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The Hamlyn Lectures 2011: The Rule of Law and the Measure of Property

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The Hamlyn Lectures 2011

THE RULE OF LAW AND THE MEASURE OF PROPERTY

Jeremy Waldron

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LECTURE 1:
The Classical Lockean Picture and its Difficulties

1. *Lucas v. South Carolina Coastal Council* (1992)

I want to begin with a case. It is a 1992 decision of the Supreme Court of the United States. Some of you will know it—*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Like many American property cases, it concerns the application of what we call the "Takings Clause" of the Fifth Amendment. These lectures are not about American constitutional law and I won't ask you to venture very far into the morass that constitutes American Takings Clause jurisprudence. It is a mess and, if only you knew how much of a mess, you would thank me for steering us away from this aspect of the case that I am about to set out.

But the facts in *Lucas v. South Carolina Coastal Council* are going to be very helpful for our discussion.

In 1986 a property developer called David Lucas paid $975,000 for some oceanfront real estate on the Isle of Palms, which is a barrier island of the coast South Carolina, intending to develop it as residential property for resale. But his plans were thwarted by new environmental regulations established by state law intended to protect the coastline from erosion. Mr. Lucas knew at the time he bought the property that the general area was subject to some regulation under a 1972 federal statute and a 1977 statute of the South Carolina legislature. But his lots were not in what was defined as a "critical area" when he bought them, and so he did not need to apply for any special consent from the newly created South Carolina Coastal Council before beginning construction. However, things changed before he actually began construction. In 1988, responding to heightened concern about the state of the beaches expressed in the report of a blue-ribbon Commission investigating the matter, South Carolina enacted a new statute, which empowered the Council to draw a new set-back line, a new line in the sand, as it were, a line that was on the landward side of Mr. Lucas's property. They did and the effect of it was to establish a more or less complete ban on

the construction of any habitable improvements on that land beyond a small deck or a walkway.

So far as Lucas's plans for development were concerned, this rendered his property worthless. So he sued under the 5th and Amendment, which, as you know, prohibits the state from taking private property for public use without fair compensation. The case went all the way to the Supreme Court of the United States and in 1992, the Supreme Court held in Mr. Lucas's favor. The case was then remanded to the South Carolina courts which required the state to pay Mr. Lucas $850,000 for the two lots, just slightly less than he had bought them for.

As I said, I do not intend to say very much more than this about the American takings clauses. Suffice to say that the *Lucas* decision represented something of a revival of the Supreme Court's willingness to condemn state regulations as takings.

But leaving aside the constitutional dimension, the facts in *Lucas* define an interesting issue for my purpose in this lecture, which is to consider the relation between property rights and the political ideal we call the Rule of Law. *Lucas* was just one case. But suppose that a legal system generates a number of confrontations like the confrontation in *Lucas v. South Carolina Coastal Council*—confrontations between private property rights on the one hand and environmental regulations on the other. Up and down the coastline, and in inland wetland areas as well, and on mountains whose tops could be removed to find lucrative seams of coal, property owners find themselves limited in what they can do with their land by duly enacted statutes and regulations, aimed at securing important public goods such as the preservation of beaches or the securing of an hospitable environment for birdlife, or the preservation of the aesthetic beauty of forests and mountains in an inland area.

2. The Rule of Law

Such confrontations can be characterized in all sorts of ways. So here's one question: what is the situation in these property and environmental regulation so far as the Rule of Law is concerned. Does the Rule of Law condemn these restrictions? Or does it recognize the environmental regulations as law also, and command that they too should be respected, upheld and complied with as part of our general respect for the law of the land?

The question is about the Rule of Law. You can't see it on my script, but you can see it on the handout. I always write "the Rule of Law" using a capital "R" and a capital "L" to distinguish it from a phrase that sounds the

same, but is all in lower case: a rule of law like the rule against perpetuities or the rule that prohibits drunk driving or the rule that says that I have to file my taxes in the United States by midnight on April 15. Those are all rules of law, but *the* Rule of Law (capital "R," capital "L") is one of the great values or principles of our political system.

The idea is that that the law should stand above every powerful person and agency in the land. The authority of government should be exercised within a constraining framework of public norms. It should be controlled by law, in contrast (as the great Victorian relic Albert Venn Dicey put it) in contrast "with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers."[1] Moreover, the Rule of Law requires that ordinary people should have access to law, access in two senses: first that the law should be accessible, i.e. promulgated prospectively as public knowledge so that people can take it on board and calculate its impact on their actions and transactions; and secondly, that legal procedures should be available to ordinary people to protect them against abuses of public and private power. All this in turn requires the independence of the judiciary, the accountability of government officials, the transparency of public business, and the integrity of legal procedures.

The Rule of Law is a hugely important ideal in our tradition and has been for millennia. It is sometimes said that Dicey in 1885 was the first jurist to use the phrase "the Rule of Law." I don't think that's true, except in the most pedantic sense of the exact grammatical construction. John Adams and other American revolutionaries explicitly contrasted the rule of law with the rule of men, and indeed Aristotle used almost exactly those terms (only in Greek) in Book III of the *Politics* more than 2300 years ago. I am not going to get hung up on the exact phrase; the point is that, whether it's in the form of a slogan, a paragraph, or a treatise, and whether it's in English, Greek or German, the ideals and concerns that the phrase connotes for us have resonated in our tradition for centuries—beginning with Aristotle, proceeding through the medieval theorists like Sir John Fortescue who sought to distinguish lawful from despotic forms of kingship, through the early modern period in the work of John Locke, James Harrington, and (oddly enough) Niccolo Machiavelli, in the Enlightenment in the writings of Montesquieu and others, in the American tradition in *The Federalist* and even more forcefully in *The Anti-Federalist Papers*, and, in the modern era,

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[1] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, Eighth edition of 1915 (Indianapolis: Liberty Classics, 1982), 110 (my emphasis).

in Britain in the writings of Dicey, Hayek, Oakeshott, Raz, and Finnis, and in America in the writings of Fuller, Dworkin, and Rawls.

There is a tremendous amount there, and quite a lot of controversy about what the Rule of Law actually requires, and what aspects of law it privileges. Law is many things, after all: for some the Common Law is the epitome of legality; for others, the Rule of Law connotes the impartial application of a clearly drafted public statute, for others still the Rule of Law is epitomized by a stable constitution that has been embedded for centuries in the politics of a country and the consciousness of its people. And people's estimation of the importance of the Rule of Law sometimes depends on which paradigm of law we are talking about. When Aristotle contrasted the Rule of Law with the rule of men, he ventured the opinion that "a man may be a safer ruler than the written law, but not safer than the customary law." And centuries later, in our own era, F.A. Hayek was at pains to distinguish the rule of law from the rule of legislation, identifying the former with something more like the evolutionary development of the common law, something less constructive, less susceptible to human control, less *positivist* than the enactment of statutes.

Plainly, these positions are going to be relevant to what we are considering today in this lecture. Because look at *Lucas v Carolina Coastal Council*. On the one hand, you have a property right developed presumably in accordance with the common law that South Carolina shares with many other jurisdictions—a property right defined by common law and circulating according to market principles. On the other hand, you have an environmental determination, made by an administrative body, pursuant to a state statute: a rule that exists as law because it occurred to some South Carolina legislators that it might be a good idea to protect the beaches of the barrier islands from erosion. These are two different kinds of law—common law versus statutory regulation—and we may want to ask whether our conception of the Rule of Law privileges one kind of law rather than the other.

I am not going to try to settle any of this with an a priori definition of the Rule of Law. I want to leave it contestable, and present everything I say in these lectures as a contribution—my contribution—to that contestation.

3. Rule-of-Law indices

The fact that the Rule of Law is a controversial idea doesn't stop various agencies around the world from trying to measure it in different societies. The World Bank maintains a "Rule of Law" index for the nations of the

earth, alongside other governance indicators such as control of corruption, absence of violence and so on. So for example, for 2008, a ranking was produced which placed countries like Canada, Norway, and New Zealand at the top of the Rule of Law League and Zimbabwe and Afghanistan at the bottom with -1.81 and -2.01 respectively. (For what it's worth, the UK scored just a little higher than the United States, and stands about six places below New Zealand.)[2]

So here's another way of asking our question. Should we expect a country's score on one of these Rule of Law indexes to go up or down depending on how much legislation there is of the kind that was at issue in *Lucas v. Carolina Coastal Council*? We might expect the indexes to be sensitive to this sort of thing, since they are supposed to be useful to investors who might be bringing money to invest in enterprises in the subject country and want to know how far their investments will be affected or limited by social or environmental legislation. According to Harvard economics professor Robert Barro,

> The general idea of these indexes is to gauge the attractiveness of a country's investment climate by considering the effectiveness of law enforcement, the sanctity of contracts, and the state of other influences on the security of property rights. [3]

Barro adds that "the willingness of customers to pay substantial amounts for this information is perhaps some testament to their validity."[4] But perhaps for this very reason we should be nervous about the integrity of these indexes, if they are skewed too much weight to the protection of investors' interests. Not everyone supports the Rule of Law or cares about it; but is it really supposed to be biased in exactly this way?

4. The constellation of our values

The Rule of Law is one star in a constellation of ideals that dominate our political morality: the others are democracy, human rights, and economic freedom. We want societies to be democratic; we want them to respect human rights; we want them to organize their economies around free markets and private property, and we want them to be governed in accordance with the Rule of Law. But constellations can deceive us. The

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[2] Daniel Kaufmann, Aart Kraay, Massimo Mastruzzi, "Governance Matters VIII: Aggregate and Individual Governance Indicators, 1996-2008" available at http://ssrn.com/abstract=1424591

[3] R Barro, "Determinants of Democracy," (1999) 107 Journal of Political Economy S158, at S173.

[4] Ibid.

juxtaposition of stars in a constellation is not necessarily indicative of their proximity to one another. Their apparent proximity may just be an artifact of where they present themselves in our visual field—the sky, as we call it, which for us is basically two-dimensional even though in astronomical fact it reaches in a third dimension away from us almost to infinity.[5]

And so too in the constellation of our ideals. We think of democracy and the Rule of Law or human rights and the Rule of Law as close, even overlapping ideals. But it may be important to maintain a sense of the distance between them. There are multiple ways in which we evaluate social and political systems, multiple ways in which social and political structures may respond to or excite our concerns, and unless we buy into a very general holism—something like the position put forward in Ronald Dworkin's new book, *Justice for Hedgehogs,* in which all our ideals, however scattered, come down more or less to the self-same thing—there is not a lot to be gained by collapsing any one of them into any of the others.

5. A Separation Thesis

This is a point we owe to a very influential 1977 article by Joseph Raz, where Raz insisted on analytic grounds that "the Rule of Law" should not be regarded is not the name of all good things:

> the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. … A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. This does not mean that it will be better than those Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.[6]

That indicates a sort of separation thesis as between the Rule of Law and our other political values like human rights or democracy.

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[5] Stars may appear close enough to one another to be grouped into a single formation—the Southern Cross or whatever—yet that's just the way they seem. It's a matter of their placement in what is in effect a two dimensional visual field, and the apparent proximity of (say) Mimosa and Gacrux in the Cross formation—the giant blue star at the left hand beam and the cool red giant at the top of the cross—belies the fact that the latter (a cool red giant) is much closer to earth than the former (88 light years as opposed to 353 light years away).

[6] Raz cite.

Of course there may be overlaps. For example: though a society may respect the Rule of Law while scoring low in its human rights record, it can't ignore all human rights, because some rights require exactly what the Rule of Law requires. Articles 7 through 11 of the Universal Declaration are a case in point, with their prohibitions on arbitrary arrest and retroactive law and their requirements of equality before the law and the entitlement of each person "to a fair and public hearing by an independent and impartial tribunal, in the determination of … any criminal charge against him." This does not imply that the Rule of Law and human rights amount to the same thing; what it means is that codes of human rights are one of the ways in which we uphold some of the most important requirements of the Rule of Law.

Our inquiry is about the relation between the Rule of Law and one other star in the constellation—our ideal of economic freedom and by implication private property. Are these distinct ideals—relatively distant from one another in the constellation—capturing quite different concerns about the way we run our society? Do they do work for one another—as we saw human rights doing work for the Rule of Law—so that the Rule of Law for example is one of the ways we protect economic freedom? Or vice versa? A suggestion to that effect was made by Alexis de Tocqueville. Tocqueville argued that the wide distribution of property rights helped sustain a fondness for and an awareness of the importance of law among Americans at the beginning of the nineteenth century. There were suggestions of a similar kind in the twentieth century as well. In 1991, James W. Ely gave a book that he'd written about the constitutional protection of property the title "*The Guardian of every other Right*"—adapting (shall we say misappropriating?) an observation made by James Madison about the right to freedom of the press.[7]

Even if the separation thesis is true, we know that traditional conceptions of Rule of Law emphasize legal constancy as something to be valued, and presumably private property rights, being legal rights, are to have the benefit of the same constancy or stability, argued for under the auspices of the Rule of Law, as any legal rights. And this is not an inconsiderable point. (I will explore between property and legal security tomorrow in much more detail in the second lecture in this series at the University of Warwick.) Predictability is often cited as a Rule of Law virtue. Though in his book, *The Rule of Law*, Lord Bingham gives little or

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[7] James Madison, Report on the Virginia Resolutions Jan. 1800 Writings 6:385—401. But check out the quote from some Virginian in Ely's book.

no privilege to property as such, he does insist as a very first principle that "[t]he law must be … so far as possible intelligible, clear and predictable." And he indicates that one of the most important things that people need from the law that governs them is predictability in the conduct of their lives and businesses. Bingham quoted Lord Mansfield:

> In all mercantile transactions the great object should be certainty: … it is of more consequence that a rule should be certain, than whether the rule is established one way rather than the other.[8]

and he went on to observe in his own voice that "[n]o one would choose to do business, … involving large sums of money, in a country where parties' rights and obligations were undecided."[9] So all that might operate as a general matter, even if the separation thesis is correct.

But we might not want to go very far beyond that. In defense of the separation thesis, we might cite the many canonical figures in the Rule of Law literature who seemed to have had no interest in making a connection. Aristotle, who wrote extensively about both topics, said nothing about any connection. Nor did Albert Venn Dicey make a connection with property except obliquely in a reference to "goods" in his first principle of the Rule of Law:

> no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land.

Nor did Lon Fuller. Nor did Joseph Raz. Nor did Tom Bingham, in his book, *The Rule of Law*., except with a brief passage on the implications of Article One of the first Protocol to the European Convention of Human Rights. [10]

On the other hand, an association between the Rule of Law and the principle of private property is not unfamiliar or preposterous as would be, for example, a suggestion that the Rule of Law required government support for the performing arts or a more powerful and effective military. It is familiar the vernacular use that is made of this ideal, just maybe not in the

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[8] *Vallejo v. Wheeler* (1774) 1 Cowp. 143, 153; cited by Bingham at p. 38.

[9] Bingham, p. 38.

[10] Lord Bingham did briefly mention the protection of property rights under the First Protocol (Article 1) of ECHR and he said he thought that this "prohibits the arbitrary confiscation of people's property … without compensation." He added that "[t]he treatment of white farmers in Zimbabwe would be the most obvious violation."[10] But Bingham also indicated the importance of acknowledging the necessity in some circumstances of overriding property rights for the benefit of the community as a whole: "It may be necessary to control the way I use my land to prevent my factory polluting the atmosphere or the local river. … But all this must be done pursuant to law, as the rule of law requires." (pp. 82-3)

narrowly focused philosophic literature. I think it is incumbent on us to explore the implications of the vernacular use of the Rule of Law. For this ideal is not the property of the analytic philosophers and it is certainly not our job as jurisprudes to go round reproaching laymen for not using the idea the idea in the way that (I don't know) Joseph Raz uses it.

I mentioned Aristotle, Dicey, Fuller, Raz and Tom Bingham as Rule-of-Law thinkers who have not really pursued this connection with property. But there *are* others who have insisted—and insisted quite heavily—on the connection we are interested in. The latter part of this lecture will be devoted to John Locke, whose account is one of the most extensive. But, closer to our modern interests, we should also mention Friedrich Hayek, whose work since *The Road to Serfdom* has concentrated on the special threat that socialist administration and appeals to social justice pose to the Rule of Law—and that seems to implicate private property at least indirectly. And others have said something similar. Ronald Cass of Boston University says that "[a] critical aspect of the commitment to the rule of law is the definition and protection of property rights."

> "the degree to which the society is bound by law, is committed to processes that allow property rights to be secure under legal rules that will be applied predictably and not subject to the whims of particular individuals, matters. The commitment to such processes is the essence of the rule of law."[11]

And I don't forget my NYU colleague Richard Epstein, who has written extensively on these matters, and whose work has moved from pursuing the Rule of Law and the ideal of a free, private property-based economy as parallel pillars of a free society—complementing one another, and perhaps (as they used to say in working class areas, taking in one another's washing), without necessarily margining into a single ideal—to a more aggressive account in his most recent writing that suggests that an analytic separation of the two ideals may leave the Rule of Law impoverished, oddly isolated from our real formal and procedural concerns about contemporary public administration. The case Epstein makes is a powerful one and it deserves our consideration—all the more so because Epstein actually concedes the conceptual point that "[a]nalytically, the rule of law is, of course, a separate conception from private property and personal liberty,"[12] but provides good reasons for thinking that these

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[11] Cass, pp. 1, 2.

[12] Richard Epstein, *Design for Liberty: Private Property, Public Administration, and the Rule of Law,* manuscript p. 14.

analytical strictures should perhaps not be the end of the matter. He says "a close connection" between the Rule of Law and private property "can … be established empirically by showing … that the cumulative demands of the modern social democratic state require a range of administrative compromises and shortcuts that will eventually gut the rule of law in practice, even if it honors it in theory."[13] (I am very grateful to Professor Epstein for making his recent book manuscript, *Design for Liberty: Private Property, Public Administration, and the Rule of Law*—now, as I understand, in press—available to me.) A lot of what I am doing in these lectures can be seen as a response to Epstein's extraordinarily rich, provocative, and influential ideas.

6. Negative and affirmative strategies

What Epstein suggests are two strategies for developing a link between the Rule of Law and private property. The connection can be pursued negatively, under the auspices of a more general Rule of Law attack on the kind of unstable, inconstant and often frankly discretionary regulation that threatens property as a matter of fact, and the sort of public administration that goes with it. Or it can be pursued more affirmatively in terms of a special and explicit connection between private property and the Rule of Law so that private property is one of the things that the Rule of Law aims to promote just as it aims to promote prospectivity or natural justice.

Most of what I'll be saying in these lectures is about the affirmative strategy. But Epstein's negative strategy is an interesting one. Since Dicey the Rule of Law has been associated with a critique of discretionary administration and since, on many views, it is discretionary administration that poses the greatest threat to private property, it may be that enforcing this general doctrine of legality in governance is all that one needs to do. It is a little bit like Lon Fuller's famous argument that if we rigorously follow the formal principles he calls the internal morality of law we will find it much harder to violate external or substantive morality. Fuller thought it was no accident that the Nazi's had to violated all sorts of formal principles of legality to pursue their racist and murderous aims; and analogously it may be thought to be no accident that those who challenge private property tend to use methods of governance at odds with the formal and procedural principles of the Rule of Law.

The more affirmative strategy is to develop and justify a substantive conception of the Rule of Law that explicitly embraces the principle of

[13] Epstein manuscript, p. 16.

private property. In the end I am skeptical about that, but it can't be ruled out, not out of hand. So I will give it a run for its money in tomorrow's lecture.

7. Rule of law and rule by law

But today I want to consider a slightly different move. Some conservative commentators, particularly in the United States, draw a distinction between the Rule of Law and what they call rule *by* law. Let me explain this, because I think it's important.

These conservative thinkers are willing to concede that the administrative enforcement of a duly enacted environmental statute in the *Lucas* case represents rule by law. The environmentalists are politically in the ascendant in South Carolina. But instead of just dictatorially *imposing* their ecological preferences for the integrity of the beaches on the barrier islands, they have had the decency to at least go to the trouble of getting the South Carolina legislature to enact a statute, and they have proceeded rigorously to make regulations in the proper form under the powers conferred in that statute. That's rule by law—rule by these men (and women) using law—and it is certainly better than a Mugabe-style invasion of property that has no legal credentials at all.

Still, rule by law—say these commentators—is not the same as the Rule of Law, where in fact law itself governs a situation, or is supposed to govern a situation, without the help of people, environmentalists, legislators, or anyone else.

Now, you may ask, well how is that supposed to happen? After all, all law is made by people and interpreted by people and applied by people. It can no more rule us by itself, without human assistance, than (in Hobbes's image) a cannon can dominate us without an iron-monger to cast it and an artilleryman to load and fire it.[14]

The commentators I am discussing may acknowledge the ontological point. But, undeterred, what they say is that there is a real sense in which the operation of a system of private property represents law itself governing a situation. Nobody in authority had to decide that David Lucas shall be in charge of these residential lots on Beachwood East in the Isle of Palms. That property circulated into his hands as a result of a series of individual transactions all conducted in which the rulers, the authorities played no part. The market transactions took place under the auspices and within the framework of the law of property, which is part of the common law of South

[14] Quoted in Harrington

Carolina, and which has *evolved* impersonally to where it is today not as the product of anyone's legislation or decisions. It is the ascendancy of common law that enables us to say that law rules here rather than any politician; by contrast, the ascendency of the environmental legislation seems to represent the rule of men, albeit men ruling by statutory means.

I don't mean that common law property rights are unrestricted. They may or may not be. But they are a matter of private law. The restrictions emerge without official interference either. They emerge in the form of restrictive covenants, or in terms of common law principles of nuisance. Their emergence or their application to any particular piece of real estate is not the result of any ruler's decision.

8. Public Law and Private Law

Plainly the distinction between The Rule of Law and rule by law implicates or rests on a differentiation between the way that private law operates and the way public law operates. And as far as I can tell, either these commentators want to associate the Rule of Law more or less exclusively with the former; or they want to associate themselves with the doctrine propounded by Montesquieu in Book 26, Ch. 15, of *The Spirit of the Laws* that we should keep the two apart and "[t]hat we should not regulate by the Principles of political Law those Things which depend on the Principles of civil Law." [15] "Civil law"—Montesquieu's word for what we are calling private law—is, he said, "the Palladium of property," and it should be allowed to operate according to its own principles, not burdened with the principles of public or political regulation.

So there you have it. Environmental regulation is the work of human hands—a gift of the state to the beaches, the mountaintops or the birds who revel in the wetland habitat – but property rights are not. Property rights come from the bottom up.

And this is a theme that my colleague Epstein also insists upon. Property rights are not the gift of the state; they have legal standing quite apart from human rule. "No system of property rights," says Epstein, "rests on the premise that the state may bestow or deny rights in things to private persons on whatever terms it sees fit." Rather, he says, "the correct starting point is

[15] Equally Montesquieu says we shouldn't decide public matters by civil law analogies e.g. succession by inheritance etc. "he order of succession is not fixed for the sake of the reigning family; but because it is the interest of the state that it should have a reigning family. The law which regulates the succession of individuals is a civil law, whose view is the interest of individuals; that which regulates the succession to monarchy is a political law, which has in view the welfare and preservation of the kingdom.

the Lockean position that property rights come from the bottom up."[16] And on Epstein's account, it is precisely misapprehensions about this point that have brought us to the courtroom in cases like *Lucas v. South Carolina Coastal Council*, "invert[ing] the relationship between individual rights and political power.

> The classical liberal theory sees limited government as a means to defend the fundamental rights of property ... The modern democratic state, by contrast, defines itself in opposition to any theory of natural law that posits these individual "pre-political" entitlements as existing prior to the creation of the state. Instead, 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.[17]

To see the proper relation, then, between the Rule of Law and private ownership we have to be prepared to turn the tables on the modern administrative state and go back to something like a Lockean account of the constraining force of property. That's Epstein's position (or one of his positions).

9. John Locke and the "bottom-up" conception of (pre-public) property rights

Well we might as well confront this position head-on, and that's the title of this lecture: "The Classical Lockean Picture and its Difficulties." As some of you know, John Locke and all his works is very much my obsession. If I were to go on *Mastermind*, Locke would be there as my special subject, in the way other people have as their special subject, the relationship between Frodo and Gollum, or MacDonald's happy meals over the decades. This whole series of lectures brings together my modern interest in the Rule of Law with themes of Lockean property that I really haven't pursued since my doctoral work in the late 1970s and 1980s.

Locke, as you know, explained property as a natural right; he saw property rights as rights that could be generated and sustained by labor and exchange, without benefit of the edicts of any positive law. Property was generated, as Epstein puts it, from the bottom up, and all we needed from positive law—when we set up a legal system to overcome certain difficulties in the state of nature—all we ever needed from the legal system was private law to recognize and accommodate the existence and circulation of property rights that were already well-established. "The reason why men enter into

[16] Epstein. 98
[17] Epstein 65-66

society," says Locke, "is the preservation of their Property," and that, as he said, presupposes that people already have property and property is neither the work nor the plaything of public law.

Well, I am a Lockean but I am not convinced. In these lectures, I am in quest of an open-eyed clear-headed view of these matters—of the relation between the Rule of Law and private property—and I don't find that in Locke's account nor do I find it in the work of twentieth-century political philosophers like Robert Nozick, who built upon Locke's account.

So, in the last part of the lecture, I want to develop two lines of critical thought about the Lockean project and its relation to the issue we are considering.

First, I want to consider whether we can possibly accord any credence, in the 21st century, -- or indeed whether it was ever possible to accord any credence—to Locke on what Epstein calls the bottom-up, private law, origins of property. And secondly, I want to consider the tensions in Locke's political and constitutional theory that arise from the juxtaposition of formal and substantive elements in his conception of the Rule of Law.

Let me begin with the basic credibility fot he private law account. Many years ago, I was asked to give a talk on Locke and Nozick, and their view of property, to a conference of Federated Farmers in New Zealand. The framers, who are politically very influential there, were facing a number of irksome environmental statutes and they wanted some philosophical vindication of their rights to their land as Lockean natural rights, or prepolitical Nozickian historic entitlements.

I told them I didn't think it was possible. The Lockean account or anything like it is simply implausible - historically - as an account of the origin of current rights over land in New Zealand. Locke's has it that property rights in their origin are independent of government and law. But consider: the history—the chain of title—of a typical New Zealand farm.

> In 2011, a farmer—we'll call him John Gardner—is in possession and very annoyed about the environmentalists. Now Gardner has farmed this land for many years. He purchased it in 1992 from a public trustee, a Mr. Dworkin, who has taken it over when the previous farmer, name of Hart, went into bankruptcy in 1985. Hart had inherited the farm from his father Goodhart, when Goodhart died intestate in 1972. Goodhart had purchased it in 1930 for a song from a company that had held it in trust after it had been farmed for a couple of generations by the Austin family. Austin in turn had bought the land in an auction sponsored by the Bank of New Zealand (which

> in those days was wholly owned government enterprise), the bank having foreclosed on a feckless settler, called Bentham in 1890. Bentham purchased it at a bargain price from a man called Blackstone in the 1880s who had held, first the leasehold and then the freehold from the colonial government since 1865, the colonial government having in turn bought it from a Maori tribe in whose collective possession it had been for some centuries.

Now you can say many things about this story, besides the fact that I think it is typical. But one thing you cannot say is that property rights in this farm originated in the labor of a Lockean individual before the institution of government or civil society. There are fragments or strings of Nozickian historical entitlement here and there—with the land passing by sale, purchase, and inheritance between individuals. But mostly the land seems to have been governed by social, public and legal arrangements from start to finish. It was used and cultivated first by a collective group, its original Maori owners, and then transferred by them, - whether by respectable or dubious transactions is something NZ tribunals are currently trying to assess - to the colonial government as part of that government's right of pre-emption and its policy of encouraging white settlement and family farming in New Zealand. The conversion form indigenous tribal property to government property to leasehold property on the government's terms to individual freehold is something that was supervised by the state purportedly in the public interest at every stage; and at every stage modifications to the conveyancing laws, and the ability to alienate government leaseholds, and modifications to the law of trusts and bankruptcy, and the laws of inheritance, family provision, and intestacy—these were all developed not by some inexorable logic endogenous to private law or natural law, but by statute and by judge-made law oriented explicitly to the needs of Aotearoa/New Zealand as an economy and to what was for a long time a public commitment to the diffusion of property and broad economic equality.

So if farmer Gardner were to oppose the imposition of some environmental legislation, affecting his farm, on the grounds that this was a public law interference with private law rights that had never been at the mercy of government in this way, we would have to say that claim would be fatuous. Or at least its grounding would be fatuous. There might be many things to be said for or against the environmental legislation; but the property right that allegedly opposes it seems to have been throughout its entire history as much an artifact of public as the environmental statute

itself. If the property right is to be set up against the environmental legislation, it is as one artifact of public law versus another, not as an entirely different sort of right whose posture in this conflict is entirely a matter of the rule of (private law) and has nothing to do with the legislative rule of men.

The New Zealand case is fairly clear-cut owing to the very prominent role of public authorities, both in regard to native ownership, in regard to the institution and distribution of modern property rights, and the continuing role of institutions like the Public Trustee etc. But I suspect that a similar tale can be told in most legal systems, with variations no doubt, but in ways that undermine the myth that modern property rights can trace their standing to anything remotely like a Lockean individualist provenance.

And all this is without even considering the respectability or integrity of the various links in the chain. In Locke's story, particularly in Nozick's version of Locke's story, the importance of respecting a current property right presupposes that it is the culmination of an unbroken series of consensual transactions stretching back to the dawn of time. The entitlement is historically based; and of course this means that its legitimacy is at the mercy of history. But what if, when you delve back through the archives, you find a fraudulent transaction in the early twentieth century or an instance of outright theft or expropriation in the nineteenth? Then, by the logic of John Locke's approach, the current land is stolen property - it's as though you bought a car from a man who bought it from a man who stole it from its owner. That defect in the title infects every subsequent step. Or if it doesn't—if we apply some doctrine of positive law that allows historical defects to be washed out by passage of time or by certain forms of uncontested registration of title, then once again we must give up any sense that the property right emerges from the nightmare of fraud and injustice blinking in the sunlight of the 21st century purely as an artifact of bottom-up private law. No: it emerges as a an artifact of the interaction of public law and private law—a sort of fugue-like relation between them -- and once again there seems no reason why other forms of interaction—such as regulation or restrictions on use—should not also be orchestrated in this way. And by the way, Nozick fully recognized this. He articulated the structure of a Lockean historical entitlement, not because he believed that such a theory vindicated contemporary property-holdings in the United States but because he wanted to understand what justice in these matters would be like, in the unlikely event it existed. Bob Nozick was actually too honorable a man to be much use to the triumphant Right in the 1980s and 1990s. He was never prepared to say that a Lockean theory legitimized

contemporary disparities of wealth in the United States. On the contrary, he thought it undeniable that contemporary holdings in America would be condemned as unjust by any remotely plausible conception of historical entitlement.

People get very uncomfortable about all this. As Blackstone put it in the *Commentaries*, we get intoxicated with the idea of property—our property—but

> we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built.

But that's what I think we have to do, to get a clear-headed and honest sense of the relation between private property and the Rule of Law.

10. The tension between formal and substantive elements in Locke's account of the Rule of Law

Many critics will want to leave the matter there. But I would like to hammer one more nail into the Lockean coffin. John Locke is one of our earliest theorists of the Rule of Law, in the account he gives in Ch. 7 of the *Second Treatise* on the importance of equality before the law and the repudiation of absolutism, in the account he gives in Chapter 12 of the relation between the Rule of Law and the separation of powers, and above all in his extensive discussion in Ch. 11 of the formal limits on legislatures.

It is the last of these that I want to focus on. In Locke's discussion of the Rule of Law, what we are told over and over again is the importance of governance through "established standing Laws, promulgated and known to the People." Locke uses these Rule-of-Law phrases over and over again: "established standing Laws," "declared and received Laws," "settled, known Law, received and allowed by common consent [throughout the community] to be the Standard of Right and Wrong."

The contrast is with rule by "extemporary Arbitrary Decrees" or "undetermined Resolutions." "The Legislative, or Supream Authority," we are told, "cannot assume to its self a power to Rule by extemporary Arbitrary Decrees…." It must rule through "established standing Laws, promulgated and [made]known to the People."

Now, "arbitrary" is a weasel word. It means many different things. When Locke is distinguishing the rule of settled standing laws from arbitrary decrees, it is not the oppressive sense of "arbitrary" that he has in mind. In this context, something is arbitrary because it is extemporary: there is no

notice of it; the ruler just figures it out as he goes along. It is the arbitrariness of unpredictability, not knowing what you can rely on, being subject, as Locke put it, to someone's "sudden thoughts, or unrestrain'd, and till that moment unknown Wills without having any measures set down which may guide and justifie their actions." And so it is an arbitrariness that may be associated not just with an oppressive ruler, but even with one who is trying as hard as he can to figure out and apply the law of nature.

You see, in Locke's story, one of the things that people wanted to get away from in state of nature, was being subject to others' incalculable opinions – even when those others were thinking as hard and as rigorously as they could about the law of nature. For the Law of Nature was "unwritten, and so no where to be found but in the minds of Men," and in the mind of each person it depended on the particular path of reasoning that he took. Locke was an opponent of innate ideas; people had to figure this stuff out for themselves; and if they figured it out for themselves what you would have in the first instance was a plethora of different results of that figuring. Your figuring might be different from mine, and since this was not just a philosophical exercise, but one which was supposed to determine our individual rights, it might turn out that your view of the relation between your property and my property and your property and my interests, might be quite different form my view of the matter and quite different from the view of the next person I came across.

The whole pint of moving to a situation of positive law was to introduce some predictability into this natural law picture. But then that's why we want settled standing laws, publicly promulgated, -- laws that can stand in the name of us all -- rather than rulers who just try to figure out for themselves what the natural law requires.

Unless we have a body of settled, standing, promulgated positive laws known in advance to everyone—"stated Rules of Right and Property to secure their Peace and Quiet …[so] that … the People may know their Duty, and be safe and secure within the limits of the Law"—unless we have that, we are no better off than we would be in the state of nature, where there was no telling whose natural law reasoning we would find themselves at the mercy of.

So far, so good. It is a powerful and compelling case for the rule of positive law. But having set out this constraint on governance, which we recognize instantly as a Rule of Law constraint, Locke immediately goes on to complicate matters—in fact, to screw things up—by adding to it a substantive principle of respect for private property.

> The Supream Power cannot take from any Man any part of his Property without his own consent.

And this, it seems, is supposed to be a limit on legislatures—that is a substantive limit on what they may enact even when they are complying with the formal constraints of stability and promulgation. They must rule by settled standing laws, known and publicized in advance, but not by settled standing rules that take away the property of the people.

Now Locke acknowledges, as any sensible person must that government has to have the power of "the regulating of Property between the Subjects one amongst another" and also that since government is costly, "every one who enjoys his share of the Protection, should pay out of his Estate his proportion for the maintenance of it." Those matters as we know are likely to be controversial –particularly as to the line between regulation and takings—and so they need to be determined too by settled standing laws, not by anyone's "unrestrain'd, and till that moment unknown Wills."

But there is a more fundamental difficulty. The picture we are being sold has property rights being determined prepolitically and those are the ones that are to be respected in principle by the legislature under this substantive constraint. But though Locke gives us his own interesting theory of the prepolitical generation of property rights, it is itself far from an uncontroversial theory. People in our day, as in his day, disagree about the rival claims of labor and occupancy, they disagree about the background of common ownership, they disagree about the provisos, about the introduction of money and the possibility of exchange, they disagree about how much anyone may appropriate by labor and how sensitive his appropriation must be to the impact on others. Above all they disagree about the claims of welfare, need, and charity, on goods that others claim to have appropriated. We disagree about all that—in ways that were made evident, for example, in the debates about Nozick's book, in the 1970s and in the subsequent literature on property. And Locke and his contemporaries disagreed about all of this, and carried on disagreeing, even after Locke produced a remarkably interesting account. And he knew, and signaled in a number of places that he knew, just how controversial this stuff was.

By insisting therefore that positive law is subject to this substantive constraint rooted in the moral reality of prepolitical property rights, Locke is subjecting the legislature to a discipline of uncertainty. The natural right of property is controversial; and so the administration of any substantive constraint of the rule of law along these lines is going to be controversial. This is particularly problematic inasmuch as Locke associates the

substantive property constraint with the classic natural law position which holds that enactments violating the laws of nature has no validity. But this means that some people—who (say) disagree with Locke about the claims of labor over occupancy—will disagree with him about which rules of property and right are valid and which are not. And similarly for those who disagree with him about the provisos, or about charity, or about money. In the state of nature, there is no telling whose reasoning on these matters one will be at the mercy of: one may be at the mercy of a John Locke or one may be at the mercy of a Samuel Pufendorf with a quite different theory. And the move to civil society offers no help in this regard, since settled standing laws are now unsettled by a substantive constraint that ties them into these controversies.

In tomorrow's discussion, I will be asking whether we can justify moving from a purely formal/procedural approach to the Rule of Law to *add in* a substantive conception. Can that addition be justified? But the upshot of this last discussion today seems to be that, whatever the justification for the additional substantive constraint, what it does is *destabilize* the other elements of the Rule of Law. So we may find ourselves having to choose a stable conception of the Rule of Law which is mainly formal and procedural in character and an unstable one, with an element of substantive controversy added in.

There is a way out of this, but it won't be attractive to most latter day Lockeans. James Tully in a book published in 1980,[18] argued that Locke's substantive Rule-of-Law principle protected private property only in the sense of positive-law rights already established by legislation. It was not supposed to protect natural law rights which, as Tully and I agree, are inherently controversial (even on Locke's own account). It was supposed to protect property inasmuch as property was already established by positive law.

When I was younger I wrote my dissertation on Locke and published several articles attacking Tully's interpretation. I still think it is wrong, but I won't go into that now. The point is that Tully's maneuver saves the coherence of the position, but only by abandoning the claim that, for legal purposes, property is determined bottom up on a private law basis in a way that is independent of legislation. On Tully's account, the property rights that are protected are themselves artifacts of public law. They are then clear, well-known and stable; and they are no longer at the mercy of natural law controversies. But the price of that deliverance is that the property rights in question, being the offspring of legislation, can have very little power and

[18] James Tully, *A Discourse on Property: John Locke and his Adversaries*.

status to set up against legislation (of the environmental kind). Property is no longer privileged as a special or primeval form of law. It is just one set of laws among others. And we judge it, in its relation to public policy, and in its relation to other laws, without assuming its untouchability.

And that, it seems to me is the counsel of wisdom. It is better in the end to evaluate laws on their own merits—and to make whatever case can be made about the exigencies of market economy untrammeled by too much regulation – better to take that case directly, rather than muddy the waters by pretending that some laws have transcendent status under the auspices of the Rule of Law and that other laws—like environmental regulations—barely qualify for legal respect at all.

The Hamlyn Lectures 2011

THE RULE OF LAW AND THE MEASURE OF PROPERTY

Jeremy Waldron

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."[19] 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. [20]

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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[19] Epstein manuscript 65-66.

[20] 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 form 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.)[21] 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 conceived in a purely formalist way and understood in a way that was purged of any possible public policy understanding.

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

[21] Refer to *Calder v Bull*.

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 form 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.[22]

I said in Lecture 1 that Joseph Raz is famous for insisting (in a 1977 article)[23] 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 into it other considerations about democracy, human rights, and social justice. Those he said are better understood as independent dimensions of

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[22] Remarks at the World Justice Forum I, held in Vienna, Austria in July 2008

[23] Joseph Raz, "The Rule of Law and its Virtue" in his book *The Authority of Law*.

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 he 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.[24]

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.

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

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[24] Bingham, The Rule of Law, p. 67

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."[25] 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 phrase to bolster the case that is made for the Washington consensus and drive home its points about markets and property.[26] This is calculated—

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[25] Cf. CL Stevenson, "Persuasive Definitions" (1938) 47 Mind 331. Cf.

[26] 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

indeed manipulated—as a purely instrumental case for using the phrase in a certain way.[27]

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

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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."

[27] 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."

[28] 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."

> 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."[29]

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 Bentham, in a work called "The Principles of the Civil Code," published first in France and in English only posthumously in ___.

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[29] SSRN cite. http://ssrn.com/abstract=1759550

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.[30]

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

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[30]. Bentham, "Security and Equality of Property," p. 54.

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.[31]

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 clams of tenants in disputes about residential rent control.[32] 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 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,

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[31]. Margaret Jane Radin, "Property and Personhood," reprinted in her collection Reinterpreting Property (Chicago: University of Chicago Press, 1993): 35-71, at p. 36.

[32]. Margaret Jane Radin, "Residential Rent Control," in Radin, Reinterpreting Property: 72-97.

> "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."[33] 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—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

[33] Bentham, ??, at 321.

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.[34]

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 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

[34] Reich, The New Property, 73 *Yale L.J.* 733 (1964)

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.[35]

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 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

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[35] 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?]**

profit thereof [?]."[36] 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.[37] [38]

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.

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

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[36] 1 E. Coke, Institutes, ch. 1, 1

[37] Blackmun J. (1043-4):

[38] 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.)

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.[39]

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 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

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[39] James Buchanan

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.

The Hamlyn Lectures 2011

THE RULE OF LAW AND THE MEASURE OF PROPERTY

Jeremy Waldron

LECTURE 3:
The Rule of Law, Property, and Legislation

1. Review of the two earlier lectures

The first lecture in this series used the facts of an American case – *Lucas v. South Carolina Coastal Council* (1992) – to pose a question about the possibility of a special relation between private property and the ideal we call the Rule of Law.

The case—*Lucas v. South Carolina Coastal Council* (1992)—concerned a property developer, who bought oceanfront 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 Council under the Takings clause 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.

However, my discussion is not oriented towards American constitutional law. I have been using the facts in Lucas in these lectures 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? This is a question about a political ideal, not about a constitutional provision. The political ideal of the Rule of Law is something we value in this society (in Great Britain) even though we have nothing like the Takings Clause in our constitution. (I guess the closest we get to it is in Article I of the First Protocol to the European Convention on Human Rights, but as far as I understand it that has not been much used in property cases).

So: we don't have the American Fifth Amendment prohibiting the taking of private property for public use without just compensation, but we can still ask whether it detracts from the Rule of Law to subject property rights to restriction in this way? Does the Rule of Law favor private property? 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?

The Rule of Law, we know, is mainly a formal and procedural ideal. It protects the independence of the judiciary and the proper functioning of the courts; it insists that people should have access to law; and that they should be able to rely upon fair and respectful procedures in the determination of their rights and claims. It insists that the government should operate within a framework of law in everything it does and that it should be challengeable by law and accountable through law when there is a suggestion of wrongful action by those in power. And it insists that governance should take a certain form—that is, that we should be governed on the basis of general laws laid down publicly in advance, operating as a stable and prospective framework to determine people's rights.

In Wednesday's lecture, I considered whether there the Rule of Law should be conceived also to have a substantive dimension besides the formal and procedural aspects that I have mentioned. And if it does, I considered whether we might think of the protection of private property as one of its substantive dimensions, perhaps alongside a broader substantive commitment to the protection of human rights. I indicated a number of reasons for skepticism about that possibility, not least that it seemed to privilege one area of law in particular over others that might be equally important for individual security and individual freedom and dignity. I said I thought it was better to let each political ideal do its own work in its own way: human rights in its way; the principle of private property for the concerns that it aims to address; and the Rule of Law for concerns about the forms, procedures and institutions of legality that cannot be conveyed by any other ideal.

And in the first lecture of the series, I considered whether we should give any credence to a distinction between the Rule of Law, on the one hand, and people using law as instrument of human rule—rule by law—on the other. Applying this to a case like *Lucas v. South Carolina Coastal Council*, it might be said that the beachfront preservation statute is an instrument used by the environmentalists as they exploit their political ascendancy in the state, and that is better than their using non-legal methods, but it is not the same as the law itself being charge—the Rule of Law as opposed to the rule of men. Property rights, it is said, represent the Rule of Law, because property rights are not the result of any human dictate: they emerge (either prepolitically in a Lockean fashion or through the evolution of the Common

Law) and they 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. I expressed doubts about this and about the contrast between public law and private law that it seems to rest on. I argued that in the real world property rights emerge from the entanglement of state action, on the one hand, and the fragmentary logic of Common Law structures on the other. In every legal system, public policy has mattered and made a difference to the articulation of property rights—either because those rights are deemed to be held from the state, or from the Crown, in the first place, or because much of the land has been collectively owned for long periods of history, or because the incidents of property, particularly modes of tenure, conveyance and exchange have been altered and developed over the years in ways that respond to the state's interest in distribution and various others aspects of political economy, or because 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. In other words, 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. If the Beachfront Management Act is rule by law rather than the Rule of Law then the same has to be said, and had to be said all along, about the property rights that it purports to modify.

In *Lucas* we have property law versus regulatory law. On Tuesday and Wednesday my lectures focused on the property side of the equation, and the relation between property and the Rule of Law. In this third lecture, however, I want to turn particular attention to the statute which lies in the other tray of the balance. How, in general, should we think about regulative legislation in the light of this very important political ideal we have, namely the ideal of the Rule of Law?

I have written about this elsewhere – but it has been buried in the first issue of the first volume of an obscure journal published out of Belgium, called *Legisprudence*. In that article, I tried to criticize an anti-legislative view that is sometimes associated the deployment of the Rule-of-Law slogan in political economy and in development studies; I wanted to criticize skepticism about legislation that seems to be characteristic, for example, the World Bank's approach to the Rule of Law. And that's what I want to talk about today.

2. Legislation in the *Lucas* case

It's a frustrating topic because I don't think this general skepticism is shared these days by academic or judicial commentators on the Rule of Law. There is no trace of it in Lord Bingham's book, The Rule of Law for example, and I suspect that this skepticism about legislation is not widely shared in this room.

On the contrary, for good-hearted people with an open mind, if legislation is properly drafted (if it is clear and intelligible and expressed in general terms) and it is properly enacted—prospectively—and properly promulgated, and if the regulations issued under it are properly made, following the procedures laid down in the statute and in administrative law generally, and if those regulations are then published and applied subsequently in an impartial way to individual cases without fear or favor according to their terms, then that counts as an entirely appropriate exercise under the Rule of Law. Indeed that's what we mean by the Rule of Law: people being governed by measures laid down in advance in general terms, and enforced equally according to the terms in which they have been publicly promulgated.

And that is what seems to have happened in the *Lucas* case. There was a series of statutes. A federal law, the Coastal Zone Management Act of 1972, provided a general framework of law and policy for measures of this kind, for the protection from erosion of coastlines and beaches. In 1977 the South Carolina legislature enacted state law under these auspices—making provision for the regulation of coastal areas in the interest of the environment, setting up administrative agencies, and providing a framework for the specification of areas where land was to be zoned and where permits were to be required for development. In 1988, pursuant to the finding of a Blue-Ribbon Commission that some of the beaches on the barrier islands were in a critical state, South Caroliona enacted further legislation called the Beachfront Management Act, authorizing the South Carolina Coastal Council to draw new lines delineating where seaward development would be prohibited or restricted. The council subsequently drew a line in the sand on the landward side of Mr. Lucas's property, in effect prohibiting him from building anything other than a small deck on the land that he owned.

It seems to have been a careful and scrupulous process, both at the various legislative stages and at the administrative stage. True, Mr. Lucas bought his property in 1986, a year or three before the new legislation came into force. But he was not a neophyte in these matters. He was already part of a larger "Wild Dunes" conservation consortium, and like all its members he was almost certainly thoroughly attuned to the legislature's interest and

concern about beach erosion. Moreover the property he purchased in his own name was "notoriously unstable," as Justice Blackmun pointed out in his dissent in the Lucas case:

> In roughly half of the last 40 years, all or part of petitioner's property was flooded twice daily by the ebb and flow of the tide. … In 1973 the first line of stable vegetation was about halfway through the property. … Between 1981 and 1983, the Isle of Palms issued 12 emergency orders for sandbagging to protect property in the Wild Dune development. … Determining that local habitable structures were in imminent danger of collapse, the Council issued permits for two rock revetments to protect condominium developments near petitioner's property from erosion; one of the revetments extends more than halfway onto one of his lots.

In other words, Mr. Lucas was not exactly sand-bagged by the Council's eventual intervention to safeguard the eroding beaches in the immediate vicinity of his property.

To me, it seems that the whole business was conducted lawful and with proper legislative propriety. The legislative purposes were good ones and they are very clearly articulated in the statutes, there were phases of legislative deliberation, there were public commissions, there was the usual notice-and-comment period for agency rule-making, and there is no indicating at all that the Coastal Council's determination as to the line that was to be drawn landward of Mr. Lucas's property was anything other than an impartial and reasonable (and, form a procedural point of view, perfectly regular) application of the state, fully responsive to its articulated concerns.

There is of course a very strong current in Rule-of-Law theory that is on the lookout for administrative irregularities and for statutes that facilitate them by conferring too much untrammeled discretion. That is as it should be, in light of the formal and procedural principles associated with the Rule of Law since Dicey. But that is not the concern here. If the Rule of Law is to take Mr. Lucas's side in the dispute, it has to be on the basis of some objection to legislative intervention as such. It has to be on the basis of a view that there is some affront to the Rule of Law in the very idea of enacting a statute that has this sort of impact on property rights. No matter how scrupulously the statute is drafted, the position we have to contend with is that there is some direct affront to the rule of law in the exercise in this sort of legislative power.

How can that be? As I said, for many of us, the enactment and enforcement of a properly drafted statute is the essence of the Rule of Law.

It is exactly the sort of activity to which (for example) Lon Fuller's famous eight principles of the Rule of Law—the inner morality of law—are properly directed. Generality, clarity, constancy, publicity, prospectivity and practicability—these are in fact all best understood as virtues of legislation; indeed for those of you who remember (from your jurisprudence classes) Fuller's articulation of those principles in his 1964 book, *The Morality of Law*, they were articulated precisely as a discipline incumbent on a legislator, Fuller's rather hapless King Rex.

3. Stability, prospectivity, and the Rule of Law

Is there anything in Fuller's conception, or the way it has been developed by people like Raz, Finnis, and Bingham, that might explain the uneasiness over legislation? Well, if we stick within the framework of formal and procedural principles, two considerations may give us pause.

Number one: legislation is something that can be enacted quickly and easily within most legal systems, and as such it may be at odds with the stability that Fuller's principles command and the predictability that the Rule of Law is supposed to promote. South Carolina enacted one statute in 1977 and amended it in 1988, when a public Commission determined that the Coastal Council needed greater powers in light of the perceived urgency of the problem. Is that an affront to stability? Is that an excessively destabilizing change in the law. I doubt whether many of us, familiar with cycles of public and legislative attention, would judge it so. But I'll talk more about these rhythms and cycles towards the end of my comments today.

Second possibility: Mr. Lucas bought his property in the period intervening between the two pieces of South Carolina legislation. The first statute was enacted in 1977 and its planning ramifications were clear by the time Lucas bought his two residential lots in 1986. But the second piece of legislation, enacted in 1988, applied to all property on the oceanfront including his. Does that mean there was an element of retrospectivity?

It has sometimes been said that the Takings Clause works in tandem with the *ex post facto clause* in Article One of the U.S. Constitution so that between them they cover all forms of retroactivity. It was settled long ago (in a 1798 case called *Calder v. Bull*) that the *ex post facto* clause covers only criminal legislation (though in recent years Justice Thomas has intimated that he, for one, might be willing to revisit the issue).

But I don't think it's a case of retroactivity, any more than I think that a statute changing the speeding fines is retrospective with regard to my operation of an automobile I purchased several years ago. Certainly Mr.

Lucas had not commenced any development work on his property before the second statute was passed.

I said earlier that Mr. Lucas knew perfectly well that the legislation on beach erosion was in flux, and that it was quite likely that property such as his might be affected. I don't quite want to get into the position that some courts have reached when they have indicated that attention to the trajectory of law reform, or public dissatisfaction with a law, or to notice given by politicians in press conferences, or attention to law reform in adjacent states can substitute for the notice associated with formal promulgation. (You'll know the cases I am talking about: the marital rape case in UK; the Australian ban imposed retroactively on white powder hoaxes in the wake of 9/11; and the abolition state-by-state in the US of the year-and-a-day rule that was at stake in 2001 in *Rogers v Tennessee*.) [40]

I don't want to go down that road. Retroactivity is not cured by notice of the intention to change the law

But I really think that it is inappropriate to apply the principle prohibiting retroactive legislation to statutes that affect the use of land purchased or inherited before the statute was passed. Though some property circulates quickly, almost as a commodity, other land remains in the stable possession of a single owner or a single family for generations, and it would be quite wrong to say that the legal situation with regard to the use of that land must remain stable and unchanged throughout that period. Much better to say that one who comes into possession of a piece of land necessarily is aware that what he can do with it will be changed and affected by the rhythm, of ordinary law-making from time to time. People know that there are such things as environmental concerns—particularly people in Mr. Lucas's position. They know that those concerns are seen as urgent and compelling; and that they evolve over time, both in their underlying principles and in terms of environmental strategy. This comes as no surprise. It is part of general civic responsibility to be alert to these matters and to adjust one's expectations according so far as those concern what you can do with your property.

4. Concerns about Legislation

So if it is not the retroactivity of the impact or the frequency of the enactments, then what is the concern about legislation?

No one doubts that a statute can undermine the Rule of Law.

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[40] 532 U.S. 451 (2001), get other cites from JW on retroactivity

If you want an example, you can look at the statute enacted in New Zealand in the wake of the first Christchurch earthquake in 2010, the Canterbury Earthquake Response and Recovery Act, that provided (among other things) that the Crown could suspend the operation of any statute—apart from a dozen or so that were listed, including the New Zealand Bill of Rights Act—if that statute threatened to "divert resources away from the effort to efficiently respond to the damage caused by the Canterbury earthquake." And we are all sickeningly familiar with occasional attempts by legislators to remove legal remedies, obstruct the operation of the courts, or preclude judicial review of executive action, etc.[41]

But this is not legislation as such; this is a concern about the content of particular enactments. So let's see if we can get a feel for this broader discomfort—the sort of discomfort you find in Hayek's later work, for example[42]—at the level of general jurisprudence.

I wonder if it is a concern about voluntarism, the role of human will and agency in a legal system. Legislation is a matter of *will*, -- so much a matter of will that it seems ill-suited for celebration under the auspices of a political ideal whose purpose many understand to be the taming or subordination of will in politics. The legislative process produces law simply by virtue of a bunch of politicians *deciding* that law is to be produced. As I said in *The Dignity of Legislation*, there does seem to be something brazen about this:[43] "We have decided that this will be the law; so it is the law. And what the law is from now on is exactly the content of our decision." And this is said by the very men—powerful politicians—to whose rule the Rule of Law was supposed to be an alternative.

Admittedly, this apprehension about sheer voluntarism or decisionism under the cloak of law can be applied to other legal sources as well. There are similar apprehensions about activist judges who understand their own

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[41] Consider, for example, the Military Commissions Act 2006, in the US, limiting the application of habeas corpus and hence the opportunity to review the legality of indefinite detention authorized by the executive (10 USC 950a).

[42] Discomfort about legislation as such is most clearly expressed in Hayek's later work, where he draws a pretty sharp contrast between the concept of law and the concept of legislation, and suggests that the rule of law comes close to meaning the opposite of the rule of legislation. F.A. Hayek in his later work contrasts law with legislation, and suggests that the rule of law comes close to meaning the opposite of the rule of legislation. See Hayek, *Rules and Order*, Volume 1 of *Law, Legislation and Liberty* (University of Chicago Press, 1973), 72-3 and 124-44. In Hayek's earlier discussions of the rule of law, e.g. in *The Constitution of Liberty* (University of Chicago Press, 1960) 157, this is discernible (just), but it is very muted. Mostly, the conception of the Rule of Law presented in the earlier book could be applied quite naturally to legislation, whereas the later work evinces great hostility owards legislation and legislatures.

[43] See Waldron, The Dignity of Legislation, at 12 and 24.

power in purely decisionist terms.[44] Rule by judges, also, is sometimes seen as the very sort of rule by men that the Rule of Law is supposed to supersede.[45] When Justice Stevens of the US Supreme Court wrote, in his dissent in *Bush v. Gore* (2000), that the true loser in that case was the Rule of Law, he meant precisely to contrast that ideal with a decision of a willful and politically motivated (or at best lawlessly and pragmatically motivated) majority of his brethren on the bench.[46] But although this cynicism about the law can be turned in this way against judicial law-making, it is more common (and more easily available to lazy minds) as turned against legislation.

Yet another way of capturing the same uneasiness, underlying this hostility towards legislation, is to think about the relation between legislation and the state. The Rule of Law is commonly seen as a way of limiting the power of the state, keeping the power of the state under control. But legislation is normally understood as one of the most important aspects of the power of the modern state. It is not the sole mode of state action, but with regard to the more important policies of the state, it is often an indispensable step in policy implementation. What legislation does is mobilize governmental and administrative resources for the achievement of governmental aims: when the state needs something done, legislation is usually step in the doing of it.[47] It is something the state controls and manipulates as a tool for its own purposes. But, it is said—and this again is a common theme in connection with the issues we are considering—the value we place in the Rule of Law is not in the rule of state law. Instead what we want is a rule-of-law state, and that is something quite different.[48]

So: if legislation is viewed just as a governmental directive, then – these people will say – then maybe it *is* a mistake to regard enforcement of

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[44] See, e.g., Wechsler, "Toward Neutral Principles of Constitutional Law" (1959) 73 *Harvard Law Review* 1, 11-12.

[45] See the discussion in Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" (2002) 21 *Law and Philosophy* 137, 142-3 and 147-8.

[46] "It is confidence in the men and women who administer the judicial system that is the true backbone of the Rule of Law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the Rule of Law."— *Bush v Gore*, 531 U.S. 98, at 128–129 (Stevens J., dissenting).

[47] Ed Rubin, "Law and Legislation in the Administrative State" (1989) 89 Columbia L R 369, 372-3.

[48] Robert Cooter, "The Rule of State Law versus the Rule-of-Law State: Economic Analysis of the Legal Foundations of Development," in E Buscaglia, W Ratliff, and R Cooter, *The Law and Economics of Development* (JAI Press, 1997), 101.

and compliance with such directives as signifying anything very important in relation to the Rule of Law. Enforcement of and compliance with legislation would be a measure of how powerful and effective the state is, and how well organized its apparatus is. But it would not tell us much about controls on that apparatus, and that is mostly what we want to know under the heading of "the Rule of Law."

I mentioned a little while ago F.A. Hayek's antipathy to legislation, and suggestion that rule by legislation represents almost the opposite of the Rule of Law.[49] According to Hayek, the legislative mentality is inherently managerial; it is oriented in the first instance to the organization of the state's administrative apparatus; and its extension into the realm of public policy generally means an outward projection of that sort of managerial mentality with frightful consequences for liberty and markets. And that, says Hayek, is the very thing the rule of law is supposed to oppose. The rule of law, he says, refers to an order of impersonal norms that emerge and evolve, more like common law, [50] rather than norms that are posited and manufactured and come bearing legislators' names like, I don't know, the McCain-Feingold Act. Legislation may occasionally be necessary if law's implicit development has led us into a some sort of *cul-de-sac*, but this acknowledgement by Hayek is grudging;[51] it's a reluctant recognition that it may sometimes be necessary to compromise the rule-of-law ideal rather than a recognition of legislation's place in that ideal.

5. The World Bank Approach

I mentioned in Lecture One the use of Rule-of-Law indexes to rate countries for the benefit of investors and others seeking to do business in a particular legal or commercial environment. On these indexes, the extent of a society's adherence to the rule of law is not determined (or determined only in very small part) by the effectiveness of its enforcement of existing legislation (or its capacity to enforce future legislation); many of the measures it uses for the Rule of Law could have been used in the time of Adam Smith, without

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[49] F. A. Hayek, *Rules and Order*, Volume 1 of *Law, Legislation and Liberty* (Chicago, University of Chicago Press, 1973), 72-3 and 124-44.

[50] The view under consideration is associated affirmatively, with a celebration of something like the Common Law. Needless to say, in this celebration, the rule-of-law difficulties of the Common Law—its opacity, the ad hoc character of its development, its unpredictability, its inherent retroactivity—are conveniently forgotten. For good accounts, see Bentham, *Of Laws in General*, ed. H. L. A. Hart (Athlone Press, 1970) 184-95 and Gerald Postema, *Bentham and the Common Law Tradition* (Oxford UP, 1986), 267-301.

[51] Hayek, *Rules and Order*, 88-89.

regard to the rise of the modern legislative and regulatory state and the concerns that underlie it. [52]

Indeed, it is often implied or sometimes even explicitly stated that a society's score on a Rule-of-Law index may be diminished by the effective enforcement of legislation if the tendency of such legislation is to interfere with market processes or to limit property rights or to make investment in the society more precarious or in other ways less remunerative to outsiders. The rule of law, on this view, requires a government to offer assurances that it will not legislate in this way or that it will keep such legislation to a minimum; it may call for legal and constitutional guarantees for property rights (and perhaps also for other rights) against legislative encroachment; and it may require provision for judicial review, that is, for offending legislation to be struck down by courts.

Those who take this approach acknowledge that some deliberately crafted law is necessary. It is important for example that there be a clearly articulated criminal code. (Even Rule-of-Law theorists who model their ideal on unlegislated private law are not comfortable with the idea of common law offences.) And often, in a developing society, legislation is necessary in order to establish the institutions and procedural frameworks through which law operates, and by which legal rights are protected, and maybe also to establish clear procedures and expectations in the area of corporate law, bankruptcy and so on.[53] Still, the idea is that we can

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[52] The view I am considering comes in various shapes and sizes, and, as I said, it is not always explicit. Sometimes the antipathy to legislation is apparent only by what is emphasized and what is omitted in a stated conception of the rule of law. According to James Wolfensohn, when he was President of the World Bank, the Rule of Law means that

> A government must ensure that it has an effective system of property, contracts, labor, bankruptcy, commercial codes, personal rights law and other elements of a comprehensive legal system that are effectively, impartially, and cleanly administered by a well-functioning, impartial and honest judicial and legal system. James Wolfensohn, quoted by Upham, at 10.

What is missing here? Well, compliance by business, industry, and commerce with legal regulation of the marketplace and with limitations placed on the use of property (e.g. for ecological reasons). Compliance with legislation, the enforcement of regulations—these aspects of the rule of law are deafening in their silence here. Indeed, by its terms, Wolfensohn's conception is a measure of the rule of law that could have been used in the time of Adam Smith, without regard to the rise of the modern legislative and regulatory state and the concerns that underlie it. In a well-known series of studies under the heading, "Governance Matters," Kaufman, Kraay, and Lobatón use as the basis of a rule of law index "several indicators which measure the extent to which agents have confidence in and abide by the rules of society. These include perceptions of the incidence of crime, the effectiveness and predictability of the judiciary, and the enforceability of contracts." -- D Kaufman, A Kraay, and P Z Lobatón "Governance Matters," (2005) *World Bank Policy Research Working Paper* 3630, 130-131, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=718081 (visited January 18, 2007).

[53] See e.g. Katharina Pistor "Company Law and Corporate Governance in Russia," in Sachs and Pistor (eds) *The Rule of Law and Economic Reform in Russia* (Boulder, Westview Press, 1997), 165.

distinguish between legislation as a framing and facilitating device for the autonomous operation of a well-functioning legal system, and legislation as a medium through which regulatory or public policy goals are pursued. Legislation of the latter sort *is* inherently subject to suspicion from the point of view of the World Bank approach to the Rule of Law, for it threatens radically to limit or undermine the property rights, market arrangements, and investment opportunities which law is supposed to frame and guarantee.[54] What people have in mind here is environmental legislation, legislation favorable to labor, restrictions on freedom of contract, restrictions on investment or on profit-taking, legislation nationalizing assets or industries, price restrictions, and so on.

The view we are considering is one element in a more general approach to economy and development, associated with what is sometimes called the Washington Consensus.[55] On the this account the whole point of the Rule of Law is the promotion of market institutions and the establishment of an atmosphere conducive to profitable investment.[56] Concomitantly, the thought is that we need to keep legislation and the propensity to legislate under very firm control. And it would be good (these people go onto say) if that control could be exercised under the auspices of the Rule of Law—an ideal that is so popular, conveys so may good vibrations, and commands such support across the political spectrum.

6. Democracy and development: giving priority to the Rule of Law?

You don't find a lot of this in academic writing about the Rule of Law, but, as I have said, you will see it in journals of political economy, or in World Bank literature, or in development studies

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[54] For example, see Shihata, "Relevant Issues," 205: "An over-regulated economy undermines new investment, incrases the costs of existing ones and leads to the spread of corruption. Multiplication of laws and regulations often reduces their quality and the chances of their enforcemnent. The absence of judicial review, or its high cost … add to the negative impact."

[55] See, for example: J. Williamson, "Democracy and the 'Washington Consensus'" (1993) 21 *World Development* 1329. (I am obliged to J. M. Ngugi, "Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse" (2005) 26 *University of Pennsylvania Journal of International Economic Law* 513, 599 for this reference.)

[56] The literature is very extensive. For examples, see: Thomas Carothers, "The Rule of Law Revival," (1998) 77 *Foreign Affairs* 95; Carothers, *Aiding Democracy Abroad: The Learning Curve* (Washington, Carnegie Endowment, 1999); Robert Barro, "Determinants of Democracy," (1999) 107 *Journal of Political Economy* S158; I Shihata, The World Bank and 'Governance' Issues in Its Borrowing Members," in F Tschofen, and A Parra (eds) *The World Bank in a Changing World: Selected Essays* (Boston, Martinus Nijhoff, 1991) 53; Shihata, "Legal Framework for Development," in *The World Bank in a Changing World*, Vol II (Boston, Martinus Nijhoff, 1995) 127; and I Shihata, "Relevant Issues in the Establishment of a Sound Legal Framework for a Market Economy," in Shihata, *The World Bank in a Changing World*, Vol III (Boston, Martinus Nijhoff, 2000) 187.

It is often expressed in this literature as a view about democratization. Those who espouse the view I am considering may concede grudgingly that societies have a legitimate aspiration to govern themselves. They may accept that a modern society does need eventually to set up and operate a represnetative legislature. They will recognize this as part of the normal aspiration to democracy. But it would good, some of them say, especially in the early stages of nation-building, if such institutions could be confined to playing a marginal role in the governance of the society, for fear that they will undermine the development or marketization of the country's economy. On Tuesday I mentioned the work of Robert Barro, a political economist at Harvard, who believes that the main value of Rule-of-Law indexes is to provide information on country risk to foreign investors. Barro also believes that the empirical evidence supports the assertion that "democracy is a moderate deterrent to the maintenance of the rule of law."[57]

So that in his view, this suggests at the very least an order of developmental priorities: democratization should take second place to legalization in nation-building.[58] And if legalization—the building of Rule of Law has priority over democracy, why then it must also have priority over legislation which is the work-product of democracy. That's why, on Barro's view, we are compelled to signal this priority with a conception of the Rule of Law that distinguishes it from the enactment and enforcement of statutes.

7. Legislation as a transparent and legitimate mode of law-making

Well what should we say about all this? As you would expect form someone who authored a book called *The Dignity of Legislation*, I have very little patience with it. Indeed, to my mind, it is very odd that the effective operation of a legislature should be separated in this way from the rule of law. And now I am going to go over onto the offensive…, (but in a way that requires us to step back for a moment and to consider the general topic of legal change.)

We know that, in any legal system, legislation is not the only source of law, not the only source of legal change. Law also comes into existence

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[57] Robert Barro, *Getting It Right: Markets & Choices in a Free Society* (Cambridge, MIT Press, 1996), 7. He continues: "This result is not surprising because more democracy means that the political process allows the majority to extract resources legally from minorities (or powerful interest groups to extract resources legally from the disorganized majority."

[58] Barro, at 11: "[T]he advanced Western countries would contribute more to the welfare of poor nations by exporting their economic systems, notably property rights and free markets, rather than their political systems, which typically developed after reasonable standards of living had been attained."

and changes in a society through the decisions of courts, through executive rule-making, and through the signing and ratification of treaties. But the legislature occupies a pre-eminent role in most legal systems, largely due to the fact that it is an institution set up explicitly—dedicated explicitly—to the making and changing of the law.[59] Though the law-making role of the courts is well known to legal professionals, judicial decision-making does not present itself in public as a process for changing or creating law. Judges constantly assure the public—disingenuously, we (insiders) know, but constantly—that their role is to find the law, not make it. Law-making by courts is not a transparent process; law-making in a legislature by contrast is law-making through a procedure dedicated publicly and transparently to that task. This ought to matter. One of the most important things about the Rule-of-Law ideal is its emphasis on transparency in governance, and one would think that that would be important in the present context as well.

Not only that, but one would think that if the Rule of Law requires that law be taken seriously and held in high regard in a society, then particular emphasis should be given to the legitimacy of the processes by which legislatures enact statutes. Again, think of the contrast with courts. Not only do judges pretend diffidently that they are just finding not making the law, but we know also that any widespread impression among members of the public that judges were acting as law-makers would seriously detract from the legitimacy of their decisions.

And this popular perception is not groundless. Courts are not set up in a way that is calculated to make law-making legitimate. Legislatures, by contrast, are organized—and occasionally reformed and rehabilitated—explicitly to make their law-making activity legitimate. If we think that the operation of the electoral system has led to some section of the community being wrongly disenfranchised so far as legislative representation is concerned, that will be widely regarded as a reason for reforming a legislature. We want our laws to be made in an institution that properly represents us all. In this and other ways we pay constant attention to the issue of the legitimacy of the legislature as a law-maker; and by doing this, we ensure that there is something to be said to a citizen who opposes a new law why it is fair nevertheless to require him to submit to it. We pay attention to the legitimacy of courts, too, but not to their legitimacy *as law-makers*; instead we look at issues like fairness *inter partes*, and to issues

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[59] See also Jeremy Waldron, "Principles of Legislation," in Bauman and Kahana (eds) *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge, Cambridge University Press, 2006), 15, 22-3.

about procedure and delay, and perhaps alsoto the substantive rationality of decisions. But since we know that the law-making of courts can bind the whole community on the basis of a decision responsive only to the arguments of two parties, this is a very curious way to go about securing legitimacy for legal change.

In general, legislation has the characteristic that it gives ordinary people a sort of stake in the rule of law, by involving them directly or indirectly in its enactment, and by doing so on terms of fair political equality. De Tocqueville remarked on this in his early observation of America: if you want to instill respect for law, he said, making law through elective processes is one of the best ways to do it.[60] Of course every law will have its opponents, those whose representatives were outvoted in the relevant session of the legislature. Still, as de Tocqueville said, "in the United States everyone is personally interested in enforcing the obedience of the whole community to the law; for as the minority may shortly rally the majority to its principles, it is interested in professing that respect for the decrees of the legislator which it may soon have occasion to claim for its own."[61] But if legislation is denigrated as a source of law for the purposes of the Rule of Law ideal, then it is not at all clear where the respect for the law, which the Rule of Law requires, is supposed to come from.

8. The Rule of Law, legal change, and human agency[62]

Objections to legislation that go beyond retail concerns about rent-seeking and so on—objections to legislation that rest on the perception of some sort of wholesale incompatibility between legislation and the Rule of Law tend to make the element of human *agency* pivotal. Legislation is the political construction of law—intentionally and explicitly. Those who feel this discomfort want the Rule of Law to find and accredit modes of legality that

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[60] Alexis de Tocqueville, *Democracy in America* (New York, Knopf, 1994), 244-8 (Volume I, Chapter 14).

[61] Ibid., 247.

[62] Ronald Cass: "The ways in which systems manage changes in property rights and in legal rules that affect property rights … are the keys to the effectiveness of the rule of law. But the rule of law does not bar change nor does it forbid discretion. Change is a natural part of any legal system, and efforts to limit change must be seen not as ends in themselves but as part of a larger framework for assuring predictable, valid, law-based governance." (p. 2)

"Property rights will not be secure if the law governing them is subject to change. Much of the rule of law focuses on predictability, and so, too, much of the security for property turns on predictability. …. Yet, it is not the mere fact of changes in the law that makes this so. There is no way to bar change in the law or to make property rights absolutely secure against such change. And no legal system has done that." (Cass, p. 15)

manage somehow to eschew political agency, because they think that any concession to human agency undermines the celebrated distinction between the rule of law and the rule of man. And so they look to the Common Law as an emergent evolving body of law and they look to markets in which property rights circulate autonomously without political intervention

Of course there is agency in a property market. But, it is not the agency of politicians inventing and imposing a particular vision of how things should be distributed. There is only the agency hundreds of thousands of individuals working through a given legal framework – as buyers and sellers, landlords and tenants, mortgagors and mortgagees. And this agency of individuals is not supposed to pose a problem, because it is exactly the kind of thing that the elimination of political agency is supposed to make room for. It's slightly harder to make the case that the common law operates apolitically. After all judges are political officials—in a sense—and the law at any time is the resultant of hundreds of judge-made decisions. But again, it is thought the case-by-case incremental nature of this decision-making avoids at the imperious and comprehensive visions that legislators aspire and that seek, by their human rule to impose.

Myself—I am skeptical about the very idea of eschewing human agency in our conception of the Rule of Law. The Rule of Law is about law and governance and it is necessarily oriented to what is done—to what people do in—in the way of governing themselves or each other. We fantasize sometimes about a society being ordered acephalously, without deliberation or deliberate decision, being ruled (as it were) directly by morality or by immemorial traditions and mores that no one has responsibility for. This is the fiftieth anniversary of the publication of The Concept of Law, and morality, as Hart reminded us Chapter 8 of that book is immune from deliberate change. This is as true of the embedded positive morality of a society as it is of the real moral reasons, values and principles that constitute what Hart called critical morality or that we might call morality *tout court*. Positive mores may change gradually but not as result of deliberation or deliberate human agency. The introduction of law by contrast is the deliberate introduction of the possibility that changes may be made in the way that a society is ordered. That's part of the what law means, on Hart's account; the union of primary rules of conduct, which may once have been immemorial, with secondary rules that empower a society to take responsibility for the primary order, adapt it flexibly to changing social conditions, and keep track of and monitor the changes that stand in the name of us all through a rule of recognition. That's what law essentially is and the principle we call the Rule of Law can't be in its essence antagonistic to that.

It is essential to law that it be susceptible to deliberate change, and though the Rule-of-Law ideal may patrol that and discipline it, it cannot be understood as an ideal designed to preclude such change.

Hayek says that this emphasis on change is already infected by a positivist mentality—no wonder that it was sponsored as an essential element of law by the arch-positivist or the arch modern positivist H.L.A. Hart. But, Hayek reminds us, positivism is just one option in jurisprudence, and he thinks for various reasons (some of them good, some of them bad, that it is a discredited option.

But do things really look any different if jurisprudence swings to a more natural law, anti-positivist point of view? It may seem so. The Rule of natural law seems a wonderful paradigm of legal stability—a timeless and objective law, built into nature or the real moral structure of the world, or the enduring commands of an eternally faithful God. It doesn't change, and certainly we cannot change it. As John Finnis puts it in *Natural Law and Natural Rights*, "of natural law there could be strictly speaking no history."[63]

But appearances are deceptive, and this inference of stability from a hypothesis of natural law is a mistake, for two connected reasons.

First: if circumstances are changing, then the ultimate deliverances of natural law (so far as concerns, for example, who has what natural property rights) will change too: a constant set of principles applied to changing circumstances (where the principle is formulated in a way that is sensitive to the relevant circumstances) will lead to changing results. When population changes drastically, expanding (say) from the thousands to the millions; or when climate changes with inundation or desertification, bringing new and unprecedented dilemmas of resources use, then the application of constant principles will not yield constant results.

And anyway, secondly, even if natural law has no history, our understanding of natural law has a history – we may have got it wrong (in principle or in application) in the past, and now we have to change what we say it implies, our sense of what it implies, to reflect the repudiation of our errors. Natural law was thought by some people to sanction slavery or the subordination of women; now we know better. Our sense of natural law has a history, even if the abstract principles laid up in heaven (which have sometimes managed to elude our understanding) are themselves timeless in character.

So any human legal system that purports to be based on natural law cannot eschew the agency involved in deliberation or deliberate change, for

[63] Finnis, NLNR, cite.

fear of embedding its own errors or for fear of being unresponsive to the varied ways in constant moral reasons interact with changing circumstances.

The point here is not to convince you to take a natural law approach. But to show that nothing in particular turns on one's jurisprudential choice in this debate between positivism and natural law – on either account, we have to set ourselves up to accept and consecrate flexible law, changeable law, including law changing deliberately through explicit thought and social decision, including in other words legislation.

So, when Justice Kennedy said in his concurrence in *Lucas v. South Carolina Coastal Council* that "[t]he State should not be prevented from enacting new regulatory initiatives in response to changing conditions" and that "the Takings Clause does not require a static body of state property law….," that is as true on a natural law approach as it is on a positivist approach.

9. The importance of social and economic legislation[64]

Some will say that, even if all this is true of law in general, there is a case to be made for slowing down the pace of change and minimizing the impact of change on rights of private property and the operation of free markets, for it is in these areas that security of expectation is particularly important and the confidence of proprietors and investors must particularly be paid attention to.

In my lecture yesterday, at the University of Warwick, I addressed this theme of the stability of property that is required for market economy. I acknowledged the truth of the point 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 markets are impossible. But I said it doesn't follow law has protect the value of any given item of property, in order to facilitate market transactions. I said that 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 in changing circumstances 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.

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[64] See also Jeremy Waldron, "Legislation and the Rule of Law," *Legisprudence*, 1 (2007).

A case can perhaps be made that the establishment and protection of property rights is one of the paradigmatic functions of law: this function for law responds to some of the most elementary circumstances of the human condition such as our need for resources, our limited altruism, and the need to mitigate what David Hume called "the easy transition from one person to another … of the enjoyment of such possessions as we have acquir'd by our industry and good fortune."[65] It is part of what H.L.A. Hart called "the minimum content of natural law."[66] All this, we can grant.

But it is inevitable in the world we live in that the nature and legitimacy of property rights will be affected over time by changes in circumstances, both in their character and in their distribution. The exploitation of land and other natural resources in a way that ignores public goods or the prospect of great public evils is not always tolerable. And the pace of our recognition of this is going to have to accelerate in breadth and intensity over the next fifty years if decent conditions of life are to have any chance of surviving man-made changes in climate that are presently afflicting us.

Likewise extreme and growing inequalities are not always tolerable. The basis on which private property rights were initially allocated may turn out to be inequitable in light of changing circumstances or they may always have been inequitable, and market circulation may have done nothing to reduce that inequity.

For example, the transition that many societies in Eastern and Central Europe and the former Soviet Union have undergone from collective property arrangements to a private property economy is one that needs careful and continuing management and scrutiny, for the first steps that were taken have not always proved to be the steps that the society can be expected to live with in perpetuity. The broad social consequences of privatization in various areas are not always easy to foresee. Eventually inequalities become intolerable.

And thirdly, what markets can and cannot produce, and how efficient they are (or what social goals they promote or retard in various circumstances) are not always calculable *a priori*. This too varies over time and with circumstances, in the face of social, economic, ecological and demographic change. The circumstances vary and—as I said in my natural law—our apprehension of the relevant principles and circumstances can vary

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[65] David Hume, *A Treatise of Human Nature*, ed. Selby-Bigge and Nidditch (Oxford, Clarendon Press, 1978), 487-9. (I have reversed the order of two quotations here, without altering the sense.)

[66] Hart, *The Concept of Law* (Oxford, Clarendon Press, 1994), 193-200.

too, with the state of our knowledge and the state of our politics. And so we may need to adjust either the framework of markets or the reach of markets in various ways. No sensible person, I think, can doubt this after 2008.

That matters like these may need collective attention from time to time is not a cranky or anomalous position; it is not Bolshevik or socially destructive; *it is the ordinary wisdom of human affairs*. No conception of governance, no conception of law that fails to leave room for changes and adjustments of this sort can possibly be tolerable. And it seems to me that any conception of the rule of law which denigrates the very idea of such changes and which treats their enforcement as an inherent derogation from that ideal has to be wrong.

Any particular proposal for change will no doubt have its opponents, and sometimes or often the opponents will be right. They may be right because a proposed environmental regulation proves unnecessary or hysterical, or because a given piece of social legislation represents nothing more than cynical rent-seeking by one faction exploiting another. These are enduring possibilities in the sordid and shabby circumstances of human politics. But the opponents are not necessarily right all the time or right as often as not because such proposals for legislative change are always out of the question. If someone is prepared to say that once markets and property rights have been established, any change or any regulation is out of the question, it seems to me that their perspective is necessarily that of an outsider, interested only (like the investors that Robert Barro referred to when he talked about the sale and purchase of Rule-of-Law indexes) in what can be extracted from a given society, rather than the perspective of someone who lives in the society and who cares about changes in the quality of life (and changes in the distribution of the quality of life among his or her fellow inhabitants) that markets and property rights are supposed to contribute to. Responsiveness to these changes and willingness to express concern about them is the hallmark of the responsible citizen, and we should be wary of adopting any conception of the rule of law that is designed to sideline or discredit that. We should be especially wary when such conception is advocated from an external or predatory point of view.

So changes in the regulation of property and market structures are not necessarily out of order. Of course everything depends on the mode of such changes. Constant day-to-day managerial meddling or changes imposed by decree are rightly regarded as incompatible with the rule of law. But *legislated* changes are not necessarily incompatible with the rule of law. On the contrary: not only does an adequate conception of the rule of law have to leave room for them; an adequate conception of the rule of law will

discipline these changes, subjecting them to formal and procedural criteria of legality. The rule of law will insist on changes enacted openly through procedures that are transparent and clear, changes that are formulated prospectively in general terms, changes that take the form of established schemes that people can expect to see upheld and enforced in the medium and long term, changes set out publicly in intelligible legal texts and then given to independent judicial tribunals for interpretation, administration and enforcement.

I am not making a case for the sort of flexibility that is characterized by peremptory or ill-considered legislation. I am a great believer in legislative due process. Legislating is not the same as the issuing of a decree; it is a formally defined act consisting of a laborious process. In a well-structured legislature that process involves public consultation and the commissioning of reports and consultative papers; as well as the informal stages of public debate, it includes also successive stages of formal deliberation in the legislature, deliberation and voting in institutional settings where the legislative proposal is subject to scrutiny at the hands of myriad representatives of various social interests.

These procedural virtues—legislative due process, if you like—are of the utmost importance for the rule of law. Bicameralism, checks and balances (such as executive veto), the production of a text as the focus of deliberation, clause-by-clause consideration, the formality and solemnity of the treatment of bills in the chamber, the publicity of legislative debates, successive layers of deliberation inside and outside the chamber, and the sheer time for consideration—formal and informal consideration, internal and external to the legislature—that is allowed to pass between the initiation and the final enactment of a bill: these are all features of legislative due process that are salient to an enactment's eventual status as law (for the purposes of our thinking about the Rule of Law).

To wish to be subject to the Rule of Law is to wish to be subject to enactments that have been through processes like these. When we say, for example, that the Rule of Law requires that no one should be punished except pursuant to the violation of some rule that was laid down before he offended—*nulla poene sine lege*—we don't just have in mind an edict or a decree issued in advance. We have in mind that the prohibition which he is accused of violating is one that was enacted in advance through the laborious solemnity of the legislative process, enacted as law not just given out as notice.

True, legislation is sometimes adopted in haste or under urgency; but by and large that is something that should be criticized in the name of the

Rule of Law—and in the Rule-of-Law indexes, the score given countries that allow it as a typical mode of law-making (such as New Zealand, which otherwise has a very high score on the World Bank's Rule-of-Law index) should be marked down sharply for this sort of abuse.

And no doubt these requirements of legislative due process mitigate the pace of legal change, if they are properly observed, and this may go some way to addressing the concerns that property-owners have about the security and stability of their expectations. But I don't think it is possible to go much further than that. The discipline of the Rule of Law, and in particular the discipline of legislative due process, already imposes substantial constraints on the alacrity with which a society can respond collectively and deliberatively to changing circumstances. We must remember too that the rhythm of change that this imposes needs to be matched with the rhythm of politics, because it is not easy to develop a platform and assemble and sustain a coalition for change all the way through this process. (This is perhaps harder in an American-style legislature, than in the Westminster system, though legislating at Westminster is proving (or will prove) more and more difficult as executive dominance gives way to specifically parliamentary institutionalization of the safeguards of legislative due process. I have in mind the growth of select committees, for example, independent of the executive, and the increasingly assertive power of a changing second chamber.)

But what I don't think we should concede is that the rhythm and timetabling of a society's legislative flexibility should be adjusted additionally to pander to the profit horizons of individual investors who crave a certainty in the property market that they cannot secure in other investment environments.

10. Eschewing the Rule of Law; arguing directly about property and markets

add conclusion