

1985

Property Rights and Social Welfare

Lawrence C. Becker
Hollins University

Follow this and additional works at: <https://digitalcommons.hollins.edu/philfac>



Part of the [Philosophy Commons](#)

Recommended Citation

"Property Rights and Social Welfare." In *Economic Justice: Private Rights and Public Responsibilities*, edited by Kenneth Kipnis and Diana T. Meyers. Totowa, N. J.: Rowman and Allanheld, 1985. Pp 71-86. Hollins Digital Commons. Web.

This Article is brought to you for free and open access by the Philosophy at Hollins Digital Commons. It has been accepted for inclusion in Philosophy Faculty Scholarship by an authorized administrator of Hollins Digital Commons. For more information, please contact lvilelle@hollins.edu, millerjc@hollins.edu.

***ECONOMIC JUSTICE:
PRIVATE RIGHTS AND
PUBLIC RESPONSIBILITIES***

An AMINTAPHIL Volume

Edited by

Kenneth Kipnis

University of Hawaii at Manoa

and

Diana T. Meyers

Cornell University

ROWMAN & ALLANHELD

PUBLISHERS

ROWMAN & ALLANHELD

Published in the United States of America in 1985
by Rowman & Allanheld, Publishers
(a division of Littlefield, Adams & Company)
81 Adams Drive, Totowa, New Jersey 07512

Copyright © 1985 by Rowman & Allanheld

All rights reserved. No part of this publication
may be reproduced, stored in a retrieval system, or
transmitted in any form or by any means, electronic,
mechanical, photocopying, recording, or otherwise,
without the prior permission of the publisher.

Library of Congress Cataloging in Publication Data

Main entry under title:

Economic justice.

Bibliography: p. 244

Includes index.

I. Distributive justice. I. Kipnis, Kenneth.

II. Meyers, Diana T.

HB523.E36 1985 330.1 84-17917

ISBN 0-8476-7384-7

ISBN 0-8476-7385-5 (pbk.)

85 86 87 / 10 9 8 7 6 5 4 3 2 1

Printed in the United States of America

Property Rights and Social Welfare

Lawrence C. Becker
Department of Philosophy
Hollins College

The burden of this argument is that the conflict between social welfare and private property is not nearly as sharp as it seems. The illusion of a sharp conflict comes from a failure to understand one complex point: There are social welfare provisos attached to all justly acquired titles, and those provisos run with the titles indefinitely. Titles are self-adjusting with respect to social welfare.¹

The Social Character of Property

Opponents of the welfare state argue that rights to private property severely restrict the state's power to tax and are part of the reason for rejecting altogether the legitimacy of so-called welfare rights.² Defenders of welfare rights, on the other hand, argue that rights to life and a minimal level of well-being are more important than property rights, and that social-welfare considerations (the "rights" of society) often override private rights in cases involving nonrenewable resources, clean air, clear water, "green space," and wilderness areas.³

The division of the house is not that simple of course. Libertarians worry about social welfare as well as property rights when the issue is economic blackmail.⁴ Welfarists recognize the important connections between private rights, personal freedom and self-esteem, and the way in which many of their concerns can be cast into the language of property rights.⁵ And legal theorists of all persuasions express concern about the takings clause of the Fifth Amendment—the clause that prohibits the taking of private property without due process of law, and requires the state to pay just compensation when it takes property for public purposes.⁶ This constitutional provision, together with the recent expansion of the legal concept of property, can in principle be a serious obstacle to public welfare. The "new property" includes all sorts of things that were once considered mere privileges or governmental largesse, such as licenses of various sorts, Social Security, welfare benefits, and the value of an education.⁷ If these things are property, how can the state legally "take" them through law reform? If an appeal procedure or compensation is required in all such cases, routine changes in the law would be impossibly burdensome.

In any case, most theorists imagine that there is in principle a sharp conflict between private rights to property and considerations of social welfare. The perception of that conflict leads the left wing to reject or restrict private property and the right wing to reject or restrict the welfare state.

Opposition to that "conflict view" has been hampered by a vague, even empty, invocation of the so-called social character of property. The suggestion is that if private property is essentially "social," there may not be a serious conflict between property and welfare after all. This is obviously an important line of inquiry, but everything depends on having a clear concept of the social character of property.

That clarity has been hard to find. Some say, for example, that property rights are empty unless they are enforced through some social order. Since any "real" property right is therefore a socially enforced one, and since no social order is likely to enforce a right that runs counter to social welfare, enforcement will carry with it many social-welfare considerations. "Real" property rights, then, are social in this clear sense.

The problem with this account is that it is too weak. It is accepted by virtually everyone and therefore cannot help to resolve the current controversy. To say that "real" rights are enforced is not to say anything significant about which ones ought to be enforced. And disputes about that are precisely what the concept of the social character of property is supposed to help decide.

It will not do, moreover, to patch up the account by pointing out that, as a matter of fact, certain specific sorts of restrictions (tax liability, eminent domain, and so forth) have always been imposed on property by political orders and that we can therefore clearly characterize the role welfare considerations will play in the administration of property rights. That patch-up continues to beg the question of whether welfare should play such a prominent role. We have recently been invited, after all, to think of rights as trumps—as cards that take any trick constructed from considerations of prudence, or efficiency, or expedience, or social welfare.⁸ The fact that no one actually does think of them quite that way—in the sense of actually acting as if the Two of Rights should trump the Ace of Negative Social Consequences—is not the point. Perhaps we should think so. Perhaps we should treat rights as trumps. If so, property has precious little "social" character.

Heroic metaphysical measures fare no better. The social character of property is not made clear by doctrines about rights emanating from the collective social body, or about property being held in trust for God. The former line is unacceptably vague. The latter rests on a religious faith that is inaccessible to many of us.

Property Rights and Social Welfare

A better way to understand the social character of property is to pay close attention to the social welfare provisos attached to all of the plausible justifications for property rights. Such attention will reveal that the conflict

between private property and social welfare is not as severe (in theory) as is usually supposed.

The core of my argument for that contention is in this section, and it has three parts. The first defends the thesis that rights dominate, but do not trump, other sorts of moral considerations—including social welfare considerations. The second summarizes arguments (made elsewhere) that hold that all plausible accounts of justice in property acquisition are sensitive to social-welfare. The third argues that such sensitivity, in the form of social welfare provisos, is a permanent feature of individual rights to property. It is a feature that makes titles self-adjusting with respect to welfare. Concluding sections of the paper sharpen the general line of argument by replying to some objections and by discussing some connections to property law.

Rights Are Dominant, But Not Trumps

If individual rights never trump desires, or expedience, or considerations of social welfare, then there are no rights at all in the usual sense. Rights theorists are correct about that as a purely descriptive matter. Some sort of preemptive or dominant status is built into the ordinary conception of a right. It may not be possible to justify the inclusion of moral claims of that sort (i.e., rights) in a coherent moral theory, but that is a separate question.⁹ My point here is merely that if there are rights, they are something like trumps, at least some of the time.

On the other hand, if rights were always trumps, it is hard to imagine that anyone would want to stay in the game. Surely it is irrational to hold that a trivial right should block the satisfaction of compelling social interests. (An argument for that assertion follows.)

The proper analogy (if we must stick to cards) is not that of a trump suit, but rather what might be called a dominant suit. Imagine a game in which spades outranks other suits in the following way: Any spade of a given number (say, a 10) outranks any other card of that number, but not any higher card. Rights are similar. They are by definition dominant over considerations of social welfare, efficiency, and prudence, but their dominance is limited by the strength of those other considerations. Compelling social interests outrank trivial individual rights.

This much is just common sense. It reflects the way we actually use the concept of a right, and that use (rather than the rights-as-trumps idea) seems straightforwardly justifiable. (a) After all, once it is granted that some rights are of relatively minor moral importance, it follows directly that they are outranked by things of major moral importance. (b) It is undeniable that some human needs (falling short of rights) are of major moral importance. (c) So it also follows that rights can in principle be outranked by other sorts of moral considerations. No doubt I have a right to the exclusive use of my private telephone. But the need of my neighbor for life-saving emergency medical care outranks that right. An operator, for example, may justifiably interrupt my conversation to put through an emergency call. That much is clear. What is not so clear is what this does

to the concept of a right. There are, after all, at least two importantly different ways of thinking about this outranking business.

Overridingness.

One way is to insist that rights can sometimes justifiably be overridden (as in the emergency medical-care case), but that whenever we do that, no matter how good our reasons, we owe the right-holder some sort of compensation. If it is a trivial right we've overridden (such as my right to an uninterrupted phone call), no doubt a pro forma apology will suffice. If it is a significant right we've overridden, proportionately more is required by way of compensation.

This view is uncomfortable because it places a great constraint on the promotion of social welfare. If compensation is always required, even when individual rights are justifiably overridden, we will often be in the position of not being able to afford to do what is justifiable. That is, we will be in a position where social-welfare considerations (exclusive of the cost of paying compensation) mandate overriding the right, but the cost of compensation is prohibitive. And that seems unacceptably paradoxical.

Prima Facie Rights.

Another way of looking at the outranking business is to hold that rights are presumptively dominant, but that the presumption is a rebuttable one. The strength of the rebuttal required depends on the strength of the right, but once an adequate rebuttal has been made, there is no question of overriding a right and having to make compensation. There is no question of that because there is no right; the "prima facie" right has evaporated.

This view is also difficult to accept. The whole notion of a right seems to have been abandoned here in favor of a case-by-case assessment of what ought to be done. The notion of a prima facie right comes to little more than a procedural device for deciding who has the burden of proof. That is something, especially in the contexts of adjudication and ultimate justification,¹⁰ but it is not much like what we ordinarily want to claim for the status of rights.

Limited Rights.

I shall take a somewhat different approach here. The theory of rights behind it is the first of the two above: that rights are dominant, but not trumps. They can therefore be overridden, but when they are overridden, no matter how justifiably, compensation is due. The scope of the compensation problem is reduced to manageable proportions by the fact that a concern for social welfare limits property rights from the very outset.

Property Acquisitions and Social-Welfare Provisos

For the purposes of this argument, let us assume that there are at least four sound and independent justifications for the acquisition of private

property: two versions of the labor theory, an argument from utility, and an argument from political liberty.¹¹ This is enough to give the views presented here a strenuous test—more strenuous, certainly, than assuming the validity of only one form of justification. And nothing is lost by ignoring the miscellany of other putative justifications (e.g., first occupancy, personality, property-worthiness). Some of these others are unsound anyway, and the rest can be reduced to one or another of the four here assumed to be sound. But I shall not go over the arguments for that conclusion, because it seems clear that anything that might have to be added to this list of four justifications would only strengthen the argument to follow. Likewise, I shall not repeat the arguments designed to show the soundness of the justifications. I shall merely develop one important result of those arguments: Each of the four justifications contains a social-welfare proviso that constrains acquisitions.

(1) Utilitarian arguments are very open about it. In utility theory, what justifies my title to Greenridge is that it is somehow best for us all—best for aggregate welfare—if I have it. Clearly, if that is the justification for property, then social welfare is not a mere proviso—not a mere constraint on acquisitions. It is the whole issue.

(2) Locke's version of the labor theory justifies acquisitions only on the condition that enough and as good be left for others.¹² It is beyond dispute that the scarcity of resources and the level of competition for them (i.e., some social conditions) will in large measure determine whether a given acquisition can leave as much and as good for others. Changed social conditions can change the range of permissible acquisitions. That is exactly what is meant by a social-welfare proviso.

(3) Another version of the labor theory holds that laborers are entitled to property as a deserved reward for their work—but only if the property rights awarded them are a fitting and proportional reward.¹³ What is fitting and proportional will depend in part on social conditions (e.g., scarcity). A little labor that has only minor and inessential benefit for others does not deserve the whole world as a reward. But what will count as a disproportionate reward will depend in part on how scarce the resources are and how essential the prize is to the welfare of others. So this too is a social welfare proviso.

(4) The argument from political liberty holds that any defensible system of liberty must allow people enough freedom to acquire some property. But this argument acknowledges immediately that some acquisitions by me may unjustifiably compromise your liberty. Think of my acquiring all the property surrounding yours, refusing you permission to cross my property, and thereby making you a *de facto* prisoner. Requiring me to grant you an easement to cross my property (by balloon?) is a simple recognition of the fact that no coherent theory of liberty can adopt a policy of unconditional acquisition. Which conditions will be necessary will depend in part on human needs, scarcity of essential resources, and the level of competition for them. In short, the liberty argument for property also contains a social-welfare proviso.

Each of the arguments that support acquisition, then, includes such a

proviso. Property acquisitions are "social" in at least that clear and strong sense.

The Provisos Run with the Titles

What is often ignored, however, is the fact that what is true of acquisitions (with regard to social welfare) is also true of holdings and transfers. The social conditions that make it just for me to acquire the property are the same ones that make it just for me to retain it—or for others to acquire it from me.¹⁴ If ever those conditions are not satisfied, my title is compromised. Social-welfare provisos run with titles.

To see this, think again of the arguments for justice in acquisition—for example, utility. If what justifies my getting title to Greenridge is in part the fact that it is best for us all if I have the title, then by definition, when it is no longer for the best that I have it, I have lost the justification for my title. Similarly for the labor theory: If what justifies my getting title is in part the fact that my having it causes no loss to others (or that my having title would be a fitting and proportional reward for my labor), then when my having it no longer meets those conditions, the justification for my title is gone. And the same is true for the political liberty argument. Social conditions in part justify my getting the property. When those conditions change, so does the justice of my having the property.

In general, then, the security of one's title to property is permanently limited from the outset by the social-welfare provisos on acquisitions. Property rights are permanently "social." (Nozick's theory recognizes this in principle. Recall his discussion of why the owner of the last water hole in the desert is not entitled to charge whatever he chooses for the water.)¹⁵

This point about the continuing force of provisos on acquisitions has often been missed. As a practical matter, no doubt this is partly because such provisos are often latent for long periods and thus forgotten by titleholders. (Think of homeowners' rage when they unexpectedly discover the social-welfare provisos administered by the local zoning board.) But it may also be the case that we are plagued by a deep confusion about the ontological status of rights: the notion that once justified, they can be cut free from their justifications to run their courses. It is as if we had in mind something like the deist's conception of the universe, in which a watchmaker God merely winds up the world and leaves it to run by itself. Rights are sometimes treated in an analogous way, as if, once acquired, they achieved an existence independent of the conditions that justified them and were therefore impervious to changes in those conditions.

But that is a false picture. The proper cosmic-scale analogy is rather to the Thomistic conception of the universe, in which the creative activity of God is necessary at every moment to sustain the world. Without it, the world would cease to exist. Rights are something like that. The justificatory work of the social-welfare provisos is necessary, at every moment, to sustain the legitimacy of the rights. Without it, the rights cease to exist.

Rights and Social Welfare

It is clear, then, that many apparent conflicts between property rights and social welfare may not be that at all. They may instead be cases in which limitations inherent in titles have unexpectedly become operative. A simple-minded illustration will make the point clearer. Suppose three people are alone on a desert island. There are three tracts of land, of equal size, fertility, access to fresh water, and convenience. Each person claims one as private property. Suppose further that those claims are justified in all the usual ways. The private property arrangement is best for all in the sense that it promotes peace and productivity. Each person equally deserves a tract as a reward for hard work. And the refusal of any two of the three to grant the other person ownership rights would be an unjustifiable infringement of liberty.

Now notice the provisos. Everything (in this case) is contingent on the rough equality of distribution. (We could change the case, of course, to make it depend instead on the special expertise and goodwill of one person—yielding, perhaps, a justification for monopoly.) But in the stated case, if there had been only two tracts, or if one or two had been infertile, the case for private ownership would not have been possible to make in the same way. (And let us assume for simplicity that it could not be made at all in any other way.)

Now suppose that after some years two of the tracts are rendered useless. The water sources dry up and the land cannot be farmed. The provisos on acquisition then come back into force. The conditions that once made the private ownership arrangement a justifiable one no longer obtain. The arrangement no longer promotes peace and productivity, no longer causes no loss to others, no longer is a fitting and proportional reward for labor. When the conditions that justify a right no longer obtain, there is no (justifiable) right.

Theoretical confusion about this is understandable. Social welfare limitations on titles are imposed at the level of general and specific justification: They are plain when we consider the question of how any system of property rights at all can be justified, or under what conditions it is justifiable for someone to have property rights in land, or nonrenewable resources, or ideas. We do not ordinarily think about these questions—and consequently about the social-welfare provisos—when we deal with particular titles. Instead, we think about the history of the title and about the consequences of enforcing or violating it. The issue before us therefore appears to be one of striking the proper balance between individual rights on the one side and public or state interests on the other. The compensation question arises with full force, then, and we are confronted with a paradoxical conflict between what we ought to do and what we can afford to do.

What I am suggesting is that an attempt to recover the “social character” of a title—in the form of the social-welfare provisos that run with it—is always in order when there is an apparent conflict between property

78 PROPERTY AND RESPONSIBILITY

rights and social welfare. If the conflict is real, as it sometimes surely is, then we play the dominance game. We compare the strength of the right to the strength of the conflicting considerations. If the right must be overridden, we pay compensation. But if the conflict is only an apparent one—if, that is, the limitations inherent in the title are precisely the social-welfare considerations at issue—then there is no right to be overridden and no compensation to be paid.

Objections and Replies

The consideration of a few objections may help to sharpen the point.

Rights Are Permanent

Objection.

The point of having rights as part of the moral landscape is lost if they are constantly threatened with extinction by changing conditions. Rights are meant to be fixed features of the landscape—bulwarks against the tides of public opinion, the expediency of the moment, the tyranny of the majority. No doubt social welfare is a crucial consideration in the initial distribution of rights. We must be careful about original acquisitions. But a right whose very legitimacy depends on the chance that a set of social conditions will remain unchanged—a set of conditions whose continuance depends in part upon the actions of others—is no right at all. Even if we must occasionally override rights in order to satisfy needs, we must recognize that we have overridden an important sort of moral injunction. And no matter how good our reasons were, we owe the injured right-holders some form of compensation. Once we lose that kind of security, we have lost the whole point of protecting people with rights.

Reply.

Rights are impervious to whole hosts of social changes—namely, the ones that did not figure in the justification of the right. And their sensitivity to changes in the conditions that did figure in the justification produces no fatal loss of security—any more than does the recognition that rights may occasionally have to be overridden. The reason that the loss of security is not fatal is partly, of course, that we are likely to profit from it as well as lose. (Your loss in private welfare is often my gain in social welfare.) But the conditions under which a right will “vanish” are also explicit in the justification of the right. We can in principle be aware of them, if we think clearly. That goes some way toward giving us the security we desire. And in any case, the situation here is no more threatening, or unusual, than our standard practice with respect to promises and contracts. They too are always conditional, and most of the conditions are implicit—simply “understood” rather than spoken. (“I’ll come over to help you move the books tomorrow. Count on me at about noon.” And

what is understood, of course, is something like, "I'll do this unless I'm in bed with the flu, or . . .") Is the whole point of promising lost when these latent conditions emerge to excuse the promisor from the duty? I think not. We merely have to be careful about the kind of excusing conditions we permit.

Objection.

But what about changes in social conditions that are the fault of other people? Take the desert-island case again. Three people start with equal shares. One is prudent and thrives. The others are imprudent—perhaps even spiteful—and allow their water holes to dry up. Does the social-welfare proviso come into play to force the prudent one to share with the others?

Reply.

This objection is just a special case of two closely related general problems in moral philosophy: (1) To what extent is one obligated to save wrongdoers (or the foolish) from the consequences of their wrongs (or follies)? (2) To what extent is one obligated to help innocent third parties? Suppose (implausibly) that a hard line on these questions can be justified, giving the answer that one is under no obligation to save either the wrongdoers or innocent victims. (It would be "good" of one to help perhaps when an infant is abandoned on the doorstep. But it is not obligatory.) Would that damage the general point about provisos running with titles? Not at all. It would merely show that the provisos do not include the duty to rescue. So the objection is irrelevant. And in fact the general point about provisos running with titles is reinforced by a consideration of these fault cases. For example, when criminals violate my right to freedom, may they not be sanctioned in ways that, under other conditions, would constitute a violation of their rights? To recognize that a criminal act can change one's protections is to concede the point that provisos attached to the rights run with them thereafter.

Objection.

But the point of this objection may be that there are no social-welfare provisos at all on property acquisition, and therefore no provisos to run with titles. Suppose it is held, for example, that people are entitled to whatever they can get and keep, no strings attached. Then the thesis about provisos running with titles is irrelevant.

Reply.

Many amazing things can be "held." If that were all it took to defeat my arguments, there would be no point in making them. But the question is not what can be held; the question is what can be held with good reason.

80 PROPERTY AND RESPONSIBILITY

And "provisoless acquisition" cannot be held with good reason. Consider: No coherent moral theory permits unconditional liberty.¹⁶ One's liberty must always be limited by the liberty of others, even in highly inegalitarian societies. "Getting and keeping" things will therefore always be controlled, at a minimum, by the principles that coordinate people's liberties. What is that but a social-welfare proviso? Of course we may argue about the extent of the proviso—about whether it includes affirmative as well as negative duties of care, for example. (Am I obligated to care for the infant left on my doorstep?) But the existence of some provisos cannot reasonably be disputed.

Objection.

Perhaps. But conceding that is not enough to make your thesis interesting. Suppose that there are provisos on acquisition and they do run with titles, but they are so minimal that they never effect changes in acquired titles? Then there is no practical point in talking about self-adjusting titles.

Reply.

An adequate reply to that objection would be book-length: an argument designed to show that all the sound lines of justification for property acquisition do in fact contain robust social-welfare provisos. Readers who want such an argument may look at my *Property Rights*.¹⁷ Here I can only be dismissive. I know of no sound line of reasoned justification for property that imposes merely minimal provisos. So once it is conceded that provisos run with titles, my thesis here has many interesting consequences.

"It'll Never Work"

Objection.

On the contrary, the supposed "interesting consequences" may well evaporate in practice. How can we possibly apply this thesis about provisos when we do not as a society or a nation under law have a coherent theory of justice in property acquisition? Some people are fond of the labor theory. Some take a utilitarian approach. Some are libertarians. In what sense, then, can one recover *the* social-welfare proviso for a given title? If we cannot recover it, we cannot know which conflicts are bogus (because they involve only the resurrection of a latent social-welfare proviso) and which conflicts are genuine.

Reply.

Two things may be said in answer. First, the fact that multiple lines of argument are used for property, in both legal and moral contexts, does not entail that property theory is incoherent. At most, it entails that the theory

is complex. It is incoherent only if its multiple lines of argument are (a) equally plausible and (b) inconsistent. Second, we have some reason to believe that the arguments are consistent. The social-welfare provisos inherent in the various types of justification for property are strikingly similar. The "no-loss" requirement imposed by the traditional version of the labor theory has obvious similarities to the substance, if not the form, of the limitations imposed by the utility argument, the political liberty argument, and the proportionality requirement on the reward-for-labor argument. So even if the various lines of argument are equally sound, we should be able to coordinate them so as to avoid major conflicts. No doubt there are striking differences in the various lines of argument. But while we wait for a resolution to the coordination problem, perhaps we shall not go too far wrong if we simply adopt, for whole classes of cases, second-level principles about which of the provisos applies when.

For example, there are surely cases in which some of the standard justifications for property do not apply. With respect to inheritance, for instance, the labor theory has only limited application. The heirs have not earned the property or produced it. And the question of whether laborers morally acquire the right to control their property in perpetuity is certainly an open one. So all that may be left here is utility (and perhaps the political liberty argument, although that is doubtful). In such a case, recovering *the* social-welfare proviso would not be so difficult. And of course if one of these lines of argument emerges as the dominant one, the problem of finding the proviso is further simplified.

Objection.

Yes, but then this whole business begins to look vulnerable to special pleading. Won't people simply tend to reach for whichever provisos best suit their purposes? Threatened owners will pick the least restrictive ones; the state (or other challengers) will pick the most restrictive ones. How will those disputes be handled?

Reply.

If the process of adjudication is genuinely dialectical—if, that is, in genuinely problematic cases it is not rigged in advance in favor of one sort of outcome—then I see nothing wrong with this. And there is surely nothing unusual about it in our legal system. In fact, an adversarial system like ours is designed to handle such disputes.

Fairness

Objection.

But surely there is a question of fairness here that has been overlooked. No matter how true it may be that these provisos are inherent in rational justifications for property, people do not normally think of them—or at

82 PROPERTY AND RESPONSIBILITY

least not all of them—when they acquire property. Surely one's actual expectations, one's reasonable expectations given current social and legal practices, should count for something. Surely those expectations should control the process of reaching back to pluck the provisos out of some abstract theory or set of theories.

Reply.

When judges decide in negligence cases what counts as an appropriate standard of care, they apply the so-called reasonability standard. The question is not, "What did the defendant believe was the proper standard?" but rather, "What would reasonable people believe?" Reasonability is related to the actual beliefs of the populace as a whole, but it is not completely determined by those beliefs, and it is certainly not determined by the actual beliefs of the parties to the case. The situation here is analogous. Fairness requires that actual expectations be considered, but it does not require that these be determinative. After all, the expectations of the parties to a particular case may be bizarre, both with regard to what is generally believed and what sound theory can support. We cannot be hostage to unfounded opinions in property law any more than we can be hostage to them in criminal law.

The difficult question of fairness arises when theory conflicts with widely held long-standing beliefs. There we may have to move carefully. (Though I am uncomfortable with delay. Think of all the specious arguments for gradualism on civil-rights issues.) Property just is "social" in the sense that I have described. To the extent that we have, through the legal system or in other ways, collectively encouraged ourselves to think otherwise, we may (arguably) have to pay the price in genuine conflicts between rights and social welfare. But otherwise, we need not pay that price.

Provisos and Property Law

It is worth noting that property law for centuries has dealt with provisos that run with titles. The legal materials show a tendency to frame the issue in terms of a conflict between rights and social welfare—the same tendency that infects social and political philosophy. But the prevalence of the problem and the way courts have typically handled it should be enough to assure skeptical readers that my arguments are not at some lunatic fringe of empty theorizing. Changes in social conditions do sometimes change the law's estimate of one's property rights—in ways that exemplify exactly what I have called the emergence of latent social-welfare provisos. Two examples from land-use law should suffice to make the point.

Private Law

The first example concerns restrictive covenants, adopted by individual landowners and intended by them to run with title to the land even when they no longer own it.¹⁸ Some such covenants (e.g., racially discriminatory

ones) are unconstitutional.¹⁹ But many types of restrictive covenants are quite legal and quite common—for example, those restricting land use to residential purposes²⁰ or defining obligations to a property-owner's association.²¹ Such covenants, if properly drafted, can in principle be enforced by the law in perpetuity.²²

The important point for present purposes is that courts may terminate such covenants, against the wishes of one or more of the interested parties, if another interested party petitions for the termination and "conditions" have changed sufficiently. The *Downs v. Kroeger* case²³ shows this as clearly as anyone could want to see it. In that case a private covenant restricting a piece of land to residential use was defeated by a showing (by owners not party to the original covenant) that the surrounding area had become a business area, greatly increasing the value of the restricted land as a business property and greatly decreasing its value as a residential property. The petitioners argued that changed conditions made the purpose of the original covenant impossible to achieve (with respect to their property), and that while enforcing the covenant would not benefit anyone significantly, it would impose a serious hardship on them. The court agreed, and even the vigorous dissent conceded the general principle.²⁴ Unless that decision and others like it are to be construed as cynical abuses of the rule against *ex post facto* legislation, they must be construed as attempts to determine whether social-welfare provisos implicit in the original covenant, and running with the title, have come into force through changed conditions.

Public Law

The other example concerns takings law. In this country, all titles to land are acquired under the condition that the land may be taken, with due process, for public purposes as long as just compensation is paid.²⁵ That condition expresses my position with regard to rights generally: that they dominate but do not trump other considerations, and that compensation is due when rights are overridden, no matter how good the reasons were for overriding them.

But there is another equally important constitutional restriction on titles. The government may regulate land use in ways that fall short of actual takings without paying compensation. (Translation: without, by its own reckoning, violating ownership rights.) And these regulations may change over time in ways unanticipated by, and unfortunate for, the owners.²⁶ The idea here is clearly comparable to my thesis about latent provisos. It is true that courts have often spoken as though the issue were simply one of degree; that is, that most regulations (e.g., taxes, zoning) do not rise to the level of a taking and therefore do not demand compensation.²⁷ But why not? Are we to say that the law may violate a citizen's property rights without compensation as long as the rights are "minor?" Or are we to say instead that a citizen's rights are always sensitive to changes in social conditions—sensitive in the sense that changed conditions can redefine the scope and character of those rights? The

84 PROPERTY AND RESPONSIBILITY

former alternative is an uncomfortable one for a legal system that takes rights seriously.²⁸ The latter alternative fits our system much better, and it is certainly the better choice.

A recent case clearly illustrates the importance of this theoretical issue. The case is *Loretto v. Teleprompter Manhattan Cable CATV Corp. et al.*²⁹ It concerns a New York statute that prohibits landlords from interfering with the installation of cable television facilities on their property, and it gives the State Commission on Cable Television the power to set a standard, nominal compensatory fee for such installations. The Supreme Court ruled that such mandatory installations constituted takings. The lines of argument in the majority opinion and in the dissent are instructive.

Briefly: Courts have repeatedly held that "[t]here is no set formula to determine where regulation ends and taking begins."³⁰ But in the *Loretto* case the Court, citing recent precedents as well as legal history,³¹ denied that the issue is to be determined solely by balancing public benefits against private harms. Instead, it affirmed what it took to be the traditional rule that any permanent physical occupation of property, authorized by the government, is a taking for which compensation must be made, no matter how minor the damage to the owner or how great the public benefit. (See p. 6 of the Slip Opinion.) The Court thus asserts in effect that rights dominate other considerations, but it fails to consider any social-welfare provisos that might be relevant to this case. Without a recognition of such provisos (whether or not they change the result in this case), the Court's strong stand on the dominance of rights could lead to some rather dangerous results, as noted by Justice Blackmun in his dissent. Blackmun's opposition, however, relies on a "balancing of interests" doctrine in which it is all too clear that rights turn out to be little more than procedural devices for assigning the burden of proof. The resultant conflict of jurisprudential theories is unnecessarily difficult to resolve. Those who want a robust theory of rights will reject the balancing test and assume that any dangerous consequences that might follow are just necessary evils. Those who accept the balancing test (in order to get the consequences they think are correct case by case) will assume that it is a watered-down theory of rights that is the necessary evil. My thesis is that we can have a robust theory of rights and also weigh the consequences case by case—by recognizing the provisos inherent in titles.

In fact, I suspect that the practice that I recommend here is already in place, even if the proper theoretical foundation for it is not. But like all practice based on bad theory, current property-rights practice is vulnerable to unnecessary confusion, conflict, and error. Recognizing that the theoretical conflict between rights and welfare is not nearly as severe as it often seems will not make the practical problems disappear. But it should make them more tractable.

Notes

1. An earlier version of this paper was presented to the Jurisprudence Section of the Association of American Law Schools, at their annual meetings in January, 1982.
2. See Roger Pilon, "Ordering Rights Consistently," *Georgia Law Review* 13 (1979): 1171.
3. See Joseph L. Sax, "Takings, Private Property and Public Rights," *Yale Law Journal* 81 (1971): 149. See also William Blackstone, ed., *Philosophy and Environmental Crisis* (Athens: University of Georgia Press, 1974).
4. Consider the implications of Nozick's discussion of the Lockean proviso. *Anarchy, State and Utopia* (New York: Basic Books, 1975), pp. 178-82.
5. C. B. Macpherson, "Human Rights as Property Rights," *Dissent* 24 (1977): 72-77.
6. See Bruce Ackerman, *Private Property and the Constitution* (New Haven: Yale University Press, 1977).
7. See the articles on takings law in Bruce Ackerman, ed., *Economic Foundations of Property Law* (Boston: Little, Brown, 1975).
8. The metaphor is Ronald Dworkin's, in his *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), p. xi.
9. For a sustained argument against the significance of rights as a moral category, see Raymond Frey, *Rights and Interests* (Oxford: Oxford University Press, 1980).
10. In adjudication, with its demands on resources and time, burden-of-proof questions are often crucial. A system of criminal law in which individuals, pitted against the state in an adversarial system, had the primary burden of proof would be grossly unfair. Likewise, when the question at issue is an "ultimate" one (e.g., whether we can know anything at all), deciding who has the burden of proof is often tantamount to deciding which "side" will win.
11. See my *Property Rights: Philosophic Foundations* (London: Routledge and Kegan Paul, 1977).
12. John Locke, *Two Treatises of Government, Second Treatise*, chap. V.
13. For a developed presentation of the desert argument, see *Property Rights*, pp. 48-56.
14. With the exception of the condition, attached only to original acquisition, that the object acquired be unowned.
15. *Anarchy, State and Utopia*, pp. 178-82.
16. I assume that nihilism is not a moral theory but rather the rejection of moral theory, and of reason as applied to moral problems.
17. Specifically, chaps. 3-7.
18. A. James Casner and W. Barton Leach, eds., *Cases and Text on Property*, 2d ed. (Boston: Little, Brown, 1969), chap. 32.
19. *Ibid.*, pp. 986-1023.
20. See *Downs v. Kroeger*, 200 Cal. 743, 254 P. 1101 (1927), and cases cited therein. Compare *Redfern Lawns Civic Assn. v. Currie Pontiac Co.*, 328 Mich. 463, 44 N.W. 2d 8 (1950).
21. See *Neponsit Property Owners' Assn., Inc. v. Emigrant Industrial Savings Bank*, 278 N.Y. 248, 115 N.E. 2d 793 (1938).
22. Casner and Leach, p. 993, n. 3.
23. 200 Cal. 743, 254 P. 1101 (1927).
24. *Ibid.* Three of the seven justices dissented vigorously—not on the ground that changed conditions could not terminate covenants, but on the ground that in this case the changes were not of the sort that could justify termination.
25. The Constitution of the United States, Amendment V: "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation." This is applicable to the states through Amendment XIV. See *Missouri Pacific Ry. Co. v. Nebraska*, 164 U.S. 403 (1896).
26. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), zoning for industrial purposes; *Berman v. Parker*, 348 U.S. 26 (1954), zoning to develop a better balanced, more attractive neighborhood.
27. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413-416 (1922). For analysis of takings law generally, see Joseph L. Sax, "Takings and the Police Power," *Yale Law Journal* 74 (1964): 36; Frank I. Michelman, "Property, Utility and Fairness: Comments on the Ethical

86 PROPERTY AND RESPONSIBILITY

Foundations of 'Just Compensation' Law," *Harvard Law Review* 80 (1968): 1165; and Joseph L. Sax, "Takings, Private Property and Public Rights," *Yale Law Journal* 81 (1971): 149. In his 1971 article, Sax analyzes takings problems in terms of a conflict between private rights to property and certain "public" rights. While this is arguably an improvement on a straight private-right vs. social-welfare analysis, it leads to unnecessarily frequent conflict of rights situations. My analysis does not.

28. See the discussion of fairness in Michelman, "Property, Utility and Fairness," n. 22, and the general line of argument in Ronald Dworkin, *Taking Rights Seriously*, chap. 7.

29. U.S. (30, June 1982) No. 81-244.

30. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, at 594 (1962).

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

Bibliography

Ackerman, Bruce. *Private Property and the Constitution*. New Haven, Yale University Press, 1977.

— — —, ed. *Economic Foundations of Property Law*. Boston; Little, Brown, 1975.

Becker, Lawrence C. *Property Rights: Philosophic Foundations*. London: Routledge and Kegan Paul, 1977.

— — —, and Kipnis, Kenneth, eds. *Property: Cases, Concepts, Critiques*. Englewood Cliffs, N.J.: Prentice-Hall, 1984.

Held, Virginia, ed. *Property, Profits, and Justice*. Belmont, Calif.: Wadsworth, 1980.

Pennock, J. Roland, and Chapman, John W., eds. *Property, Nomos XXII* (New York: New York University Press, 1980).

