

## ARTICLES

# THE TAKINGS CLAUSE AS A COMPARATIVE RIGHT

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The role of the Takings Clause of the Fifth Amendment in requiring compensation for government actions that treat landowners unequally is seldom explored. This is remarkable given that the Supreme Court has said for more than a century that the Takings Clause

prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something *more and different* from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.<sup>1</sup>

One might infer from this description of the Fifth Amendment that the regulatory takings doctrine should have developed as a comparative right (a species of equal protection law)—a right to be treated legally the same as other property owners in a community, or to receive compensation when differential treatment is justified. Indeed, when the Supreme Court first held that the Fourteenth Amendment incorporated the rule that government may not take private property without just compensation, it relied on the Equal Protection Clause, not the Due Process Clause.<sup>2</sup>

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1. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (emphasis added).

2. In *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 399, 410 (1894), the Court held that the Equal Protection Clause prohibits states from taking private property without just compensation and invalidated a state regulatory scheme on that basis. Three years after *Reagan*, in *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 266, 233–41 (1897), the Supreme Court relied on the Due Process Clause in holding that states may not take private property without just compensation, without

The comparative-right basis for the takings doctrine, however, is largely ignored in modern regulatory takings law. Our regulatory takings doctrine today functions more like a substantive due process right. Similar to due process cases prohibiting excessive punitive damages awards,<sup>3</sup> the law of regulatory takings is commonly understood as a defense for individuals against government actions that are extreme and unreasonable as applied to the individual, rather than as a guarantee of equal treatment among members of a community. Whether regulation of one owner's property has gone "too far" for regulatory takings purposes is determined independently of how the government regulates other owners.<sup>4</sup>

Thus, if a landowner challenges a land use regulation as a taking, a court generally asks whether the regulation imposes an unreasonable burden on the landowner alone. It considers factors such as whether the regulation has frustrated the owner's reasonable "investment-backed expectations," the extent to which the owner has other viable uses for the land, and whether the restriction furthers important governmental interests.<sup>5</sup> The court generally will not ask how many other landowners are subject to the same regulation. This tendency to ignore the comparative scope of a regulation may exist because society considers private property to be an inherently individual right. It may also be that a comparative regulatory takings doctrine seems unworkable. In any case, whether the government has gone too far in regulating private property is something that is determined for each landowner separately, based on individual circumstances.<sup>6</sup>

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so much as citing *Reagan*. *Chicago, Burlington & Quincy R.R. Co.* is often cited today as the foundational case holding that the Fourteenth Amendment incorporated the Takings Clause against the states, see *Dolan v. City of Tigard*, 512 U.S. 374, 383–84 & n.5 (1994), while *Reagan* and its earlier equal protection holding have been largely forgotten.

3. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996) (holding that "grossly excessive" punitive awards amount to a deprivation of property without due process of law).

4. While the Supreme Court has made a point to distinguish its regulatory takings cases from any substantive due process rationale, see *Dolan*, 512 U.S. at 384 n.5, some scholars have questioned whether this distinction is meaningful. See, e.g., Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713, 750–51 (2002); J. Freitag, Note, *Takings 1992: Scalia's Jurisprudence and a Fifth Amendment Doctrine to Avoid Lochner Redivivus*, 28 VAL. U. L. REV. 743, 774–76 (1994) (likening the regulatory takings doctrine to *Lochner*-era economic or substantive due process).

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

6. In rare cases in which owners raise equality arguments to support takings claims, such arguments are typically dismissed. See, e.g., *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1579 (10th Cir. 1995) ("[T]he Takings Clause allows some property owners to be more burdened by a challenged governmental regulation than others . . ."); *San Remo Hotel v. City of San Francisco*, 41 P.3d 87, 108–09 (Cal. 2002) ("[T]he necessary reciprocity of advantage lies not in . . . an exact equality of burdens among all property owners . . ."); *Moskow v. Comm'r of Dep't of Envtl. Mgmt.*, 427 N.E.2d 750, 753

The modern view that the Takings Clause protects isolated property interests is implicit in both of the dominant tests for identifying regulatory takings. This notion underlies the rule announced in *Lucas v. South Carolina Coastal Council*: A land use restriction is a taking if it deprives an owner of “all economically beneficial uses” of the owner’s land.<sup>7</sup> In *Lucas*, the Court explicitly declined to consider how many other landowners in the community were subject to the restriction in question,<sup>8</sup> holding that it does not matter whether an owner is singled out relative to his or her neighbors or subject to the same general rules as other landowners.<sup>9</sup> According to the Court, a land use regulation that deprives an owner of all economically viable use “no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions.”<sup>10</sup> The Court rejected the dissent’s alternative of examining comparative effects, claiming that such an approach would “render[] the Takings Clause little more than a particularized restatement of the Equal Protection Clause.”<sup>11</sup>

That the Takings Clause protects, at most, an owner’s personal economic position vis-à-vis the government is also implicit in the balancing test of *Penn Central Transportation Co. v. New York City*.<sup>12</sup> According to *Penn Central*, a land use regulation is a taking if, under all the circumstances of the case, it causes an owner to bear a burden that “in all fairness and justice[] should be borne by the public as a whole.”<sup>13</sup> In practice, courts treat the “fairness and justice” inquiry as a form of means-end scrutiny.<sup>14</sup> In *Penn Central*, the Court dismissed an argument

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(Mass. 1981) (“Legislation designed to promote the general welfare commonly burdens some more than  
*Penn Cent. Transp. Co.*, 438 U.S. at 133).

7. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

8. *See id.* at 1027 n.14.

9. In *Lucas*, the owner was in fact regulated differently than even his immediate neighbors, who were allowed to maintain existing houses on their parcels. *See id.* at 1008. The rule announced by the Supreme Court does not focus on the comparative effects, but rather turns on whether the regulation deprived the owner of all economically beneficial uses of land not inconsistent with existing state law. *See id.* at 1019, 1030–31. The Court identified the status of neighbors and neighboring parcels as important only to the extent that they revealed the existing law. *See id.* at 1030–31.

10. *Id.* at 1027 n.14.

11. *Id.*

12. 438 U.S. 104, 123–24 (1978).

13. *Id.* at 123 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

14. *See Agins v. City of Tiburon*, 447 U.S. 255, 260–61 (1980) (“Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests.”) (internal citation omitted). In *Agins*, the Court went so far as to cite substantive due process cases in its regulatory takings analysis and held that “[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land.” *Id.* at 260 (internal citations omitted).

that the plaintiff was regulated differently from neighboring owners with the observation that “[l]egislation designed to promote the general welfare commonly burdens some more than others.”<sup>15</sup> More important to the Court than whether the regulation disadvantaged one class of owners for the benefit of a broader class were the following: The restriction was “substantially related to the promotion of the general welfare” and the owner could still make some reasonable beneficial use of its land.<sup>16</sup>

Although it may seem natural to treat takings law as a balance between an individual owner’s interests and the government’s regulatory objectives, this approach to the law has produced a jurisprudential mess. If there is a consensus today about regulatory takings law, it is that it is highly muddled.<sup>17</sup> Our takings doctrine is both lacking in theory and unpredictable in application. Among its numerous mysteries are the denominator problem, which seems to indicate that the more property a person owns, the less likely he or she is to be compensated for an equivalent regulatory loss;<sup>18</sup> the public interest problem, which indicates that the more the government has to gain from a change in regulation, the less likely it will have to pay for the change;<sup>19</sup> and the unexplained relationship between regulatory takings and taxes.<sup>20</sup> When the Supreme Court has occasion to address these and other mysteries in takings law, it typically dodges the issue and resorts to ad hocery. The standard wisdom and response given by the Court to every difficult issue is that no set rule or formula can explain whether a regulation requires compensation.<sup>21</sup> As

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15. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 133 (1978).

16. *Id.* at 138 (summarizing the Court’s holding on these grounds).

17. For a few of many criticisms, see J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGY L.Q.* 89, 102 (1995) (describing the regulatory takings doctrine as “an unworkable muddle”); Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 *WASH. L. REV.* 91, 92 (1995) (“Regulatory takings are proving to be one of the enduring legal dilemmas of the twentieth century.”); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles, Part I—A Critique of Current Takings Clause Doctrine*, 77 *CAL. L. REV.* 1301, 1304 (1989) (“[I]t is difficult to imagine a body of case law in greater doctrinal and conceptual disarray.”); Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 *S. CAL. L. REV.* 561, 562 (1984) (“[C]ommentators propose test after test to define ‘takings,’ while courts continue to reach ad hoc determinations rather than principled resolutions.”). Even some judges have joined in criticizing the confused state of the law. *See, e.g.,* *Customer Co. v. City of Sacramento*, 10 Cal. 4th 368, 394 (1995) (Kennard, J., concurring) (“[L]egal commentators have long described takings law ‘as a field of doctrinal incoherence littered

18. *See infra* pp. 1028–32.

19. *See infra* pp. 1035–36.

20. *See infra* pp. 1037–38.

21. *See, e.g.,* *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (“Since *Mahon*, we have given some, but not too specific, guidance to courts confronted with deciding whether a particular

Justice John Paul Stevens has remarked, “[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court’s takings jurisprudence.”<sup>22</sup>

This Article is an optimistic attempt to resolve some of these problems in takings law, or at least to suggest a direction that may lead toward their resolution. It aims to do so in a way that would not radically change the outcomes of takings cases, but that would reorient the theory underlying takings decisions. Only by rethinking the right of private property as a comparative right may we begin to clear the debris of the regulatory takings doctrine. There is no principled way under a wholly noncomparative theory of the Fifth Amendment to distinguish between regulations that should be deemed takings of private property and those that should not. The reason for this is that the Fifth Amendment Takings Clause, like the Equal Protection Clause, is designed to protect the legal rights of individual citizens relative to others, not to protect individual expectations of wealth or to provide an insurance policy against unreasonable governmental burdens. The right of just compensation accorded to every property owner by the Takings Clause is fundamentally an antidiscrimination principle. This explains, for example, why general taxes have never been understood to violate the Takings Clause, although taxes do diminish a person’s private wealth for public use. It also explains why general criminal laws, liability rules, or business regulations should not be considered takings, no matter how financially burdensome they may be to some owners. The default “bundle of rights” inherent in private property includes an affirmative “right to use” one’s private assets, which may not be denied without compensation. This right to use, however, is inherently bounded by the government’s power to restrict an owner’s conduct through general laws. The proper role of the Takings Clause is to require compensation in those circumstances where the government legitimately targets merely one or a few owners to bear a unique legal burden for the benefit of the general community.

To understand the Takings Clause as a comparative right is not to claim that the current legal balance between government interests and

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government action goes too far and effects a regulatory taking.”); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (“[W]e have generally eschewed any ‘set formula’ for determining how far is too far, preferring to ‘engag[e] in . . . essentially ad hoc factual inquiries.’”) (quoting *Penn. Cent. Transp. Co.*, 438 U.S. at 124). The Court’s continued ad hoc approach to regulatory takings has remained a constant source for academic criticism. See, e.g., Krotoszynski, Jr., *supra* note 4, at 738 (describing the Court’s ad hoc approach as “profoundly embarrassing”); Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697 (1988).

22. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting).

private interests is far off the mark. The purpose of this Article is not to propose a dramatic shift in legal outcomes; rather, it is to suggest a way to more accurately identify the basis for existing law and to propose a framework that will allow the law to develop in a principled way. Although current takings tests are not based explicitly on a comparative theory of the Fifth Amendment, much of current law is well supported by such a theory. In fact, understanding the Takings Clause as an antidiscrimination rule may be the only way to explain and unify such disjointed takings standards as the *Lucas* rule concerning land use restrictions, the *Loretto* rule concerning physical occupations of land,<sup>23</sup> and the *Dolan* rule concerning development exactions.<sup>24</sup> At some level, it seems that intuitions of comparative justice have been shaping takings law all along.

Part I of this Article describes the regulatory takings puzzle as a conflict between classical property theory and intuitive outcomes. We as a society are committed to the belief that property consists of a bundle of rights, and yet our judicial decisions indicate that only some regulations of property require compensation. Part II discusses ways of resolving this conflict, assuming that property consists of only individualized rights, and it concludes that any such effort is problematic. As long as takings law ignores the comparative dimension of private property, it will continue to be a muddle. Part III establishes the interpretive basis for a comparative regulatory takings doctrine. Contrary to first impression, a comparative takings doctrine is well supported both textually and historically. It matches both the classical conception of property and the underlying purpose of the Takings Clause. Part IV discusses practical implications, problems, and solutions. This Part demonstrates through various examples that a comparative takings doctrine is workable in practice and need not produce extreme results, as long as we adopt a proper measure of equality. A well-defined comparative takings theory supports many of the takings standards that exist, and provides a useful framework for resolving future disputes.

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23. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (holding that permanent physical occupations are per se takings of private property).

24. See *Dolan v. City of Tigard*, 512 U.S. 374, 389–90 (1994) (holding that when the government requires an owner to surrender a property interest in exchange for a regulatory approval, the exaction must be roughly proportional to the adverse effects of the approved land use).

## I. THE REGULATORY TAKINGS PUZZLE

Before building a comparative theory of the Takings Clause, let us explore the fundamental challenge presented by regulatory takings law. This Part addresses the puzzle of how to justify a regulatory takings doctrine under the text of the Fifth Amendment without adopting extreme constitutional rules that are widely viewed as unacceptable. Is it possible to have a regulatory takings doctrine that is textually sound, theoretically consistent, and sensible in application?

The text of the Takings Clause is straightforward: “nor shall private property be taken for public use without just compensation.”<sup>25</sup> For most of the first century of the Bill of Rights’ existence, there was surprisingly little debate about the meaning of this provision of the Fifth Amendment or of similar provisions in state constitutions. In early America, there seemed to be no ambiguity as to what was meant by private property, and what it meant for the government to take it. At a minimum, the law was understood to require the government to pay compensation whenever it legally divested owners of title to land or ousted the owner of exclusive possession.<sup>26</sup> The law of just compensation, it was said, arose from principles of “natural equity,”<sup>27</sup> but its consequences were simple and practical: If the government acquires an owner’s title to property through the exercise of eminent domain, it must pay for the property taken.<sup>28</sup>

With the rise of modern government, however, the outer boundaries of the takings principle have been tested in ways that could not have been contemplated by the founding generation. Two landmark decisions mark the origins of the regulatory takings doctrine. In 1871, the Supreme Court held in *Pumpelly v. Green Bay Co.* that a statute authorizing construction of a private hydraulic dam constituted a taking of another’s property whose

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25. U.S. CONST. amend. V.

26. See *Lucas*, 505 U.S. at 1014; Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1081–83 (1993). Rubenfeld persuasively explains that the only historically settled understanding of the just compensation principle is that the government must compensate owners when it assumes full title to property through eminent domain. *Id.* at 1081.

27. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1784, at 661 (1833).

28. See Rubenfeld, *supra* note 26, at 1081–83. Rubenfeld notes, however, that outside of formal eminent domain proceedings, even physical invasions of private property were at times tolerated without compensation. *Id.* at 1082–83. See also *Lucas*, 505 U.S. at 1028 n.15 (noting that state practices prior to incorporation of the Takings Clause “occasionally included *outright physical appropriation* of land without compensation” and “were out of accord with *any* plausible interpretation of those provisions”).

upstream land was indirectly flooded.<sup>29</sup> Even though the government did not purport to change the plaintiff's title or seize his land for public use, the authorization so interfered with the owner's use and enjoyment of land that the Court held it was equivalent to a deprivation of private property.<sup>30</sup> In 1922, the Supreme Court went further, holding in *Pennsylvania Coal Co. v. Mahon* that a statutory restriction on certain mining practices constituted a taking of private mineral estates.<sup>31</sup> According to *Mahon*, the government may be required to compensate owners for merely restricting previously lawful land use practices if the regulation in question goes too far.<sup>32</sup> Since *Pumpelly* and *Mahon*, the regulatory takings doctrine has remained a viable, but controversial, principle of constitutional law.

The controversy is not so much over whether to recognize some regulations of property as governmental takings. If the law did not recognize regulatory takings in some sense, the Takings Clause would serve little purpose. Government could always avoid the compensation requirement by merely directing the use of private property for public ends instead of formally acquiring title to it through condemnation. As the Court noted in *Pumpelly*,

[I]t would be a very curious and unsatisfactory result[] if . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can . . . in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use.<sup>33</sup>

Accordingly, it is generally accepted that a legislative act may amount to a taking of private property if it crosses some substantive threshold. The difficulty is to identify that substantive boundary. What sort of regulation amounts to a taking of private property for public use? The answer depends as much on the meaning of private property as used in the Fifth Amendment as it does on the phrase "taken for public use."<sup>34</sup> The takings problem is essentially a boundary problem. If a city council zones a privately owned lot for use as a city park; if it mandates that a private house

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29. See 80 U.S. (13 Wall) 166, 177–81 (1871).

30. See *id.* at 177–78.

31. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414–16 (1922).

32. *Id.* at 415.

33. *Pumpelly*, 80 U.S. at 177–78.

34. At least since *Pumpelly*, the Court has recognized that the phrase "taken for public use" encompasses government actions that effectively destroy private property, even if the government does not directly use the land or asset in question. See *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945). For a contrary theory of the Fifth Amendment that focuses on the question of whether the government "uses" the private property, see Rubinfeld, *supra* note 26.



be used as a museum; if it requires a farmer to build and operate a telecommunications tower on his or her land—then compensation is constitutionally required, even if the government does not directly take title to the private property.

To identify that constitutional boundary between private property and the government's legitimate exercise of legislative power has proven to be one of the great problems of modern law. Why has the puzzle proven so difficult?

#### A. TWO PREMISES

Much of the difficulty in regulatory takings law arises from trying to reconcile the tension between two familiar ideas. One idea is theoretical; the other is practical and outcome-focused. Both ideas, however, are well entrenched in the law. Indeed, the law is so committed to both ideas that one may treat them as premises in the regulatory takings debate. The first premise is that private property consists of a bundle of legal rights; it does not refer to tangible things themselves, but instead, to abstract rights a person has in relation to things. The second premise is that the regulatory takings doctrine achieves a balance between two unacceptable extremes: governmental power to regulate private property without compensating adversely affected owners on the one hand, and a regulation that goes so far as to amount to a taking on the other. Neither the government's power to regulate nor the owner's power to use private assets is absolute.

It is unlikely that the law will abandon either premise. Yet the ideas are fundamentally in tension. A plausible theory of regulatory takings must find a way to reconcile them.

##### 1. Private Property Consists of Intangible Rights

In legal discourse, it is well accepted that private property refers to the legal relationship between a person and others with respect to some thing he or she is said to own. Property does not refer to a tangible thing directly, but to a person's bundle of rights concerning that thing.<sup>35</sup> Those rights may include the right to exclude others, the right to use and possess without interference by others, and the right to transfer ownership to

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35. See *PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 2* (C.B. Macpherson ed., 1978) [hereinafter *PROPERTY*] ("In current common usage, property is things, in law . . . property is not things but rights, rights in or to things.").

others.<sup>36</sup> The bundle-of-rights picture of property is so well accepted that it is taught as a fundamental concept in law schools<sup>37</sup> and has been incorporated into the Restatement of Property.<sup>38</sup> As one writer has put it, “treating property as a bundle of rights . . . has become the standard starting point for an inquiry into the nature of property.”<sup>39</sup>

Treating property as a bundle of rights is not a uniquely modern legal idea, as some writers have supposed.<sup>40</sup> Historical usage of the term “property” is consistent with the bundle-of-rights concept. John Lewis wrote in his popular 1888 treatise on eminent domain, “[t]he dullest individual among the *people* knows and understands that his *property* in anything is a bundle of rights.”<sup>41</sup> The writings of John Locke,<sup>42</sup> William Blackstone,<sup>43</sup> and James Madison<sup>44</sup> further indicate that property was understood in prior eras as referring to abstract rights of ownership, rather

36. Of course, the rights inherent in private property are not logically limited to these three. Courts and scholars, however, have tended to focus primarily on the rights of use, exclusion, and alienation in analyzing property rights. See, e.g., Maureen Straub Kordesh, “*I Will Build My House with Sticks*”: *The Splintering of Property Interests under the Fifth Amendment May Be Hazardous to Private Property*, 20 HARV. ENVTL. L. REV. 397, 451 (1996).

37. See, e.g., JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 211 (5th ed. 2002) (“[M]odern analysis insists that an estate is a ‘bundle of rights.’”).

38. See RESTATEMENT OF PROPERTY §§ 1–10, at 3–4 & introductory note (1936).

39. J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 712 n.1 (1996).

40. See Leif Wenar, *The Concept of Property and the Takings Clause*, 97 COLUM. L. REV. 1923, 1925–28 (1997) (arguing that the historical understanding of the Takings Clause was based on an *property as things*,” and that the more modern bundle-of-rights conception did not emerge until the twentieth century).

41. JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 55, at 43 (1888).

42. Locke often used the term “property” to refer to all of a person’s rights, including those of life and liberty. See A. JOHN SIMMONS, THE LOCKEAN THEORY OF RIGHTS 227–28 (1992).

43. Blackstone used the term “property” to refer to “those rights which a man may acquire in and to such external things as are unconnected with his person.” WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND § 1, at 706 (William Carey Jones ed., 1916). Blackstone consistently used the term “property” to refer to the legal rights of ownership, in contrast to his use of the term “hereditament,” which refers to those things that a person may own or possess, and are the objects of property. See, e.g., *id.* §§ 15–20, at 726–33.

44. In his famous essay on property, Madison explains that property, in one sense, refers to a person’s “dominion” over the external things of the world, as Blackstone had described; but in its “larger and juster meaning, it embraces every thing to which a man may attach a value and have a right,” even such rights as freedom of speech and religion. 14 JAMES MADISON, *Property*, in THE PAPERS OF JAMES MADISON 266, 266 (Robert A. Rutland et al. eds., 1983). Thus, according to Madison, “as a man is said to have a right to his property, he may be equally said to have a property in

*Id.*

than (or, at least, in addition to) the tangible things that are the subject of ownership.<sup>45</sup>

To be sure, the legal conception of property has evolved. Blackstone described property as consisting of dominion ““over the external things of the world”” and in this sense his view of property may be described as<sup>46</sup> Modern scholars, by contrast, are more apt to describe property as a system of social relations.<sup>47</sup> Blackstone’s thing-oriented conception of property, however, should not be confused with what is sometimes described as the layperson’s view, which is that property consists of the actual things that one may own and possess (as in the phrase, “Kindly get yourself off my property!”).<sup>48</sup> Blackstone and his contemporaries understood well that property is a legal abstraction (in a manner consistent with modern legal thought)—a person who is vested with property is vested with certain legal interests, even though the person may not have possession of any “thing” at the moment.<sup>49</sup>

The regulatory takings doctrine follows directly from the conceptual understanding of property as a bundle of rights. With this view of property, one need not stretch the text of the Fifth Amendment to comprehend regulatory changes as takings of legal rights. Well before the modern term “regulatory takings” came into use, Lewis described the theory in his nineteenth century Treatise on Eminent Domain:

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45. Forrest McDonald describes the rich conception of property in early America in a manner consistent with the bundle-of-rights metaphor. See FORREST MCDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 13 (1985) (“[N]either liberty nor property was a right, singular; each was a complex and subtle combination of many rights, powers, and duties, distributed among individuals, society, and the state. Together, these constituted the historical ‘rights of Englishmen’ of which eighteenth-century Americans were so proud . . .”).

46. See, e.g., Michael A. Heller, *The Boundaries of Private Property*, 108 *YALE L.J.* 1163, 1189 & n.132 (1999).

47. As Carol Rose has explained: “[P]roperty entails the cooperation of others. You cannot have property all alone.” Carol M. Rose, *Property As the Keystone Right?*, 71 *NOTRE DAME L. REV.* 329, 363 (1996). Wesley Hohfeld was particularly influential in bringing about the social conception of property as he demonstrated that even in rem property interests consist of rights against other persons, not things. WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS: AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* 74–85 (Walter Wheeler Cook ed., 1923). His work was followed by A.M. Honoré’s influential analysis of the multifaceted incidents of ownership. See A.M. Honoré, *Ownership*, in *OXFORD ESSAYS IN JURISPRUDENCE* 112–47 (A.G. Guest ed., 1961).

48. See PROPERTY, *supra* note 35, at 2 (“In current common usage, property is things, in law . . . property is not things but rights, rights in or to things.”); Bruce Ackerman, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977) (distinguishing between the layperson’s physical understanding of property and the “Scientific Policymaker’s” abstract understanding of property).

49. See GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970*, at 69–71 (1997); Heller, *supra* note 46, at 1191 & n.149.

If property, then, consists, not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property, and, hence, that his property may be taken, in the constitutional sense, though his title and possession remain undisturbed . . .<sup>50</sup>

The Supreme Court has followed this logic in its takings jurisprudence. In the 1945 decision, *United States v. General Motors Corp.*, the Court expressly adopted Lewis' definition of private property for purposes of the Takings Clause, rejecting the more narrow "vulgar" understanding of property as a thing that is possessed.<sup>51</sup> In more recent takings decisions, the Court has continued to describe property as a bundle of rights to explain how a regulation may take private property.<sup>52</sup> No justice has suggested that the bundle-of-rights conception should be reconsidered.

## 2. Government May Generally Regulate Private Property Without Compensation, but a Regulation That Goes Too Far Will Be Deemed a Taking

The second premise of regulatory takings law has to do with the range of outcomes this doctrine will produce. Regulatory takings law is as committed to staying within certain outcome parameters as it is to the theory that produces those results. The modern law of regulatory takings is a well-established compromise between two unacceptable extremes.

Justice Oliver Wendell Holmes' foundational opinion in *Pennsylvania Coal Co. v. Mahon* established this compromise.<sup>53</sup> In an opinion that is more practical than theoretical in its focus, Holmes laid down the oft-quoted starting point of regulatory takings analysis: "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."<sup>54</sup> While this

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50. LEWIS, *supra* note 41, § 56, at 45.

51. See *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377–78 (1945) (declaring that for purposes of the Takings Clause, the term "property" is not to be understood "in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law," but rather, to be understood "in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it").

52. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 n.6 (1980) ("The term 'property' as used in the Taking Clause includes the entire 'group of rights inhering in the citizen's [ownership].'" (internal citation omitted)).

53. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 412–16 (1922).

54. *Id.* at 415.

statement may be criticized for its imprecision (how far is “too far?”) and the mess that it has created,<sup>55</sup> it does clearly reject two possible rules: one that would allow the government essentially unlimited power to restrict the use of private property for the public benefit without implicating the Takings Clause, and another that would require the government to compensate owners whenever it restricted previously lawful uses of private property. Both bright-line extremes, while perhaps easy to articulate on theoretical grounds, are simply out of bounds.

The Supreme Court has consistently accepted these parameters in its regulatory takings decisions.<sup>56</sup> Indeed, while the justices have often widely disagreed over the scope of the regulatory takings doctrine, it is remarkable that in the eighty years since *Mahon* was decided, no justice has suggested that the regulatory takings doctrine be reconsidered (or be limited to cases of physical occupation),<sup>57</sup> nor has any justice suggested that the regulatory takings doctrine should encompass all new restrictions on the use of private property.<sup>58</sup> All seem to agree that either extreme would be unacceptable.

Most scholars have agreed with these parameters, but two exceptions are worth considering. In a prominent book and series of articles, Richard Epstein has argued for a bold interpretation of the Takings Clause that would recognize all new governmental regulations of property to be takings.<sup>59</sup> We may call this the economic status-quo theory of takings. According to Epstein, government must compensate for every diminution in value it causes to owners by restricting the use of property beyond inherent common law limitations.<sup>60</sup>

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55. See *supra* note 17 and accompanying text.

56. For examples of such holdings, see *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 320–24 (2002), and *Palazzolo v. Rhode Island*, 533 U.S. 606, 617–18 (2001). Both cases reject a categorical rule embracing either extreme.

57. Justice Harry Blackmun's dissenting opinion in *Lucas* is revealing. While Justice Blackmun argues that historically only physical invasions were recognized as takings, he stops short of arguing that the Court should overrule *Mahon*, which held that a mere restriction on use may in some circumstances amount to a taking. See *Lucas*, 505 U.S. at 1058–60 (Blackmun, J., dissenting). See also *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 484–85 (1987) (finding no taking on facts remarkably similar to those in *Mahon*, but accepting its broader regulatory takings principle).

58. See, e.g., *Lucas*, 505 U.S. at 1014–15 (recognizing limitations on the regulatory takings doctrine).

59. See generally RICHARD A. EPSTEIN, *TAKINGS PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) [hereinafter *TAKINGS*].

60. See *id.* at 70–72, 107–20.

At the other end of the spectrum, Peter Byrne has argued for what may be called an environmental status-quo theory of the takings clause.<sup>61</sup> According to Byrne, legal restrictions on an owner's use of private property, even if absolute, should never be considered takings of property;<sup>62</sup> rather, only physical intrusions are takings of private property.<sup>63</sup> Beyond physical intrusions, the regulatory takings doctrine should be abolished.<sup>64</sup>

Both theories of the Takings Clause are logically consistent—a feature lacking in current law. Both also may be reconciled with a bundle-of-rights view of property.<sup>65</sup> So why should they be considered out of bounds?

Epstein's baseline would produce consequences that are too drastic for society to manage and that would be inconsistent with any plausible original understanding of the Clause. His theory would disserve both republican and economic values. As Justice Holmes observed in *Mahon*, “[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.”<sup>66</sup> Epstein's theory suggests not only that all modern land use regulations are *prima facie* takings but also that any government restriction or obligation that goes beyond mere codification of existing common law rules is a taking, including all business and commercial regulations, general criminal laws, health and safety laws, labor laws, changes in liability rules, and even taxes.<sup>67</sup> Such a rule for regulatory takings would be equivalent to a constitutional requirement that all laws be Pareto-optimal for those that are regulated; that is, government would have no power to change the rules of society unless it ensured (through cash compensation, if necessary) that no single owner of property was left

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61. See Byrne, *supra* note 17, at 90–91. Byrne is not the only writer to question the modern regulatory takings doctrine, although he is more explicit than others about the specific principle with which he would replace it. Compare John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1156 (2000) (arguing that regulatory takings law is misconceived and *Mahon* should be reconsidered), with Byrne, *supra* note 17, at 90–91, 138–42 (arguing that *Mahon* should be overruled, and proposing a statutory scheme designed to protect private property interests while facilitating land use regulations aimed at environmental protection).

62. See Byrne, *supra* note 17, at 90–91, 136.

63. See *id.* at 90–93.

64. See *id.* at 90, 136.

65. See *supra* Part I.A.

66. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

67. See TAKINGS, *supra* note 59, at 95–104.

economically disadvantaged by the change.<sup>68</sup> As even Epstein acknowledges, this would bring modern government to a halting stop.<sup>69</sup>

The Takings Clause was certainly never meant to prohibit all regulations and taxes that leave some owners worse off.<sup>70</sup> Moreover, few would be willing to pay the price of such a rule. Many would argue that government has the inherent power and responsibility to reallocate economic benefits and burdens in the interests of distributive justice.<sup>71</sup> Even putting aside this moral issue, however, the practical difficulties of compensating thousands of property owners for even incidental redistributions of property value would prevent most general changes in the law. In law-and-economics terms, Epstein's baseline fails to maximize social welfare. He is wrong to suggest that socially optimal regulations can be expected to succeed because of government's ability to tax the beneficiaries and compensate the losers.<sup>72</sup> For many if not most types of socially beneficial regulations, the transaction costs alone associated with compensating every owner whose position is devalued (including the costs of assessing all property value losses and benefits to widespread numbers of owners, and litigating the amount of compensation where there are disputes) would be staggering, and would frequently exceed the net benefits that could be achieved from the law.<sup>73</sup>

For these reasons, it should not be surprising that the law has consistently recognized the power of government to regulate private property without compensating owners for all diminutions in property value.

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68. *See id.* at 201. Epstein acknowledges that "just compensation" may be provided implicitly through offsetting benefits caused by the same government scheme. *Id.* at 195–99. For example, a tax is valid (although it is still a taking) if the revenue is used to benefit every taxpayer to the extent of the amount paid. Ultimately, however, all owners must be fully compensated for all changes in entitlements, if not through reciprocal in-kind compensation, then through cash compensation.

69. *See id.* at 281 (recognizing that his position "invalidates much of the twentieth century legislation").

70. Even Robert Bork, who is more apt than most to accept Epstein's picture of government, has remarked on its constitutional deficiency. *See* ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 230 (1990) (noting that while Epstein has written "a powerful work of political theory," he has "not convincingly located that political theory in the Constitution").

71. For such an argument, one might turn to John Rawls, who argues that government has the moral responsibility to provide for the equal distribution of all societal values, including income and wealth, except to the extent that an unequal distribution works to everyone's advantage. *See* JOHN RAWLS, *A THEORY OF JUSTICE* 62 (1971).

72. *See* TAKINGS *supra* note 59, at 331–34.

73. *See* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 53 (3d ed. 1986) (explaining that while the economic logic of eminent domain law may suggest that the government compensate all people who are disadvantaged by a change in the law, practical difficulties prohibit this).

Peter Byrne's contrasting baseline for regulatory takings is also implausible. According to Byrne, only physical occupations should be recognized as takings of private property; mere restrictions on the use of property, no matter how severe, are never compensable. To be sure, this rule would be less troubling than Epstein's. It is also one way to reconcile the limited historical evidence of the original meaning of the Takings Clause.<sup>74</sup> Byrne's theory, however, fails to make sense of the Takings Clause principle. It draws an arbitrary boundary that does not protect established notions of private property.

Suppose the federal government sells fifty acres of undeveloped land to an entrepreneur for the purpose of building cabins. After the transaction, the government imposes a new law restricting all access to the land and declares the fifty acres to be a natural forest preserve. Are we to believe that the framers of the Fifth Amendment would not have considered this to be a taking of the property rights previously conveyed to the owner?<sup>75</sup> Surely, the principle of the Fifth Amendment that supports protecting an owner's right to exclude others—which, according even to Byrne, cannot

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74. Several writers have argued that, until the twentieth century, the Takings Clause was not understood to encompass restrictions on the use of private property. See FRED BOSSELMAN, DAVID CALLIES & JOHN BANTA, *THE TAKING ISSUE: A STUDY OF THE CONSTITUTIONAL LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE THE USE OF PRIVATELY-OWNED LAND WITHOUT PAYING COMPENSATION TO THE OWNERS* 51 (1973); Hart, *supra* note 61, at 1099–1101; William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995). There is, however, some controversy as to when the doctrine of regulatory takings first arose. See Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1212–14, 1259–60 (1996) (arguing that courts have recognized regulatory takings since the early nineteenth century). In any event, the historical record seems inconclusive as to the original understanding of the Takings Clause.

We do not know how the founding generation would have interpreted the Fifth Amendment in relation to extreme land use deprivations that today give rise to regulatory takings claims. While it is possible the founding generation would have agreed with Byrne's proposal to draw the line at physical takings, other interpretations recognizing land use restrictions as takings are also historically plausible. See generally Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 AM. U. L. REV. 181 (1999) (arguing that there is insufficient evidence to determine the original meaning of the Takings Clause, but that a regulatory takings interpretation is at least as plausible as a rule limited to physical takings).

75. On similar facts, the Marshall Court held that such an action by the State of Georgia violated the Contracts Clause (as well as other constitutional provisions). See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130–42 (1810). The Court held that having sold certain property to the plaintiff, Georgia "violated the principles which are common to our free institutions, or by . . . the constitution [sic] of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void." *Id.* at 139. It is perhaps historical accident that after the Supreme Court retreated from this original understanding of the Contracts Clause, and after the enactment of the Fourteenth Amendment incorporated many of the principles of the Bill of Rights against the states, the Court came to rely principally on the Takings Clause for the same point of doctrine.



be taken without compensation—must, to some degree, also protect an owner's affirmative rights to possess and use private land.<sup>76</sup> Without some affirmative right to use, a right to exclude others would have little value or significance.<sup>77</sup>

A regulatory takings principle based on the environmental status quo fails to protect much that is accepted as private property. Such a rule would leave certain types of estates (such as easements and profits) wholly unprotected from government takings for such property could be eliminated entirely by regulatory restrictions on use. Moreover, if land use restrictions were wholly outside the domain of the Takings Clause, the government could easily circumvent the Fifth Amendment and acquire the right to occupy land at virtually no cost. It could simply achieve this by prohibiting all use of a given parcel until its market value approaches zero, and then acquire title through eminent domain at market value.<sup>78</sup>

Given these implications, it is not surprising that the Supreme Court has firmly recognized that a restriction on land use may at some level amount to a taking of private property. The Court is not likely to reconsider the *Mahon* compromise anytime soon.

#### B. THE TENSION BETWEEN PROPERTY THEORY AND TAKINGS OUTCOMES

So far, we have seen that the Supreme Court has committed itself to two basic ideas in its regulatory takings jurisprudence: (1) The private property that is protected by the Fifth Amendment consists of rights, not things; and (2) the regulatory takings doctrine requires government to compensate for some, but not all, changes in use restrictions that it may impose. The muddle of regulatory takings law begins to arise because these ideas are often viewed as conflicting.

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76. Byrne would recognize laws that cause physical occupations of land as takings. See Byrne, *supra* note 17, at 91. Thus, he would protect an owner's right to exclude others from regulatory elimination, but would offer no similar protection to an owner's affirmative interest in entering and using private land. Hence, Byrne's rule would favor human exclusion over affirmative land use as a constitutional rule. Although this might make sense on the basis of modern ecological principles, as Byrne claims it does, *see id.* at 131–36, it is unlikely that early Americans shared this bias towards natural land preservation in their understanding of the Takings Clause.

77. As Alexander Hamilton once wrote, "What, in fact, is property but a fiction, without the beneficial use of it?" 3 HAMILTON WORKS 34 (Putnam's ed.), as quoted in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 591 (1895) (Field, J., concurring).

78. This is more than a theoretical problem. Restricting land development for the purpose of lowering or freezing property values prior to the acquisition of title by eminent domain is a recurring governmental practice that has been addressed by the courts under the regulatory takings doctrine. See STEVEN J. EAGLE, REGULATORY TAKINGS § 2-8(g)(6), at 201–03 (2d ed. 2001) [hereinafter EAGLE].

Focusing on the bundle-of-rights conception of private property, one might logically conclude (as Epstein does)<sup>79</sup> that all new restrictions on land use are takings.<sup>80</sup> If I was allowed yesterday to use my land for raising pigs, and today the government passes a new law prohibiting pigs on my land, one might easily conclude that it has removed one of the rights in my property bundle. But the same may be said for any new land use restriction government may impose, no matter how insignificant or common. To adopt this bundle-of-rights logic in an unqualified way would be to violate the second premise. We know that government has the power to alter restrictions on land use without paying for every such change in the law.

Suppose, then, we qualify this understanding of property rights. As Justice Robert Jackson recognized many years ago, “not all economic interests are ‘property rights’; only those economic advantages are ‘rights’ which have the law back of them . . . .”<sup>81</sup> One might currently enjoy the advantage of raising pigs on private land without necessarily having a property right to continue that land use practice in the future.<sup>82</sup> Recognizing that property rights must originate, not from the Constitution itself but from “an independent source such as state law,”<sup>83</sup> we might conclude that when a government grants an estate in land, it impliedly reserves the power to restrict or modify what may be done with that land in the public interest.<sup>84</sup> In other words, an owner’s title in private property is inherently qualified, from the outset, by the government’s power to regulate what is in the public interest. When the government alters the rules of private land use, it does not take property in the constitutional

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79. See TAKINGS, *supra* note 59, at 112–15.

80. See, e.g., Bruce A. Ackerman, *Four Questions for Legal Theory*, in PROPERTY: NOMOS XXII 351, 365 (J. Roland Pennock & John W. Chapman eds., 1980) (“[If he or she accepted the bundle-of-rights theory,] the Scientific Policymaker would have no choice but to interpret the Takings Clause as . . . protecting *all* uses once they have been legally authorized. But the [constitutional] text does not impose such an absurd command.”).

81. United States v. Willow River Power Co., 324 U.S. 499, 502 (1945).

82. Even Blackstone acknowledged that the usage rights inherent in private property are not absolute, but are qualified by “laws of the land.” BLACKSTONE, *supra* note 43, § 191, at 239. For further discussion of Blackstone’s use of this phrase, see *infra* Part III.A.

83. Webb’s Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980) (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)).

84. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9–7 (2d ed. 1988); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles, Part II—Takings As Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 55, 62–63 (1990) [hereinafter *Underlying Principles*].

sense, but merely exercises a preexisting sovereign right with respect to that property.<sup>85</sup>

The difficulty with taking this reasoning too far, however, is that it too would violate the *Mahon* compromise. There is no regulation that could not, in principle, be described as an exercise of inherent sovereign power to protect the public interest.<sup>86</sup> Taken to the extreme, government could even use the reserved-power logic to justify outright physical occupation of land without compensation, which historically the sovereign thought it could do before there was a Takings Clause. If there is to be some meaningful role for the Takings Clause, it cannot be that all property rights are inherently subject to any form of re-regulation without compensation.

The bundle-of-rights concept of property, therefore, presents a dilemma for regulatory takings law. Rather than assist courts in determining what is a regulatory taking, it may be misleading. Taken in one extreme form, a rights-based approach to the Takings Clause leads to a regulatory takings doctrine that is too broad; in another form, it leads to the elimination of regulatory takings. In fact, writers have criticized the bundle-of-rights concept both on the grounds that it gives too much protection to private property<sup>87</sup> and on the grounds that it gives too little.<sup>88</sup>

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85. The Supreme Court has frequently used this insight to explain why new restrictions designed to prevent public harms do not require compensation. *See, e.g., Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (“It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers . . . .”); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 491–92 (1987) (“Long ago it was recognized that ‘all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community,’ and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.”) (quoting *Mugler v. Kansas*, 123 U.S. 623, 655 (1887)) (internal citations omitted).

86. Indeed, Byrne uses this argument to conclude that the regulatory takings doctrine should be abolished. *See Byrne, supra* note 17, at 115–17.

87. *See, e.g., Heller, supra* note 46, at 1193–94 (arguing that the bundle metaphor makes it too difficult to delineate between that which is property, and thus properly protected, and that which is simply a fragment thereof); *Wenar, supra* note 40, at 1927–28 (“[O]nce [the bundle-of-rights] conception of *property as rights* was in place, it became almost irresistible to conclude that . . . government action that alters *any* existing private property right is a ‘taking’ of property.”); *Kordesh, supra* note 36, at 433 (demonstrating how one can argue for a total taking of any right by separating it from the bundle and construing it “as a separate whole thing,” which would thereby provide extremely broad protection under the Takings Clause).

88. *See JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 239 (1990) (“If property is not . . . but a bundle of legal entitlements subject, like any other, to rational manipulation and distribution in accordance with some vision of public policy, then it can serve neither a real nor a symbolic function as boundary between individual rights and governmental authority.”) (internal citation omitted). *See also EAGLE, supra* note 78, § 2-4(a)(3), at 83 (explaining the criticism of the

The puzzle of regulatory takings law is to define an owner's usage rights in a principled way that is consistent with the parameters of *Mahon*. If this cannot be done, the property rights premise of regulatory takings law must be false, and the regulatory takings doctrine is nothing more than a device to further current judicial policies and deserves to be abolished. If it is possible to identify an owner's right to use in terms that are both consistent in theory and reasonable in outcome, however, it is possible both to restore legitimacy to the regulatory takings doctrine and provide a unifying framework for future cases.

## II. PROPERTY AS A BUNDLE OF POLICIES: MUDDLED EXPLANATIONS FOR CURRENT LAW

The Supreme Court has not resolved the tension between the property-as-rights basis for the regulatory takings doctrine and the outcome that only some restrictions on property are compensable. It has never clearly explained what usage rights are inherent in a typical fee simple estate so as to clarify why some land use restrictions conflict with property rights while others do not. As a consequence, there is a gap between takings theory and takings outcomes that must be bridged.

There are various ways in which one might explain current law in light of this gap, some of which are implied in the cases. One might explain the regulatory takings doctrine as a necessary deviation from the constitutional text, or one might explain it in terms of a qualified definition of property. Either way, as long as we perceive property solely as a fixed, noncomparative right, none of these theories fully legitimates the regulatory takings doctrine, or provides a coherent framework for future development. While purporting to recognize property as a right, takings law seems more accurately to reflect an ad hoc bundle of policies.

### A. NONTEXTUAL APPROACHES

In some cases, the Court appears to assume an extreme definition of property, but declines to take such a definition to its logical conclusion for functional reasons. This dissonance may result from assuming a definition of private property that is either too strong or too weak to support reasonable outcomes. If property is assumed to be strong, we must

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bundle-of-rights approach by property rights and public rights advocates). *See generally* Thomas C. Grey, *The Disintegration of Property*, in *PROPERTY: NOMOS XXII* 69 (J. Roland Pennock & John W. Chapman eds., 1980) (arguing that the logic of the bundle-of-rights view of property threatens to eliminate its special status).

concede that government may take property in small increments without compensation to make room for modern government. If property is assumed to be weak, the regulatory takings doctrine becomes a necessary vehicle for requiring compensation in cases where the government has not literally taken property. Either way, the regulatory takings doctrine is treated as a deviation from constitutional text, rather than an application of it.

#### 1. Strong Conception of Property Minus the Petty Larceny of the Police Power

Sometimes the Court has assumed, consistent with Epstein's baseline, that every conceivable use of private land that was not historically prohibited is a property right. Thus, when a new law restricts a previously legal use, it is technically a taking of at least one strand in the owner's bundle of property. Because we know that society cannot afford to pay for every change in the law, however, one is forced by this baseline to conclude that the Takings Clause cannot be applied literally. Small, uncompensated takings must be tolerated in the name of the police power. Government must be allowed to deprive owners of some property rights; compensation will be required only when government takes too much of any one person's property, or if it takes the wrong kind of property. It is up to the courts to decide which takings of private property require compensation.

This was the perspective of Justice Holmes, which may explain some of his discussion in *Mahon*.<sup>89</sup> Holmes believed that there is no qualitative difference between takings of private property and legitimate exercises of the police power, only differences of degree.<sup>90</sup> In one draft opinion, written the same year as *Mahon*, Holmes wrote of "the petty larceny of the police power" to explain why compensation was not generally required for regulatory burdens.<sup>91</sup> He removed the language from the opinion at the

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89. See generally Robert Brauneis, "The Foundation of Our 'Regulatory Takings' Jurisprudence": *The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon*, 106 YALE L.J. 613 (1996) (providing a thorough discussion of Holmes' philosophy on private property and the police power, and its relationship to the *Mahon* opinion).

90. *Id.* at 622–23 & n.40.

91. 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916–1935, at 457 (Mark DeWolfe Howe ed., 1953) [hereinafter HOLMES-LASKI]. The case at issue was *Jackman v. Rosenbaum Co.*, 260 U.S. 22 (1922), decided during the same year as *Mahon*. See HOLMES-LASKI, *supra*, at 456 n.1.

request of his colleagues;<sup>92</sup> but consistent with the idea, Holmes later explained in *Mahon* that “to some extent values incident to property [may] . . . be diminished,”<sup>93</sup> and wrote that whether compensation is required for governmental action “is a question of degree—and therefore cannot be disposed of by general propositions.”<sup>94</sup> In a later dissenting opinion, Holmes further clarified his view, stating that “some property may be taken or destroyed for public use without paying for it, if you do not take too much.”<sup>95</sup>

The nontextual idea that we must allow government to appropriate some private property without compensation, as long as it does not appropriate too much, also appears in some modern takings cases. In *Andrus v. Allard*, the Court explained paradoxically: “[T]he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be<sup>96</sup> According to *Andrus*, whether a “denial” of property is compensable depends on how many rights are left over in an owner’s bundle. *Andrus* implies apologetically that while an owner may have a right to engage in a particular use, government may deny that right without compensation as long as it does not deny too many rights at once.<sup>97</sup>

Perhaps even more remarkable, *Lucas v. South Carolina Coastal Council* also implies that there is a petty-larceny exception to the Takings Clause.<sup>98</sup> This becomes apparent when one tries to reconcile the *Lucas* deprivation-of-all-use rule with the awkward exception to that rule stated in the same case. The *Lucas* exception holds that government does not take private property when it restricts conduct that already was restricted under

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92. See *id.* at 457. Although Holmes never published the phrase, “petty larceny of the police power,” the concept continues to influence modern legal thought. It is likely “one of the most famous phrases ever deleted from a draft Supreme Court opinion . . .” J. Gregory Sidak, *The Petty Larceny of the Police Power*, 86 CAL. L. REV. 655, 656 (1998) (reviewing FRED S. MCCHESENEY, *MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION* (1997)).

93. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

94. *Id.* at 416.

95. Springer v. Gov’t of Phil. Islands, 277 U.S. 189, 210 (1928) (Holmes, J., dissenting).

96. *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979) (internal citations omitted).

97. See *id.* Although the Court attempts to make a semantic distinction between a “taking” of property and a “denial” of property, this does not solve the textual problem. Either a “taking for public benefit” include the regulatory destruction of existing private property rights for the public’s benefit (as regulatory takings law supposes that it does), or it does not. To suggest that the meaning of “take” changes from a regulatory concept to a physical concept according to how much property an owner has is not consistent with reasonable English usage. *Andrus* is better interpreted as reflecting Holmes’ perspective that we must tolerate some government pilfering of private property without compensation.

98. See 505 U.S. 1003, 1029–31 (1992).

the common law of nuisance.<sup>99</sup> This exception is based on a historically fixed understanding of an owner's usage rights, similar to Epstein's conception.<sup>100</sup> According to the Court, a land use restriction is not a taking "only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of [the owner's]

<sup>101</sup> For purposes of this antecedent inquiry, only restrictions that duplicate the common law of nuisance or other actual historical restrictions are considered to be outside the scope of an owner's title.<sup>102</sup>

The narrowness of Lucas' background-principles exception shows that it is based on a broad and fixed understanding of an owner's usage rights in private property. By the same reasoning, however, one should also conclude that if a particular use is permitted by background principles of law, then it constitutes a usage right that the government may not eliminate without compensation. This is, of course, what Epstein concludes.<sup>103</sup> In other words, what the Court calls the "logically antecedent inquiry" into the nature of the owner's estate should logically be the only inquiry. But *Lucas* rejects this outcome for functional reasons.<sup>104</sup> Contrary to the reasoning used for purposes of the nuisance exception, *Lucas* holds that government takes property only when it (a) eliminates an owner's existing usage rights (as defined by background principles of law) and (b) deprives the owner of all economically viable use of the land.<sup>105</sup> To make room for the practical demands of government, *Lucas* reflects the assumption that the term "private property," as used in the Takings Clause, cannot be taken too literally when deciding what government actions are compensable. *Lucas* suggests that because society cannot afford to pay for every property

99. *See id.*

100. *See TAKINGS, supra* note 59, at 112–20 (endorsing a no-taking finding in cases where a regulation codifies existing common law principles, and advocating broad application of a regulatory takings doctrine).

101. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

102. To come within the exception, a regulation must "do no more than duplicate the result that could have been achieved in the courts" under background principles of state law. *Id.* at 1029.

103. *See TAKINGS, supra* note 59, at 112–15.

104. According to the Court,

[T]he *functional* basis for permitting the government, by regulation, to affect property values without compensation—that 'Government 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[]'—does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.

505 U.S. at 1018 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

105. *See Lucas*, 505 U.S. at 1027–29.

right that is denied by regulation, the Court will require compensation only for large deprivations.<sup>106</sup>

## 2. Weak Conception of Property Plus the Power of Judges Occasionally to Order Compensation

One might as easily begin with the opposite assumption that the meaning of private property in the Fifth Amendment is weak. All property interests are inherently qualified by the police power and subject to whatever restrictions government might impose at any time. Therefore, an owner's bundle of rights does not actually include usage rights against the government in any strict sense—an owner only has temporary rights to engage in land uses that the government does not prohibit.<sup>107</sup> Accepting this assertion as a baseline meaning of property, the regulatory takings doctrine must be considered a judge-made supplement to the actual takings doctrine based on the demands of natural equity. It reflects the judiciary's willingness to scrutinize the effects of government regulations and to order compensation where justice and fairness require it, even in cases where the government has not taken actual property rights.

Some Supreme Court cases imply this activist explanation for the regulatory takings doctrine, including the Court's recent decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.<sup>108</sup> Writing for the Court, Justice Stevens stated: "The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings."<sup>109</sup> The Court further explained that whereas the physical takings doctrine is "as old as the Republic"<sup>110</sup> and

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106. Some of the most influential takings scholarship, including that of Frank Michelman and Margaret Jane Radin, supports this perspective. See Frank Michelman, *Takings*, 88 COLUM. L. REV. 1600, 1627–28 (1988) ("[T]he better we learn the analytical lesson . . . that every particle of legally sanctioned advantage is property—the more we are forced to recognize in every act of government a redefinition and adjustment of a property boundary.") (internal citation omitted). Michelman concludes that popular sovereignty and classical property cannot be fully reconciled, but must be balanced with situated judgment. *Id.* See also Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1680–84 (1988) (arguing that the classical liberal conception of property, taken to its logical conclusion, would lead to an overbroad and impractical takings doctrine, and endorsing a pragmatic and standard-based approach to regulatory takings).

107. Modern use-zoning may reflect the assumption that title to land does not include inherent usage rights against the government. Use-zoning typically prohibits all land uses except for those that are expressly permitted or conditionally permitted in the zone. The list of permitted uses, of course, is always subject to revision.

108. 535 U.S. 302 (2002).

109. *Id.* at 321.

110. *Id.* at 322.



arises from the text of the Takings Clause,<sup>111</sup> the regulatory takings doctrine comes from judicial precedent<sup>112</sup> and is based on “the concepts of ‘fairness and justice’ that *underlie* the Takings Clause . . . .”<sup>113</sup> Employing a narrow interpretation of the Fifth Amendment, the Court treats the regulatory takings question as an open-ended fairness inquiry.<sup>114</sup> Rather than ask whether the government has appropriated private property rights (thereby creating a duty to compensate under the Takings Clause), the Court describes the issue as whether “‘*justice and fairness*’ require that *economic injuries* caused by public action be compensated by the government . . . .”<sup>115</sup> Other regulatory takings cases at times have implied this weak property-plus perspective.<sup>116</sup> Scholars also frequently discuss the Takings Clause in these terms, particularly those who criticize the current scope of the regulatory takings doctrine, but would not abandon it entirely.<sup>117</sup>

The flaw of both the strong property-minus and the weak property-plus perspectives is the same: They lack plausible textual legitimacy. They are excuses for deviating from the Fifth Amendment, rather than applications of it. Rather than reconsider the assumed boundaries of private property to account for both the reserved powers of government and affirmative rights of owners, these approaches give up on reconciling any firm conception of private property with acceptable outcomes under current law. With no plausible grounding in a consistent definition of private property, the regulatory takings doctrine becomes subject to charges of judicial activism, even *Lochnerism*.<sup>118</sup>

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111. *Id.* at 321–22.

112. *See id.* at 325 (“[I]t was Justice Holmes’s opinion in *Pennsylvania Coal Co. v. Mahon* that gave birth to our regulatory takings jurisprudence.”) (internal citations omitted).

113. *Id.* at 334 (emphasis added).

114. *See id.* at 315 n.10, 334–35 (discussing the factors that are relevant to consideration of

115. *Id.* at 336 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O’Connor, J., concurring)) (emphasis added).

116. *See, e.g.,* *E. Enters. v. Apfel*, 524 U.S. 498, 522–23 (1998) (noting that a “classic taking” occurs when government “directly appropriates private property for its own use,” but that “fairness and justice” considerations nevertheless may require compensation for deprivations caused by some governmental regulations); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 491–93 (1987) (“[Use] restrictions are ‘properly treated as part of the burden of common citizenship.’”) (quoting *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949)).

117. *See, e.g.,* Krotoszynski, Jr., *supra* note 4, at 718–21; Treanor, *supra* note 74, at 782–85; Bernard Schwartz, *Takings Clause—“Poor Relation” No More?*, 47 OKLA. L. REV. 417, 419–28 (1994) (arguing that the text and history of the Fifth Amendment require compensation only for physical acquisitions, but acknowledging a role for the regulatory takings doctrine in limited circumstances).

118. The criticism that modern regulatory takings doctrine is nothing more than a disguised version of *Lochnerism* arises frequently. *See Dolan v. City of Tigard*, 512 U.S. 374, 405 (1994)

Moreover, it has no guiding standard for further development. With no principle other than “fairness and justice” to navigate the wide expanse between treating every property restraint as a taking and allowing government absolute power to restrain property, every unresolved takings issue must be a political one. It is no wonder that those who view regulatory takings doctrine in such terms are so fond of ad hoc decisions and public policy balancing, rather than adherence to rules and boundaries. They do not view the regulatory takings doctrine as law in any formal sense, only an opportunity for the exercise of judicial power.<sup>119</sup>

### B. FLAWED SUBSTANTIVE APPROACHES

Rather than adopt an extreme conception of property that pits us against the text of the Constitution, suppose we try to explain the regulatory takings doctrine in terms of a moderate definition of private property. One might suppose that real property includes certain usage rights that government may not eliminate without compensation, but the right to use must be identified in limited terms. It must be defined narrowly enough to allow for ongoing government regulation, and yet broadly enough to allow some place for regulatory takings.

While a restrained concept of property seems plausible in the abstract, courts and scholars have so far found it impossible to identify a substantive right to use in terms that are internally consistent and produce reasonable outcomes. Let us take the *Lucas* and *Penn Central* standards as starting points. *Lucas* holds that a regulation is a taking if it deprives an owner of all economically viable use of land. *Penn Central* adds that a regulation is a taking if, in consideration of many factors, it would be unfair to deny the owner compensation. Suppose we invert these standards and use them to define an owner’s bundle of rights. In other words, let us posit that two inherent rights in every undivided bundle of real property include a right to use land for some minimal economic gain and a right to use land absent

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(Stevens, J., dissenting) (noting “the Court’s resurrection of a species of substantive due process analysis that it firmly rejected decades ago”) (internal citation omitted); Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and its Impact on Economic Legislation*, 76 B.U. L. REV. 605 (1996); Freitag, *supra* note 4, at 774–76. We should take this criticism seriously, especially to the extent that we abandon the effort to justify a limited regulatory takings doctrine under the text of the Fifth Amendment.

119. See, e.g., Michelman, *supra* note 106, at 1627–29. Michelman argues that all bright line rules are bound to be contrived in the field of regulatory takings, although they may function as “tokens” for a rule of law ideal. See *id.* According to Michelman, society’s desire for both classical property and popular sovereignty cannot be reconciled, and so it must ultimately reach a compromise through the exercise of “situated judgment.” See *id.*

unreasonable or unfair restrictions. By defining property in these substantive terms, it may seem that we can reconcile the *Lucas* and *Penn Central* rules with a singular conception of property. But further examination reveals that these conceptions of property rights are internally flawed. They do not treat property as a consistent entitlement.

#### 1. A Right to Use for Economic Gain: The Nuisance and Denominator Problems

The *Lucas* rule may presuppose that ownership of real property includes a fixed right to use land for some minimal economic gain, even if there is no inherent right to use land for its most profitable purpose.<sup>120</sup> Putting aside the difficult question of what is an economically viable use,<sup>121</sup> there are two reasons why such a right is implausible.

First, as the Court concedes in *Lucas*, society has never recognized a fixed right to use private land for economic gain. That is why the Court must make an awkward exception to its holding for the common law of nuisance and other “background principles” of law.<sup>122</sup> Frequently, a parcel of land will have no economically productive use, except for uses that the common law or general criminal laws prohibit. It is unconvincing to claim that the Takings Clause endows an owner with a “right to use for economic gain” if all historical laws, general laws, and even the common law of nuisance must be framed as exceptions to that right. Property is a common law concept. Accordingly, the common law of nuisance ought to be among the strongest pieces of evidence of how society has traditionally understood an owner’s usage rights. If title to real property includes a right to use, that right must plausibly be framed in terms that are consistent with the common law of nuisance, rather than admittedly in conflict with it.

Second, a supposed “right to use for economic gain” is inconsistent with property as a fungible right. This arises because of the takings

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120. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992). The Court stated: [O]ur ‘takings’ jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State’s power over, the ‘bundle of rights’ that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers . . . .

*Id.*

121. See Oswald, *supra* note 17, at 120–24 (discussing the ambiguity of the “economically viable

122. *Lucas*, 505 U.S. at 1027–29 (discussing the background-principles exception). The Court also suggests that there may be an exception to its holding for laws of general applicability that are not directed at land use. See *id.* at 1027 n.14.

denominator problem.<sup>123</sup> Whether a person is deemed to have lost all economically viable use of his or her land depends on the relevant parcel of land that is used as the basis for comparison.

For example, under *Lucas*, if a person owns one acre of land and the law prohibits all use of that acre, the owner will be entitled to compensation. But if the owner happens to own two adjacent acres of land, and the law prohibits all use of one acre, the owner likely would not qualify for compensation—the government could argue that the owner is still able to use some of the two-acre parcel for some economic use.<sup>124</sup> This odd result is possible because the Supreme Court has said that the effect of a regulation must be measured against the “parcel as a whole”; that is, a landowner is not allowed to divide real property into conceptual segments for purposes of claiming that those individual segments have been totally abrogated while ignoring other property interests that are still viable.<sup>125</sup> Otherwise, every setback ordinance and building height restriction would be a taking of private property because they completely prohibit the owner from using certain geographic space.<sup>126</sup> Taken to the extreme, the practice of “conceptual severance” could even lead to the result that all restrictions are takings of private property.<sup>127</sup>

Although the Supreme Court has not fully defined the “parcel as a  
<sup>128</sup> and lower courts vary somewhat in their approach to the issue,

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123. For a more thorough discussion of the takings denominator problem and one proposed solution, see JOHN E. FEE, *Of Parcels and Property*, in TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 101 (Thomas E. Roberts ed., 2002); John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535 (1994). These works propose a definition of the parcel based on independent economic viability.

124. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 630–31 (2001) (holding that an owner did not suffer a categorical taking under *Lucas*, even though a regulation prohibited all economic use of approximately eighteen acres, because some use remained for some of the owner’s land).

125. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 326–27 (2002); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130–31 (1978).

126. But it has long been settled, even since the *Lochner* era, that reasonable height and setback restrictions are valid without compensation. See *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 327 (“[R]estrictions on the use of only limited portions of the parcel, such as setback ordinances, or a requirement that coal pillars be left in place to prevent mine subsidence, [are] not considered regulatory takings.”) (internal citations omitted); *Gorieb v. Fox*, 274 U.S. 603, 608–10 (1927) (holding that a setback restriction was not a taking); *Welch v. Swasey*, 214 U.S. 91, 104–08 (1909) (holding that a height restriction was not a taking).

127. See Radin, *supra* note 106, at 1674–78. Radin explains that conceptual severance “is an easy slippery slope to the radical Epstein position,” for “[e]very curtailment of any of the liberal indicia of property, every regulation of any portion of an owner’s ‘bundle of sticks,’ is a taking of the whole of that particular portion considered separately.” *Id.* at 1678.

128. See *Palazzolo*, 533 U.S. at 631 (questioning the application of the whole-parcel rule in some contexts, but declining to resolve the issue because such a context was not presented in the instant

most courts entertain at least a strong presumption that all contiguous land held by a single owner is to be treated as a single unified parcel.<sup>129</sup> It may be necessary to consider an owner's property as an undivided whole to avoid extreme results under the deprivation-of-all-use standard. To engage in such "conceptual agglomeration" (as Steven Eagle has described it),<sup>130</sup> however, is to violate the concept of property as a set of fungible entitlements. Large landowners are disadvantaged in their constitutional rights compared to small landowners for no apparent constitutional reason other than to find some limit to the regulatory takings doctrine. Paradoxically, this encourages one to increase the rights inherent in a bundle of private property by subdividing it among owners. Under the parcel-as-a-whole rule, a bundle of rights does not equal the sum of its component parts.<sup>131</sup>

The takings denominator problem reveals a serious conceptual flaw with the *Lucas* rule. To demonstrate the nature of this problem, it is useful to contrast the takings denominator problem with another difficult (but less troubling) denominator question in the law: the relevant market question in antitrust law. In an antitrust case, the legality of a firm's conduct is determined in part by measuring the firm's market strength in relation to some defined market for goods and services.<sup>132</sup> The smaller the relevant market, the more likely a firm will appear to exercise excessive market power. A firm accused of antitrust violations, therefore, has an incentive to define the relevant market as broadly as possible, while those accusing the firm of antitrust violations have an incentive to define the relevant market as narrowly as possible in relation to the defendant's products.

This dynamic is similar to the relevant parcel problem in takings law. In both contexts, the broader the denominator of the equation, the more likely the defendant's conduct will be excused. But unlike the takings

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case); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) ("Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured.").

129. See, e.g., *Dist. Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999); *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999); *K & K Constr., Inc. v. Dep't of Natural Res.*, 575 N.W.2d 531, 536 (Mich. 1998); *Zealy v. City of Waukesha*, 548

130. See EAGLE, *supra* note 78, § 11-7(b)(2), at 788-90.

131. Justice Louis Brandeis raised this criticism in his dissenting opinion in *Pennsylvania Coal Co. v. Mahon*. See 260 U.S. 393, 419 (1922) (Brandeis, J., dissenting). As long as the regulatory takings law continues to focus on what is left over in an owner's bundle of rights after regulation, rather than solely on what rights are affected by regulation, these anomalies will inevitably exist.

132. See PHILLIP E. AREEDA, JOHN L. SOLOW & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* § 531, at 187-90 (2d ed. 2002).

denominator, the antitrust denominator is not based on arbitrary factors. The defining factors of the relevant market in antitrust are based directly on the primary policy of antitrust law: the preservation of marketplace competition.<sup>133</sup> If a court finds the relevant market to be broad, it will be precisely because other firms are found to provide adequate competition through similar products, revealing that the defendant's conduct is unlikely to cause anticompetitive harm. If it finds the relevant market to be small, it will be because, from a consumer point of view, there are few products that provide an adequate substitute for the defendant's products, revealing that anticompetitive harm is likely. While the relevant market inquiry often presents a difficult factual question, it is conceptually sound because it furthers the purpose of antitrust law.

By contrast, the takings denominator issue seems to exist solely because we have not found a better way to avoid the extreme result of requiring the government to compensate for all changes in the law.<sup>134</sup> We might as well say that all property owners who earn more than a certain income are not entitled to compensation under the Fifth Amendment so as to make it less expensive for government to regulate.<sup>135</sup> Unless some reason exists why the Takings Clause should be concerned with deterring citizens from owning too much property at once, the quantity of property an owner holds should have nothing to do with whether a regulation of one part of an owner's property is a taking of that part. The takings denominator problem is more than a "difficult, persisting question"<sup>136</sup> that the Supreme Court continues to avoid. It is a conceptual black hole. It reveals a fatal flaw in the supposition that there is a fixed right to use land for economic gain: Such a right cannot be reconciled with a stable theory of private property.

## 2. A Right to Use Absent Unfair Restrictions: A Problem of What to Balance

The *Penn Central* balancing test raises similar problems when one attempts to restate it in property rights terms. *Penn Central* may presuppose that a landowner's bundle of entitlements includes a right to use

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133. See *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956).

134. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130–31 (1978); Radin, *supra* note 106, at 1677–78.

135. Indeed, as Carol Rose has pointed out, the whole parcel rule effectively turns the Takings Clause into a deep-pocket rule. See Rose, *supra* note 17, at 568. If a deep-pocket rule were intended, however, we would do even better by basing the regulatory takings question on overall income and wealth, rather than solely on adjacent land interests.

136. *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001).

land absent unreasonable or unfair restrictions. Typical land use restrictions do not conflict with private property; but when government imposes an unusually heavy regulatory burden on an owner that “in all fairness and justice should[] be borne by the public as a whole,” it deprives the owner of the right to use, and must compensate for it.<sup>137</sup>

The difficulty with this interpretation of *Penn Central* arises in determining what is an unfair restriction. The factors that *Penn Central* says to balance—the economic impact on the owner, interference with the owner’s investment-backed expectations, and the character of the governmental action<sup>138</sup>—cannot be reconciled with a classical conception of property rights. Indeed, each of the *Penn Central* factors is flawed.

*Economic Impact.* According to *Penn Central*, the greater the adverse economic impact on an owner, the more likely a law will be deemed a taking of private property.<sup>139</sup> The problem presented by the economic impact factor is that it gives rise to a denominator problem. Whether an economic impact is so great as to exceed what is fair and just is measured in relation to the value of the owner’s property bundle as a whole.<sup>140</sup> The economic impact (or diminution in value) factor, therefore, depends directly on how much adjacent or contiguous property the owner has. Because of the denominator problem<sup>141</sup> and whole parcel rule,<sup>142</sup> the economic impact factor cannot be squared with a fixed, substantive conception of property. It turns the Takings Clause into a deep-pocket rule. It also means that when a single estate is partitioned and subdivided among numerous owners, the sum of private usage rights increases as the government’s power of regulation decreases; or, when an owner purchases and unites multiple estates into a single estate, the sum of private usage rights decreases as the government’s police power increases. This is

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137. *Penn Cent. Transp. Co.*, 438 U.S. at 123–24 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

138. *Id.* at 124.

139. *See id.*

140. *See id.* at 130–31.

141. *See Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987). The Court stated:

Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property “whose value is to furnish the denominator of

*Id.* (internal citation omitted).

142. *See Andrus v. Allard*, 444 U.S. 51, 65–66 (1979) (“[For takings considerations,] where an owner possesses a full ‘bundle’ of property rights . . . the aggregate must be viewed in its entirety.”) (internal citations omitted); *Penn Cent. Transp. Co.*, 438 U.S. at 130–31 (declaring that the takings jurisprudence focuses on the economic impact on “the parcel as a whole”).

fundamentally inconsistent with the classical idea of property as a fungible entitlement.<sup>143</sup>

Economic impact is also illogical as an instrument to determine whether there is a taking of private property for it also measures the amount of compensation due when government has taken property.<sup>144</sup> The degree of economic impact is already factored into the compensation step. It distorts and confuses the analysis to consider it also as part of the threshold question of whether there is a taking. If the regulatory takings doctrine is based on the theory that property usage rights may not be eliminated without compensation, the degree of economic impact should not affect whether a government has taken private property. It should only affect the amount of compensation due in the event of a taking.<sup>145</sup>

*Investment-Backed Expectations.* The Supreme Court's suggestion that regulatory takings law balances an owner's investment-backed expectations also fails to fit a stable conception of property rights. The Court has never been entirely clear about how to weigh an owner's investment-backed expectations.<sup>146</sup> But to the extent that the law gives

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143. See Radin, *supra* note 106, at 1685 ("In the classical liberal conception, property is paradigmatically fungible; everything that is property is ipso facto tradeable in markets and has an objective market value. . . . There is no room in the classical liberal conception for things that are property and yet not commodified.").

144. When government takes part of a parcel of real property, just compensation generally includes the market value of the portion taken, offset by any increase or decrease in value caused to the owner's remaining property interest. See *Bauman v. Ross*, 167 U.S. 548, 574–75 (1897).

145. Richard Epstein has argued persuasively that the current law's focus on the "deprivation fraction" for purposes of identifying a regulatory takings conflates the takings inquiry with the just compensation inquiry. See Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1376–77 (1993).

146. See Oswald, *supra* note 17, at 106–17 (discussing the test's inherent ambiguities). Since Justice William Brennan first used the phrase "distinct investment-backed expectations" in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), its meaning has evolved somewhat. See Oswald, *supra* note 17, at 106–07. Justice William Rehnquist changed the phrase to "reasonable investment backed expectations," see *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), and many cases quote it in this form. In other cases, justices have simply referred to the "reasonable expectation" of the owner. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) (suggesting that investment-backed expectations may not be essential); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 888 (1987) (Brennan, J., dissenting).

One might interpret the expectations factor as referring simply to those objective expectations that are inherent in owning property of a particular type, not to the individual circumstances or psychology of the owner. At this level of generality, however, focusing on "reasonable owner expectations" merely begs the following question: What usage rights are inherent in an owner's property bundle? It does not point to any independent factors to balance in measuring an owner's rights in relation to the government. As Justice Anthony Kennedy has noted, "[t]here is an inherent tendency towards circularity" in applying regulatory takings law on the basis of objective expectations, see *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring), yet it is at least preferable to measuring an owner's property rights on the basis of subjective factors.



independent weight to this factor, it suggests that an owner who purchases private property for valuable consideration is more likely to receive compensation in the event of a regulatory loss than one who acquires the same property by gift or inheritance.<sup>147</sup> This reasoning also seems to suggest that one who acquires property with active development plans is more likely to receive compensation than one who acquires it as a passive investment. Whether or not these distinctions make sense in terms of abstract justice, they plainly do not treat property as a consistent fungible entitlement. Under a bundle-of-rights conception of the regulatory takings doctrine, an owner's rights in relation to the government cannot vary according to how the property was acquired or what the owner subjectively expected to do with the property. Whatever rights are inherent in Blackacre must remain constant as Blackacre is transferred from one owner to another, or else Blackacre is not property in the traditional sense.

*Character/Public Interest.* The *Penn Central* framework also requires an examination of the "character of the governmental action." The Court has interpreted this criterion flexibly. It has invoked the character criterion to hold that regulations interfering with an owner's right to exclude or right to devise are takings because such rights are fundamental sticks in an owner's bundle.<sup>148</sup> In the context of land use restrictions, however, courts typically interpret the character criterion as an instruction to balance the public interest. A land use restriction is generally not a taking if it reasonably promotes "the health, safety, morals, or general welfare" of society, even if it "significantly" diminishes property values.<sup>149</sup> A land use restriction, however, does require compensation "if the ordinance does not substantially advance legitimate state interests . . ." <sup>150</sup> The greater the public interest in imposing a restriction, the less likely the government will be required to pay compensation.<sup>151</sup>

There exists a fundamental problem, however, with using the degree of public interest as a factor to define the boundaries of private property for compensation purposes. The Takings Clause presupposes that government may take private property only "for public use," or in other words, to serve

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147. In comparison, *Hodel v. Irving*, 481 U.S. 704, 715 (1987), suggests that investment-backed expectations are lacking where property is acquired by gift, descent, or devise, and where the original owners did not have specific expectations at the time of investment in passing on the land.

148. See *id.*; *Kaiser Aetna*, 444 U.S. at 179–80 (discussing the right to exclude).

149. See *Penn Cent. Transp. Co.*, 438 U.S. at 125, 131.

150. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

151. Rubenfeld, *supra* note 26, at 1094–97. Jed Rubenfeld has commented on this irony: "Is it not peculiar that the more society gains, the less chance an individual has of being compensated for the use society makes of his property?" *Id.* at 1095.

a legitimate governmental interest.<sup>152</sup> If a government action fails to serve a legitimate public purpose, the proper remedy is invalidation, not compensation.<sup>153</sup> Unlike many other constitutional doctrines that must balance the public interest, the just compensation requirement of the Fifth Amendment is not designed to prohibit invalid governmental action; it is more accurately concerned with who should bear the cost of legitimate governmental action.<sup>154</sup> When government takes private property for the purpose of building a police station, we do not refuse compensation because the action supports an important governmental interest. As Justice Holmes wrote in *Mahon*, “a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”<sup>155</sup> Whatever the boundaries of private property for purposes of the Takings Clause, those boundaries should not vary according to the degree of public interest at stake. The fact that the public will benefit greatly by depriving an owner of property rights might be all the more reason to compensate the owner from public funds, rather than force one owner to bear that burden alone.

If each of the *Penn Central* factors is flawed in isolation, the concept of property is not improved by combining those factors into an amorphous balancing framework committed to no set rule. Doing so only compounds the problem. By making abstract fairness the ultimate test of whether compensation is due, without developing a clear framework by which to measure it, the Court’s ad hoc takings jurisprudence contradicts the idea that the Takings Clause protects previously defined entitlements. If there is a convincing way to identify an owner’s right to use based on a balancing test, the courts have not yet discovered it.

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152. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 239–44 (1984) (holding that a government taking that reasonably serves the public interest satisfies the “public use” requirement).

153. See *id.* at 241. The Supreme Court has repeatedly held that “‘one person’s property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.’” *Id.* (quoting *Thompson v. Consol. Gas Corp.*, 300 U.S. 55, 80 (1937)).

154. See *Preseault v. ICC*, 494 U.S. 1, 11–12 (1996); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314–15 (1987). Seemingly at odds with a public interest criterion, the Supreme Court has explained that the Takings Clause is not meant to limit “the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.” *Id.* at 315.

155. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

quential loss or injury resulting from lawful governmental action, the law affords no remedy," even if a regulation indirectly brings "great losses [to an owner] . . . [or] render[s] valuable property almost valueless." *Id.* at 510. Thus, if by building a new state highway the government forces business owners on an alternative route to shut down because traffic is diverted, it need not pay compensation, no matter how severe the financial loss. Accepting this cold-hearted truth, one is left to wonder why the outcome should not be the same for those whose property is devalued directly by a regulation.

found no good way to explain it.<sup>157</sup> Why are general taxes not prima facie takings of private property without compensation? The answer is not that money is not property within the meaning of the Takings Clause. The Court has decided cases to the contrary,<sup>158</sup> and in any case, this would be illogical, for money is the currency with which government pays for property interests under the Takings Clause. The Takings Clause would be a pointless formality if the government could take a person's land by eminent domain, compensate the owner, and then reclaim the money without constitutional limitation. The Takings Clause must protect an owner's bank account from government appropriation, as well as an owner's tangible property. Nor can the answer be that tax obligations offer owners a choice of how to satisfy the debt, and so are not targeted as specific assets.<sup>159</sup> If, instead of condemning Blackacre, the government demands either a deed to Blackacre or the value of Blackacre in cash (which, of course, the government could later use to acquire Blackacre by eminent domain), the effect is substantively no different than condemning Blackacre directly. Property taxes take essentially this form for the failure to pay taxes on Blackacre will eventually allow the government to acquire title in lieu of the debt.

If there is a meaningful distinction for Fifth Amendment purposes between general taxes and eminent domain takings, it must be in how taxes are imposed in society compared to how government takes land. Taxes are generally imposed on a broad population according to a consistent formula, whereas eminent domain actions target specific owners to bear unique burdens. When government requires an individual to give up ten square feet of land for public use, it is neither the degree of the burden nor the special nature of land that makes this burden unfair without compensation; rather, it is that the government singled out the individual to bear a burden

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157. While there is a wealth of literature on the relationship between the police power to regulate and takings, surprisingly little scholarship exists on the relationship between the power to tax and takings, which presents many of the same conceptual problems. Abraham Bell and Gideon Parchomovsky have noted that "the taxing power remains the neglected corner of the takings triangle." Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277, 314 (2001). And yet, as Saul Levmore has indicated, a theory of takings law is incomplete if it cannot explain "why the power to tax—without compensation, of course—is not fundamentally inconsistent with the constitutional obligation to compensate condemnees." Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 292 (1990).

158. See, e.g., *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 169, 172 (1998) (holding that money and interest accrued thereon was property within the meaning of the Takings Clause).

159. Justice Kennedy's rationale in his concurring opinion in *Eastern Enterprises v. Apfel* seems to support such a distinction between taxes and takings. See 524 U.S. 498, 541–44 (1998) (Kennedy, J., concurring). He states that an act is not a taking if it "neither targets a specific property interest nor depends upon any particular property for the operation of its statutory mechanisms." *Id.* at 543.

that is not shared by the general public, but that exists for its benefit. There is no unfairness, however, if the owner is given compensation from general tax revenues for the ten acres so that taxpayers are made to share in the expense of the project equally. The problem of eminent domain is essentially one of discriminatory taxation, which the government corrects through the provision of just compensation.

The relationship between taxes and takings underscores the contention that a landowner's right to use can be defined neither in absolute terms nor as a balancing test between the individual and government if it is to be reconciled with the Takings Clause principle. This does not mean, however, that a principled regulatory takings doctrine is impossible. It only means that we need a more accurate conception of private property—one that includes an element of comparative justice.

### III. PROPERTY AS A COMPARATIVE RIGHT

Early writers on the law of just compensation confirm that it was designed to serve an antidiscrimination purpose. Well before our Fifth Amendment existed, Samuel Pufendorf relied on the natural law principle of equality to explain the requirement that government compensate owners for takings of private property.<sup>160</sup> In discussing the issues of taxation and eminent domain, Pufendorf explained that it is fair for a sovereign to appropriate the property of citizens for the benefit of society, but only on the condition that each citizen's contribution is fairly allocated in relation to that of others.<sup>161</sup> With respect to taxes, equality is achieved through quotas;<sup>162</sup> with respect to eminent domain, equality is achieved through compensation:

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160. See 2 SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* 1285 (C.H. Oldfather & W.A. Oldfather trans., 1934). Other early writers, including Hugo Grotius and Blackstone, comment that the law of just compensation arises from principles of natural law. See 3 HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 385, 807 (F. Kelsey trans., 1925); BLACKSTONE, *supra* note 43, at 138–39. Pufendorf's explanation, however, is more complete than the others in that he describes how it would offend natural equity for the government to take an individual's property for the good of the public, without compensating for the loss. See PUFENDORF, *supra*, at 1285–86. He goes on to explain how the provision of compensation corrects this inequity. See *id.*

161. See *id.* Relying on the work of Thomas Hobbes, Pufendorf discusses the follies of imposing taxes and other legal burdens unequally on society, such as the resentment such a disparity would likely foster in some of society's members. See *id.* at 1282–84. As he explains, “any burden which lies lightly upon all, will be irksome to the rest if many evade it, and, indeed, intolerable. For as a rule, out of grief at the injury, or from envy of others, men complain not so much of the burden itself, as of the inequality . . .” *Id.* at 1283.

162. See *id.* at 1283–85.

Natural equity is observed, if, when some contribution must be made to preserve a common thing by such as participate in its benefits, each of them contributes only his own share, and no one bears a greater burden than another. And the same is true in states. But since there are times in the life of every state when a great necessity does not allow the collection of strict quotas from every one, or when something belonging to one or a few citizens is required for the necessary uses of the commonwealth, the supreme sovereignty will be able to seize that thing for the necessities of the state, on condition, however, that whatever exceeds the just share of its owners must be refunded them by the other citizens.<sup>163</sup>

Early Supreme Court cases also relate the law of just compensation to the ideal of equality. In 1893, Justice David Brewer, writing for the Court stated that the Takings Clause

prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.<sup>164</sup>

The following year, in *Reagan v. Farmers' Loan & Trust Co.*,<sup>165</sup> the Court linked the law of just compensation to the Equal Protection Clause of the Fourteenth Amendment, holding that “[t]he equal protection of the laws . . . forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public.”<sup>166</sup> Even in *Mahon*, Justice Holmes distinguished laws that secure an “average reciprocity of advantage,” which are valid without compensation, from regulatory actions requiring compensation.<sup>167</sup> The reciprocity of advantage concept suggests that the regulatory takings doctrine is focused on discriminatory governmental action. Laws of sufficient general applicability do not require compensation because the legal burdens are shared among a community of landowners for their collective benefit.

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163. *Id.* at 1285. Like Pufendorf, James Madison also relates the problems of discriminatory and arbitrary taxation to the protection of private property through the law of just compensation. *See* Madison, *supra* note 44, at 267 (“A just security to property is not afforded by that government, under which unequal taxes oppress one species of property and reward another species . . .”).

164. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

165. 154 U.S. 362 (1894).

166. *Id.* at 399.

167. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)

The ideal of equality among those who contribute to the government represents the most persuasive justification for the constitutional rule that government (that is, general taxpayers) must compensate individuals whose property is taken by eminent domain. It is, therefore, remarkable that modern law places so little weight on the extent to which a regulation discriminates among property owners in determining what is a regulatory taking. To be sure, the Court continues to say that the regulatory takings doctrine is designed “to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>168</sup> But in practice, the operative part of this statement has not been “some people alone,” as equality theory would suggest, but rather the more flexible words “fairness and justice,”<sup>169</sup> which courts usually understand as implying a substantive balancing test.

Suppose we reconceive the regulatory takings doctrine as a comparative right. Rather than define a regulatory taking in relation to the owner’s expectations or the remaining value (or use) of his or her property, the antidiscrimination interpretation of the Takings Clause suggests that we recognize regulatory takings in relation to how the government regulates other owners. On the surface, there are several advantages to such an approach. A comparative takings doctrine would avoid the troubling denominator problem<sup>170</sup> because it does not require a determination of whether all viable uses of the property in question have been destroyed, thereby obviating the question of what parcel of land should be examined in making that determination. It would also avoid the public interest problem,<sup>171</sup> which like the denominator problem, serves to confuse and undermine the integrity of regulatory takings law. Importantly, a comparative approach would explain the relationship between taxes and takings, providing a consistent theoretical framework for determining whether government action requires compensation, irrespective of whether the government relies on its power to tax, its power of eminent domain, or its police power. Moreover, a comparative takings doctrine would allow government the flexibility to legislate in response to new circumstances and new perceptions of harm without requiring compensation to owners (as long as these new regulations are sufficiently general in application), but it also would not eliminate the regulatory takings doctrine. Furthermore, a

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168. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 321 (2002) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123–24 (1978).

169. See, e.g., *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 321.

170. See *supra* Part II.B.

171. See *supra* text accompanying notes 150–55.

comparative approach would bring the regulatory takings doctrine into alignment with the underlying purpose of the Takings Clause.

There are, however, reasons to be skeptical about a comparative regulatory takings doctrine. Is such a doctrine consistent with established concepts of private property? Textualists will point out that the Takings Clause does not use the word “equality,” but the words “private property,” and it is the text of the Constitution, not the underlying purposes, that courts are authorized to enforce.<sup>172</sup> If a comparative regulatory takings doctrine is valid, therefore, it must stem from a comparative concept of private property. This premise presents a potential problem because we are accustomed to thinking of private property in individualistic terms. Edmund Burke once said that “[t]he characteristic essence of property . . . is to be *unequal*.”<sup>173</sup> One might suppose that if it is a taking of private property for the government to tell one owner that he or she cannot do *X* on his or her land, it would only multiply the taking if the government were to tell every owner they may not do *X*. We should not excuse the government because it has plundered multiple landowners instead of only one.<sup>174</sup>

This analysis supposes that an owner’s right to use land consists of a series of simple on/off propositions. Either landowners have a property right to engage in *X* or they do not. The extent of their usage rights does not depend on how other members of the community are regulated. This on/off conception of property is unnecessarily limited and is unworkable in the context of regulatory takings. Moreover, background principles of private property do not require such a conception of property usage rights; in fact, history strengthens the case for a comparative concept of private property rights.

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172. See ANTONIN SCALIA, A MATTER OF INTERPRETATION 37–41 (1997) (arguing that the people enacted the text of the Constitution and not the purposes that gave rise to it, and that therefore, the intent of the framers is not authoritative).

173. 3 Edmund Burke, *Reflections on the Revolution in France*, in THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 298 (rev. ed. 1865).

174. The Court makes a similar point in *Lucas v. South Carolina Coastal Council*. See 505 U.S. 1003, 1027 n.14 (1992). Recognizing that general criminal prohibitions might be immune from takings scrutiny because of their generality, the Court nonetheless said that “a regulation *specifically directed to land use* no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions.” *Id.* The alternative approach, the Court said, “renders the Takings Clause little more than a particularized restatement of *Id.*”



## A. BLACKSTONE AND LAWS OF THE LAND

Take, for example, Blackstone's description of private property, which supports a comparative theory of property: "The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."<sup>175</sup>

Two ideas appear in Blackstone's statement. First, private property includes an affirmative right to use one's acquisitions; it does not consist solely of a right to exclude others from possessing a thing. This is consistent with our modern recognition that a restriction on the use of property assets may amount to a taking of property rights. Second, and equally important, an owner's right to use is inherently bound by the "laws of the land." Even in Blackstone's view, no property owner has a right to ignore laws of the land or to be compensated for their existence. If a law of the land provides that owners may not do *X*, government need not compensate owners for the restriction.

The key to Blackstone's conception of private property, as it relates to regulatory takings, is in the meaning of laws of the land. Restrictions imposed by laws of the land are beyond the scope of private property rights and do not require compensation. Restrictions that are not laws of the land, however, deny an owner's right to use and must be purchased from him or her by the government. Importantly, Blackstone and his contemporaries did not understand laws of the land as referring to all legislative enactments. The concept does not even encompass all enactments that are procedurally sound and substantively in the public interest.<sup>176</sup> One essential characteristic of a law of the land is that it must be a rule of general applicability. As Blackstone explained in his definition of municipal law:

[F]irst, [law] is a *rule*: not a transient, sudden order from a superior to or concerning a particular person; but something . . . uniform[] and universal. Therefore, a particular act of the legislature to confiscate the goods of Titius, or to attain him of high treason, does not enter into the

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175. BLACKSTONE, *supra* note 43, § 191, at 239 (internal citation omitted).

176. The idea of "law of the land" as a limitation on government power is historically closely related to the "due process of law" requirement originating in the Magna Carta. As with due process, the law-of-the-land requirement was understood to include both procedural and substantive components. See RODNEY L. MOTT, *DUE PROCESS OF LAW: A HISTORICAL AND ANALYTICAL TREATISE OF THE PRINCIPLES AND METHODS FOLLOWED BY COURTS IN THE APPLICATION OF THE CONCEPT OF THE "LAW OF THE LAND"* §§ 26–30, at 71–86 (1926).

idea of a municipal law: for the operation of this act is spent upon Titius only, and has no relation to the community in general . . . .<sup>177</sup>

Daniel Webster, in his famous argument in *Trustees of Dartmouth College v. Woodward*, made the same point.<sup>178</sup> Discussing the law-of-the-land limitation on private property under the New Hampshire Bill of Rights, Webster said:

By the law of the land, is most clearly intended, the general law . . . . Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions, of the highest importance, completely inoperative and void.<sup>179</sup>

Many antebellum state courts interpreted law-of-the-land clauses in state constitutions as prohibiting unequal legislation. As one court stated, the “*law of the land*” means a general public law, equally binding upon every member of the community.”<sup>180</sup> Law-of-the-land cases in the early nineteenth century, in fact, paved the way for what later became our equal protection doctrine following the enactment of the Fourteenth Amendment.<sup>181</sup>

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177. BLACKSTONE, *supra* note 43, § 44, at 70.

178. 17 U.S. 518 (1819).

179. *Id.* at 581–82. Webster further quotes Edmund Burke in a passage that foreshadowed one of the problems of ad hoc land use regulation:

“Is that the law of the land,” said Mr. Burke, “upon which, if a man go to Westminster Hall, and ask counsel by what title or tenure he holds his privilege or estate, according to the law of the land, he should be told, that the law of the land is not yet known; that no decision or decree has been made in his case; that when a decree shall be passed, he will then know what the law of the land is? Will this be said to be the law of the land, by any lawyer who has a rag of a gown left upon his back, or a wig with one tie upon his head?”

*Id.* at 582.

180. *Wally's Heirs v. Kennedy*, 10 Tenn. 554, 555 (1831). See *Regents of the Univ. of Md. v. Williams*, 9 G. & J. 365, 412 (Md. 1838) (“An act which only affects and exhausts itself upon a particular person, or his rights and privileges, and has no relation to the community in general [is not the] . . . law of the land.”); *Sears v. Cottrell*, 5 Mich. 251, 254 (1858) (“By ‘the law of the land’ we understand laws that are general in their operation, and that affect the rights of all alike . . . .”); *Janes v. Reynolds' Adm'rs*, 2 Tex. 250, 251–52 (1847) (stating that laws of the land are “general public laws, binding on all the members of the community under similar circumstances”); *Reed v. Wright*, 2 Greene 15, 22–23 (Iowa 1849) (stating that acts of the legislature that operate on a discrete group of individual do not amount to “laws of the land” because they have “no relation to the community in general”). For a more detailed explanation of this history, see MOTT, *supra* note 176, §§ 26–30, at 71–86.

181. See Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 257–64 & n.58 (1997).

Blackstone's definition of property, therefore, leads towards a comparative understanding of that right, at least in the context of land use regulation. If property ownership includes the right to use one's acquisitions within the bounds imposed by laws of the land, as Blackstone tells us, and if laws of the land include only general laws, then it follows that when government imposes a restriction that applies to only one owner for the benefit of the larger community, it denies a portion of that owner's property. But if government imposes the same restriction on all members of the community, thereby making the restraint part of the law of the land, then paradoxically, the government would not be taking property from anyone.

### B. THE HARM/BENEFIT BOUNDARY

One may arrive at the same conclusion under the historical "no harm" conception of property usage rights. The Supreme Court has often upheld statutes restricting certain uses of land on the grounds that the conduct in question was deemed harmful to others, and that no property owner has an inherent right to use his or her property in a manner that injures a neighbor.<sup>182</sup> The no-harm boundary of private property is exemplified by the leading case of *Mugler v. Kansas*, in which the Court upheld a state prohibition on liquor manufacture as applied to a previously lawful distillery.<sup>183</sup> The Court held that an owner is not entitled to compensation for laws proscribing conduct harmful to the health, safety, and morals of society because all private property "is held under the implied obligation that the owner's use of it shall not be injurious to the community."<sup>184</sup>

Although the no-harm principle has deep historical roots, many, including the Supreme Court, have expressed skepticism over whether it is a useful concept to distinguish between those regulations that require

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182. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491–92 (1987) (allowing a restriction on mining coal in such a way as to cause subsidence); *Miller v. Schoene*, 276 U.S. 272, 282–84 (1928) (allowing a regulation that prohibited planting trees to prevent the spread of disease); *Hadacheck v. Sebastian*, 239 U.S. 394, 410–14 (1915) (holding that a land use restriction on making bricks was valid as a legitimate exercise of police power to protect the health, safety, and peace in an urban area); *Fertilizing Co. v. Hyde Park*, 97 U.S. 659, 667–68 (1878) (stating that it is a "fundamental principle that everyone shall so use his own [property] as not to wrong and injure another;" and on this rationale, upholding a land use regulation that effectively shut down a plant that manufactured chemical products from animal matter).

183. See *Mugler v. Kansas*, 123 U.S. 623, 674–75 (1887).

184. *Id.* at 665 (internal citations omitted). See *Fertilizing Co.*, 97 U.S. at 668 ("Every right, from absolute ownership in property down to a mere easement, is purchased and holden subject to the restriction that it shall be so exercised as not to injure others.") (quoting *Coates v. Mayor of New York*, 7 Cow. 585, 605 (N.Y. 1827)).

compensation and those that do not.<sup>185</sup> The problem lies in Ronald Coase's insight that the difference between a law that prevents harm and a law that extracts a benefit depends on whose perspective one adopts.<sup>186</sup> For example, one can describe a historic preservation ordinance as preventing harm to society by assuming that the public has a vested interest in the preservation of historic buildings, or as extracting a benefit from society by assuming that landowners have a vested right to remove existing structures from their land. Rather than clarify an owner's usage rights, the no-harm standard seems only to beg the question of what a property owner is entitled to do.

The modern criticism of the no-harm standard, however, is overstated. While it is conceptually possible to describe any law as either harm-preventing or benefit-conferring, doing so ignores normal societal judgments of acceptable and unacceptable behavior. As one writer has noted, "[d]own' does not become 'up' just because one can invert oneself<sup>187</sup> In any given society, there are certain shared assumptions about accepted behavior that give meaning to the concept of harm.<sup>188</sup> In a typical residential community, polluting the air with noxious gas would be considered injurious to the neighbors, whereas building a house on an empty lot similar to those that exist nearby would not be considered an injurious use, even if the neighbors would prefer to see open space. The harm/benefit concept is not meaningless, but it does need to be fleshed out.

William Fischel offers one possible clarification of the harm/benefit standard. He proposes to define harmful conduct in relation to community norms.<sup>189</sup> According to Fischel, when government prohibits a landowner from engaging in conduct that is outside the scope of normal behavior, it need not compensate for the restriction.<sup>190</sup> When government prohibits an owner from engaging in normal behavior, however, it must pay for the extraction.<sup>191</sup> Fischel's theory of regulatory takings has some clear

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185. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1022–23 (1992); *TRIBE*, *supra* note 84, § 11-5, at 781–84; *Rubinfeld*, *supra* note 26, at 1137–38; *Michelman*, *supra* note 106, at 1626–29.

186. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 34–35 (1960) (explaining the reciprocal nature of harms).

187. WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 354 (1995).

188. Andrea L. Peterson makes this point convincingly in defending the no-harm boundary. See *Underlying Principles*, *supra* note 84, at 91 (arguing that Coase's notion of reciprocal harm is "inconsistent with ordinary perceptions [of harm in] the world").

189. See FISCHEL, *supra* note 187, at 353–55.

190. See *id.*

191. See *id.* at 351–53. Fischel's theory is based on the work of Robert C. Ellickson, who suggested that prohibitions on "normal behavior" provide a baseline by which to identify takings. See

advantages. Unlike many takings formulas, the normal behavior standard successfully reconciles the regulatory takings doctrine with a consistent definition of property: A landowner has an inherent property right to use land in accordance with community norms—nothing more or less. The normal behavior standard is also flexible enough to recognize variations in social definitions of harm over time and across different communities while preserving the core function of the Takings Clause, which requires compensation when an owner is asked to give up something that other members of the community are not.

The primary weakness of Fischel's proposal, however, is that it seems to give the ultimate responsibility to decide what is normal community behavior to the wrong branch of government. Fischel would have courts scrutinize legislative regulations affecting land use to determine if those regulations are consistent with public perceptions of normal conduct.<sup>192</sup> This approach seems to have it backwards because the legislative branch is in a better position (practically and constitutionally) to represent public conceptions of harm and to voice those attitudes by enacting general laws.<sup>193</sup> If, as in *Mugler*, a state legislature concludes that liquor manufacture is harmful to public welfare and prohibits it, it would be inappropriate for a court to override the legislature's conclusion on grounds that liquor manufacture was previously legal and considered normal. *Mugler* correctly holds that the legislature has the primary authority to declare what conduct is harmful to a community.<sup>194</sup> In other words, what was once normal behavior may suddenly become a violation of community norms if and when the legislature decides to change those norms by statute.<sup>195</sup> Once we recognize this ability of the legislature, however, it is

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Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines As Land Use Controls*, 40 U. CHI. L. REV. 681, 729 (1973).

192. See FISCHEL, *supra* note 187, at 354–55. Fischel would give greater deference to larger republics (states and the federal government) than to smaller local governments in determining what is normal behavior, but would still give the courts the ultimate power to determine if the legislature correctly implemented public attitudes of normalcy. See *id.*

193. Even more ironically, Fischel's approach would involve federal courts overruling state and local decisions merely on the basis of what the public considers to be normal behavior.

194. See *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (declaring that “[u]nder our system[,] that power is lodged with the legislative branch of government”).

195. Even the conservative Thomas Cooley agreed. Discussing the law of the land, Cooley noted the harsh reality that through legislative action,

the merchant of yesterday becomes the criminal of today, and the very building in which he lives and conducts the business which to that moment was lawful becomes perhaps a nuisance, if the statute shall so declare . . . [Such a determination] must be justified upon the highest reasons of public benefit . . . [and] rest exclusively in the legislative wisdom.

THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 584 (1868).

easy to suppose that there is no role for a no-harm or normal-behavior limitation on property use, for if that were the case, every regulation would become its own justification.

This problem in the normal-behavior standard is remedied if one looks to the general laws of a community to determine what is normal, instead of public attitudes and practices. Such an approach does not eliminate the regulatory takings doctrine, but recognizes the legislature's primary constitutional authority to define community norms by statute or regulation, and even to change those norms over time if the public interest requires it. In upholding the Kansas legislature's finding that manufacturing liquor was injurious to society, the *Mugler* Court emphasized throughout its opinion that the legislature had prohibited such conduct generally, and had not singled out the plaintiff.<sup>196</sup> The Court's rationale is illuminating:

Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that [certain conduct is] . . . hurtful to society, and constitute[s], therefore, a business in which *no one may lawfully engage*. Those rights are best secured . . . by the observance, *upon the part of all*, of such regulations as are established by competent authority to promote the common good. *No one* may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.<sup>197</sup>

*Mugler* suggests that generally applicable laws and regulations define normal behavior in a society, and accordingly, their application does not require compensation to landowners. By the same reasoning, regulations that single out one or a few owners for restrictions not shared by others in the community deprive those owners of their right to use in accordance with normal land use practices, and are valid only if the affected owners are compensated. This was, in fact, the Supreme Court's holding in *Yates v. Milwaukee*,<sup>198</sup> a case rarely thought of today, but which ought to be considered the counterpart to *Mugler* in the history of the regulatory takings doctrine. In *Yates*, the Court invalidated a Milwaukee ordinance declaring a riparian owner's wharf to be a nuisance and ordering it

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196. See *Mugler*, 123 U.S. at 662–63.

197. *Id.* (emphasis added). “Such legislation does not disturb the owner in the control or use of his property for lawful purposes . . . but is only a declaration by the State that its use *by any one*, for certain forbidden purposes, is prejudicial to the public interests.” *Id.* at 669 (emphasis added). “[W]e do not doubt [the state's] power to declare that *any place*, kept and maintained for the illegal manufacture and sale of such liquors, shall be deemed a common nuisance, and be abated . . . .” *Id.* at 671 (emphasis added).

198. 77 U.S. (10 Wall.) 497 (1870).

destroyed. Because there were no general laws prohibiting the wharf (rather, the ordinance applied only to one owner), the City could not rely on harm prevention to justify its action.<sup>199</sup> The City's ordinance was effectively a taking of property for public use without compensation.<sup>200</sup> As Justice Samuel Miller explained for the Court:

It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities.<sup>201</sup>

The Court concluded that if Milwaukee authorities thought removal of the owner's wharf would serve the public interest, "they must first make him compensation for his property so taken for the public use."<sup>202</sup>

Like Blackstone's definition of property, the no-harm principle of the eighteenth century leads comfortably to a comparative concept of property rights and to a comparative regulatory takings doctrine. To hold that a regulation is a taking of private property when it singles out one owner for a restraint not shared by others is certainly within the range of reasonable textual interpretation. Considering that early writers and cases declare that property rights exist relative to the general laws of society, and that the Fifth Amendment exists to prevent government from imposing unequal burdens, this may be the most faithful interpretation of the Takings Clause.

#### IV. COMPARATIVE TAKINGS DOCTRINE IN APPLICATION

Even if there are logical and historical reasons to interpret the Fifth Amendment as requiring compensation when the government treats property owners unequally, it remains to be seen whether a takings standard based on the ideal of equality is workable in application. If such a theory would sweep too broadly or too narrowly, it will likely remain in the dustbin of regulatory takings law.

A reasonable comparative takings doctrine is possible if one recognizes two important distinctions. First, takings law must distinguish between formal equality and substantive equality, and recognize that the

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199. *See id.* at 505.

200. *See id.* at 505–06.

201. *Id.* at 505.

202. *Id.* at 507.

Fifth Amendment only requires formal equality among property owners. Second, takings law must distinguish between regulations that are sufficiently general in application, so as not to require compensation, and those that target a few owners for the benefit of a larger class. From this distinction, it follows that although a regulation may not apply to all owners in a jurisdiction, it is not a taking if it applies to a broad community of owners and is reasonably designed for the overall benefit of that community.

#### A. FORMAL EQUALITY V. SUBSTANTIVE EQUALITY

One potential problem raised by interpreting the Takings Clause as an equality rule is the expense of achieving equality in practice. Nearly all laws disadvantage some citizens relative to others. If the Takings Clause were interpreted to require that the substantive effects of a regulation be equal, or even close to equal, for all affected property owners, it would work a dramatic change in constitutional law. A substantive equality requirement has radical implications, such as Epstein's suggestion that all regulations must be Pareto-optimal for all regulated owners.<sup>203</sup> For this reason, the Supreme Court consistently declines to adopt such a requirement in takings cases, and rightly so.<sup>204</sup> As Justice Brennan explained in *Penn Central*, "[l]egislation designed to promote the general welfare commonly burdens some more than others."<sup>205</sup>

This observation does not refute a comparative regulatory takings doctrine, however, for there are different measures of equality. A standard based on substantive equality (or equality of outcome) would measure a law's actual economic effect on owners, including its effect on individual property values and each owner's business practices. By contrast, a standard of formal equality (or legal equality) would simply ask whether a regulation on its face applies to a broad community of owners.<sup>206</sup> A law that is general in application satisfies the requirement of formal equality, although it may significantly disadvantage some owners relative to others.

A plausible comparative takings doctrine must be based on a baseline of formal equality. Neither Blackstone's concept of law of the land nor the

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203. See TAKINGS *supra* note 59, at 199–202.

204. See *supra* text accompanying notes 66–73.

205. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 133 (1978).

206. For discussions of substantive and formal equality, see Robin West, *The Meaning of Equality and the Interpretive Turn*, 66 CHI.-KENT L. REV. 451, 469–70 (1990), and Michel Rosenfeld, *Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal*, 74 CAL. L. REV. 1687, 1696–98 (1986).



*Mugler* concept of the police power require more than that a law be generally applicable. Formal equality is a familiar baseline in constitutional law. It is the standard that governs the equal protection doctrine,<sup>207</sup> the free exercise doctrine,<sup>208</sup> and other comparative constitutional rights.<sup>209</sup> History and reason suggest that the Takings Clause was designed to remedy government actions that formally discriminate among property owners with respect to their rights, rather than government actions that merely impact, in different ways, owners who are subject to the same legal restrictions.

By recognizing that the Takings Clause requires no more than formal equality, we see that many typical land use regulations that are highly burdensome to one class of owners (and may even be designed to put some owners out of business) do not require compensation. Consider the following examples.

*Statutory Nuisance Restrictions.* A county enacts an ordinance prohibiting the operation of large hog farms. There is only one large hog farm that happens to operate in the county. Even if the ordinance were enacted with the idea of closing that particular farm, compensation should not be required as long as other owners in the county share in the legal restriction against operating large hog farms.

*Air Emission Standards.* A state lowers its air emission standard for stationary sources pursuant to the Clean Air Act.<sup>210</sup> There is only one factory in the state whose emissions are realistically affected by the change. The state does not owe compensation to the factory owner as long as other

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207. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that disparate impact on a protected class does not, in itself, render a law violative of the Equal Protection Clause).

208. See *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877–80 (1990) (holding that generally applicable laws do not violate the Free Exercise Clause, even if they substantially burden a person's religious practice).

209. Other constitutional provisions that require formal equality, at least in certain contexts, include the Establishment Clause, see *Zelman v. Simmons-Harris*, 536 U.S. 639, 652–59 (2002) (finding an educational voucher program constitutional, despite the fact that the majority of voucher recipients used them to attend religious schools, because the program was facially neutral with respect to religion), the Free Speech Clause, see *Police Dep't v. Mosely*, 408 U.S. 92, 94–96 (1972) (holding that regulations of speech that discriminated on the basis of content were unconstitutional), and even the Search and Seizure Clause, see *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451–53 (1990) (finding suspicionless sobriety checks constitutional if imposed on all drivers at established checkpoints).

210. See 42 U.S.C. §§ 7401–7671q (2001).

landowners are also restrained from engaging in land uses that would exceed the emissions standard.<sup>211</sup>

*Rent Controls.* A city enacts rent controls applicable to residential leases. The ordinance prohibits rent increases beyond a specified percentage of the current rent per year. It also prohibits the creation of new leases at rents that are unreasonable in relation to comparable residences in the community. The ordinance does not prevent landlords from taking property off the rental market upon termination of existing leases. Although the ordinance clearly disadvantages current landlords relative to other members of the community, it is not a taking because it prohibits all owners (current landlords, future landlords, and even those who are not allowed to use their land for rental income) from using their land to charge rents above the rate at which the law determined is reasonable.<sup>212</sup>

As in each of these examples, determining whether a law prohibiting owners from engaging in a particular conduct (X) on private land is a taking, requires consideration of the entire class of owners who are legally prohibited from doing X. It would be a mistake to limit the inquiry to those owners who are currently engaged in doing X, or who would like to do X, and ask whether those owners are disadvantaged as a group. For formal equality purposes, the relevant class of regulated owners includes those who are unlikely ever to engage in the prohibited conduct, and even those who are subject to more restrictive regulations that encompass the prohibition of doing X.<sup>213</sup>

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211. The standards for new stationary sources of pollution, if anything, are likely to be more stringent pursuant to the Clean Air Act's requirements. Existing factory owners, therefore, may not complain that they are required to operate their land under a restriction that the general community is permitted to ignore. Although the remaining landowners may be restrained by more stringent emission standards, they also would not have a valid takings claim if the new source emission standards are sufficiently general, even if the new standards did not apply to other owners. For a discussion of variances, see *infra* text accompanying notes 223–32.

212. This reasoning is consistent with the Supreme Court's holding in *Yee v. City of Escondido*, 503 U.S. 519, 527–28 (1992) (holding that a rent control ordinance is not a taking, as long as an owner is not required to maintain his or her land as rental property). It would present a different case, however, if the ordinance prohibited current landlords from converting their property to nonrental property, thereby requiring landlords to have tenants at below market rates in perpetuity. A regulation of this sort would formally discriminate between current landlords, who would have no choice but to leave the rental business and engage in other land uses, and landowners who could continue to make nonrental use of their land.

213. For example, a city ordinance prohibiting one owner from operating a large hog farm would not be a taking—even if the restriction applied to only one landowner—if the rest of the city were subject to a more inclusive regulation, such as a total ban on hog farming. Although the city's action effectively creates more than one legislative classification, it may still be said that the prohibition on large hog farms is not a taking of private property because it is shared by owners throughout the city. Likewise, in considering whether a rent control ordinance is a taking, one must include in the relevant

The ideal of formal equality clarifies why the court in *Mugler v. Kansas* correctly held that it was not a taking of private property for the Kansas legislature to prohibit liquor manufacture in the state, even though only a minority of landowners were interested in engaging in this land use.<sup>214</sup> The Court stressed the point that, in terms of formal law, the legal burden was imposed equally on all owners in the State.<sup>215</sup> By contrast, if the Kansas legislature had chosen to prohibit liquor manufacture on only one owner's land, compensation would have been appropriate, even if the legislature had rational reasons for imposing the restriction solely on that location. It would have been a taking of the owner's right to use land in accordance with general community standards.

Being that the Fifth Amendment allows severe disparate impacts on different landowners, one might legitimately ask why it should require formal equality. First, the ideal of formal equality is rooted in our traditions; it governs the implementation of other constitutional provisions, such as the Equal Protection Clause. Our society has long recognized that a law is more just if it binds everyone in a society equally.<sup>216</sup> Thus, even in situations where it would make little practical difference to formally extend a restriction to owners who would never engage in the prohibited conduct, a regulation is improved when it is imposed in a generally applicable manner. Owners who are disappointed by a restriction are less likely to feel that they have been treated unjustly if the law formally applies to several other owners.<sup>217</sup>

Second, a standard of formal equality is a powerful check on majoritarian abuses of power. When government must either regulate land use through generally applicable laws or pay compensation to those who

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class those owners who are subject to a more restrictive regulation than the prohibition against operating apartments at full market value, such as owners who are not even permitted to build or operate apartments at all. Similarly, in measuring the constitutionality of an emission standard applicable to certain factories, one must consider both owners who are subject to more stringent emission standards and those who are prohibited from operating large factories on their land.

214. See *Mugler v. Kansas*, 123 U.S. 623, 662–63 (1887).

215. See *id.* at 662–63, 669, 671; *supra* note 197 and accompanying text.

216. Equality under the law is a fundamental tenet of classical liberal theory, as articulated by Hobbes, Locke, Immanuel Kant, Jean-Jacques Rousseau, John Stuart Mill, and Thomas Jefferson, and arises from the belief that because humans are equal in their capacity for moral reflection, they deserve equal treatment under the law. See CHRISTINE M. KOGGEL, PERSPECTIVES ON EQUALITY: CONSTRUCTING A RELATIONAL THEORY 48–49 (1998). As Koggel explains: “Because it matters to us that we have this freedom, we are forced logically to value the freedom of others because we realize that they are like us in also having the requisite capacities and valuing their freedom to exercise these capacities.” *Id.* at 48. See also RAWLS, *supra* note 71, at 60 (“[E]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.”).

217. See PUFENDORF, *supra* note 160, at 1282–83.

are singled out for more restrictive burdens, it is less likely to take advantage of politically powerless minorities and more likely to act on the basis of legitimate public values.<sup>218</sup> When a community wishes to impose a land use restriction that would be costly to some owners, the community confirms that the law is based on legitimate public values when it is willing to impose the same restriction on itself, or, in the alternative, provide compensation to the affected owners.

Finally, a standard of formal equality is equitable. Some land use restrictions are based on legitimate site-specific policy concerns, and therefore should not apply to the broader community. In these situations, compensation is necessary to maintain the principle that no individual should be forced to contribute more than a fair share of the cost of government. For example, a city may choose to prohibit the construction of any permanent structure at a particular location near the ocean for the purpose of preserving a valuable public view. The only way to phrase the regulation in general terms would be to subject a large community of owners to an absolute ban on permanent structures, which may not make sense. A comparative takings doctrine, however, would require only that compensation be provided to the owner who is singled out. Just as an owner should be compensated if the government chooses to take an easement across his or her land to access the beach,<sup>219</sup> the same principle of equity demands compensation if an owner's land use is uniquely restricted for purposes of creating a public view.<sup>220</sup>

#### B. HOW GENERAL MUST A REGULATION BE?

Under a formal equality standard, a land use restriction is a taking if it applies to only one owner. Because that owner is forced to sacrifice something unique for the public benefit, compensation from taxpayer funds for the owner's loss is appropriate. We can also say that a restriction is not a taking if it applies to all owners in a jurisdiction (general criminal and

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218. See Cass Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1723–27 (1984). Sunstein explains that the Takings Clause, like many other constitutional provisions, is designed to prevent government action based on interest group politics (what he calls “naked rage public deliberation of higher republican values. *See id.*”).

219. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) (“Had [the State] . . . required . . . an easement across their [property] available to the public on a permanent basis . . . we have no doubt there would have been a taking.”).

220. John Rawls' theory of justice supports this result. As Rawls explains: “There is no more justification for using the state apparatus to compel some citizens to pay for unwanted benefits that others desire than there is to force them to reimburse others for their private expenses.” RAWLS, *supra* note 71, at 283.

business laws, for example), even if the restraint leaves some owners worse off than others.

Unfortunately these rules do not resolve most situations in land use law. It remains to be seen how the law should analyze a regulation that applies to a class of owners consisting of more than one, but less than all, owners in a jurisdiction. How general must a regulation be to avoid the requirement of compensating all aggrieved owners? While this question presents a challenge for a comparative takings theory, it is a question with a principled answer.

We can easily reject the extremes. It would make little sense to hold that a law that applies to multiple owners can never be a taking. A regulation that applies to several owners for the benefit of the larger community can be just as inequitable as a regulation that applies to one owner alone, and may therefore require compensation to satisfy the demands of equity. It would, however, also be incorrect to require compensation for every regulation that distinguishes among property owners within a jurisdiction. It is the nature of modern zoning to impose land use requirements that vary from one location to another, and there is nothing inherently inequitable about this. Even the common law of nuisance imposes differing land use standards depending on geographic location.<sup>221</sup> Unless we are to declare virtually all modern land use regulation unconstitutional, we must reject a rule that would deem any regulation that formally does not apply to all owners in a political jurisdiction a taking.

An examination of the role of the just compensation requirement reveals the proper balance between these extremes. The takings clause requires only that the burden of government action imposed for the benefit of a community be dispersed and shared by the members of that community, rather than selectively borne by a few. Dispersion of a burden is achieved when the regulation formally binds most of its beneficiaries (even if some exemptions are granted), or when the government compensates, through general revenues, those owners who are singled out. The question in determining if there has been a regulatory taking, therefore, ought to be whether a regulation is sufficiently broad in its application that the owners who bear the regulatory burden also are the primary beneficiaries.

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221. As Justice George Sutherland stated in *Village of Euclid v. Ambler Realty Co.*, “[a] nuisance may be merely a right thing in the wrong place[]—like a pig in the parlor instead of the bamyard.” 272 U.S. 365, 388 (1926).

To determine whether a regulation is sufficiently general, takings law must therefore consider who the primary beneficiaries of a regulation are. Most local land use restrictions are imposed for the benefit of the owners who are subject to the restrictions. For example, in a typical cumulative zoning scheme, the most restricted zone is the R1 or single-family zone.<sup>222</sup> In such a zone, it is common to permit only single-family homes subject to detailed height, frontage, and setback specifications. While it would be accurate to say that owners in a residential zone are subject to land use restrictions that are not imposed on owners in other zones, one cannot say that they are unfairly burdened as a class. This is because the residential restrictions exist for the benefit of landowners *in that residential zone*. The restrictions preserve property values for residential owners and maintain the character of the community. In this sense, a residential zoning classification is similar to a generally applicable law; it is imposed for the collective benefit of those who are forced to abide by it.

A typical zoning classification, therefore, should not require compensation even if some owners in the zone are harmed by the classification. As usual, some regulated owners may find that it would be more profitable to engage in uses that are prohibited by the zoning classification, particularly those owners whose property is located at the edge of a zone and who already suffer the adverse effects of uses in other zones.<sup>223</sup> These owners, however, are in no less equitable a position than those who are effectively disadvantaged by generally applicable state and federal laws.<sup>224</sup> The risk that the government will enact new regulations to

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222. See JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW 82 (1998).

223. Potential profit motivated the plaintiff in *Euclid*. In *Euclid*, the zoning classification devalued the plaintiff's property by approximately seventy-five percent, or \$7500 per acre. 272 U.S. at 384. The property was particularly well suited for industrial development, but was zoned for residential use only. *Id.* Nevertheless, the Court found the zoning scheme to be a valid exercise of the police power. *Id.* at 388-92.

224. One might compare the plight of landowners in Wendover, Utah, who have complained over the years that they are hurt by Utah's prohibition on commercial gambling relative to their close Nevada neighbors. For many years, the Utah side of Wendover has suffered economically, while the Nevada side of Wendover has thrived due to its casino industry. Landowners in Wendover, Utah have sought creatively for ways to relieve themselves of Utah's gambling restriction, including annexation by Nevada, but so far they have not succeeded. See Michael Janofsky, *Moving a Border to Wed Rich and Poor Towns*, N.Y. TIMES, May 22, 2001, at A1. While the case of Wendover presents an interesting political issue, one cannot reasonably claim that Utah has taken the property of landowners in Wendover, even though they are subject to different rules than Nevada landowners. The fact remains that Utah's restriction on gambling is imposed on Utah residents for the benefit of Utah residents. The same dynamic is common to zoning. As long as a zoning restriction is reasonably imposed for the benefit of those *who are subject to it*, the law is not a taking, even if it fails to benefit every owner within that zone.

the disadvantage of some property owners is always present in a democracy. What is important for just compensation purposes is that those owners have not been chosen to bear a special legal burden for the primary benefit of those outside the legal classification, but rather, those owners are regulated in the same manner as other owners for whose benefit the restrictions are enacted.

By this reasoning, a zoning classification is not a taking even if the government grants variances to some owners within a zone. The regulated class of owners does not include those who are exempted. As long as variances are such that the regulation still creates net advantages for the class of owners who *are* subject to its restrictions, there is no equitable reason to require compensation from public funds to all the regulated landowners. Of course, too many variances may destroy the advantages of a zoning classification and result in a taking of private property for the few owners who are not given a variance. But variances that leave intact the advantages of a regulated community should not turn a zoning classification into a taking.

A balanced regulatory takings test, therefore, should ask whether a property restriction is reasonably designed for the benefit of the community of owners who are subject to the restriction. If a legislature reasonably determines that a particular community is collectively better off by imposing reciprocal restrictions on the members of that community, compensation should not be required for those within the class who are disadvantaged. If, however, a restriction on one group of owners only makes sense because of its benefits to other nonregulated members of the public, the restriction presents a classic case for compensation. One of the most important factors affecting this inquiry will be the number of owners who are formally subject to the regulation. The greater the number of regulated owners, the more likely a regulation has the relevant characteristics of a general police power regulation, that is, the more plausible it will be to find that the regulation is designed for the collective benefit of those who are subject to it. By contrast, the fewer the number of regulated owners, especially where those owners are dispersed and the effects of the regulation are severe, the more likely it is that the government has imposed a special restriction on those owners for the primary benefit of outsiders.

There is precedent for this inquiry in takings cases. We find it in the concept of “average reciprocity of advantage,” which Justice Holmes raised

in *Mahon*.<sup>225</sup> According to Holmes, a regulation is not a taking if it is designed to create an average reciprocity of advantage among those who are regulated.<sup>226</sup> Holmes never fully defined the reciprocity of advantage concept, and its usage has varied in more recent cases.<sup>227</sup> Reciprocity of advantage does not mean that the precise benefits of a regulation must outweigh the regulatory costs for every member of the regulated group.<sup>228</sup> Holmes did suggest, however, that a restriction on a select group of owners' use of property is not a taking if the restriction is designed to create a special benefit for the class of owners who are subject to its restrictions.<sup>229</sup> The reciprocity concept in land use regulation arose from the law of special assessments.<sup>230</sup> It was the police power parallel to a well-settled principle in tax law: Government may impose a special tax on a discreet group of landowners for their own benefit (for financing a specific project that will benefit those landowners particularly, for example), but not for general revenue purposes.<sup>231</sup> Just as special taxes are

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225. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

226. See *id.* See also *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 30 (1922) (holding that the police power justified the imposition on the parties and that the imposition was not a taking).

227. See Lynda J. Oswald, *The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1449, 1489 (1997) [hereinafter *Role of "Harm/Benefit"*]. Modern commentators disagree on the meaning of reciprocity of advantage. See Thomas A. Hippler, *Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine: The Principles of "Noxious Use," "Average Reciprocity of Advantage," and "Bundle of Mugler to Keystone Bituminous Coal*, 14 B.C. ENVTL. AFF. L. REV. 653, 673 n.110 (1987) (citing interpretations of various commentators).

228. As Holmes explained in *Jackman*: "The exercise of [the police power] has been held warranted in some cases by what we may call the average reciprocity of advantage, although the advantages may not be equal in the particular case." 260 U.S. at 30.

229. See *Role of "Harm/Benefit," supra* note 227, at 1489–1505. Although Justice Holmes used the phrase "reciprocity of advantage" in only two opinions, he cited precedent illustrating the principle that a police power regulation creating a reciprocity of advantage is valid without compensation. See *id.* (providing detailed explanation and interpretation of the two cases and the precedent on which they relied). That precedent included cases upholding the following acts, regulations, and restrictions: (a) a law requiring common drainage of a marshland within a defined tract at the expense of the owners; (b) a law creating an irrigation district for improvement of lands and a law assessing the costs of irrigation on landowners within the district; (c) an assessment against banks for the purpose of creating a fund to secure the repayment of deposits in the event that a bank becomes insolvent; and (d) a mining safety regulation designed to reduce flooding between adjoining mines. See *id.*

230. See Hippler, *supra* note 227, at 679 (explaining that Holmes' reciprocity of advantage insight "was merely the principle of 'special benefit' taxing districts extended to analogous police power cases. Several of the cases on which Holmes relied were, in fact, special assessment cases. See *Noble State Bank v. Haskell*, 219 U.S. 104, 113 (1911) (upholding an assessment on banks for the purpose of creating a fund to secure repayment of deposits); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (1896) (upholding the creation of an irrigation district for the improvement of lands and the assessment of costs on landowners within the district); *Wurts v. Hoagland*, 114 U.S. 606, 614 (1885) (upholding a statute requiring common drainage at the expense of the owners).



valid if they are imposed for the benefit of the group that is taxed, special police power regulations are valid if they are imposed to create an average reciprocity of advantage among the regulated owners.

In more recent cases, the Supreme Court has muddled the concept of reciprocity of advantage.<sup>232</sup> It has sometimes applied the reciprocity concept broadly, suggesting that a regulation is not a taking if it results in benefits to society as a whole. As members of society, landowners are benefited by reasonable regulations imposed on them and others, and they therefore receive some reciprocity of advantage from all regulations. This line of reasoning, if taken seriously, would unravel the entire regulatory takings doctrine, and so it is no surprise that contemporary takings cases do not consistently rely on reciprocity to determine whether a regulation requires compensation.

A comparative regulatory takings doctrine would restore the reciprocity of advantage concept to its meaningful origins. It would allow the government to regulate a discrete group of landowners without providing compensation, as long as the regulation is reasonably designed for the special benefit of those landowners. It would, however, require compensation whenever the government imposes a special regulation on a select few for the general benefit of society. This test not only has the advantage of supporting a moderate regulatory takings doctrine in a way

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231. See *Ill. Cent. R.R. Co. v. Decatur*, 147 U.S. 190, 208 (1893) (holding that a railroad company's exemption for taxation applied to ordinary taxes, not special assessments to pay the cost of local improvements from which the company benefited); *County of Mobile v. Kimball*, 102 U.S. 691, 703–04 (1880) (holding that special assessments may be imposed on a county that is specially benefited by an improvement). In *Norwood v. Baker*, 172 U.S. 269 (1898), the Supreme Court directly applied the Takings Clause to special assessments, holding that a special assessment imposed on a property owner "in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation." *Id.* at 279. In later cases, the Supreme Court relaxed the *Norwood* requirement that every owner who is assessed must receive a benefit in proportion to the assessment. See, e.g., *Louisville & Nashville R.R. Co. v. Barber Asphalt Paving Co.*, 197 U.S. 430, 433 (1905). But the principle still remains that special assessments or special tax districts are valid only if they are used to fund projects that create special benefits to the class of owners who are subject to the tax; otherwise, special assessments are an arbitrary exercise of tax discrimination. For a recent application of this principle, see *Olde Fla. Invs., Ltd. v. Port of the Islands Cmty. Improvement Dist.* (*In re Port of the Islands Cmty. Improvement Dist.*), 272 B.R. 779, 783–84 (Bankr. M.D. Fla. 2001).

232. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 (1987) (upholding a state act prohibiting coal mining that caused subsidence damage to preexisting structures because of its public benefits); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138 (1978) (holding that the city's Landmarks Law did not effect a taking based in part on the fact that the restrictions imposed were substantially related to the promotion of the general welfare). For a full analysis of the evolution of the reciprocity of advantage concept in regulatory takings law, see *Role of "Harm/Benefit," supra* note 227, at 1489–1520.

that is consistent with the text of the Fifth Amendment, it would make judicial scrutiny of police power regulations consistent with principles of taxation. Like special assessments and tax districts, a regulation that applies to a discrete class of owners ought to receive judicial scrutiny to ensure that it is reasonably imposed for the benefit of that group, and is not a vehicle for extracting something from a minority of owners for the benefit of the larger public. In effect, a comparative takings doctrine would provide a single standard of fairness that can be used to judge all government actions, whether exercised under the taxation power, police power, or eminent domain power.

### C. COMPARISON TO CURRENT TAKINGS STANDARDS AND FURTHER APPLICATIONS

Although existing takings standards do not explicitly depend on the generality of a regulation to determine whether compensation is required, the outcomes produced by these standards are often consistent with those of a comparative takings theory. Can it be that the ideal of equality has been guiding the development of takings law all along? Remarkably, a comparative theory of the Fifth Amendment seems to legitimate much of current regulatory takings law.

#### 1. Deprivation of All Beneficial Use: A New Perspective on the *Lucas* Rule

The Supreme Court has held that a regulation denying an owner all economically viable use of land is a prima facie taking of private property.<sup>233</sup> Thus, David Lucas suffered a taking of two undeveloped parcels of land when South Carolina established a protective coastal zone encompassing them and prohibited the building of any new residences in that zone. The regulation effectively destroyed all economic value of Lucas' land.<sup>234</sup>

Under a comparative takings doctrine, the outcome in *Lucas v. South Carolina Coastal Council* was correct. Moreover, we may say the same for virtually any case resolved under the deprivation-of-all-economically-viable-use rule. Few landowners would voluntarily choose to accept a ban on all economically viable use of their own land in exchange for the placement of a similar restriction on others. Restrictions of such severity realistically only exist when the broader

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233. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

234. See *id.* at 1009.

community chooses to restrict a minority of owners for the benefit of the broader community. David Lucas was selected to bear a restriction not shared by most owners in South Carolina—a permanent prohibition on having any structure capable of occupation on his land. This restriction only applied to owners of undeveloped land within the protective zone.<sup>235</sup> Given the severity of this restraint, we can be confident that it was not imposed for the reciprocal advantage of owners in Lucas' position, but was for the benefit of the broader community at the expense of certain owners.

In one passage of the *Lucas* opinion, the Supreme Court recognized the lack of reciprocity as a basis for the deprivation-of-all-economically-viable-use rule. The Court said:

Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply “adjusting the benefits and burdens of economic life[.]” . . . in a manner that secures an “average reciprocity of advantage” to everyone concerned . . . .<sup>236</sup>

The Court probably did not intend for this to be the operative portion of its opinion. Yet it is the most persuasive justification for the deprivation-of-all-economically-viable-use rule, and a comparative takings theory shows that it works quite nicely. To be sure, a comparative takings doctrine should, in theory, allow a community to permanently restrict anyone from making economically viable use of private land for the community's own reciprocal benefit, in which case the regulation should not be considered a taking. But the possibility of a general ban on all economically viable use is so remote that it need not be considered. In the real world, where almost all landowners care about using their land for some economically viable purpose, the *Lucas* rule works as an effective proxy for determining if some owners have been singled out to sacrifice property usage rights for the benefit of others.

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235. The relevant classification should not change by characterizing the regulation as a ban on “new” development, which one may say applies to all owners in the coastal zone, including those whose homes are grandfathered by the regulation and those who benefit from it. By allowing existing coastal zone homeowners to maintain their homes, while prohibiting owners of undeveloped land from ever building homes on their land, the law creates more than a disparate impact; it legally creates two classes of owners within the coastal zone who prospectively are subject to different land use requirements based on whether their land had a permanent home on it before the regulation was enacted. Because of this legal distinction, existing homeowners in the coastal zone should not be grouped with owners of undeveloped land for purposes of determining if the regulation creates a reciprocity of advantage.

236. *Lucas*, 505 U.S. at 1017–18.

## 2. Partial Deprivations: An Alternative to Ad Hocery

Understanding the *Lucas* rule as a proxy for a comparative takings doctrine also provides direction in resolving cases of partial deprivation. Under current law, a regulation that partially deprives an owner of the economic use of land could potentially be a taking, but outcomes are often uncertain because an ad hoc balancing framework applies. A comparative takings doctrine would provide a principled standard for resolving this class of cases. Rather than decide whether compensation is required based on the quantity of undivided property owned by the individual landowner (using this as the denominator of the takings fraction), the degree of public interest supporting the regulation, or the owner's subjective expectations—all of which should logically be irrelevant to whether a regulation has taken the landowner's specific property<sup>237</sup>—a comparative takings doctrine would ask whether the regulation is reasonably designed to benefit the class of owners who are regulated. This inquiry would not always produce the same outcomes as might be expected under the *Penn Central* standard, nor should it. Given the appropriate deference to legislative judgments however, a comparative takings standard should not radically change the current balance between private and public interests. Consider these potential applications:

*Setback Restrictions.* A comparative takings doctrine explains why regulations affecting how close one may build to an abutting street typically are not takings of private property.<sup>238</sup> Even though a setback restriction may deprive an owner of all economically viable use of a strip of land near the street, a typical setback restriction is imposed for the combined benefit of the regulated class. Of course, a setback restriction would result in a taking if it were designed for some purpose other than the creation of local reciprocal advantages. An example would be a special setback requirement applicable to owners on one street for the purpose of facilitating the future widening of that road. Just as the actual widening of the road over private land would be a taking of private property, a special restriction on land use imposed solely for the purpose of saving the government costs in future eminent domain proceedings (though this is a legitimate public purpose) results in a partial taking of private property.<sup>239</sup>

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237. See *supra* Part II.B.2.

238. See *Gorieb v. Fox*, 274 U.S. 603, 608 (1927) (upholding the constitutionality of setback restrictions).

239. See *Joint Ventures, Inc. v. Dep't of Transp.*, 563 So. 2d 622, 626 (Fla. 1990) (holding that compensation was required for a restriction designed solely to preserve property values in places where future highways were planned). Restrictions imposed for a mixture of reasons present a more difficult

*Wetlands.* Partial deprivations that are relatively severe in their effects and uneven in their application, such as restrictions on development in designated wetland areas, are more likely to result in takings of private property.<sup>240</sup> In the case of wetland regulation, a comparative takings doctrine would ask whether restrictions on filling wetlands work to the reciprocal advantage of wetland owners as a group. While it is unclear whether this can be shown, federal and state regulators should be allowed to make their case on this point, and courts should give appropriate deference to reasonable legislative judgments. If a court finds that wetland restrictions do not reasonably create net benefits for wetland owners as a group, but make policy sense only by weighing the benefits to society as a whole, it is appropriate that restricted owners should be compensated for their sacrifice. While there are strong policy reasons favoring wetland regulation, there is no good reason for refusing to compensate owners whose property rights are specially diminished for the benefit of the broader public.

*Land Use Moratoria.* Comparative takings doctrine also provides a useful standard for determining whether a temporary restriction on new development is a taking of private property. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Supreme Court held that land use moratoria should not be analyzed under the categorical deprivation-of-all-economically-viable-use rule.<sup>241</sup> The decision is consistent with a comparative takings doctrine. As the Court recognized, unlike permanent deprivations, moratoria often work to the average benefit of those who are regulated: They may serve to maintain the long-term planning goals of the community and allow time for regulators to make reasonable planning decisions for the average benefit of all.<sup>242</sup> But not all moratoria are designed to create an average reciprocity of advantage among those who have no present use for their land. The longer the duration of

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factual case. *Cf.* *Palm Beach County v. Wright*, 641 So. 2d 50, 53–54 (Fla. 1994) (finding that compensation was not required where restrictions on areas designated for future streets were imposed as part of comprehensive a plan). A comparative takings doctrine, however, would at least supply courts with the right question to ask in determining whether compensation is due.

240. Wetlands cases have produced mixed results under the regulatory takings doctrine, often depending on the application of the denominator issue. *See* *Palazzolo v. Rhode Island*, 533 U.S. 606, 632 (2001) (remanding for determination under the *Penn Central* test as to whether the wetlands restrictions amounted to a taking). *Compare* *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1364–67 (Fed. Cir. 1999) (affirming that the denial of a permit under the Clean Water Act to dredge and fill wetlands was not a taking), *with* *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1178–82 (Fed. Cir. 1994) (affirming that the denial of a development under the Clean Water Act constituted a taking).

241. *See* 535 U.S. 302, 334–35 (2002).

242. *See id.* at 341.

the moratorium, the more closely it should be scrutinized,<sup>243</sup> and the more likely it will appear to restrict one class of owners for the benefit of a different class.

*Historic Preservation.* Owners of historic landmarks and buildings are often subject to regulations that do not apply to other owners. A comparative takings doctrine suggests that whether a historic preservation scheme requires compensation should depend on the number of owners subject to preservation regulations, the degree to which regulated owners are concentrated or dispersed among nonregulated owners, and whether there are offsetting benefits provided by the legislation. The ultimate question asked should be whether the regulations are reasonably expected to benefit the class of regulated owners. Under this standard, the outcome of *Penn Central Transportation Co. v. New York City* is dubious. In that case, New York City designated several hundred private buildings as historic landmarks subject to special restrictions, which prevented at least one owner from using valuable air space.<sup>244</sup> The landmark owners were relatively few and dispersed, and it seems implausible that they were made better off as a group from the restrictions; rather, it was the nonregulated public that seemed to benefit most from the legislation. However, even the same set of restrictions as those imposed in *Penn Central* should not require compensation if placed on owners in an established historic district in a way that creates a reciprocity of advantage in those communities. Unlike dispersed landmark owners, landowners within a historic district are likely to be among the strongest supporters of the restrictions because they have a vested interest in the historic character of the community.

### 3. *Loretto, Dolan*, and Beyond

Beyond land use restraints, a comparative takings theory serves to clarify other areas of takings law, including physical invasions and exactions. The Supreme Court's rules governing physical invasions and exactions are well established, but the rules only make sense if we understand the Takings Clause as an equality rule.

According to *Loretto*,<sup>245</sup> government regulations that impose permanent physical occupations of private property are per se takings. The *Loretto* rule does not, on its face, ask whether a government action has

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243. Indeed, as the Court suggested in *Tahoe-Sierra Pres. Council, Inc.*, "It may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism." *Id.* at 341.

244. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 115-18 (1978).

245. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-35 (1982).

treated the plaintiff landowner differently from neighboring landowners. Yet, like the deprivation-of-all-beneficial-use rule, the permanent physical occupation rule serves to effectively identify one class of cases in which landowners typically *are* treated unequally for the purpose of benefiting the broader public. Rarely does a government physically occupy private land in a sufficiently general and equal manner that it would meet the standards of taxation; rather, when the government acts to occupy private land, as when the government takes a public easement for a road, the quantity of any given owner's land that it chooses to occupy is based on its usefulness to the public.<sup>246</sup> Because one owner's rights are diminished in a unique way for the benefit a larger class, the Fifth Amendment requires compensation.

Similarly, the Supreme Court established in *Nollan* and *Dolan* that government may not require an owner to surrender a real property interest in exchange for a regulatory approval, unless the property interest is both causally connected and proportional to the adverse effects of the land use.<sup>247</sup> Otherwise, the owner is entitled to compensation for the taking. The *Nollan-Dolan* rule correlates with a comparative takings doctrine. When the government imposes a condition as part of a subdivision or permit approval, and if the condition is imposed to remedy the specific effects of the owner's actions (and assuming that other owners in like circumstances would be held to the same condition), the owner has not been singled out to bear a special burden. If a condition is imposed solely for the purpose of acquiring a property interest that the public desires, however, then it becomes a form of uneven taxation.

The rules established in *Loretto*, *Nollan*, and *Dolan* do not make sense as absolute protections for individual property rights. They do not prevent the government from acquiring property interests from owners, nor do they protect an owner's financial position vis-à-vis the government. The government can always diminish an owner's wealth through property taxation, and it can then use the revenue to acquire the owner's real and personal property through eminent domain. What *Loretto* and

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246. Of course, if the government chooses to redefine many owners' rights to exclude in a uniform way, or to physically occupy an equivalent portion of land belonging to a broad class of owners for the owners' combined benefit, there is no good reason to require compensation. The government would be justified in taxing those same owners to pay for the modification of their rights, so why not allow it to turn two steps into one? In the typical case, however, a permanent physical-occupation rule fits well with a comparative takings doctrine.

247. See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (requiring rough proportionality between an imposition and its benefits); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (requiring a causal relationship between the property exaction and regulatory approval).

*Nollan-Dolan* do effectively accomplish is force the government, when it wishes to acquire the wealth and property of citizens, to do so in an evenhanded way. Rather than allow the government to acquire property from individual citizens based on the usefulness of the property to the public, which places the burden of government on a disproportionate few, the *Loretto* and *Nollan-Dolan* rules force the government to spread its costs on society in the form of general taxation. Like the *Lucas* rule, they are effective proxies for an underlying rule of equality.

## V. CONCLUSION

The regulatory takings doctrine continues to bewilder courts and scholars. The root of the problem is this: We ignore the relationship among owners and assume that the Takings Clause protects something absolute in each owner, or at least represents a balance between the government's regulatory interests and an owner's economic position. The regulatory takings doctrine is not a shield or an insurance policy. It is a web. Under the theory I have described, a regulation is not a taking if it is generally applicable throughout an entire jurisdiction, or if it applies to a group of owners who are specially benefited by the regulation. A regulation imposed on a discrete class of owners solely for the benefit of a larger class, however, is a taking of private property and requires compensation. This theory is consistent with history and the law of special assessments, and it explains at least a large portion of modern takings law.

As a comparative right, the Takings Clause is closely related to the Equal Protection Clause. But unlike the doctrine of equal protection, the role of the Takings Clause is not to invalidate illegitimate government action. The Equal Protection Clause prohibits discrimination among owners that is arbitrary and unjustified. The remedy is invalidation of the government action. By contrast, the Takings Clause is designed to address cases where government discrimination among property owners is justified on the basis of the broader public interest, but nevertheless disserves the interests of those who are singled out. The remedy is just compensation.