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Beware of Greens in Praise of the Common Law

James L. Huffman*

ABSTRACT

After several decades of general agreement among environmental law scholars and environmentalists that the common law is inadequate to meet the challenges of environmental protection, a few scholars have taken a second look at common law remedies in recent years. Simple pragmatism explains some of this newborn interest in the common law, while for others there has been at least some acceptance of the efficiency arguments made by free market environmentalists since the 1970s. But for the most part the fledgling environmentalist case for revival of common law remedies is rooted in a belief that a reinvigorated common law will further weaken constitutional protections of property rights that might otherwise stand in the way of command and control regulation.

Professor J.B. Ruhl has been a leading proponent of a resort to common law – in particular, nuisance law as a protector of natural capital and ecosystem services. While Ruhl understands and appreciates the link between the common law and market allocation of scarce resources, he makes his case as much on the prospect for takings clause avoidance as on the considerable efficiency advantages of markets. By this view the common law serves as a Trojan horse – a gift to free marketeers and property rights supporters that is not what it appears to be. This opportunistic embrace of the common law is thought to be made possible by Justice Scalia’s holding in *Lucas v. South Carolina Coastal Council* that “background principles,” including common law nuisance, exist as exemptions to takings claims even where there is a total loss of economic value in a regulated property.

Part I of this article is a brief tale of tree huggers, bean counters and a tentative resuscitation of the common law among environmentalists. Part II argues that reliance on public nuisance law, a doctrine long since properly recognized as the police power by another name, can serve only to promote judicial legislation or to insulate the legislature from takings claims. While acknowledging and commending the efficiency advantages of greater reliance on the marketable rights of private nuisance law, Part III argues that the recognition of private rights in ecosystem services will, in most cases, result in a radical disruption of the settled expectations that the common law exists to protect. Part IV argues there is more in Ruhl’s Trojan horse than meets the eye, namely the privileging of legislative action taken in the name of the common law. Part V responds to the stock claim that policy driven reforms of the common law are only the latest chapters in a long history of evolutionary change by demonstrating that the common law has evolved for centuries in response to bottom up consumer demand, not top down judicial policy making. Part VI argues that American common law did experience one radical change from its English roots with the enactment of the federal and state constitutions. These constitutions, and particularly the 14th amendment to the U.S. Constitution, impose limitations on state governments that the courts are not privileged to ignore. While agreeing that greater resort to the common law can yield significant environmental benefits, Part VII concludes that renewed interest in the common law fueled by Justice Scalia’s opinion in *Lucas* is driven largely by a desire to insulate environmental regulation from the takings clause,

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while evidencing very little appreciation for the common law as an institution for the allocation of scarce resources.

I. Introduction

Environmental law, as a field of study and legal practice, arose long after environmental problems entered the consciousness of American leaders and policy makers. Indeed as early as 1876 the United States government set aside a vast wilderness, in what would become northwest Wyoming, to protect its unique natural qualities. But even long before the creation of Yellowstone National Park, ordinary folks in America and England were conscious of what we now call environmental problems. They called them nuisances and the common law provided a means of relief from, or compensation for, such intrusions.

By the time laws relating to human impacts on the natural environment came to be called environmental law in the 1970s, the common law version had been largely abandoned in favor of increasingly centralized regulation. Not only was common law nuisance relegated to the dustbin as a means of dealing with environmental problems, it was generally agreed not to be up to the task in a modern, complex, technological world. Late 20th century environmental problems like air and water pollution, hazardous waste and toxic substances, wildlife habitat and species preservation required the expertise, resources and vast powers of the highest levels of government. It was widely agreed that the piecemeal methods of the common law could not make a dent in the pervasive environmental problems facing the nation and the planet.¹

But there was a small band of contrarians who argued that the common law might still have some relevance to the solving of environmental challenges. A few of these naysayers even claimed that the common law might often be superior to the top down, command and control, methods that quickly came to dominate environmental law in the wake of the first Earth Day.² Some of these folks called themselves free market environmentalists.³ Others called them the

¹ See, e.g., RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 121 (2004). “The essential premise of much environmental law is . . . that the physical characteristics of the ecosystem generate spatial and temporal spillovers that require restrictions on the private use of natural resources far beyond those contemplated by centuries-old common law tort rules.”

² See e.g., *THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW* (Roger E. Meiners and Andrew P. Morriss eds. 2000).

³ TERRY L. ANDERSON AND DONALD R. LEAL, *FREE MARKET ENVIRONMENTALISM* (1991).

“lunatic fringe.”⁴

By the 1990s the free market environmentalists had made sufficient inroads that “market mechanisms” in the form of tradable emissions permits and pollution taxes began to appear in some environmental laws. By the end of the century “cap and trade” was a generally accepted approach in proposals for regulating alleged impacts on climate. But for most environmentalists nuisance law remained the province of the lunatic fringe, at least until a few people took a look back at Justice Scalia’s opinion in *Lucas v. South Carolina Coastal Council*⁵ and saw an opportunity.

The opportunity they saw did not reflect a realization that the common law is, after all, a promising means for environmental protection. Rather what they found buried in Scalia’s *Lucas* opinion is the opportunity to evade the nettlesome problem of the takings clause. Justice Scalia held that a total loss of economic value resulting from regulation constituted a categorical taking, unless background principles of state property law would independently preclude the uses now prohibited by regulation.⁶ Or to state the matter differently, if state property law, including the common law of nuisance, precluded all economic uses of particular properties, present day regulations enforcing such limits will not constitute unconstitutional takings of private property, notwithstanding the resulting total diminution in economic value. The only hitch in this design for a takings exemption might be the actual content of the common law.

Enter the reborn common law faithful, among them Professor J. B. Ruhl who sees an opportunity to protect natural capital and ecosystem services through reliance on nuisance law.⁷ Though a Johnny-come-lately to the common law, Ruhl has never been a hard core, command and control, patriot. A self-declared member of the “radical middle,” Ruhl once confessed to being among “the weenies of environmental law . . .” “When the extremes do not outright ignore us,” wrote Ruhl, “they portray us as gutless, spineless, passionless, malleable, and

⁴ Professor Lisa Heinzerling speaking to the Environmental Law Section of the Association of American Law Schools, January 5, 2004, Atlanta, Georgia.

⁵ 505 U.S. 1003 (1992).

⁶ Justice Scalia held that “[a]ny limitation so severe [as to deprive land of all economically beneficial use] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.” *Id.* at 1029.

⁷ J.B. Ruhl, *Making Nuisance Ecological*, draft page 1. See also, J.B. Ruhl, *Toward a Common Law of Ecosystem Services*, 18 St. THOMAS L. REV. 1 (2005) and J.B. Ruhl, *Ecosystem Services and the Common Law of “The Fragile Land System,”* 20 NAT. RESOURCES & ENV’T 3, (Fall 2005)

shameless skills for the ‘other side.’”⁸ The sides, between which Ruhl claims the middle, are the “preservationist ‘tree huggers’” and the “resourcist ‘bean counters’.”⁹ But the middle Ruhl refers to when claiming to be an environmental law weenie is not between common law and command and control. It is between what has come to be called anthropocentrism (bean counters) on the one hand and biocentrism (tree huggers) on the other – that is Ruhl occupies the middle in terms of justifications for environmental protection. He has not occupied the middle in terms of preferences among the array of legal tools that might serve the goal of environmental protection.

It may seem odd to suggest that people would take sides on the selection of legal tools, no matter how passionately they seek to protect the environment. Why wouldn’t environmental advocates be pragmatic and opt for whatever approach is most effective in light of their objectives? Certainly those seeking to promote economic development have not hesitated to press for free markets, regulation, subsidies, tax breaks, trade restraints or whatever works in pursuit of their particular purposes. But not environmentalists; more often than not they have stood on principle and that has meant both pleading with and ordering people to do the right thing without regard for cost.¹⁰ That is why self-proclaimed free market environmentalists have been viewed as wolves in sheep’s clothing, and why Professor Ruhl finds himself in the philosophical middle as a pragmatist willing to argue that environmental protection is good for people.

To be fair, Ruhl has been a supporter of market approaches to environmental protection, all of which rely on a combination of command and control regulation and something resembling common law property rights. He and Jim Salzman have written approvingly on the dramatic growth of environmental trading markets,¹¹ but not without noting their limitations, particularly when it comes to the provision and preservation of ecosystem services.¹² It is a concern for ecosystem services that brings Ruhl to a consideration of the common law. Although he attributes the abandonment of the common law in favor of statutory regimes like the Endangered

⁸ J.B. Ruhl, *A Manifesto for the Radical Middle*, 38 IDAHO L. REV. 385, 386 (2002).

⁹ Ruhl credits the terms “preservationist” and “resourcist” to J. Baird Callicott & Karen Mumford, *Ecological Sustainability as a Conservation Concept*, 11 CONSERVATION BIOLOGY 32, 34 (1997). He attributes “tree-huggers” and “bean-counters” to DANIEL A. FARBER, *ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD* (1999).

¹⁰ The combination of preaching and commanding has a sort of Victorian ring to it. Good people will see the light, but there will always be those in thrall to temptation or worse who will require sterner measures.

¹¹ James Salzman and J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 STAN. L. REV. 607 (2002).

¹² *Id.* at 612.

Species Act, in part, to the perception that “nuisance doctrine was . . . a poor fit” in the protection and management of species and ecosystems, he is concerned that traditional command and control methods have not been adequate to the task.¹³

It is not a coincidence that a relatively newfound concern for ecosystem services coming at roughly the same time as Justice Scalia’s *Lucas* opinion has led a middle of the road pragmatist like Professor Ruhl to the common law. While I have no doubt that Ruhl is “interested primarily in advancing the broad integration of natural capital and ecosystem service values into environmental decision making,” his pragmatism would not allow him to ignore the possibilities presented by *Lucas* for “shrink[ing] the scope of categorical takings.”¹⁴ He is not the first to suggest that Scalia may have unwittingly created a massive 5th amendment exemption for environmental regulation in a world of evolving property rights,¹⁵ but few others have turned

¹³ “These laws worked like a charm for a good while, until things got even more complicated. We began to understand the breadth and depth of our impact on ecosystems and the landscape, and to appreciate how puny the federal laws seemed in comparison to the magnitude of large-scale ecological degradation.” Ruhl, *Toward a Common Law*, *supra* note 7 at 2.

¹⁴ Ruhl, draft *supra* note 7 at 7. Ruhl and Jim Salzman have a piece titled *Ecosystem Services and the Public Trust Doctrine: Working Change from Within* forthcoming in the SOUTHEASTERN ENVIRONMENTAL LAW JOURNAL arguing that the public trust doctrine can be grown from within to accommodate ecosystem services and natural capital, a sort of backup approach for taking advantage of Scalia’s alleged exemption from the takings clause.

¹⁵ See, e.g., Richard J. Lazarus, *Putting the Correct Spin on Lucas*, 45 STAN. L. REV. 1411, 1428 (1993) (suggesting that the court effectively created a two tiered system of review in takings cases with little likelihood that property owners will prevail “because environmental protection laws almost never result in total economic deprivations, . . .”); Samuel C. Kaplan, “Grab Bag of Principles” or Principled Grab Bag?: *The Constitutionalization of Common Law*, 49 S.C. L. REV. 463, 523 (1998) (noting that “the Court’s opinion makes clear that common-law principles will be able to accommodate changing ‘experiential propositions’ which would include, for example, new scientific understandings about the danger of a certain practice.”); Hope M. Babcock, *Should Lucas v. South Carolina Coastal Council Protect Where the Wild Things Are? Of Beavers, Bob-O-Links, and other Things that Go Bump in the Night*, 85 IOWA L. REV. 849, 856 (2000) (stating that “the Court may have inadvertently created a golden opportunity for a return to a more neighborly society and a more ecologically sensitive land use ethic, in which conflicts over the uses of private property disappear.”). Professor Joe Sax was less optimistic about the implications of *Lucas* which he read as the Court’s much belated response to *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W. 2d 761 (1972), a Wisconsin case in which the state court upheld the state’s preservation of ecosystem values in the face of a takings claim. Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1440 (1993). See also J.B. Ruhl, *The “Background Principles” of Natural Capital and Ecosystem Services – Did Lucas Open*

their attention to analyzing how common law doctrine might actually be used to sidestep the unrelenting constitutional claims of private property owners.¹⁶ For most environmental regulation these constitutional claims have been persistent, but seldom successful, so there has been little demand for translating theory to practice. In the context of Professor Ruhl's interest in ecosystem services, however, there is a much higher prospect of property owner success under a categorical taking rule. Where ecosystem service protection requires that an entire property remain undisturbed in its natural condition, a total loss of economic value is a distinct possibility. A regulatory prohibition of development will be a categorical taking under *Lucas*, but if nuisance law (part of background principles) is found to preclude the elimination of ecosystem services there will be no constitutional harm to the property owner.

While the tree huggers may be unhappy with Professor Ruhl's embrace of the idea that the ecosystem provides services to humans and his advocacy of resort to the common law, many will be mollified both by the reality that ecosystems might be preserved and by the prospect of circumventing the takings clause. On the opposing side, bean counters may object if property is taken without compensation, but resort to the common law is generally thought to be a good thing since it deals, for the most part, in private rights which serve, in turn, as an essential ingredient of markets. Perhaps Professor Ruhl has found a way to bridge the chasm between the two sides. As one who counts himself a free market environmentalist, though my motives seem always suspect to the tree huggers, I am in no position to judge whether Ruhl's fascination with nuisance law will bring him closer to those occupying the moral high ground of orthodox environmentalism. The presumption of the failure of the common law remains strong as does the

Pandora's Box?, (forthcoming).

¹⁶ Michael Blumm and Lucas Ritchie, not fellow middle grounders with Professor Ruhl, take an approach consistent with their position on the tree-hugger side of the divide. Rather than focus on the prospects for environmental protection under an evolving nuisance doctrine, they look to an assortment of property law doctrines which have served as "categorical defenses" in takings cases. Blumm and Ritchie suggest that Justice Scalia, to his "surprise and probable chagrin," laid the foundation for these categorical defenses by effectively holding that in every takings case the preliminary question is whether the plaintiff has the property right claimed to have been taken. Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 368. To the extent these property doctrines are state law, it seems unlikely that Justice Scalia would be either surprised or chagrined, although as a student of history he might raise one of those impressive eyebrows at Blumm's and Ritchie's account of the public trust doctrine, for example. To the extent these categorical defenses rely on federal law, Justice Scalia may yet have an opportunity to opine.

disdain for the idea that individuals might own natural processes and things,¹⁷ so I fear Professor Ruhl will find his bridge precarious on the green side of things.

On the other green (money) side of the environmental divide, there is likely to be some enthusiasm for Ruhl's interest in the common law of nuisance, particularly among those who think of themselves as free market environmentalists. For free marketeers, an appeal of the common law is that it deals largely in private rights that can be bought and sold in transactions among willing buyers and sellers. It is these voluntary exchanges that allocate resources to their highest valued uses yielding the efficiency that equates with maximized net social welfare. Social welfare, according to this way of thinking, is nothing more than the aggregation of individual welfares, and because it is impossible to know the relative preferences of others,¹⁸ it is only through voluntary, mutual exchange that we can be sure each individual has maximized his or her personal welfare. Of course these private rights can also be asserted in courts, but it is seldom necessary to resort to litigation where courts understand that their role is to confirm reasonable expectations and individuals are free to settle disagreements in light of what the courts have done in other cases. Markets depend upon the courts to both confirm and respect the common law rules.

So even if part of Ruhl's motivation is to amplify background principles of property law and thus take advantage of Scalia's exemption from the categorical taking rule – not a market friendly objective if reasonable expectations are destabilized, it is nonetheless encouraging to free marketeers that the private rights of nuisance law might be preferred to the blunderbuss of centralized, top down, regulation. Ruhl's is not an argument from principle, unless one is willing to view pragmatism as a principle. But most free marketeers have embraced environmental trading markets, notwithstanding that they abandon all reliance on markets to establish the efficient allocation of scarce resources.¹⁹ It is enough that environmental trading markets provide incentives for more efficient achievement of mandated allocations. So most free marketeers, like many who would rather insist on environmental protection at any cost, are pragmatists along with

¹⁷ “The unifying theme is a refusal to treat the natural world as a commodity subject to human domination. Rather, a thoroughgoing green insists on respecting the moral autonomy of nature and seeks to live in a manner that promotes ecological balance.” J. Peter Byrne, *Green Property*, 7 CONSTITUTIONAL COMMENTARY 239, 240 (1990).

¹⁸ For the original statement of the “impossibility theorem” see Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 JOURNAL OF POLITICAL ECONOMY 328 (1950).

¹⁹ Emissions trading and other market mechanisms in existing environmental regulations do not rely on market transactions to determine the optimal level of pollution. Rather they are dependent on the legislative or administrative setting of an allowable level of pollution. This establishes the available supply and trading among those holding an interest in that supply is expected to result in more efficiency (greater productivity) from the allowed pollution.

Professor Ruhl.²⁰ We should therefore give his arguments serious consideration despite his secondary objective of avoiding the limits of the takings clause.

II. Public Nuisance

Ruhl claims that common law nuisance will neatly accommodate the protection of ecosystem services. Public nuisance, concludes Ruhl, is a sort of no-brainer for his cause.²¹ Private nuisance also holds promise, but it is more complicated – seven times more complicated judging by the length of discussion Ruhl devotes to each topic. Of course it is silly to correlate complexity with numbers of pages, but it is a simple way of making the point that public nuisance law, more than private nuisance, is the impenetrable jungle of which William Prosser wrote.²² There is not a lot to describe about jungles that cannot be penetrated.

What can be said about public nuisance is that it has “nothing in common [with private

²⁰ Ruhl also describes himself as an “instrumentalist,” a term that might be understood to allow for ad hoc, case by case, outcome oriented, decision making. Alternatively it might be understood in the Hurstian sense as an explanation for the evolution of the law in a rule of law system. See JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956). See discussion *infra*, Part V, regarding common law evolution.

²¹ “Ecosystem service nuisances seem ready-made for public nuisance under all these conditions.” Ruhl draft *supra* note 7 at 19.

²² WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 571 (1971, 4th edition). The term was employed decades earlier by Frank Rice in a context perhaps meant to include nuisance law:

To the pedants of the dark ages, who were the exclusive custodians of the little learning that then flickered in the world, it was a matter of mighty concern that the administration of law should be confined within a narrow circle, and that a monopoly of learning would diffuse itself among a coterie of ecclesiastics whose constant struggle was to make that learning more difficult to obtain. In consequence we have had transmitted to us a vast and intricate system founded upon innumerable precedents and enactments, and interpreted by a horde of acute logicians, who pursued every ramification of the subtlety to its earliest source, and literally thatched every topic in the law with refinements and technique, until so late as the time of Lord Mansfield it had become an impenetrable jungle to all but the elect. FRANK S. RICE, *A TREATISE ON THE MODERN LAW OF REAL PROPERTY AS EXPOUNDED BY OUR COURTS OF LAST RESORT, STATE AND FEDERAL* 56 (1897).

nuisance], except that each causes annoyance or inconvenience to some one,”²³ that it was once a catchall for low grade criminal offenses that have for decades been largely subsumed into various legislative prohibitions,²⁴ and that any revival of the concept in the courts is an invitation to judicial policy making. In the latter sense it is a companion piece to other common law doctrines dredged from the stagnant waters of often poorly understood English common law – like the public trust doctrine,²⁵ the natural use doctrine and custom.²⁶ It can also be said that the modern incarnation of public nuisance is different from the historic concept in at least one important way. Historically it provided a remedy for widely shared annoyances and inconveniences, today it is meant to guard against the violation of “public rights.” What are these public rights, and where do they come from?

The Restatement of Torts defines a public nuisance as “an unreasonable interference with a right common to the general public.”²⁷ This language might be understood to mean that all members of the community have in common an individual right to be free from certain annoyances and inconveniences, in the same sense that tenants in common can have equal but distinct interests in the same property. But in modern parlance the term is generally used to mean that the public, as an entity separate and distinct from its individual constituents, has rights. While the Restatement and the historic common law tended to split the difference between these two views by allowing that particular individuals might have parallel actions in private

²³ William L. Prosser, *Nuisance Without Fault*, 20 TEXAS L. REV. 399, 411 (1942). Prosser went on to conclude that “it is in the highest degree unfortunate that they [public and private nuisance] are called by the same name.”

²⁴ “In [most] American states, public nuisance is now almost entirely a matter of special statutes prohibiting particular things, and the question usually litigated is whether the case falls within the statute.” *Id.* at 412.

²⁵ In fact Ruhl has written a companion piece with Jim Salzman arguing that the public trust doctrine provides another opportunity to circumvent the takings clause in pursuit of ecosystem service preservation. Ruhl and Salzman, *supra* note 14. For a revisionist history of the public trust doctrine, see James L. Huffman, *Speaking of Inconvenient Truths – A History of the Public Trust Doctrine* (forthcoming).

²⁶ All of these, including public nuisance and more, are among the “categorical defenses” to takings claims identified by Blumm and Ritchie, *supra* note 16. Writing elsewhere, Ruhl endorses the Blumm and Ritchie approach as yet another advantage of resort to common law. “Indeed, there is no reason to stop at nuisance law in this regard, as a variety of common law tort and property doctrines are aptly suited for evolution toward the new understanding of the value of natural capital and the ecosystem services it produces.” J.B. Ruhl, *Ecosystem Services and the Common Law of the “Fragile Land System,”* 20-Fall NAT. RESOURCES & ENV’T 3, 69 (2005)

²⁷ RESTATEMENT (SECOND) OF TORTS §821B (1979).

nuisance,²⁸ modern conceptions of public nuisance do not assume that community rights are a mere proxy for private rights. In the common law, however, the concept of public rights was little evident in the law of public nuisance.

Speaking of the then fresher waters of English common law, Blackstone wrote:

[N]usances are of two kinds; *public* or *common* nuisances which affect the public, and are an annoyance to *all* the king's subjects; for which reason we must refer them to the class of public wrongs, or crimes and misdemeanors: and *private* nuisances; which . . . may be defined, any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another.²⁹

Because public nuisances “annoy the whole community in general, and not merely some particular person;” said Blackstone, they “are indictable only, and not actionable.”³⁰ Blackstone speaks of public wrongs but not of public rights in his commentary on public nuisance. Perhaps this merely reflects that Blackstone was writing at a time when the concept of rights was less a dominant focus of civil society, but he did devote an entire volume to the rights of persons and a second volume to the rights of things. His rare use of the term “public rights,” in every instance save one, was in the context of discussions of crimes and misdemeanors and in combination with the concept of duties owed by individuals to the whole community.³¹

²⁸ RESTATEMENT (SECOND) OF TORTS § 821C (1979).

²⁹ WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 216 (1768).

³⁰ BLACKSTONE, 4 COMMENTARIES 167 (1769).

³¹

Wrongs also are divisible into, first, private wrongs . . . ; and secondly, public wrongs, which, being a breach of general and public rights, affect the whole community, and are called crimes and misdemeanors. Volume I at 118

And hence it appears how injurious as well to private as public rights, those statutes were, which vested in king Henry VIII., instead of the heirs of the founder, the lands of the dissolved monasteries. Volume I at 472.

WRONGS are divisible into two sorts or species; private wrongs, and public wrongs . . . : the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of crimes and misdemeanors. Volume III at 2.

[T]he king, in whom centers the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public right belonging to that community, and is therefore in all cases the proper prosecutor for every

Nowhere in these rare references did Blackstone attempt to define or explain what he meant by public rights, and in that he was no different than the American commentators who followed in his footsteps. Kent never uses the term public rights but he did refer to “rights of public necessity”³² by which he clearly meant the “public welfare”³³ or the “general interest of the community.”³⁴ Wood stated that “[p]ublic nuisances . . . are such as result from the violation of public rights,”³⁵ but he offered no definition of public rights beyond the requirement that there be injury not to particular persons but to “all the king’s subjects.”³⁶ However, not just any injury will establish either a public or private nuisance, said Wood, since if there is no public or private right violated “it is ‘*damnum absque injuria*.’”³⁷ With the exception of obstructions to public

public offence. Volume IV at 2.

[W]rongs, or crime and misdemeanors, are breach and violation of the public rights and duties, due to the whole community, considered as community, in it's social aggregate capacity. Volume IV at 5.

It was observed, in the beginning of this book, that crimes and misdemeanors are a breach and violation of the public rights and duties, owing to the whole community, considered as a community, in it's social aggregate capacity. Volume IV at 41.

The exception to this singular use of the term presumably carries the same meaning but occurs in the context of an explanation of the relative powers of Parliament and the Crown: “Yet where an act of parliament is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights of the crown, it is said to be binding as well upon the king as upon the subject.” Volume I at 254.

³² JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 338 (1832).

³³ *Id.*

³⁴ *Id.* at 340.

³⁵ H.G. WOOD, THE LAW OF NUISANCES 24 (2nd edition 1883). Absent a conceptual definition of public rights, Wood catalogues particular examples drawn from various English and American cases. As I will argue below, *infra*, Part V, these examples reflect the gradual evolution of common law nuisance with changes on the margins to accommodate changing social and physical circumstances.

³⁶ *Id.* at 28.

³⁷ *Id.* at 3.

ways “over which all the public have the equal right to pass,”³⁸ Bishop left all of public nuisance to his treatise on criminal law³⁹ and made no reference to “public rights” as distinct from individual rights equally shared by all members of the public. Hale wrote that public nuisances “result from the violation of public rights,” but offered no suggestion as to the definition of those rights and, like Wood and Bishop, distinguished public from private nuisance “upon the consideration of whether it be indictable or not.”⁴⁰ Cooley defined a public nuisance as “one that obstructs the public in the enjoyment of a common right or that injuriously affects the community at large, . . .”⁴¹ In this statement we might understand Cooley, like Bishop, to refer to individual rights held in common, but Cooley cites to a Connecticut case holding that “[t]he test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights.” The Connecticut court offered no guidance for determining what these public rights are.⁴²

Nor have other courts been particularly helpful in providing abstract definition to the concept of public rights such that we might better know what particular public rights exist. A large number of 19th century public nuisance cases arose in the context of obstructions to navigable waters and public ways.⁴³ Later in the century a growing number of public nuisance cases involved the annoyances of industry and of increasing contact between farm and city. In

³⁸ JOEL P. BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW §948 (1889).

³⁹ JOEL P. BISHOP, COMMENTARIES ON THE CRIMINAL LAW (1858).

⁴⁰ WILLIAM B. HALE, HANDBOOK ON THE LAW OF TORTS 436 (1896).

⁴¹ THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 568 (1907).

⁴² *Nolan v. City of New Britain*, 69 Conn. 668, 38 A. 703, 706 (Conn. 1897). Ironically, the defendant in the case was the City of New Britain which had been authorized by the state legislature to undertake the action complained of. Because the plaintiff was not a resident of New Britain and his property was not located within the boundaries of the city, the court held that the legislative authorization (not to engage in what would otherwise be a nuisance, but to acquire private property for a public improvement to be “paid for by that species of taxation known as the ‘assessment of damages and benefits’”) did not extend to plaintiff’s property. Although the plaintiff had sued for special damages resulting from a public nuisance, the case might have been better considered a taking for a public use without just compensation. In any event the Court made no effort to elaborate on its assertion that a public right was at stake in the event of a public nuisance.

⁴³ See e.g., *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. 245 (1829); *Irwin v. Dixion* 50 U.S. 10, (1850); *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855); *City of Hoboken v. Pennsylvania R. Co.*, 124 U.S. 656 (1888); *Scranton v. Wheeler*, 179 U.S. 141 (1900).

both of these contexts the courts had Blackstone to rely upon, although to the extent they chose to speak in terms of public rights they had little help from that source. But more often than not there was no mention of the idea of public rights. Rather the courts spoke of public good, public welfare or public interest, without asserting that public rights were at stake. Indeed most courts and commentators came to think of public nuisance law as a mirror image of the state's police powers. Nuisances could be enjoined by courts and regulated by legislatures not because public rights were at stake but because the police power is inherent in state sovereignty.

While 19th and early 20th century public nuisance cases made only occasional references to public rights, modern advocates for an expanded concept of public nuisance in the wake of *Lucas* rely heavily on claims of public rights to justify their case. Professor Ruhl relies on the Restatement in defining public nuisance as “an unreasonable interference with a right common to the general public” that (fortuitously) need not be a right in land.⁴⁴ Mike Blumm and Lucas Ritchie note that “in states that have adopted an expansive view of public rights, the public trust doctrine can be effectively used as a defense to takings claims in a variety of situations.”⁴⁵ Presumably they contemplate that public nuisance claims will benefit from the same 5th amendment exemption. Allan Kanner and Mary Ziegler suggest that public nuisance actions to enjoin natural resources damages (of which the destruction of ecosystem services is presumably one) are a vehicle for protecting public rights.⁴⁶ In contrast to tort law's concern for fault, writes Albert Lin, “[t]he focus of nuisance law . . . is on whether there is significant harm--that is, significant interference with one's use and enjoyment of land or significant impairment of public rights.”⁴⁷ Such claims of public right are the basis of the recent lawsuit by eight states against several energy companies claiming harm from global warming. In the words of plaintiffs' attorneys Matthew Pawa and Benjamin Krass, “[t]he harms identified in the case are harms to clear public rights, such as public safety (heat deaths, flooding), public health (heat stress, increase in ground-level ozone smog), the integrity of natural resources such as water supplies and forests, public property damage via inundation of coastal land, and interference with navigation.”⁴⁸

In his immediate post-*Lucas* commentary, Joe Sax twice quoted with approval from *Just*

⁴⁴ Ruhl, draft *supra* note 7 at 19.

⁴⁵ Blumm & Lucas, *supra* note 16 at 344.

⁴⁶ Allan Kanner & Mary E. Ziegler, *Understanding and Protecting Natural Resources*, 17 DUKE ENVTL. L. & POL'Y F. 119, 128 (2006).

⁴⁷ Albert C. Lin, *The Unifying Role of Harm in Environmental Law*, 2006 WIS. L. REV. 897, 904 (2006).

⁴⁸ Matthew F. Pawa & Benjamin A. Krass, *Global Warming as a Public Nuisance: Connecticut v. American Electric Power*, 16 FORDHAM ENVTL L. REV. 407, 449 (2005).

v. Marinette County (“one of the cases that launched the modern era of environmental law”⁴⁹) to the effect that “it is not an unreasonable exercise of police power to prevent harm to public rights by limiting the use of private property to its natural uses.”⁵⁰ Although the *Just* court made reference to the police power rather than nuisance,⁵¹ there remains little to distinguish public nuisance from the police power, except that the courts will play a central role in defining what public interests will be constituted as public rights and, therefore, limitations on private rights. Eric Freyfogle recognizes this advantage of public rights talk over public interest talk in arguing that environmentalists should counter the individual rights claims of property owners with claims of “the rights of citizens generally to enjoy a healthy environment.”⁵² Carol Rose has “been arguing for some time that we need a more robust language of ‘public rights’ in the United States . . . [to] bolster the sense that public claims and decisions command respect along with private ones.”⁵³ Whether public rights claims are asserted in the context of public nuisance, public trust, custom or any other of the litany of “categorical defenses” identified by Blumm and Ritchie,⁵⁴ the point is that they can serve as a trump in 5th amendment takings claims. That is not, says Ruhl, his primary objective, but it is nonetheless the “Trojan horse” on which he will happily ride in quest of ecosystem service protection.⁵⁵

It is clear from the foregoing discussion that the concept of public rights, like the content of public nuisance law, is more than elusive of definition. Even Carol Rose, the most thoughtful and prolific writer on the concept of public rights in natural resources, never offers an abstract definition nor explains how any particular public right can be known to exist.⁵⁶ With Rose, as

⁴⁹ Sax, *supra* note 15 at 1438-39.

⁵⁰ *Id.* at 1439 and 1440, quoting from 56 Wis. 2d 17.

⁵¹ The *Just* court did rely on a public nuisance case (*Hasslinger v. Hartland*, 234 Wis. 2d 201 (1940) 56 Wis. 2d at 2000). The court relied much more heavily on public trust, an early indication that some modern courts would subsume public trust and well as public nuisance into the police power.

⁵² Eric T. Freyfogle, *The Particulars of Owning*, 25 *ECOLOGY L. Q.* 574, 589 (1999).

⁵³ Carol M. Rose, *Introduction: Property and Language, or, the Ghost of the Fifth Panel*, 18 *YALE J. OF L. & HUMANITIES* 1, 25 (2006).

⁵⁴ Blumm & Ritchie, *supra* note 16.

⁵⁵ Ruhl, draft *supra* note 7 at 27.

⁵⁶ In her now classic *Comedy of the Commons* article, Rose mentions public rights in excess of twenty times without definition beyond asserting that such rights are inherent and include navigation, fishing, hunting (maybe) and use of roads, waterways and the seashore. *The Comedy of the Commons: Custom, Commerce and Inherently Public Property*, 53 *U. CHI. L.*

with Ruhl and the many others who claim the existence of public rights, it is simply asserted that such rights exist. Perhaps there is a persuasive case to be made for the existence of public rights, but it has not been made in the context of the environment and natural resources. Nevertheless, public nuisance law as set forth in the Restatement and as described by those who look to limit private rights free from constitutional obstacles, relies on the concept of public rights. These public rights are assumed to exist independent from the individual rights of members of the community and, like individual rights, are meant to function as trumps in political and legal process.⁵⁷

If public rights claims are allowed to function as trumps in the context of nuisance law, there is much theoretical work to be done on the nature and sources of such rights. That is a discussion for another time. For the purposes of this paper, we can at least understand public rights claims to be assertions of a public interest in a particular outcome. Rights, whether public or private, reflect some interest of the rights holder and a corresponding obligation or duty on others that is enforceable because of the existence of the right.⁵⁸ But a claim of public interest does not necessarily imply the existence of a corresponding public right.

If “public rights” is just another term for public interest, or a way of identifying particularly important public interests, why should the courts have any role in determining what those public interests are? As evidenced by the wide array of often conflicting claims to represent the public interest emanating from a multitude of self-described public interest groups, the community interest is by no means self evident. It is therefore not surprising that, in the democratic states sharing the common law tradition, the annoyances and inconveniences of historic public nuisance law have for a century or more been largely the concern of legislative regulation.⁵⁹ Surely the legislature, even with its many failings, is a better source for the

REV. 711 (1986). Elsewhere Rose argues that “public rights” language was more widely in use in the 19th century, a claim not reflected in the treatises. However, assuming she is correct that “public rights” talk became less frequent in the 20th century, it does not appear to reflect a loss of understanding of the concept of public rights since there seems never to have been an abstract explanation for the content or source of those rights beyond the existence of some perceived public interest. “The subtext behind the eclipse of public-rights discourse,” says Rose, “is that the public does not matter.” *Supra* note 53 at 25. But a subtext behind the revival of public rights discourse is not only that the public matters, but that it has a trump even over constitutionally guaranteed private rights.

⁵⁷ For a discussion of the concept of rights as trumps, *see* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

⁵⁸ H.L.A. HART, *THE CONCEPT OF LAW* 85 (1961).

⁵⁹ In their famous 1890 article on a common law right of privacy, Samuel Warren and Louis Brandeis argued that “the protection of society [by common law courts] must come mainly

community interest than is a single, often unelected, judge. What then, other than the prospect of trumping the takings clause, is the case for relying on public nuisance to do what can already be done in the name of the police power? Notwithstanding the Restatement and the encouragement of Professor Ruhl and others, the courts would do best to leave regulation of public nuisances to legislatures, but not, as Carol Rose urges,⁶⁰ in the name of the common law. Leaving the regulation of public nuisances to the police power and the legislature would be a bit of common law evolution consistent with the constitutional separation of powers and reflective of what most courts have done for more than a century, though it would remove such regulations from the convenient cover of “background principles.”

Professor Ruhl suggests that an advantage of common law nuisance is its capacity to reflect local circumstances and values.⁶¹ As compared to our modern reliance on federal and even state command and control regulation, he is surely correct. But as compared to the diverse array of local, representative, legislative bodies that set standards for civil life in American communities, there is little to favor a court’s intervention over legislative determination of the public interest. As I will demonstrate below, it is one thing for common law judges to formulate as rules their understanding of existing community customs and expectations. It is quite something else for modern judges to change those rules in the name of serving the public interest as perceived by the judge or by particular litigants. While it is true that public nuisance law generally requires a balancing of interests, leaving significant discretion where cases are tried to juries, and it is true that juries drawn from the general public have a certain democratic quality, it is also the case that judges will finally decide what counts as a public interest (public right?) worthy of consideration in the balance. Most judges will have opinions about the relative importance of competing claims on the public interest, but they have no legitimate claim nor institutional competence to resolve that competition. That is what legislatures do. Judges have particular expertise on the subject of rights except where, as with public nuisance, rights are

through a recognition of the rights of the individual.” Noting that “[i]t would doubtless be desirable that the privacy of the individual should receive the added protection of the criminal law [to which category public nuisance belongs], but for this, legislation would be required.” Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 219-220 (1890).

⁶⁰ “For almost a century now, legislators – with judicial acquiescence – have taken over the task of refining and specifying the range of acceptable landowner practices, once defined only by judicially administered trespass and nuisance law on a case-by-case basis.” Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265, 281 (1996). As I argue *infra*, Part V, what Rose disparages as the case-by case approach of the courts is the very thing that gives the common law its legitimacy. Case by case is the method of the common law, while the legislative is an entirely different. Just calling legislation the common law does not make it so in any meaningful sense.

⁶¹ Ruhl, draft *supra* note 7 at 21.

made to depend on changing determinations of the public interest. No doubt this is why particular interests prefer to describe their policy objectives as public rights, and why public nuisance is a particularly slippery slope in the background of a property rights system.

The judicial role in public nuisance law is thus ambivalent in separation of powers terms. Historically judges have declared, without anything resembling legislative input, that certain actions or inactions constitute a public nuisance. Or judges might instruct juries that if certain conditions are satisfied a public nuisance can be found to exist. The difficulty is that once it is established that many people share in an alleged injury, any injury can offend a public right or be *damnum absque injuria* at the discretion of the judge. Because the existence of the requisite public right depends on the existence of a qualifying public interest, the exercise of that judicial discretion requires a balancing of affected interests or a weighing of the importance of the asserted public interest. The judge has nothing to offer on this subject except a personal opinion or the opinions of particular litigants. Alternatively the judge might be asked to determine whether or not a legislatively declared public nuisance satisfies the common law requirements. Most judges will be properly hesitant to second guess the legislature on what constitutes the public interest, but those who do will have only their own opinion to offer in support of a different outcome. It is therefore not surprising that, for the most part, public nuisance law has been subsumed, like criminal law, into the police powers of the legislative branch of government.

In a constitutional regime where the police powers of the states know no limits except those explicit or implied in the federal and state constitutions, there can be little doubt that legislatures have authority under the police power to regulate for the purpose of protecting ecosystem services. In light of this reality of state legislative power, we might ask what is to be gained by embracing Professor Ruhl's suggestion that public nuisance law be revived in service to ecosystem service protection. Two possibilities come to mind. On the one hand we might appeal to direct judicial expansion of public nuisance law because we have been unsuccessful in persuading the legislature to do it. On the other hand we might appeal to legislative regulation in the name of public nuisance law in anticipation that, if such regulation destroys all economic value in private property, no 5th amendment compensation will be due in light of *Lucas's* background principles exemption. While both of these possibilities reflect Ruhl's call for pragmatic instrumentalism, neither evidence much respect for the constitutional principles of separation of powers or individual liberty.

III. Private Nuisance

Professor Ruhl's case for protecting ecosystem services under private nuisance law will have more instinctive appeal to free marketeers because of its reliance on private rights. For that same reason it presumably will have less appeal to orthodox environmentalists. The latter will object that ecosystem services cannot be owned by private parties and that it offends moral principle and the sanctity of nature to suggest that individuals might have the right to decide whether or not to compromise or sacrifice the natural ecosystem. If that is a correct summary of the position of at least some environmentalists, there is little to be said to them in defense of

Ruhl's ideas beyond an appeal to pragmatism. I will thus turn my attention to the prospects for market provision of ecosystem services in a property regime that includes common law nuisance and leave the pragmatism argument to Professor Ruhl, since he has a better, though still limited, chance of influencing green think.

Markets cannot function without private rights (including the proprietary interests of government) that can be bargained for and exchanged. In the case of private nuisance law such exchanges will not conform to the archetypal buying and selling of goods and services, but are nonetheless market transactions resulting in scarce resources being allocated to their most valued uses. A transaction based on private nuisance law might involve **A** paying **B** for the right to impose a cost (harm) on **B** that would otherwise constitute a nuisance. **A** would thus acquire something in the nature of an easement or servitude allowing **A** to interfere with **B**'s use and enjoyment of **B**'s property. Robert Goldstein argues that recognizing **A**'s right to fill wetlands with resultant costs to **B** would evidence "a fundamental misstatement of ecological reality as well as a slanted view of property."⁶² What the assignment of property rights has to do with ecological reality is not apparent, but it is clear that the right to preservation (or destruction) of wetlands or other natural capital could be and has been, at one time or another, assigned to either interested party. As Professor Coase pointed out many years ago, assuming zero transactions costs it will not matter to ultimate resource use how these rights are assigned in the first place.⁶³ But it is clear that Professor Ruhl imagines the right to ecosystem services belonging first to the property owner benefitting from those services and not to the property owner from whose property the services arise.⁶⁴ So I will proceed, for the moment, with that assumption.

⁶² Robert J. Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law*, 25 B.C. ENVTL. AFF. L. REV. 347, 381 (1998). Goldstein's comment is in response to Richard Epstein's assertion that mandated wetland preservation may provide "a possible gain to the public; [but] it does not eliminate the constitutional obligation [to compensate]." RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 95 (1985). Although the initial assignment of property rights does make a distributional difference and can make an allocational difference given the reality of transactions costs, there is no explanation for Goldstein's position other than a moral claim that some or all ecological values cannot be owned.

⁶³ Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 7 (1960).

⁶⁴ As the Coase theorem implies, there is no way to know in the abstract whether **A** is interfering with **B**'s property use or visa versa. It is the law that makes that determination, but the general principle underlying nuisance law, *sic utere tuo ut alienum non laedas* (use your own so as not to injure another's), does not resolve the matter. It is only resolved by particular decisions on particular facts. It is the accumulation of such decisions over time that allows the common law judge to articulate a general rule of liability. Albert Lin finds "less convincing . . . Coase's equating the prevention of a harm with the conferring of a benefit." In Coase's example of a rancher's cows damaging a farmer's crops, Lin says most people would say the cows harmed

As Ruhl explains, a private nuisance exists where one person's action (including failure to act in some cases) results in unreasonable harm to another person's use and enjoyment of his or her land. Relying on the Restatement, Ruhl sets forth the four basic considerations in establishing a private nuisance: 1) an intentional invasion of plaintiff's property, 2) interfering with the use and enjoyment of that property, where 3) the gravity of the harm to the plaintiff exceeds 4) the utility of the conduct to the defendant.⁶⁵ The latter two factors go to the elusive question of reasonableness, which turns not just on an accounting of harm and benefit but also on social costs and benefits and the reasonable expectations of both parties in light of local circumstances. Ruhl concludes that all of these factors can be applied to conflicts over ecosystem services and that often, but not always, actions destructive of ecosystem services could be found to be nuisances.

One might quibble with Ruhl's conclusions on each of these points. For example, where property **B** has benefitted from storm surge protection provided by the shifting dunes on property **A**'s beachfront, what is the "invasion" of **B**'s property when **A** develops the beachfront and destroys the dunes? Presumably storm water does invade **B**'s property in quantities not previously experienced, so assuming it can be demonstrated that **A**'s destruction of the beachfront dunes is the cause, the invasion requirement is met. But where is the invasion when **A** destroys forest habitat and **B**'s orchard suffers from reduced pollination as a result (again assuming cause can be proven). The problem is not that something harmful has invaded **B**'s property, rather the problem is that something beneficial has failed to invade. But, says Ruhl, the Restatement only requires that the plaintiff be made worse off by the defendant's actions.⁶⁶ Thus invasion does not mean the physical presence of something harmful, or even physical harm resulting from invisible but measurable forces put in motion by defendant. It means only that the plaintiff is worse off in the use and enjoyment of land as a result of defendant's actions – whether due to the imposition of harm or the withdrawal of benefit. Of course it cannot be quite that simple. If the closing of **A**'s motel results in a loss of business at **B**'s adjacent café, is **A** liable in nuisance for making **B** worse off? Surely not, though it is the withdrawal of a benefit. Perhaps the difference is that storm surge protection can be said to be a "natural" benefit while café business is merely business. But what if the pollinating bees in the example above are drawn to an alfalfa field rather than a native forest and the alfalfa field is plowed under to make room for a

the crops and not visa versa. "Harm . . . is not purely subjective. Rather, what qualifies as harm rests largely on societal norms about acceptable behavior." Lin, *supra* note 47 at 932. Coase would not disagree. His point is that it could be the other way around. Indeed it was the other way around in western American states with fencing-out laws reflecting the then existing societal norms favoring livestock grazing over farming. The common law, properly conceived and implemented, will be a reflection of those society norms evidenced by ordinary practice in the community.

⁶⁵ Ruhl, draft *supra* note 7 at 12-19.

⁶⁶ *Id.* at 13.

shopping center. Are those pollination services natural or merely business?

These questions and thousands more await lawyers if Professor Ruhl persuades legislatures and courts to embrace an expanded doctrine of private nuisance. If the harm-benefit distinction has been abandoned, as Justice Scalia's suggests in *Lucas*,⁶⁷ perhaps a natural-nonnatural distinction, for which there is some precedent, can be made to give nuisance law some definition while accommodating the protection of ecosystem services. But even then property owners will face the uncertainties inherent in the balancing of interests called for by the Restatement. Whether these uncertainties are easily accommodated in the day to day risk assessment required of economic actors, or prove debilitating to investment and productivity depends on what the courts do in individual cases and how they view the role of the common law in modern American jurisprudence.

Could we avoid yet another discussion of the role of the courts and of the common law in an age of constitutions, legislation and regulation simply by concluding that Ruhl's proposal is a nonstarter because the idea of private rights in ecosystem services is unworkable? The idea may be unacceptable to many on the tree-hugger side, but it is certainly not unworkable. The central point of ecological economics is that so-called ecological services do have measurable economic values.⁶⁸ Those values may not have been accounted for in the past for three fundamental reasons. First, we have only just begun to understand the connection between the natural ecology and many benefits we derive from it, but have taken for granted. No doubt we have much more to learn, and some of what we think we now know will prove not to be so. Second, what we value changes over time for a multitude of reasons. Thus, in the past we may have taken little interest in things we today view as important ecological services. Third, even where we understood that things we value are provided by the natural ecology, we may have lacked the institutional arrangements necessary to allow our values to be expressed in the political and economic competition for scarce resources.

Although these three factors are interrelated,⁶⁹ Professor Ruhl's exploration of the

⁶⁷ 505 U.S. at 1023-1024.

⁶⁸ See generally on ecological economics ECOLOGICAL ECONOMICS: THE SCIENCE AND MANAGEMENT OF SUSTAINABILITY (Robert Costanza ed., 1991); HERMAN E. DALY AND JOSHUA FARLEY, ECOLOGICAL ECONOMICS: PRINCIPLES AND APPLICATIONS (2003).

⁶⁹ We might value ecological preservation because we like experiencing nature or just knowing it is undisturbed by human presence. Many of those who advocate for ecological preservation and object to Professor Ruhl's middle of the road pragmatism will claim to speak for the ecology itself and to have risen above mere human preferences. But there is no escaping that what humans advocate for is what they prefer, and what particular humans prefer is inevitably a reflection of what they understand to be the burdens and benefits of the alternatives. Preferences will influence what we seek to understand and what we think we understand will

common law speaks largely to the third. He does not suggest that we abandon the highly centralized command and control approach of the Endangered Species Act, but he does recognize its failings and suggests that we also look to the highly decentralized, private transactions of common law nuisance. While some may see this approach as another opportunity to sue people who are behaving badly (and therefore like the idea), the reality is that recognition of ecosystem service destruction as a private nuisance would have its largest impact in the context of market transactions. There would certainly be some lawsuits to establish or confirm that ecosystem service destruction is a nuisance (or to find that legislative declarations to that effect are not a taking of private property), but such judicial rulings would quickly serve to redefine property boundaries and thus the relative positions of market participants in future market transactions.

Putting aside the transitional implications of such an innovation in common law nuisance,⁷⁰ there is no reason to conclude that rights in ecosystem services cannot be the object of market transactions just like the many other sticks in the proverbial bundle constituting property rights. Indeed the theory of free market environmentalism argues that internalizing these values to market transactions will improve prospects for achieving the truly efficient outcome, an outcome that may well be more protective of natural ecosystems than the political allocation of those resources achieved under the Endangered Species Act and other command and control or public management regimes.

Consider the following variation on the earlier example in which **A** owns beachfront property on which sand dunes providing storm surge protection to **B**'s property are located. As noted above,⁷¹ the Coase Theorem teaches that, assuming zero transactions costs and no constraints on permissible exchanges, the future of the sand dunes will be the same whether **A** has a right to destroy them or **B** has a right to the storm surge protection they provide. If **A** has the right to destroy the dunes, **B** will acquire that right and choose not to exercise it if storm surge protection is worth more to **B** than destruction of the dunes is worth to **A**. Alternatively, if **B** has a right to storm surge protection, **A** will not acquire that right and thus a right to destroy the dunes if the value to **A** of dune destruction is less than the value to **B** of storm surge protection. Thus, given the assumption that storm surge protection is worth more to **B** than dune destruction is worth to **A**, the dunes will be preserved in either case. By definition this is the

influence our preferences. But this interaction between preferences and knowledge does not take place in a vacuum. It happens in the context of social institutions that exist, in part, to resolve competing preferences in a world of scarce resources and to advance what we know about those resources and the effects of their use or non use.

⁷⁰ See discussion *infra* at note 159.

⁷¹ *Supra* at note 63.

efficient result, at least at that moment in time.⁷²

Of course there are transactions costs and they do influence the allocation of scarce resources. In the foregoing example, if the only property owner affected by **A**'s proposed destruction of beachfront sand dunes is **B**, transaction costs will likely be small and therefore not an obstacle to agreement. But in all probability, **A**'s sand dunes will provide storm surge protection to multiple properties resulting in higher transactions costs, but also resulting in greater aggregate value on the side of storm surge protection. It is possible, maybe even likely, that in situations like this the high transactions costs inherent in negotiating on behalf of multiple parties will prevent an exchange even when the aggregate value to the many of storm surge protection exceeds the value to **A** of destroying the dunes. So, taking transactions costs into account, it turns out that the initial assignment of right as between **A** and **B** does matter to the allocation of the resource. We do not necessarily get the efficient outcome, assuming the transactions costs of alternative allocative institutions do not exceed the value of the exchange.⁷³ It is for this reason that Richard Posner suggests in *Economic Analysis of Law* that property rights and liabilities should be assigned in the first instance to the party that would acquire them had they been initially assigned to other party.⁷⁴

⁷² An advantage of these private arrangements, according to welfare economics theory, is that we are not wedded to this particular allocation of resources for the indefinite future as we often are (due to political inertia) when an allocation is made by legislative or administrative action. If in the future, the value of dune destruction to **A** comes to be worth more than the value of storm surge protection to **B**, the parties will agree to an exchange of rights, thus assuring that the resource will continue to be allocated to its highest valued use. Of course it is this prospect that will lead most tree huggers to object to reliance on private nuisance law, even if the initial outcome is the one they favor. While many tree huggers insist that environmental and ecological protection must be undertaken at any cost, human experience demonstrates that tradeoffs are the essence of existence in a world of scarce resources. See. WILLIAM F. BAXTER, *PEOPLE OF PENGUINS: THE CASE FOR OPTIMAL POLLUTION* (1974).

⁷³ The transactions costs of non-market allocations of resources are generally ignored in analyses of regulatory alternatives to markets, even though the primary justification of intervention is the need to internalize costs. The reality is that these unaccounted for political transactions costs are often very high. In the context of ecosystem services, the transactions costs of command and control regulation can be particularly high due to “multiple and interconnected threats, greater scientific uncertainties, irreversible losses, and intergenerational tradeoffs, . . . [but] once one recognizes that societal resources should not be wasted in pursuing environmental goals any more than in pursuing any other society good, such complexities are merely an undeniable reality. Tailored commands do not overcome the complexities, but in most instances just quietly ignore [them].” Barton H. Thompson, Jr., *People or Prairie Chickens: The Uncertain Search for Optimal Biodiversity*, 51 *STAN. L. REV.* 1127, 1184 (1999).

⁷⁴ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 36 (2nd ed. 1977).

However, we cannot always know who will value a right or liability more highly and, in any event, those valuations can be expected to change over time. Thus Posner's suggestion will not always get the assignment right in the first instance and even where it does it is not likely to remain the efficient allocation of rights as time passes and circumstances change. It is the reality that transactions costs and therefore initial assignments of right do make a difference. That has led many mainstream environmentalists to embrace economic theory, perhaps ironically, at least to the extent that it provides a market failure explanation for command and control regulation – to wit, where high transactions costs prevent exchanges that would allocate resources to higher valued uses, government should command a reallocation and thus assure an efficient result. There are many potential flaws in this market failure justification for regulation, but if one is willing to claim that governmental command and control can produce efficiency where markets fail, one has embraced both the goal of efficiency and markets where they do not fail. If a market in ecosystem services can result from an accounting for ecosystem services in private nuisance law, then all but the most principled tree huggers should be willing to give the idea serious consideration.

We thus come full circle to the tree hugger-bean counter divide. Tree huggers want no part of any economic justification for environmental protection. Efficiency has to do with getting from nature the most net benefit to humans. Tree huggers believe the environment warrants protection for its own sake. Bean counters, on the other hand, seek to maximize net social benefits from both protection and exploitation of the environment. When markets work they are the preferred option because they provide the most accurate accounting of harms and benefits, but where markets fail most bean counters are willing to turn to government for a cost/benefit analysis. In proposing a resort to private nuisance law in the allocation of ecosystem services, Professor Ruhl drifts precariously in the direction of the bean counters, but closet pragmatists among the tree huggers may be open-minded if the likely results look promising.

IV. What's Inside Ruhl's Trojan Horse?

Professor Ruhl confesses that evasion of the takings clause fuels at least some of his interest in the law of nuisance. More about that below, but first a suggestion as to another agenda concealed in the Trojan horse. As the foregoing discussion demonstrates, there is nothing preventing **B**, whose property benefits from storm surge protection, from bargaining with **A** to acquire something in the nature of an easement or servitude in the preservation of **A**'s sand dunes. Assuming no constraining legislation or regulation, this could be accomplished without any change in the law as it presently exists in most jurisdictions. But, of course, that is not what Professor Ruhl has in mind. Rather he has in mind that a court or a legislature will declare that the destruction of sand dunes or other natural features that provide ecosystem services to other properties is a common law nuisance. The context of such a declaration will not be a situation in which there are no existing rights relative to ecosystem services and a court or legislature is called upon to make an initial assignment. Rather the context will be the common law which has existed for time out of mind, and the rights declared will be understood as rights that have always been thus. This context is essential to achieving the takings evasion objective. The declaration of a right in the beneficiary of ecosystem services, rather than in individuals who would alter the

natural environment, makes ecosystem preservation the default position, thus appealing to pragmatic tree huggers while assuring that the costs of reallocation will be borne by those seeking to develop land and resources.

If rights in ecosystem services were being assigned in the first instance, we might have resort to Posner's guideline and assign them to the parties most likely to purchase them from others if assigned to those others in the first place, and that today might well be those benefitting from ecosystem services. But we are not starting from scratch in the assignment of such rights. There are long standing practices with corresponding expectations that are more than wishful thinking on the part of affected property owners.⁷⁵ In some cases expectations have been confirmed in one way or another as legally enforceable rights. But even practices and expectations that have not been so confirmed cannot be easily dismissed as unimportant. Indeed the very essence of the common law, at least as it emerged and evolved over several centuries of Anglo-American experience, is its acceptance and confirmation of established practices and customs. What Professor Ruhl proposes is a radical break with accepted practice and custom – effectively a reassignment of property rights at the behest of the courts or the legislature. Some will say this is a taking of private property in contravention of the 5th amendment. Others will say it is just part of the evolution of the common law that should be part of the expectations of every property owner.

Professor Ruhl is clearly in the latter camp, having acknowledged that an advantage of nuisance law is its status as background principle under the *Lucas* decision, but he would probably claim there is nothing radical about his proposal. Once we get past the “elements” of a nuisance action, which exist, some would say, only to make the jungle impenetrable, nuisance law comes down to balancing. Every case is, therefore, an *ad hoc* weighing of the relevant interests based upon what is known at the time. Ruhl's argument is that we know a whole lot more about ecosystem services than we did even a decade ago. Most judges probably had never heard of the concept of ecosystem services a decade ago. Indeed many judges likely remain ignorant today. A decade or two ago the average judge or jury would have easily concluded that **A**'s destruction of beachfront sand dunes caused no harm to **B** or to the broader society, so in balancing harm to **B** and to society against the utility of **A**'s beachfront development a ruling in favor of **A** was never in doubt. But when judges (and juries) are made aware of ecosystem service losses caused by **A**, the balance may well shift sufficiently to constitute dune destruction a nuisance. What is the surprise – how are expectations changed – when new knowledge intervenes to shift the balance?

⁷⁵ Based on extensive research among poor communities in Peru, Haiti and the Philippines, Hernando de Soto concluded that, in establishing property rights to benefit the poor through the forces of capitalism, it is critical to understand that judges and legislators are not writing on a *tabula rasa*. Customs and traditions of possession, as well as vested legal rights, are deeply rooted and must be respected if we expect to succeed and to avoid significant social disruption. HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE*, 165-175 (2000).

It is perfectly conceivable that a society might have a property regime that operates on the following basic premise: individual rights in the use and occupation of land and other resources are absolute, subject only to the unlimited discretion of the state to reassign those rights in the public interest. That is the sort of property regime that has existed in some legal systems and has even been constitutionally guaranteed. But it is not a property regime that will have positive results in terms of economic development or social prosperity, nor is it consistent with Anglo-American tradition or the American constitutional principles of limited government and individual rights.⁷⁶

Perhaps I overstate the pliability Ruhl contemplates for America nuisance law, but I do not believe I misrepresent its implications for individual property owners or for the society that has prospered on the shoulders of individual initiative and creativity. The point is not that **A** must be allowed to destroy the beachfront dunes without regard for private or public harm. Rather the point is that radical changes in the law resulting in uncompensated reassignments of property rights will generally not be the best or fairest way to account for and accommodate a new understanding of the costs and benefits of beachfront development. Property owner **B** could acquire **A**'s property, or an easement in **A**'s property, to preserve the dunes. If the value of storm surge protection to **B** is not sufficient to meet **A**'s price, or if **B** simply cannot afford to pay the price, **B** can collaborate with other affected parties to acquire an interest in the dunes. The state could offer to purchase a right in the dunes, or use its expansive eminent domain powers to condemn such a right.⁷⁷ In other words, the objective of ecosystem service protection could be achieved by means other than Professor Ruhl's alternative to command and control regulation. It is all a matter of who pays.

If there is no dispute that preservation of ecosystem services will at least some times be a good thing and the only question is who pays, most tree huggers will be incredulous at my suggestion that those benefitting from ecosystem services foot the bill for their protection.⁷⁸ These benefits arise naturally from the environment. They are in the nature of things. One might even say they are natural rights. The very suggestions that individuals have a right to alter the

⁷⁶ "There is something intrinsically suspicious about any theory of constitutional rights that can be evaded merely through government edict." Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1529 (1990).

⁷⁷ See *Kelo v. City of New London*, 545 U.S. 469 (2005).

⁷⁸ Jim Salzman reports that in presenting his paper advocating the creation of markets in ecosystem services to various academic workshops, "environmentalists were disturbed and, in some cases, outraged by paying farmers to put in fencing [to protect riparian habitat]." James Salzman, *Creating Markets for Ecosystem Services: Notes from the Field*, 88 N.Y.U. L. REV. 870, 954 (2005). Peter Byrne writes that "greens reject the political economy function of compensation because ecological balance is a good independent of whether it is preferred by the majority. . . ." Byrne, *supra* note 17 at 249.

natural environment, or that other people might have to purchase a right to preserve nature, are not worthy of consideration. But it is precisely such natural rights arguments that once justified environment altering property development in the face of nuisance challenges. The default rule for most of American and English history has favored resource development,⁷⁹ often in the name of natural use of land and resources. Perhaps it is time for that default rule to change, indeed much modern environmental regulation has affected such a change with respect to particular resources and uses of those resources. But in a rule of law system, change does not come willy nilly or on the command of whomever happens to hold power. Legal change, particularly changes that affect vested rights, must come in accordance with established process and in compliance with the values underlying that process.

From this perspective, the crux of the question raised by Professor Ruhl's proposal for expanded reliance on common law nuisance to protect ecosystem services is whether it would be just another logical step in the long history of common law evolution or an unjustifiable break with the reasonable expectations created by the common law itself. Has Ruhl concealed in his Trojan horse a proposal for a vast reassignment of property rights? Or would following his lead be an act of fidelity to the great traditions of the common law?

IV. The Evolution of the Common Law

While I am sympathetic with Professor Ruhl's interest in private nuisance, it should be apparent that I am skeptical of its application to ecosystem services and natural capital. I am even more skeptical of his proposals with respect to public nuisance. In defense of both, Ruhl identifies the many advantages to efficient resource allocation and wise management that come with local decision making. Because public nuisance really equates with the police power, any advantage of decentralization will come only from the prospect that local governments will have a role in defining nuisance. This is not an insignificant advantage, but it comes at the cost of insulating from a takings challenge any regulation undertaken in the name of nuisance prevention. While private nuisance provides the same insulation from the takings clause, at least as many have interpreted Scalia's opinion in *Lucas*, it brings decision making to its most decentralized level. Nothing is more local than market transactions between willing buyers and sellers.⁸⁰ So three cheers for the common law and maybe two cheers for Ruhl. There is too much inside the Trojan horse to allow for a third cheer for the good Professor.

⁷⁹ "An altered common law regime helped fuel the transformation of the natural landscape throughout the eighteenth and nineteenth centuries, as the vast savannahs fell first to the pioneer's plow, then to McCormick's reaper, and finally, in the twentieth century, to bulldozers planting the last row crop, houses." Babcock, *supra* note 15 at 878-879. On the common law's antipathy to wilderness see also John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519 (1996).

⁸⁰ See, James L. Huffman, *Making Environmental Regulation More Adaptive Through Decentralization: The Case for Subsidiarity*, 52 U. KANSAS L. REV. 1377 (2004).

As suggested above,⁸¹ a common response to takings claims in the context of property rights adjustments that can be said to be rooted in the common law is that such changes are merely the latest adaptations in a centuries long evolutionary process. Although Ruhl has said elsewhere that “[i]t is too easy to propose that the common law simply reverse direction and place a ‘green thumb on the scales of justice’ in favor of protecting ecosystems in general,”⁸² he does argue that “common law tort and property doctrines are aptly suited for evolution toward the new understanding of the value of natural capital and the ecosystem services it provides.”⁸³ Reference has already been made to Blumm and Ritchie who urge a broad range of categorical exemptions from takings liability on the basis of “[t]he evolution of background principles”⁸⁴ Robert Goldstein argues that the “evolutionary nature” of the common law allows for the addition of “green wood in the bundle of sticks” that constitute common law property.⁸⁵ Jedediah Purdy is critical of the libertarian property thinking of the late nineteenth century which saw property as static, suggesting that property should be understood as “a set of rules evolving in response to technological and social innovation,”⁸⁶ Eric Freyfogle has written that “[i]n the end, environmental laws are not so much an attack on property rights as a reformulation of

⁸¹ Text accompanying note 26, *supra*.

⁸² Ruhl, *supra* note 26 at 8. Quoting Sprankling, *supra* note 79 at 588.

⁸³ *Id.* at 69.

⁸⁴ Blumm & Ritchie, *supra* note 16 at 367. Blumm and Ritchie argue that this evolution “illustrates how formalistic thought has benefitted defenders of regulatory restrictions.” This opportunistic endorsement of formalism is a bit jarring in the context of the authors’ grab bag collection of evolving “rules” meant to serve as categorical defenses. The common law evolves, but only, it seems, in service of the regulatory state.

⁸⁵ Goldstein, *supra* note 62 at 349. Drawing a parallel with early 20th century efforts to regulate the economy in the interests of health and safety, Goldstein concludes that “[I]ike the social changes that eviscerated the *Lochner* decision, the evolution of real property ownership in America has brought the law of real property to the point where contemporary social ideals are part of its very fabric.” At 409. Goldstein envisions evolving property rights rescuing failed environmental regulation not just from whatever constraints the takings clause might impose, but also any commerce clause limits that might follow *United States v. Lopez*, 514 U.S. 549 (1995). At 408.

⁸⁶ Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1243 (2005). While Purdy makes the same evolutionary argument as those who advocate for environment-protecting innovations in property law, his freedom-promoting agenda might often be in conflict since his concern is for human self-realization which history demonstrates has almost always required some modification of the natural environment.

them.”⁸⁷ If we understood the history of common law property rights, claims Freyfogle, we would understand that such reformulation is only a part of an ongoing process of evolution in service to social goals.⁸⁸ Carol Rose and Joe Sax both argue that property rights have always been responsive to social and economic conditions.⁸⁹ Of course reliance on the “common law evolution rationale” has not been limited to legal changes impacting on the environment. For example, in *Li v. Yellow Cab Co.*⁹⁰, a case in which the California Court abandoned the “long standing and time honored”⁹¹ common law rule of contributory negligence in favor of a new comparative negligence rule, the court explained that “the time for a revision of the means for dealing with contributory fault in this state is long past due. . . . [I]t lies within the province of this court to initiate the needed change by our decision in this case.”⁹²

From a purely theoretical perspective, the central problem with the foregoing understanding of common law evolution is that it views the common law process as a “supply side” enterprise. Douglas Whitman has suggested that most writing on the evolution of the common law is either “demand side” or “supply side.” “Supply-side models . . . explain the evolution of legal rules primarily in terms of the preferences and behavior of the makers of law, judges.” “[D]emand-side models,” on the other hand, “explain the evolution of legal rules primarily in terms of the behavior of potential litigants, whose actions are driven in part by the efficiency and other properties of the legal rules that affect them.”⁹³ The supply side model is a product of legal realism, encouraged by 20th century judicial activism and theories of judicial pragmatism. But as I will demonstrate below, the demand side models better reflect the history

⁸⁷ Freyfogle, *supra* note 52 at 589.

⁸⁸ *Id.* at 576. Freyfogle is highly critical of Richard Epstein’s account of common law history in TAKINGS, *supra* note 62. In support of his critique he cites Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995), and GREGORY S. ALEXANDER, *COMPETING VISIONS IN AMERICAN LEGAL THOUGHT 1776-1870* (1997).

⁸⁹ Carol M. Rose, *Property Rights and Responsibilities*, in THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY 49, 50 (Marian R. Chertow and Daniel C. Esty, eds. 1997); Sax, *supra* note 15 at 1446-51.

⁹⁰ 532 P.2d 1226 (Cal. 1975).

⁹¹ *Hilgedick v. Koehring Fin. Corp.*, 8 Cal. Rptr. 2d 76, 95 (Ct. App. 1992) (discussing *Li*).

⁹² 532 P.2d at 1241.

⁹³ Douglas G. Whitman, *Evolution of the Common Law and the Emergence of Compromise*, 29 J. LEGAL STUD. 753, 775-76 (2000).

and experience of the common law.⁹⁴ No doubt there has been some supply side law making, particularly over the last century,⁹⁵ but almost always while laying claim to the a restrained, supply side, explanation of the judicial role. As Todd Zywicki has written, “[t]he common law judge’s responsibilities are different from the duties that legal realists assign judges, namely to create the efficient or just policy. Instead, the judge is little more than an expert trained in articulating the tacit beliefs and expectations that undergird the ongoing order of the community.”⁹⁶

It cannot be disputed that the common law has evolved over its long history. It would not have survived without adaptation to the circumstances of time and place. But contrary to the simplistic equation of change with evolution, the history of the common law reflects gradual, purposeful and constrained development. It could be no other way in a rule of law system. Not even the most ambitious and committed advocate for ecosystem protection or any other cause could agree that a common law court is free to make whatever decision strikes its fancy, even if the court believes it is somehow serving the public interest. Indeed the public has been well served by a common law process that has provided stability for private ordering in a world of changing values, knowledge and technology.

Accepting that common law courts are a legitimate source of law in Anglo-American jurisprudence, that the law must be adaptable to be functional over time and that courts cannot

⁹⁴ Through the first half of the 20th century it was widely accepted that the history of American law could be understood by studying the writings of leading judges and other legal thinkers (*see e.g.* PERRY MILLER, *THE LEGAL MIND IN AMERICA* (1962)). Willard Hurst rejected this approach and led a revolution with his instrumentalist explanation of American legal history. *See, e.g.*, JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW* (1950) and *LAW AND THE CONDITIONS OF FREEDOM*, *supra* note 20. This grass roots explanation for legal development was not the instrumentalism of policy making judges, as Professor Ruhl would have it, but of all those who encountered the legal system and whose contributions could be understood only through painstaking investigation of local court records and legal documents like wills, contracts leases, etc.. The classic demand side theory was propounded in Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 *J. LEG. STUD.* 51 (1977) and George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 *J. LEG. STUD.* 65 (1977).

⁹⁵ Todd Zywicki argues that the demand side approach of traditional common law has been overtaken by a supply side approach of those who believe “the purpose of law is . . . to satisfy articulated social goals, whether economic, social, or moral.” Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 *NORTHWESTERN U. L. REV.* 1551, 1629 (2003).

⁹⁶ Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large-Number Externality Problems*, 46 *CASE W. RES. L. REV.* 961, 991 (1996).

have unlimited discretion without abandoning the rule of law, the challenge is and always has been to define the scope and limits of judicial discretion. Andrew Morriss, noting that the common law is not a “series of unconstrained choices” by judges, argues that the common law courts are constrained from making policy judgments by the specific facts of their cases; by their limited geographic jurisdiction (which limits the precedential impact of their decisions thus reducing incentives for interest groups to seek influence); and by the law itself, the rule of stare decisis and a strong bias against overruling prior decisions.⁹⁷ But, of course, a strong bias is not a prohibition, and not every change to existing case law takes the form of an overruling. What justifies the overruling or a dramatic reinterpretation of a prior decision?

Recognizing that an expansion of the concept of nuisance requires some justification, Professor Ruhl offers changed circumstances including, most importantly, new knowledge about the economic benefits provided by ecosystem services in support of his argument.⁹⁸ Certainly new knowledge must be accounted for, particularly in a fact dependant doctrine like nuisance, but does the recognition of just any newly understood harm constitute a nuisance? If so, how to explain that some known harms have never constituted nuisance on the principle of *damnum absque injuria*,— literally harm or damage without injury, where injury means injustice or wrong in the sense that a legal remedy is due.⁹⁹ If not every harm constitutes legal injury, than not every yet to be discovered harm necessarily constitutes legal injury. How does a court know which is which? What changes to the common law are necessary evolutionary adjustments and what are

⁹⁷ Andrew P. Morriss, *Lessons for Environmental Law from the American Codification Debate*, in Meiners and Morriss, *supra* note 2 at 130, 142-143.

⁹⁸ Ruhl, draft *supra* note 7 at 8.

⁹⁹ Without more, a simple declaration of *damnum absque injuria* in defense of the denial of a legal remedy for harm suffered is no more persuasive than the assertion, without more, that judicial reassignment of liabilities or property rights is merely the evolution of the common law. The principle of harm without legal remedy is rooted in a recognition that social life could barely proceed if individuals are held to account for their every impact on others. The success of the common law of nuisance lay in recognizing, from custom and practice, what harms should rest where they fall and what should be remedied. Over time the boundary might move in one direction or the other. As Morton Horwitz observes, in early 19th century America the courts increasingly “appealed to the idea of *damnum absque injuria* . . . in proportion to their recognition that conflicting and injurious uses of property were essential to economic improvement.” MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, 40 (1977). While Horwitz concludes that power, not principle, finally explains the evolution of the common law in America, greater reliance by courts on the principle of *damnum absque injuria* is better understood to reflect the sentiments and ambitions of a society of risk taking entrepreneurs. See, James L. Huffman, *American Legal History According to Horwitz: The Rule of Law Yields to Power*, 37 TULSA L. REV. 953 (2002).

an affront to the rule of law absent transitional adjustments of some sort?¹⁰⁰

Oliver Wendell Holmes, an instrumentalist like Ruhl, explained that the common law arose from “[t]he customs, beliefs, or needs of a primitive time.” The reason for the resulting rule is forgotten, but “ingenious minds” conceive of “some ground of policy . . . which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons . . . and enters on a new career.”¹⁰¹ No doubt Professor Ruhl brings an ingenious mind to the challenge of ecosystem preservation, but does the adaptation he proposes conform to the traditions of the common law? The evolving common law described by Holmes – new reasons for old rules followed by new rules to better comport with new reasons, in the words of Holmes’ fellow instrumentalist Louis Brandeis, was “forged in the slow fire of the centuries.”¹⁰²

Holmes illustrates the slow pace of this evolutionary process with reference to the Greek and Roman origins of the English concept of deodand which survived into the 19th century, including in American law.¹⁰³ This concept of responsibility in inanimate instruments of harm evolved from a “personification of inanimate nature,”¹⁰⁴ allowing vengeance to be levied by destruction of the instrument of harm, to an understanding of human responsibility with delivery of the harmful object as a form of compensation. The example is meant to demonstrate that the form of the law remained relatively constant while its purpose changed from vengeance to compensation, and that the judge was instrumental to this change. But it did not happen over night. It is a history extending over more than two millennia with the unchanging purpose of doing justice for a particular type of harm, while adjusting to new understandings of the source of harm and how justice can be served.

Would recognition of ecosystem service loss as a nuisance be an analogous evolutionary development to that recounted by Holmes? Professor Ruhl would impose new liabilities on individuals whose actions harmed beneficiaries of ecosystem services. Holmes describes a history in which new liabilities were imposed on individuals responsible for inanimate objects. But there are important differences. In the case of harm from inanimate objects, the owner of the object was always responsible in the sense that the object was taken and destroyed. Indeed Holmes reports that as early as Roman law the owner could retain the object by compensating for

¹⁰⁰ See discussion accompanying note 167 *infra*.

¹⁰¹ OLIVER W. HOLMES, THE COMMON LAW 5 (1881).

¹⁰² Warren and Brandeis, *supra* note 59 at 197.

¹⁰³ HOLMES, *supra* note 101 at 7-34. Holmes quotes from an opinion by Justice Story quoting from Justice Marshall in an admiralty case brought, said both renowned justices, properly against a ship and not its owner. *Id.* at 29, quoting from *The Malek Adhel*, 2 How. 210, 234 (1844).

¹⁰⁴ *Id.* at 11.

the harm.¹⁰⁵ Not until very recently was it even suggested that the alteration of natural landscapes might impose liabilities on those causing the alteration. In fact, throughout American history the law has provided incentives for alteration of the natural environment and has even viewed such development as a natural use of the land.¹⁰⁶ Furthermore, the two cases are different from the perspective of the alleged victims of harm. There was never any doubt that a person injured by an inanimate object suffered legal harm, although understanding of the nature of the harm and the appropriate remedy changed over time. Harm suffered due to loss of ecosystem services has always been *damnum absque injuria*. Professor Ruhl would have the courts change that, presumably overnight if possible.¹⁰⁷

Perhaps the example I have chosen from Holmes is not representative of the evolutionary process he describes and embraces in *The Common Law*. In his extensive discussion of the law of torts, as elsewhere in his several lectures, Holmes continually emphasizes that the common law is rooted in policy as well as precedent and, therefore, “what the courts declare to have always been the law is in fact new. . . . The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices

¹⁰⁵ *Id.* at 10.

¹⁰⁶ William Hale distinguishes between “natural and necessary development of land itself, and injury resulting from the character of some business not incident and necessary to the development of the land or other substances lying within it.” Hale, *supra* note 40 at 425 quoting from *Hauck v. Tidewater Pipe-Line Co.*, 153 Pa. 366, 375-76 (1893).

¹⁰⁷ Some have suggested an analogy between the evolution of the common law and Thomas Kuhn’s theory of scientific change. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1970); see e.g. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 540 n12 (1972). But, notwithstanding the long lingering influence of Langdell and his law as science ideas, science and the common law are fundamentally different enterprises. Because the pursuit of science is truth, truths are posited and, if adequate to answer the questions being asked, they are relied upon by individual scientists who cannot determine for themselves the answer to every question relevant to their particular, grass roots, work. Change comes in fits and starts with often revolutionary consequences for science on the ground or in the lab. The common law judge is also concerned with truth, not in the law but in the facts of particular cases. Although some advocates of environmental protection look to science to trump the politics of law-making and others would have law reflect moral truths, the common law does not depend upon top down truths that might change in revolutionary fashion. Rather the common law is a method for determining the truth about what happened in a particular case and the truth about what parties to the case might reasonably have expected the governing rules to be. A central purpose of the common law is to protect settled expectations. A central purpose of science is to upset settled expectation.

of life. I mean, of course, considerations of what is expedient for the community concerned.”¹⁰⁸ This seems to describe a common law that would easily accommodate ecosystem service harms, once the policy case has been made, but Holmes’ account of tort law reveals significant constraints on the policy minded judge. “[Tort law’s] concrete rules, as well as the general questions addressed to the jury, show that the defendant must have had at least a fair chance of avoiding the infliction of harm . . . [and must be], judged by average standards, . . . to blame for what he does.”¹⁰⁹ Of course modern tort law has paid little heed to these constraints, but there are many who would argue today that therein lies the failure of a tort system that, having abandoned precedent in the name of policy, has created a lottery for plaintiffs and a cash machine for their lawyers, all in the name of the public interest. Rather than the judge playing the legitimate legislative role of gap filling with reference to public needs, as contemplated by Holmes, courts have converted a fault based system to a compensation based system, leaving legislatures to struggle with the endless battles over tort reform in the face of new found rights said to be deeply rooted in the common law.

Another potential role model for those who would speed the pace of common law evolution by abandoning its internal constraints is Benjamin Cardozo, Holmes’ philosophical fellow traveler and successor on the Supreme Court. Many a law student has read in Cardozo’s *The Nature of the Judicial Process* “that the rule of precedent, though it ought not to be abandoned, ought to be in some degree relaxed.” But it should not be relaxed, wrote Cardozo, where the old rule “may . . . reasonably be supposed to have determined the conduct of the litigants, . . .”¹¹⁰ This concern for settled expectations was reflected in the Connecticut case he cited to illustrate his position.

That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule *when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance upon the old rule.*¹¹¹ (Emphasis supplied)

Thus even for Cardozo, change in the common law follows, not leads, the “established and settled judgement of society” and is particularly respectful of vested property rights. It is for the legislature and the executive, not the courts, to try their hand at leading society, and for the legislature to take vested property rights consistent with the requirements of both the common

¹⁰⁸ HOLMES, *supra* note 101 at 35.

¹⁰⁹ *Id.* at 163.

¹¹⁰ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 150, 151 (1921).

¹¹¹ *Id.* at 151 quoting from *Dwy v. Connecticut Co.*, 89 Conn. 74, 99 (1915).

law and the constitution.

Few American judges have been more articulate, and none more prominent, than Holmes and Cardozo in insisting on the importance of public policy to common law decision making. But as conceived by both jurists, the role of policy in judicial decision making is very different from the role of policy in legislating. The judge does not campaign for office on the basis of policy preferences, nor welcome lobbyists to his chambers or courtroom, nor conduct hearings or have reference to polls to measure the mood of the community. The judge's evidence of public needs and concerns derives from the same process and sources as evidence about the facts of particular cases. The common law judge hears testimony and reads memoranda from private parties attesting to private expectations and private circumstances. In no single case will the judge learn much of public policy except perhaps the personnel opinions of the litigants or their representatives. Only after the common law judge hears many cases and studies the reported accounts of other cases does an understanding of community needs and concerns begin to emerge. It is an understanding that does not separate public interests from private interests, rather the public interest of the common law process is evidenced by the gradual accumulation of knowledge about private interactions and the circumstances in which they occur – Justice Brandeis's "slow fire of the centuries."¹¹²

This bottom up perspective on public policy is extremely valuable. Indeed it leads to an understanding that cannot be achieved through the top down processes of the legislature.¹¹³ And it is democratic, in its own way, both through its open door to all seeking adjudication and its reliance on the jury in finding the facts. But it is very different from the legislative process. Just as the legislature is precluded from adjudicating particular disputes for lack of institutional competence,¹¹⁴ so too have the common law courts been constrained by the limitations of their process. To be sure, there have been judges along the way who were not constrained. In most cases their adventures are cut short on appeal, but occasionally, as in some 20th century tort decisions alluded to above, they launch a revolution that cannot be considered reasonably a part of the evolution of the common law. When that happens we face what some scholars have called

¹¹² Warren & Brandeis, *supra* note 102.

¹¹³ Jeffrey Rachlinski argues that, contrary to the widespread presumption that legislatures are better able to deal with modern complexities, "common law courts have distilled massive complexity down into simple, sometimes elegant rules. Rarely can that be said of any legislature." Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933 (2006).

¹¹⁴ Article I, Section 9 of the Constitution prohibits the enactment of bills of attainder. "The Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function or more simply - trial by legislature." *United States v. Brown*, 381 U.S. 437, 440 (1965).

transition problems, a topic to which I will return.¹¹⁵

But first a dip of the toe into 19th century common law history in support of the foregoing description of the role of policy in the evolution of the common law. Legal historian Morton Horwitz, with his law as power perspective,¹¹⁶ would seem an unlikely source for confirming the claim that 19th century common law courts were not top down policy makers. So what picture does Horwitz paint? Quoting Mark DeWolfe Howe on “[t]he legislative responsibility of lawyers and judges” in late 18th century America, Horwitz concludes that “by 1820 the process of common law decision making had taken on many of the qualities of legislation.”¹¹⁷ In support of this conclusion Horwitz observes that “it would have been unusual a decade earlier to hear a lawyer argue . . . that [compensation was not due] for land taken for road building because it would ‘thwart and counteract the public in the exercise of this all-important authority for the interest of the community.’”¹¹⁸ Perhaps, but it would have been more unusual for courts in any American jurisdiction, then or to the present day, to agree with the lawyer’s argument. Certainly the power of eminent domain was understood to serve the community interest, but in almost every jurisdiction compensation was required and always has been.¹¹⁹ Although eminent domain cases were not unusual, controversies between individuals and government were not the meat and potatoes of common law courts. Private disputes dominated judicial dockets and in those cases appeals to public policy were largely related to the community interest in laws of contract, property and tort that encouraged and facilitated private initiative and entrepreneurship. Michael Greve said it well in *The Demise of Environmentalism in American Law*.

By *common law*, I do not mean the *historical* common law as it existed at the time of Blackstone or at the end of the nineteenth century. Rather, I have in mind the basic logic of a legal system whose principal purpose lies in protecting private orderings. Such a system guarantees robust individual rights to exclude others (property); provides avenues for voluntary exchange (contracts); and protects

¹¹⁵ See discussion *infra* at note 167.

¹¹⁶ See Huffman, *supra* note 99.

¹¹⁷ Horwitz, *supra* note 99 at 2.

¹¹⁸ *Id.* quoting from *Lindsay v. Commissioners*, 2 Bay 38, 45 (S.C. 1796).

¹¹⁹ “[I]n taking private property for public uses; the limitation [that compensation must be paid] is admitted by the soundest authorities, and is adopted by all temperate and civilized governments, from a deep and universal sense of its justice.” *Gardner v. Village of Newburgh*, 2 Johns. 162 (N.Y. 1816). In the absence of a state constitutional requirement of compensation and the inapplicability of the United States Constitution to state matters, Chancellor Kent clearly intended to say that compensation was required by the common law. This was the law of England during the colonial period and was the law in every state with the possible exception of South Carolina.

against aggression by outsiders (torts).¹²⁰

Consistent with Greve's understanding of the common law, most of the cases cited by Horwitz relate to commerce and economic development, to what Willard Hurst called the "release of energy."¹²¹ As Horwitz's many examples illustrate,¹²² the demand for a release of energy was everywhere on the judicial docket and, to the extent the common law functioned as a restraint, it was changed – not because judges had a vision of the public good, but because individual entrepreneurs made their private needs known to the courts.¹²³ These were not test cases brought by special interests seeking judicial intervention in the political process. They were the inevitable product of day to day life which gave birth to and provided the life blood of the common law.¹²⁴ Among Tocqueville's many astute observations of early 19th century America was that

¹²⁰ MICHAEL S. GREVE, *THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW*, 115 (1996).

¹²¹ HURST, *supra* note 20 at 3-32.

¹²² Just in his brief introduction Horwitz cites as examples of judicial interest in public policy: the commercial character of the country, the commercial code, the circulation of negotiable instruments, the commercial development of water power, the development of insurance, the freedom of contract, the improvement of land, the free transfer of estates, and the free alienation of land. Horwitz asserts that this "instrumental perspective on law did not simply emerge as a response to new economic forces in the nineteenth century. Rather, judges began to use law in order to encourage social change even in areas where they had previously refrained from doing so." *Supra* note 99 at 2-4. But the reality is that judges did not decide based on abstract concepts of social good or external pressures for change, they decided based upon the evidence of private initiative and entrepreneurship that filled their dockets. Indeed only the presence in their courts of those very entrepreneurs gave them the opportunity to decide.

¹²³ "The law responds to the demands of those subject to it. If the law becomes dysfunctional, increased pressure is brought to bear to reestablish its usefulness because parties will contract around the rule to dilute its negative effects." "When contracting around the old rule becomes so prevalent that investing resources in changing the rule is less costly than the mounting transaction costs of repeatedly contracting around the rule and enforcing those contracts, then the rule will change to match what individuals have been doing. As a result, changes in the law lag behind changes in the expectations, customs, and other institutions that condition social interaction." Zywicki, *supra* note 96 at 1003 and 994.

¹²⁴ Common law litigants may have private interests beyond those at stake in a particular case. If they anticipate future disputes of a similar nature they may have an incentive to advocate for changes in the law that will serve their interests in future cases. *See* Rubin, *supra* note 94.

almost all the farmers of the United States combine some trade with agriculture; most of them make agriculture itself a trade. It seldom happens that an American farmer settles for good upon the land which he occupies; especially in the districts of the Far West, he brings land into tillage in order to sell it again, and not to farm it; he builds a farmhouse on the speculation that, as the state of the country will soon be changed by the increase of population, a good price may be obtained for it.¹²⁵

In commenting on this passage, Willard Hurst writes that “[l]aw thus ratified values early and deeply instilled in the behavior of the people, . . .”¹²⁶ This represented Cardozo’s “established and settled judgement of society.”¹²⁷ No one, particularly not judges, decided that it would be a good thing for the nation for farmers to become speculators and entrepreneurs. Rather they witnessed that farmers were engaged in entrepreneurship and the law was adapted to help make the achievement of their private goals possible. Horwitz is surely correct that the common law experienced a fall and rise in legal formalism over the course of the 19th century, but the bottom up logic of the common law remained largely unchanged until well into the 20th century.

Greve’s point above,¹²⁸ is not only that the common law has largely to do with private ordering, although that is an important recognition for those who would have the common law evolve into an opportunity for judges to make public policy. Greve also asserts that the common law has a logic, a method that defines it as a social institution. It is one thing to acknowledge and understand how the law evolves within this social institution, but if judges are to have authority to make law from the top down it is no longer the same social institution. The common law will not have evolved, rather an entirely new and unprecedented system of law-making will have been invented.

In the context of nuisance law, the claim that changes are just part of the evolution of the common law is made more plausible by the Restatement, on which Professor Ruhl relies heavily. In their effort to reduce historic nuisance law to a set of rules and comments, the authors of the Restatement have left case references to the Reporter’s Notes. The sections on nuisance are thus filled with abstract references to public and private rights, with reasonableness as the standard for resolving conflicting claims of right.¹²⁹ Reasonableness is to be determined with reference to five

¹²⁵ ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 157 (Vintage Books ed. 1945).

¹²⁶ HURST, *supra* note 20 at 13.

¹²⁷ Cardozo, *supra* note 110.

¹²⁸ GREVE, *supra* note 120.

¹²⁹ “For one intentional tort – nuisance, when it involves intentional invasion of another’s interest in the use and enjoyment of land – the single word ‘unreasonable’ is used to describe the balancing process.” RESTATEMENT (SECOND) OF TORTS, §870, Comment e.

variables,¹³⁰ but absent reference to the cases buried in the Reporter's Notes and in thousands of volumes of case reports, it comes down to "a problem of relative values to be determined by the trier of fact in each case in the light of all the circumstances of that case."¹³¹ If a judge relies heavily on the Restatement and does not become immersed in the case law, he or she will exercise judgment in the abstract rather than in the context of the historic and current practices that evidence what is reasonable and therefore constitute the common law of nuisance. Perhaps by design, the Restatement thus leads judges away from the bottom up method of the common law.

V. Common Law Courts in a Constitutional System

The reality is that a new system of law-making was invented with the founding of the American federal republic, not by judges but by the framers of the constitution and the state ratifying conventions. To some extent the common law continued to function as it had, but at the same time the previously existing common law courts became part of that new system. With the adoption of the Constitution, the common law courts had jurisdiction over matters arising under federal law and state legislation making it necessary to integrate the common law with laws rooted in the police power and the enumerated powers of Congress. And there were state and federal constitutional limits on state governments of which the common law courts were an integral part.

What is the effect on the common law courts of constitutional limits on government power? Certainly those courts must comply with the due process clauses of the 5th and 14th amendments. They must comply with the equal protection clause of the 14th amendment. The 7th amendment expressly requires common law courts to preserve the right of trial by jury, and the 8th amendment forbids those courts from imposing excessive bail or cruel and unusual punishment. Warrants issued by the courts must comply with the requirements of the 4th amendment. So it seems that courts, including those that can be said to survive from before the Constitution, are subject to the constitutional limitations that apply to the legislature and the executive.¹³² But what about the takings clause of the 5th amendment that applies to the state

¹³⁰ "(a) The extent of harm involved; (b) the character of the harm involved; (c) the social value that the law attaches to the type of use or enjoyment invaded; (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and (e) the burden on the person harmed of avoiding the harm." *Id.* at §827.

¹³¹ *Id.* at §826, Comment b.

¹³² "The Supreme Court has unhesitatingly extended most of the noneconomic restrictions of the Constitution to judicial actions, even in the face of express constitutional language to the contrary." Thompson, *supra* note 76 at 1456.

governments pursuant to the due process clause of the 14th amendment?¹³³ Does the takings clause impose any constraints on state common law courts?

Professor Ruhl is clearly of the view that common law courts are exempt from the takings clause, at least so long as we describe their law making as part of the evolution of the common law. That is also the view of Blumm and Ritchie in their much more ambitious catalogue of “categorical defenses” to takings claims.¹³⁴ But the ambitions for takings exemptions do not stop with judicial law making. They extend as well to legislative law making if it is done in the name of a common law doctrine. By this view, the legislature, and presumably any other government entity, can participate in the “evolution” of the common law. Justice Scalia’s background principles language in *Lucas* thus becomes a free pass to destruction of all economic value in private property so long as we remember to call it a nuisance or some other name with common law pedigree.¹³⁵ But why should common law courts be privileged against takings clause challenges? And why should the other two branches of government be able to bootstrap off whatever privilege the courts may be found to possess? The second question underscores that the presumption of judicial privilege should be reconsidered.¹³⁶

In the wake of *Lucas* a few commentators questioned “why . . . restrictions on property use emanating from the common law should enjoy a constitutionally privileged position in comparison with those imposed on an on-going basis by legislation.”¹³⁷ But for the vast majority of *Lucas* commentators, the possibility that judicial redefinition of property law might constitute

¹³³ *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U.S. 226 (1897).

¹³⁴ Blumm & Ritchie, *supra* note 16.

¹³⁵ Surely this is form over substance, the very problem that justified early 19th century courts in demonstrating the evolutionary capacities of the common law. Blumm and Ritchie, make the case for such formalism, *supra* note 16 at 368.

¹³⁶ John Humbach has written that “[t]he law of nuisance has been able to evolve, not just through private initiatives of litigants in court, but also through the democracy-driven processes of state legislatures.” John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1 (1993). Because most police power measures could be said to regulate nuisances, this claim has the (intended) effect of immunizing most legislative measures from the limits of the takings clause. But Carol Rose is surely correct that “the mere invocation of ‘public nuisance’ is not an excuse for public appropriation of private property.” Rose, *supra* note 60 at 276.

¹³⁷ Maurice J. Holland, *Ill-assorted Musings about Regulatory Takings and Constitutional Law*, 77 OR. L. REV. 949, 969 (1998). See Kaplan, *supra* note 15 at 504. “What is most noteworthy about the Court’s use of the common law in *Lucas*,” says Kaplan, is that the court privileged common-law restrictions over statutory ones and use the common law to avoid articulating a novel constitutional standard.”

a judicial taking is not even considered. As Barton Thompson observes in the most comprehensive and thoughtful article on the subject, “[m]ost scholars have assumed that no one could seriously make such an argument [that the takings protections apply to the courts] and have sloughed off the issue with a passing sentence or footnote.”¹³⁸ It is true that “[n]ormally, we conceive of takings by legislative action which adopts eminent domain statutes or land use regulations which substantially impinge on already established uses of property.”¹³⁹ It is also true that case law on the question is by no means definitive and is often thought to favor the presumed judicial privilege if only because opinions addressing the issue are few and far between.¹⁴⁰

Although, according to Thompson, “the most relevant Supreme Court decisions suggest that courts are absolutely free to make ... [uncompensated] changes in property rights,”¹⁴¹ there is sufficient case law to leave the question not clearly settled. The earliest Supreme Court case addressing the question of judicial takings was also the case that first established that the 5th amendment takings clause applies to the state pursuant to the 14th amendment due process clause. In *Chicago, Burlington & Quincy Railroad Co. v. Chicago* the court explicitly held that “a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state . . . , without compensation made or secured to the owner, is . . . wanting in the due process of law”¹⁴² Eight years later in *Muhlker v. New York & Harlem Railroad* a plurality of the court held that judicial alteration without compensation of easements granted by the state to plaintiffs infringed both the contract clause and the due process clause.¹⁴³ Justice Holmes dissented on the ground that it “never has been supposed . . . that all property owners in a state have a vested right that no general proposition of law shall be reversed, changed, or modified by the courts if the consequence to them will be more or less pecuniary loss.” Two years later Holmes wrote for a majority of the court in a non-takings case that “[t]here is no constitutional

¹³⁸ Thompson, *supra* note 76 at 1453.

¹³⁹ David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1435 (1996).

¹⁴⁰ See, e.g., Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 517 n. 10 (1986) (stating that where a court changes the common law “it is well accepted that no right to compensation exists”), Joseph L. Sax, *Takings and the Police Power*, 74 YALE L. J. 36, 51-52 (1974). (“[I]n the law of real property, it seems never to have been suggested that a compensable taking was involved when the courts first ‘took away’ an easement by necessity from an unwilling grantor although we today clearly treat an easement as a kind of interest which can give rise to a taking problem.”)

¹⁴¹ Thompson, *supra* note 76 at 1453.

¹⁴² 166 U.S. at 241.

¹⁴³ 197 U.S. 544, 570 (1905).

right to have all general propositions of law once adopted remain unchanged.”¹⁴⁴ Clearly Holmes did not anticipate the gradual application to state governments of the bill of rights following on the incorporation theory of *Chicago, Burlington*. Judicial changes in the common law would come to be limited by several provisions of the federal constitution, so if Holmes’ view as applied to judicial takings was to survive it would be necessary to explain how takings cases are different from other state court invasions of federal constitutional rights.

Some of the resistance to the idea of judicial takings, at least in the context of federal constitutional limits on state courts, is rooted in federalism. But this rationale, dating as far back as *Barron v. Baltimore*,¹⁴⁵ was deeply undercut by the enactment of the 14th amendment and has been further undercut by incorporation of most of the bill of rights into due process. So the most common argument relied upon by objectors to judicial takings is the general claim that whatever state court decisions may appear to result in a taking are merely incidences of the evolution of the common law. A handful of Supreme Court cases leading up to the New Deal justified the rejection of judicial takings claims on this basis, as had Holmes in his dissent in *Muhlker*. Justice Brandeis wrote in *Brinkerhoff-Faris Trust & Savings Co. v. Hill* that pursuant to their common law function, “[s]tate courts . . . may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions.”¹⁴⁶ In *Great Northern Railway Co. v. Sunburst Co.* Justice Cardozo found no federal constitutional limits where a state court is “defining the limits of adherence to precedent.”¹⁴⁷ Perhaps Justice Brandeis hedged his position a bit with the qualifier “ordinarily,” a qualification suggested also in *Broad River Power Co. v. State of South Carolina ex rel. Daniel* where the court assumed authority “to inquire whether the decision of the state court rests upon a fair or substantial basis.”¹⁴⁸

With Holmes, Brandeis and Cardozo leading the way in establishing a state court privilege against takings claims, it is fair to ask whether I have gotten their positions on the evolution of the common law correct.¹⁴⁹ It could be that their objection to judicial takings was rooted largely in federalism concerns, but neither the language of their opinions nor their more general views on incorporation and the scope of federal power support that interpretation. A more cynical perspective might be that while all three justices understood that the rule of law requires a constrained vision of common law evolution, they were more strongly committed to

¹⁴⁴ *Patterson v. Colorado*, 205 U.S. 454, 461 (1907).

¹⁴⁵ 32 U.S. 243 (1833).

¹⁴⁶ 281 U.S. 673, 681 n8 (1930).

¹⁴⁷ 287 U.S. 358, 364 (1932). See also *Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924).

¹⁴⁸ 281 U.S. 537, 540 (1930).

¹⁴⁹ See discussion *supra* accompanying notes 101-111.

instrumentalism and judicial pragmatism,¹⁵⁰ particularly when the instruments of power were in their hands and the rights affected are what have come to be called “economic liberties.”¹⁵¹ Viewed in this way, their judicial takings opinions underscore the importance of having the limits on power, including the takings clause, apply to courts as well as the legislature and executive.

This more constrained understanding of state court powers and common law evolution resurfaced in the concurring opinion of Justice Stewart in *Hughes v. Washington*.¹⁵² The state court had held, pursuant to a change in state law, that a particular property acquired by federal grant could no longer acquire title to accreted land at the shoreline. The landowner claimed a taking without compensation and on appeal the Supreme Court held that federal law was controlling and that under federal law title could still be acquired by accretion.¹⁵³ Justice Stewart agreed with the outcome, but thought it necessary to address the scope of state court power to

¹⁵⁰ Professor Thompson underscores the instrumentalist nature of the anti-judicial takings position that has relied on the opinions of Holmes, Brandeis and Cardozo.

Curiously, courts and scholars who have opposed applying the takings protections to judicial changes in the law have not argued that judicial changes should be exempt because of any claimed efficacy in the judicial process. Nor have opponents argued that the rationales motivating compensation apply differently to the courts than to the other branches of government. Instead, opponents have urged that, whatever the arguments in favor of compensating property holders, constraining judicial decisionmaking on property questions could adversely impact other important interests. Thompson, *supra* note 76 at 1498.

¹⁵¹ Beginning with *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) and culminating in *Ferguson v. Skupa*, 372 U.S. 726 (1963), the Supreme Court created a sharp distinction between “fundamental” liberties and “economic” liberties, with threats to the latter receiving little or no scrutiny by the Court. Although Justice Stewart objected in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972), that “the dichotomy between personal liberties and property rights is a false one,” the Court continues to give great deference to legislation impacting on economic liberties.

¹⁵² 389 U.S. at 290, 294 (1967).

¹⁵³ Federal law on title to accreted land was a reflection of the long established common law rule. The substance of that rule, which the state of Washington sought to change by statute, is in turn a reflection of the common law method. Gradual shifting of a stream marking property boundaries results in a gain or loss to affected property owners, that is, the property boundary moves with the stream. But an instantaneous shift in a stream (avulsion) does not result in a the gain or loss of property. Accretion, like the gradual evolution of the common law, can be fairly anticipated. Avulsion upsets settled expectations.

alter existing property rights.

To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.¹⁵⁴

With the exception of two dissenting opinions,¹⁵⁵ a case in which a judicial taking claim was decided against the plaintiff but not because of a judicial privilege,¹⁵⁶ and a case in which Justice Blackmun asserted that “[n]either the Florida Legislature by statute, nor the Florida courts by judicial decree” can convert interest earned from a deposit with the court into “public money” without violating the takings clause,¹⁵⁷ the Supreme Court has not revisited the issue of judicial takings since *Hughes*. But as Paul Stephan observes, “Stewart's equation of judicial with other governmental takings continues out there, not quite accepted doctrine but never directly

¹⁵⁴ 389 U.S. at 296-297.

¹⁵⁵ In a dissenting opinion in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 334 n11 (1987), Justice Stevens wrote: “[T]he Constitution measures a taking of property not by what a State says, or what it intends, but by what it does.” [quoting Justice Stewart’s concurrence in *Hughes v. Washington*, 389 U.S. at 443]. The fact that the effects of the regulation are stopped by judicial, as opposed to administrative decree, should not affect the question whether compensation is required.” In a dissent, joined by Justice O’Connor, from denial of certiorari in *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994), Justice Scalia cited Stewart’s dissent in *Hughes* and stated that “[n]o more by judicial decree than by legislative fiat may a State transform private property into public property without compensation.”

¹⁵⁶ In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Supreme Court held that the California Supreme Court’s changed interpretation of the California Constitution did not result in a taking. If the judiciary is privileged against takings claims, the court could have dismissed the property owners claim on that basis, but instead the court applied the *Penn Central* balancing test as it would in a legislative or executive taking case. It might be argued that state court interpretations of state constitutions are different than state court interpretations of the common law, but it is not evident on what basis that distinction would be justified.

¹⁵⁷ *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

repudiated by the Court. It describes a possibility, a space for argument.”¹⁵⁸

It is not apparent from Professor Ruhl’s case for extending nuisance law to ecosystem service protection that he sees any space for argument about possible constitutional limits on the power of the courts to amend the common law. Nor is he alone in seeing this as a settled issue, indeed an issue that really requires no discussion. As he observes in an earlier article, “[m]any commentators before me have advanced the cause that the common law is profoundly adaptive.”¹⁵⁹ But ambitions for avoidance of the takings clause in pursuit of environmental protection do not stop with this assumption of an infinitely flexible common law. It extends to the immunization of legislative acts said to be based upon the common law. It creates not just a hole you can drive a truck through. There is no longer any need for a hole because whatever barrier the takings clause might have imposed has been entirely eliminated.

If the Supreme Court had held in *Hughes* that the takings clause requires compensation when a state court changes the law on title to accreted coastal property, or had agreed to hear the *Stevens* case and held that compensation is required where the state court declares on the basis of custom that previously exclusive, private beaches are henceforth open to the public, would the Court have “[frozen] the definition of property in its current form” as Brandeis and Warren assumed the Court had the power to do under the takings clause?¹⁶⁰ If so, then either the common law of property must stop evolving or the takings clause must be read out of the constitution. But the choice is not so stark. The common law can continue to adapt to changing circumstances in the context of a vibrant takings clause if we understand and are true to both common law tradition and the purpose of the takings clause.

VI. Conclusion

I have argued above that the common law tradition is one of gradual and “consumer” driven change. David Bederman has made the same argument with respect to the common law doctrine of custom.

[I]f American courts were to return the customary doctrine to its original contours, most, if not all, of the constitutional problems implicated in judicial takings claims would vanish. Appellate courts . . . would no longer be making sua sponte assertions of public interests in private property. The courts ideally would be

¹⁵⁸ Paul B. Stephan, *Redistributive Litigation – Judicial Innovation, Private Expectations, and the Shadow of International Law*, 88 VA. L. REV. 789, 829 (2002).

¹⁵⁹ J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System*, 45 DUKE L.J. 849, 916-20 (1996)

¹⁶⁰ Warren & Brandeis, *supra* note 59 at 245.

reviewing jury verdicts endorsing proofs of a localized custom.¹⁶¹

To be sure, the boundary between traditional patterns of evolution and unacceptable judicial law making is not and cannot be clearly delineated. But so it is with many perfectly functional legal lines in the shifting sands of social existence. Volumes beyond counting have been written about the challenges of legal interpretation with differences of opinion over a wide spectrum, but so long as it is agreed that interpretation occurs within a rule of law system, the role of the judge is clear in this sense. The responsibilities of judgement that gives judges their name relate to interpretation of the law, not law making. Inevitably law will be made in the process of interpretation, but it is gap filling, not path breaking, law. Path breaking is for legislators who can be easily removed if those they represent prefer the well trodden or a different path. The more limited, but no less important, role of the judge is to resolve disagreements about what the law is, not what it should be.

The rediscovery of the common law by Professor Ruhl and others would be a grand thing if rooted in an understanding and appreciation of the liberty and efficiency enhancing benefits of the common law. In fact Professor Ruhl does evidence that he understands and maybe even appreciates these attributes of the common law, but that he admits to riding a Trojan horse should give pause to libertarians and democrats alike. The rush to embrace the common law in the wake of Justice Scalia's opinion in *Lucas* evidences not a scintilla of confidence in the common law process. Rather it is blatant and cynical opportunism that underscores the inadequacy of Supreme Court takings law in general and, I suspect, a misunderstanding of Justice Scalia's *Lucas* opinion in particular.

It has been widely argued that Scalia's background principles concept has the effect of replacing the uncertainties inherent in the *Penn Central*¹⁶² balancing test with the even greater uncertainties inherent in common law nuisance.¹⁶³ While it is certainly accurate to describe *Penn Central* as a confirmation of uncertainties in takings doctrine dating all the way back to *Pennsylvania Coal*,¹⁶⁴ it distorts the content and process of the common law to attribute even greater uncertainty to nuisance. But it does serve the objective of establishing immunity from takings, for courts in particular, to believe that nuisance law is whatever the judge decides it should be. What does not allow for the playing of a nuisance trump in every takings case is the traditional understanding that the common law is what people generally expect it to be. Settled expectations are the heart and soul of the common law, and the best evidence of those

¹⁶¹ Bederman, *supra* note 138 at 1449.

¹⁶² *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

¹⁶³ See e.g. Lazarus, *supra* note 15 at 1419; Jan G. Laitos, *The Takings Clause in America's Industrial States After Lucas*, 24 U. TOL. L. REV. 281, 310 (1993).

¹⁶⁴ *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922).

expectations, including their evolution over time, is the day to day, year to year, decade to decade docket of the common law court.¹⁶⁵

Where settled expectations are a principle source of the law, it is rare that settled expectations will be upset by changes in the law – rather change is sometimes necessary to protect expectations. But as we learned from, or were reminded by, the Legal Realists,¹⁶⁶ judges are people too. What is to be done about the judge who wants to blaze new paths rather than recognize and maintain the paths worn by those who use them? The appellate process is one check on such judges, but appellate judges are people too, even those in the House of Lords, though little of a path breaking nature ever cleared that hurdle. And there are sometimes constraints beyond the loyalty of most judges to the institution they serve. For example, “the rule in English common law was that a judicial order decreeing a custom was binding only in that tribunal,”¹⁶⁷ presumably to assure that what may or may not reflect settled expectations in one locale would not too easily become precedent in another community where settled expectations may be different.

American courts were, for most of two centuries, English courts. They brought with them the English common law and adapted its substantive content to the circumstances of North America and the needs of newly established communities. The method of the common law and the relationship of the courts to the legislative and executive functions of government remained largely unchanged. But the founding of the American nation brought important changes to both method and intra governmental relations. These changes were rooted in the Constitution, and both tend to be ignored by those who look to English common law as precedent for common law in America. Parliamentary sovereignty was abandoned in favor of popular sovereignty with the Constitution granting limited powers to the national legislature and guaranteeing individual liberties to citizens. The powers of state governments were presumed to be similarly defined by the people through their state constitutions. From the outset state governments were subject to a handful of limitations set forth in the federal constitution, but would become subject to many more limits with the adoption of the 14th amendment. For purposes of judicial enforcement of common law nuisance, central among these 14th amendment limits is the due process clause and its application of the 5th amendment takings clause to state governments.

¹⁶⁵ “As individuals within a group confront similar conflicts over property rights, traditoin becomes a way of economizing on adjudication costs. Hence, the common law evolves by categorizing similarities between different conflicts and using those similarities to create property and liability rules.” Terry L. Anderson & J. Bishop Grewell, *Property Rights Solutions for the Global Commons: Botton-Up of Top-Down?* 10 DUKE ENVTL. L. & POL’Y F. 73, 79 (1999).

¹⁶⁶ See Brian Leiter, *American Legal Realism*, in THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY (William Edmundson & Martin Golding eds., 2003).

¹⁶⁷ Bederman, *supra* note 138 at 1448.

And so we arrive back at the takings clause. Although, as interpreted by the Supreme Court over the past century, it has seldom been an obstacle to governments' regulatory ambitions, it remains a beacon of hope for property owners and an ominous threat to environmentalists. Both groups seem unable to get past the reality that the provision is a part of the 5th amendment. Property rights advocates hope against hope that it will one day be interpreted not to prohibit government action (except where there is no public purpose) but to require compensation when government action has negative economic consequences for particular property owners. Environmentalists fear that expanded protection of property rights under the takings clause would have devastating consequences for the environment because governments simply cannot afford to pay compensation. But environmentalists understand that pleading inability to pay has never justified uncompensated takings by eminent domain and will not carry the day if regulatory takings are found to be analogous. The best way to assure that regulation does not result in a taking is to persuade the courts that there was no property right to be taken. Hence the appeal of common law nuisance.

There is much to be said for greater reliance on the common law. It will allow markets to function with positive results in terms of productivity and the allocation of scarce resources. But markets only work where those participating in the market can reasonably rely that their rights and liabilities will not change suddenly or arbitrarily. This does not mean that rights and liabilities cannot be changed abruptly, but when they are, transitional measures should be taken. That is the point of the takings clause.¹⁶⁸ It does not operate as a prohibition of government action. Rather it operates, or was intended to operate, as a fair and practical means for short term transitioning from one set of rules to another. Professor Ruhl's proposal that courts and legislatures recognize ecosystem loss as a nuisance, whether in the context of public nuisance or private nuisance, would constitute a radical change in existing property rights and liabilities, not just another adaptation in the evolution of the common law. The common law has always been a reflection of the settled expectations of those it serves. Over time it has adapted as expectations accommodate changing circumstances. Where public desire or necessity are perceived by those in power to require radical change, fairness, justice and good policy require transitional

¹⁶⁸ In urging wariness of legal transitions, Richard Epstein advises that “[w]herever possible try to keep the legal framework constant, and allow the response to societal changes to take place through private adjustments.” Richard A. Epstein, *Beware of Legal Transitions: A Presumptive Vote for the Reliance Interest*, 13 J. CONTEMP. L. ISSUES 69 (2003-04). The takings clause is unique among constitutional rights guarantees in providing a mechanism for government to proceed with a desired action that would otherwise harm reliance interests. Because money cannot compensate for every loss associated with the taking of private property it is not a perfect solution, but it does allow for the shifting of many of the costs of government action from isolated individuals to the benefitting community. Most property rights advocates have agreed with Epstein's case for protecting reliance interests, but others have argued that legal change might be better accomplished if individuals have greater incentives to anticipate change in the law. See, e.g. Saul Levmore, *Changes, Anticipations, and Reparations*, 99 COLUM. L. REV. 1657, 1658 (1999) (arguing for “anticipation-oriented” transition rules).

adjustments for those affected. To claim that such radical change is another evolutionary step is to deny the very foundation of the common law.

A homely and perhaps familiar analogy will illustrate how the common law has worked in the past. Most college and university campuses have grown one building at a time over many years. As buildings are added walkways between buildings are constructed or just appear as people travel from one building to another. At some point a campus planner is hired to give order to the existing campus and to plan for future development. There are two basic approaches the campus planner might take to existing and future walkways. One method is to rely on principles of design rooted in geometry and esthetics. The other is to put the walkways where people actually walk. The latter is the method of the common law. From on high, campus walkways may look a disaster in terms of abstract notions of design, but on the ground they will serve the needs of those who use the campus, and they will adapt as new buildings are added and old ones torn down.

Scott Dewey has written that “evolution in the common law system is not supposed to happen in a Darwinian fashion, by accident; it is supposed to occur through ‘intelligent design,’ with courts changing the rules only after making reasoned decisions to do so.”¹⁶⁹ But in the common law, as in biology, we should be skeptical of “intelligent design” explanations and justifications. Certainly we want judges of intelligence, but not judges who are designers. If that more limited job does not interest judges, they should resign and run for the legislature. And those who would look to the common law to protect the environment should recognize the importance of settled expectations to effective markets while taking their proposals for radical change to the legislature.

¹⁶⁹ Scott Hamilton Dewey, *The Case of the Missing Holding: The Misreading of Zafiro v. United States, The Misreplication of Precedent, and the Misfiring of Judicial Process in Federal Jurisprudence on the Doctrine of Mutually Exclusive Defenses*, 41 VAL. U. L. REV. 149, 256 (2006).