GOD AND THE LAND SYMPOSIUM
OPENING ADDRESS

DEFINING COMMUNITY IN A SOCIETY BASED ON RIGHTS

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Tomorrow will be spent talking about the intersection of religion and land use, and a remarkable array of people who work in this vineyard will tease out chapter and verse on the topic in a host of intriguing ways. My own chosen objective flows from the fact that my invitation says I am invited to give “remarks.” This is a very different invitation, of course, than one that proposes a lecture or even a speech. “Remarks” provides more license. I would like to talk partly about law, about that intersection where the Bill of Rights and land use and religion converge, but also partly about how Americans have thought about these issues over time. Hence, my title: Defining Community in a Society Based on Rights.

It is difficult for most Americans of this generation to imagine that the nation’s discourse about the Constitution and about government ever proceeded on anything other than a conversation about “rights.” Modern discourse has much to do with how the U.S. Supreme Court and state supreme courts have treated constitutions and bills of rights over time, especially during the last half century. For the first half of our national life, it was extraordinarily rare for the Supreme Court of the United States to declare a statute unconstitutional. By late in the twentieth century, such declarations had become regular enough.

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that few would label them extraordinary.

This rising progression of declarations about the unconstitutionality of federal and state statutes has reflected an evolution about the role of judges. When Chief Justice Marshall said, “[i]t is emphatically the province and duty of the judicial department to say what the law is,”¹ that did not mean then what it means for us now. Contemplate, for example, that even Marbury v. Madison was a case in which the judges were trying to decide whether Congress had given them too much power, such that they should stand aside and not exercise the authority expressly given them by the other branches. This is a very different formulation from the way in which many modern American judges approach the topic.²

Of course, the constitutional dialogue changed in a remarkably short period of time, roughly from Brown v. Board of Education³ until the retirement of Justice Fortas, a period of nine or ten years at the most. The high watermark of the Warren-Brennan Court, all would agree, created a revolution, not just in the relationships between the federal and state courts or between the federal government and the state governments, but a revolution in how Americans talk about the way they conduct their lives together. From that period on, talk has centered on what claims we as individuals possess as against the whole of the body politic. This notion about how the country works places judges and lawyers and scholars as central actors. In many ways, it was very thoughtfully conceived and executed by teams of lawyers—and by judges who decided to embrace their claims.

I think most observers believe that one of the results is that the judiciary occupies a relatively larger piece of the ground as compared to the other actors in government than it did before, although not everybody agrees. I once put this idea to Justice O’Connor and she replied, “But what if the Court hadn’t decided Brown?” Still, I think the great weight of opinion is that judges in this era have been called upon to operate in a progressively larger circle than was the case before for most of our history.

As introduction to the subject of religion and land use, I would like to begin with the political theories and the legal theories judges and lawyers employed to address these questions back at

¹ Marbury v. Madison, 5 U.S. 137, 177 (1803).
the very beginning. Remember that, as with most aspects of public and private authority, the legal theory of the British colonies was that the land belonged to the Sovereign, who was free to exercise power except as restrained by Parliament. Remarkably, this is still a piece of British jurisprudence, such that arguments in their courts frequently proceed on nearly the reverse of the American basis. Lawyers in an American court would ask whether a given government actor has authority to act, such as, does this government agency have the power to do this or that? British lawyers would approach the question the opposite way, accepting that government actors are representatives of the Crown and thus have plenary authority to do whatever they wish to do unless the Parliament has enacted a restraint. Of course, such a formulation bears no relation to modern political reality in Britain, but it is the theory on which land use law rested as the British colonial period in America was coming to a close. The Sovereign issued colonial charters and the charters' holders were allowed to use the Sovereign's land for development of public facilities, inasmuch as only the sovereign really owned the land.4

Americans carried this idea with them into the Revolution itself. Most of the very first state constitutions adopted in the period 1776-1777, for example, did not contain any protections against the taking of private property. Only three of those first charters even mentioned the subject, and those three declared that seizure was lawful so long as the legislature authorized the seizure.5 That formulation changed during the American Revolution in part because of the experience people had with our own army, which foraged the countryside looking for sustenance, taking horses or hay or whatever the army needed, and leaving behind scrip. This did not go down very well. John Jay wrote

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4 Quite a different attitude existed concerning personal property. The early and sweeping Massachusetts Body of Liberties, 1641, provided in part:

No mans Cattel or goods of what kinde soever shall be pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford. And if his Cattle or goods shall perish or suffer damage in such service, the owner shall be suffitiently recompenced.


5 For a well-developed historical argument that the authors of the Fifth Amendment intended that it apply only to physical takings by the federal government, see William Michael Treanor, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J. 694, 708 (1985). This work also discusses the impact of republicanism on property rights. Id. at 699-700.
letters to the New York Legislature complaining about what the army had taken from him and others. Soon after the Revolution, the notion that there should be just compensation for any taking appeared for the first time in American law, in the Northwest Ordinance of 1787, adopted by the Confederation Congress meeting in New York at the same moment as the Constitution was being written in Philadelphia.

Taken as a whole, then, it is easy enough to say that the original idea of who owned property and how it could be seized or regulated was one in which the government possessed a great deal more latitude than it has possessed ever since. The constitutional debates of 1787 and those about the Bill of Rights make it clear that only restraints against actual seizure were intended and that even those were consciously designed as restraints on the national government rather than on the states. This was not because there was any doubt among colonials that the government could take actions that would affect our interests. James Madison spoke publicly about the potential effect of government policy on the value of currencies, saying the government can take certain actions that would devalue the very specie that you were holding in your hand. He and others understood that government could act in ways harmful to the property that people owned, but nevertheless, they chose at the moment when it really mattered, in 1790-1791, to foreswear from regulating that in the Bill of Rights.

This arrangement of government power and individual interests prevailed through most of the nineteenth century. In a

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6 The Revolutionary War was underway but two years when prominent citizens began to complain about seizure of property. John Jay submitted a complaint to the New York Legislature about “the Practice of impressing Horses, Teems, and Carriages by the military, without the Intervention of a civil Magistrate, and without any Authority from the Law of the Land.” John Jay, A Freeholder, A Hint to the Legislature of the State of New York (Winter 1778), in 5 THE FOUNDERS’ CONSTITUTION 312 (Philip Kurland & Ralph Lerner eds., 1987) (emphasis omitted).


8 In his Speech Opposing Paper Money before the Virginia Assembly, Madison argued against the effective depreciation of specie by comparing it to changing the nature of a land contract. Paper money, he said, “affects Rights of property as much as taking away equal value in land: illusstrd. by case of land pd. for down & to be conveyd. in future, & of a law permitting conveyance to be satisfied by conveying a part only -- or other land of inferior quality.” James Madison, Notes for Speech Opposing Paper Money (Nov. 1, 1786), in 3 THE FOUNDERS’ CONSTITUTION 392.
case that law students know, *Barron v. Mayor of Baltimore*,\(^9\) a citizen complained about the City of Baltimore having altered the surface drainage in a way that pushed silt into his pier.\(^{10}\) Barron complained that he could no longer use it because something the City had done uphill had made his property economically useless.\(^{11}\) Chief Justice John Marshall was unimpressed: “The question thus presented is, we think, of great importance, but not of much difficulty.”\(^{12}\) He notes that the Fifth Amendment does not apply to the states.\(^{13}\) Case over.

The same jurisprudential view persisted long after the adoption of the Civil War amendments, now seen as the foundation for applying most of the Bill of Rights to state activity. As late as 1884, in another case which we have all read as law students, *Hurtado v. California*,\(^{14}\) the Court said that the federal guarantee of due process meant merely that the state must have gone through whatever process it had decided you were due.\(^{15}\) That approach to Fourteenth Amendment due process prevailed nearly until the turn of the twentieth century. The turning point was the 1897 decision in *Chicago, B. & Q. R. Co. v. City of Chicago*.\(^{16}\) The city had an ordinance governing decisions to build a public street that crosses a railroad track.\(^{17}\) To be sure, building such a street is in fact an inconvenience from the point of view of the railroad. Placing the road does not necessitate eliminating the rail line, but it does mean that trains may have to pause as buggies or automobiles cross the track. The city’s ordinance recognized that inconvenience has value and created a remedy through trial by jury. The ordinance guided the court and the jury on what the value can be, limiting recovery to one dollar.\(^{18}\) Unsurprisingly, the Supreme Court had little trouble calling that a violation of due process. It said the railroad was entitled to prove what the real damages were by reference to actual evidence and not by some artificial standard. In the course of doing so, the Court held for the first time that the Takings

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\(^{10}\) *Id.* at 243-44.

\(^{11}\) *Id.* at 244.

\(^{12}\) *Id.* at 247.

\(^{13}\) *Id.* at 250-51.


\(^{15}\) *Id.* at 535.

\(^{16}\) *Chi., B. & Q. R. Co. v. City of Chi.*, 166 U.S. 226 (1897).

\(^{17}\) *Id.* at 230.

\(^{18}\) *Id.* at 229-30.
Clause of the Fifth Amendment applies to state action. Of this holding set the stage for a decision about a very different kind of taking, a very different kind of Fifth Amendment proposition—the so-called “regulatory taking.” The seminal decision for that concept was Pennsylvania Coal Co. v. Mahon, a 1922 ruling written by Justice Holmes, declaring that the government can take somebody’s land without actually seizing it. This concept became the fulcrum for all sorts of claims through subsequent decades, covering such things as airplane over-flights, which was a recent case that my court decided. To recognize a claim for money against the government even when the government does not seize land produces a result opposite the one Chief Justice Marshall reached in Barron, though for different reasons. Justice Holmes contributes this idea to the conversation, but he also contributes a phrase which has been problematic now for more than three quarters of a century. Government regulation, he says, does not constitute a taking unless it “goes too far,” a formulation that lawyers and judges have been grappling with since 1922.

The present debates about the intersection of individual rights and government regulation mostly flow from what is usually referred to as “the 1987 trilogy” in the legal community. It was a moment in the Rehnquist era when the land owners and the regulators had a shoot-out at the O.K. Corral. The landowners won twice, and the regulators won once.

I will highlight one of those three cases, because it is a case brought by a church. The tale of First English Evangelical Lutheran Church of Glendale v. County of Los Angeles began with a tremendous series of rains and widespread flooding and erosion. The local authorities decided that there should be a temporary building moratorium while they assessed the resulting damage to the landscape and the impact on drainage and the like.

19 Id. at 241.
21 Id. at 415.
22 Biddle v. BAA Indianapolis, LLC, 860 N.E.2d 570, 572-73, 580 (Ind. 2007) (finding that although the noise from the aircraft was considerable, it was not a taking because it did not substantially impair the homeowners’ the use of their property).
The church in question owned a retreat center and it sued for money damages on grounds that the moratorium constituted a taking of its property—the retreat center. Los Angeles’s answer was simple: we haven’t seized your retreat center. Under then-existing precedent of the California Supreme Court, in a case called Agins v. City of Tiburon, a landowner’s only remedy was injunction. If you think you’re really harmed and you want to do something about it, seek an injunction, but we don’t owe you any money for a temporary moratorium.

Chief Justice Rehnquist wrote an opinion on behalf of five justices (indeed, all three of the 1987 trilogy were 5-4 decisions), in which he displayed some excitement at the prospect of being positioned to void Agins. On reflection, the Agins rule was broad enough that it was what state judges sometimes call “cert. bait.” In the end, the legal question was relatively Hornbook law. After all, is there such a thing as a compensable temporary taking? Of course there is. There are temporary takings of all sorts every day. When government builds a highway, it needs more than just the land on which the pavement will be laid. It usually needs a temporary easement on adjoining land in order to move the construction equipment and the like. When I was a trial judge, I litigated cases of temporary takings, and I never doubted that temporary occupancy was worth money. So, the opinion in First English declared that there is such a thing as a temporary regulatory taking and that the fact that one can obtain an injunction does not save the government from having to pay compensation.

As law then, First English was kind of ho-hum. The other two cases are more entertaining. One was Nollan v. California Coastal Commission, and it featured one of those classic California regulatory schemes. Mr. Nollan had a one-story house on the beach, but he wanted a two-story house. The Coastal Commission had a policy aimed at affording average citizens the chance to drive by or walk by and see the ocean. Building a two-story house would make it difficult to see the ocean. If you want a variance from our standards, said the Commission to Nollan, you will have to let us build a sidewalk so that people can walk along the beach between your house and the ocean. In the

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25 See id. at 308.
27 First English, 482 U.S. at 310-11.
28 Id. at 318-20.
development world, this is called an extraction. Justice Scalia's opinion disapproving the Commission’s action treats this extraction as an unconstitutional condition.

The third case of the trilogy, *Keystone Bituminous Coal Association v. DeBenedictis*,\(^{30}\) is a case in which Pennsylvania decided to enact a comprehensive set of regulations on underground coal mines. Among other things, it required mining companies to leave a certain amount of coal under the ground so that the surface land does not subside. The coal company claimed Pennsylvania owed money for what it required they leave in the ground. The Court did not agree. In this comprehensive regulatory scheme, the rights had been carefully balanced between the owners of surface rights and the owners of coal rights. The reason I actually like this case is because Chief Justice Rehnquist said, in a dissenting opinion, “the Court attempts to undermine the authority of Justice Holmes’ opinion . . . .”\(^{31}\) That quip alone was worth the read.

As always, these cases possess value by virtue of the jurisprudence they lay out. They are more important, though, because they represent a jumping-off point for a period during which the intersection between land use regulation and rights-based claims became regular features on the Supreme Court’s *cert.* list. The Court tipped back and forth with some regularity. The *Nolan* formulation, for example, returned twenty years later in the case of *Kelo v. City of New London*,\(^{32}\) won by the state of Connecticut authorities, but to very adverse public reaction. The local redevelopment authority wanted Ms. Kelo’s home so it could create a major center city commercial development. In declaring that such a seizure could be regarded as one for a public purpose, Justice Stevens deferred to the State to impose additional restrictions on its takings power.\(^{33}\) A state officer would call that a really good deed, but it came to be portrayed, largely because of the fury of the dissents, as a declaration that it is all right to seize people’s houses and turn them over to developers.

The 1987 trilogy set in motion this continual turmoil based on clashing rights, and it reflects a way of discussing the subject that describes community life as a zero sum game. It asks a court to

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\(^{31}\) *See id.* at 507 (Rehnquist, C.J., dissenting) (noting that the majority characterizes Justice Holmes’ opinion as “uncharacteristically . . . advisory.”).


\(^{33}\) *Id.* at 489. The Court limited its analysis to whether the condemnation qualified as a “public use” within the meaning of the Takings Clause.
compare one set of rights with another set of rights, leading to an outcome in which somebody will win and someone will lose. And that it will be the judges who decide. That is why I suggested to Justice O'Connor that perhaps the judiciary has come to occupy a bigger piece of the real estate than it did fifty years ago.

I want to suggest that there is another way to talk about the lives we live together. It is the way that people thought about it when James Madison wrote the Bill of Rights. Among the most compelling political themes of that age was what people called “civic republicanism.” The notion was that active participation by citizens acting together to forge collective action for the common good was the best way in which communities or nations could thrive. It thus rested on numerous grounds: active participation, deliberation in the body politic, and a collective dedication to asking: what is the common good of the society and how can we come to an accommodation that reaches out for that objective?

Civic republicanism is an idea that scholars and others occasionally lift up again, a couple of hundred years later, as an alternative way of thinking about our lives, an alternative to the zero sum game, rights-based idea. But quite aside from the work of law writers, it is an idea that resonates in the body politic. It is what you might think of as the collectivist strain in American life. What is the good of the whole? What can the whole do together?

In the fall of 2008, you could hear that theme on the television in the most recent and very effective commercial in which Barack Obama said, “I bring people together.” That represents the collectivist idea that there might be some way in which the country, or some subset of the country, a state or a community, could act together for the common good.

This aspiration proceeds from two premises. One is an idea that flows straight from the American Revolution, that we are free because we govern ourselves collectively. The second

34 Michael Tomasky, Party in Search of a Notion, AM. PROSPECT, July 4, 2008, available at http://www.prospect.org/cs/articles?articleId=11424 (“[Civic republicanism is] the idea . . . that for a republic to thrive, leaders must create and nourish a civic sphere in which citizens are encouraged to think broadly about what will sustain that republic and to work together to achieve common goals.”).

35 Jin Hee Lee, A Civic Republican View of Hospital Closures and Community Health Planning, 35 FORDHAM URB. L.J. 561, 563 (2008) (indicating that civic republicanism emphasizes “community, deliberation and the common good . . . conceives of citizens as part of a larger political community and stresses the potential of reaching . . . the common good through deliberation . . . .”).
premise is that we are free because we are governed by laws and not by men. Now, as I will say in a moment, these two ideas sometimes stand in some tension with each other, and pursuing them both at the same time can be a difficult task. And I should also acknowledge a common critique about republicanism. It is, of course, rather obvious that the people who generated it, the people who lived in accordance with it during the revolutionary period, constituted a relatively small community with a sameness of outlook which excluded many residents from the body politic.

Still, modern constitutionalism can benefit from this idea for two reasons. One is the notion that republicanism fortifies all the actors to resist measures that restrain the liberty of any actor. It is difficult to imagine some of the great cases of the twentieth century except by reference to a commitment that we all have an interest in standing up for anyone who is excluded. That is one republican idea from which modern dialogue would benefit. The other is that republicanism might in fact help redeem the dual promise that we are both self-governors and also governed by laws. They are both legitimate ideas in their own realm, but ideas which are sometimes difficult to reconcile in given situations.

I suggest that civic republicanism is not a principle limited to small communities of similar outlook excluding others, but rather applicable in the modern era under what Kathleen Sullivan has called “rainbow republicanism.” Her notion is that in a pluralist society the plurals can act in favorable ways. She asserts that pluralism may make the notion of common good stronger rather than weaker, to the extent that the actors are committed to it. In this respect, republicanism has four claims on our national life: a claim for deliberateness and deliberation in government; for the political equality of actors; for agreement as the objective as the ideal in regulatory settings; and for active citizenship as making a difference in how the body politic chooses its future.

Let me suggest two examples of how this might work out in real life. One example is close to this symposium’s topic, “God and the Land.” It is thinking of Fourteenth Amendment restraint on state action as a matter of due process and not simply as a path to lead back to the language of “takings.” Ever since Justice Holmes wrote the Pennsylvania Coal decision, takings have been

37 Id. Sullivan dubs this concept “normative pluralism.”
the lawyers’ equivalent of the physicists’ hunt for the quark. I suggest that the ways in which we talk with each other about due process, - how we afford each other notice, the right to be heard, and the opportunity to participate - comes closer and is in fact a more historically legitimate legal doctrine for resolving questions that we now resolve using the Fourteenth Amendment simply as an incorporating path to individual amendments in the Bill of Rights.

The second example is very hands-on. It is the remarkable development in administrative law, also a topic of this symposium’s conversation, called negotiated rulemaking. In the historic model, an agency devised a scheme, announced it in draft form, received critique in public hearings, then returned to redrafting and promulgation. Now, there are agencies, including agencies of the United States, which engage instead in very high level negotiations with all relevant stakeholders. Therefore, before the rule is ever out the door, the agency has maximized the opportunity to be heard and hopefully maximized the outcome for the community in general. My hope is that other examples might prove to be powerful.

Sometimes rank and file Americans give life to the ideals of republicanism. There has been a remarkable recent transformation of public comment to Congressional offices on the topic of a federal rescue for faltering financial institutions. The published news stories of the week have described Congressional staff picking up the phone and hearing constituents say, “Don’t bail out those deep pockets. This is an outrage.” Responding in that environment, the House of Representatives voted down a rescue package on Monday, September 27, 2008. This vote produced a dramatic shift in the phone calls that arrived starting on Tuesday. The tone of the incoming calls on Tuesday was, “I’m worried that something’s going to happen, something very bad for the country. Won’t all of you stop this bickering!” The news

38 Shailagh Murray & Paul Kane, Lawmakers Revise Rescue Plan—Stocks Rise; Senate Aims to Vote Tonight, WASH. POST, Oct. 1, 2008, at A01.

39 See, e.g., David M. Herszenhorn, et al., Bailout Talks Advance, but Doubts Voiced in Congress, N.Y. TIMES, Sept. 23, 2008, at A1 (“A lot of people came up [to Sen. Durbin] and said ‘hi.’ But a lot of them came up and said: ‘Are you really going to do this? $700 billion bailing out the banks?’”); Peter S. Goodman, Chilly Review From Experts, N.Y. TIMES, Sept. 23, 2008, at A21 (expressing the outrage economics felt that “Wall Street, home of the eight-figure salary, may get rescued from the consequences of its real estate bender, even as working families give up their homes to foreclosure.”).

stories this morning suggest a vast change in public sentiment occurred in nearly the twinkle of an eye when people confronted what really might be at stake. This re-thinking produced a new national message: “I don’t like what I saw from the Speaker of the House and from Congressman Frank and from the most conservative and most liberal elements of both parties, and I demand that you sit down and iron this out to avoid this risk of calamity.” That is a version of the American people speaking for the whole good.

But there is another way this happens. Just as lawyers and judges and law professors played such a role in fashioning both the law of rights and the political ideas behind them, so it is that people in our profession, whether they are in private practice or courts, somewhere in government or the academy, are opinion leaders who can have a central role in fashioning new legal devices, political theories, and models of citizenship that can make for a better country and befit a great nation.

41 Murray & Kane, supra note 38. See also Hulse & Herszenhorn, supra note 40 (discussing the risk supporters of the Bill sought to avoid).