SHEETZ V. COUNTY OF EL DORADO: LEGISLATURES MUST COMPLY WITH THE TAKINGS CLAUSE

By Brian T. Hodges and Deborah J. La Fetra[1]

INTRODUCTION

Although state legislatures enjoy broad authority to attach conditions to licenses, permits or other benefits, this authority ends when the government conditions the issuance of a benefit upon a requirement that a person waive or surrender a constitutional right.[2] In *Nollan v. California Coastal Commission*[3] and *Dolan v. City of Tigard*,[4] the U.S. Supreme Court held that this doctrine of unconstitutional conditions, as specially applied to enforce the Fifth and Fourteenth Amendments in the context of land-use permitting, prevents the government from using that process to fund public works projects that otherwise would be subsidized by taxes or other general funding. To avoid taking private property without paying just compensation, governments must show that a challenged permit condition is designed to mitigate impacts caused by the proposed development via a two-part "essential nexus" and "rough proportionality" test.[5] A permit condition that does not satisfy either prong of this test is unconstitutional and invalid.[6]

Yet for nearly as long as the *Nollan/Dolan* doctrine has been in place, state and lower federal courts conflicted as to whether the doctrine applies

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[2] Ivanhoe Irrigation Distr. v. McCracken, 357 U.S. 275, 294–95 (1958); Lafayette Ins. Co. v. French, 59 U.S. 404, 407 (1855) ("This consent [to do business] may be accompanied by such condition [a state] may think fit to impose . . . . provided they are not repugnant to the constitution or laws of the United States . . . .").

[3] Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

[4] Dolan v. City of Tigard, 512 U.S. 374 (1994).

[5] *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 391.

[6] Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 604–05 (2013); *id.* at 612–14 (confirming that the doctrine applies to monetary exactions imposed as a condition of permit approval).

equally to all branches of government, or only to administrative exactions imposed by agencies on an ad hoc basis. The U.S. Supreme Court's unanimous decision in *Sheetz v. County of El Dorado* settled this question by ruling that takings clause liability, as a subset of the unconstitutional conditions doctrine, applies to *all* branches of government, including the legislature.[7] The decision promises positive changes to government funding of infrastructure that results in more affordable housing and greater accountability and transparency.

Sheetz explicitly continues the Court's efforts to restore the Takings Clause of the Fifth Amendment to the "full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights"[8] by confirming that "[t]he Takings Clause does not distinguish between legislative and administrative permit conditions."[9] The opinion also offers tantalizing comments on other emerging takings issues. Specifically, *Sheetz* recognizes judicial takings as a cause of action, adopting Justice Antonin Scalia's plurality opinion in *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env'tl. Prot.*,[10] and also suggests that a state's sovereign immunity cannot bar takings claims.

THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

Nollan and *Dolan* rested upon a distinct legal theory within the Supreme Court's takings jurisprudence.[11] The nexus and proportionality tests constitute "a special application" of the unconstitutional conditions doctrine that "protects the Fifth Amendment right to just compensation for property that the government takes when owners apply for land-use permits."[12] The doctrine of unconstitutional conditions originated in mid-Nineteenth century Supreme Court cases addressing protectionist state laws that required out-of-state companies to forego certain constitutional rights as a condition of

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7 Sheetz v. Cnty. of El Dorado, 601 U.S. 267, 277–80 (2024).

8 Knick v. Twp. of Scott, 588 U.S. 180, 189 (2019).

9 Sheetz, 601 U.S. at 281; *see also* Cedar Point Nursery v. Hassid, 594 U.S. 139, 149 (2021) ("The essential question [in a physical taking case] is not, as the Ninth Circuit seemed to think, whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property."); Horne v. Department of Agriculture, 576 U.S. 350, 369 (2015) (there is no "generally applicable exception to the usual compensation rule.").

10 Stop the Beach Renourishment, Inc. v. Florida Dep't of Env'tl. Prot., 560 U.S. 702, 713–15 (2010) (emphasizing that the Takings Clause is unconcerned with which "particular state actor is" burdening property rights); Sheetz v. Cnty. of El Dorado, 601 U.S. at 279.

11 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 547–48 (2005); Nollan v. California Coastal Comm'n, 483 U.S. 825, 840-42; Dolan v. City of Tigard, 512 U.S. at 392-94.

12 Koontz, 570 U.S. at 604 (quoting Lingle, 544 U.S. at 547).

obtaining permission to do business in the state.[13] The doctrine enforces the primacy of the U.S. Constitution by holding that "the power of the state . . . . is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of [federal] constitutional rights."[14]

NOLLAN, *DOLAN*, AND *KOONTZ*: TESTING FOR UNCONSTITUTIONAL CONDITIONS

The Supreme Court recognized that the unique nature of land-use permitting requires a "special application of the 'doctrine of unconstitutional conditions'"[15] designed to protect a landowner's rights in property[16] while still recognizing the government's authority to plan for appropriate community development.[17]

The "essential nexus" and "rough proportionality" tests define the limited circumstances in which the government may lawfully condition permit approval upon the dedication of a property interest to the public: (1) the government may require a landowner to dedicate property to a public use only where the dedication is necessary to mitigate the negative impacts of the proposed development on the public; and (2) the government may not use the permit process to coerce landowners into giving property to the public that the government would otherwise have to pay for.[18] The doctrine ensures that government cannot opportunistically single out individual landowners during

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13 *See*, *e.g.*, Lafayette Ins. Co. v. French, 59 U.S. 404, 407 (1855) (invalidating a state statute conditioning business license for out-of-state companies on a waiver of the right to remove lawsuits to federal court).

14 Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593–94 (1926) (invalidating state law requiring out-of-state trucking company to dedicate personal property to public uses as a condition of permission to use state highways); *see also* Martin v. Hunter's Lessee, 14 U.S. 304, 340 (1816) (The U.S. Constitution is "the supreme law of the land, and … every state shall be bound thereby."); Terral v. Burke Const. Co., 257 U.S. 529, 532–33 (1922) ("[T]he sovereign power of a state . . . . is subject to the limitations of the supreme fundamental law."); *see also* RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 5 (1993) (Even if the government has absolute discretion to grant or deny a land-use permit, "it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of that person's constitutional rights."); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1421–22 (1989) ("Unconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference.").

15 *Lingle*, 544 U.S. at 530.

16 *Nollan*, 483 U.S. at 833 n.2 ("[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit'").

17 *See* Nectow v. City of Cambridge, 277 U.S. 183, 187 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926).

18 *See Koontz*, 570 U.S. at 604–06; *Dolan*, 512 U.S. at 385 ("[G]overnment may not require a person to give up the constitutional right ... to receive just compensation when property is taken for a public use . . . in exchange for a discretionary benefit [that] has little or no relationship to the property.").

the permitting process to bear the burdens of public policies that benefit, and should be distributed among, the public as a whole.[19]

In *Nollan*, the California Coastal Commission demanded that James Patrick Nollan dedicate a shoreline easement across his private beachfront property as a condition for obtaining a permit needed to rebuild his home.[20] The Supreme Court held that the government could only justify its demand if it bore an "essential nexus" to the alleged public impacts that would result from Nollan's project.[21] The Commission claimed that "the new house would increase blockage of the view of the ocean, thus contributing to the development of 'a "wall" of residential structures' that would prevent the public 'psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit,'" and would "increase private use of the shorefront."[22] But there was no nexus between a shoreline easement adjacent to the ocean, and a rationale that relied on the ability of people on the road to have a view perpendicular to the ocean. The asserted rationale made no sense[23] and certainly failed to demonstrate an "essential" nexus. Without a sufficient nexus between the permit condition and the project's alleged impact, the easement condition was "not a valid regulation of land use but 'an out-and-out plan of extortion.'"[24]

Dolan clarified that the required "fit" between a permit condition and the alleged public impact of a proposed land use requires "some sort of individualized determination that the required dedication is related *both in nature and extent* to the impact of the proposed development."[25] In that case, the City of Tigard demanded that Florence Dolan dedicate approximately ten percent of her land as a stream buffer and for a bicycle path as a condition on a permit to expand her plumbing and electrical supply store.[26] Dolan refused to comply with the conditions and sued the city in state court on a federal Takings Clause claim.[27] The Court held that although the city established a *nexus* between both conditions and Dolan's proposed expansion; the conditions nevertheless effected an unconstitutional taking because they lacked a "degree of connection between the exactions and the projected impact of the proposed development."[28] Where a nexus exists, the exaction must be roughly proportionate to a project's impacts.[29] The city failed to demonstrate

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19 *Dolan*, 512 U.S. at 384 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

20 *Nollan*, 483 U.S.at 827–28.

21 *Id.* at 837.

22 *Id.* at 828–29.

23 *Id.* at 838–39 ("Rewriting the argument to eliminate the play on words makes clear that there is nothing to it.").

24 *Id.* at 837 (citations omitted).

25 *Dolan*, 512 U.S. at 391 (footnote omitted; emphasis added).

26 *Id*. at 377, 380.

27 *Dolan*, 512 U.S. at 378.

28 *Id.* at 386, 394–95.

29 *Id*. at 391.

that the conditions were roughly proportional to the impact of Dolan's change in land use; thus, the permit conditions unconstitutionally took Dolan's property without just compensation.[30]

How can a city show such proportionality? The Court has not provided a roadmap, but identified some boundaries to guide governmental action. For example, Tigard considered and relied on valid studies showing the beneficial effects of setting aside land to mitigate traffic and stormwater impacts prior to enacting the code provisions requiring the dedications. *Dolan* nonetheless held that beneficial goals and good intentions are *not enough* to satisfy the doctrine of unconstitutional conditions.[31]

Nollan and *Dolan* both involved conditions that demanded dedication of land. In *Koontz*, the Supreme Court held that the *Nollan* and *Dolan* tests apply also to permit conditions demanding money.[32] There, Coy Koontz, Sr., sought permission to develop 3.7 acres of his 14.9 acre, undeveloped, commercial property located at the intersection of two major highways in Orlando, Florida.[33] The local water district conditioned approval of a preliminary clear and grade permit upon one of two alternative conditions: (1) that Koontz reduce the size of his proposed development and dedicate a 13.9-acre conservation easement, or (2) that he hire contractors to install culverts and fill ditches on "District-owned land several miles away."[34]

The Court concluded that the alternative demand constituted a monetary exaction because it required the owner to "spend" or "relinquish[] . . . funds linked to a specific, identifiable property interest such as a bank account or parcel of real property."[35] Like the land demands in *Nollan* and *Dolan*, the "[t]he fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property," which creates "the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property."[36] Thus, the Court held that "the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* … even when its demand is for money."[37]

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30 *Id.* at 394–95.

31 *Id*. at 389 ("[G]eneralized statements as to the necessary connection between the required dedication and the proposed development [are] too lax to adequately protect petitioner's right to just compensation if her property is taken for a public purpose."); *see also id.* at 395–96.

32 *Koontz*, 570 U.S. at 619.

33 *Id.* at 600.

34 *Id*. at 601–02.

35 *Id.* at 613 (holding that the Takings Clause applies to the government's "demand for money" when it "operate[s] upon . . . an identified property interest by directing the owner of a particular piece of property to make a monetary payment").

36 *Id.* at 614.

37 *Id*. at 619.

SHEETZ: LEGISLATURES MUST COMPLY WITH *NOLLAN* AND *DOLAN*

Almost immediately after *Dolan*, state and lower federal courts divided on the question whether the *Nollan/Dolan* doctrine applies to permit conditions required by acts of generally applicable legislation, or whether the doctrine is strictly limited to conditions imposed as part of an ad hoc administrative procedure.[38] While several courts found no basis to distinguish one branch of government from another when the government demands property as a condition of permit approval, many other state and federal courts disagreed.[39] California courts were among the first to adopt a categorical rule exempting legislative exactions from the nexus and proportionality tests.[40]

A. *The Dispute in Sheetz and State Court Rulings*

In 2016, George Sheetz applied for a permit to construct a small, manufactured house on his rural El Dorado County property, where he planned to retire with his wife and raise his grandchild.[41] The County sits in the foothills of the Sierra Nevada mountain range, a popular destination for people priced out of the Sacramento and San Francisco Bay Area housing markets. The growing population stressed both local infrastructure and the state highway that services the area. The County estimated that it would cost $804.3 million to improve the roads, only a fraction of which was available from federal and state grants.[42] Rather than relying on general taxes to cover the unfunded cost of $572.3 million,[43] the County shifted nearly the entire burden onto developers and other property owners proposing new projects via "traffic impact mitigation fees."[44] The County issued the ministerial permit but conditioned it on Sheetz paying a $23,420 traffic impact mitigation fee,

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38 *See*, *e.g.*, California Bldg. Indus. Ass'n v. City of San Jose, 136 S. Ct. 928, 929 (2016) (Thomas, J., concurring in denial of certiorari) (acknowledging a decades-long split of authority); Parking Ass'n of Georgia, Inc. v. City of Atlanta, 515 U.S. 1116, 1117–18 (1995) (Thomas, J., dissenting in denial of certiorari) (recognizing that the split of authority raises an important question of constitutional law).

39 *Sheetz*, 601 U.S. at 273 n.3.

40 Ehrlich v. City of Culver City, 12 Cal. 4th 854, 876 (1996); Building Industry Assn. v. City of San Jose, 61 Cal. 4th 435, 460 n.11 (2015) (questioning but not deciding whether *Koontz* affected the state's legislative exactions rule).

41 *Sheetz*, 601 U.S. at 273.

42 *Id.* at 272.

43 El Dorado County, Traffic Impact Mitigation Fee Program, Draft Supplement to the General Plan EIR, Section 1, p. 21 (March 2006); *Sheetz*, 84 Cal. App. 5th at 401–02.

44 *Sheetz*, 84 Cal. App. 5th at 402, 416. The County allocated 94% of the costs for traffic improvements to new residential projects—in part, so as to not overburden and discourage new businesses from coming into the County.

among other fees.[45] Although denominated as "mitigation," the County made no "'individualized determinations' as to the nature and extent of the traffic impacts caused by a particular project on state and local roads," including whether the project created any need to construct new roads.[46]

Instead, the County imposed the fee pursuant to its legislatively adopted fee schedule, which predetermined fees based on the general type of proposed development (commercial, residential, and so on) and its location within the County.[47] Although the schedule allowed for wide variability in the fees applicable to commercial development (based on use, size, amenities and other factors that may vary traffic impacts), it deemed all single-family homes to have an identical impact on roads and subject to the same predetermined fee.[48] The resulting fee schedule disproportionately allocated fees onto new single-family homes. For example, Sheetz's 1,854-square-foot home incurred the same fee applicable to a 34,441-square-foot mega-church, an 11,047-square-foot office building, or a small gas station.[49]

George Sheetz did not believe that construction of a small, manufactured house caused public impacts justifying an impact mitigation fee of $23,420.[50] He paid the fee under protest and filed a petition for writ of mandate in the California superior court, seeking a refund on the ground that the fee was an unconstitutional condition on his building permit and violated the Takings Clause under *Nollan* and *Dolan*.[51] He claimed that the fee unfairly shifted the public's burden of addressing existing and future road deficiencies onto him as a builder of new development.[52] He also alleged that the fee violated *Dolan*'s "rough proportionality" test because the County imposed the condition on his permit without any individualized determination regarding the nature and extent of his proposed home's impact to state and local roads.[53]

The California trial court dismissed Sheetz's *Nollan*/*Dolan* claim without addressing its merits, holding that those precedents do not apply to generally applicable, nondiscretionary legislative exactions.[54] The California Court of Appeal affirmed, holding that "the requirements of *Nollan* and *Dolan* apply to development fees imposed as a condition of permit approval

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45 *Sheetz*, 601 U.S. at 272.

46 *Id.* at 402.

47 *Id.* at 273.

48 El Dorado County, Resolution No. 021-2012, Amending the 2004 General Plan Traffic Impact Mitigation (TIM) Fee Program and Adopting TIM Fee Rates, at p. 9 (Fee Schedule) (Feb. 14, 2012) (available at https://www.eldoradocounty.ca.gov/files/assets/county/v/1/documents/land-use/transportation/tim/fe-tim-fee-resolution-2012.pdf).

49 *Id*.

50 *Sheetz*, 601 U.S. at 272.

51 *Id.*; *see generally* Nollan v. California Coastal Comm'n, 483 U.S. 825, 840-42; Dolan v. City of Tigard, 512 U.S. at 392-94.

52 *Sheetz*, 601 U.S. at 276.

53 *Id.* at 272.

54 *Sheetz*, 601 U.S. at 273.

where such fees are "'imposed . . . neither generally nor ministerially, but on an individual and discretionary basis.'"[55] The court continued, explaining that under California law, "requirements of *Nollan* and *Dolan* . . . do not extend to development fees that are generally applicable to a broad class of property owners through legislative action . . . as distinguished from a monetary condition imposed on an individual permit application on an ad hoc basis."[56] The California Supreme Court denied review.[57]

B. *Sheetz in the Supreme Court*

1. The Majority Opinion

The U.S. Supreme Court granted Sheetz's petition for writ of certiorari to decide "whether a permit exaction is exempt from the unconstitutional-conditions doctrine as applied in *Nollan* and *Dolan* simply because it is authorized by legislation."[58] Sheetz argued that there was no basis in the text of the constitution, history, or in the U.S. Supreme Court's caselaw for a rule exempting legislative exactions from the doctrine of unconstitutional conditions.[59] And although El Dorado County vociferously defended California's exemption of legislative exactions throughout the state court proceedings, it abandoned those arguments before the U.S. Supreme Court and agreed that there was no basis for California's rule. [60]

Instead, the County interjected two new and substantively different questions. First, the County asked, "whether the traffic impact fee would be a compensable taking if imposed outside the permitting context and therefore could trigger *Nollan*/*Dolan* scrutiny."[61] This question sought to either overturn or drastically limit *Koontz*'s holding that extended *Nollan*/*Dolan* scrutiny to land-use permit conditions demanding money.[62] The government argued that *Koontz* was wrongly decided because Justice Anthony Kennedy's concurring opinion in *Eastern Enterprises v. Apfel,* read in conjunction with the *Koontz* dissenting opinion, would create a *better* rule (from its

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55 *Sheetz*, 84 Cal. App. 5th at 406–07 (quoting San Remo Hotel L.P. v. City and County of San Francisco, 27 Cal. 4th 643, 666–70 (2002) (citing *Ehrlich*, 12 Cal. 4th at 859–60, 866–67, 876, 869, 881).

56 *Id.* at 407 (citing California Building Industry Ass'n v. City of San Jose, 61 Cal. 4th 435, 459 n.11 (2015)).

57 *Id.* at 273.

58 Petition for Writ of Certiorari, Sheetz v. Cnty. of El Dorado, 2023 WL 3271977, at *i.

59 *Id.*

60 *Sheetz*, 601 U.S. at 279 (noting that "at oral argument, the parties expressed 'radical agreement' that conditions on building permits are not exempt from scrutiny under *Nollan* and *Dolan* just because a legislature imposed them.").

61 Cnty. of El Dorado, Response Br., 2023 WL 8719004, at *32; *see also* United States, Amicus Br., 2023 WL 8894563, at *20–*23 (U.S. Supreme Ct, No. 22-1074, Dec. 20, 2023).

62 *Koontz*, 570 U.S. at 619.

perspective): that government demands for money will not effect a taking unless the government confiscates a specific sum of money, which might include naming a bank account whose contents are being seized.[63] Based on that, the County argued that the holding of *Koontz* should be limited to fees imposed in lieu of an easement dedication.[64]

Second, the County asked, "whether a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development."[65] This argument aimed to rehabilitate California's legislative exclusion by recasting the rule from one that categorically exempts legislative exactions from constitutional review to one that exempts them from the heightened scrutiny required by *Nollan* and *Dolan*.[66] The County insisted that a legislatively adopted formula imposing development fees on classes of property is more akin to zoning—*i.e.*, a "legislative determinations classifying entire areas of a local community"[67]—than a permitting decision and therefore should only be subject to the deferential, rational basis review typically reserved for substantive due process claims.[68]

On April 12, 2024, the Court unanimously reversed the California Court of Appeal and held legislative exactions subject to *Nollan/Dolan*.[69] Written by Justice Amy Coney Barrett, the decision explained that the Court's takings caselaw is premised on the understanding that the Takings Clause "coexists with the States' … substantial authority to regulate land use."[70] This has resulted in the Court adopting different tests for determining when a government regulation rises to the level of a compensable taking, depending on the nature of the regulation and property rights involved.[71] This relationship is "more complicated" in the context of land-use permitting.[72] On the one hand, government may lawfully place conditions on a permit that are necessary to mitigate for impacts that the proposed development will have on the public.[73] For example, "if a proposed development will 'substantially increase traffic congestion,' the government may condition the building permit on the

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63 United States, Amicus Br., 2023 WL 8894563, at *20–*23 (citing Eastern Enter. v. Apfel, 524 U.S. 498, 540–41 (1998) (Kennedy, J., concurring in judgment and dissenting in part)); *accord* Eastern Enter. 524 U.S. at 554–55 (Breyer, J., dissenting).

64 Cnty. of El Dorado, Response Br., 2023 WL 8719004, at *21–*22.

65 *Id.* at *24–*25.

66 *Id.*

67 *Id.* at *22

68 *Id.*

69 *Sheetz*, 601 U.S. at 280.

70 *Id.* at 274 (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)).

71 *Id.*

72 *Id.*

73 *Id.*

owner's willingness 'to deed over the land needed to widen a public road.'"[74] In that circumstance, "the government is entitled to put the landowner to the choice of accepting the bargain or abandoning the proposed development."[75] On the other hand, the government may not "withhold[] or condition[] a building permit for reasons unrelated to its land-use interests."[76] For example, "[i]magine that a local planning commission denies the owner of a vacant lot a building permit unless she allows the commission to host its annual holiday party in her backyard (in propertyspeak, granting it a limited-access easement)."[77] Or imagine "if the commission gives the landowner the option of bankrolling the party at a local pub instead of hosting it on her land."[78] "Because such conditions lack a sufficient connection to a legitimate land-use interest, they amount to 'an out-and-out plan of extortion.'"[79]

The Court's decisions in *Nollan* and *Dolan* "set out a two-part test modeled on the unconstitutional conditions doctrine," which is designed to "address this potential abuse of the permitting process."[80] They establish a heightened scrutiny, impact-mitigation standard. "A permit condition that requires a landowner to give up more than is necessary to mitigate harms resulting from new development has the same potential for abuse as a condition that is unrelated to that purpose."[81]

With that background in mind, the Court considered California's legislative exactions rule against the text of the constitution, history, and precedent. Turning first to constitutional text, the Court observed that there is nothing "limit[ing] the Takings Clause to a particular branch of government."[82] Instead, the Clause, "which speaks in the passive voice, 'focuses on (and prohibits) a certain 'act': the taking of private property without just compensation.'"[83] The Takings Clause "does not single out legislative acts for special treatment," nor does the Fourteenth Amendment, which incorporated the Takings Clause against the States,[84] because that Amendment "constrains the power of each 'State' as an undivided whole."[85] Thus, "there is 'no textual justification for saying that the existence or the scope of a State's power to

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74 *Id*. at 274–75 ("[C]onditions of this nature," the Court noted, are "a 'hallmark of responsible land-use policy' [and] do not entitle the landowner to compensation even if they require her to convey a portion of her property to the government.").

75 *Sheetz*, 601 U.S. at 275 (citing RICHARD EPSTEIN, BARGAINING WITH THE STATE 188 (1993)).

76 *Id*.

77 *Id*.

78 *Id*.

79 *Id*. (quoting *Nollan*, 483 U.S. at 837. (internal quotation marks omitted)).

80 *Id*.

81 *Sheetz*, 601 U.S. at 276.

82 *Id*.

83 *Id*. (quoting Knight v. Metropolitan Govt. of Nashville & Davidson Cnty., 67 F.4th 816, 829 (6th Cir. 2023)).

84 *Id*.

85 *Id*.

expropriate private property without just compensation varies according to the branch of government effecting the expropriation'"[86] and "permit conditions imposed by the legislature and other branches stand on equal footing."[87]

Nor did the Court find any basis in history for exempting legislative acts from the protections of the Takings Clause. Any "special deference for legislative takings would have made little sense historically, because legislation was the conventional way that governments exercised their eminent domain power"[88] and "legislation was a prime target for scrutiny under the Takings Clause."[89] The Court's own jurisprudence confirmed that the Takings Clause "does not otherwise distinguish between legislation and other official acts."[90] And unconstitutional conditions cases in other contexts held legislation subject to review under the same standard as executive acts.[91] "Failing to give like treatment to legislative conditions on building permits would thus 'relegat[e] the just compensation requirement] to the status of a poor relation' to other constitutional rights."[92]

The Court concluded: "[T]here is no basis for affording property rights less protection in the hands of legislators than administrators. The Takings Clause applies equally to both—which means that it prohibits legislatures and agencies alike from imposing unconstitutional conditions on land-use permits."[93]

The Court noted that the County abandoned its defense of California's legislative exactions rule in favor of newly asserted and "more nuanced" arguments, "including whether a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development."[94] Because the state courts never addressed those arguments, the Court remanded the case to determine "in the first instance" whether the new arguments were preserved and "how they bear on Sheetz's legal challenge" when determining the merits of Sheetz's *Nollan/Dolan* claim."[95]

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86 *Id*. (citing Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, 560 U.S. 702, 714 (2010) (plurality opinion)).

87 *Sheetz*, 601 U.S. at 277.

88 *Id*.

89 *Sheetz*, 601 U.S. at 278.

90 *Id*. (citing Knick v. Township of Scott, 588 U.S. 180, 185 (2019)).

91 *Id*. at 279.

92 *Id*. (quoting *Dolan,* 512 U.S. at 392).

93 *Sheetz*, 601 U.S. at 279.

94 *Id*. at 280 ("The County was wise to distance itself from the rule applied by the California Court of Appeal, because, as we have explained, a legislative exception to the ordinary takings rules finds no support in constitutional text, history, or precedent.").

95 *Id*.

2. The Concurring Opinions

Although the full Court addressed only whether legislative exactions are subject to *Nollan* and *Dolan*, the County's new issues drew comments from three concurring opinions, highlighting issues that will likely arise in future exactions cases: (1) when an impact fee is an exaction, and (2) whether class-based exactions are subject to the heightened scrutiny nexus and proportionality tests. [96]

Justice Sotomayor, joined by Justice Jackson, emphasized that the Court did not decide whether the County's traffic impact mitigation fee would be a taking if it were demanded outside the permitting context—a necessary predicate to an unconstitutional conditions claim.[97] The state courts did not address this question because the California Supreme Court has long-held that impact fees are exactions under *Nollan* and *Dolan*, subject only to the state's now-repudiated legislative exactions rule.[98] Throughout the state court proceedings, the parties and courts accepted that the traffic impact fee was an exaction and focused solely on the legislative origin of the impact fee rather than the fee's operation on a property interest.[99]

The *Sheetz* majority opinion only hints as to how the Court might resolve this question, citing *Koontz* for the proposition that the nexus and proportionality tests apply "regardless of whether the condition requires the landowner to relinquish property or requires her to pay a 'monetary exactio[n]' instead of relinquishing the property,"[100] and later stating that "the Takings Clause 'protects private property without any distinction between different types[.]'"[101] The Court's citation to the majority opinion in *Koontz* is significant because the government's claim that impact fees are not exactions was based on its insistence that *Koontz* was wrongly decided.[102]

Despite the County's efforts, *Koontz* remains the most direct precedent on monetary exactions and compels a conclusion that impact fees—as a

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96 *Id.* at 267, 272.

97 *Id.* at 280–81 (Sotomayor, J., concurring); *see also* Koontz v. St. Johns River Water Management Dist., 570 U.S. 595, 611–12 (2013); *id.* at 605 ("Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.").

98 *Ehrlich*, 12 Cal. 4th at 876, 878.

99 *See Sheetz*, 84 Cal. App. 5th at 405 ("A land use-exaction occurs when the government demands real property or money from a land-use permit applicant as a condition of obtaining a development permit."); Brief for Respondent, Sheetz v. Cnty. of El Dorado, 84 Cal. App. 5th 394 (2022) (No. C093682), 2022 WL 1570886, at *31–*39 (acknowledging that "development fees" are exactions, subject to the state's legislative exactions rule).

100 *Sheetz*, 601 U.S. at 276 (quoting Koontz v. St. Johns River Water Management Dist., 570 U.S. 595, 612–15 (2013)).

101 *Id.* at 276–77 (quoting Horne v. Department of Agriculture, 576 U.S. 350, 358 (2015)).

102 Brief for United States as Amici Curiae Supporting Respondents, Sheetz v. Cnty. of El Dorado, 601 U.S. 267 (2024) (No. 22-1074), 2023 WL 8894563, at *22–*23.

subset of "monetary exactions"—are subject to *Nollan* and *Dolan*. Indeed, the question presented in *Koontz* was "whether a demand for money can give rise to a claim under *Nollan* and *Dolan*,"[103] and the Court unequivocally said yes.[104] The Court relied in part on Justice Kennedy's opinion in *Eastern Enterprises v. Apfel*, which explained that a monetary demand may effect a taking where it "operate[s] upon or alters an identified property interest."[105] *Koontz* reasoned that a monetary exaction meets that definition because it involves a "demand for money" that "'operate[s] upon . . . an identified property interest' by directing the owner of a particular piece of property to make a monetary payment."[106] This differs from a general financial burden because it is inextricably linked to and "burden[s] . . . ownership of a specific parcel of land" and is, therefore, subject to a "*per se* [takings] approach."[107] *Koontz* did not limit its holding to any particular type of monetary exaction[108] and it remains good law.

Justice Kavanaugh's brief concurring opinion, joined by Justices Kagan and Jackson, noted that the Court had not yet decided "whether 'a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular

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103 *Koontz*, 570 U.S. at 603.

104 *Id.* at 619; *see also id.* at 626, 629 (acknowledging that the majority opinion held "*all* monetary exactions" subject to *Nollan/Dolan*) (Kagan, J., dissenting).

105 *Koontz*, 570 U.S. at 613 (quoting Eastern Enterprises v. Apfel, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in part and dissenting in part)).

106 *Id*.

107 *Id.* at 614. At oral argument in *Sheetz*, Justice Alito—the author of *Koontz*—and Justice Barrett opined that an impact fee burdens property by imposing an "easement on the property that prohibits any building" unless the owner pays to release that burden. Transcript of Oral Argument at *13–*14, Sheetz v. Cnty. of El Dorado, 601 U.S. 267 (2024) (No. 22-1074); *see generally* AMERICAN PLANNING ASSOCIATION, GROWING SMART, LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE, 8-165 (Stuart Meck ed., 2002). (observing that an "impact fee is both a personal liability of the owners of property that is the subject of new development and a lien upon the property" differs from a use restriction).

108 The County's claim that *Koontz* should be limited to only in-lieu fees misreads the decision. The majority's discussion of in-lieu fees directly responded to the government's and dissent's insistence that, as a matter of law, "an obligation to spend money *can never* provide the basis for a takings claim." *Koontz*, 570 U.S. at 612 (emphasis added). The majority responded, "that if we accepted this argument it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*." *Id.* The majority used the example of in-lieu fees to illustrate that point, explaining that all the government would have to do is "give the owner a choice of either surrendering an easement or making a payment equal to the easement's value." *Id.* (noting that "so-called 'in lieu of' fees are utterly commonplace"). This back-and-forth dicta explains why the government's and dissent's proposal to shield monetary exactions from heightened scrutiny went too far, and does not limit the Court's express and unqualified holding. *See generally id.* at 619; *see also* Anderson Creek Partners, L.P. v. Cnty. of Harnett, 382 N.C. 1, 28 n.11 (2022) ("[R]ather than limiting the reach of the [Court's] decision," *Koontz*'s "reference to 'in lieu of' fees" was "a response to the . . . [argument] that a government demand for money rather than an interference in tangible property rights did not constitute a taking.").

development.'"[109] But the concurrence offers no insight into how he would resolve the class-based exactions question, simply stating that "today's decision does not address or prohibit the common government practice of imposing permit conditions, such as impact fees, on new developments through reasonable formulas or schedules that assess the impact of classes of development rather than the impact of specific parcels of property."[110]

Justice Gorsuch's concurrence responds to Justice Kavanaugh's question, opining that "the logic of today's decision" compels a conclusion that class-based exactions are indeed subject to the same nexus and proportionality tests applicable to all other exactions[111] because legislative demands for property "must follow the same constitutional rules" as those made by other government branches.[112] This conclusion is consistent with the Court's decisions in *Nollan* and *Dolan*, which both involved conditions imposed on a large class of properties.[113] In *Nollan*, "the Court acknowledged that the commission hadn't singled out the plaintiffs' particular property for special treatment but 'had similarly conditioned' dozens of other building projects."[114] Indeed, The Coastal Commission's demand was pursuant to "a 'comprehensive program' demanding similar public access easements up and down the California coast."[115] Whether the exaction was imposed individually or not made no difference "in the Court's analysis, the test it applied, or the conclusion it reached. All that mattered was whether the government's action amounted to an uncompensated taking of the property of the plaintiffs whose case was actually before the Court."[116] Similarly, in *Dolan*, the challenged permit conditions were imposed on all commercial development pursuant to the city's "comprehensive land use pla[n]," developed to meet "statewide planning goals."[117] "Even so, the Court held an 'individualized determination' necessary to determine whether an unconstitutional taking had occurred under the same test the Court applied in *Nollan*."[118]

Thus, Justice Gorsuch concluded that "nothing in *Nollan*, *Dolan*, or today's decision supports distinguishing between government actions against the many and the few any more than it supports distinguishing between

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109 *Sheetz*, 601 U.S. at 284 (Kavanaugh, J., concurring).

110 *Id.* at 284.

111 *Id.* at 283 (Gorsuch, J., concurring).

112 *Id.* at 282.

113 *Id.* at 282–83.

114 *Id.* at 282; *see also Nollan*, 483 U.S. at 855 (noting that the exaction was mandated by the California Coastal Act, which stated that "[p]ublic access . . . shall be provided" in every "new development project[]" along the coast).

115 *Sheetz*, 601 U.S. at 282.

116 *Id.* at 282–83.

117 *Id.* at 283; *see also Dolan*, 512 U.S. at 377, 379 (noting that the "conditions [were] imposed by the city's CDC"—i.e., its Community Development Code, which dictated certain dedications for all new developments in the Central Business District encompassing Dolan's land).

118 *Sheetz*, 601 U.S. at 283.

legislative and administrative actions. In all these settings, the same constitutional rules apply."[119]

IMPLICATIONS

A. *The Nexus and Proportionality Tests Impose a Project-Impact Mitigation Standard*

The Court's decision to tie the nexus and proportionality tests to an impact mitigation standard may seem obvious.[120] But there remains widespread confusion as to whether the tests measure the permit condition against the project's impacts, or against the government's broader legislative objectives. For example, in *Common Sense Alliance v. Growth Management Hearings Board*, a Washington appellate court upheld an ordinance requiring that owners dedicate a conservation easement as a condition on any new development upon finding that the easement was "reasonably necessary" to advance the County's legislative objective of protect[ing] critical fish and wildlife habitat."[121] Properly framed, the court would have asked whether the property owner's project impaired critical habitat such that the owner must mitigate that impairment with an appropriately sized easement.[122]

The confusion derives from a quirk in the Supreme Court's regulatory takings caselaw. In *Agins v. City of Tiburon*, the Court held that a regulation of property "effects a taking if the ordinance does not substantially advance legitimate state interests."[123] This "substantially advances" formula appeared throughout the Court's takings decisions for 25 years until *Lingle* excised that formula from all takings theories, including the doctrine of unconstitutional conditions set out by *Nollan* and *Dolan*.[124] The *Sheetz* opinion's explanation that the nexus and proportionality tests incorporate a mitigation standard should bring an end to this confusion.[125]

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119 *Id*.

120 *Id*. at 276.

121 *See* Common Sense Alliance v. Growth Management Hearings Bd., 189 Wash. App. 1026, *4 (2015) (unpublished) (applying the nexus and proportionality tests via a state statute).

122 *See also* Consol. Towne E. Holdings, LLC v. City of Laredo, 675 S.W.3d 65, 73 (Tex. App. 2023).

123 Agins v. Tiburon, 447 U.S. 255, 260 (1980), *abrogated by* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 545 (2005).

124 *Lingle*, 544 U.S. at 545 (holding that the "substantially advances" inquiry is a due process test, not a takings test); *see also Nollan*, 483 U.S. at 835–36 (discussing the "substantially advances" inquiry when discussing the nexus test).

125 However, when providing an overview of regulatory takings, *Sheetz* confusingly referred to the *Agins* test, stating that a "use restriction that is 'reasonably necessary to the effectuation of a substantial government purpose' is not a taking unless it saps too much of the property's value or frustrates the owner's investment-backed expectations," *Sheetz*, 601 U.S. at 274 (quoting the pre-*Lingle* decision, Lucas

B. *Capping Impact Fees Reduces the Cost of New Homes and Requires Accountability and Transparency in Funding Infrastructure*

Sheetz promises to have the most direct impact on the amount of impact fees that can be imposed on new development. For homebuilders and buyers, this means reducing the cost of developing and purchasing new homes.[126] The government will have to resume taxing the public to pay for general infrastructure. For decades, state and local governments have increasingly relied on impact fees as a strategy for funding public programs and facilities, to avoid more difficult fiscal choices like cutting costs or increasing taxes.[127]

> Because tax increases are so politically unpopular, many states turned to development exactions. For example, to deal with the cost of growth created by new development, about half of the states enacted an impact-fee statute, a type of development exaction, to give local governments authority to exact fees from developers for any type of development, from subdivisions to strip malls.[128]

People always prefer to fund public infrastructure with someone else's money. Existing residents of a growing county support impact fees because they impose a financial burden on future development (and residents), even while the existing residents benefit just as much from improved roads and schools.[129] Future residents have no vote, making impact fees "an irresistible policy option."[130] Commercial developers also put up little fight, knowing they will pass on the costs to individual homebuyers.[131] Individual developers like James Patrick Nollan or Florence Dolan or Coy Koontz or George Sheetz never seems to warrant government's consideration. By restoring the norm

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v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992) ("[T]he Fifth Amendment is violated when land-use regulation does not substantially advance legitimate state interests or denies an owner economically viable use of his land") (cleaned up).

126 Anderson Creek Partners, LP v. Cnty. of Harnett, 382 N.C. 1, 27 (2022) (noting that impact fees are often passed along to the purchaser).

127 Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 206, 262 (2006) ("All evidence points to the rapid spread of land development impact fees throughout the nation making it a prevalent means of funding new growth."); *see also* ARTHUR C. NELSON, ET AL., A GUIDE TO IMPACT FEES AND HOUSING AFFORDABILITY 19 (2008) (finding that the role of impact fees began as a limited, supplemental funding mechanism, but is now a primary strategy for raising funds); Nicole Stelle Garnett, *Unsubsidizing Suburbia*, 90 MINN. L. REV. 459, 480 (2005) ("Over the past three decades, increasing numbers of local governments . . . have turned to new methods of financing public works projects, especially land use exactions and impact fees.").

128 Brad Charles, Comment, *Calling for a New Analytical Framework for Monetary Development Exactions: The "Substantial Excess" Test*, 22 T.M. COOLEY L. REV. 1, 2 (2005).

129 Rosenberg, *supra* note 115, at 262 ("Residents now urge their elected officials to adopt impact fees when the locality has not yet done so.").

130 *Id*.

131 *Id*. at 204 n.93; *see also Anderson Creek*, 382 N.C. at 43.

of funding infrastructure through taxation, the government has an incentive to pursue projects with broad support in the community, while making that community fully aware of the cost to which all contribute.

C. *Sheetz Provides Insight Into Other Emerging Takings Issues*

Sheetz marks a continuation of the Court's focus on the text and history of the Takings Clause, rather than allowing the protections to wax and wane based on fuzzy balancing tests that ask courts to make value judgment about the legitimacy of the government's purpose and whether those interests should supersede an owner's rights.[132] With this focus, *Sheetz* offers some hints as to the Court's perspective on some recurring related issues.

1. Supreme Court Unanimously Accepts the Concept of Judicial Takings

Can the judiciary take property within the meaning of the Takings Clause? The Court was poised to answer this question in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, where it granted certiorari to "consider a claim that the decision of a State's court of last resort took property without just compensation in violation of the Takings Clause of the Fifth Amendment, as applied against the States through the Fourteenth [Amendment]."[133] The petitioners were beachfront owners who argued that the Florida Supreme Court had extinguished their littoral rights.[134] But the Court lacked a majority to answer the central question presented. With Justice Stevens recused, a four-Justice plurality authored by Justice Scalia wrote that the Takings Clause "bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking."[135] That is, a judicial declaration that "what was once an established right of private property no longer exists" effects a taking for which just compensation is due.[136]

Justice Scalia's plurality opinion viewed judicial takings as a type of per se taking, equivalent to physical invasions and deprivation of all economically beneficial use in regulatory takings doctrine.[137] In this view, state

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132 *See*, *e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (concluding that the "scope and application" of the Takings Clause "must expand or contract" in response to the "elastic[]" police powers).

133 Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 707 (2010).

134 Littoral rights concern properties abutting an ocean, sea or lake, and usually regarding the use and enjoyment of the shore.

135 *Stop the Beach*, 560 U.S. at 715.

136 *Id*.

137 *Id*. at 722 ("We are talking here about judicial elimination of established property rights.").

supreme court decisions are a form of regulation of property, and if that regulation "goes too far" by transforming a private right into a public one, it will be recognized as a taking without any balancing.[138] Because the text of the Constitution requires that any taking be accompanied by just compensation, without carve-outs, "[i]t would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat."[139] The four remaining justices would have left the question for another day.[140] Lacking a majority holding, federal courts have been unwilling to acknowledge that judicial takings are cognizable.[141]

While *Sheetz* held that the unconstitutional conditions doctrine applies to legislative acts that imposed fees on building permits, the Court's rationale applies to all three branches of state governance: "The Constitution's text does not limit the Takings Clause to a particular branch of government. The Clause itself, which speaks in the passive voice, 'focuses on (and prohibits) a certain "act": the taking of private property without just compensation.'"[142] That state court actions are constrained by the Takings Clause, as well as every other provision in the Constitution, should be wholly uncontroversial because the Fourteenth Amendment incorporates the guarantees of the Fifth Amendment against the states *qua* states, not merely state legislatures and state executive branches.[143] *Sheetz* made this explicit: The Takings Clause "does not single out legislative acts for special treatment. Nor does the Fourteenth Amendment, which incorporates the Takings Clause against the States. On the contrary, the Amendment constrains the power of each "State" as an undivided whole."[144] *Sheetz* explicitly relied on Justice Scalia's plurality opinion in *Stop the Beach*:

> [T]here is "no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation." [*Stop the Beach*, 560 U.S. at 714 (plurality opinion)]. Just as the Takings Clause "protects 'private property' without any distinction between

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138 *Id.* at 713 (citing Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163–65 (1980)).

139 *Id.* at 714 (citing Stevens v. City of Cannon Beach, 510 U.S. 1207, 1211–12 (1994) (Scalia, J., dissenting from denial of certiorari)).

140 *See Stop the Beach*, 560 U.S. at 741–42 (Kennedy, J., concurring in part and concurring in the judgment); *id*. at 745 (Breyer, J., concurring in part and concurring in the judgment).

141 *See, e.g.,* Petro-Hunt, L.L.C. v. United States, 126 Fed. Cl. 367 (2016), *aff'd* Petro-Hunt, L.L.C. v. United States, 862 F.3d 1370 (Fed. Cir. 2017); Pavlock v. Holcomb, 35 F.4th 581, 587 (7th Cir. 2022) ("Since *Stop the Beach* was decided, no federal court of appeals has recognized this judicial-takings theory. What has occurred instead is avoidance: every circuit to consider the issue has expressly declined to decide whether judicial takings are cognizable").

142 *Sheetz*, 601 U.S. at 277 (quoting Knight v. Metropolitan Govt. of Nashville & Davidson Cnty., 67 F.4th 816, 829 (6th Cir. 2023)).

143 *See* Robert H. Thomas, et al., *Of Woodchucks and Prune Yards: A View of Judicial Takings from the Trenches*, 35 VT. L. REV. 437, 450 (2010).

144 *Sheetz*, 601 U.S. at 276 (citing U.S. CONST. amend. XIV § 1).

> different types," [*Horne*, 576 U.S. at 358], it constrains the government without any distinction between legislation and other official acts.[145]

This language categorically establishes that no justification exists to treat a potential taking differently depending on the branch of government effecting the taking. As the *Stop the Beach* plurality noted, the Takings Clause "is concerned simply with the act, and not the government actor."[146]

This follows naturally from the Court's explanation in *Cedar Point Nursery v. Hassid* that "[t]he essential question is not . . . whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree)."[147] *Cedar Point* addressed a regulatory taking, but again, the Court's protection against unconstitutional conditions transcends both physical and regulatory takings. *Sheetz* explicitly equated the two and held that the outcome cannot turn on which branch of government imposes land use restrictions.[148]

As the Framers recognized, property rights are particularly vulnerable to majoritarian impulses.[149] The risk is heightened in state courts where elected judges may be sensitive to majoritarian or partisan concerns.[150] For example, when public beach access is more popular than the property rights of beachfront landowners, the New Jersey Supreme Court in *Matthews v. Bay Head Improvement Ass'n*, feared little backlash when it declared that "[a]rchaic judicial responses are not an answer to a modern social problem" and redefined the public trust doctrine to greatly increase public access to formerly private beaches.[151] This exemplifies the importance of the judicial takings doctrine: without it, there is little to stop any court from ruling to implement its own conclusion that public policy favors of a public use that

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145 *Id*. at 276–77.

146 Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 713–14 (2010).

147 Cedar Point Nursery v. Hassid, 594 U.S. 139, 149 (2021).

148 *Sheetz*, 601 U.S. at 278–79 (noting taking effected by a state statute in *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 414 (1922), and taking potentially effected via agency decision in *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001)).

149 *See* State ex rel. Cates v. W. Tenn. Land Co., 158 S.W. 746, 761 (Tenn. 1913) (redefining navigable waters to permit public access after property owners' homes and stores were set on fire, and the lower court judge and attorneys for property owners assaulted and killed by a violent mob of fishermen seeking access to privately-owned Reelfoot Lake), described in Maureen E. Brady, *Defining "Navigability": Balancing State-Court Flexibility and Private Rights in Waterways*, 36 CARDOZO L. REV. 1415, 1454 (2015). *See also* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 855 (1995).

150 Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1488–89 (1990) ("State judges are frequently former legislators or party activists and maintain their political allegiances after assuming the bench"); Ilya Somin, Knick v. Township of Scott*: Ending a Catch-22 That Barred Takings Cases from Federal Court*, 2019 CATO SUP. CT. REV. 153, 182 ("state judges have ties to broader political coalitions").

151 Matthews v. Bay Head Improv Ass'n, 95 N.J. 306, 326 (1984).

diminishes or eliminates private ownership.[152] The judicial taking cause of action ensures that, on those infrequent occasions that judges exceed their authority to transform private rights into public property, the private property owners have access to a remedy in federal courts.

2. Are States Immune from Takings Claims for Just Compensation?

Another question that remains open before the Supreme Court is whether the states are immune from being sued for just compensation in the federal courts. When local governments[153] or the federal government[154] take property without paying just compensation, aggrieved property owners may sue for inverse condemnation in both federal and state courts. But when states take property, the owners find themselves locked out of some federal courts,[155] and sometimes state court as well.[156] This is because states are generally immune from suits for damages because of their sovereign status,[157] unless they consent to suit or waive their immunity.[158] Because of this, Supreme Court jurisprudence seeks generally to "prevent[] federal-court judgments that must be paid out of a State's treasury."[159]

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152 Sotomura v. Hawaii Cnty., 460 F. Supp. 473, 481 (D. Hawaii 1978).

153 *See* Northern Ins. Co. of N.Y. v. Chatham Cnty., 547 U.S. 189, 193 (2006) ("only States and arms of the State possess immunity from suits authorized by federal law").

154 Hair v. United States, 350 F.3d 1253, 1257 (Fed. Cir. 2003) ("[S]overeign immunity does not protect the government from a Fifth Amendment Takings claim because the constitutional mandate is 'self-executing.'"); Leistiko v. Sec'y of Army, 922 F. Supp. 66, 73 (N.D. Ohio 1996) ("The Just Compensation Clause, with its self-executing language, waives sovereign immunity because it can fairly be interpreted as mandating compensation by the government for the damage sustained."); Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 NW. U.L. REV. 144, 199 (1996) ("It is a proposition too plain to be contested that the Just Compensation Clause of the Fifth Amendment is 'repugnant' to sovereign immunity and therefore abrogates the doctrine . . . .").

155 EEE Minerals, LLC v. State of North Dakota, 81 F.4th 809, 816 (8th Cir. 2023), *cert. denied*, 144 S. Ct. 1097 (2024); O'Connor v. Eubanks, 83 F.4th 1018, 1024 (6th Cir. 2023), *cert. denied*, docket no. 23-1167, 2024 WL 4486357 (U.S. Oct. 15, 2024); Gerlach v. Rokita, 95 F.4th 493, 500–01 (7th Cir. 2024), *cert. denied*, docket no.24-21, 2025 WL 76424 (U.S. Jan. 13, 2025).

156 The Eleventh Amendment affirms a principle of state sovereignty inherent in the constitutional structure. States are immune from most non-consensual suits, Hans v. Louisiana, 134 U.S. 1, 21 (1890), whether a suit is filed in state or federal court; Alden v. Maine, 527 U.S. 706, 754 (1999); *see also* Franchise Tax Bd. of Cal. v. Hyatt, 587 U.S. 230, 238 (2019) (examining preratification understanding of sovereign immunity). That said, even the Supreme Court acknowledges that the concept of "Eleventh Amendment immunity" is "convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden*, 527 U.S. at 713.

157 Edelman v. Jordan, 415 U.S. 651, 663 (1974).

158 Gunter v. Atl. Coast Line R.R. Co., 200 U.S. 273, 284 (1906).

159 Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 48 (1994) (citing William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment*, 35 STAN. L. REV. 1033, 1129 (1983) (identifying

Applying such immunity to claims for just compensation presents a textual problem, however, because the states' right to take property is conditional upon payment of just compensation.[160] The Fifth Amendment reflects this principle by providing property owners with a right to sue for just compensation when the government takes property.[161] The states are bound by the Fifth Amendment's Just Compensation Clause through the Fourteenth Amendment's Due Process Clause, which "fundamentally altered the balance of state and federal power" by "requir[ing] the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution."[162] The principle that a property owner may demand payment for a taking and that the states are sovereignly immune from claims for damages exist in an uneasy tension.[163]

To date, the Supreme Court has not explicitly stated that property owners have an affirmative right directly under the Takings Clause to access federal courts to obtain just compensation for a taking.[164] However, the Court

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"the award of money judgments against the states" as "the traditional core of eleventh amendment protection")).

160 United States v. Great Falls Mfg. Co., 112 U.S. 645, 656 (1884); *see also* Proprietors of Piscataqua Bridge v. New Hampshire Bridge, 7 N.H. 35, 66 (1834) (any taking of private property for public use must "include, as a matter of right, and as one of the first principles of justice, the further limitation, that in case his property is taken without his consent, due compensation must be provided . . . without any indemnity provided by law. Such a power would be essentially tyrannical[.]").

161 *Knick*, 588 U.S. at 191–92.

162 *Alden*, 527 U.S. at 756; *see also* Chicago Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 235–41 (1897). After the Civil War, secessionist states were required to ratify the Fourteenth Amendment as a condition of readmission to the Union, thus accepting the primacy of the United States Constitution and corresponding reduction in individual state sovereignty. *See* United States v. States of Louisiana, Texas, Mississippi, Alabama & Florida, 363 U.S. 1, 125 (1960).

163 Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 116 (1988) (The "clarity of this textual provision for a monetary remedy is inconsistent with a premise of sovereign immunity as a constitutional doctrine[.]"). Some *state* courts permit takings claims against the state. *See, e.g.*, Manning v. N.M. Energy, Minerals & Natural Res. Dep't, 140 N.M. 528, 531 (2006) (noting the Court "has consistently applied the Takings Clause to the states, and in so doing recognized, at least tacitly, the right of a citizen to sue the state under the Takings Clause"); SDDS, Inc. v. State, 650 N.W.2d 1, 9 (S.D. 2002) ("[T]he remedy [of just compensation found in the Fifth Amendment's Takings Clause] does not depend on statutory facilitation. Because it is a constitutional provision, it is a right of the strongest character."). Whether states enjoy immunity from paying just compensation may arise in the context of judicial takings, which *Sheetz* now acknowledges as a cognizable claim. *See Sheetz*, 601 U.S. at 276–77; Stephens v. Kenney, 802 F. App'x 715, 719 (3d Cir. 2020) (Eleventh Amendment immunity protects not only states but also state entities, such as the Pennsylvania Court system) (citation omitted).

164 DeVillier v. Texas, 601 U.S. 285, 292 (2024) ("Our precedents do not cleanly answer the question whether a plaintiff has a cause of action arising directly under the Takings Clause."); Bay Point Props., Inc. v. Mississippi Transp. Comm'n, 937 F.3d 454, 456 n.1 (5th Cir. 2019) (acknowledging that "'the tension' between state sovereign immunity and the right to just compensation . . . is [an issue] for the Supreme Court").

inferred such a right in *First English* and *Lucas*[165] and the decision in *Sheetz* bolsters that inference.[166] Specifically, *Sheetz* states: "[T]he [Fourteenth] Amendment constrains the power of each 'State' as an undivided whole . . . [t]hus, there is 'no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation.'"[167] Just as the "undivided whole" of the state is subject to the takings clause regardless of which branch—executive, legislative, judicial—effects the taking,[168] the Constitution also offers no basis for distinguishing between federal, state, and local takings when it comes to providing constitutionally mandated just compensation.

Historical precedent, too, indicates that states are subject to the just compensation requirement. As *Sheetz* explained, "Before the founding, colonial governments passed statutes to secure land for courthouses, prisons, and other public buildings.[169] These statutes "invariably required the award of compensation to the owners when land was taken."[170] During and after the Revolution, states used the eminent domain power to take private land for use in constructing their new capitals "and provided compensation to the

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165 First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., 482 U.S. 304, 316 n.9 (1987) (The Just Compensation Clause, "of its own force, furnish[es] a basis for a court to award money damages against the government.") (citation omitted); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1010–12 (1992) (justiciability concerns did not divest Supreme Court of the right to conduct "plenary review"). *See also* United States v. Klamath & Moadoc Tribes, 304 U.S. 119, 123 (1938) ("The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation[.]"); PennEast Pipeline Co., LLC v. New Jersey, 594 U.S. 482, 500 (2021) (The "'plan of the Convention' includes certain waivers of sovereign immunity to which all States implicitly consented at the founding.").

166 Four days after *Sheetz*, the Supreme Court decided *DeVillier v. Texas*, 601 U.S. 285 (2024). That case presented a highly unusual procedural posture, whereby the state removed the property owners' takings claims to federal court and then sought dismissal because the owners hadn't asserted their claim under 42 U.S.C. § 1983. The Court rejected this gamesmanship and, in light of the state's concession at oral argument that it never should have removed the case in the first place, sent the case back to allow the property owners to proceed in state court, as they originally planned. *Id.* at 293. The unanimous Court neither affirmed nor reversed the Fifth Circuit decision under review, nor did it answer the question presented as to whether a property owner may seek to vindicate the constitutional right to just compensation for a taking directly via the Constitution. Instead, it simply vacated and remanded. *Id.* As such, the case offers no guidance on the sovereign immunity question.

167 *Sheetz*, 601 U.S. at 277 (quoting Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 714 (2010) (plurality opinion)).

168 *See id.*

169 *Id.* at 901 (citing 4 STATUTES AT LARGE OF SOUTH CAROLINA 319 (T. Cooper ed. 1838) (Act of 1770); 6 STATUTES AT LARGE, LAWS OF VIRGINIA 283 (W. Hening ed. 1819) (Act of 1752)).

170 *Id.* (citing James W. Ely, Jr., *"That Due Satisfaction May Be Made:" the Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1, 5 (1992); 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 139 (1768) (English law required that property owners receive "full indemnification . . . for a reasonable price.")).

landowners."[171] *Sheetz* concluded that this "ingrained principle" and "longstanding practice" was "enshrined" in the Fifth Amendment.[172] The Fifth Amendment's incorporation to the states rings hollow if states can simply invoke sovereign immunity to escape takings claims resting on the right to compensation. As the Supreme Court bluntly stated in *Davis v. Mills*, "[c]onstitutions are intended to preserve practical and substantial rights, not to maintain theories."[173] The Court's recent emphasis on "[f]idelity to the Takings Clause" and "restoring takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights"[174] indicates that state immunity to just compensation must fall.

CONCLUSION

Sheetz constitutes a major step forward in protecting the rights of property owners during the permitting process. The decision ends the argument that the protections of the Takings Clause wax and wane depending on which government body demands a dedication of property. By confirming that the Takings Clause applies equally to all branches of government, *Sheetz* assures that every permit condition passes constitutional muster before private property can be taken as the "price" of securing a permit approval. Critics may accuse *Sheetz* of infringing on legislative prerogative, but in truth the decision demonstrates fidelity to the Constitution, which remains superior to a local government's discretion during the permitting process.

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171 *Id*. (citing 4 Cooper, *supra* note 157 at 751–52 (Act of 1786); 10 Hening, *supra* note 157 at 85–87 (1822 ed.) (Act of 1779)).

172 *Id*. (citing 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1784, at 661 (1833); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 275–76 (1827) (Takings clause applies to state legislatures)).

173 Davis v. Mills, 194 U.S. 451, 457 (1904).

174 *Knick*, 588 U.S. at 189.

INVOLUNTARY REGULATORY SERVITUDES: CORRECTING FOR "REGULATORY TAKINGS" TERMINOLOGICAL PROBLEMS

Donald J. Kochan[*]

INTRODUCTION

When government regulates in a manner that deprives an owner of some use or value of its property, we should be characterizing such actions as creating "involuntary regulatory servitudes" (or perhaps better termed "involuntary implicit servitudes," encompassing the critique of the "regulatory" word inside "regulatory takings" offered by Professors James Krier and Stewart Sterk).[1] The government is coercively carving out a portion of an owner's sticks in her property rights bundle without her permission and without payment. It is a taking of property because it is taking a right that the owner otherwise retained a right to sell or refuse to sell if the exchange were governed by the private law of private property.[2] Engrafting more robustly the private law of private property unto our takings jurisprudence that deals with

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[1] James Krier & Stewart Sterk, *An Empirical Study of Implicit Takings. An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 40-41 (2016). Krier & Sterk's excellent empirical analysis of takings cases posits that there are many "takings" outside formal eminent domain actions that are not the result of regulations, thus they call for "implicit takings" as a replacement term for what is often called "regulatory takings":

Recall that the doctrine examined in this Article concerns takings that arise outside the context of eminent domain actions. These are conventionally referred to as "regulatory takings," but that label is misleading. Many so-called regulatory takings have nothing whatsoever to do with regulation, whether legislative or administrative, and regulation is not treated as a distinctive category of activity in the doctrine developed by the Supreme Court. In short, takings by government regulation are just one member—although a substantial member— of a general class of all takings that arise outside the context of explicit takings by condemnation. We refer to this class as "implicit takings." When we speak of regulatory takings, we mean those that arise specifically out of government regulation.

Id.

[2] Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 555 (2005) [hereinafter "Bell & Parchomovsky, *Theory*"] ("legal enforcement of property rights should increase the property owner's probability of retaining possession of her property. The heightened protection effected by legal enforcement makes it less likely that current owners would involuntarily lose their assets.").

regulatory effects on bundles of rights would better serve the meaning and purposes of the so-called Takings Clause.[3]

This essay posits that framing the Takings Clause implications of regulatory effects as "regulatory takings" actually disserves that project. Segmenting the judicial treatment of regulatory effects into a specialized analysis takes our inquiry farther and farther away from an enterprise focused on equivalency between the private law of voluntary servitudes and the public law of what we should be calling involuntary regulatory servitudes (or involuntary implicit servitudes).

This Symposium is entitled "Too Far: Imagining the Future of Regulatory Takings." At its core, this article posits that we should imagine a future in which we no longer use the term "regulatory takings," an imprecise and incomplete label that results in a specialized, isolating, and segregated takings analysis. Instead, the legal analysis should be focused on creating a consistent set of standards for reviewing all coercive transfers of property rights – both complete bundles and the component parts held as sticks in those bundles that generally get treated as separate, enforceable rights carrying an immunity from coerced transfer and imposing upon all others a disability from demanding a transfer absent voluntary agreement. Indeed, the language we choose for the labels we attach to these rights and doctrines can sometimes influence the content of the doctrines.

There are characteristics in the private law of property that better graft on to takings analysis than are regularly discussed, and these should receive greater attention in the future of regulatory takings litigation and scholarship. Part I of this essay will briefly introduce the symposium's guest of honor, *Pennsylvania Coal Co. v. Mahon*.[4] Part II of this essay will outline the relative youth of the label "regulatory takings." While we have been struggling with what *Pennsylvania Coal* means for more than 100 years now, we have much more recently—indeed for less than half that period—been using "regulatory takings" as the name for the field in which these questions get tested. Part III will explain some of the reasons why "involuntary regulatory servitudes" (or "involuntary implicit servitudes") may be a better term for describing what we mean when we say "regulatory takings," and it may allow us to place greater emphasis on private law parallels that can inform our treatment of public decisions that wrest rights from property owners without formal procedures. Part IV will examine how a private law frame within which to view public entity effects on private property is consistent with generalizable themes in property law that may get lost in a segregated category of analysis known as regulatory takings law especially when such segregation places an undue emphasis on a police power exception to the invocation of private law principles for public entity action. It will also provide a framework for a new

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[3] For a detailed discussion of those meanings and purposes, and to understand why it is just a "so-called" clause, *see generally* Donald J. Kochan, The [Takings] Keepings Clause: An Analysis of Framing Effects from Labeling Constitutional Rights, 45 FLA. ST. U.L. REV. 1021 (2018).

[4] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

test that better accomplishes aligning the review of regulations for takings liability with the purpose of takings provisions to as closely as possible replicate market transactions despite the existence of coercion.

While word limits imposed for this symposium essay necessarily limit the depth to which this essay may go, the work here should at least preliminarily set the stage for a larger discussion about how the words we choose when developing doctrine matter. They can, even subconsciously, affect—by reducing, enlarging, distorting, limiting, or accurately shaping—the perceived and functional quality and character of the things they describe. "Regulatory takings" as a category label carves out a distinct subcategory of governmental actions negatively affecting property and, as addressed, has resulted in the development of a separate subcategory of doctrines, standards, tests, and rules. Yet, the constitutional provision regarding the taking of property does not create subcategories of effects. Using specialized rules necessarily creates inconsistencies. In the regulatory takings context, this subcategorization creates a category of "lesser" rights, or "second class" property rights. Instead, we should create a single set of interpretations and concomitant governance rules for making effective the meaning of the takings provisions that apply no matter whether property as a whole has been physically taken or sticks in the bundle of property rights – each private property – have been taken.

I. *PENNSYLVANIA COAL CO. V. MAHON*: A BRIEF INTRODUCTION TO THE GUEST OF HONOR AND TO THE ENDURING LEGACY OF ITS "TOO FAR" LANGUAGE

Takings jurisprudence illuminates the delicate balance between valid and invalid governmental actions, especially when juxtaposed against the obligation to respect and preserve private property rights. In *Pennsylvania Coal Co. v. Mahon*, for example, Justice Holmes famously explained both 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 the general law,"[5] yet at the same time at some point along the spectrum the government has hit the limit beyond which it cannot act without compensating. Thus, Holmes continues in *Pennsylvania Coal* with the now infamous "too far" passage: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"[6] requiring that, if the government still wants to impose that burdensome regulation, then it must compensate the regulated entity for the diminished value of their property from the constraints on use that went too far.

The line between acceptable and unacceptable restrictions on land use or between compensable and non-compensable actions, is incapable of

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[5] *Id.*

[6] *Id.* at 415.

precise definition, but there is a struggle to find that line. As Haar stated it, "land-use law in the different states and municipalities proceeds on even course, between contending, but certainly not overwhelming, waves of 'too far' or 'not far enough.'"[7] This blurry-line difficulty pervades many if not most land use control decisions.

The Supreme Court in its June 2017 opinion in *Murr v. Wisconsin* reinforced that the right to keep (or retain) property is an integral part of the Fifth Amendment calculus in any takings case.[8] The Court explained in *Murr* that "A central dynamic of the Court's regulatory takings jurisprudence" requires "reconcil[ing] two competing objectives central to regulatory takings doctrine. One is the individual's right to retain the interests and exercise the freedoms at the core of private property ownership. . . . The other persisting interest is the government's well-established power to 'adjus[t] rights for the public good.'"[9] On the former, the Court stressed, "Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them."[10] Regulatory takings scholars need to keep these competing interests and protective purposes at the forefront of any effort for imagining the doctrine's future.

II. HISTORY OF THE LABEL "REGULATORY TAKINGS"

I would venture to guess that most lawyers and academics—even those that consider themselves scholars of eminent domain and takings law—have seldom given much thought to the origins or even effects of adopting the label "regulatory takings" for the category of coercive actions that limit the use or value of sticks in an owner's property rights bundle. Indeed, we tend to get drawn in to the language adopted generally within our field of specialization in a path dependent manner. This section traces the history of this label, which was neither used immediately before nor even during the first four-plus decades after *Mahon*, the principal case grounding this symposium and that we often identify as a foundational step in the development of so-called regulatory takings jurisprudence.

Most recently, I explained this phenomenon in relation to the label "takings clause," revealing, among other things, that this label for the Fifth Amendment provisions governing the limits on eminent domain was never used by any court before 1955, was never used by the U.S. Supreme Court until 1978, and was not used in any substantial scholarship before the 1960s.[11]

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[7] Charles M. Haar, *The Twilight of Land-Use Controls: A Paradigm Shift?*, 30 U. RICH. L. REV. 1011, 1014 (1996).

[8] Murr v. Wisconsin, 582 U.S. 383, 394 (2017).

[9] *Id.* (internal citations omitted).

[10] *Id.*

[11] *See generally* Kochan, *The [Takings] Keepings Clause*, *supra* note 3.

This seemed to be a true revelation to every takings scholar with whom I shared the research. One might say that we've become so familiar with the label "takings clause" that we can hardly believe it was ever not used.

The history of usage for "regulatory takings" may be similarly revealing. The history is interesting in its own right, but may also be instructive as we evaluate whether there is a better term or label that categorizes the category of governmental behavior and category of individual rights we wish to capture when using the "regulatory takings" label.

For this brief essay, we are only able to provide some initial assessments based on an admittedly noncomprehensive dive into the history on the "regulatory takings" label. Yet, this initial set of findings is still quite revealing.

Usage history of the regulatory takings label in federal and state court opinions, law journal and law review articles, and briefs gives us a useful picture of the historical development of the term. As has been the case in other usage studies I have conducted, you start to see a correlation between major court adoption of a term and subsequent usage in scholarship and briefs, as if court usage, particularly U.S. Supreme Court usage, sends a message to the relevant speech community that a term should be adopted.

Usage within these categories is depicted below, with some additional narrative commentary and highlights following.[12] As long as one acknowledges the limitations, the graph nonetheless paints a broad picture that confirms the recency of widespread usage of the "regulatory takings" term.

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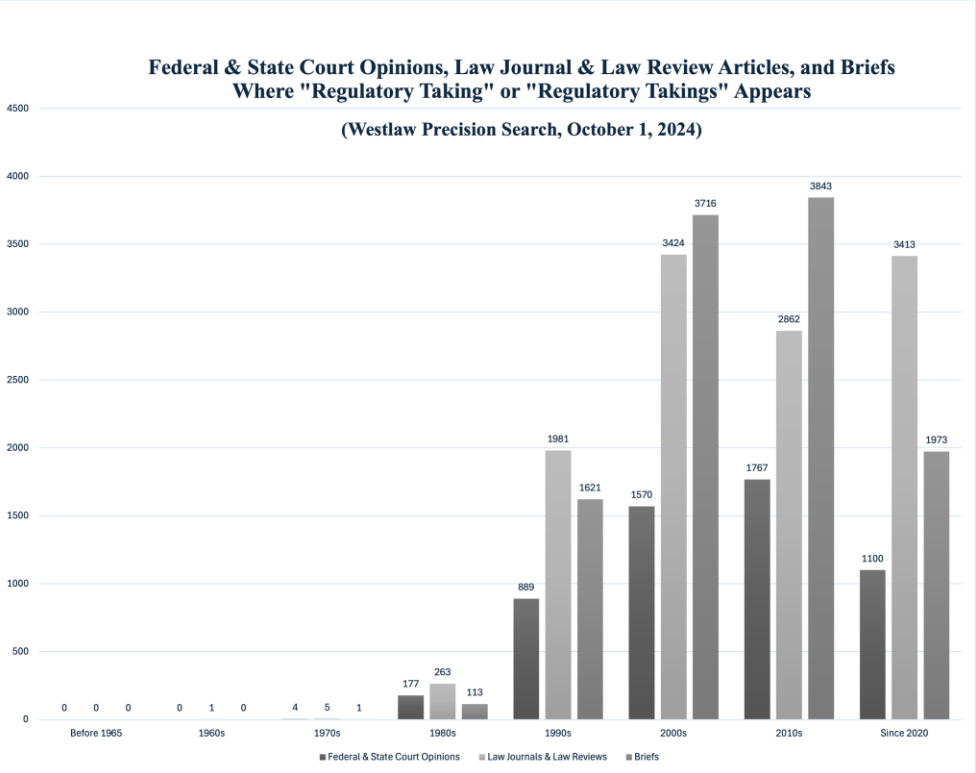
[12] These raw numbers are revealing, but also have limitations. For example, these results only capture what is available on Westlaw. And, while the case opinion databases in Westlaw are relatively comprehensive, the same cannot be said for Westlaw's collection of law reviews and briefs which suffer from a lack of completeness especially the farther one goes back in time. Furthermore, percentages would provide a better picture. In other words, the rise in raw numbers may be driven in part by the rise in the products emanating from the general categories – more cases, more articles being written or cataloged, and more briefs being written or cataloged. Future research can attempt to control for these variables. *See generally*, WESTLAW PRECISION, https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=(sc.Default) (last visited Jan. 6, 2025).



To be sure, "regulatory takings" was not a dominant part of the takings lexicon before 1981. We can also equally be sure that its use as a label and frame for evaluating the constitutional implications of regulatory effects on private property has indeed been prevalent and growing since 1981.

The first law review publication available in Westlaw to use the term "regulatory takings" was an unsigned note in the *University of Pennsylvania Law Review* in March 1965.[13] At this point in time, no court opinion had yet used the phrase.

In 1973, an important monograph was published by the Council on Environmental Quality by Fred Bosselman, David Callies, and John Banta.[14] In *The Taking Issue: An Analysis Of The Constitutional Limits Of Land Use Control*, the authors spend considerable amount of time characterizing

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[13] *Use of the Pennsylvania Eminent Domain Code of 1964 to Provide Initial Common Pleas Jurisdiction in a Limited Number of Zoning Cases*, 113 U. PA. L. REV. 782, 783 (1965).

[14] FRED P. BOSSELMAN, DAVID L. CALLIES & JOHN BANTA, COUNCIL ON ENVTL. QUALITY, the taking issue: an analysis of the constitutional limits of land use control (1973).

"regulatory takings."[15] Indeed, in his 1973 book review, UCLA law professor Donald Hagman explained that the monograph authors were "deal[ing] with post-*Mahon* confusion by describing the regulatory taking issue under current law."[16] There may very well be other important books that used regulatory takings in the 1970s. Further research is ongoing on this matter. Aside from the Fagman book review, four other law review articles appear in the 1970s in Westlaw that each briefly use "regulatory takings."[17]

Technically, the first court opinion to use the term came in a footnote from an October 1977 "special court" established under the Regional Rail Reorganization Act of 1973.[18] In 1979, we saw the first uses in general jurisdiction state court and federal courts.[19] In a wetlands regulation case, *Estuary Properties, Inc. v. Askew*, a Florida state district court of appeal used the term to explain that the fact that a wealth redistribution took place by imposing a regulation limiting use rather than acquiring the property directly.[20]

Also in 1979, the U.S. Court of Appeals for the Fifth Circuit used the term "regulatory taking" in a footnote where it acknowledged the possibility of the claim but also found it premature to consider it on the facts.[21] Nonetheless, even the way the court discussed the term, in context, reveals a type of newness to the usage.

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15 *See generally,* MELTZ ET AL., THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL (1973).

16 David Hagman, *The Taking Issue: An Analysis Of The Constitutional Limits Of Land Use Control*, 87 HARV. L. REV. 482, 485 (1973).

17 *See* Zygmunt J. B. Plater, *The Takings Issue in a Natural Setting: Floodlines and the Police Power***,** 52 TEX. L. REV. 201, 251 (1974) (one usage: The minimum proposition incorporated in the first stage of diminution-balancing review will dispose of regulatory takings questions involving grave hazards and large public losses."); *The Takings Clause*, 91 HARV. L. REV. 1462, 1464, 1498 n. 165 (1978) ("The application of the takings clause to such regulatory takings requires courts to decide what kinds and degrees of intrusions on property are compensable."); *Environmental Land Use Regulation*, 91 HARV. L. REV. 1578, 1604 n. 117 (1978) (; Donald L. Humphreys, *Existing Federal Coal Leaseholds—How Strong is the Hold*, 1979 25 RMMLF-INST 5 (1979) ("The landmark case in the regulatory 'taking' area, at least until recently, has been the case of Pennsylvania Coal Co. v. Mahon.).

18 Matter of Valuation Proceedings Under Sections 303(c) and 306 of Regional Rail Reorganization Act of 1973**,** Special Court, Regional Rail Reorganization Act of 1973, 445 F.Supp. 994 MISC. 76-1 (October 12, 1977). While a headnote in an unpublished September 1977 U.S. Court of Claims opinion used the term "regulatory taking," the phrase does not appear in that opinion itself. *See* U.S. v. Sharp, 215 Ct.Cl. 883, 883 (1977) (unpublished).

19 *See generally*, Estuary Properties, Inc. v. Askew, 381 So.2d 1126 (Fla. Dist. Cit. App., 1st Dist. 1979).

20 Estuary Properties, Inc. v. Askew, 381 So.2d 1126 (Fla. Dist. Ct. App., 1st Dist. 1979) ("The central policy issue that has confronted courts in applying the *regulatory taking* principle in a wetlands context has been the extent to which one or a few property owners can be forced to underwrite a state policy of shoreline and estuarial preservation designed to benefit the general public.").

21 U.S. v. 320.0 Acres of Land, More or Less in Monroe County, State of Fla., 605 F.2d 762, 820 fn. 131 (5th Cir. 1979).

Briefing in advance of the 1980 U.S. Supreme Court decision in *Agins v. Tiburon*[22] involved significant invocations of "regulatory takings" language across nearly a dozen briefs. This was undoubtedly fueled by the appellants' adoption of the term[23]—creating the linguistic environment for the discussion. Indeed, the first brief filed in the case and the earliest brief cataloged on Westlaw that uses the phrase "regulatory takings" in any case was from the Pacific Legal Foundation—the sponsors of this Symposium.[24] PLF Attorneys Ronald A. Zumbrun and Thomas E. Hookano invoked the term just one time to state: "Damage awards for regulatory takings might, in some cases, impose financial hardship on municipalities, but that alone cannot justify the denial of constitutional protection to the individual landowner."[25] Oddly, though, despite the frequency of the terms' usage in the briefing, the U.S. Supreme Court in its *Agins* opinion never uses the phrase "regulatory takings," falling back instead on the more traditional usage of "inverse condemnation."[26]

The first major court opinion to use "regulatory takings" language is the dissenting opinion by Justice William Brennan—joined by Justices Stewart, Marshall, and Powell—in the 1981 case of *San Diego Gas & Elec. Co. v. City of San Diego*.[27] The Brennan dissent may have entrenched the term in the takings lexicon, and it is likely the impetus for widespread adoption of the term after 1981.

Justice Brennan's discussion is also important because of the way it defines regulatory takings with an equivalency to formal takings and the breadth of the property rights being protected.[28] As he states:

> Not only does the holding of the California Court of Appeal contradict precedents of this Court, but it also fails to recognize the essential similarity of *regulatory "takings"* and other "takings." The typical "taking" occurs when a government entity formally condemns a landowner's property and obtains the fee simple pursuant to its sovereign power of eminent domain. However, a "taking" may also occur without a formal condemnation proceeding or transfer of fee simple.[29]

Justice Brennan continues to explain that there is nothing magical about a regulation versus a formal condemnation when it comes to evaluating effects on owners and benefits to the public.[30] Although his qualification that the regulation must deprive an owner of all use is perhaps questionable in light

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22 *See generally* Agins v. City of Tiburon, 447 U.S. 255 (1980).

23 Appellants' Brief, Agins v. City of Tiburon, No. 79-602, 1980 WL 339995 (Feb. 21, 1980).

24 Brief of Amicus Curiae Pacific Legal Foundation in Support of Jurisdictional Statement, Agins v. City of Tiburon, 1979 WL 200140 (Oct. 12, 1979).

25 *Id.* at 15.

26 Agins v. City of Tiburon, 447 U,S, 255, 258 (1980).

27 San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 651 (1981).

28 *Id.* at 651-52.

29 *Id.* at 651-52.

30 *Id.* at 654.

of what we will discuss later in this essay, his understanding of the capacity of regulation to simply do the same thing a formal condemnation could do can be instructive to the argument that regulatory takings should not be a separate category of analysis but simply a different focal point for a consistent analysis across takings doctrines. Justice Brennan continues:

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property. Appellees implicitly posit the distinction that the government *intends* to take property through condemnation or physical invasion whereas it does not through police power regulations. . . . But "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does." . . . It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a "taking," and therefore a *de facto* exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property.[31]

Justice Brennan's words, whether or not followed in practice in later cases by him or others, support a general jurisprudence of takings rather than a specialized jurisprudence of regulatory takings.

III. A PRIVATE LAW FRAME FOR THE PUBLIC LAW OF REGULATORY EFFECTS ON PRIVATE PROPERTY

The better way to frame the inquiry underlying what is often called regulatory takings law should be to determine *not* whether there is a regulatory taking – some special kind of taking – but instead whether there is *a regulation (or other authorized, effectively-coercive action) that amounts to a taking*. Regulations or other actions by authorized actors that restrict some but not all sticks in the property rights bundle should be characterized as the involuntary equivalent of the voluntary instrument, mechanism, or transfer that would have been necessary to achieve a parallel result. In other words, we should be thinking of what we currently term "regulatory takings" as a category that describes the coercive, nonconsensual acquisition of uncompensated servitudes, for which an ex post just compensation remedy could be available to better position the private owner subject to the involuntary servitude in a place resembling where they would have been had there been a bargain for that servitude with another private party.

While the presence of the police power and *Pennsylvania Coal*'s "government could hardly go on" warning must be reconciled with the analytical

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[31] *Id.* at 652-653.

framework proposed here, the re-framing itself is nonetheless a useful starting point.[32] It could be argued that the Takings Clause was intended to make coerced transfers as similar to voluntary transfers as possible. Such a structure would not only create natural disincentives to act coercively—because the taking will be enjoined if it is for anything other than a public use, and because it will require an expenditure from the scarce public pocketbook, internalizing the expenditure decision on public officials and the public they serve just as a private party would need to consider what it was willing and capable of buying within its budget.

The eminent domain power authorizes the state to acquire property rights without consent, and the so-called Takings Clause provides a remedy for this extraordinary deviation from the default rule that recognizes as enforceable only consensual transfers of rights. The eminent domain power gives the government the power to acquire rights by force that a private party could only obtain by contract. We should be asking, however, what is the character and nature of the rights acquired when the government takes away a stick in a private property owner's bundle. With a regulation, the government is imposing a use limit beyond what was in the deed before the government action. When a private party acquires a use limit, it alters the deed and creates a servitude with reciprocal benefits and burdens and the ability for the private party acquiring the servitude to enforce the limit agreed upon.

A very useful but under-theorized and under-discussed framing for regulatory takings outlines and highlights that they involve a government action that imposes a limit on private property that is the equivalent of a servitude with the public as the benefitted party and the private property owner as the burdened party.[33] If a private party wishes to create that burden and obtain that benefit, they must pay for it. Much more can be said on this topic than the literature has currently done.

Government regulations unaccompanied by compensation requirements amount to the coercive, nonconsensual acquisition of uncompensated servitudes. Indeed, a servitude-based focus was at the heart of *Penn Coal*.[34] The Court recognized that the government regulatory imposition there disrupted the balance struck between parties in their deeds, including adding servitudes where they were expressly dismissed and indeed excepted during the private negotiations between the neighboring properties (vertically and horizontally).[35] And, Justice Frankfurter noted in *U.S. v. Dickinson* – quoted in Rehnquist's dissent in *Penn Central* – "[p]roperty is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent

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32 San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. at 650.

33 Very few articles discuss regulations limiting property as "regulatory servitudes." For one of the few articles that makes some use of this concept, *see e.g.*, *Taking Back Takings: A Coasean Approach to Regulation*, 106 HARV. L. REV. 914 (1993).

34 Pennsylvania Coal Co., *supra* note 4 at 416.

35 Pennsylvania Coal Co., *supra* note 4, at 412.

that, as between private parties, a servitude has been acquired."[36] The Takings Clause is meant to take the sting out of coercive behavior by seeking to replicate market conditions as closely as possible. If a public use is at issue then the owner does not have the market right to refuse to sell but they should at least get as much compensation as they would have received had a private actor obtained the rights the government now retains or controls by what is effectively a public servitude. Similarly, to put this characterization of the takings protections in the Constitution in remedy law terms: takings jurisprudence generally – including when analyzing the effect of regulations – should be designed to make the injured party whole; to restore the injured party as best as possible to their position before the injury.

We can learn much from adopting a coerced-servitudes framing for regulatory takings. It is perhaps the most useful way to create a coherent theory of regulatory takings and the theory of regulatory takings that most closely respects fundamental principles, norms, and doctrines in property law – this aligning the private law of servitudes with the public law of takings. This lens also best respects the economics of property involved, including channeling our takings jurisprudence toward a compensation system that more closely aligns itself with resource allocations that would result from arms-length property transfer transactions.[37]

IV. WHY AN INVOLUNTARY REGULATORY SERVITUDE FRAMING SERVES THE CONSISTENT RECOGNITION AND APPLICATION OF PROPERTY LAW AND TAKINGS LAW VALUES

A. *Fundamental Concepts in Property Law*

Property law generally recognizes the divisibility of property interests in any one thing or parcel owned. The "bundle of sticks" is a useful metaphor for describing elements of property ownership.[38] According to the U.S. Supreme Court, "A common idiom describes property as a 'bundle of sticks'—a collection of individual rights which, in certain combinations, constitute

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[36] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 146 (1978) (Rehnquist, J., dissenting) (quoting United States v. Dickinson, 331 U.S. 745, 748 (1947)).

[37] Bell & Parchomovsky, *Theory*, *supra* note 2, at 598 ("right to exclude protects the owner's ability to preserve idiosyncratic values, such as her subjective attachment to the property. In other words, the right to exclude defends the owner's ability to extract the full value of ownership right before departing with it.")

[38] United States v. Craft, 535 U.S. 274, 278 (2002) (citing BENJAMIN CARDOZO, PARADOXES OF LEGAL SCIENCE 129 (1928) (reprint 2000) ("A common idiom describes property as a 'bundle of sticks'—a collection of individual rights which, in certain combinations, constitute property."); Dickman v. Commissioner, 465 U.S. 330, 336 (1984)); *see also generally* Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. CINCINNATI L. REV. 57 (2013) (making the case for the utility of the bundle of sticks metaphor for understanding many of the issues related to property in property law).

property."[39] Each "stick" in "the bundle" represent some specific attribute of such ownership. Guzman lays out what the bundle of sticks means—focusing on several of the sticks but like so many explications of ownership, not directly mentioning retention:

> Legal theory divorces the term "property" from the item itself to instead describe relative rights vis-a-vis that item. "Property" thus means things one can do *with* Blackacre (entitlements) including its use, possession and consumption, as well as enjoying its fruits, the ability to exclude others from its use, and the ability to transfer it. Although ownership suggests the assemblage of all such rights in one person who then totes the full "bundle of sticks," one may properly speak of "owning" a lone entitlement or stick . . . Legally, the *right itself* is the property.[40]

If indeed property rights are a bundle of sticks, and each stick represents a separate property right within the bundle, then when a stick is made inaccessible to the private property owner or otherwise destroyed because of a regulation, then is not private property taken? If it is, should that not then trigger regular analysis of the takings protective functions in constitutional law in the same manner as when title of the fee is transferred formally by direct condemnation?

The Framers understood that "private property" was a concept much broader than referring simply to bundles alone. Individual sticks are private property, too. Indeed, the private law of exchange of property regularly involves the voluntary exchange—for valuable consideration, or compensation—of something less than a full bundle of all the rights an owner has in a particular parcel. When a servitude or easement is sold, it allows some other private party to use the property or to control the use of another's property in a way that they could not do before the transaction because of the property owner then-holding those sticks and having the right to exclude others from those sticks unless and until those sticks were voluntarily parted with by a mutually beneficial exchange or gift. Similarly, a private property owner may choose to create a split estate or partition its land. In other words, owners get to slice, dice, or julienne their property in whatever way they see fit, and they may also choose to retain or even enlarge their bundle by acquiring sticks from others (such as by getting a servitude over a neighbors' land with a benefit that that attaches to their land).

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[39] *Craft*, 535 U.S. at 278 (citing BENJAMIN CARDOZO, PARADOXES OF LEGAL SCIENCE 129 (1928) (reprint 2000); *Dickman*, 465 U.S. at 336 ; *see also generally* Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. CINCINNATI L. REV. 57 (2013) (making the case for the utility of the bundle of sticks metaphor for understanding many of the issues related to property in property law).

[40] Katheleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595, 614-15 (2000).

The Supreme Court has regularly given the "right to exclude" recognition as fundamental to property.[41] The right to exclude and the corollary right to include (and its component sharing branch).[42] Inclusion is one of the rights associated with property ownership, i.e. one of the sticks in the ownership bundle, but it assumes the voluntary choice to include.[43] Regulations that allow the public to control private property uses result not just in the loss of the right to exclude, but also the involuntary imposition of public inclusion.

B. *A New Test Respecting the Market-Paralleling Goals of Takings Law Protections*

Given that the starting point of analysis can have a framing effect by emphasizing that which is most important to the inquiry, starting by analyzing a regulation puts too heavy a thumb on that regulation's legitimacy rather than approaching the regulation's legitimacy from the perspective of previously discussing its effect on private property. Conversely, if we start with the effects on property and property rights, we appropriately emphasize as the first order concern the rights meant to be protected by the constitutional text. Emphasis framing research then predicts that the property rights will be prioritized in analysis rather than the regulation.

Situated inside that ordering preference, we prioritize the private property discussion over the takings discussion. If we start with "private property" instead of focusing first on the "regulation" then we make the analysis owner-focused, again respecting the purpose of the constitutional protections by focusing on the beneficiaries of the clause (rather than the government actors limited by the clause).

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41 *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) ("one of the most essential sticks in the bundle of rights that are commonly characterized as property – the right to exclude others"); *see also* College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999) ("The hallmark of a protected property interest is the right to exclude others."); Int'l News Serv. v. Associated Press, 248 U.S. 415, 246 (1918) (Holmes, J., concurring) ("Property depends upon exclusion by law from interference. ..."); Int'l News Serv. v. Associated Press, 248 U.S. 415, 250 (1918) (Brandeis, J., dissenting) ("An essential element of individual property is the legal right to exclude others from enjoying it.").

42 DUKEMINIER ET AL., PROPERTY 104 (8th ed. 2014) (discussing exclusion and inclusion as the "necessary and sufficient conditions of transferability").

43 Grey's formulation of the things/bundles debate is illuminative:

Most people, including most specialists in their unprofessional moments, conceive of property as *things* that are *owned by persons*. To own property is to have exclusive control over something – to be able to use it as one wishes, to sell it, give it away, leave it idle, or destroy it. Legal restraints on the free use of one's property are conceived as departures from an ideal conception of full ownership. By contrast, the theory of property rights held by the modern specialist . . . fragments the robust unitary conception of ownership into a more shadowy "bundle of rights." Thomas C. Grey, *The Disintegration of Property*, NOMOS XXII 69, 69-70 (1980); *see also* Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053, 1061 (1989) ("[t]he bundle metaphor…expresses a special sense of the separability of the various sorts of legally recognized interests").

Consequently, the more appropriate analytical sequence should proceed on the following path: (1) the threshold question that should lead in the analysis requires that we first define the scope of the bundle of sticks and then ask is the use limited by the imposition of the governmental rule or action in bundle of sticks before the regulation? Then (2) is that bundle smaller after the regulation?

In other words, to appropriately prioritizing rights over power, ordering issues become important. We should define rights before the regulation and compare them with the rights after the regulation. If the bundle is smaller, something that was there is no longer there because it was taken away by the imposition of the regulation. Traditional property rules recognize the ability to divide property rights into smaller parts. If you sell a stick, we characterize it as a voluntary reduction in one's property rights.

A proper alternative test for determining whether a regulation should be deemed a taking then would be based on a comparison between the effect on the bundle from the regulation and determining whether the same effect in the private marketplace would have required a consensual, mutually beneficial exchange with appropriate compensation (or, in contracting terms, payment or consideration). This proves that the use in question is tied to a tradeable right that should be recognized as a distinct private property interest. If the public now has that stick or control over the use or disuse of that stick, then the public obtained a servitude. This coercively acquired right should be characterized as an "involuntary regulatory servitude" (or perhaps an "involuntary implicit servitude").[44] The point being that when a private party who wished to acquire the same rights to enforce a limitation on the private property owner would have been required to pay to get it, then the government should also have to pay to get it.

Under these facts, the takings clause should apply, unless we identify some exception. By starting with "difference in bundles composition" analysis, we get to a point where we can make a presumption of a taking. Only at this stage of the analysis would we engage in police power analysis as a way to rebut the presumption of a taking, rather than starting with the police power and making the property owner justify why it does not apply. There's obviously then a big debate on the scope and effect of the police power, but that debate happens on a different playing field with this ordering.

The approach proposed in this Essay better protects the values and purposes of the constitutional provisions governing property taking than our current framing. This view of analyzing whether regulations amount to takings is the best framing to make the Takings Clause replicate market conditions despite the necessity of coercion. The public as a whole should be required to pay for the servitudes it coercively obtains.[45] Owners should not be forced to bear the costs of a reduction in the size of their bundle, and hence suffer a market reduction in the value of their property when no one bought it away

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[44] *See supra* note 1 and accompanying text.

[45] Armstrong v. United States, 364 U.S. 40, 49 (1960).

from them, unless and until the public pays for the thing that a willing purchaser would have had to pay a willing seller to accomplish the same result.

V. CONCLUSION

As we imagine the future of regulatory takings, we should not be locked into present terminology, especially when it has only recently been adopted and when it fails to capture the essence of the constitutional inquiry. "Involuntary regulatory servitudes" is a superior framing device for what we mean to discuss when we use "regulatory takings." The switch is not just a semantic one, as the words we use to describe the effects sometimes define the rights because they create the fences and guideposts in which we develop the rules.

A WORKABLE COMMON LAW BASELINE FOR REGULATORY TAKINGS

Adam J. MacLeod[*]

INTRODUCTION: AFTER *PENN CENTRAL*

Rights to use property are property rights. The Takings Clause of the Fifth Amendment requires governments to provide just compensation when they take property. In our constitutional republic, legislatures are competent to change the law, and legal changes sometimes alter private rights, including use rights. The Takings Clause does not forbid such legal changes. It only requires compensation for property rights taken as a result.

To give use rights the constitutional protection that the Takings Clause requires, courts need a baseline of rightful property use to show when a change in the law that adversely affects use rights amounts to a taking. This essay proposes replacing the balancing test of *Penn Central Transportation Co.* v. *New York City* with a common law baseline.[1] Two common law concepts and one common law institution will make the baseline work.

The first concept is the distinction between declaratory and remedial enactments, the most fundamental distinction in the taxonomy of statutes that common law jurists have used for centuries. Declaratory enactments neither add nor expropriate property rights but merely restate and clarify well-settled doctrines that determine the contours of an owner's right to use some resource. By contrast, remedial enactments change the law in some way. When they deprive owners and lawful users of existing use rights, they constitute takings.

The second conceptual distinction is between vested property rights and unvested interests. A legal change that abrogates a vested property use retrospectively is presumed to be remedial and thus a taking. The government may overcome the presumption as any complaining neighbor would, by proving to a jury that the use was unlawful before the challenged change in the law. By contrast, where the landowner has no vested use at stake, as in a facial challenge, it must bear the burden of proving that the challenged law takes away a vested liberty to make a particular use in the vicinage. The jury, a common law institution that has declared the scope of private rights from a time immemorial, is competent to make the ultimate determination.

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[1] *See* Penn Central Trans. Co. v. N.Y.C., 438 U.S. 104, 115-18 (1978).

Despite the U.S. Supreme Court's occasional resort to background principles of law, such as nuisance doctrine,[2] and common law definitions of personal property dating back to Magna Carta, scholars remain skeptical that any transcendent *ius commune* can supply an independent baseline for defining use rights.[3] Thus, it is generally assumed today that the baseline for regulatory takings is variable and contingent, depending as it does on "the state law in effect before the challenged law was enacted."[4] As one scholar has succinctly put it, "A regulation that constitutes an unconstitutional taking in Houston could pass constitutional muster if enacted in New York."[5] Other scholars point out that the Court's regulatory takings doctrine lacks both intrastate and interstate uniformity,[6] and its attempt to achieve equality is "entirely without independent content."[7]

In light of the prevailing academic skepticism of a transcendent *ius commune*, this essay begins by clearing some conceptual ground. It then briefly explains how a common law baseline would work. After this Introduction, Part I explains why a workable baseline must rest in legal authority independent of state sovereignty to change property rules. Part II summarizes the argument for the common law as a baseline and provides some examples of the common law at work. Part III describes the concepts and institution that would do the work in putting a common law baseline into practice.

I. THE POSITIVIST DILEMMA AND THE NEED FOR AN INDEPENDENT BASELINE

The legal standard proposed here employs legal concepts rooted in the history and tradition of America's fundamental law, the common law. It involves a shift away from the jurisprudential assumptions underlying *Penn Central* to an older, way of thinking about what law is.[8] The term "common law" in this essay does not mean law made by judges. Instead, it means the full set of rights, duties, and institutions that comprise the customary law of

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2 Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992).

3 Horne v. Dep't of Agriculture, 576 U.S. 350, 358 (2015).

4 Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 206 (2004).

5 *Id.*

6 Some scholars think this is a feature of regulatory takings doctrine. Nestor M. Davidson and Timothy M. Mulvaney, *Takings Localism*, 121 COLUM. L. REV. 215 (2021). Others think it is a bug. Michael M. Berger, *What's Federalism Got to Do with Regulatory Takings?*, 8 BRIGHAM-KANNER PROP. RTS. CONF. J. 9 (2019).

7 Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 5 (2008). *But see generally* John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003 (2003) (reconceptualizing property as a comparative right for regulatory takings purposes, securing equality of benefits and burdens).

8 *See generally* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

England and British North America,[9] bounded by what the jurists call "the law of reason," the law of natural rights and duties.[10] In this view, the rights and duties of the common law exist as legal reasons for both private and official action whether or not any particular jurist declares them.

The existence and intelligibility of common and natural law is defended at length elsewhere.[11] Common law jurisprudence is here proposed as an alternative to a jurisprudence that has its own problems, latent in Anglo-American jurisprudence since the time of positivists such as Hume and Bentham, and dominant in American law since the rise of Legal Realism. As Henry Smith observes, on the positivist and Legal Realists' view of property, "the state could always withdraw or alter its endorsement of an owner's decisional power."[12] The resulting problem is that property rights are whatever the highest political sovereign says they are, but constitutional property rights are supposed to impose meaningful limitations on the power of public officials to take property rights away. Call this the Positivist Dilemma.

This is a dilemma if the Takings Clause governs expropriation of all property rights and if the right to determine use of a resource is a property right.[13] The clause requires compensation where "property" is "taken."[14] A property right can be taken by a change in the law as much as by an exercise of the eminent domain power.[15] A government that enacts a new rule or renders a new judgment prohibiting a previously lawful use has deprived all persons who were lawfully making that use of their rights. From the perspective of a property user (e.g. an owner, tenant, bailee, licensee, or other person with a legal right to make some use), a right to make use of an owned resource is what makes property rights worth having.

We can see the dilemma at two levels of generality. First, at the level of constitutional law, positivist assumptions negate the rights declared in the Fifth and Fourteenth Amendments. Jeremy Paul called this the "problem of

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[9] JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 68 (2003); Adam J. MacLeod, *Metaphysical Right and Practical Obligations*, 48 U. MEMPHIS L. REV. 431, 432 (2017).

[10] Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1571 (2003); ERIC R. CLAEYS, NATURAL PROPERTY RIGHTS 24 (2024).

[11] See. e.g. Stephen E. Sachs, *Finding Law*, 107 Cal. L. Rev. 527 (2019); Neil Duxbury, *Custom as Law in English Law*, 76 CAMBRIDGE L.J. 337 (2017); ADAM J. MACLEOD, PROPERTY AND PRACTICAL REASON (2015); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (2d ed. 2011).

[12] HENRY E. SMITH, EMERGENT PROPERTY IN PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 320, 327 (James Penner and Henry E. Smith, eds. 2013).

[13] If the Takings Clause does not require compensation for all expropriations of property, or if use rights are not "property," then of course the dilemma is resolved in favor of an unfettered government power to terminate use rights. But the U.S. Supreme Court has maintained a doctrine of regulatory takings since the dawn of innovative land use laws in the Progressive Era. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922).

[14] *Supra* note 8 at 146.

[15] *Id.* at 124.

positivism."[16] Constitutional rights, such as property, cannot impose any limitations on official power if the state has unlimited power to redefine those rights.[17] But American constitutions forbid government deprivation and taking of property rights, and thus contemplate that "each citizen can call upon property law to protect herself against actions of the government itself."[18]

At the level of jurisprudence, the positivist logic is in principle fatal to all rights, which it renders as mere concessions of privilege from the sovereign.[19] A power to alter a private right entails the absence of any immunity for the right holder. Conversely, if rights are not mere concessions of privilege, then they are not whatever the government says they are. A government that is forbidden to abrogate a right has a disability to abrogate it, and therefore lacks the power to do so. A legal disability just is the absence of the legal power to abrogate the private right.

In short, unless they are immunized in some way against government abrogation, use rights cease to be "property" within the meaning of the Fifth and Fourteenth Amendments. But if they are so immunized then the positivist conception of property rights as entirely contingent on sovereign power, a conception shared by Legal Realists, must be false. Further, if positivist assumptions are true of rights to use property, then it is not at all clear why they are not also true of all other enumerated, constitutional rights. All the rights enumerated in American constitutions are immunized against abrogation. That is the point of constitutional rights. So, the case in favor of property use rights rests to some extent in the existence of constitutional rights of free speech, assembly, free exercise of religion, trial by jury, right to counsel, and many other enumerated constitutional rights.

That we need an independent baseline to identify takings does not alone entail that the common law should be the baseline. But it does entail that there must be *some* baseline, that the baseline must be independent of sovereign power to change the rules, and that the baseline must impose duties and disabilities on those who hold power. An independent baseline can dissolve the Positivist Dilemma if it anchors conceptually a limitation on the power of public officials to abrogate vested private rights.

II. THE COMMON LAW CAN BE A WORKABLE AND PRINCIPLED BASELINE

A common law baseline can do that job. As one skeptic of common law baselines has observed, the "baseline of permitted property use that is

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16 Jeremy Paul, *The Hidden Structure of Takings Law*, 64 SO. CAL. L. REV. 1393, 1411 (1991).

17 *Id.* at 1410-11.

18 *Id.* at 1409.

19 *See* JEREMY BENTHAM, OF LAWS IN GENERAL, IN THE COLLECTED WORKS OF JEREMY BENTHAM 16 (H.L.A. Hart & J.H. Burns eds., 1970).

privileged over regulatory restrictions" is "found in the common law notion that, at least as regards land, an owner may make any use of his or her land that is not a nuisance."[20] The Takings Clause is meant to provide meaningful protection to use rights, rather than leaving them entirely contingent on legislative will. The common law is the source of law which the Fifth Amendment's drafters and ratifiers would most readily have consulted. It is the fundamental law that the Takings Clause takes as given.

The common law can be a workable and principled baseline because many of its norms and institutions are stable and knowable. Whether or not it is the *best* baseline, it has several advantages over alternatives. Three stand out. First, it has the advantage of being grounded in law. The law in which it rests was considered fundamental law at the time of ratification of the Fifth and Fourteenth Amendments. Second, it's familiar. While not all judges are trained in philosophy or economics, all judges have at least some training in the common law of nuisance, trespass, subjacent and lateral support, waste, and other doctrines that determine the scope of lawful property use. Third, and perhaps most significant when dealing with use rights, the common law contains proven concept, methods, and institutions for resolving ambiguities and indeterminacies. Chief among these is the jury trial. Use rights often have indeterminate boundaries because conflicting uses are defined by reference to standards of reasonableness rather than the clear trespassory rules that define exclusion rights and the estates of ownership that shape alienability rights. The contours of use rights are more context-dependent, though they remain meaningful rights.[21] This is where jury trials and legal presumptions come in. Where legal rules do not by themselves determine the scope of property rights, the jury clarifies or specifies the boundary between lawful and unlawful uses.

The Takings Clause is not unique in presupposing common law rights and institutions. Where a "pre-existing" right or wrong is at stake in a constitutional challenge, the U.S. Supreme Court looks to the common law to ascertain the meaning of the relevant term or legal concept.[22] For example, in *Horne* v. *Department of Agriculture*, the U.S. Supreme Court referred to common law doctrines of personal property to answer the question what resources count as property within the meaning of the Takings Clause.[23] In *Carpenter* v. *United States*, the Court referred to the common law in addressing the question when personal data are private property protected by the Fourth Amendment; two justices referred more precisely to the common law doctrine of bailment.[24]

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[20] J. Peter Byrne, *Regulatory Takings and "Judicial Supremacy*," 51 ALA. L. REV. 949, 957 (2000).

[21] ADAM J. MACLEOD, PROPERTY AND PRACTICAL REASON 173-15 (2015).

[22] New York State Rifle and Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 24, 46-47 (2022).

[23] Horne v. Dep't. of Agric. 576 U.S. 350, 357-61 (2015).

[24] Carpenter v. United States, 585 U.S. 296, 303-05, 361-64, 398-01 (2018) (Roberts, J., opinion of the Court, Alito, J., dissenting, and Gorsuch, J., dissenting).

To interpret the Takings Clause of the Fifth Amendment as incorporated against the states by the Fourteenth, the relevant common law doctrines are those governing in the United States in 1793 and 1868. Of particular importance, of course, are the terms "taken" and "property." To know the meaning of *taken* at the moment of that term's fixation in the constitutional text in 1793 (and its implicit extension to the states in 1868) is to know whether a new regulation which forbids a previously legal use of land is a taking within the meaning of the Takings Clause. The same logic motivates a study of the established meaning of "property" in our fundamental law in 1793 (and 1868). If property includes rights to use things, bounded by the common law doctrines governing use, then a new law that departs from the common law doctrine, removing some liberty or power enjoyed under the common law or adding some duty or legal disability not contained in it, deprives a lawful user of "property."

III. MAKING A COMMON LAW BASELINE WORKABLE

A. *Two Concepts and an Institution at Work*

A common law baseline for regulatory takings sits at the conceptual distinction between declaratory and remedial enactments. In short, declaratory enactments do not change the law or abrogate existing rights, and therefore do not constitute takings.[25] Remedial enactments do change the law and may cause regulatory takings. The baseline is made operational by a second distinction drawn from the common law, that between vested rights and unvested interests.[26] The classic concept of vested rights continues to operate in the law. Most simply, it establishes rebuttable presumptions. The law often presumes that established lawful uses remain lawful despite a change in the law.

This presumption would favor a landowner whose use is vested—who has for some time made a use which never was adjudicated to be a nuisance—and officials who abolish the law securing the right would bear the burden of proving that they have not taken vested property rights. Conversely, the law presumes that a landowner who is not actually making a use, or has been held liable to others for making the use, does not have a vested right to make the use. In a Takings Clause challenge, that landowner bears the burden of proving the land's intended use was lawful before the legal change.

Once a court establishes the starting presumption, proof is offered to the jury. The jury is competent to find what the law was before the disputed legal change, what local customs and mores filled in any gaps in the pre-existing

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25 *See supra* note 8 at 145-146.

26 THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 121–22 (2d ed. 2012); THOMAS W. MERRILL & HENRY E. SMITH, THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY 110–13 (2010).

legal rules, and the overall reasonableness of the land user's use under general nuisance and waste standards of reasonableness. The ultimate question for the jury to resolve will be whether the land user's use was lawful prior to the disputed enactment. If the use was lawful before the enactment and is now prohibited, then the enactment has caused a taking. If not, then not.

B. *Declaratory Versus Remedial Enactments*

The primary task in assessing a taking claim is to ascertain whether the challenged enactment is declaratory or remedial. This distinction has been architectonic in common law jurisprudence for centuries.[27] Remedial enactments change the law, and thus change the rights and duties of persons under the law, while declaratory enactments do not.

A remedial enactment alters some proposition of law and thus alters the rights or duties of some person or class of persons. Not all remedial enactments are takings. But if a remedial enactment abrogates vested property rights, then it constitutes a taking. For example, a statute or ordinance that abrogates a right to continue operating a home for disabled persons changes the law.[28] No neighbor has ever complained that the home adversely affects their own property rights in any way, so there is no cause to believe that the use constitutes a nuisance. The new ordinance is thus remedial, not declaratory of the common law of nuisance. It takes property.

By contrast, a declaratory enactment either merely restates or gives specific content to a pre-existing legal doctrine that defines the contours of rights. It does not cause a taking. For example, a constitutional or statutory enactment securing trial by jury declares a right that has been part of the common law from a time immemorial.[29] It confers no new rights on anyone and takes none away. In the property context, an ordinance that prohibits new manufacturing operations in an existing residential neighborhood may be understood to give specific form to common law nuisance doctrine insofar as a manufacturing plant would be a nuisance in a residential neighborhood.[30]

The conceptual distinction between declaratory and remedial enactments makes sense of the U.S. Supreme Court's least controversial takings cases. Consider first *Loretto* v. *Teleprompter Manhattan CATV*

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[27] *See generally* Heydon's Case (1584) 26 Elizabeth 1; *see also* EDWARD COKE, THE SELECTED WRITINGS OF SIR EDWARD COKE 74, 78-84 (Steve Sheppard, ed. 2003); WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *42, *54, *86–87, *91, *254 (1765); COLLECTED WORKS OF JAMES WILSON 1057-58 (Kermit L. Hall and Mark David Hall, eds. 2007); ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 209 (1966).

[28] *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

[29] *See, e.g.,* AMEND. VII; IOWA CONSTITUTION ART. I §9; MAINE CONSTITUTION ART. I §20; MARYLAND CONSTITUTION ART. 5(a)(1) ("That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law.").

[30] Hadacheck v. Sebastion, 239 U.S. 394, 412 (1915).

Corporation.[31] Unless invited by the owner or exercising a license granted by a common carrier or public accommodation, everyone has a duty not to trespass on another's real estate.[32] Loretto did not license any television cable carriers to enter her building.[33] Thus, the ordinance requiring Loretto to allow the television cables to be installed on her building took away Loretto's right to exclude.[34] It was remedial and a taking.[35]

The statute challenged in *Pennsylvania Coal Company* v. *Mahon* was also remedial.[36] Mineral rights are alienable and severable from surface estate rights. When they are severed, the owner of the surface estate retains rights of subjacent support, which correlate with the mineral estate owner's duty not to undermine the surface estate in his exercise of the mineral rights. But the mineral estates at issue in *Mahon* had earlier been conveyed without the duty of subjacent support because the surface owners had waived their correlative support right (presumably in consideration of a reduced purchase price) in private-party transactions.[37] In both natural law and common law jurisprudence, property rights are alienable.[38] So, the parties were free to assign the various subjacent support rights in this way. The later, public act requiring the mine operators to provide subjacent support thus transferred without compensation a subjacent support right from the mines back to the surface owners, which the surface owners had assigned to the mines at the time of the severance.[39]

C. *Trial by Jury*

The parties to a takings case will exploit ambiguities in the law and disagree about the alleged remedial character of an enactment. After courts return to the declaratory-remedial distinction, legislative bodies and administrative agencies are likely to adapt by characterizing all of their enactments as declaratory.[40] At the same time, every aggrieved landowner is likely to characterize every amendment to existing land use law as remedial and a taking.

This is where juries come in. A jury is competent to determine whether a land use is lawful under nuisance doctrine, alienability rules and other common law doctrines. Juries make factual findings. They also make assessments

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31 *See generally* Loretto v. Teleprompter Manhattan CATV Corp. 458 U.S. 419 (1982).

32 *See id.* at 441.

33 *See id.* at 421-24.

34 *Id.* at 441.

35 *Id.*

36 *See generally* Pennsylvania Coal Co., 260 U.S. 393.

37 *Id.* at 412.

38 *Id.* at 412.

39 *Id.* at 412-14.

40 At least those regulatory officials will who do not have a "stupid staff." *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1025 n.12 (1992).

of reasonableness where the law calls for that determination. Juries can thus resolve indeterminacies about the lawfulness of a use at any given time in the context of a particular neighborhood and community.

Juries are no less competent to make those findings and determinations in the context of a takings challenge. A jury verdict that a landowner's proposed use was unlawful before enactment of an ordinance prohibiting it is tantamount to a determination that the ordinance was declaratory as applied to the landowner and therefore does not constitute a taking. A verdict that the owner's use was not unlawful before enactment is tantamount to a verdict that the enactment is remedial. If the jury finds that the new rule abrogates the use, then it is a taking.

D. *Vested Use Rights and the Presumption of Lawful Use*

What remains is to decide who enjoys the presumption and who bears the corresponding burdens of proof and persuasion at trial. One size does not fit all. In a common law suit, for nuisance, facts on the ground, local mores and conventions, and the fact that a use is long established are all relevant and legitimate considerations. Those vary from case to case.

Here another classic juristic concept comes into play, the idea of a vested private right. The concept of vested private rights is, like the concept of remedial legislation, foundational to common law reasoning, especially in the United States.[41] The Takings Clause protects "property" rights. An expectation becomes a property right when it vests in a person. Before it vests it is either a mere interest or a liberty or privilege that is not immunized. It becomes a property right when and because it can no longer be divested or defeased; it is immunized. Immunization of the right makes it property in the fullest sense.

A vested property right may also be vested in a weaker sense.[42] A state may have power to take it away in the exercise of its eminent domain power or by exercising legislative sovereignty to change the rules of law that secure it. But when the state does perform a taking, it must pay compensation.

Takings are disfavored, and the state is never presumed to have intended them. A land user whose use is vested is entitled to a presumption that the use is lawful, and the government should bear the burden of proving that the use was already unlawful before enactment of the challenged ordinance. A landowner who has not made the prohibited use, or who has been held liable to others for making the use, is not entitled to a presumption and should bear

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[41] Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1441–42 (1999); THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 357–413 (1868).

[42] *See* Adam J. MacLeod, *Of Brutal Murder and Transcendental Sovereignty: The Meaning of Vested Private Rights*, 41 HARV. J. OF LAW & PUB. POL'Y. 253, 306 (2018) (explaining stronger and weaker instances of vested private rights).

the burden of proving that the challenged ordinance is remedial and expropriates the claimed use right.

The distinction between vested and unvested uses tracks the way many courts review due process challenges to land use regulations. In such cases, courts almost universally employ rational basis review. However, they employ different presumptions in different cases. Where a landowner brings a facial challenge and asserts no vested use, the landowner bears the burden of negating all rational bases for the ordinance.[43] By contrast, where a landowner has a vested use right at stake and challenges the new ordinance as applied to that vested use, courts often place the burden on the government not only to articulate a reasonable basis for prohibiting the use but also to come forward with evidence that the prohibition will actually serve the government's asserted end.

This practice has a long pedigree in U.S. Supreme Court practice, going all the way back to the dawn of remedial land use regulations in the 1920s. Famously, in *Village of Euclid v. Ambler Realty*, the Court upheld a legislative zoning code after the claimant failed to negate all rational bases for the code.[44] Just two year later, in *Nectow v. City of Cambridge*, the Court reversed a judgment in favor of a city that had rezoned the claimant's land.[45] Justice Sutherland wrote for the Court in both cases. In *Ambler Realty*, the landowner had not yet made any particular uses of the land.[46] In *Nectow*, the landowner had an enforceable contract to sell the land to a buyer for a particular, intended use that was prohibited neither by positive law nor by common law at the time of contracting.[47] The burdens of proof and persuasion fell on the claimant-landowner in *Ambler Realty* and on the city in *Nectow*.[48] In both cases, the initial presumption was dispositive, as the party that bore the burden could not satisfy it.[49]

There are good reasons for this differential treatment afforded to vested and unvested property uses. It makes sense when layered on top of the distinction between declaratory and remedial enactments. A vested land use that

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[43] The distinction between facial and as-applied challenges is not entirely contiguous with the distinction between unvested and vested land uses, but the two sets of concepts are often related in practice. Courts generally defer entirely to local governments in facial challenges while employing higher levels of scrutiny when local government action is challenged as applied to particular property uses. That courts show less deference to unvested, intended uses of land and more deference to local rules and judgments that divest no established uses, may explain in part why. A facial challenge is abstract. To claim that a law is invalid on its face does not require a showing of concrete illegality. A plaintiff who brings a facial challenge, such as Ambler Realty Company, generally does not bother to prove that it has suffered any actual injury – any infringement or deprivation of its actual property rights, exercised and vested. And while not all as-applied challenges involve vested uses, many do. *See generally* Pennsylvania Coal Co., 260 U.S. 393. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

[44] Village of Euclid, Ohio v. Ambler Realty Co. 272 U.S. 365, 396-97 (1926).

[45] *See* Nectow v. City of Cambridge, 277 U.S. 183, 187-88 (1928).

[46] *See* Ambler Realty 272 U.S. at 368.

[47] *See* Nectow, 277 U.S. at 186-87.

[48] *See* Ambler Realty 272 U.S. at 397; Nectow 277 U.S. at 187-88.

[49] *See* Ambler Realty 272 U.S. at 397; Nectow 277 U.S. at 187-88.

has never been found to be a nuisance or otherwise unlawful (e.g. waste, trespass, undermining) is likely to be a use permitted under existing laws and local customs. The probability that it is lawfully permissible increases the longer it has been made on the situs. So, a new ordinance or land use decision that forbids a long-vested use is unlikely to be declaratory of existing law. Instead, it imposes a new duty on the land user. It forbids a use that law and custom have always previously permitted. In short, it takes someone's use right.

By contrast, where a land user identifies some intended, but not yet existent use, or challenges a local government action on its face, we cannot refer to facts on the ground in assessing whether the government action declares existing law or creates new duties. Faced with uncertainty of this kind, it is reasonable for courts to presume that the local government has acted lawfully. Indeed, to presume the lawfulness of local rules and judgments is consistent with centuries-old judicial practice, which employs canons of equitable construction to avoid the conclusion that a legislator has intended an unjust result, where that conclusion is avoidable. This presumption places the burden on the challenger to prove that the local government action is contrary to, or a departure from, existing law.

CONCLUSION

We need a baseline for regulatory takings. The baseline must be independent of the positive law it is meant to measure. Common law provides such a baseline, the distinction between declaratory and remedial enactments. Juries are competent to tell the difference after courts establish the burdens of proof and persuasion according to whether the person challenging the new law has a vested use or not.

PENANCE FOR *PENN CENTRAL*: HOW TO TREAT PROPERTY RIGHTS PROPERLY

Sam Spiegelman

INTRODUCTION

In the pantheon of wrongheaded Supreme Court rulings, *Penn Central Transportation Co. v. New York City* ranks somewhere in the middle.[1] The opinion—which created a multifactor test for determining when and whether a regulation goes so far that it is functionally a taking of all or part the regulated property—is hardly notorious.[2] Nor should it be, however much we property-rights advocates are prone to hyperbolize it, ask anyone else—even the vast majority of lawyers—and few will be even remotely acquainted. It is incomparable to the likes of *Scott v. Sandford* , which spared the Fugitive Slave Act and was pivotal to the onset of the Civil War.[3] Nor is it even close to *Korematsu v. United States*, which upheld the WWII-era internment of tens of thousands of Japanese Americans on flimsy "national security" grounds.[4] But at the same time, neither is *Penn Central* innocuous or even morally correct.

In its roughly half century on the books, *Penn Central* has caused immense (in some respects, immeasurable) damage to Americans' private property rights. It has produced a "crazy-quilt pattern"[5] of simulacra that tend to resemble its form, but hardly ever its substance. That is, there *is no* original *Penn Central* test, but rather a series of recommendations of *some* factors to consider in determining whether and when a regulation becomes a taking. Yet the ruling quickly became the "polestar" of the Court's regulatory-

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1 *See generally,* Penn Central Transportation Co. v. New York, 438 U.S. 104 (1978).

2 *Id.* at 124 (internal citations omitted). (The factors the Court listed in *Penn Central* were explicitly meant to be some among several other unstated ones: "In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.").

3 *See generally,* Scott v. Sandford, 60 U.S. 393 (1857). *See generally* Faith Joseph Jackson, Dred Scott v. Sandford*: A Prelude to the Civil War*, 15 Rich. J.L. & Pub. Int. 377 (2011).

4 *See generally,* Korematsu v. United States, 323 U.S. 214 (1944).

5 Allison Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 63 (1962) (obviously this phrase predates *Penn Central*, but it is still a fitting metaphor); *See* Steven J. Eagle, *Penn Central and Its Reluctant Muftis*, 66 BAYLOR L. REV. 1, 4 (2014) ("In Ptolemaic fashion, courts have added epicycles upon epicycles to *Penn Central*, without much direction from the Supreme Court.").

takings jurisprudence, and with that signal the lower courts were off to the races.[6]

In its search for a brightline answer to the question of when, exactly, a regulation "goes too far"—as it first articulated the notion in *Pennsylvania Coal Co. v. Mahon*—the Supreme Court after *Penn Central*—coat-tailed by a cavalcade of lower federal (and eventually also state) courts—transformed the ruling's recommendations into hard-and-fast rules.[7] For decades now, aggrieved property owners have had to navigate a landmine-laden doctrinal landscape pockmarked with thousands of losses and few victories. Theories abound on the root cause of this disparity—one that is far wider than most other constitutional-rights tests. But the answer is far simpler than it might seem: the Supreme Court *can* be wrong. It has course-corrected several times before, and in some such cases actually acknowledge its past error! For example, this past term the Court reversed the much-derided "*Chevron* deference" doctrine, which had commanded courts to defer to agency interpretations of ambiguous statutory language.[8] More proximately, in *Lingle v. Chevron U.S.A. Inc.*, the Court acknowledged the serious categorical error it made three decades prior, when it held that a regulation typically is not a taking if it "substantially advances" a legitimate state interest—a question appropriate in the due-process context, but hardly relevant for takings claims, where compensation is due regardless of what public interest the violation serves.[9]

The original sin rests not in *Penn Central* itself but in the handful of cases the high-court handed down in its aftermath, solidifying its strange, almost accidental legacy. Rulings in which it hardened what the *Penn Central* majority presented as soft—and hardly all-encompassing—recommendations.[10]

The result? Decades in which the right to just compensation for the government's "taking" of private property for public has continuously stood in starkly "poor relation" to most of its counterparts in the Bill of Rights.[11] This

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[6] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 326 n. 23, 336 (2002) (endorsing Justice Sandra Day O'Connor's reference to *Penn Central* as the "polestar" of regulatory-takings analysis, from her concurrence to Palazzolo v. Rhodes Island, 533 U.S. 606, 636 (2001)).

[7] *See generally,* Pennsylvania Coal Co. v. Mahon*,* 260 U.S. 393, 415 (1922).

[8] Loper Bright Enters. v. Raimondo, 144 S.Ct. 2244, 2273 (2024).

[9] Lingle v. Chevron*,* 544 U.S. 528, 543, 542 (2005) (overturning "substantially advances" test from *Agins v. City of Tiburon*, 447 U.S. 255 (1980), suggesting instead that *all* takings must "substantially advance" a governmental purpose if it is to qualify as "public use" in the first place).

[10] Eric R. Claeys, *The* Penn Central *Test and Tensions in Liberal Property Theory*, 30 HARV. ENVTL. L. REV. 339, 341 (2006) ("Federal regulatory-takings law balances three separate factors. While the Court first spoke of these factors as a group in Penn Central, they were referred to as three separate factors in Kaiser Aetna Inc. v. United States. At some point in the decade after Kaiser Aetna the Court came to assume that these factors set forth the main framework for considering general takings challenges."). *See also* Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (the Court without explanation replaced Penn Central's "distinct investment-back expectations" prong with a "reasonable" one.)

[11] Dolan v. City of Tigard, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth

despite John Adams warning that "property must be secured, or liberty cannot exist."[12]

This Article aims to help reverse these past few decades of doctrinal misfeasance in the takings space by highlighting elements of *other* tests of *other* rights set forth in the Bill of Rights—those rights against which private property stands in such "poor relation." **Part I** sets the stage, explaining in greater detail how a seemingly one-off test, applicable primarily to the facts of its case, became the "polestar" of a takings jurisprudence that becomes ever more muddled with time. **Part II** surveys several tests governing treatment of other rights in the Bill of Rights, focusing on those that in their respective spheres produce far more frequent plaintiff victories, relative to losses, than the roughly 10% success rate among *Penn Central* claimants.[13] Compare this with the far higher success rates for litigants claiming certain other Bill-of-Rights violations—30% in cases involving strict scrutiny,[14] the proper test for fundamental rights; except, apparently, rights in property. So, *triple* the success rate of litigants challenging regulations under *Penn Central*.[15]

Part III applies the lessons of these tests to the takings context, highlighting those elements that any viable *Penn Central* replacement must possess, and why they are indispensable. The Article concludes that the short- to medium-term prospects for *Penn Central*'s demise are slim, but that any chance will require convincing courts—the Supreme Court chief among them—that the *Penn Central* test was and is not what they have variably (and sometimes incompatibly) made it out to be, and that a fair, equitable, and truly constitutional interpretation of the Takings Clause requires a test that turns on the rights and interests inherent in property, rather than a test focused on the loss of value resulting from the offending regulation.

I. THE DAMAGE DONE

It did not take long for scholars, at least, to grasp that there was something terribly wrong with *Penn Central*, and that its growing popularity among lower courts posed a serious threat to the rights it was supposed to

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Amendment, should be relegated to the status of a poor relation[.]"). For a broader discussion, *see* Michael B. Kent, Jr., *From "Preferred Position" to "Poor Relation": History,* Wilkie v. Robbins*, and the Status of Property Rights Under the Takings Clause*, 39 N.M. L. REV. 1 (2009).

12 John Adams, "DISCOURSES ON DAVILIA," IN CHARLES FRANCIS ADAMS, ED., THE WORKS OF JOHN ADAMS (vol. 6) (1851).

13 *See* James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 58–59 (2016).

14 *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006) (reviewing the 459 federal cases applying strict scrutiny from 1990 to 2006).

15 Krier & Sterk, *supra* Table 2, at 58 – 59.

help protect. Professor Carol Rose in 1984 noted that *Penn Central* had "stated that the takings inquiry required examination of 'the parcel as a whole' but did not say how to determine the appropriate bundle of rights."[16] It is not difficult to see how this would become a perpetual source of confounding, and often mutually incompatible results. Courts applying *Penn Central* tend too often to adopt pell-mell one parties' depiction of the relevant property's contours, thus foregoing any real independent analysis.[17] It is no surprise, then, that a facial regulatory-takings claim is well-nigh impossible to even formulate. Indeed, the Court in *Penn Central* itself adopted New York City's false portrait of the Grand Central owner's transferable development rights ("TDRs"), drastically overvaluing them by failing to consider that "[t]he narrowly circumscribed receiving area made the Grand Central TDRs quite difficult of not impossible to use."[18] And the Supreme Court's most recent effort to formulate a test for determining the relevant property has failed to move the needle away from an inherent bias towards government's definitions.[19]

This error highlights one of *Penn Central*'s most fatal flaws, in theory *and* practice—*viz.*, the false notion that *value* is a plausible stand-in for the *property rights* themselves. Specifically, that a regulation goes "too far" when it diminishes how much the property will sell for, rather than the extent to which it disrupts the elements of ownership. Independent judicial analysis of the relevant "parcel" would undermine this flaw because it would compel courts to measure rights in pure rather than monetary terms. John Groen, a property-rights stalwart (and a former colleague at Pacific Legal Foundation), in a recent article made this crucial point, noting that "secured rights in property" do "create value, but value itself is not a right, an estate, or a legal interest in property."[20]

In an earlier article, Professor Stephen J. Eagle, another giant of the field, noted that a focus on *value* fails because it is so difficult to judge with any accuracy the full social and economic impacts a specific regulatory regime, let alone several concurrent ones, will have in the aggregate. Indeed,

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16 Carol M. Rose, Mahon *Reconstructed: Why The Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 568, n. 43 (1984).

17 *See* Richard A. Epstein, *Disappointed Expectations: How the Supreme Court Failed to Clean Up Takings Law in* Murr v. Wisconsin, 11 N.Y.U. J.L. & LIBERTY 151, 162 – 67 (2017) (discussing tendency of courts to simply pick among the definitions of the relevant parcel presented to them).

18 Christopher Serkin, Penn Central *Take Two*, 92 NOTRE DAME L. REV. 913, 919 (2016). The Supreme Court itself has questioned this approach in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n. 7 (1992), opining that "total value of the taking claimant's other holdings in the vicinity" was an "extreme—and we think unsupportable—view of the relevant calculus" (internal citations omitted).

19 *See generally* Timothy M. Harris, *No* Murr *Tests*: Penn Central *Is Enough Already!*, 30 Geo. Envtl. L. Rev. 605 (2018).

20 John M. Groen, *Takings, Original Meaning, and Applying Property Law Principles to Fix Penn Central*, 39 TOURO L. REV. 973, 978 (2024).

this focus often produces tremendous hidden costs. While "[p]ublic officials may perceive that property taken without compensation to the owner"—that is, via regulation held not to be a taking (or gone unchallenged)—"is 'free,'" "such a taking imposes opportunity costs" by "discourag[ing] investment in property" in general.[21]

Eagle concluded that the focus on "the relationship between government and owners, or even necessarily upon the relationship between property and its ownership claimants"—considerations relevant primarily to the value diminished, rather than the rights or interests lost—evinced a failure of imagination more than anything else.[22] That it is certainly possible for the "legal scholarship" to "concentrate upon property-based answers to property takings questions" by fleshing out what counts as private property (what interests and rights, that is) versus those elements that are at the perpetual police-power mercy of the sovereign.[23]

The Court's own use of *per se* tests for certain families of regulations starkly demonstrates the problems that emerge by misfocusing on *value*. In *Loretto v. Manhattan Teleprompter CATV Corp.* (1981) and *Lucas v. South Carolina Coastal Council* (1992), the Court held, respectively, that whatever the purpose of the governmental action, any permanent physical invasion[24] or total loss in an owner's capacity to make productive use[25] of their property is *always* a taking. But why a different set of rules based upon the form the diminishment takes? Nowhere in Anglo-American common law is one fundamental attribute of ownership *more fundamental* than another. Nor is either test even accurate in practice. Several forms of physical invasion are constitutional precisely because the purpose for the invasion falls within the sovereign's police powers, most of which are rooted in the anti-nuisant notion that one should not use their property in any manner that harms their neighbors' use of theirs—in Latin, *sic utere tuo ut alienum non laedas*.[26] These notable exemptions by themselves demonstrate that a rights-based regulatory-takings test *is* possible. Courts are *already* applying them—especially since the Supreme Court highlighted these carveouts in *Cedar Point Nursery v. Hassid* (2021).[27]

The physical invasion in *Loretto* was *de minimis*, both in physical terms and in value lost.[28] It worked a far less drastic diminishment in rights than did Penn Central's forced forbearance from exercising theirs. *Lucas* further

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21 Stephen J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. 899, 926 (2007).

22 *Id.* at 928.

23 *Id.*

24 Loretto v. Manhattan Teleprompter CATV Corp., 458 U.S. 419, 441 (1982).

25 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

26 *See generally* Elmer E. Smead, *Sic Utere Tuo Ut Alienum Non Laedas: A Basis of the State Police Power*, 21 CORNELL L. REV. 276 (1936).

27 Cedar Point Nursery v. Hassid, 594 U,S, 139, 160 (2021).

28 Loretto v. Manhattan Teleprompter CATV Corp., 458 U.S. at 441.

complicates the picture, since it allows that a total *loss of (productive) use* is a *per se* taking—that is, the reason for the deprivation is irrelevant—but does not accord any other fundamental attribute of ownership (*e.g.*, the right to alienate) the same Manichean protection.[29] *Cedar Point* bridged this gap some, holding hat *any* diminishment in the right to exclude is a *per se* taking—again, with the crucial caveat that government may pierce this right for the health and safety of others.[30]

Some might fear that replacing *Penn Central*'s *value*-based analysis with a *rights*- and *interests*-based one will impose too many restrictions on governmental power. First, this is a poor excuse for overburdening a constitutional right. True, the Constitution "is not a suicide pact," but here there is no such risk here.[31] Under a *rights*- and *interests*-based analysis, government will still have at its disposal a panoply of expansive police powers to regulate property for purposes of protecting the broader public's health and safety.[32] Indeed, besides zoning—a distinctly modern phenomenon—almost all of the property rules that would pass constitutional muster simply replicate or at least emulate common-law anti-nuisance principles—most notably, *sic utere tuo ut alienum non laedas*.[33]

Due to *Penn Central*'s strange but enduring appeal, however, governments may still diminish any *other* fundamental property right provided that it does not take *too* much of one or the other.[34] Well, sort of. The categorical "exemptions" show that even the rights apparently protected under *per se* analysis are just as subject to the categorical distinctions between *takings* for public benefit and *mere regulations* designed to protect the public from harm.[35] Meaning that the substance of property law—as we will discuss, when properly informed by *history*, *anti-harm* principles, and societal *reliance* on particular outcomes (or at least incrementalism in fostering doctrinal change)—more than suffices to protect property from the government going "too far," and good governance from overly burdensome restrictions in turn.

But how to achieve a doctrinal refocus on rights instead of value given how far into the *Penn Central* muddle the courts have waded? To replace *Penn Central*'s value-based test and replace with a rights-centered one, courts (especially the Supreme Court) must have a ready viable alternative.

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29 Lucas v. S.C. Coastal Council, 505 U.S. at 1019.

30 Cedar Point Nursery v. Hassid, 594 U.S. at 154.

31 Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.").

32 Supreme Court rulings from throughout its history bear this out. *See, e.g.*, Mugler v. Kansas, 123 U.S. 623 (1887) (finding a legitimate exercise of the state police power to regulate the use of private property to protect the public from harm), Hadacheck v. Sebastian, 239 U.S. 394 (1915) (same), Goldblatt v. Town of Hempstead, 369 U.S. 590 (1969) (same).

33 *See* Smead, *supra* note 26.

34 *See generally*, Penn Central Transportation Co. v. New York, 438 U.S. 104.

35 Again, we hesitate to call these "exemptions" more than they are landmarks of property rights' boundary lines in view of government's obligations under the social contract. *See e.g. supra* note 27.

Otherwise simple inertia will keep the doctrine petrified in perpetuity. It is not an easy problem to solve, but constitutional tests on other rights in the Bill of Rights offer elements that are indispensable to any future lasting replacement to *Penn Central*.

II. LESSONS FROM OTHER TESTS: *HISTORY*, *ANTI-HARM*, AND *RELIANCE*

When the government restricts an individual's rights to speak, to practice their credos, or to receive all the trappings of due process, whether such limitations are unconstitutional does not turn on the *quantitative* extent of the restriction. Instead, it hinges on whether the proscribed conduct *qualifies* as a bona fide exercise of a constitutional right. Courts often speak of "exceptions" to constitutional protection. But this is a misnomer. More accurately, restrictions on one's ability to yell "fire!" in a crowded theater and the like *resemble* protected conduct, but on examination—preferably using an originalist lens—fall outside the constitutional ambit.

Private property offers a salient example—ironic given its "poor relation," in practice, to other fundamental rights articulated in the Bill of Rights. To wit, a law requiring homeowners to install smoke detectors is not a taking because no right or interest in property has been taken. Since there *is no right* to use (or disuse) one's property in a manner that diminishes others' rights and interests in theirs, laws that work to ensure this and other longstanding conceptual limitations on "property" never touch an actual property right or interest. In this example, what *looks like* a breach of the right to exclude is merely one among several "carveouts" that in fact *define what that right is*—or, in most circumstances, is already well-defined under a particular sovereign's background principles of property law. Simply put, the "right to exclude," for example, *by definition* ends at the lines where its extension would push the owners' dominion beyond what has, over centuries of legal and normative evolution, become commonly understood as "private property."

Under *Penn Central*, however, most courts never even reach the conceptual and definitional boundaries of private property because, by their approximation, enough *value* remains of the property (again, usually borrowed pell-mell from one party's definition of the relevant property—typically the government's). Thus in contemplating a post-*Penn Central* world, it is useful—imperative, even—to review those tests, covering other rights articulated in the Bill of Rights, that unlike *Penn Central* rest on categorical distinctions instead of arithmetic.

Three common elements in particular stand out (certainly among those test this Article will discuss). **First** is an emphasis on the *history* of the right in question. **Second** is using elements of the so-called *"anti-harm* principle*"* to distinguish protected from unprotected conduct. *History* certainly informs this element but does not overwhelm it. Since, as societies evolve and technology advances (or devolves, in certain respects), the risks once inherent in a particular action change in tandem. An excellent example is commercial

flight, once properly deemed an "ultrahazardous activity" with several attendant use restrictions that have long since fallen away, both normatively and legally, as the activity becomes safer and more commonplace. **Third** is taking seriously individual and group *reliance* of what courts should and will do. Courts applying *Penn Central* will pay lip service to, say, "investment-backed expectations"—what a reasonable owner believes he can and cannot do with his property at purchase (momentarily ignoring inheritance and other prickly exceptions). But in the final analysis, many of these same courts then integrate existing *and* future restrictions into what owners should be prepared to expect. It is not difficult to see the dangers in this approach, wherein the universe of protections a "reasonable" owner can expect diminishes precipitously with the addition of each new restriction. Imagine if what constitutes protected "due process" shrunk with every new restriction that, the day prior, was widely (and properly) perceived as impermissible.

History, *anti-harm*, or *reliance* (or some combination thereof) play pivotal (though varying) roles in prominent cases involving free speech,[36] religious exercise,[37] the right to keep and bear arms,[38] cruel and unusual punishments,[39] and those other rights, predating ratification, that are "retained by the people" under the Ninth Amendment.[40] We review these three elements in turn, homing in on a particularly landmark case for each, also noting their glaring absence from prevailing regulatory-takings jurisprudence.

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[36] *See generally* Rebecca L. Brown, *The Harm Principle and Free Speech*, 89 S. CAL. L. REV. 953 (2016) (discussing how harm parameterizes acceptable exercise of free speech). *See also* R. George Wright, *On the Logic of History and Tradition in Constitutional Rights Cases*, 32 S. CAL. INTERDISC. L.J. 1, 7–9 (2023) (discussing role of history in interpretation of Establishment and Free Speech Clauses).

[37] *See generally* John Witte, Jr. & Eric Wang, *The New Fourth Era of American Religious Freedom*, 64 HASTINGS L.J. 1813 (2023) (surveying Supreme Court's recent shift towards analyzing what constitutes "religious" content and conduct based on what the concept meant to the public at ratification).

[38] *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms After* Bruen, 98 N.Y.U. L. REV. 1950, 1955 (2023) (describing current Second Amendment jurisprudence, exemplified in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022), as "a highly historical inquiry into late colonial and early American legal practices, based on the theory that these were the practices that the Framers constitutionalized in enacting the Bill of Rights"). *See generally* Nelson Lund, *The Future of the Second Amendment in a Time of Lawless Violence*, 116 NW. L. REV. 81 (2021) (implying that the Second Amendment is, in part, designed to fulfill the ani-harm function of government when the state is not competent or physically available to intervene).

[39] *See generally* Note, *The Eighth Amendment, Proportionality, and the Changing Meaning of "Punishments"*, 122 HARV. L. REV. 960 (2009) (discussing—and critiquing—the Supreme Court's understanding of the public meaning of "punishment" at ratification).

[40] *See generally* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006) (discussing the centrality—indeed, indispensability—of history in understanding the meaning of the Ninth Amendment).

a. History: District of Columbia v. Heller (2008)

History is of particular import in constitutional jurisprudence, since the underlying document is, by definition, a product of the variable times in which its incremental parts are ratified. Whether courts apply history correctly is quite another matter, but under *Penn Central* courts tend not to do it at all—at least not beyond lip service. Thus, it is not particularly fruitful, at least at this juncture, to compare different methods for integrating history into constitutional theory. On this, Professor Jack Balkin argues "that something—whether original intention, original understanding, or original meaning—is fixed at the time of adoption, and that the proper interpretation of the Constitution depends on what was fixed at that point in time."[41] And "even when non-originalists contest the uses of history, they tend to do so on originalists' . . . turf—and about the kind of history that originalists care about."[42]

Though *how* to apply history to constitutional questions remains hotly debated, courts in several Bill-of-Rights contexts at least give it due consideration. Not so for regulatory takings, with even the Supreme Court getting the point of its history wrong. The worst iteration of the misinterpretation of history by The Court is its almost unqualified endorsement of zoning laws. This started most prominently when the *Village of Euclid v. Ambler Realty Co.* (1926) opinion largely replaced nuisance-based restrictions on individual uses with district-wide bans on entire classes of property: industrial, commercial, residential, and everything in between.[43] This opinion came in spite of more than a century of regulatory-takings fights having been resolved on nuisance (or at least harm-preventing) grounds, the tried-and-truest approach to determining those uses (and disuses) of private property that offend the public interest and can thus be restricted without compensation.[44]

Perhaps the best example of history's outsized role in interpretation of the Bill of Rights is found in the Supreme Court's Second Amendment jurisprudence. A recent landmark case highlighting this focus—and in a manner that truly stresses history's central role—is *District of Columbia v. Heller* (2008).[45] In *Heller*, the Court engaged in an exhausting (though not necessarily exhaustive) survey of the history of the right. Of course, many can—

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41 Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 647 (2013).

42 *Id.* at 657.

43 *See* Melvyn R. Durchslag, *Village of Euclid v. Ambler Realty Co., Seventy-Five Years Later: This Is Not Your Father's Zoning Ordinance*, 51 CASE W. RES. L. REV. 645, 647 (2001) (noting that since Euclid, "the focus of zoning has shifted from the effects of one use upon another's reasonable enjoyment to preserving the environmental character or amenities of a particular community or neighborhood. . ."); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395-97 (1926).

44 *See supra* note 27.

45 District of Columbia v. Heller, 554 U.S. 570 (2008).

and do[46]—quibble with how the Court *used* history, but *Heller*'s discussion of "militia" alone contrasts powerfully with *Penn Central*'s almost complete omission of history:

> The "militia" in colonial America consisted of a subset of "the people"—those who were male, able bodied, and within a certain age range. Reading the Second Amendment as protecting only the right to "keep and bear Arms" in an organized militia therefore fits poorly with the operative clause's description of the holder of that right as "the people.[47]

This sort of detailed analysis—which the Court in *Heller* undertook for every word of the Second Amendment—contrasts drastically with *Penn Central*'s failure to discuss the history of property rights *at all*. It should come as no surprise, then, that boiling history to a light simmer produced a final test (or what would become *Penn Central*'s "test" via subsequent high-court cases) that forewent historical analysis of *any kind*.

b. Anti-Harm: New York Times Co. v. United States (1971)

The limits history imposes on "property" are often also drawn (with varying precision) where conduct becomes so "prejudicial to the interests of others" and thus "may be subjected either to social or to legal punishments, if society is of the opinion that the one or the other is requisite for its protection."[48] While the U.S. Constitution well-predates John Stuart Mill's *On Liberty* (1859), in which the liberal giant expands on this core thesis, Mill was a product of what was already, by the ratification of the Bill of Rights in 1791, a well-worn classical liberal consensus among those opposed to absolute monarchism and other Hobbesian conceptions of government as whoever is strongest.[49] It is no coincidence, then, that the Framers' conception of the Bill of Rights rested heavily on the presumption that man consented into *limited* sovereign subjugation in order to protect his life, liberty, and property from the tyranny and vagaries of the crowd.[50] Of course, what qualifies as *harm*

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46 *See, e.g.*, Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 Duke L.J. 67 (2023) (critiquing the majority's approach to history).

47 *Heller*, 554 U.S. at 580–81.

48 JOHN STUART MILL, ON LIBERTY 86 (1859).

49 *See* Sam Spiegelman & Gregory C. Sisk, Cedar Point*: Lockean Property and the Search for a Lost Liberalism*, 2021 CATO. SUP. CT. REV. 165, 186 (2021) (And what are more permissible limitations than those that prevent harm to others? After all, protecting members' lives, liberties, and estates from the violence and vagaries of others is the very purpose for which individuals enter into the social contract to leave the Hobbesian state of nature and adopt a Lockean rule of law.). *See also* Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 310 (1795) ("The preservation of property . . . is a primary object of the social compact.").

50 Spiegelman & Sisk, *see supra* note 44 at 189–90 ("Despite arguments that it is too subjective to be workable, the harm/benefit distinction controlled much of the public-private relationship for and aligns

is—at least on the margins—a matter of serious debate.[51] But there are some obvious examples in the Western moral canon—the core of property rights clearly among them.

Indeed, the *anti-harm* ethos marks the state-power limits on nearly every one of the individual rights inscribed in the first eight amendments (and those impliedly listed via the Ninth), *including* the guarantee of "just compensation" in the event of a public seizure of private property. That is, the sovereign's responsibility to use its forceful authority to protect those with whom it has contracted to govern often draws the line between a bona fide exercise of a right (protected) and a transgression that merely *resembles* the bona fide exercise of a right. In the former case, government cannot intrude. In the latter case, government has an inherent obligation to interfere, and in doing so sets the parameters of the right in question. Not by fiat, of course, but by the very graduated trends of *history*, *(anti-)harm*, and *reliance* that permeates so much of Bill-of-Rights jurisprudence beyond takings law (and other rights therein that tend to stand in "poor relation" to the others). And the more we compare *Penn Central* with those constitutional tests that hew closer to the Lockean conception of government-as-pact, the more glaring the flaws of modern takings jurisprudence become.

One case in particular highlights the decisive role *anti-harm* principles can play in determining the outcome in Bill-of-Rights cases. *New York Times Co. v. United States* (1971)[52] implied an incredibly high bar for permitting the government to prevent the publication of classified materials—here the so-called "Pentagon Papers"—that the Gray Lady acquired after it was stolen from a safe at the RAND Corporation.[53] Justice White's concurrence (the majority opinion itself was fairly barebones) offered that the government must show that publication poses a "grave and irreparable" harm to national security. White theorized that in practice this standard—which the federal government had put forth in favor of prior restraint—did not foreclose criminal prosecution, only that it could not prevent the disclosure.[54] *New York Times* protected the fundamental and constitutional right to free speech (even if White argued that such did not preclude the speaker from criminal prosecution for the damage that speech wrought) against the highly charged military situation then unfolding in the Vietnam War.[55] It seems odd that a threat to national security of this caliber could not restrain free speech, whereas something as banal as a municipal historic-preservation law can run

far better with Locke's social contract—with its ultimate end of preserving individual life, liberty, and estates—than does the modern positivistic style.").

51 For the (incorrect) civic republican—as opposed to Lockean classical liberal—conception of "harm," *see* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 818 (1995).

52 New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam).

53 *See generally* Mike Gartner, *The Pentagon Papers*, 9 B.Y.U. PRELAW REV. 7 (1995).

54 *New York Times*, 403 U.S. at 731–39 (White, J., concurring).

55 New York Times Co. v. United States, 403 U.S. at 719 (White, J., concurring).

roughshod over property rights, which in the Anglo-American pantheon long predates even free speech.[56]

c. Reliance: West Virginia v. Environmental Protection Agency (2022)

Reliance is also a key feature of several Bill-of-Rights tests, granted it appears to be less common than *history* or *anti-harm*. There is no "formulaic answer" to the question of "what makes constitutional expectations change."[57] Whatever form it takes in a given case, however, its practical importance is beyond doubt. Not because the Constitution says anything like ". . . unless Americans have come to rely on incorrect interpretations of this test," but because it is essential to the effective real-world implementation of interpretive revisions. For example, whatever one feels about the Courts decision in *Dobbs v. Jackson Women's Health* (2021),[58] which overturned *Roe v. Wade* (1973),[59] the former has clearly produced myriad real-world complications.[60]

The closest *Penn Central* comes to incorporating reliance interests into its test is an apparent (though, again, mostly perfunctory) accounting for aggrieved owners' "investment-backed expectations."[61] Such an individualized approach, however, misses the point of reliance—which is designed to ensure that interpretive revisions do not sow so much confusion that its final product is a maze of Balkanized and bastardized lower-court readings that offer no real guidance on how claimants should behave to minimize their exposure to unconstitutional state actions.[62]

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56 *See, e.g.*, Robert C. Ellickson & Charles D.. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 CHI.-KENT L. REV. 321, 354–57 (1995).

57 Richard A. Primus, *Constitutional Expectations*, 109 MICH L. REV. 91, 99 (2010).

58 Dobbs v. Jackson Women's Health, 597 U.S. 215 (2022).

59 Roe v. Wade, 93 S.Ct. 705 (1973).

60 *See, e.g.*, Maya Manian, *The Impact of* Dobbs *on Health Care Beyond Wanted Abortion Care*, 51 J.L. MED. & ETHICS 592, 592-97 (2023).

61 Penn Central Transportation Co., 438 U.S. 104, 124-28 (1978).

62 *See* William N. Eskridge, Jr., *Reliance Interests in Statutory and Constitutional Interpretation*, 76 VAND. L. REV. 681, 687-88 (2023) ("Political philosophers as diverse as Friedrich von Hayek and John Rawls maintain that the rule of law enables individuals and institutions to rely on a stable, predictable legal regime when they make their plans and structure their activities . . . In addition to its grounding in the rule of law and social support, judicial legitimacy also depends on the Court playing a constructive role in the operation of our representative democracy. Settled legal precepts are building blocks upon which legislatures, courts, and agencies construct or amend legal regimes. Decisions exploding these foundational assumptions might be antidemocratic (where legislators or presidents relied on those assumptions), may impair government programs or unravel well-considered policies, and will impose transition costs on private regulated entities as well as government agencies.").

Compare this with a recent landmark case in which *reliance* interests took center stage. In *West Virginia v. Environmental Protection Agency* (2022),[63] the Supreme Court struck proposed agency rules that

> [O]ur precedent teaches that there are "extraordinary cases" that call for a different approach—cases in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority. [64]

In brief, contrast this with *Penn Central*'s rubberstamping New York City's historic-preservation regime, completely mischaracterizing the plaintiff's position in the process:

> Stated baldly, appellants' position appears to be that the only means of ensuring that selected owners are not singled out to endure financial hardship for no reason is to hold that any restriction imposed on individual landmarks pursuant to the New York City scheme is a "taking" requiring the payment of "just compensation." Agreement with this argument would, of course, invalidate not just New York City's law, but all comparable landmark legislation in the Nation. We find no merit in it.[65]

The disparity all but speaks for itself.

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The survival of whatever test replaces *Penn Central*'s depends on how well it integrates the *history*, *anti-harm*, principles, and *reliance* interests that permeate so many of the tests for delineating other rights articulated in the Bill of Rights. While these three are far from the only elements that a lasting post-*Penn Central* test should borrow from its constitutional counterparts, they are of particular salience in this context because *Penn Central* has so glaringly excluded them.

III. PREREQUISITES FOR AN ENDURING POST-*PENN CENTRAL* WORLD

We lawyers tend to exaggerate our roles in society—the title of this Part is no exception. In almost every ordinary respect, a post-*Penn Central* "world" will resemble the one that existed before. But for property lawyers, land-use scholars in the Academy, and, most crucially, property owners swept up in Kafkaesque regulatory loops, it will mark a watershed moment.

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63 West Virginia v. Environmental Protection Agency, 597 U.S. 697 (2022).

64 *Id.* at 721.

65 Penn Central Transportation Co., 438 U.S. at 131.

A total repudiation of *Penn Central*—unfortunately, an unlikely outcome[66]—would have to exclude value from the analysis; otherwise it will not be a new test so much as a mere replacement of the set of factors considered relevant to determining value. And observing the course *Penn Central* jurisprudence took in practice, it is no stretch to predict that these new considerations would quickly morph into prerequisites.

The sad upshot is that *value*, as relevant to anything other than the compensation due, will almost certainly never be banished from regulatory-takings analysis. And as long as *value* is still pertinent to the peremptory question of whether a regulation *has even worked a taking*, we happy few warriors will never have the chance one day to "remember, with advantages, what feats" we performed to get there.[67] But hope springs eternal! One recent Supreme Court case offer glimpses of a brighter future. In *Alabama Association of Realtors v. Health & Human Services* (2021), the Court struck the Department of Health and Human Services' ("HHS") national Covid-related rental eviction moratorium, citing among other reasons that "the moratorium intrudes into an area that is the particular domain of state law—the landlord-tenant relationship," within which are embedded countless expectancies of how such contract disputes would (and should) be resolved.[68]

Justice Holmes's caveat in *Mahon* that "[g]overnment hardly could go on if to some extent *values* incident to ownership could not be diminished without paying for every such change in the general law" has played an unfortunate lexical role in the presumption, still fairly ubiquitous among jurists, that value is therefore the gravamen of any regulatory-takings analysis.[69] Indeed, that it is the *only* plausible metric for determining when a regulation works a taking because *interests* and *rights* suscept to brightline analyses that tell us nothing about whether an aggrieved owner is sharing his proper

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66 This was the motif of Justice Clarence Thomas's dissent in the Supreme Court's declining to review a case that had the potential to overturn *Penn Central*: "As one might imagine, nobody—not States, not property owners, not courts, nor juries—has any idea how to apply this standardless standard . . . Next year will mark a 'century since *Mahon*,' during which this "Court for the most part has refrained from" providing 'definitive rules.' It is time to give more than just 'some, but not too specific, guidance.' If there is no such thing as a regulatory taking, we should say so. And if there is, we should make clear when one occurs." Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n, 141 S.Ct. 731, 731–32 (Mem) (2021) (Thomas, J., dissenting from denial of certiorari).

67 "St Crispin's Day" speech in William Shakespeare, Henry V, Act IV, Scene iii, 18-67 ("He that shall live this day, and see old age, will yearly on the vigil feast his neighbors, and say 'To-morrow is Saint Crispian.' Then will he strip his sleeve and show his scars and say, 'These wounds I had on Crispin's day.' Old men forget; yet all shall be forgot, but he'll remember, with advantages, what feats he did that day. . . . But we in it shall be remembered—we few, we happy few, we band of brothers . . .").

68 *See* Eskridge, *supra* note 55, at 685 ("In Ala. Ass'n. of Realtors v. H.H.S., the Court invalidated HHS's effort to extend a COVID inspired national moratorium on evictions that Congress had allowed to lapse. The 6-3 majority found persuasive the realtors' arguments that landlords had relied on established state law when drafting leases and reaching agreements with tenants.") (internal citations omitted); Ala. Ass'n. of Realtors v. H.H.S. 594 U.S. 758, 764 (2021) (Per Curiam).

69 *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. at 413.

portion of writ-large public burdens, ala *Armstrong*, or is otherwise overburdened. *Value*, after all, is quantitative. *Rights* and *interests*, on the other hand, are categorical—you either lose them or you don't. The extent of the loss (the disparity between pre- and post-deprivation *value*), again, goes to the amount of compensation owed; it has no real utility elsewhere. As for the denominator problem—*i.e.*, calculating the physical and temporal parameters of the relevant property—either analytical approach faces difficulties.

Qualitative, categories-based analysis (*rights* and *interests*) is a much better vehicle for determining if *any* taking has occurred, regardless of the magnitude of the resultant loss, than is its quantitative counterpart. How can one possibly objectively calculate exactly what amount of diminishment in, say, fair market value, "goes too far"? It is nigh impossible in practice, which of course explains why in one case a calculated value loss of 95% is *not* a taking,[70] while in another 77% *is*, and *in the same federal court*.[71] (Note that these numbers are close to total diminution, but their marginal difference is significant since value losses recognized as takings under *Penn Central* are almost never on the low end—not even close.[72]) It is hardly outlandish to make qualitative distinctions to determine a breach of the Takings Clause in view of how widespread (and successful) is that same approach in doctrinal tests to determine violations of other rights articulated in the Bill of Rights—as discussed in Part II, *supra*. Certainly, if it can be done for *Loretto*-, *Lucas*-, and *Cedar Point*-style regulatory takings, so can it be utilized against regulations that interfere with the *same* rights and interests, distinguishable only in degree.[73]

Governments already are well within their sovereign police powers to invade, intrude, and deprive private parties of their rights and interests in property. This power is *sui generis* at the state level, delegated at the local, and explicated via constitution at the federal. It happens everywhere and all the time, with no fanfare. Health and safety inspectors enter homes, restaurants, and other establishments as a matter of course. Our cars are physically invaded by license plates and a host of government-mandated safety mechanisms. I could go on, but even a minor accounting of the myriad ways in which police powers properly invade private rights and interests could fill multiple volumes.

The upshot is that a test of whether a regulation works a taking that uses the proper tools of constitutional interpretation will focus on whether a right or interest has been interfered with *and why*—as the Supreme Court

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70 Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1567 (Fed. Cir. 1994).

71 Yancey v. United States, 915 F.2d 1534, 1542 (Fed. Cir. 1990).

72 For more insights on the few plaintiff wins under *Penn Central*, *see generally* Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or a One Strike Rule?*, 22 FED. CIRCUIT B.J. 677 (2013).

73 Loretto v. Manhattan Teleprompter CATV Corp., 458 U.S. 419, 441; Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015; Cedar Point Nursery v. Hassid, 594 U,S, 139, 160.

emphasized in *Cedar Point*—instead of *to what extent* (again, only a relevant consideration in calculating compensation).[74] And such categorical lines are more than capable of ensuring that governments continue protecting the public from harmful uses (and disuses) of private property without unduly burdening government's responsibilities, in turn. As important, too, is that such a test fosters a degree of certainty that permits far greater interpretive and outcome coherence between and among courts than does the value approach, which has produced such a "crazy-quilt pattern" of regulatory takings precedent.

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[74] Cedar Point Nursery v. Hassid, 594 U.S. 139, 149.