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I. INTRODUCTION

The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation."[1] For cases in which the plaintiff property owner claims that a government regulation has effected a taking, the Supreme Court has adopted "essentially ad hoc, factual inquiries" in its decisions, and in so doing has "identified several factors that have particular significance."[2] The principal factors the Court has identified are: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action."[3]

The purpose of this Article is to reexamine these three factors in the light of the text of the Takings Clause. While there is a textual basis for each factor, this Article proposes refinements in the Court's jurisprudence under each to tie it more closely to the clause's text. The clause will then operate less as an ad hoc balancing test, and more as a rule.

The Article begins with a discussion of the key phrases in the text of the clause,[4] and then examines the historical origins of the text.[5] The Article next discusses the textual basis of each of the three factors currently identified by the Supreme Court as the critical weights to be balanced in determining whether a regulatory taking has occurred.[6] In its conclusion, the Article argues that these factors should be considered seriatim, so that the clause is a rule of law—rather than weighed all at once—so that the clause degenerates into a mere mask for judicial predilections.[7]

II. KEY PHRASES IN THE TEXT

It is important to begin by reading the text of the Takings Clause carefully and exploring where the text itself leads us. The text's key phrases are (1) "private property," (2) "just compensation," and (3) "taken for public use." Each is discussed below.

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1. U.S. CONST. amend. V.

2. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

3. *Id.*; Connolly v. PBGC, 475 U.S. 211, 225 (1986); Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 191 (1985); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979). The most recent application of these three factors, in a unanimous opinion that also recognized the "ad hoc" nature of the inquiry, was Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 113 S. Ct. 2264, 2290-92 (1993).

4. *See infra* part II.

5. *See infra* part III.

6. *See infra* parts IV, V, and VI.

7. *See infra* part VII.

A. "Private Property"

There is no way to justify reading the term "private property" to apply only to certain kinds of private property. "Private property" is a broad concept indeed, but it was such a concept at the time it was written. It would have been simple enough to have said "real property," or "a fee simple absolute in real property," but the broader protection was instead adopted.

The distinction recently drawn by the Supreme Court between real property and personal property in *Lucas v. South Carolina Coastal Council*[8] is therefore unsupportable. The Court reasoned essentially that the government has regulated personal property more than real property, that accordingly personal property owners were on notice that their property might be taken, and that therefore the Takings Clause afforded them less protection. At a minimum, this argument ignores the cause-and-effect relationship between what courts allow governments to do (without paying for it) and what governments are then likely to do.[9] To put it less charitably, this is essentially an argument that property owners cannot complain that the government ignores the Constitution, because it has done so in the past.

There is also no basis in the text for excluding takings of a certain duration from the just-compensation requirement (so long as the property was taken for long enough to have had more than a de minimis effect on its value to the owner). There is no distinction drawn in the clause between permanent and temporary takings—and no wonder. Such a distinction is logically indefensible and practically unworkable.

Nor is there any textual basis for refusing to compensate for "regulatory takings"—that is, instances where the government abridges private property rights by regulating their exercise, rather than by simple and forthright seizure.[10] To be sure, the requirement that the property be "taken for public use" will, as discussed below, defeat some claims of regulatory takings but few claims of "eminent domain" takings. But, as Professor Richard Epstein concludes,

> There is no reason to think that private property, as an undefined term in the Constitution, was to be understood in a way completely at variance

8. 112 S. Ct. 2886, 2899-2900 (1992).

9. *Cf. Lucas*, 112 S. Ct. at 2903 (Kennedy, J., concurring in the judgment) ("There is an inherent tendency towards circularity in this [reasonable, investment-backed expectation] synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is.").

10. The Supreme Court repeatedly has recognized regulatory takings. United States v. General Motors Corp., 323 U.S. 377-78 (1945). *See also Lucas*, 112 S. Ct. at 2900 n.15; First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316-17 (1987) (collecting cases); Munn v. Illinois, 94 U.S. 113, 141-45 (1877) (Field, J., dissenting).

> with the accepted usages of that time or was to mean bare possession, with which it had long been contrasted under both the English and Roman law of real property.[11]

Moreover, if a distinction is drawn between "physical" and "regulatory" takings, the calculation of the just compensation for even a physical taking becomes problematic. The value of property normally cannot be calculated without considering the income that can be earned from it; that is why an acre in Manhattan is worth more than an acre in the Mojave desert.[12] It seems strange that this potential income is wholly compensable so long as the government has taken, along with it, the seisin itself, but is completely incompensable otherwise.

Denying the compensability of regulatory takings creates unresolvable paradoxes. Is a distinction to be drawn between the government effecting a complete regulatory taking on the first day, rendering the property worthless or nearly so, and then taking the deed itself on the second day, versus the government taking both bites of the apple at once? What if the government attempts to argue that certain income-producing aspects of the property cannot properly be considered in establishing the just compensation for the physical taking, since those aspects could have been taken without compensation had this been done separately?[13] The Supreme Court was surely right in *United States v. Lynah*[14] when it said:

> Where the government by the construction of a dam or the public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested.[15]

B. "Just Compensation"

Nor is there much ambiguity in the phrase "just compensation." It is hard to see how it can mean anything less than "full compensation." Using

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11. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 59 (1985) (footnote omitted).

12. *See* Monongahela Navigation Co. v. United States, 148 U.S. 312, 328-29 (1893).

13. *See id.* at 312, 322, 337-38 (1893).

14. 188 U.S. 445, 470 (1903).

15. In United States v. Cress, 243 U.S. 316 (1917), the Court cited *Lynah* and extended it to cover two other situations resulting from the government's installation of a lock and dam system: intermittent (as opposed to permanent) flooding, and raising the water level so as to prevent the drop in current necessary to operate a mill.

the adjective "just," for instance, to shoehorn in considerations of how badly the public needs the use of the private property, is untenable. It would mean that in the most classic sort of taking—condemnation and seizure of private land for the building of a fort—no compensation need be paid, for surely in that situation the public's need may be great indeed. It would also necessitate the court's involvement in a very unjudicial inquiry, namely weighing the strength of the public's claim on the private land.[16]

There also seems to be no textual justification for limiting considerations to "fair market value" when to do so leads to unjust compensation. This point is discussed at greater length by Professor DeBow.[17]

Thus, a straightforward reading of the text leaves the terms "private property" and "just compensation" in the Takings Clause very broad.

C. "Taken for Public Use"

The phrase "taken for public use" is a more difficult matter. "Taken" is a narrower and more specific verb than "deprive," which appears in the immediately preceding clause in the Fifth Amendment. That is, to say that "No person shall . . . be deprived of . . . property" would appear to be a broader injunction than saying that private property shall not be "taken." This is because "taken" connotes property leaving one person's hands and

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16. In *Monongahela Navigation Co.*, 148 U.S. at 326, the Court wrote:

> The noun "compensation," standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective "just" had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective "just." There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. "No person shall be held to answer for a capital, or otherwise infamous crime," etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the "just compensation" is to be a full equivalent for the property taken. This excludes the taking into account, as an element in the compensation, any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated, and leaves it, to stand as a declaration, that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner.

17. Michael DeBow, *Unjust Compensation: The Continuing Need for Reform*, 46 S.C. L. REV. 579 (1995); *see also Monongahela Navigation Co.*, 148 U.S. at 325-29; United States v. Grizzard, 219 U.S. 180, 182-86 (1911).

becoming the property of another. Deprivation has no such connotation. Thus, if a right in the property owner's bundle is simply extinguished, it might be plausibly argued that, while a deprivation has been effected, a taking has not.

This argument is greatly bolstered by the remaining key phrase in the clause, "public use." Even if it might be argued that the simple extinguishment of a right *is* a taking—after all, the right certainly has been taken *from* the property owner even if it no longer resides anywhere, just as your hat would be taken even if the taker immediately threw it out the window—it is hard to see how in that situation there has been a taking for public *use*. The clause says "public use," not "public purpose." How can the public "use" something that no longer exists?

To be sure, it might be argued that it is "useful" to the public to prohibit the exercise of certain property rights. And it is also certainly true that, from the property owner's perspective, it doesn't matter whether the right he has lost is one that was taken from him for public use, or whether he has simply been deprived of it. But the text remains, and it is hard to affix the label of "taken for public use" to a law simply barring the exercise of some property right.

It might be argued, too, that the phrase "taken for public use" appears because the archetypal situations where the Framers thought there would be a taking certainly involved public use. To the Framers, then, the phrase was redundant, not limiting, although it does show that the Framers intended other words in the text to be more limited than their plain meaning might otherwise suggest. Thus, the phrase might indicate, in particular, that "private property" and "taken" should not be read so broadly as to cover regulatory takings, since many regulatory takings are not "for public use"—and even when they are, the now-narrowed definition of "private property" and "taken" prevent their being covered by the clause.

This argument sounds plausible, but it is ultimately unpersuasive because it boils down to an assumption of the conclusion. The conclusion assumed is that the Takings Clause covers no more than the physical taking of personal or real property, and that it covers those takings whether for public use or not. There is some intuitive, historical appeal to this result. But to reach it, each phrase in the clause is construed in a way quite at odds with what it means. Thus, unless there is some additional evidence—and there appears to be none—to support this narrow reading as the proper starting place, this reading of the text is not the most natural one and, therefore, cannot of its own justify the result it reaches.

Let us assume instead that, in fact, the Framers wished to limit the requirement of just compensation to cases where private property was "taken for public use." Could they have written the clause in a way that made that

desire clearer? No such text comes to mind.[18] Perhaps "just compensation shall be paid for private property taken for public use," but it is not that much clearer, and besides the rest of the Fifth Amendment—indeed, the rest of the Bill of Rights, except the Sixth Amendment and the first part of the Seventh—is written in terms of what the federal government may *not* do.

If, on the other hand, the Framers wanted the Takings Clause to provide a general prohibition against any taking not for public use, in addition to a requirement of just compensation for public-use takings, they could have said so much more clearly; similarly, if they intended a broader term than "public use," that could have been easily accomplished as well. But the Takings Clause does not say: "nor shall private property be taken, unless for public use upon payment of just compensation,"[19] nor does it say "taken for legitimate public purpose" or "taken pursuant to Congress's power," instead of "taken for public use." Indeed, if the only requirement were that the federal government be acting pursuant to a legitimate purpose, then no phrase would be needed at all, since that requirement is implicit throughout the Constitution.

Even if it made no sense to limit the clause to takings "for public use"—and, as discussed below, it might make very good sense—that is the way the clause reads. It is not at all ambiguous. The prepositional phrase simply cannot be read as broadening rather than narrowing the clause's scope. Indeed, a prepositional phrase beginning with "for" appears twice more in the Fifth Amendment, and in both cases there is no doubt that the phrase is narrowing the scope of the Amendment.[20]

There is no more reason to suppose that the phrase "for public use" does not qualify the Takings Clause than to suppose that the phrase "without due process of law" does not qualify the preceding claims in the Fifth Amendment. The Constitution generally, and certainly the Takings Clause itself, is not so lengthy that a phrase should be lightly presumed to have wandered in and remained there without deliberation and scrutiny.

The context of the Takings Clause is the Fifth Amendment, which deals largely with constraints on the federal government when it is proceeding criminally against an individual. The phrase "for public use," then, serves also to distinguish situations from those in criminal law where the taking is part of the punishment. Without the phrase, fines and criminal forfeiture

18. This is especially so when this additional constraint is added: the language must not suggest, as a negative pregnant, that takings not for public use *are* ipso facto constitutional.

19. Compare this with U.S. CONST. amend. V, cl. 1 ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .").

20. U.S. CONST. amend. V ("No person shall be held to answer *for a capital, or otherwise infamous crime*, unless on a presentment or indictment of a Grand Jury . . ., nor shall any person be subject *for the same offence* to be twice put in jeopardy of life or limb . . .") (emphasis added).

would be unconstitutional.[21] But it seems unlikely that the phrase "for public use" means *only* "except for punishment"—had they intended this narrow meaning, the Framers easily could have used less ambiguous text.

It is, finally, quite plausible that the Framers intended to limit the just compensation requirement to takings "for public use." They may well have thought that takings for other than public use had to be treated differently—that some government rationales were insufficient to support the taking, whether or not just compensation was paid, and that others were permissible, even without a payment of just compensation. The "designer drug" case[22] is an example of the latter; an action supported by no enumerated power is an example of the former. Indeed, the relevant universe might, to the Framers, have been divided into precisely three parts: takings for public use, which are permitted so long as just compensation is paid; takings for some other public purpose pursuant to an enumerated power,[23] which are permitted whether or not just compensation is paid; and all other takings, which are unconstitutional, whether compensated or not.

Defining what is and is not a taking "for public use" is not an easy task. But the words are there; they should not be ignored just because some would prefer that they were not.

III. HISTORICAL ORIGINS OF THE TEXT

There is nothing in the historical background of the Takings Clause to support a departure from its text. The clause was not a simple codification of rights that had existed already. On the contrary, "[u]ncompensated takings of private property occurred regularly in the revolutionary era."[24] Thus, it is difficult to argue that the clause was intended simply to restate existing rights, and that the text should not get in the way of accepted historical practice. And, as discussed in this Part, there is no evidence in the takings protections that did exist in 1791 to support a nontextual interpretation.

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21. For a forerunner of the drug-dealer "asset forfeiture" laws, see Mugler v. Kansas, 123 U.S. 623, 670-74 (1887); *id.* at 676-78 (Field, J., dissenting). Because *Mugler* was a Fourteenth Amendment due process case, the distinction between civil and criminal "takings" was not addressed.

22. *See infra* part VI.B.

23. The way I have stated the second class probably contains a redundancy: any purpose pursuant to an enumerated power is ipso facto "public."

24. William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 698 (1985). Thus, the Magna Charta allowed government takings without provision for just compensation: "No free man shall be . . . disseised . . . except by the lawful judgment of his peers or by the law of the land." MAGNA CHARTA art. 39.

The Treanor Note does an excellent job collecting sources on the Takings Clause's origins, and the discussion in the text draws heavily on them.

A. The Limited Historical Evidence

Prior to the ratification of the Bill of Rights, only two state constitutions had takings provisions. Vermont's provided that "whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money."[25] Massachusetts declared that "whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."[26] In addition, the Northwest Ordinance stated: "should the public exigencies make it necessary for the common preservation to take any person's property, or to demand his particular services, full compensation shall be made for the same . . . ."[27]

The text of the clause originally proposed by James Madison read: "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation."[28] Thus, the final text—also drafted by Madison—is shorter, broader, and more direct, but there appears to be no extrinsic evidence explaining why the text was changed.[29]

Soon after the Bill of Rights was ratified, Madison published a brief essay titled "Property" in the March 27, 1792, *National Gazette*. The essay ascribes a remarkably broad definition to the word "property," saying that in its *narrow* sense it encompasses "a man's land, or merchandize, or money," and that "[i]n its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right . . . ."[30] Madison laments "arbitrary seizures of one class of citizens for the service of the rest," "arbitrary restrictions, exemptions, and monopolies," and even "unequal taxes [which] oppress one species of property and reward any species . . . ."[31] In the intriguing penultimate paragraph in the essay, Madison writes:

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25. VT. CONST. of 1777, ch. I, art. II, *reprinted in* VERMONT STATE PAPERS 241, 242 (W. Slade ed., 1823).

26. MASS. CONST. of 1780, part I, art. X, *reprinted in* JOURNAL OF THE CONVENTION FOR FRAMING A CONSTITUTION FOR THE GOVERNMENT OF MASSACHUSETTS BAY 225 (Boston ed., 1832).

27. Northwest Ordinance of 1787, art. 2, *reprinted in* 32 JOURNALS OF THE CONTINENTAL CONGRESS 340 (Hill ed., 1936).

28. Speech Proposing the Bill of Rights (June 8, 1789), *in* 12 JAMES MADISON, THE PAPERS OF JAMES MADISON 201 (Hobson et al. eds., 1979).

29. Treanor, *supra* note 24, at 711.

30. MADISON, *supra* note 28, at 201.

31. *Id.* at 267. *See also id.* at 709 (footnotes omitted):

> During his legislative career in Virginia, Madison had championed the interests of property. He had opposed state seizure of loyalist property, pushed through the first road bill providing compensation for unimproved land, fought against the introduction of paper money to aid debtors, and opposed attempts to forestall debt collection.

> If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to the owner, and yet *directly* violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which *indirectly* violates their property, in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and sooth their cares, the influence will have been anticipated, that such a government is not a pattern for the United States.[32]

B. Analysis of the Evidence

This history, while surprisingly truncated, is instructive as to the meaning of the key terms in the text. As to "*private property*," there is no basis on which to limit the term artificially, and a good deal of evidence that the intuitively broad meaning—for it is a broad term—is the correct one. None of the contemporaneous documents seek to limit the term by defining it in a certain way.[33] Madison's essay considers personal property ("merchandize") and money, in addition to "a man's land," to be within even a narrow construction of the term; and Professor Epstein has pointed out that an artificial limitation on the term to include only "bare possession" is at odds with the historical understanding of the term.[34] Thus, neither a "horizontal" (only real property) nor a "vertical" (only possessory, versus use, rights) limitation can be supported.[35]

The other, contemporaneous takings clauses do not use the term "*just compensation*"; instead, they say "equivalent in money" (Vermont), "reasonable compensation" (Massachusetts), and "full compensation" (Northwest Ordinance). Assuming that the Framers were aware of these other terms, but

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32. *Id.* at 267-68.

33. Treanor, *supra* note 24, concludes that the Vermont Constitution intended to broaden the definition from only improved property to all property, unimproved or not. Other states had paid compensation only for improved land. *Id.* at 702-03.

34. *See supra* note 11, and accompanying text.

35. Treanor's conclusion, *supra* note 24, at 711, that only "direct, physical taking[s]," were covered is therefore puzzling, if it means that regulatory takings were not covered. (Treanor concedes that both real and personal property were to be covered, *id.* at 712 n.99.) The only basis given for this conclusion is the penultimate paragraph in Madison's essay on "Property." Apparently Treanor reads this paragraph to characterize the meaning of the Takings Clause as "[no property] shall be taken *directly* even for public use without indemnification to the owner" (emphasis in original), and the rest as a moral and logical—but not legal—extension of the Clause to other liberty protections. See *id.* at 710-13. That bifurcation may well be correct, but it does not follow that a regulatory taking cannot be characterized as "direct" and "for public use," nor, conversely, that regulatory takings fit within Madison's description of "indirect" takings.

rejected them, what does this tell us of their choice of "just compensation"? It apparently indicates that courts were to be allowed greater leeway in considering factors beyond the simple value of the taken property than either Vermont's or the Northwest Ordinance's language would have perhaps allowed, but not as much as Massachusetts'. Thus, it is entirely proper for courts to consider the *net* effect of the taking, including any average reciprocity of advantage to the property owner, but the award still must be "just" to the individual.

The phrase "*taken for public use*" has as its counterparts "taken for the use of the public" (Vermont), "whenever the public exigencies require, . . . appropriated to public uses" (Massachusetts), and "should the public exigencies make it necessary for the common preservation to take any person's property, or to demand his particular services" (Northwest Ordinance). In addition, Madison's proposed draft said "obliged to relinquish his property, when it may be necessary for public use," and his essay contains the phrase "nor shall be taken *directly* even for public use without indemnification to the owner" (emphasis in original).

The phrase "for public use" has been commonly misinterpreted in two respects: first, the clause as a whole has been read as an affirmative prohibition of all takings (whether or not compensated) *not* for public use; and, second, it has been read to mean "for legitimate public purpose," so that there is no longer any "use" requirement.

As to the former point, it is certainly worthy of note that all of the texts contemplate as a premise to any taking that there be some public need; given that, isn't it fair to conclude that, without that premise, no taking would be permissible? And Madison came close to saying this in his essay: no property shall be taken "even for public use" without just compensation.

But none of this is to say that the premise must be found in the Takings Clause itself, rather than elsewhere in the Constitution's text. The principle of enumerated powers, after all, is required by the Constitution's text, regardless of what one part of the Fifth Amendment says.[36] That seems to be the better way to meet the premise of required public need, rather than in a very awkward reading of the Takings Clause.

The contemporaneous texts seem to address the latter misinterpretation as

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36. *See also* Treanor, *supra* note 24, at 709 (footnote omitted): "few initially felt that a just compensation requirement was a necessary restraint on a federal government that would have little occasion to take property . . . ." In Block v. Hirsh, 256 U.S. 135, 144 (1921), the property owners argued:

> There is no power in the United States, through Congress or otherwise, to take private property for private use. The right to take it at all, is not expressly conferred by the Constitution, but, as held in Kohl v. United States, 91 U.S. 367, 374, 375 (1876), the right of eminent domain, to which all lawful taking is referred, is a necessary attribute of sovereignty, but limited to it for sovereign purposes.

well. The two state constitutional texts came nowhere close to saying anything as broad as "for legitimate public purpose," but instead seemed to contemplate some immediate use of the taken property.[37] If it is objected that the phrase "for public use" should not be imparted with too much significance—that the purpose of the phrase is really just to serve as a rhetorical counterpoint to "private property," and it really means nothing more than "for public purpose"—one ready answer is, therefore, that the idea that the property taken then would be used by the public appears in the two contemporaneous state takings clauses, and in them there is no phrase "private property" with which to contrast it. In them the phrase is "for the use of the public" (Vermont) and "whenever the public exigencies require . . . be appropriated to public uses" (Massachusetts), so it seems clear that the idea of public use was being incorporated, not just used as a contrapuntal. Likewise, in the Northwest Ordinance, the word "use" does not appear at all, and something more like the rationale of "public purpose" did ("should the public exigencies make it necessary for the common preservation to take any person's property"), and yet this language—passed just two years before—was not followed. In addition, Madison's originally proposed text included the term "for public use" *without* the term "private property," and the principal change made in his draft was to shorten it; if the phrase "for public use" was really surplusage, it would have been easy enough to strike it. Finally, as a general rule it should be assumed that each word in a constitution is there for a reason.

The word "use" is and was distinct from the word "purpose," and there is no reason to suppose that the Framers used the former when they meant the latter. The word "use" appears in Article I, Section 10, clause 2 of the Constitution ("the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States"), for instance, as well as in the Takings Clause; the word "Purposes" appears in Article V (ratified amendments "shall be valid to all Intents and Purposes, as Part of the Constitution") and the word "Purpose" appears in, for instance, Article II, Section 1, Clause 3 ("A quorum for this Purpose shall consist of," etc.), as well as in the resolution of September 17, 1787, in which the Constitutional Convention unanimously transmitted the Constitution to the states for ratification and implementation ("the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the votes for President"). "Use" has had a much different—and narrower and more specific—meaning than general purpose, rationale, or reason for hundreds of years. Its principal definition is "The act of *employing*

37. The three examples in Treanor, *supra* note 24, of "[u]ncompensated takings of private property [which] occurred regularly in the revolutionary era" would probably each have involved public "use": "Loyalist property was seized," "Undeveloped land was taken for public roads," and "Goods of all types were impressed for military use." *Id.* at 698 (footnote omitted); *see also id.* at 711 n.97.

a thing for any (esp. a profitable) purpose; the fact, state, condition of being so *employed*; *utilization or employment* for or with some aim or purpose, *application or conversion* to some (esp. good or useful) end."[38] In sum, it means employing with a purpose; it does not mean purpose.

There is, finally, also a great deal of logic in insisting on payment of just compensation when the government has taken private property and is itself using it, and in not requiring such payment when the government has simply outlawed the use of the property. As a matter of equity and economics, it is hard to conceive of a situation where the government is justified in taking property that a private citizen has acquired, developed, or built, and appropriating it to the state's use without compensating the individual. That is certainly not fair, and it creates an enormous disincentive for private citizens' initiative. Conversely, it is quite conceivable that banning a particular product or use of property altogether may make equitable and economic sense even where no compensation is paid—for instance, banning the emission of deadly fumes. Thus, proceeding from Lockean premises, Professor Epstein defends, on economic grounds, uncompensated takings under the police power that are "an attempt to control the [owner's] wrong,"[39] it being understood that "[t]he sole function of the public power is to protect individual liberty and public property against all manifestations of force and fraud."[40] Even in non-Lockean cases, it is less hypocritical for the government to ban something altogether than to take it from someone and continue itself to use it. That is, in the case of an outright ban, it is more likely that the government is acting because it really believes that the use of certain property in a certain way by *anyone* is harmful, whereas taking the property for its own use is simply theft.

IV. "ECONOMIC IMPACT"

A. A Fair Starting Point

The first of the three factors typically weighed by the Supreme Court in

38. OXFORD ENGLISH DICTIONARY 3573-74 (1984 compact ed.) (emphasis added). The OED indicates that the word "use" has meanings that are also specifically law and property-oriented (italics in original: I.b. "In legal phr., coupled with *occupation* (or *occupancy*)"; 4. "*Law*. The act or fact of mining, holding or possessing land or other property so as to derive revenue, profit, or other benefit from such." (inc. 1766 cite to Blackstone); 18. "*Law*. The advantage *of* a specified person or persons in respect of profit or benefit derived from lands or tenements, etc." To be sure, the sixteenth entry is "A purpose, object, or end, esp. of a useful or advantageous nature," but the examples given of this usage seem also to hinge on the *employment* of an object to that purpose, object, or end.

39. EPSTEIN, *supra* note 11, at 121.

40. *Id.* at 112.

determining whether a regulatory taking has occurred is "the economic impact" of the regulation on the claimant.[41] Properly limited, this factor squares with the clause's text. If no diminution or only a de minimis diminution in value has been suffered, then a claim is properly dismissed, for the just compensation will be zero. For this reason, the economic impact inquiry is a fair starting point in order to to screen out such cases.

But for the more than de minimis case, consideration of the degree of impact seems more emotionally satisfying than textually permissible. One would of course expect the degree of economic impact to be relevant to calculating the *amount* of just compensation, but it has no bearing on whether private property was taken for public use in the first place. The Court said in *Armstrong v. United States*[42] that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." If the Court's statement of the clause's "design"—and not the text of the clause itself—is the touchstone, then it is easy to see why a small diminution in value need not, "in all fairness and justice," be compensated. But of course it is the text that should be the touchstone, and accordingly even small takings must be justly compensated.

There are, however, a few additional points worth making. It is perfectly appropriate to consider the net effect of a law on the value of the claimant's property. Thus, if a statute limits the amount of wheat that can be sold, but as a quid pro quo provides price supports for wheat, the two effects—one negative but one positive—must be considered together in determining if the statute actually effected any diminution in value of the farmer's property. Similarly, a zoning ordinance may prevent the sale of a lot for industrial use, but thereby increase its value for residential use. This "average reciprocity of advantage," as the Court has called it,[43] may well defeat a claim that there has been a (net) taking.

In determining whether reciprocity of advantage exists, an issue may arise as to how broadly government benefits may be considered. At the extreme, for instance, it might be argued that, without the police and the national defense, all private property is at risk, and so the government's leaving the property owner with anything at all is to the owner's net reciprocal advantage. That the argument can be taken to this extreme proves that any claimed reciprocity of advantage must be limited to a defined program.[44]

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41. *See supra* note 3 and accompanying text.

42. 364 U.S. 40, 49 (1960).

43. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *Lucas*, 112 S. Ct. at 2894.

44. In *Monongahela Navigation Co.*, 148 U.S. at 326, the Court made essentially this point when it said that just compensation necessarily excludes "any supposed benefit that the owner may receive in common with all from the public uses to which his private property is

Similarly, it cannot credibly be argued that whether there exists a reciprocity of advantage should be judged in the aggregate, rather than on an owner-by-owner basis. That approach would be entirely at odds with the whole rationale of the Takings Clause, which is to compensate those *individuals* required to carry a burden for society's overall benefit.

B. "Partial" Takings

The Court, in the *Lucas* case, recently held that where there has been a *complete* diminution of value, there has been a taking and there is no need for "case-specific inquiry into the public interest advanced in support of the restraint."[45] The Court went on to discuss, however, that the prohibition of a common-law nuisance would not require compensation since then "the proscribed use interests were not part of [the] title to begin with."[46] This makes perfect sense, with of course the caveat just discussed: there is nothing special about a *complete* diminution in value, so long as there is *some* diminution in value.[47]

Nor can there be drawn a distinction between a prohibition that is complete as to a particular interest, and a prohibition that is only partial as to that interest. Thus, the government cannot take one acre of a thousand-acre tract, leaving the rest, and claim there was no taking; or take all of the water rights of a tract, leaving the other mineral rights, and claim there was no taking; or take some of the water rights of a tract, leaving the other water rights, and claim there was no taking.[48]

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appropriated . . . ."

45. 112 S. Ct. at 2893.

46. *Id.* at 2899 (footnote omitted). This point is discussed at greater length in part VI below.

47. *Cf. id.* at 2919 (Stevens, J., dissenting) (criticizing the arbitrariness of a distinction between 100% takings and 95% takings); *id.* at 2895 n.8 (majority's response to Stevens's dissent, namely that 95% taking may be compensable in some circumstances, too). *See generally* Steven J. Eagle & William H. Mellor III, *Regulatory Takings After the Supreme Court's 1991-92 Term: An Evolving Return to Property Rights* 29 CAL. W. L. REV. 209 (1992).

48. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436-37 (1982) ("constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied") (footnote omitted): EPSTEIN, *supra* note 11, at 57-62 (chapter on "Partial Takings: The Unity of Ownership"). *See also Loretto*, 458 U.S. at 430 ("permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land") (citations omitted); *id.* at 438 n.16 ("whether the [installation] is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox"). *Contra* Thomas Hanley, *A Developer's Dream: The United States Claims Court's New Analysis of Section 404 Takings Challenges*, 19 B.C. ENVTL. AFF. L. REV. 317, 320, 345, 348-49, 351-53 (1991) (contending that what government has taken should be balanced against what it has not).

Any other approach will confront the courts sooner or later with a—probably unsolv-

On this point, it is certainly troublesome that the Court in *Keystone Bituminous Coal Association v. DeBenedictis*[49] stressed the importance of determining the percentage of the property value taken.[50] More generally and worse, the Court seemed to frame the issue as whether the property owners after the taking could still "profitably engage in their business"[51]—implying that if a profit can still be turned, it doesn't matter if that profit is diminished.[52] And the dissent may have been correct that, as a matter of fact, there was a more than de minimis diminution in both value and profit.[53] Nonetheless, much of *Keystone*'s authority can be plausibly limited as dicta on the grounds that the majority apparently claimed it had shown that the owners' interests had not—in the "critical"[54] posture of the case—been proved to have been "materially affected"[55] at all with respect to the coal in place, or with respect to the support estate, given the abbreviated record.[56]

C. "Temporary" Takings

Nor is there a textual basis for considering the duration of the government's taking as other than a factor in calculating the amount of compensation that will be just. Property taken for a short period of time is still taken. Where the duration is very short, there may be no just compensation due, simply because the claimant has suffered no injury; indeed, in such cases the claimant may well lack standing and his claim will be nonjusticiable. But where more than de minimis injury in fact has been suffered, some amount of compensation will be just.[57]

Thus, in *United States v. Cress*,[58] the Court found that the government's construction of a lock and dam system effected a compensable taking because of the flooding it caused, even though the flooding was only intermittent:

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able—riddle: Is the taking of half of all the property, or all of half the property? *Cf. Lucas*, 112 S. Ct. at 2894 n.7; *id.* at 2913-1914 (Blackmun, J., dissenting); *id.* at 2919-20 (Stevens, J., dissenting).

49. 480 U.S. 470 (1987).

50. *Id.* at 497-505.

51. *Id.* at 485.

52. *See also id.* at 446, 494; *cf. id.* at 515 (Rehnquist, C.J., dissenting).

53. *See id.* at 515-20.

54. *Keystone*, 480 U.S. at 494.

55. *Id.* at 499.

56. *See id.* at 501-02 & n.29.

57. *See supra* part IV.A; *see also Lucas*, 112 St. Ct. at 2901 n.17. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), has dicta to the contrary, *id.* at 427-28, 434, 435 n.12; *but see id.* at 442-43 (Blackmun, J., dissenting); *id.* at 447-51 (persuasively criticizing the permanent/temporary distinction made by the majority.)

58. 243 U.S. 316 (1917).

> There is no difference of kind, but only of degree, between a permanent condition of continual overflow by back-water and a permanent liability to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other. If any substantial enjoyment of the land still remains to the owner, it may be treated as a partial instead of a total divesting of his property in the land. The taking by condemnation of an interest less than the fee is familiar in the law of eminent domain.[59]

A more recent case on this point is *First English Evangelical Lutheran Church v. County of Los Angeles*,[60] which held that an interim ordinance denying all use of a landowner's property effected a compensable taking, even though the taking may have been only temporary. *First English* cited favorably cases "involv[ing] appropriation of private property by the United States, for use during World War II," stressing that while the takings were temporary, "there was no question that compensation would be required for the Government's interference with the use of the property . . . ."[61]

In three significant respects, however, the Court hedged in *First English*. First, it repeatedly stated that it was addressing situations where the landowner had been denied *all* use of his land.[62] As discussed elsewhere in this Article,[63] this is an untenable distinction. Second, the Court seemed to say that the government is not to be held responsible for a decline in property value that occurs prior to—and, presumably, because of—its final condemnation.[64] This distinction is untenable.[65] Finally, the Court reserved the "quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like . . . ."[66] This distinction actually *is* tenable, since in these circumstances the owner was likely on notice at the time the property was acquired of the need for government permission for certain activities.[67] Likewise, the owner may be on notice not only that the permit is needed, but also that its processing takes time. When the owner had this notice at the time the property was acquired, he cannot claim that a right was taken from him, for

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59. *Id.* at 328-29.

60. 482 U.S. 304 (1987).

61. *Id.* at 318 (citing Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945)); the Court also relied on United States v. Dow, 357 U.S. 17 (1958).

62. *See* 482 U.S. at 318, 321, 322; *but see id.* at 319 ("governmental action that amounted to a taking").

63. *See supra* text accompanying notes 48-54.

64. 482 U.S. at 320.

65. *See infra* note 83.

66. 482 U.S. at 321.

67. *See infra* text accompanying note 83.

he never had a right to that permit-free or delay-free use to begin with.[68] Postacquisition permitting requirements are different, but even then the owner must "mitigate" the harm by using reasonable foresight in applying in advance.

V. "INVESTMENT-BACKED EXPECTATIONS"

The second factor the Court weighs is "the extent to which the regulation has interfered with distinct investment-backed expectations."[69] This criterion is sound, if we always return to its roots in the word "taken."

A. What Was in the Bundle You Bought?

The word "taken" in the Takings Clause provides a narrower protection than "deprive" (the preceding verb in the Fifth Amendment) in two respects. The first, discussed earlier,[70] is that the former denotes not only that the right is lost to one person, but that it came into the possession of another. The second is that, for a right to be taken from you, it had to be in your possession at the time of the taking; but you can be deprived of something that you never had in the first place.

This latter point is important in fitting the clause together with the common law. If a particular use of property was considered tortious under the common law, a statute prohibiting that use cannot credibly be said to have "taken" anything from the property owner, since that right never was in his bundle of property rights to begin with. Thus, Professor Epstein is quite right that the common law is very important in delineating compensable takings.[71] If a use was tortious under the common law, its prohibition by a statute is not compensable.[72] By the same token, if at the time property was acquired a given use was prohibited by statute or regulation, when that prohibition is enforced the property owner cannot complain that a right has been taken from

68. The notice point is discussed at greater length in part V *infra*, "Investment-Backed Expectations."

69. *See supra* note 3 and accompanying text.

70. *See supra* part II.C.

71. The dissent in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. at 511-12, reached the same conclusion by reasoning that the "*nature*" of the government action is special in these cases: "a taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use" (citations omitted).

72. The converse, however, is not necessarily true. Prohibition of uses not tortious at common law are not necessarily compensable, for such prohibitions may not "take[] [private property] *for public use*." And, as discussed next in the text, a given use may have been excluded from the property bundle by statute or regulation, as well as by common law.

him.[73]

The second footnote in *Nollan v. California Coastal Commission*[74] bears discussion here. The Nollans had originally leased their beachfront property with an option to buy,[75] but that option to buy was conditioned on their promise to demolish the existing bungalow and replace it. That in turn was contingent on obtaining a permit from the California Coastal Commission.[76] The permit was granted, subject to the condition that the public be granted an easement across the Nollans' property.[77] Justice Scalia's opinion held that there had been a compensable taking since the easement served no plausible "land use" public purpose with an "essential nexus" to the permit requirement.[78]

On the way to this conclusion, he dealt in the second footnote with the dissent's suggestion that, because the Commission had publicly announced its intention to subject permits to access easements, the Nollans could not claim a right to exclude the public. Justice Scalia began by characterizing this as "the peculiar proposition that a unilateral claim of entitlement by the government can alter property rights;"[79] then pointed out that there is a difference between conditioning government *benefits* and conditioning the right to build on one's own property;[80] and stated that "the Nollans' rights [are not] altered because they acquired the land well after the Commission had begun to implement its policy" since, "[s]o long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot."[81]

Carefully read, none of the three points Justice Scalia makes in this footnote is inconsistent with the principle that what was never held cannot be taken. As to the first, there is a distinction between a "claim" and legal enactment. As to the second, it certainly makes sense to ask at the outset whether only a benefit (versus a right) is at issue—since the government will of course have much greater discretion in setting conditions for the former versus the latter—though it does not answer the question of when a preacquisition right is preserved. And as to the third, it is significant that while the Nollans may have acquired "the land" after the new policy's implementation, nothing is said about whether the Nollans' *option to buy* the property was also

73. *See* Hanley, *supra* note 47, at 319-20, 331, 350-53.
74. 483 U.S. 825, 833-34 n.2 (1987).
75. *Id.* at 827.
76. *Id.* at 828.
77. *Id.*
78. *Id.* at 837.
79. *Nollan*, 483 U.S. at 833 n.2.
80. *Id.* at 833-34 n.2.
81. *Id.* at 834 n.2.

acquired that late. An option to buy property is itself property, and if the government acts to diminish its value, just compensation must be paid.

This principle does have some grey areas, however. For instance, suppose that property is acquired while a law severely curtailing its profitable use is pending before the legislature. Until the law is passed, the principle can be invoked. It is always the case that the legislature *might* pass a law taking your property away. Thus, to say that, if you are on notice that it *may* do so, then there has been no taking, would swallow the clause. And legislatures are too unpredictable for courts to calibrate what they were likely to have done.[82] To define a judicially manageable standard for determining when a legislature has put citizens on notice that it will act in the future is impossible. A bright line at the law's enactment seems quite reasonable.[83]

But suppose, next, that a broad but vague law has been passed; the property is then acquired; and subsequently a regulation spells out what the law means in a way that was foreseeable—given the statute—but not inevitable. Or suppose that a law is passed requiring a permit (or, conversely, a waiver) for a certain use; the property is then acquired; and the permit (or waiver) is then denied. Or, to change that example slightly, suppose the permit is granted, but with a condition attached that the property owner believes to be onerous. In all these cases, there seems to be no alternative to a case-by-case inquiry into whether the owner knew or should have known that there was a substantial possibility that the desired use would be denied or conditioned.[84]

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82. *But cf. Lucas*, 112 S. Ct. at 2899-2900 (because states commonly exercise a "high degree of control over commercial dealings, [the owner of personal—versus real—property] ought to be aware of the possibility that new regulation might even render his property economically worthless"); *id.* at 2916 n.24 (Blackmun, J., dissenting).

83. It does not follow, of course, that—as the actual taking draws closer and closer and the value of the property goes lower and lower—the government at the final taking can ignore the depression in value that occurred, say, in the time between passage of the bill by the legislature and the governor's actual signature. Here again, that defense would effectively swallow the guarantee of the Clause. *But see First English*, 482 U.S. at 320; *see also id.* at 333 n.9 (Stevens, J., dissenting). This point is more important for purposes of calculating the value of the property taken than for the determination whether it was taken, but if ignored it would mean that in some cases the government could claim that it had effected no taking at all, as the market reflected the worthlessness of the condemned property.

84. See Hanley, *supra* note 47, which discusses the Claims Court's takings jurisprudence for claims brought when the federal government denies land developers a permit under the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1988). In *Monongahela Navigation Co.*, at issue was whether just compensation had to be paid the owner of a franchise to exact tolls along a waterway, after the United States had condemned the system of locks and dams built by the franchisee. In concluding that compensation was due, the Court stressed that "in this case there was not only the full authority of the State of Pennsylvania, but also, so far as respects this particular lock and dam, they were constructed at the instance and implied invitation of Congress." *Id.* at 334. The Court rejected the argument that the franchise "was a mere revocable license" and that the state had reserved the right to "alter, amend or annul the charter" and "to

The principle that what was never held cannot be "taken" raises another interesting question. Suppose that, at the time the owner acquires his property, the law prohibiting the desired use is already on the books, but the deed conveys—or seeks to convey—the property and all attendant rights of the prior owner thereof. If the prior owner acquired the property before the desired use was prohibited, and therefore would be able to maintain a claim that the law effected a taking, can the new owner now maintain that claim as well?[85]

The Takings Clause itself does not require the answer to that question. That is, the legislature certainly may allow such assignments and, if it does, then the new owner may step into the previous owner's shoes. Further, if the conveyances are generally considered to transfer all attendant rights—whether they say so explicitly or not—and the legislature has permitted this rule, then the shoes may also be filled.

If the legislature decides to bar such assignments, however, it may do that as well. Owners whose property diminishes in value because of such a bar may have a valid takings claim, but only if they acquired the property before *that* law's passage. Those who acquire property after the passage of that law cannot claim that that law has taken property from them, because they were on notice that the law existed, and the assignment stick was never in their property bundle. Presumably the purchase price was discounted to reflect this fact, so the new owner has not paid something for nothing. Only the previous owner suffered that, and he may sue for that taking.

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purchase the entire improvement and franchise" by paying a predetermined amount. *Id.* at 343. The Court said:

> We do not understand that the Supreme Court of Pennsylvania has ever ruled that a grant like this is a mere revocable license. The cases referred to by counsel are those in which there was simply a permit; but here there was a chartered right created,—the right not merely to improve the river, but to exact tolls for the use of the improvement—and such right created by an act of incorporation . . . is a contract which cannot be set aside by either party to it.

Id. at 344 (citation omitted). The Court also distinguished Bridge Co. v. United States, 105 U.S. 470 (1881), stressing that in that case, which rejected the claimed taking of a bridge, Congress had contemporaneously stated this reservation when it assented to the bridge's construction: "'But Congress reserves the right to withdraw the assent hereby given, in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution, or to direct the necessary modifications and alterations of said bridge.'" *Id.* at 338 (quoting 15 Stat. 347). The *Monongahela* Court's case-specific analysis of circumstances of the particular arrangement is instructive and—with the exception of its unexplained rejection of the significance of the state's buy-option for a predetermined amount—seems to be correct in its determination that, all things considered, here there was a frustration of reasonable investment-backed expectations.

85. *See supra* part V.A. (discussing *Nollan v. California Coastal Comm'n*).

The Supreme Court's recent decision in *Lucas v. South Carolina Coastal Council* explicitly recognizes the principle that it is the law at the time the property is acquired that is critical. The case involved a South Carolina statute that barred the plaintiff, David Lucas, from erecting any permanent habitable structure on two beachfront lots he had bought. The Court noted in its recitation of the facts that "at the time Lucas acquired these parcels, he was not legally obliged to obtain a permit from the [state agency] in advance of any development activity,"[86] and that the trial court explicitly so held.[87] Later, the Court stated that "our 'takings' jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' they acquire when they obtain title to property."[88] The Court makes this point in its explanation of why, on remand, "South Carolina must identify background principles of nuisance and property law that prohibit the uses [Lucas] now intends in the circumstances in which the property is presently found."[89] Specifically, "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of title to begin with."[90] That regulation "must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise."[91] The Court then briefly discussed the common-law principles that ordinarily would bear on whether a use is tortious.[92]

The dissent in *Keystone Bituminous Coal Association v. DeBenedictis* hade earlier accused the majority of departing from these principles, arguing that the state subsidence law at issue there was "much more than a nuisance statute."[93] The dissent may well have been right about the statute there, but it is significant that the majority at least *claimed* it was a nuisance law and tried at some length to demonstrate as much.[94]

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86. 112 S. Ct. at 2889.

87. *Id.* at 2890.

88. *Id.* at 2899.

89. *Id.* at 2901-02.

90. *Lucas*, 112 S. Ct. at 2899 (footnote omitted).

91. *Id.* at 2900 (footnote omitted). *See also id.* at 2901 (it is "open to the State at any point to make the implication of those background principles of nuisance and property law explicit") (citing Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1239-41 (1967)).

92. *Id.* at 2901-02.

93. 480 U.S. at 513.

94. *Id.* at 474-77, 485-93.

As noted earlier, the number of sticks in the property owner's bundle may have been limited by preexisting statute or regulation at the time he acquired the property, just as they may have been limited by common-law principles. Thus, if a statute had been enacted prior to acquisition, reserving the right to the airspace above the property to the federal government, then that owner cannot claim that that right was "taken" from him, since he never had it—just as if the private terms of the conveyance had reserved the rights to the airspace to the previous owner. Justice Blackmun's dissent[95] and Justice Kennedy's concurrence in the judgment[96] accuse the majority in *Lucas* of countenancing examination only of common law, and not other statutory, limitations. The majority does not respond to this charge, and it may not be true; the majority may have limited its discussion to common-law nuisance simply because there had been no suggestion that any other notice to the landowner conceivably existed.

United States v. Cress[97] also is instructive on the "notice" point. There the government had constructed a lock and dam system to improve the navigability of the Cumberland River in Kentucky. The system resulted in intermittent flooding of one owner's land, and "prevent[ing] the drop in the current which [was] necessary to run the mill" of the other.[98] In holding that, in both instances, a compensable taking had occurred, the Court repeatedly emphasized that the critical inquiry was whether the government's action had altered the "natural" condition of the river.[99] That is, indeed, the question. If the natural condition has been changed by the government in a way that diminishes the value of the owner's property, then surely the government has taken property; if not, then it is hard to see what has been "taken."

B. The Dolan *Decision*

The "notice" inquiry is the only way to make sense (in terms of the text of the Takings Clause) of the Supreme Court's most recent takings decision, *Dolan v. City of Tigard*.[100] This case involved a property owner who wanted to expand her store and pave her parking lot. The City Planning Commission said she could do so, but only if she dedicated part of her land for a "public greenway" to minimize the flooding that would be exacerbated by the increase in impervious surfaces associated with the property develop-

95. 112 S. Ct. at 2912 & n.15.
96. *Id.* at 2903.
97. 243 U.S. 316 (1917).
98. *Id.* at 330 (internal quotation marks deleted).
99. *See id.* at 321-26, 330.
100. 114 S. Ct. 2309 (1994).

ment, and for a pedestrian/bicycle pathway to relieve downtown traffic congestion. The Supreme Court held that this effected a compensable taking, unless the city could show on remand that there was "rough proportionality" between the required dedications and the impact of the proposed development.[101]

A slightly simpler situation than the one in *Dolan* will highlight some issues in the Court's decision. Suppose a landowner decides he wants to build a store on his property. The local government tells him that he may do so, but only if he dedicates a portion of his property to a public parking lot—on the rationale that the store will increase the number of cars that, absent the parking lot, would park on the city's streets and require increased city expenditures on road repairs and the like. Has there been a taking?

If, as a general matter, landowners may build stores on their property without permission from the government, it is hard to see why there hasn't been a taking. After all, a property right—to build a store without having to give up another part of one's property—has been taken. While the new store may cause wear and tear on nearby streets, building it is not the sort of activity that can be described plausibly as a nuisance. But if it is, then it is hard to see why any limits the government puts on it must pass a rough proportionality test. (Note that if the city wants to charge a parking fee on its property to cover the wear and tear, it is of course free to do so. This, incidentally, would seem the better solution—fairer, and economically more sound in terms of where incentives are placed.)

Does it matter whether in fact there really is rough proportionality between the landowner's activity and the condition dictated by the city? That is, suppose in one case the city really can show that there will be more traffic, and in the other case it can't. How does that bear on whether "private property [has been] taken for public use without just compensation"? The only relevance might be if in the former case the city can claim that it really is engaging in the sort of "land use" regulation of which landowners are on notice their property was acquired subject to, and if in the latter case it can't.

Consider another example that is a slight simplification of *Dolan*. Suppose a landowner proposes to develop his property in such a way that it will cause downstream flooding. Suppose further that there is no doubt that the government could ban such development altogether without effecting a compensable taking; in other words, the proposed development is effectively the creation of a nuisance, and no "right" to such development was ever a stick in the property owner's bundle of rights.

In these circumstances, it seems unobjectionable were the government to tell the property owner that, instead of banning such a development, it will allow it, but only if the "nuisance" part of it is eliminated. Thus, for instance,

101. *Dolan*, 114 S. Ct. at 2319-20.

the property owner must provide alternative drainage to prevent the downstream flooding.

What if the government were instead to attach a condition that had nothing to do with alleviating the potential nuisance, such as buying a new computer for the public school system? This certainly raises the possibility that the government has simply seized on the nuisance objection as a justification for "extortion" from the property owner. And, in *Nollan*, the Court concluded that such an unrelated condition would be unconstitutional since "the situation [is] the same as if [state] law forbade shouting fire in a crowded theater, but granted dispensation to those willing to contribute $100 to the state treasury."[102]

There are two problems with this analogy, however. First, it is more likely that the government interest in land-use cases can be easily reduced to monetary terms than in free speech cases. Money can be used to widen the river downstream to prevent flooding, or install pumps, or pay for the state's own alternative drainage system. So if the state asks for payment in money or some other medium, it is not so easily concluded that the asserted purpose is pretextual.

The second objection to the analogy is more fundamental. Banning speech for reasons other than certain purposes is unconstitutional per se; thus, the government's subjective intent is critical. Banning land development, on the other hand, should not hinge on the government's subjective intent. The ban is lawful either if the development would lead to a nuisance or if the state pays for the ban. Both of these are matters of objective inquiry. You can't "take" something from someone that they don't have. The government's subjective intent may tell us something about whether the state really believes the development will lead to a nuisance, and the presence of an "essential nexus" and "rough proportionality" will tell us something about the government's subjective intent, but all of this obscures the real question: was the development right in the property owner's original bundle or not? Why not just ask *that* question?

One suspects that what is happening in cases like *Dolan* (and *Nollan*) is that the Court's conservatives are trying to limit the zoning and "land-use regulation" exception to the Takings Clause that has grown up over the years. If the exception is left too broad, it would swallow the clause; the trick is to find some plausible way to limit it. The "essential nexus" and "rough proportionality" requirements of *Nollan* and *Dolan* certainly have the potential to achieve that limitation, and they have some intuitive policy appeal, but it is not obvious what they have to do with the language of the clause. Unless, that

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102. 483 U.S. at 837. The "unconstitutional conditions" holding in *Nollan* is critiqued in Stanley C. Brubaker, *Up (Sort of) From Footnote Four: In The Matter of Property Rights,* 1993 PUB. INTEREST L. REV. 97, 110-117.

is, the Court believes the law as it has evolved has put landowners on notice that their bundle of rights is now limited with respect to (somewhat narrowly defined) land-use regulations. This is not a terribly compelling argument,[103] and it would have been better simply to abandon the ill-conceived land-use precedents. But that option may not have been open to the Court's conservatives, and so they have elected to limit the exception for land-use regulation as best they could.

VI. "CHARACTER OF THE GOVERNMENTAL ACTION"

The third factor the Court typically weighs in a regulatory takings case is "the character of the governmental action."[104] The Court has applied this principle in ways that have little to do with the clause's text. Nonetheless, as discussed below, the character of the governmental action can be, by virtue of that text and especially its phrase "for public use," a decisive consideration.

A. Taking Seriously the "For Public Use" Requirement

Serious attention to the text's "for public use" requirement will avoid some otherwise difficult problems. For instance, suppose a chemist discovers and markets a "designer drug" that is identical to heroin in all its properties, but is not quite within the chemical definition used in the statute outlawing heroin's manufacture, sale, and use. Suppose further that the legislature quickly amends the statute to make the new chemical equally illegal, and the chemist demands "just compensation" for the street value of his warehouse full of the new drug.

It is counterintuitive that the government should have to pay anything in this situation, and apparently inconsistent with the Court's holding in *Mugler v. Kansas*.[105] To reach the result that there is no compensable taking without reliance on the phrase "for public use" is difficult, however. The right that the chemist heretofore had to sell his drug apparently has been taken. The best that can be argued is that he had no "reasonable, investment-backed expectation" in such sales; after all, it was quite predictable what the government would do. But, as discussed earlier,[106] we are on extremely shaky ground when we require citizens to predict what laws the legislature will

103. *See supra* note 9 and accompanying text.

104. *See supra* note 3.

105. 123 U.S. 623 (1887). *Mugler* held that a state prohibition law effected no taking of the owner's brewery in violation of the Fourteenth Amendment. *See infra* notes 154-173 and accompanying text.

106. *See supra* notes 82-84 and accompanying text.

pass.

If we take the phrase "for public use" seriously, however, the problem becomes a simple one. Yes, the chemist's property has been taken—but it has not been taken "for public use." Neither the public nor anyone else is using the property that has been taken from the chemist.

Environmental regulation should be subject to the same sort of inquiry. Consider two situations. In the first, the government is afraid that the development of a particular tract of land will destroy the only wild habitat of an endangered species, so it prohibits that development. In the second, the government forbids all hunting of a particular endangered species and, consequently, the game preserve built for the purpose of hunting that animal suffers a severe diminution in value.

Although the ultimate government aim—the preservation of an endangered species—is the same in both cases, the means for achieving that aim is, in the first case, a taking of private property for public use, but not in the second. The right to develop land in the first case is taken for the public use of providing a sanctuary for the animal. The right to hunt the animal may be taken, but not for public "use."

Consider two other situations. In the first, the government bans the use of pesticides on particular kinds of land (e.g., wetlands). In the second, the government bans the use of the pesticide altogether. In both cases, a taking is claimed by both the pesticide retailer and the landowner whose land has become worth much less. In both cases, the retailer has clearly had private property (the right to sell the pesticide to whomever he pleases) taken from him; likewise, in both cases, the landowner has had private property (the right to use the pesticide) taken from him. But in each case, was the taking "for public use"?

The two retailers sound familiar—they are in the same boat as the designer-drug manufacturer, and it seems, again, difficult to claim that their right to sell a particular chemical was taken "for public use." The right to sell has, rather, been extinguished, and is no longer being used by anyone.

Are the two landowners no different than disappointed drug users? In each case, the buyer/user is being thwarted from employing the chemical in a way satisfying to him that he was heretofore allowed. But that is the wrong question: the right question is, is the public using (or not using) the property?

In the designer-drug example, it is hard to articulate what "public use" is obtained by the taking of the right to buy and use the drug. A drug-free citizenry? That stretches the meaning of "for public use" too far. But the public *is* getting some ongoing use from a pesticide-free wetlands. Does it matter whether the law was limited to wetlands property, as opposed to all property? It certainly makes it easier to see how the public is using what is taken—that the public wants some lands left in a pristine state for the greater good. But, ultimately, it is probable that landowners suffered a Fifth Amendment taking in both circumstances.

Is it anomalous to say that a person who has lost his right to sell something has not suffered a taking but that the person who has lost the complementary right to buy something has? Not really. After all, they have lost different rights, and it is quite possible that one was taken "for public use" and the other was not.

Suppose that the state illegalizes someone's private property for more selfish reasons. For example, suppose that the state bans casinos, partly because it views casinos as an immoral vice breeding corruption and other crime, but also because it plans to offer its own casinos, and has concluded that there is more money to be made from a monopoly than in a competitive market. If the former motive cannot be characterized as "for public use," can the latter? It does seem that the state is getting something of continuing value from its new monopoly of casinos that it does not get from banning casinos altogether. One transaction looks like an involuntary buy-out (if just compensation is paid); the other does not. If what the Framers sought to do by the Takings Clause was ensure that property that the government would like to acquire was, when acquired, paid for—if that is what they meant when they wrote "taken for public use"—then the casino example is within the Takings Clause, and the designer drug example is not.[107]

In other cases it is clearer that the government is taking private property rights for government use. An interesting recent example involves requirements that automobile manufacturers build a certain number of experimental, "environmentally correct"—e.g., electric—cars. This requires the payment of just compensation: private property (the automobile manufacturing plant and the owner's right to operate it as he sees fit) has been taken (by regulation) for public use (the manufacture of the government's preferred automobiles).

Another easy case is presented by a law prohibiting the development of lands that are wetlands or the habitat of an endangered species. The land in this case is clearly being converted to public use. It is becoming a nature or wildlife preserve. Or consider a law prohibiting the building of dwellings on beachfront property, because such dwellings hasten erosion and pose a threat as potential projectiles during hurricanes. Here, too, the land is being converted to public use, this time as a buffer. On the other hand, consider a law that prohibits the construction of factories that manufacture beer. It is hard to see in that case what has been "taken for public use."

For zoning, whether there was a compensable taking should hinge on whether the purpose is to ensure a particular "use" of the property for the common good, not whether the purpose is simply a valid and important one. Consider the most common situation: only residential uses are permitted in a particular neighborhood, for aesthetic, as well as health and safety, reasons.

107. Compare the doctrine of quantum meruit, which also required that the materials or services have been used and accepted before payment would be required for them.

Has "private property"—i.e., the right to use this lot in nonresidential ways—been "taken"? Certainly. And has it been taken "for public use"? I would say so. By taking this right the public enjoys an ongoing aesthetic "use" of the property—a scenic easement, if you will—and "uses" it as a buffer against the dangerous nonresidential purposes to which it might be put.

It may be objected that all this will simply encourage legislatures to be clever in drafting and justifying their statutes. For instance, if the statute prohibiting erection of beachfront dwellings is justified not because it creates a buffer, but because of concern for the safety of the owner himself, has there then been a taking "for public use"? Or, conversely, suppose that what is really going on in the beer case is the state wishing to diminish the value of the property prior to condemning it for the construction of a railroad. Or suppose that the law prohibiting a particular use of property is completely opaque in its rationale.

These are valid objections, but there are two persuasive responses. First, an inquiry into the legislature's intent may be difficult, but the textual requirement that the taking be "for public use" may not allow a court to bypass that inquiry. That is, the phrase "for public use" might be read as meaning only an objective requirement that the law on its terms contemplate the public using the property taken. But it seems more logical to read it as requiring an inquiry into what subjectively was sought. If the state wants a buffer zone, then the land is taken *for* public use; if the state wants to protect the foolhardy from themselves, it is not. There is simply no way to determine whether the text is met without considering legislative intent.[108] The other answer is that inquiry into legislative intent is probably necessary under any framework.[109]

B. The Significance of Loretto

The Court held in *Loretto v. Teleprompter Manhattan CATV Corp.*[110] that there is a taking "when the 'character of the governmental action' . . . is

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108. *Cf. Lucas*, 112 S. Ct. at 2925 (citation omitted, brackets in original) (Stevens, J., dissenting). Justice Stevens wrote:

> The impact of the ban on developmental uses [of beachfront property] must also be viewed in light of the purposes of the Act. The legislature stated the purposes of the Act as "protect[ing], preserv[ing], restor[ing] and enhanc[ing] the beach/dune system" of the State not only for recreational and ecological purposes, but also to "protec[t] life and property." The State, with much science on its side, believes that the "beach/dune system [acts] as a buffer from high tides, storm surge, [and] hurricanes."

109. *Cf. id.* 2898 n.12 (majority opinion); Block v. Hirsh, 256 U.S. 135, 154-55 (1921); EPSTEIN, *supra* note 11, at 236-38 ("spite fences"—intended only to block neighbors view or light—are enjoinable at common law).

110. 458 U.S. 419 (1982). The state statute at issue in *Loretto* provided that a landlord must permit a cable television company to install its facilities upon the landlord's property.

a permanent physical occupation of property, . . . without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[111] The reason this makes sense is because, in a case of permanent physical occupation by the government, there is no question that property has been "taken for public use"—after all, the public *is using* the property. That is the better rationale for the bright line drawn in *Loretto*, as opposed to the Court's declarations that "a physical invasion is a government intrusion of an unusually serious character,"[112] indeed "perhaps the most serious form of invasion of an owner's property interests,"[113] "chop[ping] through the bundle [of property rights], taking a slice of every strand"[114]—"[t]he power to exclude,"[115] "to control the use of the property,"[116] and "to dispose of the occupied space by transfer or sale" at some value.[117] It is quite difficult to explain why some invasions are "unusually serious" or "qualitatively more intrusive"[118] than others, and in fact it is easy to think of situations where some nonpermanent occupations of property—indeed, some nonoccupations—are more serious and more intrusive than permanent occupations. But the Court was right to want to draw at least one bright line[119] in the takings area,[120] and it also was right to see the case of permanent public use as presenting an opportunity for just that.[121]

In the cases relied on by the Court in *Loretto*[122]—*Pumpelly v. Green*

111. *Id.* at 434-35 (citation omitted).

112. *Id.* at 433 (footnote omitted).

113. *Id.* at 435.

114. *Id.*

115. *Loretto*, 458 U.S. at 435.

116. *Id.* at 436.

117. *Id.*

118. *Id.* at 441.

119. *See id.* at 436 ("[t]he traditional rule also avoids otherwise difficult line-drawing problems"); *id.* at 437 ("whether a permanent physical occupation has occurred presents relatively few problems of proof").

120. *See also* Michelman, *supra* note 91, at 1184 ("The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, *never* deny compensation for a physical takeover.").

121. The Court's other two factors besides character of the government action—the economic impact on the property owner and the extent of interference with reasonable, investment-backed expectations—were not at issue in *Loretto* and, interestingly, either might have raised difficulties for the named plaintiff. She "did not discover the existence of the cable until after she had purchased the building" (458 U.S. at 424), the prior owner having "granted . . . permission to install a cable" (*id.* at 421). If these references are to the same cable installation of which she complained, it is very questionable whether the named plaintiff, at least in this class action, had any reasonable, investment-backed expectation. It is also possible that the value of having cable access would offset any value of the taken property, so that there was no net taking. *See id.* at 437-38 n.15; *id.* at 441; *see also id.* at 452 & n.9, 453-54 (Blackmun, J., dissenting).

122. *See id.* at 427-32.

Bay Co.,[123] *St. Louis v. Western Union Telegraph Co.*,[124] *Western Union Telegraph Co. v. Pennsylvania Railroad Co.*,[125] *United States v. Causby*,[126] and *United States v. Pewee Coal Co.*[127]—for the proposition that a permanent occupation is ipso facto a taking, the occupying party was using the property. Conversely, in those cases that the Court distinguished—notably *Northern Transportation Co. v. Chicago*[128] and *United States v. Central Eureka Mining Co.*[129]—there was no such use by the "taker." Further, although the Court did not focus specifically on the phrase "for public use" in the text of the clause, there was considerable discussion of the importance of "use" as an attribute of property ownership.[130]

Twice toward the end of its decision in *Loretto*, the Court drew a distinction between regulation of the owner's use—by requiring the owner either to do[131] or not do[132] something—and the permanent occupation at issue in the case. This is a questionable distinction.[133] Is there really any difference between a demand that the government (or a cable company) be allowed to enter your property to install some device, and a demand that instead you install and maintain that device? Either way, your right not to have such a device has been taken from you, for public use, and thus you are entitled to just compensation.

C. "Strength" of the Government's Interest

Accordingly, in some ways the "character of the governmental action" is highly relevant. What is not relevant, however, is the strength of the government's interest in prohibiting the use or the legitimacy of the power by which the use at issue is prohibited.[134]

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123. 80 U.S. (13 Wall.) 166 (1872).
124. 148 U.S. 92 (1893).
125. 195 U.S. 540 (1904).
126. 328 U.S. 256 (1946).
127. 341 U.S. 114 (1951).
128. 99 U.S. 635 (1879).
129. 357 U.S. 155 (1958).
130. 458 U.S. at 435-36.
131. *Id.* at 440 n.19.
132. *Id.* at 441.
133. Justice Blackmun's dissent criticizes it, *id.* at 448-50, 452-53.
134. *Cf. Lucas*, 112 S. Ct. at 2900 ("where 'permanent physical occupation' of land is concerned, we have refused to allow the government to decree it anew (without compensation), *no matter how weighty the asserted 'public interests' involved*") (emphasis added; citing *Loretto*, 458 U.S. at 426); *Loretto*, 458 U.S. at 426 ("a permanent physical occupation authorized by government is a taking *without regard to the public interests* that it may serve") (emphasis added); *Keystone Bituminous Coal Ass'n*, 480 U.S. at 513 (Rehnquist, C.J., dissenting) ("A broad exception to the operation of the Just Compensation Clause based on the exercise of

The condemnation of a particular tract of land may be absolutely essential for the government's proposed post office; that post office may, in turn, be of the utmost importance to the settlement of the territory and the national well-being; and the Constitution may be very specific and very clear that "Congress shall have Power . . . To establish Post Offices and post Roads."[135] But the government still must pay just compensation to the private citizen who owns the land.[136] And if that is conceded, there is no principled agreement to be made for weighing the strength of the government's intent and the legitimacy of its power when a regulatory taking is at issue.

The failure to see this is sad, for what it reflects is the erosion of the principle of a federal government of enumerated powers. We are so surprised when Congress acts pursuant to a narrow and defined constitutional authorization that we assume there is something especially sacrosanct about that action, forgetting that Congress is *always* supposed to have such authorization before it acts. The limits placed on Congress by the Bill of Rights apply when Congress is acting pursuant to an enumerated power, as well as when it isn't.

Two special circumstances are when Congress acts pursuant to its power "To lay and collect Taxes"[137] or "To establish . . . uniform Laws on the subject of Bankruptcies."[138] They are special not because these powers are enumerated, but because their exercise would be impossible without taking private property for public use without just compensation. That is, the whole concept of taxation is that private property (usually money) is taken for public use (usually running the government), and if just compensation then had to be paid for the taxes just collected, there would be no gain for the government.[139] Similarly, the whole concept of a bankruptcy law is to excuse *A* from paying his full debt to *B*, because of a net social utility in allowing *A* a

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multifacted health, welfare, and safety regulations would surely allow government much greater authority than we have recognized to impose societal burdens on individual landowners, for nearly every action the government takes is intended to secure for the public an extra measure of 'health, safety, and welfare.'"); *contra Loretto*, 458 U.S. at 444-45 & n.3, 454 (Blackmun, J., dissenting) ("Given the growing importance of cable television, the legislature decided that urban tenants' need for access to that medium justified a minor intrusion upon the landlord's interest . . . . The tenant's interest clearly is more substantial, consisting of a right to receive (and perhaps send) communications from and to the outside world."); Hanley, *supra* note 48, at 319-20, 327-30, 333, 346-48, 351-53 (strength of government's interest is key factor in determining if taking occurred).

135. U.S. CONST. art. I, § 8, cl. 7.

136. *See Monongahela Navigation Co.*, 148 U.S. at 336. *Cf.* United States v. Lee, 106 U.S. 196, 221-22 (1882) (finding that, even in wartime, property claims against government offices are justiciable).

137. U.S. CONST. art. I, § 8, cl. 1.

138. U.S. CONST. art. I, § 8, cl. 4.

139. Professor Epstein argues that, while some taxes may not violate the Takings Clause (e.g., a flat-rate income tax), many others do. EPSTEIN, *supra* note 11, at 283-305.

fresh start. While it would be possible to give *B* just compensation (his net loss) for the private property (*B*'s full claim against *A*) taken for public use (*A*'s fresh start), the concept of bankruptcy was well accepted at the time of the Framers, and it therefore seems unlikely that the Takings Clause applies. In all events, it is not clear that *A*'s unpaid debt to *B* is actually "taken for public use"; it is, rather, arguably, and used by no one.

The line between a taking and a tax will not always be easy to draw. For instance, suppose that a legislature decides to levy a confiscatory tax on beachfront property with dwellings built thereon with, again, the hope that the property will become a buffer zone against storms and erosion. In such a case, the court has no choice but to determine whether the purpose of the tax is to raise revenues or "take" other property for public use.[140]

D. Supreme Court Case Law

The Supreme Court's case law bearing on the "character of the governmental action" in general, and the "for public use" phrase in particular, is tantalizing but oblique. Selected cases are reviewed below in more or less chronological order.

The first Supreme Court case to help illuminate the meaning of takings, like many such cases to follow, was not directly about the clause at all. In *Fletcher v. Peck*[141] Chief Justice Marshall did, however, write two sentences of relevance to takings. First: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation."[142] And second: "Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate?"[143] The former, besides being a candid statement of why, as a matter of first principles, that

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140. Another hard case is the levy of a windfall profits tax against a specific part of a particular industry—for instance, the profits made from the sale of domestic oil by oil companies. But here, since the purpose is in fact to raise revenues from a particularly "deserving" source, there appears to be no principled way to apply the Takings Clause. *But cf.* EPSTEIN, *supra* note 11, at 283-305.

Of course, a tax can have purposes besides raising revenues—notably, discouraging certain habits like smoking, drinking, or driving unnecessarily. Thus, a beachfront tax could be justified as discouraging the behavior of building houses on the beach. But the former forms of behavior take no property for public use; the latter does.

141. 10 U.S. (6 Cranch) 87 (1810).

142. *Id.* at 135.

143. *Id.* at 138.

Takings Clause makes sense, also makes the point that the right has to have been acquired before it can have been taken. The latter, which occurs in the course of an argument that the logic of the prohibition of ex post facto laws[144] also bars a law rescinding title once conveyed, contains the phrase "for public use"—additional evidence that the phrase is more than an ink blot.

In *Munn v. Illinois*[145] the Court upheld the constitutionality of Illinois's regulation of the prices charged for grain storage. The challenge had been brought by the owner of private grain warehouses, alleging, inter alia,[146] a "deprivation of . . . property without due process of law" in violation of the Fourteenth Amendment. The Court stated that, "when private property is devoted to a public use, it is subject to public regulation,"[147] including a legislative determination of "reasonable compensation"[148] to the owner. Justice Field's dissent accepted this principle, but disputed the Court's determination that the warehouses had lost their private character. In the course of its discussion, the dissent noted that "[t]he state may take [the citizen's] property for public uses, upon just compensation being made therefor."[149] The fact that this is a Fourteenth Amendment due process decision limits its illumination of the Takings Clause. Still, it is worth noting that the phrase "public use" was used repeatedly by the Court, suggesting it might actually have been thought then to mean something.

In *United States v. Lee*[150] the Court rejected an attempt by the Lee family to recover land that it had once owned but that was being used as, inter alia, the Arlington Cemetery. The two issues decided were whether the Court had jurisdiction, since the United States had not consented to the suit, and whether federal commissioners properly refused to allow the owner to pay the taxes owed on the property prior to its sale for their collection. The Court ruled that it had jurisdiction (four Justices dissented on this point), but on the merits ruled against the property owner.

Thus, this was—once again—not really a case about the Takings Clause, but it is interesting nonetheless because the United States and the Court stated throughout that the property at issue was now in the government's possession for "public use."[151] In particular, the Court noted, in the context of the

144. U.S. CONST. art. I, § 10, cl. 1.

145. 94 U.S. 113 (1877).

146. Violations of the Commerce Clause, No Preference Clause, and Equal Protection Clause were also alleged. U.S. CONST. art. I, § 8, cl. 3; *id.* § 9, cl. 6; and *id.* amend. XIV, § 1.

147. 94 U.S. at 130.

148. *Id.* at 133.

149. *Id.* at 145.

150. 106 U.S. 196 (1882).

151. *See id.* at 198 ("for public uses . . . and for the uses and purposes set forth in the certificate of sale"), 204 ("appropriated to lawful public uses"), 218 ("proper public use," "devoted to a proper public use"), 221 ("seized and converted to the use of the government").

government's sovereign immunity claim: "The fact that the property which is the subject of this controversy is devoted to public uses, is strongly urged as a reason why those who are so using it under the authority of the United States shall not be sued for its possession even by one who proves a clear title to that possession."[152] The Court rejected this argument, pointing out that the Court had earlier decided the merits of cases involving property "in use," "occupied," or "devoted by her laws to public uses" for the United States,[153] and that "[t]he objection is also inconsistent with the principle involved in the last two clauses of article 5 of the amendments to the Constitution of the United States," and quoting that text.[154] In other words, the Court concluded (thank goodness) that the fact that property had been taken "for public use" did not *defeat* a takings claim. It is otherwise hard to know what to make of the repeated references to the land's public use. Perhaps this found its way into the case simply because the government was raising the specter of having to disinter the honored dead if the Court ruled against it. But it seems plausible, too, that the United States and the Court were also each emphasizing that takings "for public use" were in a special class—that such takings were of the sort that was contemplated by the Fifth Amendment.

In *Mugler v. Kansas*[155] the Supreme Court upheld the constitutionality of a state prohibition law against a challenge brought by manufacturers of alcoholic beverages. Although it is widely cited as a seminal regulatory takings case, in fact the decision discussed the Takings Clause very little, since the challenge was brought on Fourteenth Amendment due process grounds (the Takings Clause was not "incorporated" into the Fourteenth Amendment until ten years later, in *Chicago, Burlington & Quincy Railroad Co. v. Chicago*[156]). Moreover, the Kansas statute was more than simply a "regulatory" statute, since it contemplated the physical seizure and destruction of not only the distilled spirits, but also of "all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining [the distillery]."[157] Still, the decision is instructive. The state labeled the manufacture of alcoholic

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The dissent did as well. *See id.* at 224 ("use for war, military, charitable, and educational purposes"), 225 ("using . . . as a national cemetery"), 240 ("public use"), 242 ("any land held and used for military, naval, commercial, revenue, or police purposes"), 250 ("for public uses . . . as a military station, . . . national cemetery . . ., and for war, military, charitable, and educational purposes"), 251 ("using it as a national cemetery . . ., and as a fort and military reservation"). *But see id.* at 220 ("it is absolutely prohibited . . . to take private property without just compensation"), 225 ("held . . . for military and other public purposes") (dissent), 250 ("for public purposes") (dissent).

152. *Id.* at 217.

153. *Id.* at 217-18.

154. *Id.* at 218.

155. 123 U.S. 623 (1887).

156. 166 U.S. 226 (1897).

157. *Mugler*, 123 U.S. at 670.

beverages a nuisance and justified the government's actions as an exercise of its "police power."[158] The brewers countered, first, that the state's police power was limited to matters regarding the *sale* of such beverages in the state, and did not extend to an individual's manufacture of spirits for his own consumption, nor could it be applied to the export of beverages outside the state;[159] they also argued that, if the statute was within the police power, then they were entitled to just compensation as a due process matter.[160]

In his opinion for the Court, the elder Justice Harlan relied on earlier Supreme Court decisions upholding state prohibition laws in concluding that such laws were within a state's police power.[161] As to the argument that prohibiting an individual from manufacturing and consuming alcohol *himself* would not "injuriously affect the public,"[162] the Court said that the power to make that sort of determination "is lodged with the legislative branch of the government,"[163] and that "[i]ndeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the Constitution to another department."[164]

Finally, the Court rejected the brewers' claim that, if the prohibition were allowed to stand, it is "a taking of property for public use without compensation, and depriving the citizen of his property without due process of law."[165] The Court argued that, in adopting the Fourteenth Amendment, the states did not intend "to impose restraints upon the exercise of their powers for the protection of the safety, health, and morals of the community." As a historical matter, that may be true; much more problematic was the Court's claim that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community"[166]—*if* that pronouncement means that the government's prohibition without compensation of a particular property use that had been lawful does not implicate the Takings Clause.[167] The Court may or may not have meant that; only the Due Process Clause of the Fourteenth Amendment is mentioned in that

158. The "police power" is discussed *infra* at text accompanying notes 187-91.

159. This latter, "dormant Commerce Clause" argument is quite modern-sounding, and might prevail today but for the Twenty-First Amendment's express contemplation of state prohibition laws. The Court in *Mugler* did not address the issue, since it found no evidence in the record that the beer was intended for export. *Mugler*, 123 U.S. at 647.

160. *See id.* at 634, 650-51.

161. *Id.* at 657-59.

162. *Id.* at 660.

163. *Id.* at 661.

164. *Mugler*, 123 U.S. at 662.

165. *Id.* at 664.

166. *Id.* at 665 (citations omitted). *See also id.* at 669-70.

167. *See supra* part III.

paragraph.

And, even if it did have the Takings Clause in mind, this is a situation where there was clearly no taking "for public use." Thus, the Court distinguished *Pumpelly v. Green Bay Co.*[168]—where Wisconsin's permanent flooding of a man's land in the course of building a dam was held to be a taking under the state constitution[169]—since "[h]is property was, in effect, *required to be devoted to the use of the public*, and, consequently, he was entitled to compensation."[170]

The two paragraphs that immediately follow contain significant insights and significant errors, bearing out Justice Holmes's observation that Justice Harlan's mind was "a powerful vise the jaws of which couldn't be got nearer than two inches to each other."[171] Justice Harlan wrote:

> As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is

168. 80 U.S. (13 Wall.) 166 (1872).

169. "[T]he constitution of Wisconsin . . . provid[ed] that the property of no person shall be taken for public use without just compensation therefor." 123 U.S. at 667.

170. *Id.* at 668 (emphasis added).

171. EDWARD J. BANDER, JUSTICE HOLMES EX CATHEDRA 235 (1966) (quoting 2 HOLMES-POLLOCK LETTERS 7-8 (Howe ed. 1961), and also referencing ACHESON, MORNING AND NOON 65 (1965)).

> very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.
>
> It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in *Stone v. Mississippi*,[172] the supervision of the public health and the public morals is a governmental power, "continuing in its nature," and "to be dealt with as the special exigencies of the moment may require;" and that, "for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with anymore than the power itself." So in *Beer Co. v. Massachusetts*, 97 U.S. 32: "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer."[173]

Justice Harlan was quite correct that the prohibition in *Mugler* "cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." But the reason this is true is not because the prohibition "does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it . . . ." That there are still some rare and unprofitable uses besides drinking to which beer may be put is surely irrelevant. The reason the statement is true is because the public is not *using* the property. Similarly, "the destruction of property . . . or the prohibition of its use in a particular way" is indeed "very different from taking property for public use," but the reason this is so has nothing to do with whether "a nuisance only is abated" or whether "unoffending property is taken away from an innocent owner"—if the "nuisance" label is newly affixed. In that case, it surely proves too much that "the State did not . . . give any assurance" that it might not affix such a label, since the state provides no assurances that it won't seize land for public use as a park, either, and *that*, all would agree, is compensable. Again, what is critical is whether the property has been taken "for public use," or whether certain uses of the property have been banned for anyone, public or private.[174]

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172. 101 U.S. 814 (1880).

173. 123 U.S. at 668-70.

174. Justice Harlan also may have been quite right that, "in any case," the *Fourteenth* Amendment does not require that compensation be paid for such takings. That will depend on to what extent the Takings Clause ought to be "incorporated" into the Due Process Clause, which is beyond the scope of this article.

Monongahela Navigation Co. v. United States[175] involved the federal government's taking of a franchise to exact tolls along a waterway, as well as of related turnpike property. The Court said:

> It should be noticed that here there is unquestionably a taking of the property, and not a mere destruction. It is not a case in which the government requires the removal of an obstruction. What differences would exist between the two cases, if any, it is unnecessary here to inquire.[176]

Similarly, the Court distinguished *Bridge Co. v. United States*,[177] saying that "that was a case not of the taking, but of the destruction, of property,"[178] and that there was "no taking of private property for public uses . . . while the company may have been deprived of property . . . ."[179]

The Court later held that, where the government builds a dam and causes upstream land to flood, the owners of that land are entitled to just compensation by the Takings Clause.[180] It is not an exaggeration to say that, in that situation, the land has been taken, nor that it has been taken "for public use"—i.e., as the site of the inevitable overflow. A harder question was presented years later when the claims were that the dam had rendered inoperable a private mill (in one case) and a power plant (in two others) because it has changed the river's level.[181] That the government had "taken" a property right seems clear,[182] but it is not so clear that the right has been taken for public use. Like the right to sell a designer drug, the right to use the river's current has not been "taken for public use" so much as it has simply been eliminated. On the other hand, the public may be using the power generated by the river, if that is the government dam's function; if its function is simply to improve the river's navigability, it might still be argued

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175. 148 U.S. 312 (1893).

176. *Id.* at 337.

177. 105 U.S. 470 (1882). In this case, the Court rejected a claim against the United States for requiring a bridge to be rebuilt at considerable expense to the owner, because of the old bridge's deleterious effect on navigation.

178. 148 U.S. at 338.

179. *Id.* at 341. In *Monongahela*, the Court at several other times also notes "the public use" to which the taken property at issue will be put. *See id.* at 329 ("a public use"), 341 ("for public use" used three times); *see also id.* at 326 ("public use"), 327 ("the public use"); *but cf. id.* at 341 ("for public purposes").

180. *See* United States v. Cress, 243 U.S. 316 (1917); *see also* Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871) (construing Wisconsin state constitution).

181. *See* United States v. Willow River Co., 324 U.S. 499 (1945) (holding plant not taken); United States v. Cress, 243 U.S. 316 (1917) (holding mill taken); United States v. Chandler-Dunbar Co., 229 U.S. 53 (1913) (holding plant not taken).

182. *See* EPSTEIN, *supra* note 11, at 71.

that the river itself, at least, is being used by the public. Still, it is undeniably a stretch to say that the *private property* is being used by the public in this situation.

In *Hadacheck v. City of Los Angeles*[183] an ordinance had been passed forbidding the manufacture of bricks within specified limits of the city. The owner of a brickyard was criminally prosecuted, and he challenged the constitutionality of the ordinance as violative of the due process and equal protection guarantees of the Fourteenth Amendment, arguing that the police power was not so broad as to enable the prohibition of an activity that was not a nuisance per se, and that the ordinance was "discriminatory and unreasonable."[184] While Justice McKenna's decision for a unanimous Court notes at the outset that the owner charged, inter alia, "the taking of property without compensation,"[185] neither the Court's opinion nor the owner's arguments deal at all with the Takings Clause. Instead, the opinion focuses on whether the prohibition of brickyard use was a valid exercise of the police power and, concluding that it was, there is no discussion of whether just compensation must be paid. The opinion contains language that, applied to the takings context, would be quite troublesome were it read as allowing the state to ignore the owner's reasonable, investment-backed expectations,[186] but in context it seems clear that the Court is addressing only the state's ability to pass the ordinance, not whether it might require the payment of just compensation when it does so.

Assuming the truth of the brickyard owner's claim that the ordinances prohibited a heretofore lawful use and caused him significant financial harm for which no compensation was paid, the remaining question under the Takings Clause would have been whether the property was "taken for public

183. 239 U.S. 394 (1915).

184. *Id.* at 399.

185. *Id.* at 407.

186. *See id.*. The court wrote:

> [The police power is] one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community. The logical result of [the owner's] contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground and that if it grows at all it can only grow as the environment of the occupations that are usually banished to the purlieus.

Id. at 410 (citation omitted).

The meaning of the "police power" in Court's early zoning cases is discussed *infra* at text accompanying notes 187-91.

use." This is, essentially, a zoning case and, as discussed above,[187] when the government takes away the right to use property in a particular way in order to ensure that, instead, it is used in the way the government prefers, there indeed has been such a taking.

Village of Euclid v. Ambler Realty Co.[188] is another seminal zoning decision. An owner of unimproved land within the corporate limits of the village challenged its zoning ordinance, which created a hierarchy of six categories of land use, thereby limiting what the owner could do to develop its land. The Court upheld the ordinance as a proper exercise of the police power against the owner's claim "that it is in derogation of § 1 of the Fourteenth Amendment to the Federal Constitution in that it deprives [the owner] of liberty and property without due process of law and denies it the equal protection of the law . . . ."[189] There was no discussion of the Takings Clause, although the parties focused, in part, on the lack of "compensation"[190] and the owner, in particular, discussed the clause[191] before turning to "the police power under which the ordinance in this case purports to be passed."[192]

It is puzzling, in *Euclid* as elsewhere, why the Court and the parties believe that, where it is found that the "police power" gives the government authority to prohibit a particular use of property, the inquiry ends—with no further discussion of whether the owner may nonetheless be entitled to just compensation. And, in concluding that the ordinance was within the police power, the Court appeared to require no more than a rational relationship to a legitimate state interest, as the Court would later formulate the minimal scrutiny standard. The Court made clear that the common law of nuisance was consulted only "for the helpful aid of its analogies."[193]

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187. *See supra* part VI.A.

188. 272 U.S. 365 (1926).

189. *Id.* at 384.

190. *See id.* at 368, 370.

191. *See id.* at 374-75:

> The distinction between the power of eminent domain and the police power is important. In the first place, there must be a public need, the property proposed to be taken must be taken for a public use, all the forms of law must be observed in the taking, and the private owner ultimately compensated. The courts do not allow the private owner to argue with the legislative authority in the exercise of its discretion as to what is a public need and his opinion is not important in the definitions of public use, but the books are full of cases in which the exercise of this power has been stayed, even against the legislative determination, where the proposed use was only colorably public and the plain purpose of the appropriation was private advantage, no matter how widely distributed. Even where the owner is to be fully compensated, his right to retain and use his own property is protected unless there is a real, as against a pretended, public need to take it and use it.

192. *Id.* at 375.

193. *Id.* at 387.

One explanation is that these were only due process cases, after all, and so once the government's authority to pass the law was established, the constitutional case was over; in other words, the Takings Clause had not yet been fully "incorporated" into the Fourteenth Amendment, so any discussion of it was metaphorical and by analogy, rather than literal. Also possible—and by no means mutually exclusive—is this reasoning: that if the police power is successfully invoked, then the activity in question is simply being prohibited, not "taken for public use."[194] Or perhaps the Court really believed that all property was held subject to the "police power," and that where that power was exercised, it really did "trump" any right to just compensation. This rationale would not swallow the Takings Clause so long as the "police power" is narrowly defined—and especially if it is limited to codifying limitations on use of which the landowner should already be aware.[195] Any of these explanations is plausible, and consequently *Euclid* really tells us very little about how the Takings Clause applies to zoning cases.

In *Block v. Hirsh*[196] the constitutionality of a wartime rent-control regulation for the District of Columbia was challenged by the lessor property owner under, inter alia, the Takings Clause.[197] He argued that "[t]here is no power . . . to take private property for private use," that "[t]he right to take it at all, is not expressly conferred by the Constitution," and that while "the right of eminent domain, to which all lawful taking is referred, is a necessary attribute of sovereignty," the right can be exercised only "for sovereign purposes."[198] Here, plaintiff continued, the record shows that the "property was not affected with a public interest; that it has not been subjected to a public use but—that it has been, ever since the execution of the lease, private property in the strictest sense."[199] As amicus, the United States claimed that "[t]he whole argument against the statute proceeds upon an extreme individualistic conception of real property which, in effect, denies the existence of any police power in respect thereof."[200]

In his opinion for the Court, Justice Holmes upheld the constitutionality of the regulation. Three aspects of his opinion deserve comment. First, Holmes is surely correct that the rent control regulation had a public purpose, notwithstanding the fact that its immediate effect was only on private lessor-lessee relationships. Second, neither Holmes nor the parties seemed to consider whether an inquiry into the precise kind of public purpose—i.e.,

194. *Cf. id.* at 374-75 (quoted *supra* note 191).

195. *See infra* note 202 and accompanying text.

196. 256 U.S. 135 (1921).

197. Substantive due process and Seventh Amendment claims were also made. *Id.* at 141.

198. *Id.* at 144.

199. *Id.* at 147 (citation omitted).

200. *Id.* at 148.

"public use"—was required by the Takings Clause, or why the failure to meet that kind of purpose would implicate the Takings Clause. Third, Holmes's assertion that "under [the police power] property rights may be cut down, and to that extent taken, without pay"[201] is mischievous at best. The precedents he cites are all public safety cases, and are distinguishable from the case before him if they involved simply codification and enforcement of preexisting (e.g., common law) limitations on property use.[202] Holmes viewed the question as "whether the statute goes too far," and concluded that it did not—noting, in addition to the wartime exigencies, that the regulation was "only . . . a temporary measure"[203] and that "[m]achinery is provided to secure to the landlord a reasonable rent."[204] These latter considerations go to the calculation of just compensation rather than to whether there has been a taking in the first place.

It is, however, hard to tell which parts of Holmes' opinion were aimed at the plaintiff's substantive due process claims and which were aimed at his Takings Clause claims, assuming—as may not have been the case—that Holmes viewed the claims as having any significant legal distinctions. The same is true of the spirited dissent, which threw in the Contracts Clause[205] for good measure. Justice McKenna did, however, correctly note that whether the power relied on by government was "an exertion of police or other power"[206] was not really the point.

In *Berman v. Parker*[207] plaintiff property owners challenged the constitutionality of a federal law that took their urban property and, through an administrative redevelopment agency, sold or leased the property to other private parties who would follow the agency's urban renewal plan. The plan apparently contemplated the payment of just compensation.[208] The challenge under the Takings Clause[209] was that, because the property was being redeveloped by and for private, not public, interests, therefore the clause was violated. The Court rejected the claim, holding that the object of urban

201. *Block*, 256 U.S. at 155.

202. *Id.* at 155-56. This suggests a promising way to explain the Court's "police power" cases: that they frequently involved no more than the prohibition of actual common-law nuisances. The Court did not consider merely "aesthetic" regulation to be within the police power, for instance. *See* Welch v. Swasey, 214 U.S. 91 (1909); St. Louis Poster Advertising Co. v. City of St. Louis, 249 U.S. 269 (1919).

203. 256 U.S. at 157 (citation omitted).

204. *Id.* (citation omitted).

205. U.S. CONST. art. I, § 10, cl. 1. By its terms, the Contracts Clause applies only to the states, and not to the federal government.

206. *Block*, 256 U.S. at 168 (McKenna, J., dissenting).

207. 348 U.S. 26 (1954).

208. *Id.* at 36.

209. A due process claim was made as well. *Id.* at 31.

renewal was within the broad "public purpose" of the "police power,"[210] and that the fact that this end was achieved through private means was "also for Congress to determine."[211] As in some other "public use" cases, *Berman* focuses on the word "public," rather than "use," and proceeds from an unexplained premise that, if the taking is not for "public use," it would violate the Takings Clause.[212] Nonetheless, the Court's conclusion that Congress can achieve a "public" purpose by taking private property from *A* and giving it to *B* is unexceptionable. Further, the Court's conclusion that there was no violation of the Takings Clause was correct as well. Private property was in fact taken for public use,[213] but just compensation was paid.

In *Hawaii Housing Authority v. Midkiff*[214] the Court considered the constitutionality of a state statute that created a land condemnation scheme, whereby title in real property was taken from landholding lessors and transferred to homeowner lessees in order to reduce the concentration of land ownership on the Hawaiian islands. Prices for the title were set by a condemnation trial or by negotiation between lessors and lessees. The landowners claimed that redistribution of their land to other private persons violated the "public use" language in the Takings Clause, but the Court held that "[r]edistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power."[215] The Court was surely correct that property need not remain in government possession to have been "taken for public use," but the landowners' argument had a more fundamental flaw than that. The text of the Takings Clause simply does not contain an independent prohibition of the government taking private property for nonpublic use, whether or not just compensation is paid. It might be objected that this would allow the government to effect such takings and pay nothing, which seems odd since even takings for *public* use require the payment of just compensation. This is true, so far as the Takings Clause is concerned. But, as discussed above,[216] the Framers probably assumed that no independent prohibition of this sort of taking was needed, since it fell within no enumerated power.

In *Lucas v. South Carolina Coastal Council*[217] the Supreme Court drew this bright line: "when the owner of real property has been called upon to

210. *Id.* at 32.

211. *Id.* at 33.

212. *See supra* part II.C.

213. The public was in fact "using" the property taken, since it received an ongoing benefit from its renewal.

214. 467 U.S. 229 (1984).

215. *Id.* at 243.

216. *See supra* parts II.C, III.B.

217. 112 S. Ct. 2886 (1992).

sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[218] In addition to citing past cases supporting this proposition,[219] the Court offered two justifications for the rule: that "[p]erhaps" the total deprivation of beneficial use is, from the landowner's perspective, "the equivalent of a physical appropriation,"[220] and that "regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here [i.e., in *Lucas*], by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."[221]

The first justification is not entirely unpersuasive. Certainly a complete diminution in value is, to the landowner, financially equivalent to a complete physical appropriation (which would be compensable); by the same token, however, a fifty percent diminution in value is, to the landowner, financially equivalent to a fifty percent physical appropriation (which also should be compensable).[222] Similarly, the Court argued that there is unlikely to be an "'average reciprocity of advantage'"[223] to the aggrieved landowner when there is a complete diminution in value, and that in such cases the claim that "'[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in general law'"[224] has little force. Also true but, again, this argument becomes persuasive well before the "100%" point is reached.

The more interesting argument is the second, that where a regulation leaves the owner with no economical use for the land, it appears more likely that the land has been pressed into "public service under the guise of mitigating serious public harm." There is certainly much to this argument, and at least the Court is recognizing, in a rather oblique way, that whether the taking is "for public use" is perhaps a relevant inquiry. But the Court's analysis is flawed inasmuch as it overstates the correlation between the percentage diminution in value and whether the taking is "for public use." That is, there will be many situations where there has been a taking for public use without there being a complete diminution in value, and there will even be some situations where there has been a complete diminution in value but no taking for public use.[225]

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218. *Id.* at 2895 (footnote omitted).

219. *Id.* at 2893-94.

220. *Id.* at 2894 (citation omitted).

221. *Id.* at 2894-95 (citations omitted).

222. *Compare Lucas,* 112 S. Ct. at 2920 (Stevens, J., dissenting).

223. *Id.* at 2894 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

224. *Id.* at 2894 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. at 413).

225. I had concluded that the phrase "for public use" has been much neglected in the case law

VII. CONCLUSION: THE NEED FOR A RULE

Rather than simultaneously weighing the various factors discussed in parts IV, V, and VI, so that the outcome in any given controversy is the product of a difficult-to-fathom judicial "black box," the factors should be considered sequentially, so that the Takings Clause operates as a rule. The inquiry can end at any step.[226]

Thus, in the case where there is no diminution in value, or only a de minimis diminution in value, or a diminution in value completely offset by an average reciprocity of advantage, there is no taking, and further analysis is not

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and secondary literature on the Takings Clause—and completed most of the above text—when, in March 1993, Professor Rubenfeld published his article on *Usings*. 102 YALE L.J. 1077. While of course I must confess disappointment in being beaten to the punch, I was pleased and impressed to see the point made so thoroughly and persuasively.

Nonetheless, while I agree with Professor Rubenfeld that the Takings Clause requires that property be taken "for public use" before just compensation must be paid, there are many respects in which I disagree with what he considers to be "for public use." He believes that zoning laws, *Loretto*-like physical occupation, rent control, and regulations that circumscribe some but not all uses of property are, as a general matter, not takings for public use. This is the principal area of disagreement for purposes of this chapter. Professor Rubenfeld also discusses the relationship between the Takings Clause and Roe v. Wade, 410 U.S. 113 (1973), which is beyond the scope of my article (and, I think, beyond the scope of his article as well).

226. In his dissent in *Lucas*, Justice Stevens objected to such rules, arguing instead for the continuation of "'essentially [an] ad hoc, factual inquir[y],'" since "'fairness and justice' are often disserved by categorical rules." 112 S. Ct. at 2922 (citations omitted; brackets in original). *See also Loretto*, 458 U.S. at 432 (describing Court's rule as "a balancing process"); *id.* at 442 (Blackmun, J., dissenting) (lamenting majority's rejection of the traditional ad hoc, balancing approach for a "rigid *per se* takings rule"); *id.* at 444 ("the multifactor balancing test prescribed by this Court's recent Takings Clause decisions"); *id.* at 456 ("'the solution of the problems precipitated by . . . technological advances and new ways of living cannot come about through the application of rigid constitutional restraints formulated and enforced by the courts'") (quoting United States v. Causby, 328 U.S. at 274 (Black, J., dissenting). *See also, e.g.*, Hanley, *supra* note 48, at 317, 319-20, 327, 328 ("As the Supreme Court itself has explained, the question of whether a governmental action effects a taking necessarily requires a weighing of public and private interests," citing Agins v. City of Tiburon, 467 U.S. 255, 261 (1980)), 333, 351-53; Roger J. Marzulla & Nancie G. Marzulla, *Regulatory Takings in the United States Claims Court: Adjusting the Burdens that in Fairness and Equity Ought to Be Borne by Society as a Whole*, 40 CATH. U. L. REV. 549 (1991) (discussing ad hoc approach of Supreme Court and U.S. Claims Court); Charles R. Wise, *The Changing Doctrine of Regulatory Taking and the Executive Branch: Will Takings Impact Analysis Enhance or Damage the Federal Government's Ability to Regulate?*, 44 ADMIN. L. REV. 403, 410 (1992) ("In doing their balancing act, the courts employ no clear standard in weighing the factors."); David Coursen, Lucas v. South Carolina Coastal Council*: Indirection in the Evolution of Takings Law*, 22 ENVTL. L. REP. (ENVTL. L. INST.) 10,778, 10,782 (Dec. 1992) (discussing Court's "impatience" with balancing approach and "search for a bright-line rule"); Barry M. Hartman, Lucas v. South Carolina Coastal Council*: The Takings Test Turns a Corner*, 23 ENVTL. L. REP. (ENVTL. L. INST.) 10,003, 10,004-05 (Jan. 1993) (applauding the Court's shift in *Lucas* from a "policy-based," "ad hoc" approach to a more "objective, principled" approach).

needed. If there has been no taking because the prohibited use was not part of the owner's bundle of rights when the property was acquired, there is likewise no need to proceed further. And if there is nothing "taken for public use," then no compensation is required either.

If, however, there is a more than de minimis diminution in value, not offset by any reciprocity of advantage, as a result of the government taking a right that the owner held upon acquisition of the property, and the taking was for public use, then just compensation must be paid—even if the value of property taken was small, in absolute terms or as a percentage of other property rights held by the owner, and even if the property was not taken for very long, and even if the government's reasons for wanting the property were powerful.

The "ad hoc" consideration all at once of a variety of "factors" to be "balanced" results, unsurprisingly, in each Justice voting his or her own policy preferences. It results in no predictability—in no real "law" at all.[227] This balancing has no textual justification, and its lawless result is flatly inconsistent with a constitution's letter and spirit.

The need for rule and principle in Takings Clause jurisprudence can be illustrated by reading *Pennsylvania Coal Co. v. Mahon*[228] and *Penn Central Transportation Co. v. New York City*,[229] two widely cited—and utterly irreconcilable—Supreme Court decisions. In *Mahon*, the issue was whether a state prohibition of coal mining where it might cause subsidence of buildings effected a compensable taking; in *Penn Central*, the issue was whether a municipal ordinance prohibiting construction of a multistory office building above a designated landmark effected a compensable taking. The Court—per Justice Holmes, Justice Brandeis dissenting—held that there was a taking in *Mahon*; the Court—per Justice Brennan, Justice Rehnquist dissenting—held that there was no taking in *Penn Central*.

Aside from the fact that they were decided fifty-six years apart, and that one involved property beneath a building and the other property above a building, the cases are difficult to distinguish factually. More to the point, the methodologies in the Court's two decisions are very similar. In both cases, the Court explicitly eschewed hard and fast rules in favor of an ad hoc, highly fact-specific inquiry, with the strength of the public interest balanced equitably against the unfairness to the property owner. Justice Holmes freely second-guessed whether the legislative scheme adopted could not have been better drafted, and stressed the severe diminution in value of the owner's property; Justice Brennan, conversely, discounted the degree and unfairness of the

227. *See generally* Justice Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

228. 260 U.S. 393 (1922).

229. 438 U.S. 104 (1978).

limitation on the owner's use of his property, and found the prohibition to be "substantially related to the promotion of the general welfare."[230] Given this approach, it can hardly come as a surprise that the Court essentially votes its policy preferences, and that Brennan and Brandeis will reach results different from Holmes and Rehnquist.[231]

A rule is especially preferable to a "black box" in law where property rights are concerned. For our economic system to work, those who acquire, create, or develop property must have some assurance that it will not be taken from them. Otherwise there is created an enormous disincentive for productivity. If patents and copyrights are granted to encourage thought and initiative, then *a fortiori* there must be definite, knowable limitations when the government takes private property for public use without just compensation.

The Court itself, in eschewing reliance on the three-part test in its most recent important takings decisions, *Lucas* and *Dolan*, seems to recognize the desirability of finding a way to make takings law less "ad hoc." This Article has discussed how the Takings Clause's text itself, if taken seriously, would provide a law of rules. Moreover, while there is much in the Supreme Court's jurisprudence to date that is not consistent with that text, the Court's three basic inquiries and many elements of those inquiries have textual roots, or at least could be given them. It is not too late for the Court to reclaim the text of the Takings Clause.

230. *Id.* at 138.

231. *See also* Hartman, *supra* note 226, at 10,005 (contending that an ad hoc, balancing approach led to contradictory outcomes in two "sick chicken" takings decisions from the Federal Circuit and Third Circuit, respectively).