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

---

[*] Professor of Law and Executive Director of the Law & Economics Center, George Mason University Antonin Scalia Law School; Non-Resident Scholar, Georgetown Center for the Constitution. I greatly appreciate the opportunity to deliver this paper as part of the October 2024 Pacific Legal Foundation Symposium, in conjunction with the *Journal of Law, Economics & Policy* at George Mason University's Antonin Scalia Law School, entitled "Too Far: Imagining the Future of Regulatory Takings."

[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

---

[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

---

[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]

---

[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.

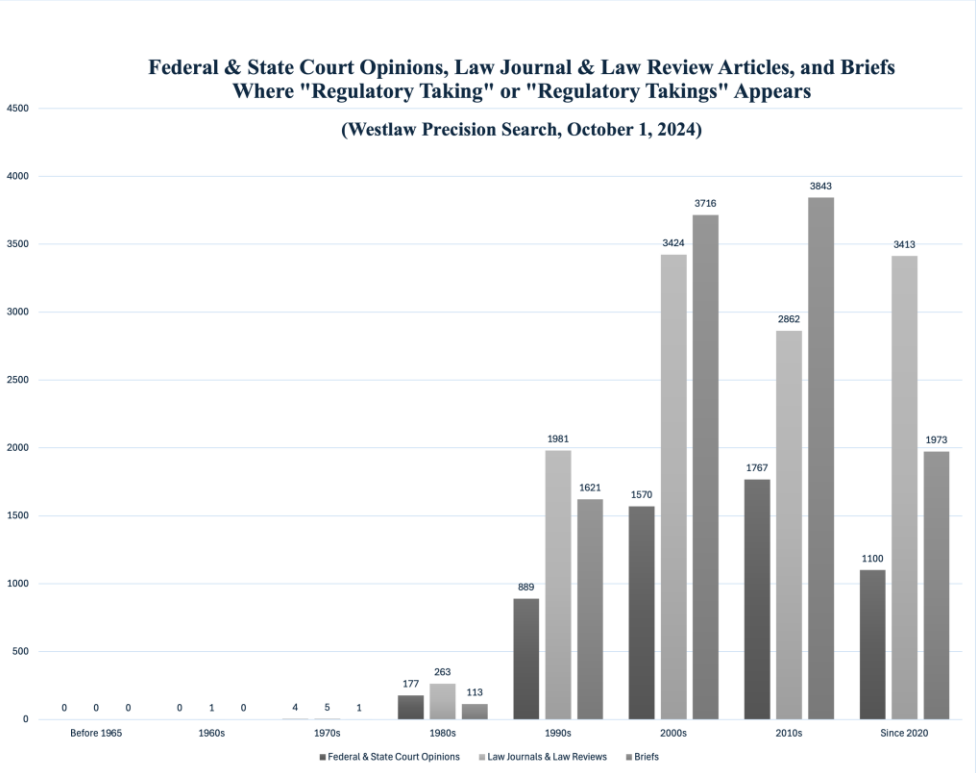
For this brief essay, we are only able to provide some initial assessments based on an admittedly noncomprehensive dive into the history on the "regulatory takings" label. Yet, this initial set of findings is still quite revealing.

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.

---

[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

---

[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.

---

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

---

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

---

[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

---

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

---

[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).

---

[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).

---

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

---

[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.