose this means that had "personal" property also been excluded from
total government takings (as it should have been), Blackmun would have opened his
dissent by stating "Today the Court began Armageddon to kill a flea."

Substantively, Blackmun considered LUCAS's claim unripe despite the economic odor emanating from the lack of recognition that if use restriction was foisted upon LUCAS for any time at all, at least some taking would have been committed. Present use must always be regarded as more valuable than future use.

Blackmun also argued that the trial court erred in treating the LUCAS property as valueless without accepting any evidence from the state on the property's value without a home and ruled incorrectly in accepting that the property was valueless if it was not available for its most profitable use.

In actuality the only witness that could provide such evidence of valuelessness was the subjectively valuing owner of the property, who in this case, was LUCAS himself. Secondly, with respect to the most profitable use argument, what is the purpose of any human action other than that of hoping to gain the psychic profit by pursuing the most highly ranking goal instead of the second most highly ranking goal otherwise defined as opportunity cost.

Profit in a broader sense, is the gain derived from action, it is the increase in satisfaction brought about; it is the difference between the higher value attached to the result and the lower value attached to the sacrifice made for its attainment; it is in other words, yield minus costs. To make profit, is invariably the aim sought by any action.

Blackmun's attempt to further justify that the LUCAS land was not totally devalued because remaining sticks in LUCAS's bundle included the right to "pitch a tent or have a picnic" on his million dollar "campground" were certainly amusing but not terribly convincing. Once again, the first stick removed from the bundle may

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have been the only stick with any value for LUCAS.

Blackmun argues further that because the legislature enjoys a presumption of constitutionality and LUCAS did nothing to challenge the legislature's rationale in enacting the legislation, the case should not have even been reviewed. He then criticizes the majority for burdening the various government agencies in the future with proving that a regulation is not a total taking.

The majority's decision to shift the burden of proof to governments has a positive effect in that it reduces government's ability to grow through collective initiations of force. This force becomes more costly and more difficult to resist as the size of the collective grows.

Even Blackmun's argument that legislatures have always enjoyed a presumption of constitutionality is rather doubtful. On this point, Constitutional Law Professor, Bernard Siegan is once again helpful:

Eighteenth-century political leaders...looked to the judiciary [as] the government entity that was esteemed above all others...as a counterweight toward popular rule...emphatic statements favorable toward judicial review were directed toward legislative attempts to interfere with property rights.61

The majority's decision which eliminates to some degree case-specific inquiries in the future and restrains the Court from performing private-cost/public-benefit analysis was equally troublesome for these dissenters. Blackmun did not cite a downward shifting demand curve for the legal profession as the reason for their disdain, however. Rather, Blackmun argues that regardless of the economic impact

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61Siegan, Liberties, p. 88.
on a property owner, "only the courts can weigh the private and public interests of a decision."62

This or any cost-benefit analysis, in fact, can only occur as a result of individual's demonstrated preferences revealed while engaging in Pareto superior actions.

Like the South Carolina State Supreme Court, Mugler is cited by Blackmun to justify the premise that property should be regulatable no matter "how adverse the economic effects on the owner might be."

The Mugler decision to legislate a brewery out of existence, which until that point, had been engaging in the Pareto superior actions of production and exchange, is the typical case of "interest group" attacks which lead to property use deprivation.

We can contrast this with Bastiat's proper role of law which argued that the collective could not be the initiator of the very force the collective organization was entered into to prevent. Because property existed before law, the law must have only been enacted to protect it.

Nevertheless, Blackmun drones on citing a long line of cases to further justify this grant of collective force in which total deprivation of economic use was regulated while no compensation was paid. According to Blackmun, all these cases justified the collective force because either "the government interest was sufficient to prohibit the activity given the significant private cost or the state has full power to prohibit

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an owner's use of property when it is harmful to the public. Once again, the interventionary forces rely on the faulty public goods argument.

Is "flora and fauna" of sufficient government interest to prohibit LUCAS's use of his own land?! Blackmun criticizes the majority for espousing a theory that an owner has a constitutional right to harm others if only he makes the proper showing of economic loss. But actions in intentional civil tort law limit a property owner from "harming others" in the true sense.

Blackmun's difficulty is in not grasping the idea that an externality must be limited to some physical invasion as opposed to some hypothetical deprivation of "flora and fauna." Without an understanding of this principle, there is practically no limit to the number of public projects that can be zealously embarked upon using private individual's property without the check or constraint of justly compensating these property owners.

Heavy reliance on Mugler prompts Blackmun to suggest that it was the role of the legislature to determine what measures are appropriate for health and safety. This broad perception of judicial power must make closing of the Mugler brewery seem insignificant in light of current knowledge that has identified so many other uses of property to be harmful, e.g. sugar, cigarettes, cholesterol. Rights to engage in the Pareto superior actions pursuant to self ownership is somehow missed completely by Blackmun in his attempt to wrestle with the issue at hand.

Blackmun proceeds next to attack Scalia's rationale that "the court's inability

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63Ibid., p. 16.
to discern objectively the harm preventing versus benefitting conferring consequence of decisions" necessitates eliminating the noxious use doctrine. Blackmun supports this attack by pointing out that "deprivation of all economic use" cannot be determined objectively either.

In recognizing accurately this inconsistency in the majority's case, Blackmun also stumbles upon the notion of subjective utility. A notion which almost all economic schools other than the Austrian school seem to discount to much too great an extent. As with the majority, Blackmun ignores the ramifications of the discovery in pursuing his own judicial agenda. Mr. Blackmun argues that subjectivity of value renders "deprivation" undiscernible. Yet in the same breath he urges that case specific inquiries by the judiciary continue because "only the courts can weigh the public benefit versus the private cost of restriction of property use." This, of course, is a subjective value judgment in itself.

Blackmun ends his dissenting opinion by asserting that no actual historical basis exists for the Court's claim that individuals should be compensated for property taken by government because "such action is not part of the long recognized understandings of our citizens."

On this matter, one can only wonder what subjectively valued utility generating activity might have induced Justice Blackmun to dismiss himself from the law school legal history class on the day that Madison's contributions were discussed. Perhaps,...just maybe,....he was reading Steinbeck.
CHAPTER IV
CONCLUSION

The majority of economics textbooks identify economics as the science of resource allocation under conditions of scarcity.

Scarcity exists and individuals have insatiable wants. No legal institution or economic model, however sophisticated, can eliminate this condition. Nevertheless, scarcity can be reduced by engaging in some actions with property while refraining from others.

As presented in the preceding pages, economics as a positive science can help explain the consequences that result from certain actions. If society's goal is to reduce scarcity, Pareto superior actions must be strongly encouraged and left unrestricted absent initiation of force. For if even one individual gains by an action while no others are made worse off, the level of scarcity has been reduced by at least some amount.

Oddly enough, it is this condition of a few gaining while a number of others do not lose that generates an interest in the other aspect of economics. That is, an "equitable" means of resource allocation or distribution.

Initiations of collective or individual force that destroy the link between production and distribution in an attempt to make the distribution of resources more
"equitable" reduces society's total number of Pareto superior actions. In addition, such intervention hinders the utility gains that otherwise result from the market process, the price mechanism, and a higher ratio of savings to consumption.

Because individuals are different in many ways, any attempt to somehow make them equal would require that they be treated unequally in that process. This makes the goal of total equity an internally inconsistent proposition. As such, any limiting of Pareto superior actions in pursuit of this utopian goal of equity must be recognized as nothing more than scarcity increasing.

In addition, attempts to destroy the link between production and distribution by allowing an individual a "right" to more than the proceeds of his own Pareto superior actions suspends even the equality of opportunity or equality under the law. This increase in inequality results because such a proposition is not universalizable. For if "every one else" is not left "the like advantage," such a proposal cannot be considered a right.

If each individual was entitled to even the most minuscule amount above that which he produced, one must ask from where the sum of each of these minuscule amounts is to come?! This realization prompted Bastiat to label "the state as that great fictitious entity by which everyone seeks to live at the expense of everyone else."64

Only when a legal system precisely defines and strictly enforces property rights

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to include the "properties in rights" to engage in Pareto superior actions, can society reduce scarcity, maximize utility, and experience growth. By establishing such a legal system, society will maximize its level of prosperity given the physical constraints imposed upon it by nature.

That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred.65

Justice Story
Wilkinson v. Leland

6527 U.S. 627, 657 (1829)
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