

Uldaho Law

Digital Commons @ Uldaho Law

Articles

Faculty Works

2012

Waiting for Hohfeld: Property Rights, Property Privileges, and the Physical Consequences of Word Choice

Jerrold A. Long

University of Idaho, jlong@uidaho.edu

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/faculty_scholarship



Part of the [Land Use Law Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

48 Gonz. L. Rev. 307 (2012/13)

This Article is brought to you for free and open access by the Faculty Works at Digital Commons @ Uldaho Law. It has been accepted for inclusion in Articles by an authorized administrator of Digital Commons @ Uldaho Law. For more information, please contact annablaine@uidaho.edu.

Waiting for Hohfeld: Property Rights, Property Privileges, and the Physical Consequences of Word Choice

Jerrold A. Long*

ABSTRACT

An important part of our institutional and cultural history is our understanding of a system of property interests. The most common trajectory of land-use regulation appears consistent with a property rights meta-narrative that informs multiple academic disciplines and levels of human interaction. This meta-narrative suggests that all land-use decisions begin with an assumption about the nature and extent of property rights held by potentially affected landowners, and that the ultimate end of any land-use regime is to “protect” those assumed property rights from unwarranted or unjustified intrusion by government. Because the law is a distinct linguistic environment in which word choices, and definitions, have significant consequences, this assumed rhetorical landscape of a property dispute plays a significant role in determining the dispute’s ultimate outcome. In most land-use disputes, all participants make one important concession, or assertion, before the discussion begins. The often unchallenged assertion is the claim that the discussion is in fact about property rights. Once a particular property interest is characterized as a “right,” the community’s political capacity to regulate that property interest diminishes substantially. Consequently, our decisions to characterize as “rights” those settings, circumstances and relationships that are better and more accurately understood as “privileges” changes our focus from the

* Jerrold A. Long is an Associate Professor of Law and an Affiliate Professor in the Bioregional Planning and Community Design and Water Resources programs at the University of Idaho. He earned a J.D. from the University of Colorado-Boulder in 2000 and a Ph.D. in Environment and Resources from the University of Wisconsin-Madison in 2008. I presented an early draft of this paper at the 3rd Annual Meeting of the Association for Law, Property and Society. I am very grateful to the many individuals who provided their assistance and suggestions, particularly to my colleagues Monique Lillard, Mark Anderson, and Dale Goble, who carefully reviewed earlier drafts of this article and provided substantial and useful feedback. I am also grateful to Simon Douglas, Tim Iglesias, Jason Jones, Dave Owen, James Penner, and Sarah Schindler, among others, who gave me some confidence that this idea might be worth pursuing, even if they didn’t necessary agree with it. Of course, I claim sole and despotic dominion over all errors and misunderstandings herein.

community to the individual, and necessarily weakens the political justification for, and community understanding of, most resource- or community-protective ordinances. This article considers contemporary property jurisprudence, theory, and conflict in a Hohfeldian context to demonstrate how our default rhetorical landscape leads to real and unnecessary negative social and environmental effects.

TABLE OF CONTENTS

I. INTRODUCTION	308
II. LAND AND RIGHTS IN AMERICAN CULTURAL DISCOURSE	311
III. RIGHTS VERSUS PRIVILEGES: WAITING FOR HOHFELD	323
A. <i>Understanding Property Interests</i>	325
B. <i>Rights and Privileges on the Ground</i>	330
C. <i>Property Interests as a Matter of Scale</i>	335
IV. COMPETING “RIGHTS” AND THE RHETORIC OF BEACH SAND.....	339
A. <i>Conflicting “Rights” in Stop the Beach Renourishment</i>	341
B. <i>Miller v. Schoene: Avoiding the Conflicting “Rights” Minefield</i>	345
V. CONCEDED BY EXAMPLE: HOW THE ACADEMY FAILS TO MODEL CLARITY	352
VI. CONCLUSION: RIGHTS, PRIVILEGES AND THE PHYSICAL CONSEQUENCES OF WORD CHOICE	363

I. INTRODUCTION

An important part of our institutional and cultural history is our understanding of a system of property “rights.” The most common trajectory of land-use regulation (or the lack thereof) follows a property rights meta-narrative that informs multiple academic disciplines and levels of human interaction. This meta-narrative suggests that all land-use decisions begin with an assumption about the nature and extent of property rights held by potentially affected landowners, and that the ultimate end of any land-use regime is to “protect” those assumed property rights from unwarranted or unjustified intrusion by government or neighboring landowners. Or at least to regulate land in a way that causes the least harm to those assumed rights.

While this meta-narrative provides some useful information, it suffers from (or more accurately, benefits from) an intentional carelessness regarding its most crucial term. Perhaps more than in any other epistemic community, language matters in the law. Even at its most generic, the law is a distinct linguistic environment in which word choices, and definitions, have significant

consequences. In this specific context, all participants in the discussion make one important assertion, or concession, before the discussion begins. And that assertion largely predetermines the discussion's outcome. The assertion is the claim that the discussion is about property *rights*.

The word "right" has—or at least could have—a distinct meaning in the law. But at that initial conflict when adjoining property owners first go about negotiating their interactions, most of the circumstances that we consider property rights are not in fact rights as the law understands them. Rather, at that first conflict, most alleged property rights are better understood as property *privileges*.¹ This distinction is important. Our decisions to characterize as rights those settings, circumstances, and relationships that are better and more accurately understood as privileges changes our focus from the community to the individual. This necessarily weakens the political justification for, and community understanding of, most resource or community-protective ordinances.

This article argues that we misuse legal terms of art in a fashion that causes negative changes to the landscape and the communities that emerge around given landscapes.² *Proponents* of legitimate, and arguably necessary, land-use or environmental regulation facilitate these negative outcomes by conceding the rhetorical playing field to anti-regulatory advocates. The rhetorical and political landscape resulting from this concession creates a gap between a local government's potential constitutional authority and its actual political authority—that is, rhetorical choices create political conditions that prevent state and local governments from exercising the full range of regulatory authority and options available to them.

1. I may be running against the grain a bit in my insistence on using the word "privileges" rather than "liberties" to describe the property interests at issue. But given the nature of this argument, my fear is that replacing "rights" with "liberties" does not get me where I want to go. So I'll use privileges even if I'm alone in doing so. See J.E. Penner, *Hohfeldian Use-Rights in Property*, in *PROPERTY PROBLEMS FROM GENES TO PENSION FUNDS* 165 n.7 (J.W. Harris ed., 1997) ("The term Hohfeld uses is 'privileges,' but no one else does, and for all intents and purposes he means 'liberties.'").

2. In some ways, this work is an extension of recent empirical work performed by Professors Jonathan Remy Nash and Stephanie M. Stern regarding the effect of different property "frames." Although, as will be clear throughout this article, I think Professors Nash and Stern would have benefitted from a Hohfeldian conception of their property frames. See Jonathan R. Nash & Stephanie M. Stern, *Property Frames*, 87 WASH. U. L. REV. 449, 453 (2010); see also Jonathan R. Nash, *Packaging Property: The Effect of Paradigmatic Framing of Property Rights*, 83 TUL. L. REV. 691, 693 (2009).

Failing to recognize that property consists of both rights and privileges,³ and focusing on property exclusively as a set of rights, allows property to exist as a setting or circumstance unique and singular to each individual. Property becomes less of a mutually-beneficial agreement between the individual and his or her community and more of a bulwark against that community. This singular understanding of property precludes considering property as part of a broader institutional, cultural, or community arrangement.⁴ And that failure potentially transforms an otherwise rational balancing of various individual and community interests into the “taking” of private property that the local government cannot justify. But often the taking is *not* a constitutional taking; rather, it is merely a context-specific political taking.

So when the discussion about proposed land-use regulation becomes a dispute over “property rights,” anti-regulation, or anti-communitarian, activists have already largely won the battle. More troublesome, those activists enjoy considerable assistance from their opponents in framing the issue in this fashion. Courts, academics, environmentalists, community interest groups, and others all concede this characterization, giving up an important rhetorical and legal tool.

To be clear, this argument that particular property interests are inappropriately classified as “property rights” is not an argument that the fundamental property interest at issue is inappropriate—too large or too “absolute.” The basic nature, justification, and purpose of the property interest does not change, only the rhetorical landscape in which we consider the property interest. An accurate rhetorical rendering of the property interest is relevant, and important, because it allows for a better individual and community understanding of both the costs and benefits of the proposed, or final, institutional arrangement. An accurate rhetorical landscape does not

3. Property interests might also be characterized as including powers and immunities, but I set aside those interests for the moment to focus on property privileges.

4. This article fits within a larger set of works arguing for a more complete discussion of the range of effects property-allocation decisions have on both communities and the landscape. See Craig Anthony Arnold, *Legal Castles in the Sand: The Evolution of Property Law, Culture, and Ecology in Coastal Lands*, 61 SYRACUSE L. REV. 213, 214 (2011); Craig Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 281 (2002) [hereinafter “Reconstitution”]; John Copeland Nagle, *From Swamp Drainage to Wetlands Regulation to Ecological Nuisances to Environmental Ethics*, 58 CASE W. RES. L. REV. 787, 788 (2007); David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public’s Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311, 311 (1988); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1439 (1993); ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* 3 (2003).

leave us with *less* property. It leaves us with *better* property. Consequently, it leaves us with better communities and landscapes.

This article begins by considering how the American public understands and uses its rights rhetoric in a property context. My goal is not to recreate the significant but somewhat more general work already completed on this subject,⁵ but rather to create a context for the section that follows: the reintroduction of an understanding of property first proposed in 1913 by Professor Wesley Hohfeld.⁶ Although Hohfeld's approach is both simple and useful—and inspired the first five sections of the Restatement (First) of Property—courts, academics, and activists have chosen not to take advantage of the rhetorical tools it provides. Following the reintroduction of Hohfeld, I present examples of how courts, academics, and activists fall prey to the same misuse of a property-rights rhetoric. The Supreme Court's recent decision in *Stop the Beach Renourishment Incorporated v. Florida Department of Environmental Protection*⁷ illustrates how a Hohfeldian approach might have facilitated better understanding of the dispute and its resolution. My argument is not that Hohfeld presents the best possible, or even best currently available, approach to understanding property.⁸ Rather, my claim is simply that recognizing the distinction between rights and privileges—and then using it—provides for a better discourse about how a community might use, protect, or restrict potential interests in land.

II. LAND AND RIGHTS IN AMERICAN CULTURAL DISCOURSE

*[I]n its simple American form, the language of rights is the language of no compromise. The winner takes all and the loser has to get out of town. The conversation is over.*⁹

Because this article argues that the claim of “property rights” is significant, and often outcome determinative, we must begin with a brief discussion of how

5. See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

6. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L. J.* 16, 17 n.4 (1913).

7. 130 S. Ct. 2592 (2010).

8. There are a number of significant and reasonable criticisms of Hohfeld's approach. See, e.g., A.M. Honoré, *Rights of Exclusion and Immunities Against Divesting*, 34 *TUL. L. REV.* 453, 453 (1960); James E. Penner, *The “Bundle of Rights” Picture of Property*, 43 *UCLA L. REV.* 711, 712 (1995); Reconstitution, *supra* note 4, at 282, 287-88.

9. GLENDON, *supra* note 5, at 9.

we—as a social and cultural organization—understand the phrase “property rights” and why its use is worth reconsidering.¹⁰

One of the potentially more troubling legal concepts awaiting a new law student is also one of the most fundamental. From the first day of the 1L Property class, emerging legal scholars are informed that property is not a thing, but rather a constellation of relationships about a thing.¹¹ More important, and perhaps more troubling, we teach immediately that there is nothing inherent in land that we can identify as constituting “property” as a cultural and legal concept. There is no *a priori* eternal truth about property or its nature, no ideal that might be identified and then pursued. As Justice Marshall provided in *Johnson v. McIntosh*, the first property case experienced by many law students: “[a]s the right of society, to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie[.]”¹² While this statement presupposes “property,” it is consistent with the notion that property must emerge from the ongoing disputes, community conversations, and temporary resolutions that we call law.

This understanding of property as a set of relationships about a particular piece of land, for example, rather than the land itself, is neither new nor controversial within the legal community, even if it might be controversial culturally. When tasked with determining whether trade secrets were property interests recognized by the 5th Amendment, the U.S. Supreme Court noted in *Ruckelshaus v. Monsanto Company*:

It is conceivable that [the term “property” in the Taking Clause] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen’s relation to the

10. For a much more thorough discussion of the role of a rights rhetoric and American political and cultural discourse, see generally *id.*

11. Professor Arnold has argued that we focus too much on the relationship and not enough on the “thing.” I’ll address Professor Arnold’s approach briefly in Section V, although it is worth acknowledging here that his fundamental critique is useful. See *Reconstitution*, *supra* note 4, at 281-83; see also Penner, *supra* note 8, at 712-13.

12. *Johnson v. McIntosh*, 21 U.S. 543, 572 (1823) (*Johnson v. McIntosh* is the first case in Dukeminier, et al.’s popular Property casebook).

physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.¹³

This characterization of how the law understands “property” is also reflected in the Restatement (First) of Property, first published in 1936.¹⁴ The introductory note to Chapter 1— “Definition of Certain General Terms”— provides:

The word “property” is used sometimes to denote the thing with respect to which legal relations between persons exist and sometimes to denote the legal relations. The former of these two usages is illustrated in the expressions “the property abuts on the highway” and “the property was destroyed by fire.” This usage does not occur in this Restatement. When it is desired to indicate the thing with regard to which legal relations exist, it will be referred to either specifically as “the land,” “the automobile,” “the share of stock,” or, generically, as “the subject matter of property” or “the thing.”¹⁵

Unfortunately, this understanding makes less sense to the mass of landowners and decision makers that influence and create land-use regulation. While lawyers and legal academics are relatively comfortable distinguishing between *res*¹⁶ and relationships, for the general public, the *res*—the land itself—matters more than the relationships it inspires.¹⁷

From a simplified perspective, property disputes might be broadly characterized as addressing one of two issues: who owns the thing, and what does that ownership mean?¹⁸ The 1L property class is likely the first place

13. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377-378 (1945)).

14. RESTATEMENT (FIRST) OF PROPERTY (1936).

15. *Id.* at 3.

16. *Res* is used here to represent the physical object of the property relationship. See BLACK’S LAW DICTIONARY 1420 (9th ed. 2009).

17. “Do you stand there, Scarlett O’Hara, and tell me that Tara – that land – doesn’t amount to anything?”

Scarlett nodded obstinately. Her heart was too sore to care whether or not she put her father in a temper.

“Land is the only thing in the world that amounts to anything,” he shouted, his thick, short arms making wide gestures of indignation, “for ‘tis the only thing in this world that lasts, and don’t you be forgetting it! ‘Tis the only thing worth working for, worth fighting for—worth dying for.”

MARGARET MITCHELL, *GONE WITH THE WIND* 55 (60th Anniversary Ed, Scribner Publ. 1996) (1964).

18. Carruthers and Ariovich identify five distinct dimensions of property, of which I’ve only explicitly mentioned two. However, the other three are implicit in the two primary

many people think carefully about the second question—to that point, what ownership means seems obvious. This distinction is not perfect, of course, as answering the “who” question requires the antecedent answer to “what” the thing is to be owned. And the “what” answer necessarily requires consideration of the relationship of the potential owner, whoever that may be, to other potential owners, or to the potential owners’ neighbors. The Coasean parable occurs at the intersection of these questions.¹⁹ The farmer and rancher in Coase’s tale do not dispute the appropriate boundary between their parcels, but rather dispute the meaning of that boundary.²⁰ The “who” and “what” questions become somewhat more complicated when we realize that it is some element of the relationship between the parcels that must be identified and allocated. The answers to these questions are reciprocally constituted. In the Coasean conflict, we only have a “what” and subsequent “who” problem because of the particular “whos” involved in the conflict. The conflict does not occur, at least not in this fashion, if both landowners are farmers without cattle that might stray.²¹

dimensions identified here. Those five dimensions are: the objects of property (what can be owned), the subjects of property (who can own), the uses of property, the enforcement of rights, and the transfer of property. Bruce G. Carruthers & Laura Ariovich, *The Sociology of Property Rights*, 30 ANN. REV. SOC. 23, 24-30 (2004).

19. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2-3 (1960). Coase described a situation in which a cattle rancher owns land next to a farmer. *Id.* Without a fence, the cows wander across the property boundary and cause harm to the crops; each additional cow causes more harm than the previously-added cow (i.e., the marginal cost increases with each cow added). *Id.* At some point, the harm caused by a new cow is greater than the benefit to be gained by adding the cow. *Id.* Additionally, at some point, the cumulative harm caused by the cows exceeds the cost of building a fence between the parcels. *See id.* For the purposes of this article, the interesting component of this story is the question of who should be responsible for building the fence between the parcels—i.e., does the rancher have the privilege of letting his cows wander (and the farmer no right to remain unmolested by wandering cows), or does the farmer have a right to remain unmolested by wandering cows (and the rancher a duty to control his cows). Note this does not address the question of the farmer’s right to exclude the cows by building the fence, which is assumed.

20. *See id.*

21. In an age of genetically modified organisms, plants can also stray in a manner that has negative effects on other plants. Cross-pollination by genetically modified plants—or “pollen-mediated gene flow”—provides an excellent contemporary example of the “problem” in *The Problem of Social Cost*. *See generally* Katie Eastham & Jeremy Sweet, *Genetically Modified Organisms (GMOs): The Significance of Gene Flow Through Pollen Transfer*, European Environment Agency, Environmental Issue Report, No. 28 (2002), available at <http://www.pedz.uni-mannheim.de/daten/edz-bn/eua/02/28.pdf>; *see also* Paul J. Heald & James C. Smith, *The Problem of Social Cost in A Genetically Modified Age*, 58 HASTINGS L.J. 87, 87-88 (2006).

But those are the conceptual realities and difficulties of a law professor, not a first-year law student, much less a typical landowner. Although for our simpler purposes, identifying these two distinct questions does provide a few benefits. First, the “who” and “what” understanding of property is consistent with how the law treats property questions. Returning to the popular Dukeminier casebook, we find the first two chapters dedicated to the idea that property can be “acquired.”²² In articulating the sets of rules—and justifications for those rules—that apply to found property, gifted property, trespass (adverse possession), etc., the law is focusing on answering the “who” question and leaving the “what” for later (albeit sometimes within the same dispute). The 5th Amendment “takings” jurisprudence also recognizes this distinction. The Supreme Court recognizes two basic categories of takings: “classic” takings and regulatory takings.²³ Classic takings involve the actual, physical appropriation of land. For example, taking land from one owner and conveying it directly and completely to the public for a public use, such as a road, school, park, or some other similar use.²⁴ To the extent the everyday application of these cases is controversial, the controversies revolve around the relatively simple questions of what actually has been taken, and the value of that thing taken.²⁵ In both cases, the primary focus is on defining the *physical* boundaries of the “thing.”

22. Chapters 1 and 2 of the Dukeminier casebook are titled “First Possession: Acquisition of Property by Discovery, Capture, and Creation,” and “Subsequent Possession: Acquisition of Property by Find, Adverse Possession, and Gift.” JESSE DUKEMINIER, ET AL., PROPERTY, Ch. 1-2 (6th ed. 2006).

23. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

24. The takings clause of 5th Amendment is perhaps best understood as creating a limitation on a pre-existing power of government. That pre-existing power is the ability to take private property for a public use. The limitation is that when private property is taken for a public use, the government must provide just compensation. As Justice O’Conner noted in *Hawai’i Housing Authority v. Midkiff*: “The ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.” 467 U.S. 229, 240 (1984). This is something of a doubled-edged sword, however. While an expansive definition of “public use” allows government to take private lands for activities that do not contemplate actual use by the public, see, e.g., *Kelo v. City of New London, Conn.*, 545 U.S. 469, 479 (2005), it also arguably expands the reach of the regulatory takings doctrine to land-use regulation that is not the equivalent of “use by the public.” In other words, the government’s ability to take is larger than a strict “use by the public” standard would allow, but its ability to regulate without compensation is also potentially restricted. See JULIAN CONRAD JUERGENSEMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 397 (2003).

25. See generally *Ivers v. Utah Dep’t of Transp.*, 154 P.3d 802, 804, 806, 808 (Utah 2007) (determining whether in exercising eminent domain, the Utah DOT must pay for the value associated with visibility from a highway (no) and the value associated with the view

In contrast, regulatory takings cases do not transfer property from one owner to another as transfer is commonly understood. In other words, regulatory takings cases do not change the “who.” Rather, a regulatory takings case—particularly a case that *does not* rise to a level sufficient to be characterized as a takings—adjusts the “what” that is owned.²⁶ The landowner has not changed, but her relationship with the community has.

But most important, this distinction is also consistent with how we—as a social community—understand property. More to the point, the distinction highlights what the public understands, and what it chooses to ignore, about property. People care primarily about *land*²⁷—particularly, we care about specific parcels of land that we can call our own. The “right to exclude” is considered the most important right in the proverbial “bundle of sticks” for a reason.²⁸ There is also a reason that of the recent Supreme Court decisions characterizing the rights guaranteed in the Bill of Rights, *Kelo v. City of New London, Connecticut*²⁹ had a much larger immediate cultural impact than *Citizens United v. Federal Election Commission*,³⁰ even though *Citizens United* is arguably more offensive and consequential.³¹ Although *Kelo* had very little real effect on the existing legal landscape, it appeared to affect the sanctity of the private home, which has a greater visceral effect—if nothing more—than some abstract change in the intricacies of campaign finance.

The public’s focus on the physical component of property is a durable part of American Culture. Professor Eric Freyfogle describes our early understandings of the relationship between land and property:

from the building (depends on if the land condemned was essential to the project that blocked the view)).

26. See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 107 (1978).

27. See generally Richard C. Stedman, *Is It Really Just a Social Construction?: The Contribution of the Physical Environment to Sense of Place*, 16 SOC. & NAT. RES. 671 (2003).

28. See, e.g., *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1044 (1992) (Blackmun, J., dissenting); see also *Kaiser Aetna v. U. S.*, 444 U.S. 164, 176 (1979).

29. 545 U.S. 469 (2005).

30. 130 S. Ct. 876 (2010). The cultural effect of *Citizens United* has increased, particularly during the “Occupy” period and the early stages of the Republican Presidential Primary. Although unlike *Kelo*, the public perception of the connection between negative campaign advertisements (or the “Definitely Not Coordinating with Stephen Colbert Super Pac”) and a Supreme Court decision is much more attenuated.

31. E.g., 2 Am. Law. Zoning § 17:18 (5th ed.) (“[B]y 2008 forty-two states had adopted some type of legislative response to the *Kelo* decision.”); Sean Flynn, *Will the Government Take Your Home?*, PARADE MAG. (Aug. 6, 2006), http://www.parade.com/articles/editions/2006/edition_08-06-2006/AEminent_Domain; Timothy Egan, *Ruling Sets Off Tug of War Over Private Property*, N.Y. TIMES, July 30, 2005, available at <http://www.nytimes.com/2005/07/30/national/30property.html>.

When Americans in the early nineteenth century thought of property at law they envisioned preeminently the fee simple ownership of an imaginary land parcel, with distinct boundaries and a physical, albeit hypothetical, existence. Other forms of ownership existed, but it was land that supplied the paradigm, a physicalist model that drew attention to actual boundaries and to the landowner's right to exclude.³²

It is this *physical* notion of property that matters most to us, and, to be sure, has always mattered most to us. From the beginnings of the Anglo-American system of property relations, we could not understand property without the physical thing.³³ Although we no longer require the literal transfer of a clod of dirt or other physical representation of the land, on the land, when we transfer interests in the land, the land itself remains meaningful.³⁴

Our connection to land—and general assumption that land and property are synonymous—presents some difficulty in achieving a sophisticated understanding of the word “right” as it relates to property. As I suggest above, property disputes can be loosely characterized as answering one of two questions: “who owns the land?” and “what does that ownership mean?” But entering 1L students and the general public largely already understand the answer to the second question. Ownership of land means the ability—that is, the “right” in the typical parlance—to do whatever one chooses with his or her land.³⁵ For the general public, there are not two distinct “who” and “what” questions. Or if there are, the “what” question is readily answered.

Our understanding of the source of those individual perspectives of property is facilitated by considering both historical ideas and contemporary events, with the contemporary events demonstrating the significance of the historical idea in the American experience. In 1651, Thomas Hobbes published *Leviathan or The Matter, Forme, & Power of a Common-Wealth*

32. Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. REV. 77, 97-98 (1995); see also Donna R. Christie, *Of Beaches, Boundaries and SOBs*, 25 J. LAND USE & ENVTL. L. 19, 20 (2009) (“Boundaries were important . . .”).

33. There is a brief discussion of the importance of “livery of seisin” in JESSE DUKEMINIER, ET AL., PROPERTY 205 (6th 2006); see also Percy Bordwell, *Seisin and Disseisin*, 34 HARV. L. REV. 592, 592 (1921).

34. See generally Stedman, *supra* note 27; Julie K. Clark & Taylor V. Stein, *Incorporating the Natural Landscape Within an Assessment of Community Attachment*, 49 FOREST SCIENCE 867, 868 (2003).

35. See generally Eric T. Freyfogle, *Private Property: Correcting the Half-Truths*, 59 PLAN. & ENVTL. L. 3 (2007); see also 2 WILLIAM BLACKSTONE, COMMENTARIES 2 (1813) (“sole and despotic dominion”).

Ecclesiasticall and Civill.³⁶ As cultural participants, we are most familiar with *Leviathan's* description of life in the state of nature before the creation of the sovereign. In that pre-sovereign life there is “no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.”³⁷ That last phrase being, for many of us, the limit of our cultural understanding of Hobbes.³⁸

But as political participants, we understand Hobbes much more thoroughly, even if indirectly. Hobbes' description of the “natural condition of mankind” in the absence of a sovereign was intended to justify the existence of that sovereign.³⁹ And not just any sovereign, of course, but the Leviathan—an absolute sovereign unconstrained by the desires or inputs of its subjects.⁴⁰ Hobbes' Leviathan had twelve “rights,” many of which contemporary Americans would find spectacularly offensive.⁴¹ Of the more offensive rights, the following are illustrative. According to Hobbes, after first agreeing to create the sovereign, its subjects cannot later change the government by subsequent covenants.⁴² The sovereign is incapable of breaching the covenant with its subjects, and thus sovereign power cannot be forfeited.⁴³ Because the sovereign acts for and as all of its subjects, it cannot therefore harm any of its subjects—“[f]or he that doth any thing by authority from another, doth therein no injury to him by whose authority he acteth[.]”⁴⁴ In short, the sovereign's power is absolute, and the sovereign's subjects possess no rights that might limit its power.

The influence of these alleged rights of the sovereign on both the political views of early Americans and much of our contemporary political discourse should be obvious. The American Constitution, and its Bill of Rights and subsequent Amendments, were designed specifically to limit the authority and

36. THOMAS HOBBS, *LEVIATHAN* (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

37. *Id.* at 89.

38. We are fond of the phrase. See, e.g., Sally Fallon, *Nasty, Brutish and Short?*, 29 *ECOLOGIST* 20 (1999); Victor L. Streib, *Law Deanships: Must They Be Nasty, Brutish, and Short?* 44 *J. LEGAL EDUC.* 116 (1994); J. NEIL SCHULMAN, *NASTY, BRUTISH AND SHORT STORIES* (1999); see also *Popped Culture: The Nasty, Brutish and Short Life of Mario* (Aug. 16, 2003), <http://culturepopped.blogspot.com/2010/08/nasty-brutish-and-short-life-of-mario.html>.

39. HOBBS, *supra* note 36, at 117.

40. *Id.* at 121-28.

41. *Id.*

42. *Id.* at 121-22.

43. *Id.* at 122.

44. HOBBS, *supra* note 36, at 124.

capacity of the Leviathan.⁴⁵ The Constitution creates a government of limited and enumerated powers.⁴⁶ From this perspective, the purpose of individual “rights” is to protect against a Leviathan that attempts to exercise authority beyond those specifically granted in the Constitution.⁴⁷ In many cases, the connection between the rights and the Leviathan are obvious. Free speech rights, including the right to petition the government, prohibitions on unreasonable searches and seizures, prohibitions on the quartering of troops, due process guarantees, among others, all mediate this relationship between governor and governed. For the purposes of this article, the protections of property in the 5th and 14th Amendments are our primary concern. But even beyond the confines of this specific article, the protections afforded property are significant. Indeed, from the perspective of many landowners, “property rights” serve principally to protect all other asserted rights: “[t]he right of property . . . is the guardian of every other right, and to deprive a people of this is in fact to deprive them of their liberty.”⁴⁸

In *The Noblest Triumph*,⁴⁹ Tom Bethell takes this understanding of the importance of private property one step further. According to Bethell, as the title of his work suggests, private property is the bedrock on which prosperity and civilization are grounded: “[w]hen property is privatized, and the rule of law is established, in such a way that all including the rulers themselves are subject to the same law, economies will prosper and civilization will blossom.”⁵⁰ At times, Bethell’s rhetorical engine runs a bit hot. Rather than identifying the potential benefits of private property, he finds “blessings”⁵¹—and not simple blessings; but “liberty, justice, peace and prosperity.”⁵²

45. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 8 (1985) (“Our Constitution rejects this crude Hobbesian conception.”).

46. See, e.g., *THE FEDERALIST* No. 45, at 237 (James Madison) (Ian Shapiro, ed., 2009) (“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”).

47. See *id.*

48. JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 26 (2d ed. 1998) (quoting ARTHUR LEE, *AN APPEAL TO THE JUSTICE AND INTERESTS OF THE PEOPLE OF GREAT BRITAIN, IN THE PRESENT DISPUTE WITH AMERICA* 29 (2d ed. 1775)).

49. TOM BETHELL, *THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES* (1998).

50. *Id.* at 3. A criticism of this argument presents itself immediately, as Bethell’s argument appears to rely more on the rule of law than the institution of private property. But the point here is not to assess the strengths or weaknesses of his argument, but rather to identify its contribution to a broader narrative.

51. *Id.* at 9.

52. *Id.*

While Bethell's language might claim too much for the detached, "objective" academic, it is consistent with the perspective of many landowners. Over the past few decades, an allegedly grassroots "movement" has emerged, attempting to focus our understanding of property on this relationship with the Leviathan.⁵³ A range of works from multiple disciplines address this modern private property rights movement.⁵⁴ This movement's expressions in public policy are somewhat complicated, at times focusing more on dissatisfaction with federal lands management.⁵⁵ But the fact that a "private" property rights movement might include private claims to public lands demonstrates the importance of attachment to particular lands and landscapes.

Dissatisfaction with the Supreme Court's decision in *Kelo* further demonstrates a similar cultural fixation on property "rights." On February 29, 2012, the U.S. House of Representatives passed a bill titled "The Private Property Rights Protection Act of 2012."⁵⁶ The bill prohibits states and political subdivisions of states from exercising eminent domain for economic development purposes, on pain of being ineligible for federal funding.⁵⁷ The operative provision—Section 2—is titled "Prohibition on Eminent Domain Abuse by States." The bill also provides a "Sense of Congress" section: "[i]t is the policy of the United States to encourage, support, and promote the private ownership of property and to ensure that the constitutional and other legal rights of private property owners are protected by the Federal Government."⁵⁸ But Congress was slow in joining the anti-*Kelo* bandwagon. According to the

53. See, e.g., Joseph L. Sax, *Why America Has a Property Rights Movement*, 2005 U. ILL. L. REV. 513, 513 (2005).

54. See, e.g., ERIC T. FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND 83 (2007); Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1238 (2005); HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 218 (2000); Bethel, *supra* note 49, at 341; Epstein, *supra* note 45, at 3; Ely, *supra* note 48, at 152; HARVEY M. JACOBS, ED., WHO OWNS AMERICA?: SOCIAL CONFLICT OVER PROPERTY RIGHTS 250 (1998); HARVEY M. JACOBS, ED., PRIVATE PROPERTY IN THE 21ST CENTURY: THE FUTURE OF AN AMERICAN IDEAL 32 (2004).

55. See, e.g., PHILIP D. BRICK & R. MCGREGGOR CAWLEY, EDs., A WOLF IN THE GARDEN: THE LAND RIGHTS MOVEMENT AND THE NEW ENVIRONMENTAL DEBATE 161-232 (1996); John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C. DAVIS L. REV. 317, 341-355 (1980-1981); Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847, 848 (1981-1982); Richard S. Krannich & Michael D. Smith, *Local Perceptions of Public Lands Natural Resource Management in the Rural West: Toward Improved Understanding of the "Revolt in the West,"* 11 SOC'Y & NAT. RESOURCES 677, 678 (1998).

56. H.R. 1433 112th Cong. (2012).

57. *Id.* at § 2.

58. *Id.* at § 11.

Castle Coalition, forty-three states have already enacted some form of legislation restricting the exercise of eminent domain.⁵⁹

The “Tea Party Movement” follows a similar pathway, emphasizing the importance of private property rights above all other potential interests, public or private. As provided in Article 6 of the Tea Party’s “Articles of Freedom”:

The United States is the only nation on earth specifically based on the premise of the right of individuals to own and control private property. It is the essential ingredient for Freedom and in the ability to build personal wealth. Private property ownership is the main factor in creating our national prosperity and it is the root of our individual Freedom. Ownership of private property is essential to guaranteeing individual Liberty. Without private property, no other rights are possible. There can be no freedom of speech, no freedom of mobility, or no ability to be secure in our persons without the ability to own and control private property.⁶⁰

But more significant, in terms of its potential long-term impact on the rhetorical landscape of property disputes, the emphasis on absolute *rights* in land has also developed in recent political work on the importance of private property in the fundamental structure and function of government, particularly its role in ensuring liberty and prosperity to developed and developing economies.⁶¹ Over the past few decades, a new understanding of the role of the state emerged that has dramatically influenced governance at all levels. Governments (and not just the governed) now consider government to be a market actor that should assess its potential choices based on the marginal utility each might provide.⁶² This transition to a “neoliberal” government emphasizes the government’s relationship with the private property of its citizens.⁶³ The government’s role is to protect that private property and

59. See *Enacted Legislation Since Kelo*, CASTLE COALITION, http://www.castlecoalition.org/index.php?option=com_content&task=view&id=510 (last visited November 9, 2012).

60. CONTINENTAL CONGRESS 2009, ARTICLES OF FREEDOM art. 6 (2009), available at <http://www.articlesoffreedom.us/ArticlesofFreedom/ReadtheArticlesPDF.aspx>.

61. See, e.g., DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 2 (2005); LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (2009) (discussing neoliberal ideology and the rhetoric of “insecurity” in the context of social welfare and crime control policies); Suzan Ilcan, *Privatizing Responsibility: Public Sector Reform Under Neoliberal Government*, 46 CAN. REV. SOC. 207, 208-09 (2009); Terris Milton, *The Neoliberal Triad of Anti-Health Reforms: Government Budget Cutting, Deregulation, and Privatization*, 20 J. PUB. HEALTH POL’Y 149, 151-54, 156-57 (1999).

62. See, e.g., HARVEY, *supra* note 61, at 64-65.

63. See *id.* at 2.

facilitate its use in an unfettered market economy.⁶⁴ Orthodox neoclassical economics becomes the guiding principle in government, and even social and cultural relationships; the role of the state is to ensure the unfettered function of private markets:

Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices.⁶⁵

From this perspective, the guiding principle of modern government is the market economy.⁶⁶ Among the core neoliberal principles are the sanctity of private property and deregulation.⁶⁷ A rights rhetoric—from an economic perspective rather than personal liberty or social betterment perspective—now pervades even the most basic and fundamental structure of government.

This increasingly uniform understanding of private property—and particularly, private property as a suite of individual rights—is an integral part of American culture. In a review of Ely's *The Guardian of Every Other Right*, Professor Herman Belz identified a transition that was occurring in historical understanding of private property.⁶⁸ Property had previously been understood as but one component of “economic liberty as a legal construct embracing ‘the whole of the citizenry and . . . the prosperity of the larger society.’”⁶⁹ Ely's work, in contrast, signaled a transition to an intellectual and cultural climate in which property rights are a form of individual rights that are “essential to personal and political liberty.”⁷⁰

What is important about this transition is not its own inherent value—i.e., whether it signals a move toward a better community understanding of property—but rather what it demonstrates about how we understand property. To the typical cultural participant, a property “right” is not a simple legal

64. *Id.* at 64-65.

65. *See id.* at 2.

66. *See* John Comaroff, *The End of Neoliberalism? What is Left of the Left*, 637 ANNALS AM. ACAD. POL. & SOC. SCI. 141, 144-145 (2011).

67. HARVEY, *supra* note 61, at 2-3; *see also* DE SOTO, *supra* note 54 (arguing that the protection of private property is one of the most important roles of the state).

68. Herman Belz, *Property and Liberty Reconsidered*, 45 VAND. L. REV. 1015, 1016-17 (1992).

69. *Id.* at 1015 (quoting Harry N. Scheiber, *Economic Liberty and the Constitution*, in ESSAYS IN THE HISTORY OF LIBERTY 75, 77 (1988)).

70. *Id.*

relationship among multiple potential legal relationships about a particular thing. Rather, it is the very foundation of liberty and freedom. If a “right” is the thing—the only thing—that protects us against tyranny and keeps the Leviathan at bay, the circumstances in which rights can be curtailed are extremely limited. In that context, the import of conceding the rhetorical landscape—and accepting that all land-use disputes are about “rights”—is obvious.

III. RIGHTS VERSUS PRIVILEGES: WAITING FOR HOHFELD

*One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to “rights” and “duties,” and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests[.]*⁷¹

The core of my argument is that a more accurate description of the property interests affected by land-use or other regulation will improve the success rate of natural-, social- or cultural-resource protective initiatives. The antecedent argument is that there is a more accurate, and thus better, way to describe those various property interests.

While the exclusive use of the phrase “property rights” to define American property relationships serves an obvious purpose, as implied in the preceding section, it is not necessary. Property interests protected by the Fifth and Fourteenth Amendments include the property privileges that are the focus of this article, as well as powers and immunities.⁷² We do not often speak of those interests in a regulatory takings context, for example, and the elevation of “rights” in our political and legal discourse has been matched by a denigration of “privileges.” Although the distinction is somewhat less important now,⁷³ throughout the twentieth century, judges regularly distinguished between rights and privileges in constitutional cases.⁷⁴ The issues were distinctly property

71. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16, 28 (1913).

72. See RESTATEMENT (FIRST) OF PROP., §§ 1-5 (1936).

73. See Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 571 (1972) (“the Court has fully and finally rejected the wooden distinction between ‘rights’ and ‘privileges’ that once seemed to govern the applicability of procedural due process rights”).

74. See generally Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). As initially described by Justice Holmes,

related, answering questions about the types of circumstances that might enjoy the protection of the Fourteenth Amendment's due process clause. But the Court's decision to reject the right-privilege distinction (and to replace it with the similar entitlement approach)⁷⁵ was not grounded in a more nuanced understanding of privileges in the *property* context. Rather, the Court grounded its rejection of the right-privilege distinction in the developing "unconstitutional conditions" approach to assessing governmental regulation.⁷⁶ Rather than characterizing privileges as independent constitutionally-protected interests, the unconstitutional conditions doctrine reaffirms the idea that privileges are distinct and lesser interests than "rights."⁷⁷ But this distinction was, and remains, both inappropriate and confusing. The problem is not that there is no distinction between property rights and property privileges. The problem is that it is not *this* distinction.⁷⁸

Identifying and understanding the appropriate distinction between rights and privileges (and the ultimate failure to distinguish between them) is primarily consequential not from a legal perspective but rather from a political perspective. Both rights and privileges are property interests potentially,

then on the Massachusetts Supreme Court, "rights" were those things protected by constitutional guarantees whereas mere privileges were not. For example: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892), *abrogated by O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716 (1996) ("The Court has rejected for decades now the proposition that a public employee has no right to a government job and so cannot complain that termination violates First Amendment rights . . .").

75. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571-72 (1972) ("[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights. The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.").

76. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

77. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) ("Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property"); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006) ("the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit") (alteration in original) (quoting *United States v. Am. Library Ass'n*, 539 U.S. 194, 210 (2003)).

78. It is worth mentioning again that most property scholars prefer the word "liberties" to refer to the settings that Hohfeld characterized as "privileges."

although not necessarily, protected by the guarantees of the Fifth and Fourteenth Amendments to the U.S. Constitution.⁷⁹ To say that something is a “property privilege” rather than a “property right” is not to say that it does not enjoy the same constitutional protections. But there exists a real, and often significant, gap between the reach of local governmental authority allowed by those constitutional provisions and the reach of local governmental authority allowed by the political conditions of a particular community, culture, or time. Most local governments refuse to regulate to the extent allowed by the Constitution, even as they frame those local political limitations as constitutional limitations. It is within this gap between constitutionally-allowed regulation and politically-allowed regulation that the distinction between rights and privileges matters most.

A. *Understanding Property Interests*

One hundred years ago, Professor Wesley Newcomb Hohfeld first articulated a more nuanced understanding of competing property interests. Hohfeld’s article—*Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*⁸⁰—and its companion article four years later⁸¹ provided an understanding of property relationships that inspired the principles established in the first five sections of the Restatement (First) of Property.⁸² Professor Hohfeld identified four distinct property interests and their correlatives.⁸³ Those property interests are: right, privilege, power, and immunity.⁸⁴ The respective correlatives are: duty, no right, liability, and disability.⁸⁵ In creating these distinct legal categories, Hohfeld sought to improve understanding of legal relationships by clarifying, and more precisely defining, the nature of those legal relationships:

In this connection the suggestion may be ventured that the usual discussions of trusts and other jural interests seem inadequate (and at times misleading) for the very reason that they are not founded on a sufficiently comprehensive and discriminating analysis of jural relations in general. Putting the matter in another way, the tendency—

79. See U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; RESTATEMENT (FIRST) OF PROPERTY, §§ 1-5 (1936).

80. See generally Hohfeld, *supra* note 6.

81. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L. J. 710, 711-12 (1917) [hereinafter *Legal Conceptions*].

82. RESTATEMENT (FIRST) OF PROPERTY, §§ 1-5 (1936).

83. Hohfeld, *supra* note 6, at 30.

84. *Id.*

85. See *id.*; *Legal Conceptions*, *supra* note 81, at 710.

and the fallacy—has been to treat the specific problem as if it were far less complex than it really is; and this commendable effort to treat as simple that which is really complex has, it is believed, furnished a serious obstacle to the clear understanding, the orderly statement, and the correct solution of legal problems. In short, it is submitted that the right kind of simplicity can result only from more searching and more discriminating analysis.⁸⁶

Hohfeld's simplest and most important insight is that a legal interest only makes sense in a relational context.⁸⁷ That is to say, because a legal interest necessarily changes the status of any other person or entity with a potential interest in the same property, the nature of the legal interest can only be understood in relation to the situation of all other relevant actors.⁸⁸ Following naturally from that antecedent insight is the understanding that the nature of the relationships between actors can vary. It is one thing to say "you cannot stop me from doing X." It is something else to say "you must allow me to do X."

The two sides of this relationship are not always, or even regularly, two individual persons expressing a claimed interest in the property, nor are there always only two sides to the relationship.⁸⁹ An individual may have a legal relationship with another individual, demonstrated by a basic contract.⁹⁰ The individual may have a legal relationship with a community, for example the duty not to engage in acts amounting to a public nuisance, in which the community has a right to be free from the public nuisance.⁹¹ And the individual may have a legal relationship with the state, as demonstrated by

86. Hohfeld, *supra* note 6, at 19-20.

87. *Id.* at 30. Hohfeld was not the first to recognize this, of course. See OLIVER WENDELL HOLMES, *THE COMMON LAW* 198 (Belknap Press of Harvard Univ. Press 2009) (1881) (arguing that rights can only be understood by considering the logically antecedent duty).

88. See Hohfeld, *supra* note 6, at 30.

89. This might be inconsistent with Hohfeld's original understanding, but we won't let that limit us here. See Penner, *supra* note 1, at 166 ("The genius of Hohfeld's scheme, or fatal flaw, depending on your perspective, is his disintegrating urge to define each legal relation in its most sparse possible form. Thus, every legal relation can only exist as between two individuals.").

90. A contract may consist of a single promise by one person to another, or of mutual promises by two persons to one another; or there may be, indeed, any number of persons or any number of promises. One person may make several promises to one person or to several persons, or several persons may join in making a single promise to one or more persons. RESTATEMENT (FIRST) OF CONTRACTS § 1 cmt. a (1932).

91. "A public nuisance is an unreasonable interference with a *right* common to the general public." RESTATEMENT (SECOND) OF TORTS § 821B (1979) (emphasis added).

certain provisions of the U.S. Constitution.⁹² But it is impossible to conceive of a legal interest without some type of relationship with another legal actor. In the absence of community—even a community of two—law is unnecessary, and the notion of “legal interest” is meaningless.

A legal relationship can be viewed from the perspective of either actor, and it is for this reason that Hohfeld described legal interests as a series of four correlatives—each identifying the nature of the legal interest on each side of the relationship.⁹³ This understanding of legal relationships is useful for two reasons. First, it furthers understanding of the overall relationship by recognizing the condition of both actors. Second, the correlative increases understanding of the legal interest possessed by each party.

For example, when one actor has a right, the other actor has a duty to do or not do a given act.⁹⁴ In a property context, a landowner might have a right to exclude. All other individuals would have a duty not to trespass. Outside the property context,⁹⁵ one of the most important rights in the American tradition is the right to “freedom of speech.”⁹⁶ The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”⁹⁷ The Supreme Court determined in *Gitlow v. New York* that this prohibition applies

92. See, e.g., U.S. CONST. amend I (“Congress shall make no law . . . abridging the freedom of speech . . .”) The U.S. Supreme Court regularly characterizes this prohibition on Congressional action as creating a “right[] to freedom of speech.” See, e.g., *Morse v. Frederick*, 551 U.S. 393, 396 (2007) (emphasis added) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). Or perhaps more appropriate for our present purposes: “nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend V. This provision creates a duty to provide just compensation whenever private property is taken for public use. It also recognizes a privilege to take property for public use whenever just compensation is provided.

93. Hohfeld, *supra* note 6, at 30, 32-33, 45, 55.

94. See RESTATEMENT (FIRST) OF PROPERTY § 1 cmt. a, (1936) (“The relation indicated by the word ‘right’ may also be stated from the point of view of the person against whom that right exists. This person has a duty, that is, is under a legally enforceable obligation to do or not to do an act.”).

95. Although not completely: free speech rights affect rights in land in a number of ways, from adult entertainment to billboards. See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) (upholding a zoning ordinance restricting the location of adult movie theaters); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512 (1981) (upholding the regulation of billboards).

96. Stephen Siegel suggests that First Amendment rights occupy the “preferred position” in contemporary American understandings of Constitutional values. See Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and “Takings” Clause Jurisprudence*, 60 S. CAL. L. REV. 1, 57 & n.278 (1986). Professor Siegel is not using “privilege” in a Hohfeldian sense in the argument presented in this article.

97. U.S. CONST. amend I.

to state governments as well as Congress.⁹⁸ The First and Fourteenth Amendments create the right to be free from government interference in participating in certain forms of speech.⁹⁹ The government has a correlative duty not to interfere with those forms of speech—i.e., “Congress shall make no law”¹⁰⁰ It is tempting to qualify the government’s duty by saying it is subject to certain exceptions. For example, the First Amendment’s protections do not apply to “fighting words”¹⁰¹ or advocating imminent forceful action against the government.¹⁰² “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”¹⁰³ But these are not “exceptions” to the government’s duty not to interfere with speech; they are areas in which the First Amendment does not extend the duty, and consequently there is no correlative right to engage in those forms of speech. In other words, there is just the right, as articulated by the Supreme Court, and talk of “exceptions” to that right is somewhat nonsensical: “[y]our right to swing your arms ends just where the other man’s nose begins.”¹⁰⁴ The other man’s nose is not an “exception” to the right; it is beyond the right.

Given its nature as limitation on the authority of government, the Constitution *does not* create an absolute right to be free from interference from other *private* actors, and in some cases, those private actors have the capacity to interfere directly with speech.¹⁰⁵ In my hometown, as in many similar towns across the country, a group of individuals gathers regularly in the town square to protest American involvement in both Iraq and Afghanistan (and more recently to support the Tea Party or Occupy movements). This is precisely the type of behavior, in precisely the type of location, that the authors of the First

98. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“For present purposes we may and do assume that freedom of speech and of the press – which are protected by the First Amendment from abridgment by Congress – are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

99. “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

100. *Id.*

101. *Chaplinsky v. N. H.*, 315 U.S. 568, 571-72 (1942).

102. *Dennis v. United States*, 341 U.S. 494, 496, 516-17 (1951).

103. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

104. Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919). Of course, Chafee should have said, “Your *privilege* to swing your arm”

105. *See United States v. Kokinda*, 497 U.S. 720, 725 (1990) (recognizing that private actors “enjoy absolute freedom from First Amendment constraints”).

Amendment sought to protect.¹⁰⁶ The government has a duty not to interfere with this speech, and the speakers have a right to be free from government interference.¹⁰⁷

But what about other private actors? With respect to their fellow citizens, these public speakers are exercising a *privilege* without any corresponding duty on the part of passersby to allow the behavior. Those passersby have no duty to allow or protect the speech but also have *no right* to prevent it. They can try to drown it out by engaging in similar speech but have no other mechanism to affect the speech in any fashion short of refusing to listen.¹⁰⁸ To the extent that the passersby have a duty at all, it is to avoid battering the speakers (i.e., physically forcing them to alter their behavior). But that duty is wholly unrelated to the speech itself. In that case, the correlative right is not the right to freedom of speech, but the right to be free from unwanted touching. The “right” guaranteed by the Constitution only affects the speaker’s relationship with the government; it does not affect the speaker’s relationship with other private actors.¹⁰⁹

Under certain circumstances, boundaries do limit the privilege to criticize. Freedom of speech is not limitless. There is a point at which the speaker’s privilege to criticize stops and a duty begins—the duty not to make defamatory assertions about another person.¹¹⁰ Where society has created those duties, the subject of the criticism has a correlative right to be free from defamatory

106. See, e.g., *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”).

107. Governments are allowed to impose reasonable time, place and manner restrictions on the exercise of free speech rights in public forums. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. Ctr. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (“Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions “are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”)).

108. While reasonable time, place and manner restrictions might affect the capacity to engage in “competing speech,” those limitations are not Constitutional duties. Rather, the duty created is the duty to comply with legitimate local law, independent of its relationship to speech.

109. This point is a bit more obvious in other areas, e.g., the ability of private universities to constrain speech. See Kelly Sarabyn, *Free Speech at Private Universities*, 39 J.L. & EDUC. 145, 145, 181 (2010).

110. See, e.g., RESTATEMENT (SECOND) OF TORTS § 558 (1977).

assertions. Even here, again, we find that the “right” created is not unlimited, as the duty to avoid defamatory assertions itself is not unlimited: “[o]ne who publishes a defamatory *statement of fact* is not subject to liability for defamation if the statement is true.”¹¹¹ A speaker has the privilege of speaking the truth, and the object of the speech has no right to prevent it, no matter how defamatory it might be.¹¹²

B. *Rights and Privileges on the Ground*

Returning to the example that is the focus of this article, it is similarly common to describe all of our interactions about land as concerning property rights. Of course, property rights in land exist in many circumstances, with both the government and other private actors having correlative duties. But it is also possible for land-use privileges to exist without rights “protecting” the same activity, and this is precisely the situation that is the primary focus of this article. In at least two situations, it is appropriate to think of land-use privileges rather than land-use rights: where a government actor refuses to act (e.g., by declining to find a duty in a nuisance case), and, more important, where the government actor has simply not acted yet. Many land uses remain untouched by regulation of any sort. Put another way, a community has yet to opine on the validity of the use, or has perhaps implicitly acknowledged that the particular use is occurring, but has not indicated whether it is allowed, supported, or potentially permanent. Both situations—governmental refusal and failure to act—overlap in significant ways, and both cases, depending on the context and specific relationships, might suggest that property rights, rather than privileges, exist. But the distinction is useful for explaining the broader thesis: we use “rights” in many circumstances when “privileges” would be more useful and appropriate. Justice Oliver Wendell Holmes, Jr. argued that the existence of a duty is “logically antecedent” to the existence of a right.¹¹³ The same concept applies for property privileges: we can only understand the property interest claimed by first considering the legal position of the individual (or community) on the other side of the relationship.

The idea that a property right can exist in isolation, separate from the community or constellation of relationships within which it is embedded, is

111. *Id.* at § 581A (emphasis added).

112. Of course, the privilege to speak the truth is itself bounded by a limited right to privacy. As articulated in *id.* at § 652D: “One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.”

113. HOLMES, *supra* note 87, at 198.

contrary to basic legal and practical understandings of property. As Holmes recognized, absent a *legal* duty to act or not act, there can be no correlative legal right.¹¹⁴ The addition of the qualifier “legal” —implied so far in this article—completes our understanding of the right-duty correlative. A duty that is enforceable—i.e., “legal”—within a given institutional arrangement does not emerge spontaneously. To the contrary, those duties must be created, or recognized, by specific acts. The act can be legislative, judicial, or a combination of the two. But the creation of a duty necessarily requires a determination regarding the appropriate allocation of various income streams between individuals or between an individual and a community (or group of individuals). Consequently, that allocation must be the product of a conscious act if it is to achieve and retain any legitimacy among the affected persons. There must be an explanation for the conditions and relationships that emerge (or persist), and where explanations address human relationships, they can only follow a specific and identifiable choice. Even when the explanation relies on theories of natural rights, or “that’s how it’s always been,” there must be the antecedent choice to believe in that particular explanation in the face of multiple competing explanations. But again, when focusing on the “legal” descriptor, we recognize that the choice can be identified as a specific legislative act or judicial decision creating the duty and the subsequent, correlative right.

Absent that specific legislative or judicial act creating a duty, the claim that a “right” exists is only an argument that a duty *should* exist which might allow or protect a specific type of behavior on the part of the “right” holder. This is something of an inverse argument in Peircean Pragmatism, in which a potential outcome is characterized as having already occurred in order to justify the specific choice that would ultimately give rise to that outcome.¹¹⁵ In this understanding, the purpose of arguing that a right exists is to create a set of political circumstances that allows the choice to create the right in the first place. This is, perhaps, a useful rhetorical approach for the rights proposer, but it is misleading. Such an approach necessarily assumes that a choice has already been made, and consequently, that there remains no choice to make. This beguilingly obvious point is important because a choice does remain, and that choice is to deprive other landowners and the community of their own potential rights and currently-exercised privileges. To the extent that privileges exist, they are legitimate property interests that would be taken (albeit not

114. *See id.*

115. As interpreted and popularized by William James, Peirce’s pragmatic method involves an inquiry into the conceivable consequences of alternative choices. We identify the better choice by identifying better potential outcome. *See* William James, *What Pragmatism Means*, in *PRAGMATISM: A READER*, 93, 94-95 (Louis Menand ed., 1997).

necessarily in the Fifth Amendment context, although that is possible) by the choice to accept the created imaginings proffered by the beneficiary of the right to be created.

More important, this inverse pragmatic approach—attempting to justify future choices based on potential outcomes that are alleged to already exist—is inconsistent with the American legal tradition’s well-established and accepted understanding of property.¹¹⁶ The focus on “rights” that allegedly already exist converts property from a triadic constellation of thing and relationships to a dyadic relationship between the individual and “her” property (as she understands that term). But our legal tradition understands “property” as a specific set of “legal relations between persons with respect to a thing.”¹¹⁷ It is not the individual’s relationship with the thing, nor is it a concept inherent in the thing itself.¹¹⁸ But when a person argues that “I have a right which you can’t take,” that argument fails to recognize the effect that choice has on the person to whom the new duty will now apply; a person that also might have an equally legitimate story to tell about property “rights.”

Consider a situation in which a community has not yet acted regarding potentially competing property interests. In this circumstance, an individual landowner might be using the land in a particular fashion, and the community has yet to decide how to address the use and its effects on neighboring landowners or the community at large. Nothing prevents the acting landowner from using her land as she desires. But that is because the community has yet to decide whether it desires to prohibit the use, not because the community has assigned a “right” to the landowner that is correlated with a duty on the part of the community not to interfere with the activity, even if the duty might ultimately arise due to detrimental reliance, or the passage of time, for example.¹¹⁹ Even then, the right does not, and cannot, exist until the community attempts to interfere with the activity and the landowner succeeds in convincing the relevant decision maker (e.g., local government or state or federal court) that the community has a duty to allow the use, thus creating a right in the landowner.

From the perspective of the community, or the neighboring landowners, this choice to recognize a duty where no duty previously existed has the

116. RESTATEMENT (FIRST) OF PROPERTY ch. 1, intro. note (1936).

117. *Id.*

118. *See* United States v. Gen. Motors Corp., 323 U.S. 373, 377-78 (1945).

119. Perhaps the simplest analogy here, even if imperfect, is to servitudes created by estoppel. When the use first begins, the owner of what will become the servient estate has the legal capacity to stop the use. But over time, and with detrimental reliance, that right to stop the use (and the correlative duty not to trespass) turns into a duty not to stop the use. *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.10 (2000).

necessary consequence of eliminating a potential right in the community. For example, the legally-unexamined potential “nuisance”—i.e., a situation where one landowner’s use of her land affects a neighboring landowner in some negative way—is best thought of initially as a privilege and lack of right rather than as a right and a duty. The affected landowner might think he or she has a “right” to be free from the alleged nuisance, and that the neighbor has a duty not to create the negative effect, but until a qualified decision-maker so decides, we are left with an inactive legal system and the ongoing privilege (or better said, hope for a privilege). But at the moment the decision-maker determines how to assign the interests in the dispute, one of the parties loses a potential property interest. Either the “polluter” loses the privilege to pollute free of interference from his or her neighbor, or the neighbor loses the potential right to exist free of his or her neighbor’s pollution. Up to this point, there can exist no rights to use land in a particular way.

It is tempting to characterize a legal decision that a suffering neighbor has no right to stop pollution as creating a right on the part of the polluter to continue polluting. This is, in fact, how we normally characterize this circumstance.¹²⁰ Conceptually, this is both unnecessary and inaccurate. As Holmes suggests, rights only exist where we have identified an antecedent duty that affirmatively prohibits or specifies particular legal behaviors of another actor.¹²¹ Finding “no right” *might* give rise to a duty. A duty is a “legally enforceable obligation to do or not do a given act.”¹²² The alleged duty in this example would be the duty not to interfere with the pollution-causing activity, leading to a correlative right to engage in the pollution-causing activity. This is conceptually troubling. The polluter has no capacity to call upon the coercive power of the state to force the neighbor to allow the harmful activity, and it is not clear how that could happen. If the neighbor were trespassing and interfering in the polluting activity, the right at issue would be the right to exclude, rather than the right to pollute. This is a right the polluter already possessed, prior to the dispute regarding the pollution.¹²³ The polluter cannot call the sheriff to force the neighbor to breathe the dirty air or drink the dirty water. But if the initial decision is that the polluter cannot pollute, the

120. See, e.g., DANIEL W. BROMLEY, *SUFFICIENT REASON: VOLITIONAL PRAGMATISM AND THE MEANING OF ECONOMIC INSTITUTIONS* 53 (2006) (describing a privilege as existing in a circumstance of “no law” with some subsequent legal act converting the privilege into a right).

121. See HOLMES, *supra* note 87, at 198.

122. RESTATEMENT (FIRST) OF PROPERTY, § 1, cmt. a. (1936).

123. See *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979) (“[T]he owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others.”).

determination is that the neighbor has a right to be free from the pollution, and the polluter thus has the duty not to pollute. In contrast to the opposite outcome, the neighbor can now call upon the coercive power of the state to force the polluter to stop the harmful activity.

What this means is that there can *never* be a “right” to pollute—or even to use land—in the same way there might be a right to exclude (with a correlative duty not to trespass) or a right to access (with a correlative duty not to block an easement). This, however, does not mean that the privilege to pollute is not a constitutionally-protected property interest, at least potentially. For example, the ability to construct a home on a particular parcel of land is a property privilege. The local government, through its exercise of the police power, might have created a related duty to issue a building permit (assuming certain requirements are met),¹²⁴ but that is a tangential correlative interest, not inherently a part of the fundamental property privilege at issue. The government does not have a duty to allow the basic use of the land—to build a house, in this case—but rather lacks the legal right to stop the use, short of using its eminent domain power and *buying the right* to stop the use. So if the relevant government actor determines that the “pollution,” or other community harm, caused by constructing the home is too great, it might decide to take away the *privilege* to construct.¹²⁵ If it takes away *all* of the use privileges associated with a particular parcel of land, that act might require compensation under the Fifth Amendment’s takings clause.¹²⁶ The privilege to use the land remains a privilege, but it enjoys the same constitutional protections as any other property interest.

124. Zoning ordinances generally identify “permitted uses” that will always be approved so long as the landowner satisfies whatever legitimate requirements are imposed on the particular use proposed (e.g., lot-line and road setbacks, height restrictions, building codes, etc.). *See, e.g., Juergensmeyer & Roberts, supra* note 24, § 4.2(B), at 71-72. To the extent these regimes create any duties on the local government’s part, those duties are to abide by the ordinances as then in effect. Those requirements can and do change without changing any of the property rights of the affected landowners. *See, e.g., Hale v. Bd. of Zoning Appeals for Town of Blacksburg*, 673 S.E.2d 170, 180 (Va. 2009) (“[W]hen a landowner has only a future expectation that he will be allowed to develop his property in accord with its current classification under the local zoning ordinance, there is no vested property right in the continuation of the land’s existing zoning status”).

125. Short of a complete taking of all beneficial uses of property, determining whether a Fifth Amendment taking has occurred requires consideration of the factors articulated in *Pennsylvania Central Transportation Co. v. New York City*, 438 U.S. 104, 124-25 (1978).

126. *See Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1028 (1992) (finding that a taking had occurred where the landowner lost all economically beneficial use of his land due to a building setback requirement. The goals of the coastal zone protection regime were perfectly legitimate, but still required compensation for taking of Lucas’s privilege to build two homes).

C. *Property Interests as a Matter of Scale*

The purpose of the rights-privileges distinction is not that it necessarily leads to different legal or constitutional outcomes. It is largely a distinction to be used for its rhetorical effect as we engage in community discussions about how we should or should not regulate land. The reason the distinction has some rhetorical, if not legal, effect, is a function of scale: understanding a property interest as a “privilege” forces a focus on the community of interests being harmed by the use. In contrast, a property “right”—as understood by the person asserting the right—can exist in isolation from that community, and more to the point, as protection against it.

The examples in the previous section—or any understanding of property—only make sense if we consider both sides of the relationship at the same time. In the land-use context, the distinction between a right and a privilege is simultaneously obvious and hidden, depending on the *scale* at which the issue is addressed. A primary goal of legal analysis—and of legal communication and education between the legal academy and its experts and the relevant and regulated public—is to identify and describe that scale at which legal relationships are both best and most easily understood. Outside of questions of actual physical jurisdictions (i.e., federal, state, or local governments),¹²⁷ we do not often think of legal distinctions as questions of scale. That is a mistake, complicating our understanding of both property interests and property disputes.

Many property disputes occur when an individual landowner protests some governmental act he perceives as being unduly restrictive.¹²⁸ In such disputes, the scale at which the property interests are considered consists of a single parcel of land, with a single landowner, affected by a single act of government. But that is not the only scale available for considering property disputes. Geography understands scale as representing different approaches for understanding or framing a particular problem or phenomenon.¹²⁹ We tend to

127. See, e.g., Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763, 1766 (2002); Donald F. Norris, *Prospects for Regional Governance Under the New Regionalism: Economic Imperatives Versus Political Impediments*, 23 J. URBAN AFFAIRS 557, 557-58 (2001); Stephen Wheeler, *The New Regionalism: Key Characteristics of an Emerging Movement*, 68 J. AMER. PLANNING ASS'N 267 (2002); William Blomquist & Edella Schlager, *Political Pitfalls of Integrated Watershed Management*, 18 SOC'Y. & NAT. RES. 101, 102 (2005).

128. This is the foundation for virtually every regulatory takings case. See, e.g., DANIEL MANDELKER, LAND USE LAW § 2.01 (5th ed. 2003).

129. See D.R. MONTELLO, *Scale in Geography*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES, 13501-13540 (N. J. Smelser & P.B. Baltes, eds. 2001).

think of geography as focusing primarily on spatial scale, but it also addresses temporal scale and thematic scale.¹³⁰ Within these general approaches, scale can refer to the physical representation of a phenomenon (cartographic scale), the boundaries of a particular investigation (analysis scale), or the actual size at which the phenomenon occurs, regardless of how it is characterized or studied (phenomenon scale).¹³¹

In the resolution of legal disputes, there is often a significant difference between analysis scale—the boundaries of the specific dispute—and the actual phenomenon scale. Often the analysis scale is constrained—appropriately in many cases—by jurisdictional issues.¹³² But this can lead to absurd results. For example, in 2000, a group of environmental organizations challenged a decision by the Bureau of Land Management (“BLM”) to lease forty-nine discrete parcels of the public lands for natural gas development.¹³³ The environmental organizations claimed that the BLM failed to comply with the National Environmental Policy Act (“NEPA”) before offering the leases for sale.¹³⁴ In 2004, the United States Court of Appeals for the Tenth Circuit determined that the BLM failed to comply with NEPA.¹³⁵ The court ordered the agency to prepare the appropriate environmental documents before offering the leases for sale.¹³⁶ Between February 2000 (the date of the original challenged lease sale) and August 10, 2004, when the Tenth Circuit finally determined that the BLM violated NEPA, the agency issued 285 leases, covering 170,663 total acres.¹³⁷ Developers had already drilled 114 new wells on these lease parcels.¹³⁸ All of the leases were issued without complying with NEPA.¹³⁹ Because the appeal only considered three leases, only those three leases were stayed pending the four-year resolution of the case.¹⁴⁰

130. *See id.*

131. *See id.*

132. Personal jurisdiction, subject matter jurisdiction, and standing are all examples of statutorily or jurisprudentially imposed limitations on analysis scale.

133. *See Pennaco Energy, Inc. v. United States Dep’t. of the Interior*, 377 F.3d 1147, 1152 (10th Cir. 2004).

134. *Id.*

135. *Id.* at 1162.

136. *See id.*

137. *See* Bureau of Land Management, Environmental Assessment Oil and Gas Leasing Buffalo Field Office, August 2005, at Table 1-1, available at <http://www.blm.gov/pgdata/etc/medialib/blm/wy/information/NEPA/bfodocs/og-leasing.Par.8845.File.dat/01ea.pdf>

138. *See id.*

139. *See id.*

140. *See Pennaco*, 377 F.3d at 1150.

Why were the analysis scale (the three leases) and the phenomenon scale (all coal bed methane leasing in Wyoming) so different? Because the plaintiffs only demonstrated that they actually used three of the original forty-nine lease parcels, and thus only established standing to challenge those three leases.¹⁴¹ While this outcome might have been required by the Supreme Court's standing jurisprudence,¹⁴² the decision created an analysis scale completely disconnected from the phenomenon scale, despite the obvious conditions on the ground. Even though the Supreme Court's Article III cases and controversies jurisprudence may have mandated such a decision, the fact that the chosen scale of analysis could not address the phenomenon purportedly being analyzed does not change.

In a property context, this disconnect between analysis scale and phenomenon scale is less apparent but no less significant. And it is directly connected to the rights-privileges distinction. As the *Pennaco* leasing decision demonstrates, legal disputes often focus on an arbitrarily limited analysis scale, without any explicit (or even implicit) consideration of the appropriate phenomenon scale.¹⁴³ In many cases, arbitrary jurisdictional boundaries require legal analyses without the benefit of understanding and using an appropriate cartographic scale.¹⁴⁴ Unfortunately, for the typical landowner facing undesirable land-use regulation, this discussion misunderstands the role that scale plays in determining the rhetorical landscape, and in many cases, the political (if not legal) outcome. For that aggrieved landowner, the analysis scale *is* the phenomenon scale: the perceived effect on the individual landowner is all that matters—there is no other broader phenomenon to consider.

That characterization of the *claimed* phenomenon scale of land-use disputes makes the right-privilege distinction somewhat difficult to tease out in

141. See Wyoming Outdoor Council, et al., 153 I.B.L.A. 379, 380-81, 389-90 (Oct. 6, 2000).

142. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (requiring a "description of concrete plans" to visit the specific location where the harm would occur); see also *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1152 (2009) (requiring plaintiffs to demonstrate specific connections to specific parcels of land where the Forest Service's salvage timber sale procedures would cause legal harm).

143. Without using this language, Judge Posner describes how judges engage in both analysis scale and phenomenon scale decision making as they balance the various desirable policy outcomes relevant to a particular case, e.g., that the specific outcome be fair, that the outcome in the specific case be consistent with broader policy concerns, that the outcome be consistent with previous decisions, etc. See RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 64 (2003).

144. For a classic treatment of this issue, see WALLACE STEGNER, *BEYOND THE HUNDRETH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST* 274-82 (Penguin Books 1992) (1954).

individual controversies. But it also demonstrates the rhetorical value in making that distinction. The usefulness of Hohfeld's property interests lies in the explicit recognition of correlatives—that each property interest is defined by its relationship to affected interests. The independent, isolated landowner holding steadfastly to his “right” in opposition to the Leviathan need not consider the effect of that right on his neighbor, at least not beyond the somewhat abstract reasoning that his right benefits the community in the sense that we are all better off if we have similar, isolated rights. At this scale, with its focus on the individual as individual (rather than as member of a community), there are no other actors, save for the Leviathan. The only possible way to understand property is in a libertarian state of “use however the owner sees fit,” subject only to the very minimum regulation necessary to ensure a functioning civil society: “[t]he private rights of individual relationships are thereby preserved as much as possible even after the formation of civil society, modified only to secure the internal and external peace for which the political power is necessary.”¹⁴⁵

But an appropriate phenomenon-scale approach that properly incorporates the off-parcel effects of particular activities makes it more obvious that we need another way to complete our understanding of the property interests at issue. The phenomenon-scale approach necessarily recognizes that there are *competing* property interests, with the Leviathan nowhere to be found.¹⁴⁶ Without the Leviathan, the only way to make sense of the relationship is to focus on the effect on the adjoining landowner. But for the adjoining landowner who suffers from the odors of a stockyard, for example,¹⁴⁷ identifying legal interests possessed by the stockyard operator is pointless. What would those legal interests represent if not the ability to cause harm to the neighbor? The focus then moves, appropriately, to the fact that it is not the stockyard operator that has a legally protected right to operate the stockyard, but rather the neighbor who *lacks* a legally-protected right to prohibit operation of the stockyard.

That is not to say that the stockyard operator does not possess a legal interest. Upon recognizing that the stockyard neighbor has “no right” to prohibit its operation, it is clear that the stockyard operator's legal interest is a privilege. At this point, the situation begs a simple question: which land-use activity should the community allow? The community can either choose to

145. Epstein, *supra* note 45, at 12-13.

146. The trained and domesticated Leviathan—the community—is, of course, the ultimate enforcer of the property interest. But assuming an enforcement mechanism, we do not need the Leviathan to understand the nature of the interest to be enforced.

147. For a classic example of a nuisance case, see *Spur Industries, Inc. v. Del E. Web Development Co.*, 494 P.2d 700 (Az. 1972).

prefer the stockyard, and formalize the privilege and neighbors' absence of any right to stop it. Or the community can choose to prefer the stockyard-free condition, without the odors and other negative effects of its operation. And the choice made might vary over time in the same place, depending on the nature of the interests involved.¹⁴⁸ What should be clear about this situation is that nothing inherent in the land, nor in the landowners, recommends or requires either outcome.¹⁴⁹

IV. COMPETING "RIGHTS" AND THE RHETORIC OF BEACH SAND

The primary relevance of the distinction between rights and privileges is in its effect on the stories the parties (and the community) create as they go about articulating the future that describes the best outcome to a particular conflict. Consider again the two neighbors, one with the smelly stockyard and the other in his or her pristine (or ideally so) rural retreat. Assume both arrived and began their competing uses simultaneously. Negotiations over the years have failed, and the rural retreat neighbor, finally fed up with the smells and "nuisance," appeals to a sympathetic board of county commissioners. After appropriate study, and consistent with duly enacted local land-use plans, the commissioners choose to prohibit stockyards in this particular area. The stockyard operator challenges the outcome. What result?

In the ideal rhetorical world I am proposing, a court would balance the various interests articulated by the community, assess the process used to reach the community decision, potentially require or approve some form of amortization,¹⁵⁰ and approve the rezone. What the court should *not* do, in this

148. See, e.g., *Spur Industries*, 494 P.2d at 707-08. While the Arizona Supreme Court required indemnification on the facts of this case, it also recognized that under certain circumstances, particularly the normal expansion of an urban area into an agricultural area, the privilege of operating the stockyard might change to a duty not to operate the stockyard, without the payment of compensation, either by a private claimant or the government. *Id.* As the U.S. Supreme Court noted almost a century ago, "a vested interest cannot be asserted against it because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way, they must yield to the good of the community." *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915).

149. For another approach to this same issue involving different property interests, see Freyogle, *supra* note 54, at vii-x (discussing *Lenk v. Spezia*, 213 P.2d 47 (Cal. Ct. App. 1949)).

150. Because changes in land-use regimes often affect significant investments in existing businesses or installations, many state and local governments allow the elimination of the now non-conforming uses or installations with amortization of that investment over a period of time before the use must finally cease. See Mandelker, *supra* note 128, at § 5.82; Juergensmeyer & Roberts, *supra* note 24, § 4.39, at 122-23.

context, is assume that the stockyard operator already possesses “rights” to operate the stockyard. But most courts begin with an assumption of rights. One compendium of land use law, in a section titled “Rights of Property Owners,” notes that “[i]n the adoption of zoning changes, consideration generally must be given to the rights of the individual landowner of the property involved, as well as the interests of adjoining landowners and others.”¹⁵¹ Whether a right exists is the very question being asked, but courts regularly start with an assumption of rights and proceed from there.

An explicit component of this discussion is the recognition that legitimate interests can conflict. In the Coasean parable, the rancher’s interests in raising beef conflicts with the farmer’s interests in raising crops.¹⁵² Coase recognized that the “cost of exercising a right . . . is always the loss which is suffered elsewhere in consequence of the exercise of that right[.]”¹⁵³ Coase, “above all,” recommended that the assignment of legally-protected property interests, or the creation or evolution of social arrangements that govern the assignment or exercise of those interests, take into account both the gains and losses that would result from any particular assignment:

It would clearly be desirable if the only actions performed were those in which what was gained was worth more than what was lost. But in choosing between social arrangements within the context of which individual decisions are made, we have to bear in mind that a change in the existing system which will lead to an improvement in some decisions may well lead to a worsening of others. Furthermore we have to take into account the costs involved in operating the various social arrangements (whether it be the working of a market or of a government department) as well as the costs involved in moving to a new system. In devising and choosing between social arrangements we should have regard for the total effect. This, above all, is the change in approach which I am advocating.¹⁵⁴

For our purposes, Coase is important because of his focus on the moment when property interests are initially ordered and assigned.¹⁵⁵ More important is his focus on the positive and negative effects of particular assignments and his recognition that property “rights” are the result of a specific choice to prefer one setting or circumstance over another.¹⁵⁶ Coase’s farmer and rancher were

151. 101A C.J.S. Zoning & Land Planning § 71 (2005).

152. Coase, *supra* note 19.

153. *Id.* at 44.

154. *Id.*

155. *See id.* at 2.

156. *Id.*

not arguing about which one had the *greater* legally-protected property interest.¹⁵⁷ Rather, they were arguing about who should have *the only* legally-protected property interest in this context—either the rancher had the duty to keep his cows from trespassing by building a fence (and the farmer a correlative right to be free from the cows), or the farmer had no right to require the rancher to build a fence to control the cows (and the rancher had the correlative privilege to let his cows wander).¹⁵⁸ In this context, the notion of “conflicting rights” does not make much sense. It is the *assertions* of rights that conflict, not the boundary between the legal interests that are ultimately assigned. Once a right is assigned, its boundaries are established, and there should be no conflict remaining—that is the very purpose of the decision to assign the right. But what happens when a court, particularly the Supreme Court, talks of “subordinate” rights?

A. *Conflicting “Rights” in Stop the Beach Renourishment*

In 2010, the United States Supreme Court issued a decision specifically addressing how we define various, potentially competing, property interests.¹⁵⁹ While most of the commentary on that case has focused on the application of the Fifth Amendment’s takings clause to judicial decisions,¹⁶⁰ for the purposes of this article, the decision’s most interesting aspect is how the Court described the property interests at stake in the context of articulating who owns those interests. With apparently little concern for the consequences of particular word choices, the Court ignored more useful and accurate means of describing the conflict before it, adding both semantic and practical confusion to an already complicated dispute.¹⁶¹ To be sure, the Florida Supreme Court initiated the confusion, but the U.S. Supreme Court unnecessarily continued it.¹⁶²

The dispute before the Court required consideration of the two simple questions that arise in the first few weeks of a first semester Property law

157. *Id.*

158. *Id.*

159. *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Env’tl. Prot.*, 130 S. Ct. 2592, 2597-98, 2611 (2010).

160. *See, e.g.*, Eduardo M. Peñalver & Lior Jacob Strahilevitz, *Judicial Takings or Due Process?*, 97 CORNELL L. REV. 305, 306 (2012); D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. RICH. L. REV. 903, 903-04 (2011); Ilya Shapiro & Trevor Burrus, *Judicial Takings and Scalia’s Shifting Sands*, 35 VERMONT L. REV. 423, 424 (2011). *But see* Richard A. Epstein, *Littoral Rights Under the Takings Doctrine: The Clash Between the Ius Naturale and Stop the Beach Renourishment*, 6 DUKE J. CONST. L. & PUB. POL’Y 37 (2011).

161. *Walton Cnty. v. Stop Beach Renourishment, Inc.*, 998 So. 2d 1102, 1111 (Fla. 2008), *aff’d sub nom.*, 130 S. Ct. 2592 (2010).

162. *See id.*

course.¹⁶³ First, and most comfortable to most current or prospective landowners, whether lawyers or not, is the question of *who* owns a particular piece of land—a newly created strip of beach.¹⁶⁴ Second, and more important, is the question of what it means to own something.¹⁶⁵ The Court did not, and of course could not, shy away from this second question, because even after determining that the State of Florida owned the new strip of beach, it had to determine what that ownership meant in relationship to the equally valid ownership of the neighboring piece of dry land.¹⁶⁶ But it was on this point that the Court failed to heed or understand the advice of Holmes, Coase and others—including, of course, Hohfeld—that it is the relationship that determines the property interest, not the assumed property interest that determines the relationship.

The beaches near the City of Destin in Walton County, Florida suffered significant cumulative erosion due to Hurricanes Erin and Opal in 1995, Hurricane Georges in 1998, and Tropical Storm Isidore in 2002.¹⁶⁷ Florida enacted the Beach and Shore Preservation Act in 1986,¹⁶⁸ having recognized that “beach erosion is a serious menace to the economy and general welfare of the people of this state.”¹⁶⁹ This Act authorized local units of government to request permission to use Florida’s sovereign lands (those lands seaward of the mean high water line) for the renourishment of critically-eroded beaches.¹⁷⁰ In 2003, after a series of studies and construction design conferences with the Florida Department of Environmental Protection (“DEP”), Walton County and the City of Destin requested permits for coastal construction and use of Florida

163. *See supra* Section 2.

164. *See Walton*, 998 So. 2d at 1111.

165. *See id.*

166. *See id.*

167. Unless otherwise noted, the facts of the case are taken from the original district court opinion, *Save Our Beaches, Inc. v. Florida Dept. of Env'tl. Prot.*, 27 So. 3d 48, 50 (Fla. Dist. Ct. App. 2006), *decision quashed sub nom. Walton Cnty. v. Stop Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008), *aff'd sub nom. Stop the Beach Renourishment, Inc. v. Fla. Dept. of Env'tl. Prot.*, 130 S. Ct. 2592 (2010); *see also* Consolidated Notice of Intent to Issue Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands, *Stop the Beach Renourishment, Inc. v. Florida Dept. of Env'tl. Prot.*, 130 S. Ct. 2592 (2009) (No. 08–1151), 2009 WL 2576003 [hereinafter Notice of Intent].

168. *See* Fla. Stat. § 161.011 (2012).

169. Fla. Stat. § 161.088.

170. *See, e.g.*, Fla. Stat. § 161.041.

sovereign lands to renourish 6.9 miles of beach.¹⁷¹ In 2005, the Florida DEP granted the permits.¹⁷²

In Florida, the owners of land abutting navigable waters, or waters subject to the ebb and flow of the tide, possess certain property interests that depend in varying degrees on the particular parcel's relationship to other parcels.¹⁷³ These interests include the ability to access the water, and the ability to obtain certain interests in new land that accretes or relicts to the littoral property.¹⁷⁴ The Florida Supreme Court described these interests as follows: "upland owners hold several special or exclusive common law littoral rights: (1) the right to have access to the water; (2) the right to reasonably use the water; (3) the right to accretion and reliction; and (4) the right to the unobstructed view of the water."¹⁷⁵ The Florida court went on to describe these rights as being "such as are necessary for the use and enjoyment of the upland property, but these rights may not be so exercised *as to injure others in their lawful rights*."¹⁷⁶

The U.S. Supreme Court adopted the Florida court's basic understanding of the dispute, both in terms of the property interests at stake, and the manner in which those property interests interact. The Court noted that the first "core principle" of Florida law was that "the State as owner of the submerged land adjacent to littoral property has the *right* to fill that land, so long as it *does not interfere with the rights* of the public and the rights of littoral landowners."¹⁷⁷ The Court further described the conflict as being a question of which rights were subordinate.¹⁷⁸ Thus, "Florida law as it stood before the decision below allowed the State to fill in its own seabed, and the resulting sudden exposure of previously submerged land was treated like an avulsion for purposes of ownership. The right to accretions was therefore *subordinate* to the State's right to fill."¹⁷⁹

While it might seem useful initially to characterize this conflict as a question of which "rights" were better, or more important, or superior in a given context, that characterization is somewhat illogical. This approach

171. Notice of Intent, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (No. 08-1151), 2009 WL 2576003 (2009).

172. *Id.*

173. *Save Our Beaches v. Fla. Dep't. of Env'tl. Protection*, 27 So.3d 48, 57 (Fla. Dist. Ct. App. 2006).

174. *Id.*

175. *Walton Cnty. v. Stop Beach Renourishment, Inc.*, 998 So. 2d 1102, 1111 (Fla. 2008) *aff'd sub nom.*, 130 S. Ct. 2592 (2010).

176. *Id.* (citations and internal quotation marks omitted) (emphasis added).

177. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2611 (emphasis added).

178. *Id.* at 2611-612.

179. *Id.* at 2611 (emphasis added).

misunderstands the meaning of the word “right” in a legal context, and complicates, rather than facilitates, reaching an appropriate final outcome. Perhaps more significant, this approach also misunderstands the meaning of the word “right” in a non-legal context. For many people in this country, the notion that the government might have “rights” that are *superior* to the rights of an individual would seem nonsensical. These same people would argue that the very purpose of a legal right is to establish a boundary between various potentially competing interests. If I have a right in some setting, necessarily, no other interest holder has a superior right in the same setting.

Yet at the same time, the notion that two adjoining landowners might have competing interests is both widely understood and accepted by the public and legal communities alike.¹⁸⁰ The law is but a reflection of public habit, and legal principles like nuisance reflect an engrained public understanding that freedoms can be limited in the event they cause harm. But describing this understanding as competing *rights* does not adequately represent that inherent understanding. In *Stop the Beach Renourishment*, the state’s rights end where the private landowner’s rights begin; there is no overlap, subordination, or competition between “rights.” While the Court’s holding may have been the same, the Court’s analysis, and the public’s understanding of and respect for it, would have been simplified had it recognized this fact.

But perhaps more significant, we do not need a Hohfeldian understanding to appreciate the problems with the Court’s “subordinate” rights rhetoric. The crucial question in *Stop the Beach Renourishment*—from a property-interest perspective—was not which landowner had the “greater” right, but rather whether the legal consequences of a specific factual occurrence—an avulsion—would extend to an avulsion that occurred artificially. In other words, the issue was how to define “avulsion.” If an avulsion had occurred, the littoral landowner had no rights to the land under long-standing riparian law.¹⁸¹ Once the Supreme Court determined that the state’s act of filling its sovereign lands would be—and always had been, for legal purposes—treated as an “avulsion” for property-allocation purposes, the case’s primary dispute had been resolved, and it need not have stated, in the next sentence, that the littoral landowners rights were “subordinate” to the state’s right to fill.¹⁸² It is unnecessary to compare hypothetical rights in two discrete factual scenarios—avulsion and accretion—that cannot happen at the same time in the same place.

180. This understanding is the foundation of the classic limitation on property: “sic utere tuo ut alienum non laedas.” See David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. COLO. L. REV. 497, 502 (2004).

181. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2611.

182. *Id.*

Returning to the Hohfeldian frame, the state's "right to fill" was not a right at all, but rather a privilege to fill, with the correlative lack of right to prevent the fill in the littoral landowners. Put another way, according to Florida law, the littoral landowners have no right to prevent "avulsions"—whether natural or not—so as to protect access to some potential accretion in the future.¹⁸³ The "right to accretions" does not extend that far.¹⁸⁴ The landowners have a right to access the water, with Florida's correlative duty not to impede that access, but that right is not affected by the State's privilege interest in avulsions—a privilege which does not extend to impeding access.¹⁸⁵ In other words, it is possible to describe the entirety of property relations in the dispute without resorting to a rhetoric of "subordinate" or conflicting rights.

B. *Miller v. Schoene: Avoiding the Conflicting "Rights" Minefield*

Courts have not always struggled rhetorically with conflicting property interests. In the classic property case *Miller v. Schoene*, the United States Supreme Court faced a Coasean dispute in which it had to assess the validity of a community's choice to prefer one property setting over another—specifically, a decision to assign a property right to one type of interest rather than to recognize and continue a legitimate privilege in another.¹⁸⁶ Rather than offering a confusing discussion of competing or subordinate "rights," the *Miller v. Schoene* Court assessed the conflict for what it was: a community's choice about what types of land uses and harmful effects it should allow.¹⁸⁷ *Miller v. Schoene* might be an anomaly in a history of rights rhetoric, but it demonstrates how a more careful consideration of property interests and relationships facilitates dispute resolution.

The conflict was relatively simple. The Red Cedar Tree,¹⁸⁸ indigenous to the eastern United States, is host to the cedar-apple rust, a fungal plant

183. This is the basic holding of *Stop the Beach Renourishment*, recast in Hohfeldian terms. *See id.* at 2612.

184. *See id.* at 2611.

185. Again, this is the Court's basic holding recast in Hohfeldian terms. *See id.* at 2611-12.

186. *Miller v. Schoene*, 276 U.S. 272, 279 (1928).

187. *Miller v. Schoene* has been the subject of a number of law review articles assessing or criticizing the property assignment choice identified here. *See generally* Warren J. Samuels, *Interrelations Between Legal and Economic Processes*, 14 J. LAW & ECON. 435 (1971); *see also* James M. Buchanan, *An Alternative Interpretation of Miller et al. v. Schoene*, 15 J. LAW & ECON. 439, 451 (1972).

188. The eastern red cedar tree is not a cedar at all, but is rather a type of juniper, *Juniperus virginiana*. It is named a "cedar" because early settlers confused it with European

disease.¹⁸⁹ While the fungus does not significantly harm the cedar tree, the fungus does harm its co-host, the apple tree.¹⁹⁰ The rust requires both trees to survive, overwintering on the cedar and infecting the apple in the summer.¹⁹¹ Unfortunately, the rust causes substantial harm to apple trees, causing premature defoliation of the leaves and small, misshapen, and marked fruits.¹⁹² The fungus's two-host requirement suggests a straightforward method of control: separate the trees.¹⁹³

In the early twentieth century, apples were an important agricultural product in Virginia.¹⁹⁴ Due to the economic harm the cedar-apple rust might cause, the Virginia legislature enacted the "Cedar Rust Act" in 1914.¹⁹⁵ The Act made it illegal to "keep alive and standing" any cedar or other tree infected by the rust.¹⁹⁶ The Act further declared all such trees within a specific distance of an apple orchard to be a public nuisance, and authorized the State Etymologist to order the destruction of any infected cedar trees within two miles of an apple orchard, under certain conditions.¹⁹⁷ The Act did not require any reimbursement of the value of the infected cedar tree: "Neither the judgment of the court nor the statute as interpreted allows compensation for the value of the standing cedars or the decrease in the market value of the realty caused by their destruction whether considered as ornamental trees or otherwise."¹⁹⁸

Given the authorization to destroy trees without compensation, *Miller v. Schoene* is unsurprisingly about the claim of a landowner that the Cedar Rust Act violated the Fourteenth Amendment by depriving him of property without due process of law.¹⁹⁹ What might be surprising, at least to modern observers

cedars based on a hope that it might have the same economic value. See WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND*, 9 (2003).

189. For a contemporary discussion of the cedar-apple rust and its effect on apple trees, see James LeRoy Weimer, *Three Cedar Rust Fungi. Their Life Histories and the Diseases They Produce*, 390 CORNELL UNIV. AGRIC. EXPERIMENT STATION BULL. 509 (May 1917).

190. Ronald H. Peterson, *The Rust Fungus Life Cycle*, 40 BOT. REV. 453, 454 (1974).

191. See *id.* at 456-57.

192. *Miller*, 276 U.S. at 278.

193. "The only practicable method of controlling the disease and protecting apple trees from its ravages is the destruction of all red cedar trees, subject to the infection, located within two miles of apple orchards." *Id.* at 278-79.

194. *Id.* at 279.

195. See *id.* at 278.

196. *Id.* at 277.

197. *Id.* at 278.

198. *Id.* at 277.

199. *Id.*

of land-use disputes, is that the Court never uses the phrase “property rights,” nor even the word “rights,” in analyzing the dispute. The Court instead recognized this conflict for what it was—the intersection of legitimate, but incompatible, property interests in which a “rights” rhetoric would be of little use. Prior to the emergence of the cedar rust in Virginia, no relationship existed between growers of cedars and apples trees that required any exploration of which might have a right relative to the other.²⁰⁰ At the moment the dispute arose, no rights existed for either party.

The most crucial aspect of this particular dispute is that it involved two incompatible property interests. Whatever the government chose to do—to act or not to act—would have harmed or eliminated one of those property interests.²⁰¹ It is this aspect of the dispute that is often ignored in similar modern disputes. The Court recognized that Virginia was

under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked.²⁰²

This choice exists whether the legislature or a court in a nuisance action is assigning or not assigning the right.

Most property disputes involve similar choices. Choosing to regulate water pollution, for example, limits to some extent the ability of the regulated landowner to use his or her property. But failing to regulate water pollution causes some harm to downstream landowners. This type of dispute is precisely the type that land-use or environmental regulation seeks to address. As the Court noted, “[w]hen forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public.”²⁰³ It is therefore the public interest, or “considerations of

200. See Buchanan, *supra* note 187, at 441 (acknowledging this point but criticizing the decision – and the legislative choice – from a law and economics perspective). Buchanan argues that the parties agreed that the cedar tree owners had a right (or more accurate, a privilege) to grow diseased trees notwithstanding the harm to apple growers. He bases this argument on the apparent lack of claims made by apple growers against cedar growers to cease the growing of diseased trees. See *id.* at 441, n. 8 and accompanying text.

201. *Miller*, 276 U.S. at 279.

202. *Id.*

203. *Id.*

social policy,” that determines the appropriate outcome to the dispute.²⁰⁴ It is not a pre-conceived and untested notion of “rights.” In this case, which “right” would be greater? The right of a landowner to have ornamental cedar trees, or the right of an orchard owner to have disease-free apples? If both are “rights,” how might we decide between the two?

Comparing *Miller v. Shoene* to *Stop the Beach Renourishment* suggests the Court has adopted (or continued) its own property rights rhetoric over the past century. But it is not just this most recent case that demonstrates the Court’s over-reliance on the rhetorical power of the word “right.” Particularly in land-use or regulatory takings cases, the Court habitually begins with an assumption of property rights before assessing what should be the more appropriate question: of two competing interests, which should we prefer and protect? Even when the property rights assumption is not explicit, the Court reveals its assumption in its approach to the issue.

For example, in *Lucas v. South Carolina Coastal Council*, the Court considered a state statutory regime that attempted to balance the development interests of private landowners with the state’s legitimate police power concerns regarding eroding barrier islands.²⁰⁵ By the 1980s, the negative effects of development on barrier islands and beaches were widely understood.²⁰⁶ Because natural beaches and shorelines are more durable than human-reinforced shorelines, the best approach to preserving those shorelines is to prohibit development.²⁰⁷ The South Carolina program, therefore, established a setback line and prohibited development on the seaward side of this line.²⁰⁸ Unfortunately for Mr. Lucas, he owned two lots within this new setback.²⁰⁹

Now two decades after the decision, hundreds of law review articles analyze its effect on regulatory takings jurisprudence, and several thousand

204. *Id.* at 280.

205. *See* 505 U.S. 1003, 1008 (1992).

206. *See* Robert Dolan & Paul Godfrey, *Effects of Hurricane Ginger on the Barrier Islands of North Carolina*, 84 GEO. SOC’Y AMER. BULL. 1329, 1331 (1973); J.G. Bartlett, D.M. Mageean, & R.J. O’Connor, *Residential Expansion as a Continental Threat to U.S. Coastal Ecosystems*, 21 POPULATION & ENV’T 429, 461 (2000); M.T. El-Ashry, *Causes of Recent Increased Erosion Along United States Shorelines*, 82 GEOL. SOC’Y AMER. BULL. 2033, 2033 (1971). *But see* Robert A. Morton, *Temporal and Spatial Variations in Shoreline Changes and Their Implications, Examples from the Texas Gulf Coast*, 49 J. SED. PETROLOGY 1101, 1108 (1979).

207. *See* Dolan & Godfrey, *supra* note 206, at 1331.

208. *See* Lucas, 505 U.S. at 1037-38 (Blackmun, J., dissenting).

209. *Id.*

more cite to the case in some fashion.²¹⁰ The case also appears in casebooks teaching property,²¹¹ environmental law,²¹² land use law,²¹³ constitutional law,²¹⁴ and perhaps others. The take-home message for law students is relatively simple: a regulatory provision that deprives a landowner of all economically beneficial use of his or her property is a categorical taking requiring compensation under the Fifth Amendment, *unless* the land use activity prohibited would not have been allowed under the particular state's background principles of property or nuisance law.²¹⁵ For my present purposes, the case is interesting not for the specific substantive outcome, but rather the manner in which the Court considered and communicated that outcome. From this perspective, the fundamental issue in cases like *Lucas* is not whether a complete deprivation of all economically beneficial use occurred, but rather how we should define the property interest at issue. In other words, the *Lucas* Court analyzed the case backwards: assuming a property right, identifying the effect of a regulation on that property right, and then, only after the fact, thinking about whether the landowner had any capacity to use the land in the proposed fashion to begin with. That is to say, the Court waited until after assuming a property right and analyzing the effect of a regulatory provision on that property right before it got around to determining—or rather, acknowledging that someone should determine—whether a property right existed in the first place. The Court did this even as it recognized that the “background principles” discussion is “the logically antecedent inquiry.”²¹⁶ While the substantive outcome might not change were a court to consider the logically antecedent inquiry first, the rhetorical effect would.

The *Lucas* approach is both conceptually and practically problematic. The practical problems are amply demonstrated in the wonderful (from a

210. Clicking the “citing references” tab above the case in WestlawNext reveals 1,548 cases and 4,482 secondary sources citing to the case.

211. JESSE DUKEMINIER, ET AL., PROPERTY, 1131 (7th ed. 2010); EDWARD H. RABIN, ET AL., FUNDAMENTALS OF MODERN PROPERTY LAW, 675 (6th ed. 2011).

212. ROBERT V. PERCIVAL, ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, & POLICY 739 (5th ed. 2006); DANIEL A. FARBER, ET AL., CASES AND MATERIALS ON ENVIRONMENTAL LAW 347 (8th ed. 2010).

213. JOHN R. NOLON, ET AL., LAND USE AND COMMUNITY DEVELOPMENT: CASES AND MATERIALS 421 (7th ed. 2008); ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 169 (3d ed. 2005); DAVID L. CALLIES, ET AL., CASES AND MATERIALS ON LAND USE 324 (5th ed. 2008).

214. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 517 (7th ed. 2004); DANIEL A. FARBER, ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY, 469 (3rd ed. 2003).

215. *Id.* at 473.

216. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

pedagogical perspective) case, *Palazzolo v. Rhode Island*.²¹⁷ In many ways, *Palazzolo* presented a perfect set of facts to push back against what the plaintiff (and his lawyers)²¹⁸ considered an overzealous regulatory state. Mr. Palazzolo had been attempting to develop his land in some fashion since 1962.²¹⁹ In a number of proposals over two decades, Mr. Palazzolo proposed filling approximately eighteen acres of coastal wetlands to allow construction of a beach club and subdivision.²²⁰ After Mr. Palazzolo initiated his proposal and received a few of the necessary government approvals, Rhode Island adopted a new coastal resource regime that prohibited the filling of the coastal wetlands on the Palazzolo parcel.²²¹

To the extent we discuss the Supreme Court's decision in public or in law school classrooms, our discussions tend to focus on two components of the case: the Court's determinations that (1) any remaining economically viable use—even if less than ten percent of the value of the landowner's proposed use—does not rise to the level of a “categorical taking under *Lucas*,” and (2) the mere passage of title after the effective date of a regulation does not bar a regulatory takings claim by creating a background principle of the state's law of property.²²² This last point was cause for some celebration among private property advocates:

Today, the U.S. Supreme Court decided the case of *Palazzolo v. Rhode Island*, handing a major victory to landowners and a defeat to state and local governments. This closely-watched case, in which a landowner has been fighting the state since 1962 to develop his beach-front property, has sustained national prominence. The outcome of the case helps define the boundary of permissible land use as regulated by individual states and the Federal government.²²³

217. 533 U.S. 606 (2001).

218. Mr. Palazzolo received legal and financial support at the Supreme Court from the Pacific Legal Foundation, a national property rights organization. See *About PLF*, PACIFIC LEGAL (Feb. 17, 2012), <http://www.pacificlegal.org/page.aspx?pid=262>.

219. For a chronology of the case up to 2001 (immediately following the Supreme Court's decision), see *Analytical Chronology of Palazzolo v. Rhode Island*, 30 B.C. ENVTL. AFF. L. REV. 171, 174 (2002-2003) [hereinafter *Analytical Chronology*].

220. *Id.* at 174-75, 178-79.

221. See *id.* at 174-75.

222. See, e.g., Michael C. Blumm, *Palazzolo and the Decline of Justice Scalia's Categorical Takings Doctrine*, 30 B.C. ENVTL. AFF. L. REV. 137, 138, 144 (2002); Carol Nicole Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims after Property Transfers*, 36 CONN. L. REV. 7, 13-14 (2003).

223. *Palazzolo v. Rhode Island; Regulatory Takings Case Decided in Favor of Landowner*, BUSINESS WIRE (June 28, 2001), available at

Of course, the Supreme Court's approach to any case is limited by the procedural history and factual determinations presented to it.²²⁴ On its surface, stripped of all the nuances and intricacies that make property disputes fascinating, the *Pallazolo* case might have seemed like a success for anti-regulation activists, particularly in its holding on the effect of post-acquisition regulatory enactments on the background principles determination.²²⁵ But we find the real significance of Mr. Palazzolo's claims *after* the case left the Supreme Court. On July 5, 2005, almost twenty years after Mr. Palazzolo first challenged Rhode Island's regulation of his land,²²⁶ and more than forty years after he first purchased the land, a Rhode Island Superior Court determined that based on the public trust doctrine and the state's background principles of property and nuisance law, Mr. Palazzolo *did not* have the property rights he claimed, and that his land would in fact likely be worth *more* to him after regulatory enforcement than without it.²²⁷ That determination should have come first, rather than last.²²⁸

A property-rights rhetoric was neither the sole nor primary cause of Mr. Palazzolo's unfortunate journey through our legal system. The original trial court may have made a key factual error regarding when Mr. Palazzolo

<http://www.thefreelibrary.com/Palazzolo+v.+Rhode+Island%3B+Regulatory+Takings+Case+Decided+in+Favor...-a075997773>.

224. "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court *shall have appellate Jurisdiction, both as to Law and Fact*, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2 (emphasis added).

225. Although to be sure, the case does *not* indicate that new statutory provisions can *never* affect a landowners legitimate expectations: "Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the Penn Central analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance." *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring).

226. See *Palazzolo v. Coastal Res. Mgmt. Council*, C.A. No. 86-1496, 1995 WL 941370, at *1 (R.I. Super. Ct. Jan. 5, 1995) (indicating that Mr. Palazzolo filed his initial complaint on April 3, 1986).

227. See *Palazzolo v. Rhode Island*, No. WM 88-0297, 2005 WL 1645974, at *7 (R.I. Super. Ct. July 5, 2005).

228. This is partly Mr. Palazzolo's doing, given his argument that the regulations deprived him of all economically beneficial use, and thus were a per se taking under *Lucas*. The trial court did have the opportunity to engage in a *Penn Central* analysis, but its review was somewhat cursory given its initial determination that Mr. Palazzolo's investment backed expectations were limited by the legislative enactment that allegedly occurred after he purchased the property. See *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707, 714-15 (R.I. 2000) *aff'd in part, rev'd in part sub nom.* *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

acquired the land.²²⁹ This error influenced its cursory *Penn Central* analysis.²³⁰ But even so, Mr. Palazzolo's experience does identify a potential problem with the *Lucas*-demonstrated habit of assuming property rights at the outset of our property-interest-allocating conversations. It is not that the initial rhetorical assumptions necessarily determine the outcome. There are many examples of cases—*Palazzolo* included—in which a court begins with a property-rights rhetoric but still upholds a “communitarian” allocation of property interests.²³¹ Rather, the property rights assumptions have the potential to increase our transaction costs by obfuscating the variety of legitimate interests at play in any given dispute, and particularly the legitimate property interests held by neighboring landowners and the community at large. A property-rights rhetoric is not only potentially anti-communitarian, but also inefficient and it complicates the formation and protection of the very property interests the rhetoric allegedly seeks to support. Nonetheless, our courts continue to follow this inefficient and ineffective path.

V. CONCEDEING BY EXAMPLE: HOW THE ACADEMY FAILS TO MODEL CLARITY

*Private property is in bad shape today,
not economically or politically, but rather intellectually.*²³²

Given our broader cultural trajectory, and the role of “rights” in explaining much of that trajectory, it is unsurprising that the land-owning public might prefer a rights-oriented rhetoric when discussing the proper role of the state in regulating the use of land. While we might expect more out of our court system, the idea that our judges and justices might eschew Hohfeldian nuance in favor of a rights rhetoric is also understandable. It was, of course, a lack of precision in contemporary jurisprudence that motivated Hohfeld in the first place.²³³ Perhaps more significant, courts also largely respond to—and adopt the language of—the arguments presented to them. It is that last point that is most troubling. Even those who are defending reasonable land-use regulation,

229. See *Analytical Chronology*, *supra* note 219, at 176.

230. See *Palazzolo*, 746 A.2d at 713.

231. For example, in *Graff v. Zoning Board of Appeals of the Town of Killingworth*, before upholding a somewhat ad hoc application of the town's accessory use provisions, the court begins by stating that “[b]ecause zoning regulations are in derogation of common-law property rights, they must be strictly construed and not extended by implication.” 894 A.2d 285, 291 (Conn. 2006).

232. Eric T. Freyfogle, *What is Land? A Broad Look at Private Rights and Public Power*, 58 *PLAN. & ENVTL. L.* 3, 3 (2006).

233. See Hohfeld, *supra* note 6, at 28.

and the “rights” of a community versus the individual, adopt a potentially self-defeating property-rights rhetoric. This is particularly concerning when those advocates are academics or other similarly-situated individuals with both the capacity and desire to influence the rhetorical landscape of the dispute. The use of a rights rhetoric by academics and activists concedes the rhetorical landscape to anti-regulatory advocates before a discussion of the appropriate allocation of interests can even begin. If the purpose of the academy is to provide the stories, explanations, or models that facilitate understanding, we might start by recognizing where our language has the potential to confuse.

In his classic work on ownership, A. M. Honoré identified eleven standard incidents that are present in the “liberal concept of full individual ownership.”²³⁴ Of the eleven incidents, eight are appropriately characterized as property interests consistent with the understanding of that term as used here.²³⁵ Two of those eight are correlatives of Hohfeld’s property interests, if not specifically recognized as such.²³⁶ Honoré characterizes his first six incidents as *rights*: to possess, to use, to manage, to the income, to the capital, and to security.²³⁷ Because Honoré claims to generally disagree with the Hohfeldian approach,²³⁸ it might seem unsurprising that he would not use property privileges, even where appropriate. But in *Ownership*, Honoré specifically and intentionally adopts the Hohfeldian understanding of property.²³⁹ He does so while simultaneously collapsing the interests into a rights short hand, saying, “[i]n this article I identify rights with claims, liberties, etc.”²⁴⁰ It is perhaps appropriate for Honoré, within a distinctly academic work, to use “rights” as a short hand for a much more nuanced understanding of property, and to leave the recognition of that rhetorical move to a footnote and a different work. But in other cases when the very purpose is to articulate a communitarian understanding of property, in which property interests can and should evolve over time and place in reaction to specific cultural or socio-ecological conditions, that rights short hand is much less appropriate.

234. A. M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107, 113-27 (A.G. Guest ed., 1961).

235. The remaining three incidents—transmissibility, absence of term, and residual character—largely reflect the “duration” of ownership addressed in estates in land and future interests concepts. *See id.* at 113-22.

236. *See id.* at 123. The incident of “the prohibition of harmful use” is better understood as a property duty, and the incident of “liability to execution” is just that, a liability that is correlative to a property power held by another.

237. *Id.* at 113-120.

238. Honoré, *supra* note 8, at 457 (“It seems preferable, therefore, to reject Hohfeld’s axioms.”).

239. *See* Honoré, *supra* note 8, at 113 n. 1.

240. *Id.*

If we understand property as a political or social construct,²⁴¹ it is appropriate to think about the specific political act that causes a particular property interest to emerge. For example, Professor Daniel Bromley argues that “property rights are not protected because they are, *a priori*, property rights. Rather, those settings and circumstances that gain protection by the Supreme Court acquire, by virtue of that protection, the status of property rights. A property right is not the cause of protection but rather its effect.”²⁴² In this understanding, it is only those circumstances that we *decide* to protect using the coercive power of the state that earn the title “right.” And if only specific social or cultural settings or circumstances might give rise to a right, new or changed settings or circumstances might justify reconsideration of those “rights.”

Given that understanding, the interesting component of Professor Bromley’s argument is not his perception of the Supreme Court’s role in determining what constitutes a property right,²⁴³ but his use of the word “right” itself. As suggested above, there are two very general strands of property theory in American academia: natural rights and social construct.²⁴⁴ The natural rights approach understands property as pre-existing social organization and thus, at some fundamental level, not subject to that organization’s regulation or control.²⁴⁵ Alternatively, the social construct understanding recognizes property as existing to serve societal ends, and thus subject to the regulation and control of that society.²⁴⁶ This understanding is neither new nor inconsistent with the ideas or ideologies that founded the United States. As Benjamin Franklin noted, “private Property therefore is a Creature of Society,

241. Not all property theorists are comfortable with this description of property. See, e.g., Robert P. Burns, *Blackstone’s Theory of the “Absolute” Rights of Property*, 54 U. CIN. L. REV. 67, 67, 70 (1985). However, because my specific focus is on the effects of language choices on our understandings of property, I will pass by natural rights theory for the moment.

242. Daniel Bromley, *This Land is Whose Land?* 48 WISC. ACAD. REV. 60, 63 (2002).

243. Ultimately, we find out what constitutes a property “right” when a local government changes its mind about what it will or will not allow. If it can take something away that it previously allowed, that use was not legitimately a “right.” But if the Supreme Court (or, obviously, a lower or state court) determines the local government cannot change its mind, the previously allowed use was, in fact, a property right. See, e.g., *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1031 (1992).

244. Given that even a natural rights approach requires some conversation and agreement about the appropriate structure and allocation of those “natural” rights, a natural rights approach is really just one form of a social construct. See, e.g., Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347 (1967).

245. See, e.g., EPSTEIN, *supra* note 45, at vii-viii; Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1554-55 (2003).

246. See FREYFOGLE, *supra* note 4, at 106.

and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing[.]”²⁴⁷

Professor Bromley is among those in this second category, recognizing that property is fundamentally social.²⁴⁸ More to the point, Professor Bromley adopts a “property relations” nomenclature to represent the “constellation of benefits that give [property] its empirical content.”²⁴⁹ Bromley’s purpose in adopting the property relations approach is specifically to achieve the clarity Hohfeld imagined.²⁵⁰ It is this aspect of his scholarship that is most curious: despite explicitly recognizing the value of Hohfeldian nuance, Bromley continues to describe our ongoing resource allocation discussions as being significantly about “rights.”²⁵¹

But Bromley is somewhat lonely in his explicit, if not pervasive, use of Hohfeldian correlatives to explain and understand property interests. Academics from a variety of disciplines ignore this potentially useful approach to discussing property in favor of a rights rhetoric that concedes the rhetorical landscape to anti-regulation advocates. Within the legal academy, there are a number of property theorists that maintain the “competing rights” approach. For example, Professor Freyfogle has written a number of books and articles that are works in property theory.²⁵² Each of these works approaches property from a Franklinian social benefit understanding of property.²⁵³ But

247. Benjamin Franklin, *Queries and Remarks on “Hints for the Members of the Pennsylvania Convention”* (Nov. 3, 1789) (unpublished), available at <http://franklinpapers.org/franklin/yale?vol=46&page=344>.

248. See BROMLEY, *supra* note 120, at 57.

249. *Id.* at 56.

250. *Id.* at 52-54. It says something about the traditional Property education in law school, or at least my participation in that course, that it was not until I took a class in Institutional Economics with Daniel Bromley – taken after I had graduated from law school and practiced law for several years – that I first heard about Hohfeld and his property correlatives.

251. See, e.g., DANIEL W. BROMLEY, *ENVIRONMENT AND ECONOMY: PROPERTY RIGHTS AND PUBLIC POLICY* (1990); Bromley, *supra* note 242, at 63 (suggesting that only “rights” are protected by government); Daniel W. Bromley, *Formalising Property Relations in the Developing World: The Wrong Prescription for the Wrong Malady*, 26 *LAND USE POL’Y* 20, 21 (2009) (“To have a right – a civil right, a contractual right, or a property right – is to have the capacity to compel some authority system to come to the defence [sic] of the specific interest associated with that right. To have a right is to have the ability to command the agents of government (or a similar authority structure) to come to your aid.” (internal citation omitted)).

252. See generally *id.*; FREYFOGLE, *supra* note 54.

253. See, e.g., FREYFOGLE, *supra* note 4, at 4 (describing approvingly Franklin’s understanding of the origins of private property); FREYFOGLE, *supra* note 54, at 10 (“Property is inherently a social institution.”).

notwithstanding this fundamental premise—that property begins and ends with the social arrangements that justify it—Freyfogle uses an exclusively rights-based rhetoric in making this argument.²⁵⁴

In criticizing claims that any inherent rights exist in property, Freyfogle bemoans the “muddled thinking about how the rights of one owner are restrained by the rights of neighbors and about how private property rights fit with the pursuit of the public’s well being.”²⁵⁵ It is certainly appropriate to address the role of a community in defining private interests in land, but in his criticism, Freyfogle demonstrates the same rights-based “muddled” thinking.²⁵⁶ For example, a few pages later he articulates the primary thesis of the book: “[p]rivate property, in fact, has been an evolving, organic institution with ownership *rights* that have varied greatly from era to era and place to place.”²⁵⁷ In response to legitimate concerns about the motivations for Oregon’s Measure 37,²⁵⁸ and the nationwide private property rights movement, Freyfogle proposed a “landowner’s bill of rights” to clarify the rights all landowners hold.²⁵⁹ But perhaps Freyfogle’s most interesting use of the rights rhetoric occurs when he argues that rights can and should change: “[l]egitimate changes in the prevailing laws of ownership—even new laws that fundamentally revise the rights and responsibilities of ownership—are proper and often necessary legal acts that *landowners simply must accept*.”²⁶⁰

Assuming the validity of a Hohfeldian approach, this language is both unintentionally careless and potentially counterproductive. As understood by much of the public, and certainly by property-rights activists, the phrase “property right” does not allow for evolving understandings subject to the whims of a given society, even if that is a widely recognized—if not accepted—argument in the legal academy.²⁶¹ As Holmes famously argued, “[t]he felt necessities of the time, the prevalent moral and political theories, [and] intuitions of public policy” are more important in identifying appropriate

254. FREYFOGLE, *supra* note 4, at 2.

255. *Id.*

256. *Id.*

257. *Id.* at 7 (emphasis added).

258. For a description of Measure 37, see, Micael C. Blumm & Erik Grafe, *Enacting Libertarian Property: Oregon’s Measure 37 and Its Implications*, 85 DENV. U. L. REV. 279, 308 (2007).

259. See Freyfogle, *supra* note 232, at 3, 9; see also FREYFOGLE, *supra* note 54, at 151-55.

260. FREYFOGLE, *supra* note 4, at 273.

261. There are a wide variety of cases outside of this specific context (property) in which the public has recognized that rights (or other legal interests) can and should change over time. But that acceptance of evolving legal interests has not visited property in the same fashion.

outcomes than notions of *a priori* and immutable laws or rules.²⁶² But as noted previously, for many people, rights, including importantly rights in land, are “natural.”²⁶³ They pre-exist the state and social society. They stand “as the bulwark of freedom from arbitrary government.”²⁶⁴ Property rights, in short, are the last line of defense against the Leviathan, and as such, cannot be diminished or altered by that Leviathan. The “felt necessities of the time” are irrelevant in this understanding.

The law is not alone in elevating “rights” in its interest-allocation decisions, as we find similar uses of “property rights” in related disciplines. Harvey Jacobs, a planning professor whose work focuses in large part on our understandings of property and the role of the state in its regulation, approaches property from a similar Franklinian perspective that property is a creature of society and subject to societal changes:

What’s important about this legal and economic conception of ownership is how it allows land to respond to changing social circumstances. If land is conceived of as a bundle of rights, then rights can be taken from or added to the bundle, and the very shape and content of those rights can change.²⁶⁵

This passage demonstrates simultaneously the mischaracterization of property interests of concern here, and the potential political consequences of that mischaracterization. Jacobs’ primary argument—that property interests can change over time as social or community values change—is legitimate and supported by the Supreme Court.²⁶⁶ But Jacobs’ characterization of these changing interests as “rights,” and the notion that “rights” can be taken from the bundle, and change over time, is again directly contrary to the widespread—if colloquial—understanding of what the word “rights” represents. To suggest that rights can be taken away is directly contrary to our understanding of what it means to possess a legally-protected right, and the argument thus immediately de-legitimizes itself with the community it must convince.

The use of a rights rhetoric places all of these arguments at a disadvantage at the discussion’s outset. If the conversation is about “rights,” then it is obvious to most participants how it *should* end. Proponents of reducing

262. HOLMES, *supra* note 87, at 1.

263. See *supra* notes 32-70 and accompanying text.

264. ELY, *supra* note 48, at 17.

265. JACOBS, *supra* note 54, at xi-xii.

266. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258-60 (1964) (adjusting a landowner’s “right to exclude” by prohibiting discrimination in allocated rooms in a hotel).

rights—as if any American would ever dare suggest such a thing—thus must find other rhetorical approaches that might overcome this initial deficit. Returning to Freyfogle, his recent efforts to connect land-use regulation to increased liberty are insightful.²⁶⁷ He begins with a summary of a common land-use dispute:

In the typical tale used to frame discussions about private property rights, an individual landowner is pitted in battle against a government regulatory body. The landowner wants to exercise her individual liberty by using her land in some way; the government body, desirous of promoting some public conservation goal, opposes the proposed land use and deploys a law to restrict it.²⁶⁸

As Freyfogle accurately notes, there are “countless” cases involving these basic facts.²⁶⁹ In each of them, the landowners perceive the two sides of the dispute largely as Freyfogle articulates it: the individual landowner claiming property rights on the one side, and the Leviathan seeking to take away those rights on the other.²⁷⁰ There is no question that the regulation of property both increases and decreases liberty, and it is worth discussing the various ways in which things that might be characterized as a taking of rights actually do more to increase liberty than restrict it. Although Freyfogle makes an effort to think more carefully about the various relationships in a property dispute, note again that the discussion begins with an assumption of property rights: “[t]he core component of private property, I argue, is not the right to use land, nor is it exactly the right to exclude. It is instead the right to halt interferences with one’s use of land.”²⁷¹

Even at our most practical, as legal actors or advisors seeking to affect real outcomes on the ground and avoid the effects of the property-rights meta-narrative, we still use a rhetoric that reinforces that narrative. For example, one mechanism to address the impacts of previous development or to reduce future development is to “down zone” remaining undeveloped land.²⁷² While local governments are free to reduce the potential capacity to develop a specific

267. Eric T. Freyfogle, *Property and Liberty*, 34 HARV. ENVTL. L. REV. 75, 75 (2010).

268. *Id.* at 77.

269. *Id.* at 77 n.6.

270. See Freyfogle, *supra* note 232, at 3, 5-6.

271. Freyfogle, *supra* note 267, at 78.

272. “Down zoning” occurs when an area is re-zoned to a less intensive or less dense use, e.g., from commercial to residential use, or from small lot residential zoning to relatively larger lot residential zoning. See, e.g., Mandelker, *supra* note 128, at § 6.36.

parcel, absent the recognition of some vested rights,²⁷³ those reductions in potential development capacity have significant political implications.²⁷⁴ In order to reduce the political impact of reducing development capacity through a zoning or other ordinance, in the 1960s, New York City implemented a density-transfer mechanism as part of its landmarks preservation law.²⁷⁵ This approach, now known generally as a “transfer of development rights” (“TDR”) program, spread across the country in the ensuing four decades.²⁷⁶ Described simply, a TDR program allows the development “rights” to be severed from a specific parcel and transferred to another parcel within a designated district, often through the use of a development rights “market.”²⁷⁷

As the U.S. Supreme Court demonstrated in *Penn Central Transportation Company v. City of New York*, the transfer of development rights was not strictly necessary to avoid paying compensation for the reduced development potential of a protected landmark.²⁷⁸ In fact, local governments are free to reduce development potential by often significant margins without creating a compensable regulatory taking: “several Supreme Court decisions suggest that diminutions in value approaching 85 to 90 percent do not necessarily dictate the existence of a taking [T]his court has likewise relied on diminutions well in excess of 85 percent before finding a regulatory taking.”²⁷⁹ In other words,

273. Landowners are not guaranteed the continuation of any particular zoning ordinance. But generally speaking, once a landowner relies on some affirmative governmental act, rights vest to develop land in a manner consistent with that act. *See, e.g., Avco Cmty. Developers, Inc. v. S. Coast Reg'l Comm'n*, 553 P.2d 546, 550 (Cal. 1976), *superseded by statute*, CAL. GOV'T CODE § 65864 (West 2009).

274. *See* Hershel J. Richman & Lane H. Kendig, *Transfer Development Rights—A Pragmatic View*, 9 URB. LAW. 571, 571 (1977) (acknowledging that TDR programs emerged in part to avoid regulatory takings problems).

275. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Pruetz and Pruetz suggest that New York initiated a now four-decades long trend of “transfer of development rights” programs. *See* Rick Pruetz & Erica Pruetz, *Transfer of Development Rights Turns 40*, 59 PLAN. & ENVT'L. L. 3, 3 (2007). Nelson et al. suggest that New York City created the first transfer of development rights program in its original 1916 zoning ordinance. *See* ARTHUR C. NELSON ET AL., *THE TDR HANDBOOK: DESIGNING AND IMPLEMENTING SUCCESSFUL TRANSFER OF DEVELOPMENT RIGHTS PROGRAMS* 3 (2012).

276. *See* Pruetz & Pruetz, *supra* note 275, at 3; Jennifer Frankel, *Past, Present, and Future Constitutional Challenges to Transferable Development Rights*, 74 WASH. L. REV. 825, 829-30 (1999); Richman & Kendig, *supra* note 274, at 571 (“The Transfer of Development Rights (TDR) has exploded on the planning scene.”); Frank Schnidman, *Transferable Development Rights: An Idea in Search of Implementation*, 11 LAND & WATER L. REV. 339, 367 (1976); NELSON, *supra* note 275, at 3.

277. NELSON, *supra* note 275, at 3; *see also* Mandelker, *supra* note 128, at § 11.38.

278. *See Penn*, 438 U.S. at 125.

279. *Walcek v. United States*, 49 Fed. Cl. 248, 271 (2001), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002) (internal citations omitted).

only very significant down zoning would run into constitutional problems. Why then do transfer of development *rights* programs begin with an assumption of development *rights*? In attempting to avoid the political problems associated with land-use regulation, TDR advocates only reinforce the rights rhetoric that makes the program necessary in the first place.

Some of the more careful considerations of property's triadic nature (i.e., "thing," owner, and community) fall back on the rights rhetoric, at least to some limited extent. For example, Professor Arnold's thorough and useful critique of the dominant "bundle of rights" metaphor focuses not on criticizing our understanding of property as predominantly a suite of rights, but rather on the potential for the Hohfeldian understanding of the rights-duty correlative to ignore the "thingness" of property.²⁸⁰ Arnold critiques the bundle of rights metaphor for perpetuating a dyadic understanding of property, but not the owner-thing dyad criticized throughout this article.²⁸¹ Instead, Arnold's dyad is between the owner and the duty-obligated community, ignoring the "thing" that is the ultimate reason for the relationship.²⁸² Arnold suggests we would be better off—better able to take care of, preserve, or protect the land—if we could think and talk more like the "amateur" property theorist (i.e., the typical American property owner) who focuses on property as "thing-ownership" rather than relationship.²⁸³

From an ecological perspective, the focus on a "web" of interests, and the inclusion of the "thing" (e.g., land) within that web, has the effect of turning the focus from the individual to the consequences of that individual's actions on her socio-ecological community. This focus on developing an at least triadic understanding of property as a "web of interests" is therefore warranted, useful, and consistent with the general thrust of the rhetorical argument presented herein. But the characterization of the new metaphor as a "web of rights"²⁸⁴ is less useful. Again, my critique is not substantive, and I agree with Arnold's Leopoldian argument that all parts of the property triad have legitimate interests that must be respected. Arnold's use of "web of interests" as a metaphor successfully communicates the value of that substantive argument. But the potential trouble lies in characterizing the new metaphor as "an image of property that enables us to see the objects of our *rights*, responsibilities, and relationships, as well as the shared, interconnected nature of those relationships

280. Reconstitution, *supra* note 4, at 297; *see also* Penner, *supra* note 8, at 714.

281. *See supra* notes 32-70 and accompanying text.

282. Reconstitution, *supra* note 4, at 297.

283. *See id.*

284. *See id.* at 346, 364. Professor Arnold elsewhere relies on the "web of interests" metaphor. *Id.* at 281, 364.

with regard to objects.”²⁸⁵ This return to a rights-duties approach, and particularly our cultural difficulty with recognizing that land might itself have “rights,” risks subsuming the value of the “web” metaphor and continuing the individual-versus-Leviathan understanding of rights that plagues property rights discourse.

Arnold is not alone in his efforts to re-imagine our property conversations.²⁸⁶ But similar efforts to recast the property rhetoric in a fashion that might have real effects on the ground also misunderstand the potential problems with continuing the rights rhetoric. In their “Property Frames” approach, Professors Nash and Stern address directly the capacity of particular initial property descriptions to influence a property holder’s willingness to accept later rights limitations.²⁸⁷ Nash and Stern present empirical evidence that “rights perceptions,” and specifically the reaction to later “rights infringement,” varies depending on how the property rights were originally characterized and understood.²⁸⁸ The authors conducted experiments comparing the consequences of two rhetorical options for describing the same suite of interests: a “discrete-asset” approach that focused on ownership of a specific thing,²⁸⁹ and a “bundle of rights” approach that described a suite of *rights* in the thing.²⁹⁰ Nash and Stern describe the bundle of rights understanding as originating, in part, as an effort by legal realists “to depict property as limited, flexible rights capable of ceding to social needs and obligations.”²⁹¹ The “discrete-asset” understanding is more similar to the Blackstonian “sole and despotic dominion”²⁹² over a single, unified thing, rather than a combination of disaggregable interests. The discrete-asset understanding is thus more “absolute” than the bundle of rights understanding.

Nash and Stern determined that when property interests were characterized as a bundle of rights rather than a discrete asset, the property owner was more likely to accept subsequent limitations or infringements on those rights,

285. *Id.* at 364 (emphasis added).

286. *See generally* Nash & Stern, *supra* note 2; Nash, *supra* note 2.

287. *See generally* Nash & Stern, *supra* note 2; Nash, *supra* note 2.

288. *See* Nash & Stern, *supra* note 2, at 471-79 figs. 1-3.

289. “[T]he student would ‘have ownership and control of the laptop and, among other things, [could] use, possess, and enjoy the laptop, exclude others from using the laptop, and transfer the laptop.’” *See* Nash & Stern, *supra* note 2, at 467 (first alteration added).

290. “[S]tudents would ‘own a set of rights to the laptop. These rights include, among other things, the right to use, possess, and enjoy the laptop, the right to exclude others from using the laptop, and the right to transfer your rights in the laptop.’” *Id.*

291. *Id.* at 455.

292. *See* BLACKSTONE, *supra* note 35, at 2; *see also* HONORÉ, *supra* note 234, at 108 (describing ownership – in one sense – “as the greatest possible interest in a thing which a mature system of law recognizes”).

particularly where the potential for such infringement was described in advance.²⁹³ This empirical work reinforces the value of a more accurate description of property interests and relations, even as it retains a “rights” approach. To be sure, in their “bundle of rights” approach, the word that matters is “bundle” rather than “right.” In this sense, Nash and Stern are most of the way toward the Hohfeldian “bundle of interests”—and specifically the bundle of privileges—that would allow for a more complete understanding of property. But insisting on the use of “rights” to characterize the property interests retains the individual-versus-Leviathan “frame” for understanding property.

Returning to Honoré to close my critique of the academy, we find a final example of how our property rhetoric unnecessarily detracts from a richer understanding of property as one component of a larger cultural conversation, albeit not directly in the “rights” context that has been discussed so far. In this case, it is Honoré’s use of the word “prohibition” rather than “duty” to describe his ninth property incident.²⁹⁴ Consistent with the individualist’s understanding of property rights as being a bulwark against the Leviathan, characterizing the obvious and necessary boundaries of our property interests as “prohibitions” again calls to mind the image of property existing on this boundary between individual and governmental power. As Honoré’s examples make clear, his ninth incident identifies those circumstances in which a property owner has duties that he or she owes to his or her neighbors or community.²⁹⁵ Of course, this means that the neighbors, or the community, possess *rights* relative to that individual’s private property.²⁹⁶ Understanding this relationship from a Hohfeldian perspective allows again for a focus on how particular interests in land might affect the community within which those interests arise. But Honoré’s focus is on the individual, refusing to acknowledge that *non-owners* can in fact possess rights in their neighbors’ property.

The academy exists because our cultural settings have identified it as that group of particularly specialized or educated individuals best able to identify and explain truth claims. But if those truth claims are to be accepted as truth *in*

293. See Nash & Stern, *supra* note 2, at 471-79.

294. HONORÉ, *supra* note 234, at 123.

295. See *id.* This notion is of course inherent in nuisance actions, which require the identification of a specific duty on the part of a particular landowner, e.g., the affirmative duty not to cover your neighbor’s house with dust. See *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 871 (N.Y. 1970).

296. There is a growing literature arguing for a more careful focus on the *responsibilities* that accompany ownership of land. This notion is consistent with my characterization of ownership *duties* here. See, e.g., Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 747-48 (2009); Reconstitution, *supra* note 4, at 303-06; FREYFOGLE, *supra* note 4, at 273.

fact, they must provide some legitimate and useful explanatory power to the cultural settings that requested the truth claims in the first place. There is a distinction between what the academy identifies as a warranted belief—the settled belief of a particular group of disciplinary adherents—and what a community identifies as a *valuable* belief.²⁹⁷ Only those truth claims that are valuable for the relevant community—those claims that motivate action—obtain the blessing of “truth.” A property-rights rhetoric within the academy that is inconsistent with broader cultural understandings of what rights are and why they exist will never obtain that blessing it seeks: truth.

VI. CONCLUSION: RIGHTS, PRIVILEGES AND THE PHYSICAL CONSEQUENCES OF WORD CHOICE

Clifford Geertz argued that “man is an animal suspended in webs of significance he himself has spun.”²⁹⁸ At its most fundamental, law is one component of that web—the constellation of signs, symbols and meanings that create culture. *Legitimate* law must therefore reflect the other aspects of that culture; ultimately, law requires the blessing of the community or communities it regulates. A group of cultural actors will—and should—reject legal rhetoric and the substantive choices that rhetoric recommends that are inconsistent with the larger suite of their cultural understandings. In the property law context that matters—the context on the ground—the relevant cultural actors are not judges, lawyers and academics, but rather the property owners whose interests the rhetoric seeks to change. In communicating with that group of relevant cultural and political actors, it does not matter what “we”—as academics, activists, or judges—understand when we use particular words. What matters is how our word choices play out in that broader property-related cultural context, on the ground, where understandings of property have real effects on our lands and landscapes.

This is not an article about how we understand property. Rather, it is an article about how the ways in which we *talk* about property affects the ways our communities understand property. The argument is simple: talking about property as if it were something that cannot be regulated by government turns it

297. See, e.g., Robert B. Westbrook, *Pragmatism and Democracy: Reconstructing the Logic of John Dewey's Faith*, in *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE* 128, 131 (Morris Dickstein ed., 1998); WILLIAM JAMES, *The Will to Believe*, in *THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY* 1, 10 (1897); BROMLEY, *supra* note 120, at 134; Jerrold A. Long, *From Warranted to Valuable Belief: Local Government, Climate Change, and Giving up the Pickup to Save Bangladesh*, 49 *NAT. RESOURCES J.* 743, 776-85 (2009).

298. CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, in *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* 3, 5 (1973).

into something that cannot be regulated by government. The reliance on the word “rights”—with all of its political and cultural meanings—to describe and understand property limits our capacity to accurately describe both the costs *and* benefits of particular interest-allocation decisions. Use of the word “rights” allows for a narrowed analysis scale that focuses exclusively on the individual with little concern for that individual’s place in a broader community. That narrowed focus limits the quality of the property that results. It does not matter whether we begin from a natural rights or social construct understanding of property, our ultimate goal is to achieve that set of institutional and property relations that promote the greatest cultural and societal, and thus individual, good. A rights rhetoric will not achieve that goal.