

The Hamlyn Lectures 2011  
**THE RULE OF LAW AND THE MEASURE OF PROPERTY**  
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Lecture 2:  
**UNRAVELLING THE FORM AND SUBSTANCE OF PROPERTY**

**1. Summarizing the first lecture in this series**

In the first lecture in this series, given in Oxford yesterday, I raised a question about the relation between private property rights and the legal/political ideal we call the Rule of Law. The association between the two is common and familiar, but my aim in these lectures is to put it under some scrutiny. I pursued this aim in Lecture 1 using the facts of a case from the United States.

The case—*Lucas v. South Carolina Coastal Council* (1992)—concerned a property developer, who bought beachfront real estate on a South Carolina barrier island, intending to develop it as residential property for resale. Unfortunately (or fortunately depending on your point of view), his plans for development were thwarted by new environmental regulations intended to protect the coastline from erosion. Mr. Lucas sued the Coastal Council under the Takings clauses of the U.S. Constitution, on the ground that the regulations deprived his property of all or almost of its value, amounting therefore to a taking of property by the state. This argument was accepted by a majority in the Supreme Court of the United States, and after the case was remanded back to the Supreme Court of South Carolina, Mr. Lucas was paid \$850,000 in compensation for the two lots, just slightly less than he had bought them for. (I am told that now, twenty years later, large homes sit on both lots.)

I said in Lecture One that my discussion is not oriented towards American constitutional law. I want to use the facts in *Lucas* to pose a question of a different kind. Is there a problem for the Rule of Law in the impact that the environmental statute and the regulations made under it, have on Mr. Lucas's rights of private property? Does it detract from the Rule of Law to subject property rights to restriction in this way? Or is the ideal of the Rule of Law neutral in this matter, given that there is law on both sides of the equation—law inasmuch as Mr. Lucas's property rights are *legal* rights but law also inasmuch as the restriction on development that he faces represents the application of a properly enacted statute?

Some people think that the legal/political ideal we call the Rule of Law is a purely formal/procedural ideal, neutral as between different kinds

of law, provided that law to whatever ends it is directed satisfies formal constraints of generality, prospectivity, clarity, etc. and is applied in a procedurally fair and respectable manner. So the environmental statute that constrained Mr. Lucas's development plans is law and its application to him counts as part of the Rule of Law. I suspect this view is held by many people in this room, by many who labor in the academic vineyard of rule of law studies. The Rule of Law is neutral as between property rights and the environmental legislation that constrains them.

But others, particularly outside the sphere of narrow analytic Rule-of-Law studies, believe that there is a special affinity between the Rule of Law and the vindication and support of private property rights, and that the Rule of Law looks with a jaundiced eye, rather than a neutral eye, on legislation of the kind we are considering. It is part of the mission of the Rule of Law, on this account, to support private property and therefore, to this extent, it provides a basis for criticizing legislative intervention. I associated something approaching this position with people like my NYU colleague Richard Epstein, with F.A. Hayek, and, hundreds of years ago, with John Locke.

The Lockean view was of particular interest to us in Lecture 1. Richard Epstein has identified an important contrast in the way different legal theorists think about the relation between law and property. Some see property as the child of law, the artifact of positive law-making. On this view "property rights are arbitrary assemblages of rights that the state creates for its own instrumental purposes, and which it can undo almost at will for the same instrumental ends."<sup>1</sup> But that is not the view that Epstein favors. He says that no sensible view of ownership,

[n]o system of property rights rests on the premise that the state may bestow or deny rights in things to private persons on whatever terms it sees fit. Rather, the correct starting point is the Lockean position that property rights come from the bottom up.<sup>2</sup>

Another way of looking at what we did in Lecture One was in terms of a contrast, familiar from conservative literature in the United States, between rule of law and rule by law. What tends to be said about a case like *Lucas* is that the environmental legislation represents "rule *by* law" but not the Rule *of* Law. Property rights, it is said, represent the Rule of Law, inasmuch as property rights emerge (either prepolitically or through the Common Law)

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<sup>1</sup> Epstein manuscript 65-66.

<sup>2</sup> Epstein 98.

and circulate (in free markets) without the interposition of any authoritative act of human rule determining, on the ruler's own terms, that such-and-such a person is to have such-and-such rights over such-and-such a resource. So, as a striking historical instance of this view, we considered John Locke's position, that property rights arise in this way and that it is the role of positive law to protect them and vindicate them, not to redefine them out of existence. It is part of the Rule of Law, on Locke's account, not only to ensure that we are governed by "settled standing laws" that are publicly promulgated, but also to ensure that those laws do not cut across private property rights that have natural and moral claims upon us—claims that are older, stronger, and quite independent of whatever claims are made on us by enacted positive law.

Well, I criticized both the position itself and its application. I am, as you know, a great fan of John Locke; I have written a couple of books and innumerable articles about his political philosophy. But I believe his theory of property is of very limited utility in the issues that concern us here. Epstein cites it because he likes the idea of property rights emerging as prepolitical entitlement rather than as a result of state action. But in almost every legal system, state action is present and fundamental to the emergence of a property regime—either because rights are deemed to be held from the state, or from the Crown as they are in England, or because much of the land has been collectively owned or owned in complex relationships of collective interconnectedness for long periods of history, or because state action, state authorization, and state guarantees have been necessary to wash out the effects of pervasive injustice in the transmission of property from one set of hands to another over the centuries. Either way, it is an artifact of the entanglement of public law and private law; it is not just a matter of entitlements established in the state of nature taking their place within a private law framework that eschews all public law elements. Legislation like the South Carolina's Beachfront Management Act is not the first public law intervention so far as the definition and redefinition of property rights is concerned.

That's a familiar critique. But in Lecture 1 we also considered the tension set up in Locke's constitutional theory by juxtaposing substantive constraints on legislation associated with property with more familiar formal and procedural Rule of Law constraints. And there I argued not only that a substantive principle of protecting private property adds something controversial to the formal and procedural aspects of Locke's conception of

the Rule of Law but that it is profoundly unsettling and destabilizing so far as that formal and procedural element is concerned.

One other way of understanding what I was doing in Lecture One was that I was exploring, in the company of my NYU colleague Richard Epstein, the idea that we should associate the Rule of Law with private law values, organizing our understanding of the Rule of Law so that it looks much more askance at the operation of public law.

I don't think (and I don't think Epstein thought) that it was ever plausible to associate the Rule of Law *exclusively* with the vindication of private law rights. An awful lot of the work that the Rule of Law does, it does with special emphasis on criminal law, in the principle of legality for example, or in the special emphasis on prospectivity in criminal law. (In the United States, the constitutional prohibition on ex post fact law-making has no operation at all outside the area of criminal law.)<sup>3</sup> But much of that work is negative, trying to rein in public law or blunt the force of its impact upon us, and it might be thought, by those in the Lockean tradition, that this is consistent with a special connection between the Rule of Law and the *affirmative* support and vindication of private law rights of property.

But in end, I don't think this is going work. It is partly because I share Hans Kelsen's skepticism about the very basis of the distinction between private law and public law. All law involves something like state agency, if only because in the end it is the state that is called upon to come to the aid of private litigants in upholding their private law rights, and I don't think that devotion to the Rule of Law ideal should lead us to neglect or denigrate the role of human agency involved in both law-making and law-enforcement. I will talk about this more in London, tomorrow, in the last of these lectures. And the fact is that law works more than ever these days as an integrated whole, so that we think of private law as serving public as well as private purposes and as being on that account naturally susceptible to public law emendation, and the rights it comprises being subject to both extension and restriction for public purposes. This is true in tort law, it is true in contracts, and there is no reason to insist that it cannot be true in property law. There is no turning back to an era where the private law relations could be conceived in a purely formalist way and understood in a way that was purged of any possible public policy understanding.

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<sup>3</sup> Refer to *Calder v Bull*.

## 2. A Substantive Rule of Law?

Let me now turn to the issues that I want to discuss in this lecture, the second in the series. The failure of the Lockean maneuver does not mean that we have refuted the claim that private property commands a special place in the Rule of Law. There may be other ways of vindicating the sort of connection that Epstein, Hayek and others are interested in.

Those who work academically, studying the Rule of Law in the shadow of Albert Venn Dicey and Lon Fuller and Joseph Raz, tend to think of the Rule of Law in formal and procedural terms. Laws should be clear, public, and prospective, they should take the form of stable and learnable rules, they should be administered fairly and impartially, they should operate as limits on state action, and they should apply equally to each and every person, no matter how rich and powerful they are. That's the formal/procedural conception. But there has long been a debate about whether the Rule of Law also has or requires a substantive dimension.

Many good-hearted people believe that it should. For example, it is widely believed that (and this is a quotation from the World Justice Council, an organization that measures states performance on a Rule-of-Law index)—it is widely believed that “a system of positive law that fails to respect core human rights ... does not deserve to be called a rule of law system.” The World Justice Council quotes Arthur Chaskalson, former Chief Justice of South Africa, to this effect:

[T]he apartheid government, its officers and agents were accountable in accordance with the laws; the laws were clear; publicized, and stable, and were upheld by law enforcement officials and judges. What was missing was the substantive component of the rule of law. The process by which the laws were made was not fair (only whites, a minority of the population, had the vote). And the laws themselves were not fair. They institutionalized discrimination, vested broad discretionary powers in the executive, and failed to protect fundamental rights. Without a substantive content there would be no answer to the criticism, sometimes voiced, that the rule of law is ‘an empty vessel into which any law could be poured.’<sup>4</sup>

I said in Lecture 1 that Joseph Raz is famous for insisting (in a 1977 article)<sup>5</sup> that “the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged,” and that we should not try to read

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<sup>4</sup> Remarks at the World Justice Forum I, held in Vienna, Austria in July 2008

<sup>5</sup> Joseph Raz, “The Rule of Law and its Virtue” in his book *The Authority of Law*.

into its other considerations about democracy, human rights, and social justice. Those he said are better understood as independent dimensions of assessment. Tom Bingham, however, in his book on *The Rule of Law*, said this in response to Raz:

While ... one can recognize the logical force of Professor Raz's contention, I would roundly reject it in favor of a 'thick' definition, embracing the protection of human rights within its scope. A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed.<sup>6</sup>

Lord Bingham's position has an intuitive appeal even if it irritates in its casual rejection of a point whose logic it claims to recognize.

Both Chaskalson and Bingham seem to want to fill out the formal / procedural conception of the Rule of Law with some human rights component. And many liberals are inclined to follow them in that. But this is not the only possibility. I have argued elsewhere for an association of the Rule of Law with prohibitions on torture, brutality, and degradation—a specific subset of human rights. Many associate it with a presumption of liberty or a presumption in favor of human dignity. (I have argued this also). Others—and Arthur Chaskalson hinted at this—associate the Rule of Law with a substantive dimension of democracy. And of course, there is the possibility that we are investigating—that the substantive dimension of the Rule of Law is some role in the special protection of private property.

And that sounds an interesting danger signal. Once we open up the possibility of the Rule of Law having a substantive dimension, and not just being a collection of formal and procedural principles, is that we inaugurate a sort of competition whereby everyone clamors to have their favorite value, their favorite political ideal, incorporated as a substantive dimension of the Rule of Law. Those who favor property rights and market economy will no doubt scramble to privilege their favorite values in this regard. But so will those who favor human rights, or those who favor political participation, or those who favor civil liberties or social justice. The result in my view is likely to be a general decline in political articulacy, as people struggle to use the same term to express disparate ideals.

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<sup>6</sup> Bingham, *The Rule of Law*, p. 67

It's not quite a zero-sum game. Bingham in his discussion thinks that if property comes in at all it comes in under the auspices of human rights, because it is mentioned in the Article 1 of the First Protocol to the European Convention of Human Rights. And there is, I guess, no reason why the Rule of Law shouldn't have several substantive dimensions. In fact, I guess once one abandons any Razian inhibition – then the more the merrier.

But it really isn't clear how one goes about arguing for the recognition of a substantive dimension. Or how one should go about arguing that private property has a special and independent importance in this regard. We are after all, talking about the shape of our political ideas and since these are not ordained canonically for us, it may be thought that we can divide them up any way we like and that there is no correct or incorrect way of limiting or extending the application of an ideal such as the Rule of Law. I know comparable questions arise about our definition of democracy—how much human rights baggage does it convey? And our definition of “liberty”—how much does that ideal, particularly in its positive form, commit us to a whole vision of social order? Or “justice”: was Rawls right to encompass within the concept of justice a whole vision of a well-ordered society, or should justice have been conceived more narrowly than that? “Liberty,” justice, “democracy,” and “the Rule of Law”—these are just words for various segments of our political morality and presumably we can organize the categories any way we like. Unless we are committed to a strong Platonic sense of what each one entails, the reasons we are going to have to appeal are reasons having to do with the pragmatics of argumentation—that dividing the concepts up in such and such a way makes us more articulate, makes it easier for us to distinguish lines of argument, or makes it easier to spot equivocations and to grasp and face up to the need for trade-offs.

Sometimes the case that is made is quite cynical, involving what the emotivist philosopher, Charles Stevenson, would have recognized as a “persuasive definition.”<sup>7</sup> Certain hard-nosed World Bank types say, in effect, that our real interest is in getting governments to respect property rights, investor concerns, and the principle of free markets, and we should use whatever means come to hand to promote these ideals. “Because the phrase ‘rule of law’ has acquired such a strong positive connotation,” it may be useful in this regard. Since everyone happens to be in favor of the Rule of Law at the moment, we can use the good vibrations associated with the

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<sup>7</sup> Cf. CL Stevenson, “Persuasive Definitions” (1938) 47 *Mind* 331. Cf.

phrase to bolster the case that is made for the Washington consensus and drive home its points about markets and property.<sup>8</sup> This is calculated—indeed manipulated—as a purely instrumental case for using the phrase in a certain way.<sup>9</sup>

But are there more respectable ways of proceeding? I can think of several. One is to bring to the surface the values that motivate the traditional formal / procedural aspects of the Rule of Law. After all, even in the formal/procedural conception, we don't insist on clarity, generality, publicity, prospectivity, and due process for their own sake; we do so because of the way they serve liberty or (in Fuller's account and in Raz's account—though Raz now disowns this) because of the way they enable law to respect human dignity.<sup>10</sup> But actually, I am not sure that this is going to get us to anything like private property as a substantive dimension of the Rule of Law. The substantive values yielded by this approach are likely to be quite abstract: liberty, equality, and dignity, rather than particular values like the principle of private property.

### **3. From security to property**

The other possibility is to see if we can discern a substantive dimension for the Rule of Law by considering the substantive tendency of some of the acknowledged formal and procedural elements. I think this is quite promising as a strategy, and let me talk for a few minutes about it a particularly powerful version of it.

One important aspect of the Rule of Law as it is traditionally conceived is the requirement that the laws be reasonably stable. This is a hardy perennial. Aristotle emphasized it in Book II of the *Politics*, when he suggested that by and large change in the laws was a bad thing, since it undermines their role in the inculcation of virtue. That is hardly our concern

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<sup>8</sup> World Bank, "Rule of Law as a Goal of Development Policy: "The main advantage of the substantive version of the rule of law is the explicit equation of the rule of law with something normatively good and desirable. The rule of law is good in this case because it is defined as such. This is appealing, first because the subjective judgment is made explicit rather than hidden in formal criteria, and, second, because the phrase 'rule of law' has acquired such a strong positive connotation."

<sup>9</sup> See *ibid.*: "What we really should be interested in—that is, the essence of the rule of law—is the substantive or functional outcome. Whether or not the formal characteristics contribute to that outcome ought to be a matter for research, not presumption."

<sup>10</sup> Raz writes in 1977: "the rule of law is necessary if the law is to respect human dignity. Respecting human dignity entails treating humans as persons capable of planning and plotting their future. Thus, respecting people's dignity includes respecting their autonomy, their right to control their future."

today. Today, the explanation for the importance of legal stability is probably the one stated by Joseph Raz:

If [the laws] are frequently changed people will find it difficult to find out what the law is at any given moment and will be constantly in fear that the law has been changed since they last learnt what it was.

Not only that, but it is also important to extend the horizon of action:

people need to know the law not only for short-term decisions ... but also for long-term planning. Knowledge of at least the general outlines and sometimes even of details of tax law and company law are often important for business plans which will bear fruit only years later. Stability is essential if people are to be guided by law in their long-term decisions.

It is, said Raz in 1977, a matter of dignity (though, as I have already mentioned, he tells me that he now wants to retract this dignity talk).

“Respecting human dignity entails treating humans as persons capable of planning and plotting their future.”

These are general reasons for stability, arising out of the need for individuals to be able to guide their actions, short- medium- and long-term actions on the basis of a secure knowledge of the law. In Lecture 3, I shall have something to say about the limits of this principle given some of the features that modern legal systems possess: I spoke about this earlier this year in my British Academy Law Lecture on “Thoughtfulness and the Rule of Law.”<sup>11</sup>

Now, on the face of it, these reasons apply to laws of every kind, whether criminal law, commercial law, public regulation, tax law, or aspects of private law, such as tort or contract. People need to know where they stand; they need to be able to plan around the laws demands, in the autonomous organization of their lives. Since law’s presence in people’s lives tends to be intrusive if not coercive, then it is important that its presence be made calculable, so that it can enter into their planning. And since other people’s actions may also impact intrusively upon us, we need to know in advance how and to what extent these too will be controlled by law.

We need in short a basis for expectation. Now in jurisprudence, the best account that was ever given of the importance of legal expectations was given more than 150 years ago by the utilitarian philosopher Jeremy

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<sup>11</sup> SSRN cite. <http://ssrn.com/abstract=1759550>

Bentham, in a work called “The Principles of the Civil Code,” published first in France and in English only posthumously in \_\_\_\_.

Expectation, said Bentham put it, is immeasurably important in human affairs. It “is a chain which unites our present existence to our future existence.”

It is hence that we have the power of forming a general plan of conduct; it is hence that the successive instants which compose the duration of life are not isolated and independent points, but become continuous parts of a whole.

The establishment of expectations, said Bentham, is largely the work of law, and the principle of secure expectations, what he called the principle of security, is a vital constraint on the action of law: “The principle of security ... requires that events, so far as they depend upon laws, should conform to the expectations which law itself has created...”

All that so far as general legal stability is concerned. But it is not hard to see how someone might think this interest in security, secure expectations, has a special relation to property. And that was exactly Jeremy Bentham’s position in his *Principles of the Civil Code*. I am going to quote quite extensively:

The idea of property consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed ... [T]his expectation, this persuasion, can only be the work of law. I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it to me. It is law alone which permits me to forget my natural weakness. It is only through the protection of law that I am able to inclose a field, and to give myself up to its cultivation with the sure though distant hope of harvest.

He has no patience at all with any Lockean theory of natural property rights. I might appropriate something and hope to hang on to outside the auspices of positive law. But “[h]ow miserable and precarious is such a possession!”

A feeble and momentary expectation may result from time to time from circumstances purely physical; but a strong and permanent expectation can result only from law. ... Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.

When we made this point against Locke, the inclination was to say that property can be the plaything of law, can be modified and must be flexible so that it can respond to law's ever-changing demands. But Bentham drives the point in the opposite direction. Precisely because property is the product of law, the basis of property must be stabilized. And the conclusion is utterly conservative:

As regards property, security consists in receiving no check, no shock, no derangement to the expectation founded on the laws, of enjoying such and such a portion of good. The legislator owes the greatest respect to this expectation which he has himself produced.

In this sense the protection of property emerges as a substantive theme in a process that began from simply noting the nature of the human interest in the stability of the laws that is protected by traditional formal and procedural principles of the Rule of Law.

That it seems to me is in principle a good and respectable way to argue for a substantive version of the Rule of Law.

Similar variations on the human need for legal stability may also be in play here. In the tradition of David Hume, people might point to special considerations about the personal and psychological investment that an individual has in the objects connected to him. "What has long lain under our eye," said Hume in Book III of the Treatise," and has often been employ'd to our advantage, that we are always the most unwilling to part with; but can easily live without possessions, which we never have enjoy'd, and are not accustom'd to."

Such is the effect of custom, that it not only reconciles us to anything we have long enjoy'd, but even gives us an affection for it, and makes us prefer it to other objects, which may be more valuable, but are less known to us.

Bentham thought along the same lines:

Everything which I possess, or to which I have a title, I consider in my own mind as destined always to belong to me. I make it the basis of my expectations, and of the hopes of those dependent upon me; and I form my plan of life accordingly. ... [O]ur property becomes a part of our being, and cannot be torn from us without rending us to the quick.<sup>12</sup>

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<sup>12</sup>. Bentham, "Security and Equality of Property," p. 54.

Someone who has been designated officially as the owner of a given piece of land has actual control of it as often as not: he will know it intimately, he may inhabit it with his family, cultivate it, earn his living from it, care about it, and regard it as part of the wealth that he relies on for his own security and that of his descendants. He will be able to point to features of the land where his work and his initiative have made a difference, so that the land will not only seem like his. These effects are likely to accrue to him by virtue of the operation of the system of property as positive law quite independently of whether it is just or unjust, or whether he or anyone else regards it as just or unjust.

And the thought is echoed by a modern jurist, Margaret Radin, who in a number of influential articles has argued that respect for existing property rights is bound up with respect for persons:

Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world.<sup>13</sup>

There is, as I said, a sort of natural continuity, between these accounts of property and the Razian explanation of the importance of relative stability in terms of the dignity of man as being who lives, acts, and plans in the world over long periods of time.

#### **4. But... property versus private property.**

However—and here's the catch—it is not at all clear that an argument of this kind privileges *private* property—specifically rights of ownership—in the sense that (say) Richard Epstein has in mind. After all, property rights come in all shapes and sizes—the rights of full ownership

I mentioned Margaret Radin's position. Radin uses the idea to distinguish, for example, between the claims of landlords and the claims of tenants in disputes about residential rent control.<sup>14</sup> It is the tenant not the owner who is invested psychologically in the stability of the property relation on her account.

Property is not the same as ownership, and an account that privileges property under the auspices of the Rule of Law may be hospitable to other types of property relation as well. In a famous coda on the Rule of Law at

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<sup>13</sup>. Margaret Jane Radin, "Property and Personhood," reprinted in her collection Reinterpreting Property (Chicago: University of Chicago Press, 1993): 35-71, at p. 36.

<sup>14</sup>. Margaret Jane Radin, "Residential Rent Control," in Radin, Reinterpreting Property: 72-97.

the end of his book *Whigs and Hunters*, the late E.P. Thompson reminded us that in battles between eighteenth century agribusiness and eighteenth eco-terrorists, the conflict was not just property against humanity

it was alternative definitions of property-rights: for the landowner, enclosure—for the cottager, common rights; for the forest officialdom, “preserved grounds” for the deer; for the foresters, the right to take turfs.

People invest themselves in property rights of all kinds and it is by no means clear that in confrontations between owners and those who stand up for various kinds of public right that the Rule of Law, on this conception, will always side with the owner. A public footpath may have been defined for centuries across a patch of what is otherwise a privately owned field. People in the neighborhood might have just as much investment in the security of their footpath—in the expectation they have of being able to use it when they want and the plans that they build around this expectation as the farmer does in his ownership of the field and in his view that he ought to be able to plough and cultivate it in a regular pattern unconstrained by the public right of way.

The point is acknowledged most clearly by Bentham. As his discussion of security and property draws to a close, Bentham begins his conclusion with what sounds like a traditional privileging of unequal property.

In consulting the grand principle of security, what ought the legislator to decree respecting the mass of property already existing? He ought to maintain the distribution as it is actually established.

But then, for the purposes of those who want to privilege private property, Bentham takes a radically wrong step. He says that the principle of respecting the existing distribution is “a general and simple rule which applies itself to all states; and which adapts itself to all places, even those of the most opposite character.”

There is nothing more different than the state of property in America, in England, in Hungary, and in Russia. Generally, in the first of these countries, the cultivator is a proprietor; in the second, a tenant; in the third, attached to the glebe; in the fourth, a slave. However, the supreme principle of security commands the preservation of all these distributions, though their nature is so different, and though they do not produce the same sum of happiness.

It seems like a wrong step, but it is in fact Bentham following the logic of his own position. Maybe there are certain property systems that find it harder than others to get a foothold in human expectation. There are certain laws, he says, which “lie under a sort of natural incapacity of being made known to the people; they refuse to take hold of the memory.”<sup>15</sup> And there is no doubt that in some of his exposition his account of security is biased towards the good husbandry of a private proprietor. But he is honest enough to see that his account can be generalized in all sorts of directions. Maybe the law that secures the beaches and the coastline in *Lucas v. South Carolina Coastal Council* is as invested in protecting holidaymakers’ expectations on the Isle of Palms as the law that protects Mr. Lucas’s investment in development. At best we circle back to the general argument for legal stability, not for an argument that privileges the stability of private property as opposed to the stability of other forms of law.

## 6. The New Property

The word “property” was only beginning to emerge in its modern meaning in the seventeenth century, when John Locke wrote about the topic. And we know that he often signaled his desire to use the term in a broad sense, encompassing life and liberty as well as specific interest in (say) real estate.

This is partly a matter of semantics, how of the meaning of the word “property” evolved, from a broader to a narrower sense. But it also reminds us of an important substantive point about property, that the functions it performs—providing individuals with security and a stable horizon for their expectations—can be performed by other aspects of law as well.

### (a) Hayek

One of the theorists most associated—in the public mind (to the extent that the public thinks about these things at all)—with a property-oriented account of the Rule of Law is Friedrich Hayek. But even Hayek acknowledges that the security and independence that historically has been associated with property is in the modern world associated with much more diverse and complex legal structures and arrangements – many of them contractual in character. In his great book *The Constitution of Liberty*, published in 1960, Hayek spoke of the need to guarantee for each individual a sphere of freedom where he could pursue his own interest without coercive interference. Traditionally, this might be understood in terms of property—

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<sup>15</sup> Bentham, ??, at 321.

something like “an Englishman’s home is his castle,” and he can organize things within his castle as he pleases. We have all sorts of public law problems with this, once we begin to understand the violent and oppressive things that sometimes go on inside the gates of people’s castles. But even leaving that important point aside, Hayek is not prepared to accept that private property is the only way of securing individual freedom. “In modern society,” he says, “the essential requisite for the protection of the individual against coercion is not that he possess property,” but that he have multiple possibilities of access to “the material means which enable him to pursue a [ ] plan of action.

It is one of the accomplishments of modern society that freedom may be enjoyed by a person with practically no property of his own. . . . That other people's property can be serviceable in the achievement of our aims is due mainly to the enforceability of contracts. The whole network of rights created by contracts is as important a part of our own protected sphere, [and] as much the basis of our plans, as any property of our own.

Once again it seems to follow that we should be sticking with the general Rule of Law commitment to stability such as it is, rather than looking specifically to its association with one limited domain of law namely private property.

Hayek’s case still leaves individual security in the domain of private law. But the point can be extended in a public law direction as well. In 1970, in the great case of *Goldberg v. Kelly*, the Supreme Court of the United States held that an entitlement to welfare support could not just be taken away from a needy individual without explanation and without a hearing affording him an opportunity to state his side of the case. In the course of that decision, the Court said this

Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that ‘(s)ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether

private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced.’

The Court was quoting from an article published in 1964 by Charles Reich, a Yale law professor, entitled “The New Property.” Reich argued that

[o]ne of the most important developments in the United States has been the emergence of government as a major source of wealth. Government is a gigantic syphon. It draws in revenue and power, and pours forth wealth: money, benefits, services, contracts, franchises, and licenses. Government has always had this function. But while in early times it was minor, today's distribution of largess is on a vast, imperial scale. The valuables dispensed by government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth - forms which are held as private property. Social insurance substitutes for savings; a government contract replaces a businessman's customers and goodwill. The wealth of more and more Americans depends upon a relationship to government. ... As government largess has grown in importance, quite naturally there has been pressure for the protection of individual interests in it. The holder of a broadcast license or a motor carrier permit or a grazing permit for the public lands tends to consider this wealth his "own," and to seek legal protection against interference with his enjoyment.<sup>16</sup>

It is a powerful and important argument, and again, there is no serious possibility of rolling this back. So if we are really to pay attention to the security of expectation that individuals need in the autonomous conduct of their lives, we have to think also about the guarantees that are associated with these forms of “property” too and that means guarantees in relation to public as well as private provision, or guarantees in relation to the stability of public licensing and regulation. Those are certainly worthy aims. But, as we saw with Bentham, they mean that the ideal of security no longer takes us from the Rule of Law to private property as such; it takes us from the Rule of Law to law in all its varieties inasmuch as it impacts on the free conduct of our lives and the space we space for autonomous engagement in economic activity. Paradoxically, the expansion of our sense of the multiple

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<sup>16</sup> Reich, *The New Property*, 73 *Yale L.J.* 733 (1964)

roles that law plays in this requires us to contract or reduce the expansion of the Rule of Law so that it applies to law in general rather than to any particular domain of law, privileged as a substantive dimension.

### **7. Bundles of Rights**

Let's pause and take stock. We have been examining the possibility of establishing a special connection between the Rule of Law and private property *via* the notions of stability and security of expectation, which seem to be common between the two. And our argument has been that such an argument seems to prove a lot more since it directs our attention to a myriad of areas in which this security is important, not all of which by any means involve private property as it is ordinarily conceived. But that doesn't discredit the link with private property. It still leaves Mr. Lucas with his beachfront lots on Beechwood East on the Isle of Palms saying, well whatever the situation with Bentham's views on other forms of property, or Hayekian contracts or the Reich-ian new property, he at least was relying on a traditional package of real estate so far as his personal activity was concerned. And he at least ought to be sheltered by any generally available legal security from the sort of upset that was served on him by regulations made under the Beachfront Management Act.

I will talk a bit in general terms about the legal security he craved in my third lecture tomorrow. But now, for the last few minutes of this lecture, let me say something about the difficulty involved in giving Mr. Lucas the benefit of a special Rule-of-Law doctrine so far as his traditional private property is concerned.

No one in the modern debate about property needs to be told that, from a legal point of view, ownership is not a single right but comprises a bundle of rights, of various Hohfeldian shapes and various sizes. An owner of land characteristically has the privilege of using the land, the right that others not come on it or use it without his permission, the power to alienate it completely through gift or sale, or in part or for a period by leasing it, the liability to have it seized by creditors in the event of unpaid debt or bankruptcy, and so on.<sup>17</sup>

Property may represent a unified idea, but when we are exploring its legal ramifications we have to pay attention to the detail. So, for example, in American takings law there is often a question about which sticks in an

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<sup>17</sup> Not all the sticks in the bundle apply to all forms of property—for example, there is no use that one can make of a bond or security except the use of it in redemption or in a transaction. Intangible property of various forms, including intellectual property, all have their characteristic bundles. [more?]

owner's bundle of rights are impacted or broken by some offending statute or regulation. In *Lucas v South Carolina Coastal Commission*, the majority held that a restriction on use that drastically reduced the likely resale value that the owner was anticipating amounted more or less to a taking of the whole thing. They quoted Coke who asked, "[F]or what is the land but the profit thereof [?]."<sup>18</sup> But other justices on the panel disagreed. Justice Blackmun insisted that the

Petitioner still can enjoy other attributes of ownership, such as the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer. ... Petitioner also retains the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house.<sup>19 20</sup>

The issue there is inescapable. Since the Constitution prohibits legislative takings, but since regulative legislation tends to impact on some rights and not others, we have to ask in detail which impacts amount in effect to a taking of the whole thing and which do not.

Is the same true when we are exploring the relation between private property and a political ideal? Can we say, as political philosophers, that the Rule of Law just protects private property without saying what *aspects* of private property it protects?

I am not sure. The idea of the Rule of Law's having a special role to play in protecting private property is perhaps not beset in the same way with doctrinal rigidities and the conundrums that constitutional law throws up. No particular official consequence follows from anyone's determination that the Rule of Law does or does not protect a given incident of property. Yet if our political morality is not to fall into incoherence, there must be something to be said on this issue – that is, if we do want to maintain a belief that the Rule of Law privileges and protects property rights.

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<sup>18</sup> 1 E. Coke, Institutes, ch. 1, 1

<sup>19</sup> Blackmun J. (1043-4):

<sup>20</sup> During oral argument, one of the justices pursued this theme: QUESTION: is it perfectly clear ... that [the petitioner]... was denied all economically viable use of his land?

MR. LEWIS: Yes, sir.

QUESTION: So you feel it was completely worthless.

MR. LEWIS: Yes, sir.

QUESTION: Would you be willing to give it to me?

MR. LEWIS: I don't own it, but with the taxes that are owed on it I would be willing to give it to you, yes, sir. (Laughter.)

In my book *The Right to Private Property*, published in 1988 (and that's a long time ago), I said that we should not let the intricacies of the bundle theory blind us to the importance of private property as a general, intuitive idea, and that we should distinguish between the concept of private property and various conceptions of private property, with the conceptions being spelled out in terms of various configurations of the bundle. So maybe the alleged connection that we are in pursuit of is just a connection between the Rule of Law and the *concept* of private property rather than between the Rule of Law and any particular conception of ownership.

That's possible, but then it leaves the owner of those beachfront lots on the Isle of Palms in a rather invidious position, because as the dissenters said in *Lucas*, he is still the owner of those lots. The ownership has not been taken away from him, or if it has, it is so, only on the basis of a particular controversial conception of ownership.

I don't mean that as a sneaky academic maneuver. The fact is that in modern world even our intuitive sense of what it is to be the owner of something has to be an adaptable one. In rather the same way in which we come to identify our personal income in terms of post-deduction payment, net of income tax—this is argued in a book by two of my NYU colleagues, Liam Murphy and Thomas Nagel, called *The Myth of Ownership: Taxes and Justice*—so also it is arguable that people nowadays identify their property in a way that takes net account of actual and sometimes likely restrictions on use and development. Every owner of property in a historic town center is familiar with this, and it is not at all clear why we should have to work with an intuitive notion of property that stands aloof from this awareness. Any intuitions about property that we bring to the Rule of Law have to be, in this way, reasonable and flexible intuitions.

Apart from anything else what our property amounts to—certainly what we can do with it—is going to depend on what else is permitted, what else is prohibited, what else is regulated in the law at large. Law works holistically. And property rights are not defined in isolation from the rest of the law. What my property rights amount to, is partly a matter of how things stand in other areas of law. Notoriously, the use we can make of our property is dominated by a sense of what actions are permitted anyway. Robert Nozick once observed that “[m]y property rights in my knife allow me to leave it where I will, but not in your chest.” Property rights live in the shadow of the criminal law. And it will not do to turn the tables and say that property rights constrain the development of the criminal law and place limits on what uses of material goods the legislature may criminalize. (As in:

“I thought this was my gun or my marijuana. Why can’t I do with it what I please?”)

### **8. The Preservation of Market Value**

Indeed I have even heard the argument pushed the other way. If the Rule of Law protects the expectations we associate with our property, then the Rule of law may condemn even the repeal of some criminal law or regulation if that has an adverse effect on people’s property. Innumerable small businesses in New York state thrive as liquor stores because supermarkets are prohibited from selling wine or spirits (though not beer). Any proposal to lift the prohibition on supermarket sales would likely encounter howls of outrage from liquor store owners that this was a way of undermining their property because it ruined the business plan on which their acquisition of this property was predicated. But we can’t have that. We can’t have the Rule of Law endorsing a fanatic stabilization which underwrites every expectation of profit that people happen to have conceived in a particular legal context. The Rule of Law is not affronted every time a change in the law upsets people’s business plans.

If someone invests in real estate in upstate New York where a prison is located, anticipating profits from selling homes to corrections officers, they cannot complain on the grounds of the Rule of Law when the discriminatory Rockefeller drug laws are repealed, thus reducing the need for prison spaces, to the detriment of their investments. Yet I have heard just such outrage expressed, although some of it takes an allegedly more moderate form, with people saying that the repeal should operate only prospectively, with new offenders. It should not be applied to those currently in the law enforcement pipeline, let alone to those already incarcerated. In a spirit of moderation, the real-estate developers acknowledge that the Rule of Law mustn’t be construed as prohibiting all changes that affect property, but it does require such change to be measured and slow, rather than abrupt. That way there will be time for a soft landing for property prices in the prison cities most likely to be affected. It seems to me that we can’t have a notion of the Rule of Law that holds public policy hostage to anything remotely like this kind of calculation.

People may say that, without some stability along these lines, you can’t have a market in real estate. Mr. Lucas, you may say, obviously wasn’t working with a conception of this kind. He bought the beachfront property for development and he wouldn’t have paid a penny for it if he hadn’t had that possibility—underwritten by traditional doctrines of property—in mind.

But we should be very careful with this point. It is true that you can't have a market in any good or commodity, including land, without a clear sense of who is entitled to sell a piece of land—who is, at the moment of any given transaction, its owner. That has to be determinate and we have to have clear rules for the passage of a given item from one person's ownership to another. Otherwise market economy is impossible.<sup>21</sup>

But it by no means follows that the law has preserve the value of any given item of property, in order to facilitate market transactions. Indeed that would more or less make a nonsense of the very idea of a market, where prices are established as a resultant of hundreds of thousands of transactions and are not under anyone's control. If uncertainty is the issue, then markets can monetize uncertainty. And the monetization of uncertainty can be as sensitive to probabilities concerning legal change as they are to probabilities concerning cyclical economic decisions. I know this is heresy. An awful lot of people want a connection established between private property and the Rule of Law that is advanced as a major plank in state building so that foreign investors can have some advance assurance of the amount of wealth they can extract from a developing economy. But no such certainty is available in any other realm of economic activity, and honest jurists working with the notion of the Rule of Law should have nothing to do with cynical uses of it which simply designed to underwrite the profits of predatory and extractive enterprises associated with foreign investment.

### **9. Property on the Rule of Law's Terms**

We have been considering the shape and the detail of the property rights that might be privileged if property rights were privileged as a substantive dimension of the Rule of Law. It's a difficult subject to say anything about, because—as I said—it is not clear how exactly we are supposed to argue for the recognition of property as a substantive dimension of legality.

But here's an important point to remember. I don't think we can answer the question simply by pointing to the incidents of property that are most important for the individuals who have them or to the incidents that are most important for the social functions that private property is supposed to perform or for its role in a market economy. We can't just identify the important incidents of property (in any of these regards) and say that *these* must be the incidents that the Rule of Law supports. We can't just say, "Private property is important in this regard and that is why the Rule of Law

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<sup>21</sup> James Buchanan

supports it.” This is because a substantive dimension of the Rule of Law if there is one is attuned to property’s significance for legality, not to property’s significance in itself.

If the Rule of Law protects private property, it does so presumably on the Rule of Law’s own terms and these may or may not be the terms on which, in other contexts, the principle of private property is extolled. As a value in and of itself, private property commands respect in the dimensions of its greatest ethical, social, and political importance. But as a value protected specifically under the auspices of the Rule of Law, it will be protected in those aspects in which the values specifically and already firmly associated with the Rule of Law map on to it. And there’s the difficulty: we may have an intuitively plausible or politically convenient association between the Rule of law and private property, but we have no full or widely accepted explication of why the Rule of Law has this (particular) substantive dimension.

For my money, all this argues in favor of what I called in yesterday’s lecture the separation thesis. We are better off arguing for the Rule of Law in the respects in which the Rule of Law’s concerns cannot be duplicated under the auspices of any other political ideal. And we are better off arguing directly for (or about or against) private property, market economy, and economic freedom in general or in some situation on the terms that seem most appropriate to those considerations. Arguing in Rule-of-Law terms for property, markets, and economic freedom is simply too distracting. It bogs us down in debates about substantive conceptions and about the sticks in the bundle that are specially privileged as a matter of legality. And it prevents us saying what we want to say about private property for fear that that will not be something that comes under the auspices of the Rule of Law ideal.

It may seem a modest conclusion to separate our ideals in this way. And I don’t mean that we should be afraid to explore various connections between them . But there is absolutely no point trying to hijack the goodwill invested in one value to try to map it on to another. If we do try that, we may find that all the value leaks out in the process and we end up discrediting the Rule of Law—in every respect--instead of making the case that we want to make about economic freedom.