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The Inevitable Failure of Nuisance-Based Theories of the Takings Clause: A Reply to Professor Claeys

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THE INEVITABLE FAILURE OF NUISANCE-BASED THEORIES OF THE TAKINGS CLAUSE: A REPLY TO PROFESSOR CLAEYS

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I. INTRODUCTION

The Rehnquist Court has played a significant role in shaping the U.S. Constitution's Takings Clause. In the eighteen years since William Rehnquist became Chief Justice in 1986, the Supreme Court has reviewed more taking challenges and invoked the clause to invalidate more regulations than in the preceding eighty-five years of the twentieth century.[1]

Despite these extraordinary statistics, Professor Eric Claeys suggests that Chief Justice Rehnquist and his conservative colleagues on the Court have made little impression on takings law as it stood in 1986.[2] Professor Claeys advances and defends four basic propositions. First, he concludes that in the battleground over takings jurisprudence, the Court's liberals have emerged as victors.[3] Second, he suggests that the liberals have prevailed because they have a coherent theory of the Takings Clause, while the

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[1] *See* Robert Brauneis, *"The Foundation of Our 'Regulatory Taking' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon, 106 YALE L.J. 613, 615 (1996) ("Before 1986, the Supreme Court's two-hundred-year history arguably reveals no more than four occasions on which the Court found laws to be regulatory takings, triggering the obligation to pay just compensation under the Federal Constitution's Takings Clause although they involved no physical appropriation or destruction of property."). Professor Brauneis notes that the precise number of such cases depends on definitional issues. *Id.* at 615 n.3. By any count, the pre-1986 cases in which the Court found a taking have been outnumbered by those cases in which the Rehnquist Court has invalidated regulations on takings grounds. The Court has invalidated state or local regulatory practices in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). The Court has invalidated federal regulations in *Babbitt v. Youpee*, 519 U.S. 234 (1997); *Hodel v. Irving*, 481 U.S. 704 (1987), and perhaps, *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), where a four-Justice plurality voted to invalidate a federal regulation on takings grounds, and Justice Kennedy concurred on substantive due process grounds.

[2] Professor Claeys acknowledges two important doctrinal developments—the "exactions" doctrine and the *Lucas* rule, which protects owners when regulations strip them of all economically productive use, but concludes that these represent "high-water marks." Eric R. Claeys, *Takings and Private Property on the Rehnquist Court*, 99 NW. U. L. REV. 187, 188 (2004).

[3] *Id.* at 218 ("If one takes [the] long view the Rehnquist Court's liberals won.").

Court's conservatives do not.[4] Third, he contends that originalism can provide conservatives with a coherent theory of the takings clause.[5] Finally, he argues that the coherent theory originalism generates is a nuisance-based theory of the takings clause.[6]

Professor Claeys advances his propositions with clarity and defends them with vigor. Ultimately, however, three of his four propositions are difficult to sustain. Part II of this commentary demonstrates that the nuisance-based theory cannot provide a comprehensive basis for takings clause jurisprudence. Part III establishes that no plausible vision of originalism supports a nuisance-based theory. Part IV argues that the liberals, who generally support wide government latitude to regulate land use, have won the takings battle only if one defines victory as the failure to offer unconditional surrender; judicial scrutiny of state and local land use practices is significantly less deferential than it was at the inception of the Rehnquist court.

Part IV, which traces the approach the Court's conservatives have followed in takings cases, concedes that Professor Claeys's argument is at its strongest when he contends that the Court's conservatives have developed no coherent theory of the takings clause. Indeed, to the extent he argues that Chief Justice Rehnquist and his colleagues have articulated no coherent theory, Professor Claeys is correct. But as I have argued elsewhere, the Court's takings jurisprudence begins to look like a coherent whole when one integrates issues of federalism and the Court's institutional role.[7]

II. THE DILEMMA OF NUISANCE-BASED THEORIES OF THE TAKINGS CLAUSE

Government's universally-accepted power to control nuisances has long served as a justification for land use regulation. For example, in *Hadacheck v. Sebastian*,[8] the Court sustained a prohibition on brickyards within an area of the City of Los Angeles, noting that the effect of a land use "upon the health and comfort of the community" serves to justify a prohibition on that use.[9] The Court was even more express in *Village of Euclid v. Ambler Realty Co.*,[10] where Justice Sutherland, in upholding the village's

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[4] *Id.* at 188 (asserting that liberals had a coherent theory; moderates and conservatives did not).

[5] *Id.* at 7 (arguing that the "nuisance-based view has support in natural law sources. . . . These sources . . . are relevant for understanding the original meanings of the constitutional provisions that enforce takings guarantees."); *see also* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1664–65 (2003).

[6] Claeys, *supra* note 2, at 7, 194, 217–218.

[7] Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203 (2004).

[8] 239 U.S. 394 (1915).

[9] *Id.* at 411.

[10] 272 U.S. 365 (1926).

zoning ordinance, opined that "the law of nuisances . . . may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of [the government's police power]."[11] *Hadachek*, *Euclid*, and subsequent Supreme Court cases assumed, therefore, that nuisance control was a sufficient basis for local land use regulation.

To what extent, however, does nuisance law serve as the constitutional boundary for land use regulation? The Supreme Court has never regarded nuisance-control as the only permissible basis for land use regulation,[12] although Justice Rehnquist articulated that position in his dissent in *Penn Central Transportation Co. v. City of New York.*[13] Rehnquist argued that government could regulate without compensation in two circumstances: when government was prohibiting a "noxious use," or when the regulation applied over a broad cross-section of landowners, thereby securing an "average reciprocity of advantage."[14]

Richard Epstein has developed the most extensive and articulate academic defense of Rehnquist's position in his book, *Takings*.[15] Epstein started his analysis by concluding that the government effects a taking whenever its action would be treated as a taking if committed by a private party.[16] When, however, government acts to control nuisances, no taking results because it is merely preventing a landowner from interfering with established property rights of neighbors; nuisance regulation provides state enforcement of rights already possessed.[17] Conversely, under Epstein's analysis, the state can regulate only to control nuisances[18]—unless the state provides explicit or implicit compensation to the regulated landowner.

As Epstein recognizes, his analytical framework depends on a clear distinction between activities which cause harm and those which merely fail to confer benefits.[19] Yet much modern theory, springing from an insight

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[11] *Id.* at 387–88.

[12] Indeed, in *Hadachek* itself, the Court explicitly rejected the argument "which asserts that a necessary and lawful occupation that is not a nuisance *per se* cannot be made so by legislative declaration." 239 U.S. at 410; *see also* Miller v. Schoene, 276 U.S. 272, 280 (1928) ("We need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law; or whether they may be declared so by statute. For where, as here, the choice is unavoidable, we cannot say that its exercise, controlled by considerations of social policy which are not unreasonable, involves any denial of due process." (citation omitted)).

[13] 438 U.S. 104, 144–47 (1978) (Rehnquist, J., dissenting) (examining "two exceptions where the destruction of property does *not* constitute a taking": nuisance control measures and those that secure an average reciprocity of advantage).

[14] *Id.* at 144, 147.

[15] RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

[16] *Id.* at 36.

[17] *Id.* at 111–12.

[18] *Id.* at 112.

[19] *Id.* at 116.

first developed by Ronald Coase,[20] assumes reciprocity between harms and benefits: one person's harm is another's benefit.[21] Consider an example currently engendering a plethora of litigation—cell phone towers.[22] A landowner seeks to build a tall and ugly cell phone tower in a neighborhood zoned for residential use. If the municipality denies a permit to the landowner, is it preventing harm to neighbors, or is it merely conferring a benefit on potential cell phone users who would not receive service without the tower? Parallel questions arise if the municipality grants the permit: Is the municipality preventing harm to cell phone customers, or is it conferring a benefit on neighboring landowners?

This reciprocity insight creates no problem for most takings theorists, or for liberals on the Court. Because they reject the nuisance-centric view of takings jurisprudence in favor of greater deference to government regulation, whether a regulation is harm-preventing or benefit-conferring is of no constitutional consequence.[23]

For conservatives, who might find a nuisance-based vision of the takings clause ideologically attractive, the reciprocity insight creates two problems. First, what principles dictate whether a regulation is treated as harm-preventing? Second, who should decide whether a regulation is treated as harm-preventing?

For Epstein, these problems are easily solved. Nuisance law has inherent logic derived from natural law;[24] although difficulties might exist around

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[20] *See* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960). Coase states:

> The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A?

Id.; *see also* R. H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 26–27 (1959).

[21] For discussion of the reciprocity insight in the takings literature, one need go no further than Frank Michelman's classic article. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1199–1201 (1967).

[22] Much of the litigation over cell phone towers involves the impact of the Telecommunications Act of 1996, 47 U.S.C. § 332(c) (2000), on the authority of local zoning bodies. *See, e.g.*, USCOC of Va. RSA #3, Inc. v. Montgomery County Bd. of Supervisors, 343 F.3d 262 (4th Cir. 2003); U.S. Cellular Tel. of Greater Tulsa, L.L.C. v. City of Broken Arrow, 340 F.3d 1122 (10th Cir. 2003); Omnipoint Communications Enters. v. Zoning Hearing Bd. of Easttown Township, 331 F.3d 386 (3d Cir. 2003), *cert. denied*, 124 S. Ct. 1070 (2004).

[23] *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1068–69 (1992) (Stevens, J., dissenting). Justice Stevens wrote:

> The Court's holding today effectively freezes the State's common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property. Until today, I had thought that we had long abandoned this approach to constitutional law. More than a century ago we recognized that "the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."

Id. (quoting Munn v. Illinois, 94 U.S. 113, 134 (1877)).

[24] Epstein argues that the state's function is "to stabilize and protect the rights created exclusively by private individuals in the course of their ordinary actions." Richard A. Epstein, *Takings, Exclusivity*

the margins,[25] right-thinking people should have little difficulty with the vast bulk of cases. Because the Court can apply natural law principles to separate nuisance controls from other regulations, the Court can simply sustain nuisance regulations, while invalidating other regulations as unconstitutional takings.[26]

For other conservatives, particularly conservatives on the Court, the second question—who should decide whether a regulation is harm-preventing—presents more of a dilemma. First, in other areas of constitutional law, conservatives on the Court tend to defer to democratic branches.[27] The notion of appointed judges as philosopher-kings is anathema to the political right;[28] indeed, during the selection process, prospective federal judges are expected to promise to leave lawmaking to the legislature.[29]

Second, conservatives on the Court tend to locate power in the states rather than the federal government. By contrast, the nuisance-centered approach to takings doctrine—at least as espoused by Professor Epstein—would effectively federalize much of property law.[30] If universal principles dictate whether a particular regulation tracks the private law of nuisance, there is little if any room for state variation—the very sort of variation often championed by the Court's conservatives, as well as by a number of prominent liberals.

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and Speech: The Legacy of PruneYard v. Robins, 64 U. CHI. L. REV. 21, 26 (1997). That is, property rights precede the state.

[25] Epstein, *supra* note 15, at 114 ("Some uncertainty must be tolerated at the edges; sound social institutions will never stand or fall on the marginal classification issues that test every legal doctrine.").

[26] Epstein conceded, however, that some regulations should be sustained not because they are nuisance controls, but because they provide implicit in-kind compensation to those burdened by the regulation. *Id.* at 195–99.

[27] For example, consider Justice Rehnquist's defense of originalism:

> Once we have abandoned the idea that the authority of the courts to declare laws unconstitutional is somehow tied to the language of the Constitution that the people adopted, a judiciary exercising the power of judicial review appears in a quite different light. Judges then . . . [have] a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country. Surely there is no justification for a third legislative branch in the federal government, and there is even less justification for a federal legislative branch's reviewing on a policy basis the laws enacted by the legislatures of the fifty states.

William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 698 (1976).

[28] *Cf.* Stanford v. Kentucky, 492 U.S. 361, 379 (1989) (Scalia, J.) (rejecting proportionality analysis under the "cruel and unusual punishment" clause and disparagingly referring to application of such a standard as substituting philosopher-kings for "judges of the law").

[29] *See* William G. Ross, *The Questioning of Lower Federal Court Nominees During the Senate Confirmation Process*, 10 WM. & MARY BILL RTS. J. 119, 135–44 (2001) (discussing steps nominees take to dispel fears of judicial activism).

[30] For a discussion of the tension Supreme Court conservatives face between their commitment to property protection and their commitment to federalism, see Frank I. Michelman, *Property, Federalism and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 WM. & MARY L. REV. 301 (1993).

So if conservatives are to embrace the nuisance-based view of the takings clause, and simultaneously avoid the charge that they are usurping the powers of the democratic branches and the states, they must find an acceptable theory that solves the dilemma created by the reciprocity of harms and benefits. For Professor Claeys, that theory is originalism.

III. ORIGINALISM AS A SOLUTION TO THE RECIPROCITY DILEMMA

Professor Claeys suggests that a commitment to originalism generates the nuisance-based approach espoused by Professor Epstein.[31] As Professor Claeys concedes, however, his conclusion is inconsistent with originalist theories that focus on the intention of the Framers. First, as John Hart has demonstrated, state and local land use laws were common in the period preceding the framing of the federal constitution.[32] James Madison, in particular, was familiar with land use regulation from his days as a Virginia legislator;[33] indeed, Madison had introduced legislation giving landowners of unimproved tidal lands capable of reclamation three years to complete that reclamation.[34] Had Madison and the Constitution's other Framers contemplated that regulations like these could fall afoul of the takings clause, one would have expected more explicit constitutional language.

Second, in drafting the takings clause, the Framers imposed limits not on the power of states and local governments, but only on the power of the federal government.[35] The Bill of Rights in general was promulgated largely in response to fears that the new federal constitution would expand federal power at the expense of individuals and the states.[36] Not until more

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[31] Claeys, *supra* note 2, at 194.

[32] John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1107–32 (2000) [hereinafter Hart, *Original Meaning of the Takings Clause*]; John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996) [hereinafter Hart, *Modern Takings Doctrine*].

[33] Hart, *Original Meaning of the Takings Clause*, *supra* note 32, at 1136–39.

[34] *Id.* at 1136.

[35] A number of state constitutions already included clauses precluding state governments from taking property without just compensation. *See generally* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 827–34 (1995). Although there was no significant pressure from the states to constrain the national government's power over property rights (perhaps because the body of the Constitution already included protections for property), the clause was included, perhaps at Madison's insistence. *Id.* at 834–37. In Professor Treanor's words, "the best piece of evidence explaining why most people initially favored the clause is St. George Tucker's . . . statement that the clause was ratified in order to ensure compensation when there was military impressment of personal property." *Id.* at 835; *see also* Hart, *Original Meaning of the Takings Clause*, *supra* note 32, at 1132–34.

[36] *See, e.g.*, John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1392–93 (1997) ("[T]he main purpose of the First Amendment and much of the Bill of Rights, which was added in response to Anti-Federalist demands, simply was to deny the federal government power rather than to define the rights of the individual."); Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 315 (1989) ("The tenth amendment, which reserved to the

than a century later did the Supreme Court hold that the Fourteenth Amendment incorporated the Takings Clause and made it applicable to the states.[37] As a result—and as Professor Claeys explicitly recognizes—it would be impossible to argue that the Framers intended the takings clause to restrict state and local land use regulation. In light of this difficulty, Professor Claeys discusses/focuses on a different conception of originalism. He defines "original meaning" to refer to "the meaning that a hypothetical observer, judicious by temperament and well-versed in the legal and moral culture of the Founding, would judge to be the best approximation of the relevant clause."[38] The originalist inquiry, according to Professor Claeys, should focus on what Gary Lawson has called "meanings that are latent in their language and structure even if they are not obvious to observers at a specific moment in time."[39]

Professor Claeys is not the first to reject an originalist theory that focuses on the subjective intention of particular framers. Most originalists who search for original meaning rather than original intent do so to avoid the inevitable subjectivity that accompanies a search for the intent of individual framers. As Professor Caleb Nelson has summarized, originalists typically focus on how the document would have been understood by an "objectively reasonable" member of the founding generation.[40] In the search for original meaning, the principal tools are "grammatical rules and other interpretive conventions of the day."[41] Those, however, are not Professor Claeys's tools. Instead, he purports to derive original meaning from the natural law culture prevailing among the Framers and the inferences an outside observer can draw from that culture.[42]

Even if Professor Claeys's turn to natural law is consistent with modern originalist approaches to constitutional interpretation,[43] using natural

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people and the states powers not granted by the Constitution, grew out of Anti-Federalist demands for greater precision about the extent of federal power.").

37 Chi., Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 241 (1897).

38 Claeys, *supra* note 2, at 195.

39 Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 341 & n.51 (2002).

40 Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 554 (2003).

41 *Id.*

42 Claeys, *supra* note 2, at 195; *see also* Claeys, *supra* note 5, at 1566–74.

43 There is a close, though not inevitable, affinity between originalism and textualism. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 8 (2001) (noting that "statutory textualists are originalists in matters of constitutional law"); Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1, 10–15 (describing Justice Scalia's textualist originalism, but noting that originalism does not compel textualism). Modern textualists readily concede that interpretation requires looking beyond the text itself to "common points of reference and assumptions that a reasonable speaker and interpreter would share." John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1342 (1997). As a result, extratextual sources may count as authoritative evidence of original meaning, so long as reasonable speakers would have consulted those sources "to determine the meaning of the law for which he or she was voting." *Id.* As Justice Scalia himself has written: "[I]t is often exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the con-

law as a foundation for takings clause interpretation leaves considerable room for Justices to smuggle in their own policy preferences.[44] Among current advocates of natural law principles, agreement about the content of those principles is far from universal.[45] And what is true for contemporary theorists was undoubtedly true of eighteenth century Framers as well.[46] A search for definite answers in the Framers' understanding of natural law principles is not likely to be successful.

That leads to a more fundamental problem. Even if we adopt Professor Claeys's brand of originalism, and even if we concede that the Constitution's language and structure is imbued with natural law principles, the Framers' objectives did not begin and end with the entrenchment of natural law. Rather, they were also concerned with separation of powers issues, and with giving the legislative branch sufficient lawmaking power. That is, even if the Framers were committed to a natural right to property, they might have been content to permit Congress a role in defining that right. It is not at all clear that the Framers intended to place all natural rights and natural law principles beyond the reach of Congress.[47]

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sideration of an enormous mass of material." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989). Hence, if a reasonable constitutional framer would have consulted natural law as a source or meaning, contemporary originalists and textualists would be entitled to draw on natural law as evidence of meaning.

[44] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 50 (1980) ("[Y]ou can invoke natural law to support anything you want.").

[45] Consider, for instance, the debate over natural law with respect to the confirmation of Justice Thomas. Clarence Thomas had appeared to endorse natural law principles in interpreting the Constitution, and the chair of the Senate Judiciary Committee, Joseph Biden, then endorsed natural law reasoning, contending that the real issue was over the appropriate version of natural law. *See generally* Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENT. 93, 94–96 (1995). On contemporary differences about the content of natural law, see, for example, Robert P. George, *Natural Law, The Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269, 2281–82 (2001) (detailing competing natural law principles dealing with issues of abortion and contraception); R. George Wright, *Is Natural Law Theory of Any Use in Constitutional Interpretation?*, 4 S. CAL. INTERDISC. L.J. 463, 469–70 (1995) (discussing indeterminacy of natural law theories).

[46] As Justice Iredell put it in his concurring opinion in *Calder v. Bull*, 3 U.S. (1 Dall.) 386, 399 (1798): "The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject." *See also* Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 853–54 (1978) (noting belief among many seventeenth and eighteenth century natural law theorists that it was "no easy matter" to determine what laws are repugnant to natural law).

[47] Indeed, Calvin Massey, among others, has emphasized two divergent strands in the natural law theory prevalent in eighteenth century America, one which relied on majoritarian decision makers to ascertain natural law theory, and the other which relied on judicial application of natural law theory to check abuses by the executive and legislature. Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 U. CIN. L. REV. 49, 55–62 (1992); *see also* Grey, *supra* note 46, at 891–93 (detailing two competing views of natural law in the revolutionary period). For those subscribing to the majoritarian view, legislative bodies themselves were in a position to determine which natural rights and which natural law principles should govern. *See* George, *supra* note 45, at 2279 (noting that "natural

With respect to property in particular, any constitutional natural right to property would come into immediate conflict with another important constitutional principle: federalism. The Framers were creating a federal government of limited powers, as was clear from the enumerated powers in Article I,[48] reinforced by the express language of the Tenth Amendment.[49] If the states were to retain authority in all areas not reserved to the federal government, why assume that a natural right to property trumped the right of states to regulate property?

In an earlier article, Professor Claeys derived support for his natural law reading of the Taking Clause from a series of nineteenth century state court cases.[50] But, as he recognizes, those cases do not generally invoke the federal Constitution; they invalidate state and local regulations of land on a variety of state law grounds, or sometimes, based on general principles not tied to any explicit authority.[51] Those decisions are entirely appropriate; the federal Constitution does not constrain the ability or power of state courts to protect property against incursion by state legislatures or local municipalities. Indeed, as I have argued elsewhere, state courts remain today the principal bulwark against intrusive regulation of land.[52] But the fact that state courts in the nineteenth century embraced and invoked natural law conceptions of property rights tells us nothing about whether or why the original meaning of the federal Constitution assures protection for those conceptions when they come into conflict with other values the Framers embedded within the Constitution. In short, Professor Claeys has not demonstrated that originalism mandates, or even permits, a coherent nuisance-based account of the Takings Clause.

IV. PROCESS DEFECTS AND BRIGHT-LINE RULES

One of Professor Claeys's persistent themes is that the Rehnquist Court's conservatives, primarily Justices Rehnquist and Scalia, have failed to develop a coherent approach to the Takings Clause—a critical problem if it takes a theory to beat a theory. As Professor Claeys accurately observes, these two Justices have supported a series of bright-line prohibitions in takings jurisprudence, but have not explained how those prohibitions fit into a coherent vision of the Takings Clause. This section examines the Rehnquist/Scalia approach to takings cases. What emerges from the results Justices Rehnquist and Scalia have supported (if not from their opinions

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law does not dictate an answer to the question of its own enforcement" and that "authority to enforce the natural law may reasonably be vested primarily, or even virtually exclusively, with the legislature.").

[48] U.S. CONST. art. I, § 8.

[49] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.").

[50] Claeys, *supra* note 5, at 1549.

[51] *Id.* at 1575–76.

[52] Sterk, *supra* note 7.

themselves) is a public choice approach to takings litigation—an approach that emphasizes process rather than substantive protection, and that is consistent with the values of federalism.

Adherents of the nuisance-based vision of the Takings Clause focus on substance, not process. For them, the role of the Supreme Court Justice is essentially the role of a local legislator: to determine whether a particular regulation would conflict with property rights derived from natural law.

By contrast, Justices Rehnquist and Scalia are, as Professor Claeys observes, positivists. They distinguish sharply between the role of the legislator and the role of a Supreme Court Justice.[53] To take an obvious example from a takings case, it seems beyond dispute that neither of them, as legislators, would have supported the rent control ordinance sustained by the Court in *Yee v. Escondido*.[54] But neither Justice Rehnquist nor Justice Scalia views the Constitution as an instrument that entrenches libertarian values. Both of them believe that within our constitutional scheme, democratic branches should have the power to act, even if the result is to make some landowners poorer.[55]

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[53] Consider, for instance, Justice Scalia's dissenting opinion (joined by Chief Justice Rehnquist and Justice Thomas) in *Lawrence v. Texas*, 539 U.S. 558 (2003), in which the Court invalidated a Texas sodomy statute:

> [P]ersuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. I would no more *require* a State to criminalize homosexual acts—or, for that matter, display *any* moral disapprobation of them—than I would *forbid* it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change . . . . [I]t is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best. One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion.

Id. at 603–04 (Scalia, J., dissenting).

[54] 503 U.S. 519 (1992). A unanimous Court, in an opinion by Justice O'Connor, held that a challenged mobile home rent-control law did not constitute a permanent physical occupation and did not, therefore, work a per se taking of the mobile home park owners' property. The Court did not determine whether the challenged law constituted a regulatory taking.

[55] Even when Justices Rehnquist and Scalia have disagreed about results, they have endorsed the power of legislatures to redistribute wealth. Thus, in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), the majority, in an opinion by Chief Justice Rehnquist, upheld a rent control ordinance against a takings challenge (albeit because the claim was premature, *id.* at 8–10). Justice Scalia dissented, but his dissent conceded legislative power to transfer wealth from landlords to tenants:

> Of course all economic regulation effects wealth transfer. When excessive rents are forbidden, for example, landlords as a class become poorer and tenants as a class (or at least incumbent tenants as a class) become richer. Singling out landlords to be the transferors may be within our traditional constitutional notions of fairness, because they can plausibly be regarded as the source or the beneficiary of the high-rent problem.

Id. at 22 (Scalia, J., dissenting).

Moreover, Justices Rehnquist and Scalia combine their positivism with a commitment to federalism.[56] These commitments, taken together, lead them to reject the notion that the Constitution embodies natural law conceptions that insulate a class of property rights from state control. That rejection is most explicit in Justice Scalia's opinion for the Court in *Lucas*, where he makes it clear that the scope of South Carolina's power to regulate beachfront land depends on the content of background South Carolina law.[57] Their rejection of a constitutional definition of property, or even a constitutional floor, is also apparent from Justice Rehnquist's opinion in *Keystone Bituminous*, where he wrote that "we have evaluated takings claims by reference to the units of property defined by state law."[58]

As a result, the focus of the conservatives' inquiry, in Professor Claeys's terms, has been on whether a "taking" occurred, and not on whether "property" was involved. The problem, from their standpoint, has been with the scope and nature of legislative changes to property rights, not with their initial content. That is, Justices Rehnquist and Scalia have been concerned not with protecting natural property rights from political processes, but with defects in the political process that might lead local decision makers to single out landowners for disproportionate burdens.

Scalia and Rehnquist's public-choice analysis of the takings problem does have a Madisonian pedigree. In Federalist No. 10, Madison recognized that regulation of competing property interests "forms the principal task of modern legislation," even before he identified the evils of faction.[59] As a cure for those evils, Madison suggested not that matters of importance be removed from the legislative agenda, but that governing mechanisms be developed to minimize the likelihood that faction will control legislation.[60]

On Madison's terms, land use regulation presents great opportunity for faction to operate. Much regulation is done at the local level, where the potential is greatest "that a majority of the whole will have a common motive to invade the rights of other citizens."[61] In fact, when states step in to regulate, they often do so not through general legislation, but through special-purpose administrative agencies—like the coastal commissions operating in

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[56] For discussion of the Rehnquist Court's federalism jurisprudence, see John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002).

[57] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029–31 (1992). Chief Justice Rehnquist joined the opinion in *Lucas*.

[58] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 518–19 (1987) (Rehnquist, C.J., dissenting). Justice Scalia joined Chief Justice Rehnquist's opinion.

[59] THE FEDERALIST NO. 10, at 79, (James Madison) (Clinton Rossiter ed., 1961).

[60] *Id.* at 80 ("The inference to which we are brought is that the *causes* of faction cannot be removed and that relief is only to be sought in the means of controlling its *effects*.").

[61] *Id.* at 83.

Nollan and *Lucas*—which may be peculiarly subject to capture because their agendas are so restricted.[62]

The Court's conservatives have responded to the (perceived) threat of regulatory capture largely by prohibiting practices that enhance the capacity of majority factions to maintain a stranglehold on the political process. The "nexus" requirement developed in *Nollan* and *Dolan* furnishes a prime example.[63] If a municipality can condition granting a building permit on concessions by the landowner unrelated to the reasons for requiring that permit, the municipality's incentive to impose restrictive permit requirements increases dramatically. In Justice Scalia's words:

> One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served than would result from more lenient (but nontradeable) development restrictions.[64]

By requiring "rough proportionality" between the conditions imposed and the purposes justifying the underlying regulation, the Court reduced the incentive for a majority faction to treat the value of the landowner's land as a public asset available for all to share.[65]

The *First English* rule, requiring regulators to pay money damages for a "temporary taking" any time a regulation is invalidated as an unconstitutional taking, provides another constraint on a municipality contemplating a regulation of questionable constitutionality.[66] Without expanding the substantive conception of constitutional property, the Court used the prospect of municipal liability as a counterweight for municipalities under majori-

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[62] *Cf.* Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203, 1269 (1997) (concluding that moving regulatory policies from politically isolated commissions to an electorally responsible state legislature would likely contribute to efficient regulatory performance).

[63] In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court established that government can impose conditions on grant of a land use permit only when there is a nexus between the purpose of the ban and the purpose of the condition. In Justice Scalia's words:

> [T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land-use context, this is not one of them.

Id. at 837. In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court, in an opinion by Chief Justice Rehnquist, refined the requirement to require a "rough proportionality" between the permit conditions and the impact of the proposed development. *Id.* at 391.

[64] *Nollan*, 483 U.S. at 837 & n.5.

[65] *See generally* Stewart E. Sterk, Nollan, *Henry George, and Exactions*, 88 COLUM. L. REV. 1731, 1744–47 (1988).

[66] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318 (1987).

tarian pressure to prohibit or seriously restrict development on a particular parcel of land.[67]

Similarly, in *Palazzolo v. Rhode Island*,[68] the Court's focus was on process, not substance. By invalidating the state's per se rule that a taking challenge could not succeed when the challenged regulation was enacted before the challenger purchased the regulated land, the Court did not embrace any substantive definition of property. The Court did, however, make it impossible for local regulators to dismiss a class of takings claims without considering the effect of the regulation on the affected landowner.[69]

Even when dissenting, as in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[70] Justices Rehnquist and Scalia continued to focus on the nature of the regulatory process. In that case, landowners challenged a moratorium that prevented all use of their land. *Lucas* had previously established that a regulation prohibiting all use constituted a per se taking, but unlike the restriction in *Lucas*, the moratorium in *Tahoe* was only temporary.[71] To the Court's majority, that difference was enough to save the restriction from unconstitutionality.[72] The dissenters, however, would have limited the power of regulators to prohibit development by enacting a series of "temporary" measures which, collectively, could impose

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[67] The Court noted that the Takings Clause was designed to "limit the flexibility and freedom of governmental authorities," *id.* at 321, and quoted Justice Holmes's "aphorism that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 321–22 (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)). The Court also cited with approval Justice Brennan's dissent in *San Diego Gas & Electric v. City of San Diego*, 450 U.S. 621 (1981). In that dissent, Justice Brennan wrote:

> [L]and-use planning commentators have suggested that the threat of financial liability for unconstitutional police power regulations would help to produce a more rational basis of decisionmaking that weighs the costs of restrictions against their benefits. Such liability might also encourage municipalities to err on the constitutional side of police power regulations, and to develop internal rules and operating procedures to minimize overzealous regulatory attempts. After all, a policeman must know the Constitution, then why not a planner?

Id. at 661 n.26 (Brennan, J., dissenting) (citations omitted).

[68] 533 U.S. 606 (2001).

[69] The Rhode Island courts had held that the landowner could not prevail on a takings claim when the landowner had purchased after the enactment of the challenged regulation; the impact of the regulation on the value of the land was irrelevant with respect to such claims. *Id.* at 616; *see also* Anello v. Zoning Bd. of Appeals, 678 N.E.2d 870, 871–72 (N.Y. 1997). *Palazzolo* held that post-enactment transfers of title could not absolve the state of the obligation to defend actions restricting land use. *Palazzolo*, 533 U.S. at 627.

[70] 535 U.S. 302, 343 (2002).

[71] In fact, *Tahoe-Sierra* involved two moratoria which, together, prohibited development for thirty-two months. *Id.* at 306. The dissenting Justices noted that the development ban in fact lasted far longer than thirty-two months because of a court-ordered injunction that took effect after expiration of the last moratorium. *Id.* at 343–44 (Rehnquist, C.J., dissenting).

[72] *Id.* at 330–31 ("Our holding that the permanent 'obliteration of the value' of a fee simple estate constitutes a categorical taking does not answer the question whether a regulation prohibiting any economic use of land for a 32-month period has the same legal effect.").

on landowners a burden similar to that created by an outright development ban.[73]

The bright-line, process-oriented rules embraced by the Rehnquist Court's conservatives are all designed to make it more difficult for local regulators (and state courts) to avoid the basic takings issue: Should the landowner bear the burden of a proposed regulation, or should that burden be shared by the community? These process rules supplement the only two substantive limits on state regulatory power that the Court's conservatives have been able to articulate: the *Lucas* rule that a regulation is a taking if it denies landowner all use of his or her land, and the previously-established rule that a permanent physical invasion constitutes a per se taking.[74]

Can this approach fit into a coherent theory of the Takings Clause? I have argued elsewhere that the answer is yes, so long as we take federalism seriously, and view the state courts and state legislatures as the primary bulwarks against regulatory abuse.[75] Those are the institutions with the greatest familiarity with underlying state law, and they enjoy a comparative advantage in developing responses that take best account of local variation in both substantive law and procedure. If we take federalism seriously, the Supreme Court can best use its institutional capital by articulating process-oriented, bright-line rules that do not immerse the Court in examining the content of background state law, but that do provide a counterweight to the influence of faction on the local legislative process. Given all this, it should be clear that the current Court's conservatives, with their own commitments to democratic governance and to federalism, could hardly have embraced Professor Claeys's substance-oriented approach to the Takings Clause.

V. THE TAKINGS BATTLE: WHO WON

Professor Claeys's final premise is that in the Rehnquist Court's takings battle, the liberals have won. He argues that only in the area of exactions have the Court's conservatives made a significant dent in the pre-existing takings jurisprudence—a jurisprudence that had essentially placed no limits on regulatory takings. Even if one focuses only on Supreme Court cases, Professor Claeys's conclusion is somewhat surprising in light of the unprecedented number of invalidations of state and local property regulations.[76] The conservatives' impact on regulatory takings, however, extends

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[73] The dissenting Justices conceded that moratoria prohibiting particular categories of use, rather than all uses, did not implicate the *Lucas* rule. The dissenters also concluded that "this case does not require us to decide as a categorical matter whether moratoria prohibiting all economic use are an implied limitation of state property law, because the duration of this 'moratorium' far exceeds that of ordinary moratoria." *Id.* at 353 (Rehnquist, C.J., dissenting). That is, from their perspective, a "moratorium prohibiting all economic use for a period of six years is not one of the longstanding, implied limitations of state property law." *Id.* at 352 (Rehnquist, C.J., dissenting).

[74] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[75] Sterk, *supra* note 7.

[76] *See* Brauneis, *supra* note 1, at 615.

far beyond Supreme Court doctrine. Its primary impact has been on state courts and local regulators. And in that realm, the cases in which the Rehnquist Court's conservatives prevailed have made a significant difference.

First, consider the impact the Rehnquist Court's opinions have had on municipal planners. Until *First English*, the highest courts of what were then the two largest states—California and New York—had held that judicial invalidation was the exclusive remedy available to a landowner who established the unconstitutionality of a land use regulation; money damages were not available.[77] Under that regime, municipal officials essentially took no risk by aggressively regulating use of land; even if the regulation ultimately failed to pass constitutional muster, the municipality would have frustrated development for a period of years—weakening the ex ante position of any developer negotiating with the municipality.[78] *First English* changed that calculus entirely; planners now must consider—and developers can now threaten—possible municipal liability for a temporary taking whenever regulation transcends constitutional limits.[79]

First English, in turn, has had a significant impact on state courts. In particular, *First English* has prompted a number of state courts to use state law doctrines to invalidate onerous land use regulations.[80] These courts, recognizing that a finding that the municipal regulation constitutes a taking would subject the municipality to money damages, have begun invalidating regulations on state law grounds—concluding, for instance, that the regulations were beyond the authority of the local regulators—in order to avoid the prospect of damages. Yet those cases will not show up in a search of

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[77] Agins v. City of Tiburon, 598 P.2d 25, 28 (Cal. 1979), *aff'd*, 447 U.S. 255 (1980); Fred F. French Investing Co. v. City of New York, 350 N.E.2d 381, 385 (N.Y. 1976).

[78] Justice Brennan's dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), quoting a statement by a California city attorney, captured the legal position of municipal planners: "If all else fails, merely amend the regulation and start over again." *Id.* at 655 & n.22.

[79] See Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 173–74 (2002) (observing that *First English* coerces government toward negotiation: "[T]he fact of potential liability for government delay creates an incentive to negotiate over permits, variances, and the like.").

[80] Among recent state court cases applying state law to invalidate local land use regulations, and concluding that *First English* does not require a damage remedy for state law invalidation, are *Torromeo v. Town of Freemont*, 813 A.2d 389, 392 (N.H. 2002) ("Absent a determination that the ordinance is unconstitutional and constitutes a taking, this case presents merely the type of municipal error for which judicial reversal of the erroneous action is the only remedy."); *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334, 343 (N.J. 2001) ("A per se compensable taking does not occur as a result of the temporary application of a zoning ordinance that is ultimately declared invalid in a judicial challenge to the municipal zoning authority."); and *Landgate, Inc. v. California Coastal Commission*, 953 P.2d 1188 (Cal. 1998) (stating that the *First English* rule does not apply when development prohibition results from error by a governmental agency). For criticism and rejection of efforts like these to narrow *First English*, see *Eberle v. Dane County Board of Adjustment*, 595 N.W.2d 730, 741–43 (Wis. 1999) (rejecting California court's approach in *Landgate* and overruling language in prior Wisconsin intermediate appellate court opinion taking same approach).

cases in which state courts have invalidated regulations as unconstitutional takings.

As Professor Claeys concedes, *Nollan* and *Dolan* have altered the takings landscape by reducing the leverage enjoyed by municipal officials in the planning process. Municipalities often seek concessions from developers as a condition to the issuance of development permits. These concessions might include dedication of land, repaving of roads, or payment of cash. *Nollan* and *Dolan* have strengthened the hand of developers seeking to avoid these concessions. Leading state courts have read the Supreme Court's cases broadly, to include not only dedications of land (the issue before the Court in *Nollan* and *Dolan*), but also other types of exactions.[81] Moreover, a number of state courts have held that *Dolan*'s "rough proportionality" standard applies not only to exactions demanded by municipal officials in the exercise of their discretion, but also to exactions authorized by statute.[82] Finally, the Texas Supreme Court, relying in part on a similar judgment reflected in a California statute has recently absorbed the lesson of *Nollan* and *Dolan* by holding—as a matter of state law—that a developer is entitled to challenge an exaction *after* complying with the municipality's demand and developing the project. That holding effectively removes the prospect of litigation delay from the arsenal available to municipal negotiators.[83]

Other, more recent decisions—particularly *Palazzolo*—promise to have a similar impact on the work product of state courts. The problem the court addressed in that case was not confined to Rhode Island. Many state courts had avoided consideration of takings claims by embracing a per se rule barring a landowner from challenging a restriction in place at the time of landowner's purchase.[84] Thus, *Palazzolo* requires state courts to confront takings issues they have previously deflected.

The point, then, is that the Rehnquist Court's decisions have made a difference in doctrine, and in practice. The Court's liberals have "won" the takings battle if the conservative objective was constitutionalization of a nuisance-based view of takings; they have not won if the liberal objective was maintenance of the status quo.

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[81] *See, e.g.*, Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620 (Tex. 2004); Benchmark Land Co. v. City of Battle Ground, 49 P.3d 860 (Wash. 2002); Home Builders Ass'n v. City of Scottsdale, 902 P.2d 1347 (Ariz. Ct. App. 1995); Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996).

[82] *See, e.g.*, *Flower Mound*, 135 S.W.3d 620; Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E.2d 380 (Ill. App. Ct. 1995). *But see Home Builders Ass'n*, 902 P.2d 1347.

[83] *Flower Mound*, 135 S.W.3d 620.

[84] *See, e.g.*, City of Va. Beach v. Bell, 498 S.E.2d 414 (Va. 1998), *cert. denied*, 525 U.S. 826 (1998); Anello v. Zoning Bd. of Appeals, 678 N.E.2d 870, 871–72 (N.Y. 1997); Grant v. S.C. Coastal Council, 461 S.E.2d 388 (S.C. 1995).

VI. CONCLUSION

Professor Claeys's article accurately traces a path not taken by the conservative members of the Rehnquist Court. Professor Claeys is certainly correct that the Rehnquist Court's takings jurisprudence has been far less revolutionary than it would have been if the Court had embraced the nuisance-based approach he describes.

Two points bear emphasis. First, even if the Rehnquist Court has not revolutionized takings jurisprudence, the Court has afforded landowners significant protections that they did not enjoy before 1986. Second, the nuisance-based approach advanced by Professor Claeys is inconsistent with commitments to democratic governance and federalism that are central to the jurisprudence of Justices Rehnquist and Scalia. And in this area, they chose fidelity to their jurisprudential principles, even at some cost to their undoubted policy preferences.