Beyond Law and Economics: Theological Ethics and the Regulatory Takings Debate

David E. DeCosse
BEYOND LAW AND ECONOMICS: THEOLOGICAL ETHICS AND THE REGULATORY TAKINGS DEBATE

David E. DeCosse*

I. INTRODUCTION

The vociferous national debates in Congress and the courts about defining the statutory and constitutional lines between private property and public regulatory authority ultimately can shape our fundamental conceptions of democratic government and the social contract. These battles most often are pitched in terms of law and economics.

This Article attempts to introduce a new perspective on the debates—a theological ethics analysis of issues arising in the regulatory takings setting. The particular analytical perspective here is based on Roman Catholic theology, but it offers avenues for a welcome extension of the inquiry by scholars from other religious traditions as well.

It will be helpful at the outset to consider in the light of history the challenges posed to Catholic social teaching by takings legislation now before Congress. As amid scarce resources in medieval times when lords protested with increasing vigor against claims to commons that ran over their lands, so today amid economic uncertainty powerful corporations have taken a lead role in supporting takings bills that

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The idea for this paper originated with Walt Grazer of the Environmental Justice Program of the United States Catholic Conference (U.S.C.C.). An earlier version of this Article was presented to the U.S.C.C. as a background paper to aid U.S.C.C. in its evaluation of federal takings legislation. The current Article, however, entirely reflects the author's opinion and makes no claim to represent the opinion of the U.S.C.C. The author would like to thank Mr. Grazer, David Hollenbach, S.J., J. Bryan Hehir, and Angela Carmella for their comments on drafts of the Article.

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would restrict allegedly intrusive regulation of their land. Moreover, the medieval struggle pitted the lords' overly rigorous claims to title against customary, if not always explicit, rights of common use. In turn, the conflict in Washington over takings legislation features an absolutist school of property rights claiming a long historical pedigree squared off against environmentalists invoking the benefits of environmental laws adopted only in the last thirty years—and struggling as they do to specify to an economically anxious public the immediate relevance of new, recondite terms like "biodiversity" and "ecosystem."

To be sure, this historical comparison has limits. For one, it would be a mistake to assume that the only supporters of today's federal takings laws are also its most powerful ones—large corporations akin to latter-day lords. In fact, congressional supporters of takings legislation argue that it is a long-overdue guarantee of the "rights of every small landowner in America." Nevertheless, this comparison of the present day to medieval times sets the context for what follows in this Article, for it underscores in broad terms the perduring challenges raised by takings legislation for Catholic social teaching: the need to balance private and social aspects of property against the perennially powerful appeal of absolute property rights; the opportunity to articulate persuasively an ethic that establishes with clarity the moral claims raised by the common good of the environment; and the requirement to recognize the properly historical character of purportedly absolute claims—and thus to recognize the economic circumstances amid which such claims often arise and the political possibilities that such claims can subvert.

In particular, this Article argues that the absolutist property claim behind the takings legislation poses an anti-democratic threat to federal environmental protection, as well as to labor laws, civil rights standards, and similar measures. The argument in part follows the

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1 The account of the medieval conflict is taken from selections from an article by Joseph Sax. 

2 [L]ook at the bill as adopted. Who are the special interests supporting this? The National Mining Association, the Chemical Manufacturers Association, the National Association of Manufacturers, the American Petroleum Institute, the American Independent Refiners Association, American Forest and Paper Association, and International Council of Shopping Centers. Those do not sound like small landowners to me. 141 CONG. REC. H2531 (daily ed. Mar. 2, 1995) (statement of Rep. Sam Farr (D-Cal.)).

path laid out by Mary Ann Glendon in *Rights Talk: The Impoverishment of Political Discourse*. As Professor Glendon notes, the insistent assertion today of absolute rights has led to a disdain for the compromises achievable in politics. Extrapolating from this, I shall argue that the strong assertion of property rights behind takings legislation subverts the possibility of a just political solution to the conflicting claims of property holders and environmentalists. Furthermore, I shall argue that takings bills have as their premise notions of private property, the state, and the common good which are sharply at odds with these concepts as they appear in Catholic social teaching. Moreover, I will argue that a Catholic social ethic provides a set of balancing principles by which to resolve conflicts such as those raised by proposed takings legislation. By focusing on these particular bills, I also hope to illuminate aspects of broader intellectual challenges certain to be posed in the coming years to Catholic social ethics in the United States.

At issue in this controversy is legislation *The New York Times* has noted “would arguably affect more people than anything else considered by Congress this session.” The key provision of this legislation would require taxpayers to compensate a property owner whenever a federal government action reduced the value of that person’s property. For example, if the legislation were passed, the federal government would have to pay $20,000 to a property owner who claimed that a denial of a permit to build on the property’s wetlands reduced the value of a $100,000 lot by twenty percent. In March, the House of Representatives passed its version of this bill, which requires compensation after a twenty percent loss in value and purchase by the

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5 It is important to note that in *Rights Talk* Professor Glendon does not take a position on takings legislation. Moreover, while she criticizes the intellectual basis of absolute claims of property rights, she also laments what she describes as the steady erosion in the last half-century in the United States of the constitutional value of the right to property at the hands of overreaching legislatures. She explains the relationship of these two aspects of her criticism by noting:

[the historic rise and decline of property rights in our constitutional scheme has been outlined here not only in order to further illustrate our American tendency to formulate rights in a stark, unqualified, fashion, but to suggest how such habits of exaggeration can foster the illusion that the rights in question are more secure than they are in fact. *Id.* at 40.


7 See *id.*
government after a fifty percent loss in value.\(^8\) The House Bill applies to such environmental laws as the Clean Water Act, the Endangered Species Act, and laws related to western water usage. The House Bill would not permit compensation if actions undertaken by a property owner would violate common law nuisance standards, traditionally a far less restrictive prohibition than that accorded by state and federal law.\(^9\) The Senate presently is considering its version of the legislation, which would require compensation after a one-third loss in a property's value.\(^10\)

These property rights initiatives appeared in the Republican *Contract with America* along with similar proposals to require federal agencies to undertake extensive analyses of the cost and risk of environmental regulation. The *Contract* describes this group of proposals as a "variety of tax law changes and federal bureaucratic reforms designed to enhance private property rights and economic liberty and make government more accountable for burdens it imposes on American workers."\(^11\) The takings bills, in particular, are the principal legislative goals of a loose coalition of western-based property rights groups that calls itself the "wise use" movement.\(^12\) Among the central claims of the coalition is the argument that federal environmental regulation is running amok in the hands of intrusive bureaucrats and is overriding the right to private property. As one Californian told a House of Representatives subcommittee:

[i]t's time for Congress to admit that the bureaucratic regulations promulgated from the Clean Water Act, the Endangered Species Act and other federal land-use legislation gives far too much unchecked power to out of control bureaucrats. It's time for Congress to stand up to the tunnel-visioned preservationists who want the government to control every inch of the land, every use and every specie.\(^13\)

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\(^8\) See id.


\(^12\) See Christopher J. Duerksen & Richard J. Robbewig, Takings Law in Plain English, 10-11 (1994); Plater et al., supra note 1, at 5-16 (Supp. 1994).

\(^13\) Regulatory Takings and Property Rights: Hearings on HR925 before the Subcomm. on the Constitution of the Judiciary Comm. of the House of Representatives, 104th Cong., 1st Sess. 4
Congressman Thomas Delay (R-Tex.), the House majority whip, spoke for many of the bill’s supporters when he invoked the promise of the American Revolution for the protection of property, criticized the arbitrariness of Federal environmental action and the disproportionate value accorded to animals like the “golden-cheeked warbler,” and argued that “one person should not have to shoulder the full costs of achieving a particular goal, whether it be environmental protection or improved infrastructure.” The government compensates a person, Representative Delay said, when it wants “to build a highway through his front yard.” It should compensate a person as well when it “prohibits him from farming on his land because it is determined that a wetland needs protection.”

Is the federal government running amok with environmental regulations? This claim should be examined carefully. Environmentalists have argued, for instance, that it is not the overabundance of environmental regulation but rather its effectiveness which has led to the current takings backlash. In the 1980’s, environmentalists argue, developers, flush with easy savings-and-loan money and generous federal tax breaks, ran headlong into good environmental law and into government and citizen groups that knew how to apply that law. Stymied in their desire to develop, the developers turned to takings proposals to regain a justifiably lost freedom.

Claims of constriction at the hands of a federal leviathan also are often not what they seem. Ocie Mills, for instance, is a Floridian who gained notoriety when he was jailed for violating federal wetlands regulations. To Congressman Joe Scarborough (R-Fla.), Mills’s fate is “one of the starkest illustrations of how crazy regulations have become over the past 20 years.” Yet, Mr. Mills only was jailed for wetlands violations, the judge in his case noted, after Mills was told “constantly and regularly and continually by the Federal Government that he couldn’t do these things, and he took the position, ‘Well, we’ll see you in court.’” Nor was Mills’s case part of a broad pattern of criminalizing petty wetlands disputes. According to the Environmental

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15 Id. (statement of Rep. Delay).
16 Id. (statement of Rep. Delay).
17 Duerksen & Robbwig, supra note 12, at 10.
18 Egan, supra note 6, at A1, A12.
19 Id.
Protection Agency (EPA), the federal government authorized 45,000 wetlands activities in 1994 and sought court enforcement in fewer than 30 cases.\(^\text{20}\)

Between 1963 and 1993 the federal government passed 178 environmental laws. Between 1933 and 1963 it passed only 45.\(^\text{21}\) To the present staff of the Department of the Interior, the United States owes its current high standards of beauty, health, and productivity in large measure to the wisdom behind previous years' environmental laws. The takings legislation, the Department of the Interior noted, "is a Trojan horse, filled with devastating proposals that would decimate the kinds of protections that Americans have relied on for decades."\(^\text{22}\) Congressman Melvin Watt (D-N.C.) argued that portraying regulators as running amok is inaccurate from the start because it assumes a wide gulf between regulations and their enabling laws:

I do not know of any agency in the Federal Government that is over there writing regulations, unless they are writing those regulations pursuant to statutes that we passed in this body. And if we do not like the regulations that they write pursuant to our statutes, then we ought to change the statutes. We ought to have the guts to stand up and say, "We do not like the Clean Water Act, we do not like the Endangered Species Act, and we are going to do away with them," rather than coming and telling the American people that somebody else over there on the other side of town has done something that we do not like, even though they are acting pursuant to the authority we gave them.\(^\text{23}\)

The current House and Senate proposals are referred to as "takings" bills because they represent a novel legislative application of principles of eminent domain derived from the Fifth Amendment of the United States Constitution—"nor shall private property be taken for public use, without just compensation."\(^\text{24}\) The principal recent theoretical work providing the intellectual framework for these bills is the 1985 book, *Takings: Private Property and the Power of Eminent Domain* [hereinafter *Takings*], by Richard A. Epstein, Professor of Law of the University of Chicago. In this highly controversial work, Professor Epstein develops an entire theory of government based on


\(^{24}\) See U.S. CONST. amend. V.
the Takings Clause of the Constitution. Central to Professor Epstein's argument is the notion that any government regulation takes property and thus may require compensation by the government. As Professor Epstein puts it: "Would the government action be treated as a taking of private property if it had been performed by some private party? If so, there is a taking of private property, and we must examine further to determine whether compensation must be paid." Professor Epstein also argues that the Fifth Amendment, properly understood, provides the grounds for invalidating, among other things, welfare programs, progressive taxation, the minimum wage, and the National Labor Relations Act—all of which, in his view, fail the requisite constitutional test in that they fail to increase the sum total of wealth. In other words, these laws are unconstitutional because they either transfer property from one party to another without payment of just compensation or because they fail to preserve and enhance the given distribution of wealth extant before any such law was passed. Professor Epstein's ideas would no doubt lead to overturning much of the last fifty years of American jurisprudence. Indeed, Thomas Grey of Stanford Law School has called Takings a "travesty of constitutional scholarship" because the book fails to engage in argument the main trajectories of this last half-century of legal thinking. Yet, the thrust of Takings has had a profound influence, not only on pending takings legislation, but also on other proposals now before the House and Senate.

Indeed, the proposed takings legislation would, in fact, represent a significant legal change from current constitutional practice. In the 1922 case of Pennsylvania Coal v. Mahon, Justice Oliver Wendell Holmes gave birth to modern takings jurisprudence when he wrote that "if regulation goes too far it will be recognized as a taking." The vagueness of Holmes's dictum has been criticized for providing little guidance to courts and meek restraint on the government's regulatory power. Yet, the dictum was also a statement of principle—one that was meant to permit courts a necessary latitude in the face of the

26 See generally id.
27 Id. at 306–29.
complexity of property cases. In any event, state and federal courts over the years have developed principles for interpreting when a regulation has gone "too far," including: an assessment of the economic impact of a regulation on a property owner; an evaluation of this impact against the public benefit promoted by the legislation; a requirement that for a taking to have occurred the property must have lost its entire value; a judgment that the loss of the most profitable use or of a fraction of the value of the property is not sufficient to constitute a taking; and an inclination on the part of courts to defer to a legislative determination of legitimate public use. While there has been a loud outcry today against a constitutional devaluation of property rights, it is also important to note a sharp disagreement in this regard. For instance, environmental lawyer and Professor of Law of Boston College Law School, Zygmunt J.B. Plater, has argued that even today courts' scrutiny is directed more at protecting the private right of a property owner than at taking into account the public claims at stake in environmental cases. To remedy this tendency, Professor Plater and others have argued, for instance, for an increasing use by judges of the public trust doctrine, to accord a measure of defined public ownership to certain common resources. Indeed, there are interesting affinities between the public trust doctrine's assertion of common things—lakes, rivers, forests—that either cannot or should not be owned privately and thus that are in fact held in deed by the public and the Catholic understanding of a common good like the environment.

In light of these established constitutional practices, it is instructive to consider the positions of legal supporters and opponents of the proposed takings bills. To James Ely, Professor of Law of Vanderbilt University School of Law, the proposed takings legislation would introduce a welcome certainty to replace the vague guidance of Holmes's dictum in Mahon; spread the cost of public burdens broadly by requiring taxpayers to compensate a property owner for a loss in value resulting from regulation; give needed pause to government officials as they weigh environmental enforcement; and enhance democratic accountability by requiring an impulsive state to pay for an intemperate regulatory appetite. Conversely, to an opponent like J.

31 Duerksen & Robbewig, supra note 12, at 5–22.
32 Plater et al., supra note 1, at 365–74, 453.
33 260 U.S. at 415.
Peter Byrne, Professor of Law of Georgetown University Law Center, the pending bills would cripple the legislation of legitimate public interests; create perverse incentives for property owners to file development plans in the hope of incurring a loss in value in property for which they could then collect money from the government; and render void the longstanding constitutional test for a taking.\textsuperscript{35}

\section*{II. Property and the Environment}

The defense of the right to private property has been a constant theme of modern Catholic social teaching—from Leo XIII's lengthy justification of the right in the opening pages of \emph{Rerum Novarum}\textsuperscript{36} to John Paul II's forceful reaffirmation of this teaching in \emph{Centesimus Annus}.\textsuperscript{37} In turn, environmental protection also has gained special prominence in Catholic teaching in recent decades. In \emph{Sollicitudo Rei Socialis}\textsuperscript{38} in 1987, John Paul II called the growing world-wide ecological concern one of the "positive signs" of the day.\textsuperscript{39} In an address commemorating the 1990 World Day of Peace, Pope John Paul II said: "[t]he profound sense that the earth is ‘suffering’ is also shared by those who do not profess our faith in God. Indeed, the increasing devastation of the world of nature is apparent to all."\textsuperscript{40} As the proposed takings legislation primarily raises questions about the good of the environment and the rights of private property owners, I now will examine these issues as they are understood in Catholic social teaching and in relation to the pending bills.

When John Paul II has discussed ecological matters, he has often done so in light of the morality of property. For instance, in \emph{Centesimus},\textsuperscript{41} the Pope stated that the origin of the environmental problem of the day can be found in the heart of men and women—in a domineering "desire to have and to enjoy rather than to be and to grow" and, thus, in a possessiveness that manifests itself in a disor-

\begin{footnotesize}
\textsuperscript{35} Id. at 1–5 (Feb. 9, 1995) (testimony of J. Peter Byrne, Professor of Law, Georgetown University Law Center).
\textsuperscript{36} POPE LEO XIII, RERUM NOVARUM (1878).
\textsuperscript{37} POPE JOHN PAUL II, CENTESIMUS ANNUS (1978) [hereinafter CENTESIMUS].
\textsuperscript{38} POPE JOHN PAUL II, SOLlicitudo REI Socialis (1987) [hereinafter SOLlicitudo]. All subsequent references to church documents will be by paragraph number.
\textsuperscript{39} Id. ¶ 26.
\textsuperscript{40} Pope John Paul II, Message of His Holiness Pope John Paul II for the Celebration of the World Day of Peace (June 1, 1990) in VATICAN CITY, LIBRERIA Editrice VATICANA 5 [hereinafter World Day of Peace Message].
\textsuperscript{41} CENTESIMUS, supra note 37, ¶ 37.
\end{footnotesize}
dered consumption and use of the earth's resources. Indeed, in Pope John Paul II's view, the very development of a person depends on nothing less than "subordinating the possession, dominion, and use of created things and the products of industry to man's divine likeness and vocation to immortality." As the Pope continues, from such a subordination and proper ordering of values can arise "an unselfish and aesthetic attitude that is born of wonder in the presence of being and of the beauty which enables one to see in visible things the message of the invisible God who created them," and a concrete concern for the inevitable consequences of the degradation of the earth on human life today and in the future.

Thus, Catholic teaching about the environment insists on a careful balance. It first stresses the original gift of creation and the ontological difference between all that is created and God. In other words, Catholic environmental teaching affirms what Michael and Kenneth Himes have called the "'iffiness' of one's existence. . . . This poverty unites all creatures." Nevertheless, the Catholic Church recognizes in the human person a primacy over the rest of creation: "[m]an is the image of God partly through the mandate received from his creator to subdue, to dominate, the earth. In carrying out this mandate, man, every human being, reflects the very action of the creator of the universe." Yet, this mandate to exercise "dominion" can in no way be understood in the exploitive sense of "domination." As one commentator has noted: "[t]he Pope affirms 'the dominion' of humanity over the rest of creation, but insists that this dominion is circumscribed by moral limits"—the limits that are imposed on every person as a steward of the earth.

Today, however, these fundamental convictions essential to a respect for the environment often are overlooked. Indeed, according to Pope John Paul II, in their place is a "widespread anthropological error" arising from those who discover a "capacity to transform and in a certain sense create the world through . . . work" and in the

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42 Id.
43 SOLICICUTO, supra note 38, ¶ 29.
44 Id. ¶ 37.
45 Id. ¶¶ 31–34.
47 POPE JOHN PAUL II, LABOREM EXERCENS ¶ 4 (1982) [hereinafter LABOREM].
48 Christiansen, supra note 46, at 70.
49 Id.
process forget that the possibility and success of their work “is always based on God’s prior and original gift of the things that are.”\textsuperscript{50} Thus, people turn in pride against the earth, as though it “did not have its own requisites and a prior God-given purpose,”\textsuperscript{51} and as if its biological and moral laws could be violated with impunity.\textsuperscript{52}

Against this proud abuse of the earth, the Catholic Church not only offers the converting message of the Gospel, but also some practical guidance. Pope John Paul II, for instance, has emphasized the need to respect the individual nature of every being and of every being’s indispensable connection to the cosmos.\textsuperscript{53} Thus the Pope has called for attention to the issue of endangered species—an aspect of the debate over the takings legislation—saying that “people are rightly worried—though much less than they should be—about preserving the natural habitats of the various animal species threatened with extinction, because they realize that each of these species makes its particular contribution to the balance of nature in general.”\textsuperscript{54} In more general fashion, Pope John Paul II also has noted the interconnectedness of the entire ecological question—an observation that, in terms of the takings debate, points toward the need for an adequate governmental role in protecting vast, often multi-state ecosystems. As the Pope said: “[w]e cannot interfere in one area of the ecosystem without paying due attention both to the consequences of such interference in other areas and to the well-being of future generations.”\textsuperscript{55}

While the proposed takings legislation likely would make federal environmental protection more difficult, that consequence must be considered alongside perhaps the principal aim of the legislation: the defense of property rights. Accordingly, it will be useful next to consider Catholic teaching regarding private property in light of assumptions about the inviolability of the right to property implicit in the takings legislation.

As with ecological concerns, it is necessary first to consider the Catholic Church’s longstanding affirmation of the right to private property in light of the doctrine of creation. In his discussion of private property in \textit{Centesimus}, Pope John Paul II stated: “God gave

\textsuperscript{50} \textit{Centesimus}, supra note 37, ¶ 37.
\textsuperscript{51} Id.
\textsuperscript{52} See \textit{Sollicitudo}, supra note 38, ¶ 34.
\textsuperscript{53} See id.
\textsuperscript{54} \textit{Centesimus}, supra note 37, ¶ 38.
\textsuperscript{55} World Day of Peace Message, supra note 40, at 6.
the earth to the whole human race for the sustenance of all its members, without excluding or favoring anyone." Several essential principles in relation to property follow from this original act and intention of God. The most important principle is that creation is the foundation of the principle of the universal destination of the earth's goods—what the Pope has called the "characteristic principle of Christian social doctrine." Yet, in creation, God also provides the gift of the earth so that each person "might have dominion over it by his work and enjoy its fruits." Indeed, it is the true self fulfillment and cultivation of the divine image expressed in the exercise of dominion over the things of the world that are the foundation of the right to property. The resulting ownership includes, among other things, land, capital, and "know-how, technology and skill." Yet, all manifestations of ownership always must be evaluated on the basis of the prior and pre-eminent principle of the universal destination of the world's goods. Thus the Pope has stated that the right to private property is "valid and necessary" but that the right nevertheless has a "social mortgage"—that is, the right has an "intrinsically social function based upon and justified precisely by the principle of the universal destination of goods."

The proposed takings legislation, by contrast, projects a strong sense of the inviolability of the right to property. Since the language of the legislation does not reveal the basis for such a theory of property, it will be instructive to consider, in light of Catholic social teaching, the theory of property in Professor Epstein's Takings. Indeed, it is not too much to say that Professor Epstein's theory of property determines many of the rest of his conclusions, just as it is an underlying theory of private property that determines other public concerns in the takings legislation.

Several preliminary remarks are in order. The first relates to John Locke's celebrated theory of property, which Professor Epstein uses to support his claim of a natural right to property. Indeed, many supporters of takings legislation invoke Locke's ardent defense of the

56 CENTESIMUS, supra note 37, at ¶ 31.
57 Id.
58 SOLLICUTUDO, supra note 38, ¶ 42.
59 CENTESIMUS, supra note 37, ¶ 31.
60 See id. ¶ 43; SOLLICUTUDO, supra note 38, ¶ 30.
61 CENTESIMUS, supra note 37, ¶¶ 31–32; LABOREM, supra note 47, ¶ 14.
62 SOLLICUTUDO, supra note 38, ¶ 42.
63 See generally Epstein, supra note 25.
right to property in *The Second Treatise of Government*. There are no doubt several close affinities between the proposed takings legislation and the classic political treatise: mainly, the close link of personhood and property and an intense wariness of tacit and arbitrary government actions. Yet it also must be noted that Locke's theory does not on its own necessarily justify current takings legislation. For one thing, Locke grounds the natural right to property on God's original gift of creation. From such a beginning, it would be possible to argue in a manner taking greater account of a wide range of public issues like environmental protection than is possible with an exclusive theory of property such as that behind the takings legislation. Moreover, while Locke states that not even a part of a person's property may be taken without consent, he also signals the legitimacy of strong legislative regulation of property when he explains: "[b]ut still it must be with his own consent, i.e. the consent of the majority, giving it either by themselves, or their representatives chosen by them."

These observations underscore Professor Epstein's unusual use of Locke's theory of property and help situate Professor Epstein's particular brand of liberalism. Professor Epstein invokes Locke as he seeks to place himself in the tradition of natural rights. Like Locke, Professor Epstein asserts that these rights are not derived from the state. However, Professor Epstein explicitly disavows the Lockean basis for these rights—the act of divine creation. In place of this theological ground, Professor Epstein introduces a systematic, utilitarian theory of wealth maximization that is the fundamental basis of political organization and the right to property. This basis of political

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65 *Locke, supra* note 64, ¶ 25.

66 Mark Sagoff, *Upstream/Downstream: Issues in Environmental Ethics* 172–73 (Donald Scherer ed., 1990). Andrew Lustig has argued that Locke's discussions of property and justice have three basic correspondences to similar discussions in the social encyclicals: both perspectives emphasize the "social character of the good to be pursued"; both also maintain the "moral priority of property in common"; and both hold it is a "legitimate function of government" to safeguard the "positive as well as the negative rights of individuals." Andrew B. Lustig, *Natural Law, Property, and Justice: The General Justification of Property in John Locke*, 19 J. of Religious Ethics 1, 145 (Spring 1991).

67 *Locke, supra* note 64, ¶ 139.

68 *Id.* ¶ 140.


organization, then, sets the normative limit on the use of political power: that it "should preserve the relative entitlements among the members" of a polity.71 Yet, such a preservation of a status quo of property holdings is a minimum moral standard. In fact, Professor Epstein argues, the final moral measure is the increase of overall wealth while preserving and adding to the original property holdings: "All government action must be justified as moving a society from the smaller to the larger pie."72

In this scheme, then, "natural rights," as Thomas Grey points out, are "simply those rights which, if postulated as initially binding, will maximize utility."73 Thus, Grey notes, Professor Epstein uses Locke's language as a "rhetorical" gloss for a utilitarian theory of property derived from entirely different premises than Locke introduces.74 Grey explains: "[w]hen the verbiage about rigor and natural rights is stripped away, Epstein's core position is that 'private property' means that set of rules governing resource distribution and allocation that will produce the greatest good for the greatest number."75 Thus, it is possible to see more clearly Professor Epstein's place in liberal thought. Cass Sunstein, Professor of Law of the University of Chicago, has argued:

[i]nsofar as it is political theory, Takings is part of a narrow strand of the liberal tradition, one that takes the existing distribution of property and the existing set of preferences as natural, rather than social, and disables government from affecting either. That strand of liberalism flourished during the Lochner76 era. A competing species of liberal thought—reflected in much of modern law—sees the collective selection of preferences as a natural and desirable feature of government. This species of liberalism is, of course, subject to abuse. Those abuses can be controlled, however, thus promoting both welfare and autonomy in ways that are impossible under the approach in Takings.77

The sharp contrast between Professor Epstein's view of property and a Catholic understanding can be seen by considering several crucial junctures in the argument in Takings.78 As I have already

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71 Id. at 10–11.
72 Id. at 4.
73 Grey, supra note 28, at 36.
74 Id. at 31.
75 Id. at 45.
76 Lochner v. United States, 198 U.S. 45 (1905).
78 See generally Epstein, supra note 25.
noted, Professor Epstein rejects Locke's assumption of the original common ownership of the earth as a result of God's gift of creation to all. This assumption is, of course, the starting point for the theory of private property in Catholic social teaching. For Professor Epstein, however, this assumption of common ownership raises an insuperable difficulty in his Hobbesian world of possessive individualists. In other words, by starting with the premise of common ownership, one cannot account for the problem of having "to explain how any individual can, without the consent of others, reduce common property to private ownership." Rather, for Professor Epstein, a more solid philosophical basis for a right to property can be obtained by employing as a theory of property the traditional common law rule—in the original position each person only owns his or her labor; nothing is owned—either individually or in common—until the first possessor of any thing acquires it. In the scheme of Takings, this theory leads to the fact itself of ownership—and thus of any given distribution of property—taking on unimpeachable moral importance. Professor Epstein, for instance, argues that trespass is not wrong because the state says it is wrong—a claim perfectly coincident with Catholic thought and the natural rights tradition. Rather, trespass is wrong "because individuals own property"—a claim that from the point of view of Catholic teaching amounts to an assertion in search of justification. Moreover, on the basis of this theory of property Professor Epstein construes the entirety of the social aspect of ownership within the terms of private positive law—that is, that what is "social" about ownership is the fact that ownership itself provides an inviolable right not to be interfered with by the rest of the world. Of course, this is in flat contradiction to the Catholic understanding of the social obligations that both inhere in ownership and justify it.

III. THE STATE, JUSTICE, AND THE COMMON GOOD

For all of his invocations of Locke, Professor Epstein may, in the end, share more with Hobbes—especially as to anthropology. Professor Epstein insists, for instance, on the central, ineluctable desire to maximize wealth—a formulation of desire not unlike Hobbes's bleak

79 Id. at 10.
80 Id. at 11.
81 Id. at 6.
82 Id. at viii.
picture of human nature, and sharply different from the Catholic understanding of a rational and social human nature. Moreover, like Hobbes, the texture of political life is in the end reduced to an individual and the state, and thus parts ways with the rich Catholic understanding of the intermediate associations requisite for the achievement of the common good of political life. For Professor Epstein, political life is reduced to a wealth-maximizing individual and a compliant state. As Professor Sunstein has noted, though, Professor Epstein's assumption that the given preferences for wealth maximization must as such be accorded respect, is a departure from classical liberal politics:

[for James Madison, national representatives were supposed to deliberate on constituent preferences, not to implement what constituents "want".... The republican conception of politics generalizes this understanding, treating governance as a collective process in which citizens select ends through political participation. Takings ignores this aspect of the liberal tradition, which played an important role in the constitutional framing. For the framers, freedom consisted in self-governance through politics as well as in the satisfaction of private preferences.]

It is this criticism of Professor Epstein's view of the state that informs my contention that the proposed takings legislation poses an anti-democratic threat to federal environmental protection. For the legislation would no doubt inhibit the enforcement of environmental laws already on the books and it would accomplish this inhibition by subordinating the power of the state—and the possibility the state represents of the achievement of a political common good—to the power of private preferences. It will be instructive to consider this contention in light of Catholic teaching on the state's role in regulation, the ordering of goods in justice, and the common good.

In Centesimus, Pope John Paul II states that it is the state's task to provide for the defense and preservation of common goods such as the environment "which cannot be safeguarded simply by market forces." By such provision, the state working with the rest of society fulfills its "duty of defending those collective goods which, among others, constitute the essential framework for the legitimate pursuit of personal goals on the part of each individual." Thus, the environment is a limit on the market. It is a "collective and qualitative" need

83 Sunstein, supra note 77, at 246-47.
84 CENTESIMUS, supra note 37.
85 Id. ¶ 40.
86 Id. (emphasis in original).
which escapes the market’s logic and which requires the state’s protection. Yet, to insist that environmental protection is a task of the state is not yet to have specified at what level of government this task should be carried out. For this judgement Catholic teaching provides the principle of subsidiarity. As defined by Pius XI in *Quadragesimo Anno*, the principle states that “it is an injustice, a grave evil and a disturbance of right order for a larger and higher organization to arrogate to itself functions which can be performed efficiently by smaller and lower bodies.”

The encyclical goes on to note:

> [t]he State should leave to these smaller groups the settlement of business of minor importance. It then will perform with greater freedom, power and success the tasks belonging to it, because it alone can effectively accomplish these directing, watching, stimulating and restraining, as circumstances suggest or necessity demands。

Thus while the principle of subsidiarity favors action by the “smaller and lower bodies,” it is important to note that it neither precludes action by the state nor by the largest polity within a state—so long as that polity is the one appropriate for the political task at issue. In the matter at hand, then, the principle asks whether there are aspects of environmental protection that require the federal government’s involvement. Clearly there are: among them, the many environmental and public health problems that cross state lines, the need in some aspects of regulatory law for uniform federal standards, and the federal government’s power to enforce laws that less powerful state and local agencies cannot. Accordingly, the proposed takings legislation would not only inhibit the state from carrying out its duty to defend a collective good like the environment, but the legislation specifically would frustrate the federal government in seeing to those tasks of environmental protection that only it can and should perform.

Catholic teaching as well acknowledges that it is a principal task of the state to guarantee private property. This protection is vital so that “those who work and produce can enjoy the fruits of their labor and thus feel encouraged to work efficiently and honestly,” thereby creating the economic life of society. How, then, is it possible fairly to

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87 Id.
88 POPE PIUS XI, *QUADRAGESIMO ANNO* (1939) [hereinafter *QUADRAGESIMO*].
89 Id. ¶ 86.
90 Id. ¶ 87.
91 Id. ¶¶ 86–87.
92 *CENTESIMUS*, supra note 37, ¶ 48.
balance the legal regimen governing the goods of the environment and private property?

The concepts of commutative and social justice are of assistance here. Drawing on Aquinas, Pius XI applied these principles to property. The right to possession of property, Pius said, is governed by commutative justice or the justice of contracts. This kind of justice requires an exact numerical equivalence of exchange: for example, it is the kind of justice regnant in Takings, where every loss in property value at the state's hands requires an exact numerical compensation. Commutative justice, then, is a "pure" type of justice in that it is, in itself, concerned only with the immediate exchange at hand and not with broader questions of social or political significance. Nevertheless, the demand for commutative justice always occurs in social or political contexts, even if this form of justice is able to give only a partial response to the conflicting claims inevitably arising in such contexts. Jesuit theologian David Hollenbach has noted: "[t]here are goods or values necessary for the realization of human dignity which transcend the sphere of private interaction and contract which is the concern of commutative justice... Individuals come to share in these goods in a way that is mediated by political, economic, and cultural structures."

Yet, while for Pius XI, the right to property was governed by commutative justice, the use of property fell under the purview of social justice. Social justice is the virtue that has as its aim the securing of the common good—a good that is analogically different from an individual good like the right to property just as, according to Aquinas, the political community and the family differ specifically. Social justice primarily manifests itself in the ordering of rights through legislation and other forms of governmental activity. This governmental power to intervene and coerce arises from the interdependent character of human existence and from the fact that some rights are claims on goods which are essentially public and which cannot be weighed out and distributed piecemeal.

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93 See Quadragesimo, supra note 88, ¶¶ 86–87.
94 See id.
96 Aquinas, supra note 95, 2a, 2ae, 7, 58; Quadragesimo, supra note 88, ¶ 24.
97 Hollenbach, supra note 95, at 155.
In these terms, then, the takings legislation is commutative justice writ large—too large. This legislation, following Professor Epstein, construes the public realm in exclusively private terms, or, as Professor Epstein puts it: "[t]here is no clean break on that continuum between disputes with two parties and those with two hundred million."98 Professor Epstein also rejects the possibility of adjudicating claims between collectivities and individuals: "[t]here is simply no common metric which allows one to balance the interests of groups or entities against individuals."99 Thus, where in Catholic thought commutative justice should be applied to discrete private exchanges, in the proposed takings legislation it is misapplied to fundamentally public goods. Accordingly, in this legislation, commutative justice intrudes into the sphere of social justice and effectively inhibits the possibility of action by the state on behalf of the common good.

IV. Conclusion

In conclusion, it is important to consider the proposed takings legislation's impact on the common good. As I have noted, one likely effect of the legislation would be to inhibit federal protection of the environment for the common good: those charged by law with the task of enforcement obviously will hesitate to carry out their duties if the consequences of doing so include the payment of potentially huge sums of money to property owners. Indeed, it is not farfetched to say that a primary goal of the proposed legislation is precisely to inhibit federal environmental protection.

But it is important to note the specific manner of this inhibition. For it is not the Catholic view that social justice gives the state or society unlimited warrant to regulate a common good like the environment. Thus, there are no doubt manifold occasions when existing legislation in service of a common good like the environment must be changed to accommodate the just claims of personal and social rights.100 The problem with the proposed takings legislation—as with Professor Epstein's theories—is that it is not so much an effort at an accommodation as a means around arriving at a new balance of personal and public concerns. There is no attempt here to find a new political consensus about environmental protection that could result, if neces-

98 Epstein, supra note 25, at ix.
99 Outline, supra note 70, at 5.
100 Hollenbach, supra note 95, at 153.
sary, in a readjustment of the federal environmental apparatus or the streamlining of citizens' appeals in the face of violations by intrusive bureaucrats. Instead, the proposed legislation is an evasion of these profoundly "political" and "public" questions in favor of a deceptively schematic solution that fails to risk a public debate over existing laws while it succeeds in checking their application.

This sort of evasion raises important moral questions for the Catholic Church. One question has to do with the deterioration of political life signaled by the foreclosure of the possibility of achieving a new political consensus. Another effect of this evasiveness—especially if takings legislation is applied to a broad range of federal law—could be a growing cynicism towards the law. In other words, people may develop a hopelessness arising from the recognition that there are laws but that they cannot be enforced. In his classic treatise, Aquinas said: "[i]n order that a law obtain the binding force which is proper to a law, it must needs be applied to the men who have to be ruled by it." Yet, the proposed legislation would undermine the possibility of application of environmental laws and thereby would undermine the idea of law itself. A related matter of moral corrosion bears on the legitimacy of the right to property itself. As Pope John Paul II has expressed, the right to property derives its legitimacy from its service to the common good—whether this service results from individual generosity, societal influence, or the force of law.

101 The House of Representatives debated and rejected a number of amendments that sought more extensively to balance concerns for property with protection of the environment. During the course of one such debate, Representative Wayne Gilchrest (R-Md.) asked:

[s]o how do we as humans solve this particular dilemma? Do we solve it by talking and discussing with the regulators, with Members of Congress, with the landholders about what they can do with their property and still hold onto biodiversity for future generations? Or do we solve the problem by sterilizing debate, by saying that we are going to take care of this and if some regulator comes in there and wants to take your property or regulate your property, we are going to compensate you, flat out, the Federal Government will pay for you not to abide by the Endangered Species Act, or for protecting wetlands.


Representative John Ehlers (R-Mich.) raised a similar concern later in the same debate:

I can tell you from our experience with takings in Michigan that once we turn the bureaucrats around and say, "No, you cannot just simply say no to some alternatives, you have to sit down with the property owners when they have a permit, you have to sit down with them and discuss alternatives with them." That solved virtually all of the problems that we had.

Id. at H2543 (statement of Rep. John Ehlers).

102 AQUINAS, supra note 95, at 1a, 2ae, 4, 90.

103 CENTESIMUS, supra note 37, ¶ 31.
tion for legitimacy, it is not then inconceivable that an assertion of inviolable property rights which is seen to undermine the common good could in fact lead to a diminished respect for the right to ownership itself.

The richness of Catholic social ethics—with its balancing of personal and public concerns and its understanding of a rational, social person—challenges many assumptions behind this legislation and offers a way to balance a concern for private property with a concern for the common good of the environment. This is no doubt only one piece of legislation in a vast sea of social issues. But the issues it raises about the private and social aspects of property, such as the perception of the environment as a common good, the need rationally and politically to arrive at new balances of personal and social claims, a related wariness of absolute, one-size-fits-all political solutions, and the size and function of the state—all of these issues are in the air today and require careful attention in Catholic social ethics. Indeed, it fairly can be asked whether the thought represented by *Takings* and the fact of the proposed legislation represent an instance of what Pope John Paul II called in *Centesimus* a “crisis within democracies themselves, which seem at times to have lost the ability to make decisions aimed at the common good.” This crisis, the Pope says, is evident in a “growing inability to situate particular interests within the framework of a coherent vision of the common good”—a description that aptly could be applied to the clashing claims of commutative and social justice provoked by the legislation. Another sign of this crisis, according to the Pope, is a view of the common good as simply a sum of particular interests—a characterization that calls to mind the individualism and monetarization of public life signaled by the legislation’s schemes of compensation. Lastly, the Pope calls at the present time for a development of a sense of the common good “on the basis of a balanced hierarchy of values”—a balance that this legislation profoundly would undermine.

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104 Epstein, supra note 25.
105 Centesimus, supra note 37, ¶ 31.
106 Id.
107 Id.