PENN CENTRAL AND ITS RELUCTANT MUFTIS

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INTRODUCTION

For over thirty-five years, the Supreme Court's opinion in *Penn Central Transportation Co. v. New York City*[1] has been the "polestar" of its regulatory takings jurisprudence.[2] Although it purported to set forth largely objective tests for determining whether a taking had occurred, *Penn Central* may better be viewed as embodying the aspiration that a just society would make the inevitable adjustments to permitted land uses with sensitivity and compassion. Like the meaning of the Mona Lisa's enigmatic smile, the import of *Penn Central* lies largely in the sensitivities of the beholder.

While judgments about the Mona Lisa are made by casual museum visitors and art critics, the prime audiences for *Penn Central* are land use lawyers and judges. The difficulty for lawyers is figuring out how judges would apply *Penn Central* to their particular facts. The difficulty for judges is figuring out what *Penn Central* really means.

In a related article, the Author analyzes the principal *Penn Central* tests, which he concludes to be four in number, including "parcel as a whole," rather than the conventional three.[3] In this Article, the focus is on the aspirational underpinnings of *Penn Central*, and on the struggle of judges to apply the case without, in the Ninth Circuit's memorable words, becoming the "Grand Mufti" of zoning.[4]

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[1] 438 U.S. 104, 138 (1978).

[2] Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) ("Our polestar . . . remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings.").

[3] Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN ST. L. REV. (forthcoming 2014) (adding "parcel as a whole" as a factor interacting with the "economic impact," "investment-backed expectations," and "character of the regulation" tests).

[4] Hoehne v. Cnty. of San Benito, 870 F.2d 529, 532 (9th Cir. 1989) ("The Supreme Court has erected imposing barriers in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986) [(parallel citations omitted)], and *Williamson County* [*Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*], 473 U.S. 172 [(1985) (parallel citations omitted)], to guard against the federal courts becoming the Grand Mufti of local zoning boards.").

I. *PENN CENTRAL* AS PRAGMATISM

> *So-called "growth," "progress," and "development" are more than symbols of power in modern society; they represent the goal which planners—private and public alike—establish and seek to attain. And the State plays an important, at times crucial, role in achieving that goal.*
>
> Justice William O. Douglas[5]

It is customary to understand the *Penn Central* doctrine as evaluating expectations attributed to landowners with respect to vague notions of fairness.[6] If, as Justice Holmes argued, law consists of the ability to make accurate predictions,[7] the status of *Penn Central* as "law" is dubious.[8] But this understanding of "law" might be unduly narrow.[9]

Some commentators, drawing from complexity theory, have sought to explain law from an evolutionary standpoint, as it interacts with competing regulatory systems and social norms.[10] Professor Carol Rose, for example, argues that the current regulatory takings doctrine reconciles the need for flexibility in solving problems of agglomeration and environmental degradation, with individualized fairness toward owners.[11] From this perspective, *Penn Central* balances fairness and regulatory flexibility.[12] Other commen-

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[5] Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 268 (1972) (Douglas, J., dissenting).

[6] *See generally* Richard A. Epstein, Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993).

[7] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 79 (Dover Publ'ns 1991) (1881).

[8] *See* Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 WM. & MARY BILL RTS. J. 679, 796 (2005).

[9] *See, e.g.*, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 23 (1980) (arguing that law broadly aims to promote overall human flourishing and the ends shared by members of a community).

[10] *See, e.g.*, Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577, 589 (1990) (applying an "evolutionary approach" to understanding regulatory takings); J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407, 1489 (1996) (drawing on complexity theory to propose a "sociolegal" and evolutionary approach to law).

[11] *See* Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 20–23 (2000).

[12] *See, e.g.*, WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 141 (1995) (attempting to move the "justice and fairness" notion in takings doctrine "beyond the

tators have argued that *Penn Central* provided an abstract plane to analyze regulatory conflicts with property, but was never intended to serve as a fountainhead for a takings doctrine.[13]

Consistent with evolutionary theory, regulatory takings doctrine seems to have evolved over time through a process of accidental adaptation, not conscious design.[14] In Ptolemaic fashion, courts have added epicycles upon epicycles to *Penn Central*, without much direction from the Supreme Court.

While the evolution of *Penn Central* has not been one of conscious design, the Supreme Court has deliberately encouraged "ad hocery"[15] by repeatedly stating the need to implicate fairness in regulatory takings cases.[16]

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platitudinous-poster stage" by exploring different academic approaches); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1680 (1988) (arguing that the "no set formula language" of Penn Central is "simply one way of expressing a pragmatic approach to decision making. Pragmatism is essentially particularist, essentially context-bound and holistic; each decision is an all-things-considered intuitive weighing. Pragmatism is indeed 'essentially' ad hoc."); F. Patrick Hubbard, Palazzolo, Lucas, *and* Penn Central*: The Need for Pragmatism, Symbolism, and Ad Hoc Balancing*, 80 NEB. L. REV. 465, 513–14 (2001) (arguing that the *Penn Central* framework is a superior and more nuanced way to approach regulatory takings than *Lucas*).

[13] Gary Lawson et al., *"Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering the* Mathews v. Eldridge *and* Penn Central *Frameworks*, 81 NOTRE DAME L. REV. 1, 36 (2005); Eric R. Claeys, *The* Penn Central *Test and Tensions in Liberal Property Theory*, 30 HARV. ENVTL. L. REV. 339, 369 (2006) (arguing that Penn Central is a way to "bracket disagreement" over takings law).

[14] For example, some Justices seemed surprised to learn how the Supreme Court's ripeness rules effectively stripped federal courts of jurisdiction over state regulatory takings cases. *See infra* Part III.A. Similarly, the Court's insistence that background principles of state property and nuisance law should limit property interests largely has morphed into a set of sub-rules related to the "expectations" factor. *See infra* Part II.C.1. After twenty-five years, the Court also rejected the *Agins* test, which apparently confused or conflated takings and substantive due process. *See infra* Part II.A. Those are some examples of what Justice O'Connor termed in a different context the Court's use of "errant language" in the takings area. *See infra* Part II.B. The Supreme Court's inability to predict the effects of its language raises serious question as to its ability to meaningfully guide takings law towards achieving fairness.

[15] *See* Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1697 (1988) ("Part I demonstrates that the Court does not appear to be articulating consistent formal principles in the takings area. Part II argues that it should try to do just that.").

[16] *See* Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring) ("The temptation to adopt what amount to *per se* rules . . . must be resisted."). For criticism, *see, e.g.*, William W. Wade, Penn Central's *Ad Hocery Yields Inconsistent Takings Decisions*, 42 URB. LAW. 549, 550 (2010) (arguing that Penn Central's *ad hocery* generates arbitrary results, inconsistent with fairness and economic reasoning); Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Tak-*

If there is one overarching theme in regulatory takings, it is that when a governmental action "implicates fundamental principles of fairness underlying the Takings Clause" compensation is in order.[17]

The thesis of this Article is that the Supreme Court has struggled to orient takings law toward fairness in a meaningful way. The Supreme Court generally proceeds by postulating vague and incoherent factors, and leaves it to lower courts to ascertain relevant dicta and give content to such factors. Occasionally, the Supreme Court reverses lower courts without supplying meaningful standards, begetting yet another epicycle of takings litigation.[18] For *Penn Central* skeptics, "the governing standard is to be what might be called the unfettered wisdom of a majority of [the Supreme] Court, revealed to an obedient people on a case-by-case basis."[19]

Less skeptical commentators have sought to justify "fairness" balancing in regulatory takings cases.[20] According to Professor Stewart Sterk, reducing the Taking Clause to a second-order matter of fairness loosens the ability of local regulators to experiment with flexible property arrangements, encouraging federalism by deferring to the States in zoning cases.[21] The Supreme Court always has the ability to intervene if a State fails to provide justice according to its lights. As explained by Justice Brennan:

> [T]he Constitution does not embody any specific procedure or form of remedy that the States must adopt: "The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining . . . [the] niceties regarding 'causes of action'—when they are born, whether they proliferate, and when they die." The States should be free to experiment in the implementation of this rule, pro-

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ings Law?, 30 URB. LAW. 307, 310 (1998) ("[W]hen the Supreme Court overtly puts itself in the business of 'engaging in essentially *ad hoc* factual inquiries' on a case-by-case basis, it creates utter confusion.").

[17] E. Enters. v. Apfel, 524 U.S. 498, 537 (1998).

[18] Morrison v. Olson, 487 U.S. 654, 712 (1988) (Scalia, J., dissenting).

[19] *Id.*

[20] *See* Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 237–56 (2004).

[21] *See id.* Professor Sterk states that "[t]he Supreme Court's *Penn Central* balancing test, which, as a matter of practice, results in deference to the state courts, recognizes the institutional advantages state courts enjoy in constraining regulatory abuse." *Id*. at 206 (footnote omitted).

> vided that their chosen procedures and remedies comport with the fundamental constitutional command.[22]

This statement calls to mind Justice Frankfurter's admonition to his colleagues that the Supreme Court is "a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency."[23]

Although expounding compassion, the Supreme Court has shown little desire to implicate itself in zoning laws. Rather than stay local experimentation with property rights, the Court joined in the experimentation, formulating vague takings tests and novel ripeness rules.[24] The Supreme Court's "ad hoc" attitude in regulatory takings resembles Jonathan Swift's Laputians,[25] an intellectually distraught crowd, applying Cartesian logic to its own inventions and internal debate over fairness, meanwhile glossing over important factual and legal realities on the ground.

The expansion of *Penn Central*'s "ad hoc" fairness review bodes ill for the security of property, which the Framers deemed of paramount importance.[26] In contrast to its concerns in cases implicating free speech,[27] the

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[22] San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 660 (1981) (Brennan, J., dissenting) (citations omitted). Justice Brennan was of the view that the Federal Courts should provide guidance to the States through incorporation doctrine, but that the States should serve as the ultimate bulwark of individual liberty. *See* William J. Brennan, *Guardians of our Liberties—State Courts no Less Than Federal*, 15 JUDGES J. 82, 83 (1976).

[23] Terminiello v. City of Chi., 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting); *see also* Kanner, *supra* note 16, at 311.

[24] *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 866 (1987) (Steven, J., dissenting) (noting that "[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence," and "local governments and officials must pay the price for the necessarily vague standards in this area of the law.").

[25] *See* JONATHAN SWIFT, GULLIVER'S TRAVELS 129–86 (Albert J. Rivero ed., W. W. Norton & Co. 2002) (1726). *See generally* David Renaker, *Swift's Laputians as a Caricature of the Cartesians*, 94 PMLA 936 (1979).

[26] *See, e.g.*, 6 CHARLES FRANCIS ADAMS, THE WORKS OF JOHN ADAMS 280 (Boston, Charles C. Little & James Brown eds., 1851), *quoted in* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 388 (1996) (quoting John Adams's opinion that "[p]roperty must be secured, or liberty cannot exist").

[27] *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2547–48 (2012). The Court stated:

> Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amend-

Penn Central doctrine does not consider the chilling effect that discretionary balancing has on the exercise of property rights.[28] Also, *Penn Central*'s evolving notions of expectations are susceptible to a ratcheting effect. As District of Columbia Circuit Judge Stephen Williams succinctly put it, "regulation begets regulation."[29] Finally, *Penn Central*'s focus on the circumstances of the individual owner avoids considering the aggregate effect that land-use restrictions have on landowners and consumers as a class.[30] Landowners and consumers face serious collective action problems when

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ment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.

Id.

[28] Precisely the opposite is true. When considering whether there has been a taking of property, fairness considerations usually include a possible "chilling effect" on regulators, while no reciprocal policy analysis is offered to account for the effect of regulation on property ownership. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 339 (2002) (concluding that *per se* rules are unnecessary because "fairness and justice" considerations in "facilitating informed decision making by regulatory agencies" and an interest in avoiding "ill-conceived growth" would not be served by such a rule). The efficiency of awarding compensation for takings is subject to an extensive and conflicting economic literature, which Justice Stevens's casual public policy discussion simply ignores. *See, e.g.*, FISCHEL, *supra* note 12, at 96–97 (discussing studies); Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 622 (1984) (discussing problems of fiscal illusion and moral hazard in just compensation law); Joseph J. Cordes & Burton A. Weisbrod, *Governmental Behavior in Response to Compensation Requirements*, 11 J. PUB. ECON. 47 (1979) (discussing studies and arguing that under certain situations compensation can help ameliorate the problem of "fiscal illusion").

[29] Dist. Intown Props. Ltd. P'ship v. District of Columbia, 198 F.3d 874, 887 (D.C. Cir. 1999) (Williams, J., concurring).

[30] Kanner, *supra* note 8, at 681. According to Professor Gideon Kanner:

> "[*Penn Central*'s] aftermath has become an economic paradise for specialized lawyers, a burden on the judiciary, as well as an indirect impediment to would-be home builders, and an economic disaster for would-be home buyers and for society at large. The vagueness and unpredictability of its rules, or more accurately the "factors" deemed significant by the Court which declined to formulate rules, have encouraged regulators to pursue policies that have sharply reduced the supply of housing and are implicated in the ongoing, mind-boggling escalation in home prices—a process that favors the well-housed rich and increasingly disfavors the middle class, to say nothing of those lower on the economic scale who are still climbing the rungs of the socioeconomic ladder." *Id.* (footnotes omitted).

organizing to resist adverse zoning decisions.[31] The *Penn Central* doctrine compounds this problem, both by raising unnecessary procedural barriers to the vindication of constitutional property rights, and by confusing the nature and extent of underlying property rights.[32]

The *Penn Central* doctrine does make room for local planners to decide questions of "growth" and "progress" with little interference from the federal judiciary.[33] Although Justice Brennan envisioned a more robust role for state constitutions and state courts in protecting liberty,[34] since *Penn Central* many state courts have read state just compensation clauses as "co-extensive" with the Fifth Amendment.[35] Also, *Penn Central*'s "ad hoc" three factor test has made its way into state takings doctrine.[36] The question arises whether in their desire to avoid the role of Grand Mufti, federal courts have leaned over backwards and allowed local experimentation with property rights to go, as Justice Holmes put it in a related context, "too far."[37]

The first part of the Article examines how the institutional ecosystem of property rights,[38] as protected by substantive due process and represented by *Pennsylvania Coal Co. v. Mahon*,[39] and *Nectow v. City of Cambridge*,[40]

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[31] *See* David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1704–17 (2013) (discussing the Olsonian dynamics of land-use political markets). *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 1–18 (1965).

[32] *See infra* Part III.A; Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel as a Whole*, 36 VT. L. REV. 549, 549 (2012) (discussing the "parcel as whole" and arguing that its lack of foundation in property law makes it both complex and uncabined, yielding arbitrary results).

[33] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 129 (1978).

[34] *See* Brennan, *supra* note 22, at 83.

[35] *See, e.g.*, St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1222 (Fla. 2011), *rev'd*, 133 S. Ct. 2586 (2013); Ypsilanti Fire Marshal v. Kircher, 730 N.W.2d 481, 516–17 n. 22 (Mich. Ct. App. 2007); Byrd v. City of Hartsville, 620 S.E.2d 76, 79 n. 6 (S.C. 2005); Commonwealth v. Blair, 805 N.E.2d 1011, 1016–17 (Mass. App. Ct. 2004); Strom v. City of Oakland, 583 N.W.2d 311, 316 (Neb. 1998).

[36] *See, e.g.*, Sheffield Dev. Co. v. City of Glenn Heights, 140 S.W.3d 660, 672 (Tex. 2004); Ala. Dep't of Transp. v. Land Energy, Ltd., 886 So. 2d 787, 797–99 (Ala. 2004); United Artists' Theater Circuit, Inc. v. City of Phila., 635 A.2d 612, 617–19 (Pa. 1993).

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

[38] The term "institutional ecosystems" is used here to describe very broadly the relationship between authoritative legal doctrines and decision makers and resources in land. *See* Jon Cannon, *Choices and Institutions in Watershed Management*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 379, 386 (2000).

[39] *See generally* 260 U.S. 393 (1922).

was supplanted by ad hoc "fairness" balancing in *Penn Central*.[41] It also discusses the *Penn Central* case, and describes how the open texture of *Penn Central*'s "ad hoc, factual inquires" liberated judges to apply idiosyncratic standards in particular cases, so long as the terms of discussion assured a deferential treatment toward public interest regulations "adjusting the benefits and burdens of economic life."[42] The second part of the Article analyzes contemporary regulatory takings doctrine, emphasizing how the *Penn Central* doctrine's lack of objective standards leaves judges searching for fundamental fairness in a broad manner.

A. The Just Compensation Tradition in American Law

The United States has a long-standing legal and historical tradition of contempt for state granted monopolies and partial legislation.[43] The Fourteenth Amendment, which includes a Due Process Clause,[44] also includes a Privileges and Immunities Clause,[45] arguably intended to protect common law rights against unwarranted interference by the States.[46] Given its history and structure, it is also possible that the Fourteenth Amendment was in-

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[40] *See generally* 277 U.S. 183 (1928).

[41] *See infra* Part I.B. At the time of Penn Central, American law had been "evolving" away from vested rights and toward interest balancing, most notably in conflicts and procedure. *See, e.g.*, BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963); William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 22–23 (1963).

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

[43] *See* Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983, 987 (2013) (arguing that post-new deal cases on economic liberties are wrongly decided given that "the right to be free from class legislation, monopolies, and grants of special privilege[s] is deeply rooted in this nation's history and traditions").

[44] U.S. CONST. amend. XIV, § 1, cl. 3.

[45] U.S. CONST. amend. XIV, § 1, cl. 2.

[46] This view was rejected by the Supreme Court in the *Slaughter-House Cases*, 83 U.S. (6 Wall.) 36, 79 (1872) (narrowing the due process clause to apply only to rights that "owe[d] their existence to the Federal Government"). Justice Field argued in dissent that the clause was consistent with *Corfield v. Coryell*, 6 F. Cas. 546, 552 (E.D. Pa. 1823) (No. 3,230), which interpreted the Fifth Amendment to protect the common law rights of out-of-state citizens. *Slaughter-House Cases*, 83 U.S. at 97 (Field, J., dissenting). Many modern scholars agree that Field's dissenting interpretation of the clause was correct. *See, e.g.*, AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 157 (2012); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 62–66 (2004); Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 334, 340–46 (2005).

tended broadly as a ban on all forms of class or partial legislation.[47] Concurrently during the nineteenth century, many states added just compensation amendments to constitutionalize existing common law protections of private property.[48]

While the Supreme Court has stated that regulatory takings are "of . . . recent vintage,"[49] this is not completely accurate. While many regulatory takings were pre-empted by limits on the police power, regulatory takings existed before *Pennsylvania Coal Co. v. Mahon*.[50] The lack of federal "regulatory takings" precedent in the early nineteenth century might be due to the modest nature of federal activities, the fact that the Takings Clause, like most provisions of the Bill of Rights, was originally binding only on the federal government,[51] or perhaps to the view that the federal government lacked the power of eminent domain.[52]

In his examination of early state just compensation laws, Professor Robert Brauneis concluded that, "for most of the nineteenth century, just compensation clauses were generally understood not to create remedial duties, but to impose legislative disabilities."[53] As Brauneis noted, compensation clauses "were designed to operate within a vast, complicated, pre-existing

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[47] Calabresi & Leibowitz, *supra* note 43, at 1024 ("[T]he Amendment bans not only systems of caste but also all special [and] partial laws that single out certain persons or classes for special benefits or burdens.").

[48] James W. Ely, Jr., "*That Due Satisfaction May Be Made:" The Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1, 15 (1992) (describing how, during the post-revolutionary era, just compensation was elevated to constitutional status in many states). For an argument that the common law provided the transitional basis to a society based on liberty and individual dignity, see WILLIAM S. HOLDSWORTH, *The Influence of the Legal Profession on the Growth of the English Constitution*, *in* ESSAYS IN LAW AND HISTORY 71, 72 (A.L. Goodhart & H.G. Hanbury eds., 1946).

[49] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002).

[50] *See* Eric R Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1553 (2003) ("Early state eminent-domain opinions did not organize takings cases under the same categories that we apply now, but it is still possible to identify a series of decisions that closely resemble modern regulatory takings cases.").

[51] Barron v. Mayor of Balt., 32 U.S. (7 Pet.) 243, 247 (1833); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177 (1871) (deeming "well settled" that the Takings Clause "is a limitation on the power of the Federal government, and not on the States").

[52] *See* William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1741 (2013).

[53] Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 60 (1999).

common law context, including common law damage remedies."[54] According to Brauneis, takings clauses evolved alongside the dissolution of the common law forms of action,[55] and after the Civil War, courts interpreted state just compensation clauses both as a limitation on the legislature and a source of liability for government and chartered corporations.[56] Fear of what we now would call "crony capitalism" was one of the main reasons supporting the passage of state just compensation amendments.[57]

Pumpelly v. Green Bay Co. captures the post-Civil War understanding of state just compensation clauses.[58] There, the Green Bay Company argued that there was no taking because it was authorized to flood land, and because the damages claimed were consequential, thus sounding in trespass on the case.[59] Justice Miller rejected both arguments. He first found the plea

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[54] *Id.* at 62. According to Brauneis:

> An owner who believed that his property had been taken by eminent domain, like an owner who believed that his property had been subject to an unlawful search or seizure, brought an ordinary common law action of trespass or trespass on the case against whomever might be liable at common law for the occupation or asportation of his property.

Id. at 64–65 (footnotes omitted). After that "the defendant could proceed to the second stage of litigation and seek to justify those acts by appealing to legislation that authorized them and thus altered the common law." *Id.* at 65. It was then up to the plaintiff to argue that the legislation was unconstitutional, because the statute "authorized acts that worked a taking of private property, but provided no just compensation to those whose property had been taken." *Id.*; *See also* FISCHEL, *supra* note 12, at 78 ("When state constitutions were written after Independence, several of the original states simply assumed that the common law right of compensation would continue, and they did not enshrine this particular right in their bills of rights.").

[55] Brauneis, *supra* note 53, at 63, 127. Brauneis stated that states limited compensation to direct, and not consequential damages, and refused to grant permanent damages. *See id.* at 127. This refusal was grounded in common law trespass, which only made retrospective damages available, and notions of sovereign immunity. *See id.* at 63. These distinctions survive in modern takings law in the form of the tort/takings distinction. *See* Hansen v. United States, 65 Fed. Cl. 76, 95 (2005) (discussing an analyzing the tort/takings distinction).

[56] Brauneis, *supra* note 53, at 113 ("The innovation was to treat a just compensation clause as a kind of legislation providing a right and remedy to property owners, rather than merely as a limitation on legislative power.").

[57] *Id.* at 115–20 (discussing Just Compensation Amendments in the backdrop of internal improvements legislation, and the perceived need to reign in powerful railroad corporations); *see also* FISCHEL, *supra* note 12, at 78–79.

[58] 80 U.S. (13 Wall.) 166, 176 (1871) ("This requires a construction of the Constitution of Wisconsin.").

[59] *Id*. at 177.

misconstrued the authorizing statute.[60] Then, in broad language, Justice Miller held that limiting takings to direct invasions of property would work a curious effect on the constitutional clause at issue:

> Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.[61]

Thus, the early history suggests just compensation clauses functioned as "swords"[62] to protect the common law rights of property owners against government interference.[63] The United States Supreme Court, along with state supreme courts, viewed just compensation as protecting the delicate common law ecosystem of property rights. Understood against this background, the turn to substantive due process was not a naked attempt to constitutionalize laissez-faire. Rather, it was an attempt to uphold "the laws and practices of our ancestors" finding expression in English common law and colonial practice.[64]

Similarly, substantive due process has long-standing historical antecedents in American law. Even before the incorporation of property rights protections against the states in *Chicago, Burlington & Quincy Railroad v. Chicago*,[65] federal courts, like their state counterparts, were pronouncing that uncompensated takings would be "arbitrary."[66] *Chicago, B&Q* itself was a substantive due process case:

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[60] *Id.* at 176 ("[W]e must hold that, so far as the plea relies on this statute as a defense, it is fatally defective.").

[61] *Id.* at 178.

[62] Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1532 (1972).

[63] Brauneis, *supra* note 53, at 110 ("Courts that attempted to provide fuller accounts of what they were doing most often drew on a vision of the common law, not simply as a set of judge-made rules of conduct, but as a source of remedies to protect rights whatever their source.").

[64] *See* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 13 (1985) (noting that the property and liberty of which the Framers' generation was "so proud" derived from the historic "rights of Englishmen").

[65] 166 U.S. 226, 241 (1897).

[66] *See, e.g.*, Balt. & O. R. Co. v. Van Ness, 2 F. Cas. 574, 576 (C.C.D.C. 1835) (No. 830) (noting that while the taking would not contravene the Constitution, "it would be an arbitrary proceeding").

> [I]f, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the Fourteenth Amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the State to public use and without compensation of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation.[67]

Thus, at the time of incorporation the Due Process and Takings Clauses were entangled with the common law system of property. However, long before *Penn Central*, the relation between common law property rights and constitutional guarantees started to decay.

B. The Road to Penn Central

The introduction of Euclidian zoning and land-use planning largely functioned as a substitute, rather than a complement, to common law regulation of property rights.[68] While the Court in *Village of Euclid v. Ambler Realty Co*. ostensibly relied on nuisance principles,[69] the case itself displayed a flexible conception of nuisance.[70] The introduction of comprehensive zoning further required a corresponding examination of judicial doctrine, as it became clear that zoning was not ostensibly anchored in traditional common law nuisance principles.[71] Since *Euclid*, administrative

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[67] *Chicago, B&Q*, 166 U.S. at 236.

[68] Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 685 (1973) (noting that zoning might also displace informal problem-solving between neighbors).

[69] 272 U.S. 365, 397 (1926) (rejecting a facial challenge to a comprehensive zoning law). While he wrote the opinion upholding zoning as a general matter in *Euclid*, two years later, in *Nectow v. City of Cambridge*, 277 U.S. 183, 187–89 (1928), Justice Sutherland struck down a zoning ordinance as arbitrary as applied.

[70] *See* Schleicher, *supra* note 31, at 1681 (stating that nuisance justifications were central to the court's reasoning in *Euclid*, but noting that "it became clear that zoning regimes did far more than reduce traditionally justiciable nuisances").

[71] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring) ("The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society." (citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 593 (1962))).

processes and regulation have largely replaced common law property rights and litigation as enforcement tools.[72]

1. The Expanding Police Power

The gradual evolution and growth of regulation under the police power and the Commerce Clause were central to the eventual significant displacement of traditional common law rights.[73] During the late nineteenth century, utilities and common carriers, especially railroads, saw an increase in regulation,[74] followed by extensive business regulation in the twentieth century.[75] During the subsequent period, often referred to as the *Lochner* Era,[76] the Supreme Court invoked the Due Process Clause to invalidate legislation that infringed on common law contract and property rights.[77] However, the Great Depression subsequently discredited economic substantive

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But zoning might be both over inclusive and under inclusive of common law nuisance, in the sense that zoning eliminates the risk of locally undesirable uses which would not actually be attracted to a location, and in the sense that zoning can fail to eliminate actual nuisances. *See* Ellickson, *supra* note 68, at 693–94.

[72] *See* Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State*, 41 J. ECON. LITERATURE 401, 401 (2003) (developing an economic model to explain the rise of a regulation during the Progressive Era). *See generally* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938).

[73] *See* Adam S. Grace, *From the Lighthouses: How the First Federal Internal Improvement Projects Created Precedent That Broadened the Commerce Clause, Shrunk the Takings Clause, and Affected Early Nineteenth Century Constitutional Debate*, 68 ALB. L. REV. 97, 102–03 (2004); *See generally* STEVEN J. EAGLE, REGULATORY TAKINGS §§ 2-1 to -5 (5th ed. 2012) (detailing the evolution of the Police Power).

[74] The early cases proceeded gradually by expanding the circumstances under which regulation was affected with a "public interest." *See, e.g.*, Munn v. Illinois, 94 U.S. 113, 125–26 (1877) (holding the storage-houses and other special business could be regulated if there was a *sufficient* public interest without violating due process).

[75] *See* Glaeser & Shleifer, *supra* note 72, at 401.

[76] Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 877 (1987); *see also* David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1, 1–2 (2003) (challenging Sunstein's account of Lochnerism).

[77] *See, e.g.*, *Ex parte* Young, 209 U.S. 123, 148–49 (1908) (finding a state statute regulating railroad rates violated the fourteenth amendment due process clause). This included commerce clause challenges. *See* Barry Cushman, *Carolene Products and Constitutional Structure*, 2012 SUP. CT. REV. 321, 376 (arguing that the commerce clause cases were based on evolving notions of due process and vested rights).

due process.[78] President Roosevelt's ensuing court-packing plan was averted by the Court's "switch in time that saved nine," and led to a Court that "by the 1940s was dramatically different."[79] The Supreme Court quickly came to endorse increased regulation of commerce in the name of the "public interest."[80]

The New Deal Court's "conceivable rational basis" test for business regulation is well known.[81] After *Nectow v. City of Cambridge*,[82] the Court abstained from reviewing zoning questions for half a century.[83] Lacking a ready-made constitutional doctrine to address the constitutional implications of zoning, state courts applied constitutional norms and intertwined them with flexible policy and common law principles.[84] In many cases, it was not clear what constitutional clause applied, or even what constitution supplied the limiting principles. The general rule was that "vested" rights would be more protected than others, and that, if a court found an important public interest, no compensation would be forthcoming.[85]

2. Making Room for the Individual

As Justice Kennedy recently stated, "the right to own and [to] hold property is necessary [for] the exercise and preservation of freedom."[86] In-

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[78] *See* JAN G. LAITOS, LAW OF PROPERTY RIGHTS PROTECTION: LIMITATIONS ON GOVERNMENTAL POWERS § 2.03[A] (2013).

[79] *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 1047–48 (2000).

[80] *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT 48 (1998).

[81] For a conventional summary, see Hettinga v. United States, 677 F.3d 471, 481 (D.C. Cir. 2012) (Brown, J., concurring). However, perhaps the irrebuttable hypothetical rational basis test is more adequately traced to the later decision, *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–91 (1955). *See* Randy E. Barnett, *Keynote Remarks: Judicial Engagement Through the Lens of* Lee Optical, 19 GEO. MASON L. REV. 845, 856 (2012) ("While most academics attribute the judicial withdrawal from policing economic legislation to the New Deal Court, as the previous analysis shows, the true credit should go to the Warren Court and, in particular, to Justice William O. Douglas.").

[82] *See generally* 277 U.S. 183 (1928) (holding that restrictions by zoning regulations must bear a substantial relation to public health, safety, morals, or general welfare).

[83] Goldblatt v. Town of Hempstead, 369 U.S 590, 591 (1962), was an unexceptional exception to the rule.

[84] S*ee* DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION 9 (1993).

[85] *See id.* at 15.

[86] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 734 (2010) (Kennedy, J., concurring).

terestingly, recognition of the role of property rights in securing liberty was the impetus for the argument that government largess had become so important that it should be given the same protections against arbitrary deprivation that traditional property enjoyed.[87]

Charles Reich's *The New Property*,[88] the seminal statement of this view, had an important role in developing the Supreme Court's insistence on compassion for the individual.[89] As Reich saw it, the "public interest" state resembled feudalism in its subordination of individual man.[90]

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[87] *See* Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) ("[A] fundamental interdependence exists between the personal right to liberty and the personal right in property."). For examples of the Court revisiting land-use restrictions and personal freedom, see Moore v. City of E. Cleveland, 431 U.S. 494, 505–06 (1977) (ability of members of extended family to live together trumps zoning ordinance); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 521 (1981) (ordinance restricting billboards unconstitutionally restricted political speech); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76–77 (1981) (ordinance prohibiting "nude dancing" in an adult bookstore impermissibly restricted speech); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982) (ordinance granting churches veto rights over liquor licenses offended the prohibition against the establishment of religion); and City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985) (denial of a special use permit to home for the mentally retarded was not rationally based and violated the equal protection clause).

[88] *See generally* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (discussing importance of government conferring benefits such as professional licenses and welfare benefits for individual recipients, and the need for their procedural protections akin to those of traditional property rights).

[89] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 267–71 (1970) (holding that the state could not deprive recipients of welfare benefits without a pre-termination hearing and that the Due Process Clause required reasons should be stated and evidence cited supporting the determination). Justice Black in dissent, asserting the "public interest" perspective, observed that it "somewhat strains credulity to say that the government's promise of charity to an individual is property belonging to that individual when the government denies that the individual is honestly entitled to receive such a payment." *Id.* at 275 (Black, J., dissenting). Charity or not, the case stands for meaningful scrutiny of administrative action under the Due Process Clause, which many thought a dead letter.

[90] Reich outlined several factors of feudal tenure shared by the public interest state. These factors trace many aspects of zoning: (1) by enabling zoning, the underlying fee simple use rights are turned over to local governments, which allocate and redistribute uses according to the need of the community; (2) the public trust doctrine is used to create easements and servitudes on private land, blurring the line between the public and private property; (3) special zoning laws give rise to special commissions, boards of adjustment, zoning boards etc. existing outside the traditional three branches of government; (4) low-income housing programs classify individuals by status, and rent control laws restrict the alienation of property; (5) most future use rights are held conditionally, and may include obligations in the form of exactions or community benefits subject to the discretion of government actors; (6) failure to abide by government conditions can mean complete denial of use rights; (7) zoning laws increase government involvement in private decisions,

Along similar lines, Professor Dennis Coyle, in reviewing land-use law, argued that "[t]he attachment of public service conditions to land is evocative of the feudal emphasis on status and obligation, and the heavily decentralized regulatory process can make California communities akin to feudal fiefdoms."[91] At the time, leading Progressive California judges publically admired at least some aspects of feudalism.[92] They defended zoning precisely on those terms, arguing that in a "society of organization" law should be reformed "to impose duties and obligations on the basis of status."[93]

There is a persistent tendency for Reich's zone of liberty to be threatened by zoning that ostensibly focuses on land *uses* and actually focuses instead on the personal characteristics of land *users*.[94]

C. The Penn Central *Case*

The legacy of Justice Brennan evinces Charles Reich's concern with reconciling the public interest and individual autonomy. Speaking on the subject of *Goldberg v. Kelly*[95] years later, Justice Brennan, defended that decision as "an expression of the importance of passion in governmental conduct, in the sense of attention to the concrete human realities at stake."[96]

As in *Goldberg*, Justice Brennan's seminal opinion in *Penn Central Transportation Co. v. New York City*[97] discussed in broad terms when a

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encouraging cronyism between private developers and public officials; (8) the purported object of the whole system is to enforce "the public interest." Reich, *supra* note 88, at 770. *See* 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 229–406 (2d ed. 1898).

[91] *See* COYLE, *supra* note 84, at 118.

[92] *See id.* at 215.

[93] *Id.* (citing Mathew O. Tobriner & Joseph R. Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CALIF. L. REV. 1247, 1248–49 (1967)).

[94] *See, e.g.*, Bd. of Supervisors v. Gaffney, 422 S.E.2d 760, 763 (Va. 1992) (focusing, inter alia, on use of area zoned for "recreation" as recreation by nudists, and that area was not zoned for a "nudist club"); Cal. Bldg. Indus. Ass'n v. City of San Jose, 157 Cal. Rptr. 3d 813, 824 (Cal. Ct. App. 2013) (holding mandatory set aside of 15 percent of units for "inclusionary" housing to be land use regulation, rather than exaction), *cert. granted*, 307 P.3d 878 (Cal. Sept. 11, 2013).

[95] 397 U.S. 254, 262 n.8 (1970) (noting that "[i]t may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity'").

[96] William J. Brennan Jr., *Reason, Passion, and "The Progress of the Law,"* 42 REC. ASS'N B. CITY OF N.Y. 948, 971 (1987).

[97] *See generally* 438 U.S. 104 (1978). For a more complete discussion, see Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN ST. L. REV. (forthcoming

regulation of property rights should trigger judicial compassion.[98] Notably, *Penn Central* did little to discern the property interests at stake.[99] Rather, the Court saw its role largely in terms of protecting landowners' legitimate "expectations" in an age of pervasive regulation.[100] Thus, the *Penn Central* Court embarked on the murky path of exploring notions of fundamental fairness.

1. *Penn Central* and Public Creation of Value

The decision of the New York Court of Appeals in *Penn Central* considered whether the railroad achieved a fair rate of return on Grand Central Terminal despite the use restrictions.[101] In making this determination, Chief Judge Charles Breitel announced it was necessary to subtract "that ingredient of property value created not so much by the efforts of the property owner, but instead by the accumulated indirect social and direct governmental investment in the physical property, its functions, and its surroundings."[102]

Justice Brennan did not discuss Judge Breitel's Georgist view that society gives value to property. Instead, he broadly deemed the regulation as "beneficial,"[103] a factor generally not relevant in the law of eminent domain.[104] Perhaps Justice Brennan was invoking a distorted view of "average

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2014) (adding "parcel as a whole" as a factor interacting with the "economic impact," "investment-backed expectations," and "character of the regulation" tests) and Kanner, *supra* note 8.

[98] *See* Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. Rev 899, 909 (2007).

[99] *See infra* Part I.C.2.

[100] *Penn Central*, 438 U.S. at 124 (discussing "distinct investment-backed expectations").

[101] Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271, 1272–73 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978).

[102] *Id.*

[103] *Penn Central*, 438 U.S. at 134–135 ("Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures . . . by improving the quality of life in the city as a whole—which we are unwilling to do—we cannot conclude that the owners of the Terminal have in no sense been benefitted by the Landmarks Law.").

[104] *See generally* 3 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 8A.02 [3]–[5] (3d ed. 2013) (noting that general benefits, such as enhancing the city's aesthetics, are not considered offsetting benefits in condemnation law).

reciprocity of advantage."[105] Alternatively, Justice Brennan was asserting that landmark regulations were desirable, generally fair, and not a sufficient hardship on Penn Central to trigger the need for compassion.[106]

2. *Penn Central*'s Vanishing Bundle

Justice Brennan's opinion did not identify the property interest in the airspace above the Terminal in which construction had been precluded as the property taken, but instead deemed the city tax block that included Grand Central Terminal as "the relevant parcel" for analysis. Thus, Brennan confounded tangible physical boundaries with intangible property interests.[107] In dissent, then-Justice Rehnquist noted that the city had effectively exacted a non-consensual servitude on the railroad's property that could not be justified by the concept of reciprocity of advantage.[108]

Overall, Justice Brennan seemed less concerned with the empirics of the case than with exploring the commands of fundamental fairness.[109] While the New York high court treated Penn Central as a regulated utility whose income stream could be adjusted in the public interest, the U.S. Supreme Court treated the definition of its property as elastic so as to preclude just compensation.[110] In this regard, Justice Brennan's use of "parcel as a whole" to define the relevant property interest[111] might be inconsistent with

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[105] *Penn Central*, 438 U.S. at 138 (Rehnquist, J., dissenting) ("Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks.").

[106] *See id.*

[107] *Id.* at 130–31.

[108] *Id.* at 143 (Rehnquist, J., dissenting).

[109] *See, e.g.*, William W. Wade, Penn Central's *Economic Failings Confounded Takings Jurisprudence*, 31 URB. LAW. 277, 284–85 (1999) (arguing that the *Penn Central* opinion relied on incorrect facts and applied *sui generis* concepts divorced from real estate valuation methods).

[110] *See* Richard A. Epstein, *The Takings Clause and Partial Interests in Land: On Sharp Boundaries and Continuous Distributions*, 78 BROOK. L. REV. 589 (2013). Epstein noted that, in the New York Court of Appeals, "the entire case was treated as a rate regulation matter." *Id.* at 616. Furthermore, Justice Brennan's invocation of "parcel as a whole" meant that "so long as there is some residual value . . . the destruction of any fractional interest is of no concern." *Id.* at 619.

[111] *Penn Central*, 438 U.S. at 130–31; *see also* Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel as a Whole*, 36 VT. L. REV. 549 (2012) (reviewing relevant cases and current extensions of the doctrine).

the Court's general insistence in *Erie R.R. Co. v. Tompkins* that "[t]here is no federal general common law."[112]

3. Class Legislation in *Penn Central*

Perhaps inevitably, *Penn Central* carried undertones of equal protection. Justice Brennan quoted the Court's admonition in *Armstrong v. United States* that "the 'Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[113]

While the Takings Clause serves many purposes,[114] *Armstrong* evinces deeply rooted judicial disdain for laws singling out individuals to bear special burdens.[115] Counsel for Penn Central had suggested that the Landmark Preservation Act was analogous to "reverse spot" zoning, discriminating against a few owners for the benefit of the public at large.[116] While Justice Brennan saw the Act as general legislation worthy of respect,[117] Justice Rehnquist noted that the law selected only 400 structures, out of over a million, to bear the regulatory burden of providing aesthetic benefits to the City of New York.[118]

Since *Penn Central*, the Supreme Court has remained divided as to when public burdens are appropriately imposed on private individuals with-

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[112] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[113] *Penn Central*, 438 U.S. at 140 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[114] *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 49–51 (3d ed. 1986) (ensuring efficiency); Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP CT. REV. 1, 44; Steven J. Eagle, *Public Use in the Dirigiste Tradition: Private and Public Benefit in an Era of Agglomeration*, 38 FORDHAM URB. L.J. 1023, 1078–81 (2011) (insulating the individual and preventing crony capitalism).

[115] *See, e.g.*, Ely, *supra* note 48, at 3 n.10 (citing Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795) (noting that "no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompense in value"); Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893) (declaring that right to compensation "prevents the public from loading upon one individual more than his just share of the burdens of government")).

[116] *Penn Central*, 438 U.S. at 132.

[117] *Id.* at 109 (asserting that the city "acted from the conviction that 'the standing of [New York City] as a world-wide tourist center and world capital of business, culture and government' would be threatened if legislation were not enacted to protect historic landmarks and neighborhoods from precipitate decisions to destroy or fundamentally alter their character").

[118] *Id.* at 138.

out compensation.[119] The Court has continued to invoke *Armstrong*'s dicta in a way that blurs the distinction between the Equal Protection and Due Process Clauses and the Takings Clause.[120] At the time *Penn Central* was decided, the Court used the term "takings" loosely to refer to government actions that violated substantive due process and equal protection.[121] Therefore, perhaps *Penn Central* was never a regulatory takings case to begin with.

4. *Penn Central*'s Conception of the Public Interest

While much scholarship focuses on categorizing regulatory takings cases according to the nature of the conception of property embodied in opinions,[122] this Article turns that approach on its head. If conceptions of fundamental fairness are the gravamen of the *Penn Central* universe, then the doctrine is driven by conceptions of what constitutes the public interest, and not by property concepts. Notions of fundamental fairness depend on background understandings of what the "public interest" requires.[123] However, there are competing theories of what constitutes the "public interest."

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[119] The Court's cases raise many varied issues. *See, e.g.*, Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2595–97 (2013) (permit denials following refusal to accede to extortionate monetary exactions unconstitutionally burden Takings Clause rights); Pennell v. City of San Jose, 485 U.S. 1, 20–23 (1988) (Scalia, J., concurring in part and dissenting in part) (asserting that rent control based in part on individual tenants' financial circumstances constitutes a taking).

[120] *See, e.g.*, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536–37 (2005).

[121] *See* Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59 (1978). *Duke Power* was decided the same term as *Penn Central*, and concerned a challenge to a statute limiting liability in the case of nuclear accidents. *Id.* at 64–65. The majority and concurring opinions broadly intertwined equitable remedies under the takings clause with equal protection and due process deprivations. *Id.* at 94, 101. The Court upheld the law as appropriately furthering the public interest without depriving challengers of due process or equal protection, hence not amounting to a taking. *Id*. at 93–94. In upholding the law as not violating equal protection, however, the Court noted that a Fifth Amendment takings claim might be available under the Tucker Act in case of a Nuclear Accident. *Id.* at 94 n.39.

[122] *See* Claeys, *supra* note 13, at 340 (discussing tensions between the classical approach to property and the modern approach to property in takings doctrine).

[123] *See id.* However, Professor Claeys also notes that definitions of property adopted by the Court in regulatory takings cases depend largely on ex ante judgments about public policy. *Id.* at 342.

The constrained version of the "public good" typically associated with classical liberalism, was wary of human nature,[124] and relies on a generalized ecosystem of property rules that leave "to everyone else the like advantage."[125] In this view, only natural monopolies, such as utilities and common carriers, were affected with a substantial public interest, allowing for broad regulation.[126] The broad version of the "public interest," present in *Penn Central*, has intellectual roots in the early interaction of pragmatism and progressive political theory; a blending of scientific positivism[127] with Jacksonian ideals of equality and an Anti-Federalist distaste for commercialism.[128]

As a corollary to their enthrallment with social experimentation, pragmatists rejected the concept of truth, preferring the more guarded concepts of "warranted assertibility,"[129] or "falsifiability."[130] If truth only is "warranted," or "assertible," there are no immutable principles, only testable hypotheses and ongoing experimentation.[131] The public interest is open to dis-

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[124] THE FEDERALIST NO. 10 (JAMES MADISON); *see also* THOMAS SOWELL, A CONFLICT OF VISIONS: IDEOLOGICAL ORIGINS OF POLITICAL STRUGGLES 19–21 (1987) (describing the clash between "constrained" and "unconstrained" visions about the perfectibility of human nature as underlying many seemingly disparate political conflicts).

[125] James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON 266 (Robert Rutland et al. eds., 1983).

[126] *See* Richard A. Epstein, *Exit Rights and Insurance Regulation: From Federalism to Takings*, 7 GEO. MASON L. REV. 293, 296 (1999) (arguing that the phrase "public interest" "should not necessarily strike terror into the hearts of the defenders of free markets, for when used by Lord Hale in *De Portibus Mari* (Concerning the Gates of the Sea), it only included those industries where firms exercised monopoly power over their customers").

[127] *See generally* AUGUSTE COMTE AND POSITIVISM, THE ESSENTIAL WRITINGS (Gertrud Lenzer ed., 1998).

[128] *See* Elvin T. Lim, *The Anti-Federalist Strand in Progressive Politics and Political Thought*, 66 POL. RES. Q. 32, 32–41 (2013).

[129] John Dewey, *Propositions, Warranted Assertibility, and Truth*, 38 J. PHIL. 169, 169 (1941).

[130] *See* KARL R. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 41 (1959) ("I shall require [of a scientific system] that its logical form shall be such that it can be singled out, by means of empirical tests, in a negative sense: it must be possible for an empirical scientific system to be refuted by experience." (emphasis omitted)); RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 6 (2003) (asserting that "even scientific knowledge is tentative, revisable—in short, fallible").

[131] Similarly, where there is not immutable or correct rule of law, there is public policy. Pragmatists, in this vein, rejected natural law as lacking a scientific "pedigree," a sentiment trace-

cussion and change, which can be accomplished through the formulation of public policy.[132] For early American pragmatists in the progressive tradition, centralization and planning were the means to realize autonomy and equity in industrial society.[133]

While policy has replaced "rights," philosophical pragmatism has gained adherents, and with time, sophistication. Judge Richard Posner, for example, embraces philosophical pragmatism and argues that law should remain flexible as social science advances and society changes.[134] Efficiency helps to define, but does not exhaust, the public interest.[135] Sometimes, advocates assert, the public interest will require dramatic changes in institutional arrangements, including the expropriation of property rights.[136] Overall, pragmatism requires flexibility, which finds refuge in flexible doctrine.[137] It is in this latter sense that *Penn Central*'s "ad hoc*"* determination of governmental fairness stands for pragmatism in takings law.[138]

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able to Jeremy Bentham. *See* Ross Harrison, *Jeremy Bentham*, *in* THE OXFORD COMPANION TO PHILOSOPHY 87–88 (Ted Honderich ed., 1995).

[132] *See, e.g.*, Ann Southworth, *Conservative Lawyers and the Contest Over the Meaning of "Public Interest Law,"* 52 UCLA L. REV. 1223, 1224 (2005) (documenting how conservative legal advocacy groups based their organizational models on leftists organizations, in order to influence public policy and advance conservative conception of the public good).

[133] *See* JOHN DEWEY, LIBERALISM AND SOCIAL ACTION 60 (Prometheus Books 2000) (1935).

[134] RICHARD A. POSNER, OVERCOMING LAW 401–405 (1995).

[135] *See* BURTON A. WEISBROD ET AL., PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 4 (1978).

[136] Contemporary examples of innovative expropriation include confronting sea-level rise and rescuing underwater mortgages. *See* J. Peter Byrne, *The Cathedral Engulfed: Sea-Level Rise, Property Rights, and Time*, 73 LA. L. REV. 69, 88 (2012) (arguing that sea-level rises will require regulatory innovation and massive interference with property rights); Robert Hockett, *It Takes a Village: Municipal Condemnation Proceedings and Public/Private Partnerships for Mortgage Loan Modification, Value Preservation, and Local Economic Recovery*, 18 STAN. J.L. BUS. & FIN. 121, 149 (2012) (calling for the condemnation of "underwater" mortgages, where the loan balance exceeds fair market value, as a way to stabilize local economies).

[137] The need for flexible arrangements might have led to the disintegration of the concept of property into a bundle of severable rights. *See* Thomas C. Grey, *The Disintegration of Property*, *in* PROPERTY 81–82 (J. Roland Pennock & John W. Chapman eds., 1980). For an informative symposium on the subject, see generally Symposium, *Intellectual Tyranny of the Status Quo: Property: A Bundle of Rights?*, 8 ECON J. WATCH 193 (2011).

[138] Hubbard, *supra* note 12, at 515 (arguing that *Penn Central* is a superior approach to takings than *Lucas*).

II. THE GRAN MUFTI'S RELUCTANT AWAKENING

> *Federal Courts are not boards of zoning appeals. This message, oft-repeated, has not penetrated the consciousness of property owners who believe that federal judges are more hospitable to their claims than are state judges. Why they should believe this we haven't a clue; none has ever prevailed in this circuit . . . .*
>
> Judge Frank Easterbrook[139]

The Supreme Court's unwillingness to review local land use determinations undoubtedly contributed to Chief Justice Rehnquist's reminder that the Takings Clause was not a "poor relation" to other constitutional protections.[140] Moreover, neither conservative nor progressive Justices have pressed to eliminate entirely the compensability of regulatory takings. For conservatives, the preferred path was to adopt bright-line rules, such as the "deprivation of all economically feasible use" principle in *Lucas v. South Carolina Coastal Council*.[141] For progressives, the path was shown by Professor Frank Michelman, who sharply distinguished between the deserving owner, for whom a new regulation might inflict the sharp pang of deprivation of an existing use, and the speculator, for whom the regulation means the loss of one possible land use among many.[142]

After a quarter century of wrangling over regulatory takings law, the Court reasserted the primacy of the *Penn Central* ad hoc balancing model in *Lingle v. Chevron U.S.A. Inc*.[143] This section surveys the contemporary issues in regulatory takings after *Lingle*, including the Court's ongoing explo-

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[139] River Park, Inc. v. City of Highland Park, 23 F.3d 164, 165 (7th Cir. 1994).

[140] Dolan v. City of Tigard, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.").

[141] 505 U.S. 1003, 1016 n.7 (1992). For a broader exposition of the importance of bright-line rules, see generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[142] Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1234 (1967) (comparing an apartment house owner who would lose "the apartment investment he depended on" with "the nearby land speculator who is unable to show that he has yet formed any specific plans for his vacant land," and who "still has a package of possibilities," albeit with "lessened" value).

[143] 544 U.S. 528, 538 (2005).

ration of fairness, and its continued unease with the due process framework of its regulatory takings jurisprudence.

A. Casting Away a Heritage of Substantive Due Process

While it is customary today to think of constitutional protections regarding deprivations of property as synonymous with the Takings Clause, that is a decidedly revisionist view of history.[144]

In what is generally regarded as the seminal regulatory takings case, *Pennsylvania Coal Co. v. Mahon*, Justice Holmes never referred to the Takings Clause.[145] *Pennsylvania Coal* is better viewed as an incremental extension of Contract Clause and Due Process Clause jurisprudence.[146] In Holmes's view: "As applied to this case the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far."[147]

Justice Stevens's dissent in *Dolan v. City of Tigard*[148] asserted that *Chicago, Burlington & Quincy Railroad* "applied the same kind of substantive due process" as spawned *Lochner*, and that "[t]he so-called 'regulatory takings' doctrine that the Holmes dictum [in *Pennsylvania Coal*] kindled has an obvious kinship with the line of substantive due process cases that *Lochner* exemplified."[149] Stevens added that "[l]ater cases have interpreted the Fourteenth Amendment's substantive protection against uncompensated deprivations of private property by the states as though it incorporated the text of the Fifth Amendment's Takings Clause."[150] He saw "nothing problematic" in reinterpreting due process cases as takings cases pertaining to physical invasions, but that such reinterpretation involving regulatory takings creates "potentially open-ended sources of judicial power to invalidate state economic regulations."[151]

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[144] *Supra* Part I.A; *see also* Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 978–79 (2000).

[145] *See generally* 260 U.S. 393 (1922).

[146] *See, e.g.*, 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, 666 (1996).

[147] *Pennsylvania Coal*, 260 U.S. at 413.

[148] 512 U.S. 374, 405 (1994) (Stevens, J., dissenting).

[149] *Id.* at 406–07 (Stevens, J., dissenting) (footnote omitted).

[150] *Id.* at 406 (Stevens, J., dissenting) (citing Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 481 n.10 (1987)).

[151] *Id.* at 406–07 (Stevens, J., dissenting).

Justice Stevens's provocative invocation of Lochnerian principles elicited a curt response from the *Dolan* majority. Chief Justice Rehnquist wrote that "there is no doubt that later cases have held that the Fourteenth Amendment does make the Takings Clause of the Fifth Amendment applicable to the States. Nor is there any doubt that these cases have relied upon *Chicago, B. & Q. R. Co. v. Chicago* to reach that result."[152]

The Court's unwillingness to acknowledge substantive due process more explicitly might be ascribed to the dislike of judicial conservatives of its uncabined nature,[153] and the sharing by judicial progressives of Justice Stevens's concern that economic substantive due process is antidemocratic.[154] Justice Scalia, for example, vehemently expressed his disapproval of substantive due process in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*.[155] He reminded Justice Kennedy that economic liberties are not protected by substantive due process,[156] and also that the Court's *Graham* doctrine[157] precluded substantive due process challenges in ordinary takings cases.[158]

Subsequent to Justice Stevens's dissent in *Dolan*, Justice O'Connor considered the Court's "substantially advance" formulation, first stated in *Agins v. City of Tiburon*,[159] in her opinion for the Court in *Lingle v. Chev-*

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[152] *Id.* at 384 n.5 (citations omitted).

[153] *See, e.g.*, United States v. Carlton, 512 U.S. 26, 39 (1994) (Scalia, J., concurring) (describing substantive due process as an "oxymoron"); Nat'l Paint & Coatings Ass'n v. City of Chi., 45 F.3d 1124, 1129 (7th Cir. 1995) (Judge Frank Easterbrook noting acerbically that "[n]ow [the Court has] spent some time looking through the Constitution for the Substantive Due Process Clause without finding it.").

[154] *See, e.g.*, *Dolan*, 512 U.S. at 406–07 (Stevens, J., dissenting) (warning that due process-based compensation for takings of property had an "obvious kinship" with Lochnerism).

[155] 560 U.S. 702, 721 (2010).

[156] *Id.* ("The first problem with using Substantive Due Process to do the work of the Takings Clause is that we have held it cannot be done.")

[157] *See generally* Graham v. Connor, 490 U.S. 386 (1989).

[158] *Stop the Beach Renourishment*, 560 U.S. at 721 (quoting Albright v. Oliver, 510 U.S. 266, 273 (1994) (four-Justice plurality opinion) (quoting *Graham*, 490 U.S. at 395)) ("'Where a particular Amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."'").

[159] *See generally* 447 U.S. 255, 260 (1980).

ron U.S.A. Inc.[160] In the course of explaining why "substantially advance" was not a legitimate takings test,[161] she observed:

> There is no question that the "substantially advances" formula was derived from due process, not takings, precedents. In support of this new language, *Agins* cited *Nectow v. Cambridge*, a 1928 case in which the plaintiff claimed that a city zoning ordinance "deprived him of his property without due process of law in contravention of the Fourteenth Amendment[.]" *Agins* then went on to discuss *Village of Euclid v. Ambler Realty Co.*, a historic decision holding that a municipal zoning ordinance would survive a substantive due process challenge so long as it was not "clearly arbitrary and unreasonable, having no *substantial relation to the public health, safety, morals, or general welfare*."
>
> . . . Moreover, *Agins'* apparent commingling of due process and takings inquiries had some precedent in the Court's then-recent decision in *Penn Central*.[162]

It was also preceded by long-standing Supreme Court jurisprudence that was never overruled during the New Deal.[163]

Justice O'Connor's observation that *Penn Central* was a precedent for "commingling" due process and takings law is important.[164] The *Penn Central* doctrine attempts to finesse the problem by abjuring economic substantive due process while continuing to maintain a property deprivations jurisprudence sensitive to just deserts and fairness.[165] Thus, the Court confirms William Faulkner's truism: "The past is never dead. It's not even past."[166]

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[160] 544 U.S. 528, 540 (2005).

[161] See *infra* Part II.A.3 for discussion.

[162] *Lingle*, 544 U.S. at 540–41 (alteration in original) (citations omitted) (quoting Nectow v. City of Cambridge, 277 U.S. 183, 187–88 (1928)) (quoting Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).

[163] *See* Barbier v. Connolly, 113 U.S. 27, 31 (1885) (Field, J.) (holding that the Fourteenth Amendment did not prohibit regulation if the regulation serves an important public interest and the regulation meaningfully furthers that interest).

[164] *See Lingle*, 544 U.S. at 541.

[165] *See* Richard A. Epstein, *From* Penn Central *to* Lingle*: The Long Backwards Road*, 40 J. MARSHALL L. REV. 593, 606–07 (2007) ("The Supreme Court made a small step forward when it

1. *Penn Central*'s Centrality Reasserted in *Lingle*

Given its commingling of due process with takings, the elevation of *Penn Central* to takings "polestar" status seems curious.[167] As cited in takings opinions, *Penn Central* usually stands as a metaphor for balancing and as authority for the three-factor test subsequently extrapolated by then-Justice Rehnquist in *Kaiser Aetna v. United States*.[168] In *Lingle*, however, the Court construed its "permanent" and "physical" takings precedents as narrow exceptions to *Penn Central*'s domain.[169] While the *Lingle* Court attempted to chip away at the substantive due process origins of regulatory takings, the Court's reliance on *Penn Central* as the "polestar" of its regulatory takings jurisprudence ironically confirmed its dependence on the very doctrine it sought to reject.[170]

In *Lingle*'s summary of the *Penn Central* doctrine, "economic impact and the degree to which it interferes with legitimate property interests" seem to trump all.[171] "Character" is not even mentioned in *Lingle*, other than as part of the rote *Penn Central* formula.[172] "Legitimate" property interests refer, not to assets that constitute property and belong to the claimant under the law of real or personal property, but rather to those legal property rights that are reasonable "expectations" under what ostensibly is a test of subjective intent.[173] The decision also reaffirms *Penn Central*'s emphasis on ad hoc "fairness and justice."[174]

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rejected the Agins Test . . . . But it took a giant [step] backwards when it reaffirmed the confused and mischievous *Penn Central* standard.").

[166] WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (1951).

[167] *See* Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) ("Our polestar . . . remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings."); Kanner, *supra* note 8, at 680 ("[I]n spite of [*Penn Central*'s] dubious provenance and inconsistency with the Supreme Court's preexisting taking jurisprudence . . . to say nothing of the Court's lack of jurisdiction to decide it, it somehow became the judicial 'polestar' of regulatory takings law." (footnote omitted)).

[168] 444 U.S. 164, 174–75 (1979).

[169] *Lingle*, 544 U.S. at 538. Justice O'Connor stated that, outside the "two relatively narrow categories" of physical and permanent takings, "regulatory . . . challenges are governed by the standards set forth in *Penn Central*. *Id.* (citation omitted).

[170] *See id.* at 548.

[171] *Id.* at 540.

[172] *See id.* at 539.

[173] *Id.* at 538–39. *Penn Central* stated the subjective formulation as "distinct investment-backed expectations." 438 U.S. at 124. However, in *Kaiser Aetna v. United States*, then-Justice Rehnquist restated it as "interference with *reasonable* investment backed expectations." 444 U.S.

At the end of the day, *Lingle* "reconciles at a high level of generality constitutional 'private property' and 'regulatory' powers, so as to make both compatible with twentieth-century regulatory schemes."[175] At its core, *Penn Central* "fundamentally centers on considerations of 'fairness,' a standard no less vague than [Justice Holmes' famously cryptic formulation] 'goes too far.'"[176]

2. Substantive Due Process Claims Remain (Almost) Viable

Even while disfavoring substantive due process, the Supreme Court has left open the doctrine's use in property deprivation cases.[177] In *Lingle v. Chevron U.S.A., Inc.*, the Court noted that "the 'substantially advances' inquiry probes the regulation's underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking . . . ."[178] Thus, *Lingle* implicitly affirms that the Takings Clause does not pre-empt substantive due process claims.[179]

The Supreme Court's recognition of the validity of substantive due process analysis in property deprivation cases harkens back to its earlier jurisprudence.[180] In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Court said that a landowner has a "right to be free of arbitrary or irrational zoning actions."[181] In *Pruneyard Shopping Center v. Robins*,[182] the Court added: "'[T]he guaranty of due process, as has often

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at 175 (emphasis added). Thus, with no elucidation whatsoever, Rehnquist changed a subjective formulation to a subjective *and* objective formulation.

[174] *Lingle*, 544 U.S. at 537.

[175] Claeys, *supra* note 13, at 340.

[176] Steven Geoffrey Gieseler et al., *Measure 37: Paying People for What We Take*, 36 ENVTL. L. 79, 86–87 (2006); *see also* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule . . . is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

[177] *See generally Lingle*, 544 U.S. 528.

[178] *Id.* at 543.

[179] *See* Crown Point Dev., Inc. v. City of Sun Valley, 506 F.3d 851, 856 (9th Cir. 2007) (noting that *Lingle* modified the California rule that the takings clause "pre-empted" substantive due process claims).

[180] *See generally* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

[181] 429 U.S. at 263.

[182] 447 U.S. at 88 (upholding state permission for private expressive speech in shopping centers without permission of owners).

been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be attained.'"[183]

Unfortunately, however, the Supreme Court has not ruled on the appropriate standards under which substantive due process challenges to land use regulations should be adjudicated. In the absence of guidance, the circuit courts of appeals have adopted tests that make it difficult or impossible for plaintiffs to obtain relief.[184] Thus, some federal courts have held that "the requisite arbitrariness and caprice must be stunning,"[185] or that the action complained of must be invidious or irrational.[186] Borrowing from *Rochin v. California*, where the Supreme Court termed illegally pumping a suspect's stomach for illicit drugs as "conduct that shocks the conscience," some courts of appeals have imposed a "shocks the conscience" standard for deprivations of property in land use cases.[187]

The "shocks the conscience" standard has its genesis in police chases often requiring split-second decisions.[188] That is a far cry from legislative and administrative land use determinations, where there is ample opportunity to consult with legal counsel before acting. It is a poor fit for land use cases.[189] The "shocks the conscience" standard invites judicial subjectivity reminiscent of Justice Stewart's well-known observation regarding pornog-

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[183] *Id.* at 85 (quoting Nebbia v. New York, 291 U.S. 502, 525 (1934).

[184] *See* EJS Props., LLC v. City of Toledo, 698 F.3d 845, 862 (6th Cir. 2012); Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 468 (7th Cir. 1988).

[185] Aubuchon v. Massachusetts, 933 F. Supp. 90, 93 (D. Mass. 1996).

[186] *See Coniston*, 844 F.2d at 468.

[187] Rochin v. California., 342 U.S. 165, 172 (1952); *see, e.g.*, Bettendorf v. St. Croix Cnty., 631 F.3d 421, 426 (7th Cir. 2011); Snaza v. City of St. Paul, 548 F.3d 1178, 1183 (8th Cir. 2008); Harron v. Town of Franklin, 660 F.3d 531, 536 (1st Cir. 2011); United Artists Theatre Cir., Inc. v. Township of Warrington, 316 F.3d 392, 400 (3d Cir. 2003) (holding that the "shocks the conscience" and not the "improper motive" standard should apply). *See also* Clifford B. Levine & L. Jason Blake, United Artists*: Reviewing The Conscience Shocking Test Under Section 1983*, 1 SETON HALL CIR. REV. 101, 112–115 (2005) (reviewing section 1983 "shocks the conscience standards" in land use cases in the several circuits). *But see* McKinney v. Pate, 20 F.3d 1550, 1556 n.7 (11th Cir. 1994) ("The *Rochin* standard has no place in a civil case for money damages.").

[188] *See United Artists*, 316 F.3d at 407 (Cowen, J., dissenting) ("'Shocks the conscience' is a useful standard in high speed police misconduct cases which tend to stir our emotions and yield immediate reaction. But it is less appropriate, and does not translate well, to the more mundane world of local land use decisions, where lifeless property interests (as opposed to bodily invasions) are involved.").

[189] *Id.* (arguing that the "shocks the conscience" standard is "the jurisprudential equivalent of a square peg in a round hole").

raphy: "I know it when I see it."[190] It "[is] not a very illuminating" test, and does little to protect landowners' constitutional rights.[191]

Additionally, some federal circuit courts of appeals hold that, regardless of whether government action is arbitrary, there can be no basis for a substantive due process claim if a discretionary approval is involved, which is typical in land use cases.[192] Other courts, however, have stated that an ownership interest in the land for which a permit is sought suffices,[193] or that procedural rights imposing substantial restrictions on discretion create property rights.[194] While the Supreme Court held that background principles of State property law would define claims of entitlement for deprivations of property without due process in *Board of Regents v. Roth*,[195] federal courts remain confused as to whether *Roth* is applicable at all in land-use cases.[196]

The problem is exemplified by a recent Sixth Circuit case, *EJS Properties, LLC v. City of Toledo*.[197] There, the plaintiff wanted to construct and operate a charter school, for which rezoning was required.[198] The neighborhood city council representative, Robert McCloskey, originally supported the rezoning, but later voted against it.[199] "EJS claims that McCloskey's sudden reversal occurred only after EJS refused to acquiesce to McCloskey's demand that EJS donate $100,000 to a local retirement fund, a de-

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[190] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

[191] Slade v. Bd. of Sch. Dirs., 702 F.3d 1027, 1033 (7th Cir. 2012) (observing that shocks the conscience "[is] not a very illuminating expression" and arguing that the term should be simplified to a "recklessness" standard).

[192] *See, e.g.*, Ruston v. Town Bd., 610 F.3d 55, 58 n.2 (2d Cir. 2010); Gerhart v. Lake Cnty., 637 F.3d 1013, 1019 (9th Cir. 2011).

[193] *See, e.g.*, DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 600 (3d Cir. 1995). *DeBlasio* subsequently was partially overruled because it applied the less "demanding 'improper motive' test" instead of the "shocks the conscience" standard required by Lewis. *United Artists*, 316 F.3d at 400.

[194] George Washington Univ. v. District of Columbia, 318 F.3d 203, 207 (D.C. Cir. 2003).

[195] 408 U.S. 564, 577 (1972).

[196] *See* John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 WASH. U. J. URB. & CONTEMP. L. 27, 29–30 n.10 (1996) (noting that "confusion has reigned in federal courts as to whether the *Roth* analysis is applicable to land regulation cases; i.e., whether the plaintiff's property interest lies in the land he owns or in the development permit he seeks" and citing cases showing this confusion).

[197] *See generally* 698 F.3d 845 (6th Cir. 2012).

[198] *Id.* at 851.

[199] *Id.*

mand McCloskey does not deny that he made.'"[200] EJS sued the city and McCloskey under 42 U.S.C. § 1983, claiming, inter alia, a denial of substantive due process.[201] The trial court granted the City summary judgment on all constitutional claims, and the U.S. Court of Appeals for the Sixth Circuit affirmed.[202]

The court found that EJS had not been deprived of a property right, since it had "no protectable interest" in a discretionary zoning decision.[203] Even if no such interest was required, the court added, "although we can condemn McCloskey for his misconduct, we simply cannot say that his behavior is so shocking as to shake the foundations of this country. . . . '[I]t was not that type of conduct which so "shocks the conscience" that it violates appellant's substantive due process rights.'"[204]

Likewise, in *River Park v. City of Highland Park*, a rezoning application for a residential subdivision was met with almost endless procedural irregularities, and, finally by demands that the applicant begin the costly application process several times over.[205] River Park then brought suit in federal court, which dismissed for failure to state a claim.[206] In an opinion by Judge Frank Easterbrook, the Seventh Circuit reasoned that, *inter alia*, the landowner had no legitimate claim of procedural entitlement to a rezoning under the federal Constitution.[207] In Judge Easterbrook's view, River Park lost a political fight.[208] Judge Easterbrook then ruled that the suit for inverse condemnation, along with other remedies, belonged in state court.[209]

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[200] *Id.*

[201] *Id.* at 854.

[202] *Id.* at 866.

[203] *Id.* at 862.

[204] *Id.* (quoting Vasquez v. City of Hamtramck, 757 F.2d 771, 773 (6th Cir. 1985)).

[205] 23 F.3d 164, 165 (7th Cir. 1994). These included 26 public hearings, an aborted attempt to condemn the parcel, and a city engineer who "raised one niggling objection after another and eventually went incommunicado." *Id.*

[206] *Id.*

[207] *Id.* at 166–67 ("[L]et us not confuse . . . [this denial] decision . . . with the property itself . . . . [S]o far as the Constitution is concerned, state and local governments are not required to respect property owners' rights . . . ."). Like Justice Scalia, Judge Easterbrook rejects substantive due process for historical and ideological reasons. *See* Frank H. Easterbrook, *The Constitution of Business*, GEO. MASON U. L. REV. Winter 1988, at 53–54 ("Substantive Due Process is dead. . . . Substantive due process is an oxymoron . . . .").

[208] *River Park, Inc.*, 23 F.3d at 166. ("We know from *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) [(parallel citations omitted)], that the procedures 'due' in zoning cases are minimal. Cities may elect to make zoning decisions through the political process . . . ."). To para-

3. Due Process in Takings Law Lingers After *Lingle*

Although the Supreme Court separated substantive due process and takings doctrine in *Lingle*,[210] courts continue to conflate elements of substantive due process with *Penn Central* doctrine. The Ninth Circuit's recent en banc opinion in *Guggenheim v. City of Goleta*, involving a challenge to a stringent mobile home park rent control ordinance, is illustrative.[211] As is typical, tenants owned their own mobile homes and rented the pads on which they sat.[212] The Guggenheims owned a mobile home park, and sought relief principally, as they asserted, because the ordinance unreasonably burdened their property without achieving a permissible public end.[213] The tenants were able to capitalize the difference between market rents and controlled rents by charging more when selling their mobile homes.[214] Thus, they were able to fully capture the entire advantage of rent control, leaving no benefit to future tenants.[215] The result, the dissent asserted, was that the ordinance resulted in a simple transfer of wealth from park owners to mobile home incumbents.[216]

Judge Andrew Kleinfeld, writing for the en banc court, denied all the Guggenheims' claims.[217] Addressing the facial *Penn Central* challenge,[218] the majority reasoned that because the Guggenheims purchased the park and brought the action long after the regulation was effective, "[l]eaving the ordinance in place impairs no investment-backed expectations of the Gug-

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phrase Reich, labeling a decision "political" does not adequately explain the "dependent position of the individual and the weakening of civil liberties [that follows]." Reich, *supra* note 88, at 774.

[209] *River Park, Inc.*, 23 F.3d at 167. After four years of litigation in state court, the Supreme Court of Illinois denied all claims, holding that federal dismissal meant all claims were precluded under state law. *See* River Park, Inc. v City of Highland Park, 703 N.E.2d 883, 896–97 (Ill. 1998).

[210] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 543 (2005) (describing the substantive due process inquiry as "logically prior to and distinct from" takings review).

[211] 638 F.3d 1111, 1115 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2455 (2011).

[212] *Id.* at 1126. (Bea, J., dissenting).

[213] *Id.* at 1115.

[214] *Id.* at 1134. (Bea, J., dissenting).

[215] *Id.*

[216] *Id.* at 1124 (Bea, J., dissenting).

[217] *Id.* at 1116.

[218] Facial challenges are not subject to *Williamson County* ripeness requirements, but the plaintiff has the burden to show that the challenged regulation will always lead to impermissible results. In the words of the Supreme Court, "Petitoners thus face an uphill battle on making a facial attack on the Act as a taking." *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 495 (1987); *see also* STEVEN J. EAGLE, REGULATORY TAKINGS § 8-6(a) (5th ed. 2012).

genheims, but *nullifying it* would destroy the value these tenants thought they were buying."[219] This was despite the fact that there was a short period of time between the automatic termination of the applicability of the similar county ordinance at the moment that Goleta became a city, and its enactment of rent control several hours later.[220]

As a matter of property law, the tenants' interest in the continuation of rent control was nothing more than a mere expectancy, and the court did not state to the contrary.[221] Thus, Judge Kleinfeld's concern for their plight correspondingly was based on fairness rather than legal property interests.

Regarding the Guggenheims' separate substantive due process claim, the court brusquely invoked *Lochner*, and reasoned it was not empowered to "impose sound economic principles on political bodies."[222] While it is hard to see how invalidation resulting from a facial *Penn Central* challenge would be any less "imposing," perhaps Judge Kleinfeld only meant the court would not scrutinize the ordinance, consistent with the deferential strand of Supreme Court precedent.[223]

However, if a regulation serves no conceivable purpose other than transferring wealth from *A* to *B*, then the regulation violates substantive due process under the Supreme Court's precedents beginning in 1798, in *Calder v. Bull*.[224] The Court invoked *Calder* with respect to its similar conclusion regarding the Public Use Clause[225] in *Kelo v. City of New London*.[226] The lack

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[219] *Guggenheim*, 638 F.3d at 1122 (emphasis added).

[220] *Id.* at 1121 (asserting that "the Guggenheims had already made their investment years before, and even if they had bought the mobile home park during those few hours, they would have known that Goleta's first official act would, under controlling law, have to be adoption of the county's rent control ordinance").

[221] The absence of an underlying legal right, the condemnation of which would require taking expectancies into account, distinguishes *Guggenheim* from such cases as, *Almota Farmers Elevator & Warehouse Co. v. United States*, in which the value of a condemned leasehold was held to include the value of tenant improvements contemplating lease renewal. 409 U.S. 470, 473 (1973).

[222] *Guggenheim*, 638 F.3d at 1123 (citing Lochner v. New York, 198 U.S. 45, 75 (1905)).

[223] *See* Hettinga v. United States, 677 F.3d 471, 480 (D.C. Cir. 2012) (Brown, J., concurring) (upholding legislation challenged on bill of attainder, equal protection, and substantive due process grounds, arguing that the result could not have come out any other way based on the Supreme Court rational basis precedent).

[224] 3 U.S. (3 Dall.) 386, 388 (1798) ("[A] law that takes *property* from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.").

[225] U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

of public benefit would invalidate the government's action, even if it were eager to offer compensation.[227] Perhaps the Court deemed *Penn Central* to incorporate the public benefit test reiterated in *Kelo*.[228]

The Supreme Court earlier brushed aside arguments that rent control ordinances have no plausible benefit, in *Yee v. City of Escondido*.[229] The issue was deemed improperly raised in the context of physical takings, and the record did not contain evidence supporting the landowner's assertion that it was not free to leave the rental business.[230] However, Justice O'Connor prophetically asserted in dicta that a finding of a pure wealth transfer "might have some bearing on whether the ordinance causes a regulatory taking, as it may shed . . . light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance."[231]

Judge Bea's dissenting "character of the regulation" analysis in *Guggenheim* paralleled in many respects his subsequent analysis of the substantive due process claim.[232] In Judge Bea's view, testimony in the case indicating a pure wealth transfer was important, since the regulation served no *actual* public interest.[233] *Guggenheim* illustrates that, for all the Supreme Court's efforts, *Penn Central*'s search for "fundamental fairness" will ensure that regulatory takings remain entangled with substantive due process.

4. Class of One Equal Protection

In *Village of Willowbrook v. Olech*, the Supreme Court considered the Equal Protection Clause in the context of a homeowner deprived of a water connection for three months, ostensibly based on her refusal to grant the Village an easement over her property that was not demanded of other own-

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[226] 545 U.S. 469, 477–78 n.5 (2005).

[227] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984).

[228] *See Kelo*, 545 U.S. at 477–78.

[229] 503 U.S. 519, 530 (1992).

[230] *See id.* at 530–31.

[231] *Id.* at 530 (emphasis omitted).

[232] Guggenheim v. City of Goleta, 638 F.3d 1111, 1132 (9th Cir. 2010) (Bea, J., dissenting) ("[T]his ordinance does not serve its stated purposes because of the way it is structured and written.").

[233] *Id.* at 1136. The legitimate state interest asserted by the majority, equalizing leverage because of the "cost[] of moving" mobile homes, puzzled the dissent. *Id.* Surely, if current mobile homeowners are able to capture the wealth premium, future tenants would not be better off.

ers similarly situated.[234] In a brief per curiam opinion, the Court held that Ms. Olech's allegation that she had been singled out and subjected to an "irrational and wholly arbitrary" demand was sufficient to state a claim under the Equal Protection Clause.[235] Justice Breyer reluctantly concurred in the result, noting that the test would "transform many ordinary violations of [the] city or state law into violations of the Constitution."[236] He relied on the lower court opinion by Judge Richard Posner, finding vindictiveness and illegitimate animus, and stressing the need for ill will to state a constitutional claim.[237]

Some circuit courts addressing *Olech* have tended to follow Justice Breyer's lead, requiring proof of "ill will" in "class of one" Equal Protection cases.[238] Other courts have disagreed.[239] Given the Supreme Court's recent heightening of pleading standards,[240] and the difficulty of showing "ill will" without discovery, the ill will standard will effectively leave most plaintiffs without a remedy, thus alleviating Justice Breyer and Judge Posner's concern that *Olech* could open the federal floodgates to "garden variety" land-use cases and local enforcement.[241]

The Seventh Circuit recently revisited *Olech* in an en banc opinion, acknowledging that the law of "class of one" Equal Protection claims is "in

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[234] 528 U.S. 562, 563 (2000) (per curiam). For a well-researched discussion of the factual history of the case, see Dwight H. Merriam, *Good and Evil in the Village of Willowbrook: The Story of the* Olech *Case*, 23 ZONING & PLAN. L. REP. 35 (2000).

[235] *Olech*, 528 U.S. at 565.

[236] *Id.* (Breyer, J., concurring in result).

[237] *Id.* at 565–66; Olech v. Village of Willowbrook, 160 F.3d 386, 387 (7th Cir. 1998) (quoting Esmail v. Macrane, 53 F.3d 176, 180 (7th Cir. 1995)).

[238] *See* Del Marcelle v. Brown Cnty. Corp., 680 F.3d 887, 892–93 (7th Cir. 2012) (en banc) (citing cases applying a variant of the "ill will" standard in several circuits); *See also* EAGLE, *supra* note 73, at § 8-8(A).

[239] *See, e.g.*, Analytical Diagnostic Labs, Inc. v. Kusel, 626 F.3d 135, 143 (2d Cir. 2010) (not imposing an animus requirement but requiring plaintiffs to show that "decision-makers were aware that there were other similarly-situated individuals who were treated differently"); Lindquist v. City of Pasadena, 525 F.3d 383, 387 (5th Cir. 2008) (explicitly declining to impose an animus requirement).

[240] *See infra* Part III.B.

[241] *See* Hilton v. City of Wheeling, 209 F.3d 1005, 1008 (7th Cir. 2000) (observing that failure to require evidence of motive would cause federal courts to be "drawn deep into the local enforcement of petty state and local laws").

flux."[242] Unable to agree, the Seventh Circuit split three ways.[243] Judge Posner, joined by three judges, proposed a refined version of the "ill will" standard.[244] Judge Easterbrook, concurring in the judgment, noted that the relevant consideration was whether there was a "conceivable rational basis" for singling out the individual.[245] In yet another opinion, subscribed to by half of the voting judges, Judge Wood presented a third test.[246]

The Seventh Circuit's inability to agree on the required wording after more than a decade evinces the high stakes at issue in "class of one" Equal Protection claims. In the spirit of takings law, the dust will not settle until the Supreme Court more precisely and clearly delineates the extent to which constitutional rights trump judicial reluctance to review local decision-making.

B. The Errant Language Problem

The phrase "errant language" was used by Justice O'Connor to refer to the tendency of courts in property deprivation cases to build upon, or use in other contexts, the Supreme Court's prior broad and vague dicta to construct extensions of *Penn Central* that the Court later repudiates.[247] In one sense, such dicta are errant because they treat prior general expressions as controlling subsequent cases. Justice Ginsburg recently reiterated Chief Justice Marshall's warning against this in a takings context.[248]

The problem is acute in property deprivation law, since judges want to fashion rules that can be applied objectively to decide cases, as opposed to

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[242] *Del Marcelle*, 680 F.3d at 888 (en banc) (affirming dismissal of complaint by equally divided court).

[243] *Id.*

[244] *Id.* at 889.

[245] *Id.* at 900–01 (Easterbrook, J., concurring) (arguing that the "class of one" Equal Protection claims were the functional equivalent of substantive due process claims).

[246] The test enumerated four elements: (1) plaintiff was the victim of intentional discrimination, (2) at the hands of a state actor, (3) the state actor lacked a rational basis for so singling out the plaintiff, and (4) the plaintiff has been injured by the intentionally discriminatory treatment. *Id.* at 913 (Wood, J., dissenting).

[247] Kelo v. City of New London, 545 U.S. 469, 501 (2005) (O'Connor, J., dissenting).

[248] Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 520 (2012) (quoting Cohens v. Virginia, 19 U.S. 264, 399 (1821) (recalling Chief Justice Marshall's "sage observation that 'general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.'").

making unguided ad hoc inquiries under *Penn Central*. The Supreme Court's inability to predict the effects of its errant language in lower courts, and in the Supreme Court itself, raises serious questions as to the Court's ability to orient regulatory takings toward fairness.

Justice O'Connor's use of the phrase "errant language" was in *Kelo v. City of New London*,[249] involving the Public Use Clause.[250] As discussed later in this Article, the Court's "public use" jurisprudence has been infused with its *Penn Central* approach to property rights.[251] In her *Kelo* dissent, Justice O'Connor vividly described how the Court's equation of "public use" with "public benefit" meant that the "specter of condemnation hangs over all property."[252] In reviewing the Court's principal public use cases, *Berman v. Parker*[253] and *Hawaii Housing Authority v. Midkiff*,[254] she plaintively added that "[t]here is a sense in which this troubling result [in *Kelo*] follows from errant language in *Berman* and *Midkiff*."[255] In *Berman*, the Court seemed to eliminate "public use" as an independent constitutional requirement.[256] In *Midkiff*, it pronounced that the scope of the public use requirement was "coterminous" with that of the police power.[257] Perhaps out of modest recognition that her approval of the result in *Midkiff* led her to write overly-broadly, Justice O'Connor refrained from noting that she wrote that opinion.

Another notable example of errant language was the misapplication of a Supreme Court takings directive by the Federal Circuit, in *Arkansas Game*

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[249] 545 U.S. at 501 (O'Connor, J., dissenting).

[250] U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

[251] *See infra* Part III.B.

[252] 545 U.S. at 503 (O'Connor, J., dissenting).

[253] 348 U.S. 26 (1954).

[254] 467 U.S. 229 (1984).

[255] *Kelo*, 545 U.S. at 501 (O'Connor, J., dissenting) (citing *Berman*, 348 U.S. at 33; *Midkiff*, 467 U.S. at 240). *But see* D. Benjamin Barros, *Nothing "Errant" About It: The* Berman *and* Midkiff *Conference Notes and How the Supreme Court Got to* Kelo *with Its Eyes Wide Open*, *in* PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 57 (Robin Paul Malloy, ed., 2008) (arguing insertion of broad language about public use in *Midkiff* was intentional).

[256] 348 U.S. at 33 ("Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end.").

[257] 467 U.S. at 240 ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers.").

and Fish Commission v. United States.[258] There, the Commission's valuable trees had been destroyed as a result of recurrent flooding resulting from annual decisions over a six-year period by the U.S. Army Corps of Engineers to release water from a government dam.[259]

The Federal Circuit held that the government's actions could not constitute a taking, because it was not inevitable that the government-induced flooding would recur.[260] The court noted its earlier cases holding that "temporary flooding" would not lead to "the 'inevitably recurring floodings which the Supreme Court [had] stressed . . . in [*United States v.*] *Cress*.'"[261] Later, in *Sanguinetti v. United States*, the Supreme Court wrote that, to constitute a taking, flooding must "constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property."[262] The Federal Circuit took *Cress* and *Sanguinetti* to mean that there could not be a taking if flooding were both intermittent and not inevitably recurring.[263]

Writing for a unanimous Supreme Court in *Arkansas Game & Fish*,[264] Justice Ginsburg held this characterization of its holdings erroneous: "We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection."[265] Justice Ginsburg further stated:

> We do not read so much into the word "permanent" as it appears in a nondispositive sentence in *Sanguinetti*. That case, we note, was decided in 1924, well before the World War II-era cases and *First English*, in which the Court first homed in on the matter of compensation for temporary takings. That time factor, we think, renders understandable the Court's passing reference to permanence. If the Court in-

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[258] 637 F.3d 1366 (Fed. Cir. 2011), *rev'd*, 133 S. Ct. 511 (2012).

[259] *Id.* at 1367.

[260] *Id.* at 1379. ("The deviations in question were plainly temporary and the Corps eventually reverted to the permanent plan. Under such circumstances, the releases cannot be characterized as inevitably recurring.").

[261] *Id.* at 1378 (quoting Fromme v. United States, 412 F.2d 1192, 1196–97 (1969) (citing United States v. Cress, 243 U.S. 316, 318, 328–29 (1917))).

[262] 264 U.S. 146, 149 (1924).

[263] 637 F.3d at 1374–76.

[264] Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 515 (2012) (Justice Kagan recused herself, apparently because of her involvement in the case as Solicitor General).

[265] *Id.* at 522.

> deed meant to express a general limitation on the Takings Clause, that limitation has been superseded by subsequent developments in our jurisprudence.[266]

One might take Justice Ginsburg's language to say "we didn't mean 'inevitable' then, and, if we did, we don't mean it now." She added: "The sentence [in *Sanguinetti* referring to "permanent invasion"] was composed to summarize the flooding cases the Court had encountered up to that point, which had unexceptionally involved permanent, rather than temporary, government-induced flooding."[267]

Dicta in *Arkansas Game and Fish* also discussed permanent versus temporary takings, and physical versus regulatory takings,[268] a manner that both made those distinctions murkier, and perhaps hinting that all of those questions should be considered under the rubric of *Penn Central*.

1. "Substantially Advance" from *Agins* to *Lingle*

In *Agins v. City of Tiburon*, the Supreme Court stated 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."[269] According to Justice O'Connor's subsequent analysis for the Court in *Lingle v. Chevron U.S.A. Inc.*, the "substantially advances" formulation was applied to uphold regulations in *Agins* and, arguably, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*.[270] *Lingle* added that in no case had a regulation been deemed a taking under the "substantially advance" test.[271] "Indeed, in most of the cases reciting the 'substantially advances' formula, the Court has merely assumed its validity when referring to it in dicta."[272] Justice O'Connor also referred

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[266] *Id.* at 520.

[267] *Id.*

[268] *See infra* Part II.C.2 for discussion.

[269] 447 U.S. 255, 260 (1980) (internal references omitted) (emphasis added).

[270] 544 U.S. 528, 545–46 (2005) (citing *Agins*, 447 U.S. at 261–62; Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485–92 (1987)).

[271] *Id.* at 546.

[272] *Id.* (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 334 (2002); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 704 (1999); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992); Yee v. City of Escondido, 503 U.S. 519, 534 (1992); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985)).

to "substantially advances" as a "formula minted" in *Agins*,[273] and as "regrettably imprecise."[274]

Despite minimizing the salience of "substantially advance," Justice O'Connor conceded that the *Agins* standard "has been read" as a freestanding test because it was "phrased in the disjunctive."[275] Her more straightforward appraisal was that "the 'substantially advances' formula was derived from due process, not takings."[276] Although *Agins* thus downplayed the role of substantive due process in the protection of property rights, it remains largely intertwined with the *Penn Central* doctrine.[277]

2. Broad Language About Public Use

The Supreme Court decided three seminal cases involving condemnation for alleviation of "blight" and economic revitalization: *Berman v. Parker*,[278] *Hawaii Housing Authority v. Midkiff*,[279] and *Kelo v. City of New London*.[280] In *Berman*, the Court held that a "sound" building could be condemned to effectuate the wholesale condemnation, bulldozing, and subsequent redevelopment of the "blighted" neighborhood in which it was imbedded.[281] In *Midkiff*, it approved the condemnation of feehold interests of residential land at the behest of long-term ground lessees, and subsequent retransfer of the fees to them.[282] In *Kelo*, it upheld the condemnation of a moderate- and middle-income neighborhood for retransfer for private eco-

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[273] *Id.* at 540.

[274] *Id.* at 542.

[275] *Id.* at 540 ("substantially advance" *or* denying economically viable use).

[276] *Id.*

[277] *See supra* Part II.A.3.

[278] 348 U.S. 26 (1954).

[279] 467 U.S. 229 (1984).

[280] 545 U.S. 469 (2005).

[281] 348 U.S. at 29 (The concept of "blight" often was the ostensible driver of redevelopment condemnation.). *See generally* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 3 (2003) (noting that those desirous of urban redevelopment for various reasons facilitated their goal by stressing "urban blight" as a metaphor for disease). The present author has asserted that the proper remedy for even dangerous blight is not condemnation, but rather remediation. Steven J. Eagle, *Does Blight Really Justify Condemnation?*, 39 URB. LAW. 833, 833 (2007).

[282] 467 U.S. at 241–42.

nomic redevelopment, intended to help leverage the advantage to the economically distressed City of a nearby research facility.[283]

The homeowners did not claim that the proffered compensation was inadequate, but rather that the condemnations were invalid because they were not for "public use," as the Fifth Amendment independently requires.[284] The Court's approach in *Kelo* exemplifies the style of its *Penn Central* jurisprudence.[285] The leitmotiv of *Penn Central* is unwillingness to separate the concepts of "property" and the "police power," but instead to conflate them under the rubric of "fairness."[286] The theme of the "public use" cases is that government has the power to eradicate societal problems, that doing so is complicated, and that government may use condemnation in that endeavor except where manifestly unfair.

Kelo eschewed a bright-line test of compliance with the Public Use Clause, such as one based on use by the general public, the government, or heavily regulated public utilities.[287] Instead, it based its holding on loose interpretations of existing government powers.[288] In *Berman*, noting that blight is a traditional police power concern, the Court declared, "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear."[289] *Midkiff* added that "[t]he 'public use' requirement is coterminous with the scope of a sovereign's police powers."[290]

However, the police power requires no compensation and the eminent domain power requires just compensation, so they could not be "coterminous." As Professor Thomas Merrill observed, however, the Court might be spared the "illogic" of the "coterminous" language by conceptualizing it in terms of "proper government ends, rather than means."[291] But, the fact that two ends are legitimate does not necessarily mean that one is a legitimate means to achieve the other. Conflating ends and means, Justice Stevens wrote for the *Kelo* majority that in prior cases the Court had rejected a nar-

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[283] 545 U.S. at 473, 483–84.

[284] U.S. CONST. amend. V ("nor shall private property be taken for public use, except with just compensation.").

[285] *Berman* was decided before *Penn Central*, which is cited by neither *Midkiff* nor *Kelo*.

[286] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

[287] 545 U.S. at 478–80.

[288] *Id.* at 479–80.

[289] Barman v. Parker, 348 U.S. 26, 33 (1954).

[290] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984).

[291] Thomas W. Merrill, *The Economics of Pubic Use*, 72 CORNELL L. REV. 61, 69–70 (1986).

row view of "public use" as use by the "general public," and instead had endorsed the view that public use equated to "public purpose."[292]

As vividly captured in Justice O'Connor's dissenting opinion, government condemnation of the property of any of us could be justified by the notion that there is someone who could put it to a more valuable use, thus raising tax revenues or in some other way facilitating a governmental purpose.[293] Yet, the *Kelo* majority, while endorsing a broad view of public purpose, recognized that there had to be some device to restrain indiscriminate takings.[294]

Just as the *Penn Central* doctrine latched onto its three-factor test embodying fairness in the absence of an approach based on property law, *Kelo* latched onto the doctrine of "pretextuality," thereby attempting to substitute fairness for a rigorous law of public use.[295] Justice Stevens, writing for the majority, attempted to cabin "public purpose" by stating that the State cannot "take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."[296] Alas, this safeguard of "pretextuality" and promise of vigilant judicial review has not borne fruit.[297]

C. Toward an Equitable Takings Doctrine

It is conventional to say that during the past two decades attempts to achieve more vigorous constitutional protections for property rights have stalled.[298] However, several recent Supreme Court cases suggest a trend towards granting equitable relief in federal and state regulatory takings cases.

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[292] 545 U.S. at 479–80 (citing Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158–64 (1896); Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906)).

[293] *Id.* at 503 (O'Connor, J., dissenting) ("Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.").

[294] *Id.* at 480.

[295] *Id.* at 478.

[296] *Id.*

[297] *See infra* Part III.B for discussion.

[298] *See, e.g.*, Donald C. Guy & James E. Holloway, *The Climax of Takings Jurisprudence in the Rehnquist Court Era: Looking Back from* Kelo, Chevron U.S.A. *and* San Remo Hotel *at Standards of Review for Social and Economic Regulation*, 16 PENN ST. ENVTL. L. REV. 115, 175–76 (2007) (discussing the cases noted in the title as evidence that, after Dolan v. City of Tigard, 512 U.S. 374 (1994), "it was evident that Justices Kennedy and O'Connor were playing musical chairs with Justice Stevens as they sought to preserve or reshape *Penn Central Transp. Co.* while recognizing the omnipotence of circumstances in making regulatory taking determinations and a

In *Horne v. Department Agriculture*, the Court held in 2013 that the Takings Clause could be raised as an affirmative defense to challenge monetary assessments where the regulation challenged provides "a comprehensive remedial scheme."[299] The Court relied on the unassailable logic that it makes no sense to force a party to pay a fine in one proceeding as a requisite for suing for recovery in another proceeding.[300] While the decision broadly affirmed the availability of equitable relief under the takings clause, the case resolved a narrow jurisdictional question under the Tucker Act.[301]

Horne, however, forcefully undercut the prong of the Court's holding in *Williamson County* that stated that a takings claim would not be "ripe" for federal constitutional review if "the plaintiff had not sought 'compensation through the procedures the State ha[d] provided for doing so.'"[302] Instead, *Horne* deemed this requirement, which it often referred to as "prudential ripeness," as "not, strictly speaking, jurisdictional."[303]

The view that *Horne* contains a subtle invitation for reexamination of *Williamson County* ripeness principles[304] reinforces a four-Justice concurrence in the judgment in *San Remo Hotel, L.P. v. City of San Francisco*.[305] There, the Court ruled that the full faith and credit statute[306] precluded federal court review of issues previously litigated in state courts.[307] Thus, the

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fundamental fairness protecting property interests that usually exist in deference to public interests").

[299] 133 S. Ct. 2053, 2062–63 (2013).

[300] *Id.* at 2063 (citing E. Enters. v. Apfel, 524 U.S. 498, 520–21 (1998) (plurality opinion)).

[301] *Id.* at 2053 (In particular, the court held that the extensive remedial provisions of Agricultural Marketing Agreement Act of 1937 ("AMAA"), 7 U.S.C. §§ 601–74, and the concrete injury threatened by prospective government enforcement, meant that the takings claim was ripe, and that the AMAA stripped the Court of Federal Claims of jurisdiction under the Tucker Act, thus foreclosing the availability of post-deprivation compensation). *But see* Preseault v. ICC, 494 U.S. 1, 13–14 (1990) (stating a presumption of Tucker Act availability in takings cases absent legislative direction).

[302] 133 S. Ct. at 2062 (quoting Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1985)).

[303] *Id.*

[304] *See, e.g.*, John Echeverria, Horne v. Department of Agriculture: *An Invitation to Reexamine "Ripeness" Doctrine in Takings Litigation*, ENVTL L. REP. (September 2013) (Vt. L. School Faculty Accepted Paper, No. 22-13).

[305] 545 U.S. 323 (2005).

[306] 28 U.S.C. § 1738 (2006).

[307] *San Remo Hotel*, 545 U.S. at 347–48 (Rehnquist, C.J., concurring in judgment) (joined by O'Connor, Kennedy, and Thomas, JJ.).

very act of "ripening" a case under *Williamson County* by litigating in state court would collaterally estop the landowner from subsequently asserting the relevant takings issues in federal court.[308] The concurrence in judgment, written by Chief Justice Rehnquist and joined by Justices O'Connor, Kennedy, and Thomas, agreed that this result was required, but explained why the *Williamson County* state litigation requirement "may have been mistaken."[309]

Another 2013 Supreme Court case, *Koontz v. St. Johns Water District Management*, broadened heightened scrutiny of demands for development exactions, extended such scrutiny to monetary exactions, and established the availability of relief for burdening Takings Clause rights.[310] In *Nollan v. California Coastal Commission*, the Court held that a public agency could not condition development approval on the transfer of an easement, where there is no "essential nexus" between the exaction and the ends sought by the regulator.[311] In *Dolan v. City of Tigard*, the Court ruled that, where such a nexus is present, there would have to be "rough proportionality" between the demanded exaction and the police power burdens that the development would impose, and that this relationship would have to be established through an "individualized determination" involving the parcel for which the permit was requested.[312]

Koontz extended the *Nollan/Dolan* principle to provide relief where the development application was denied because the applicant had refused to accede to the exaction upon which it was conditioned.[313] It also held that monetary exactions would be treated the same way as exactions of real property.[314] Finally, it held that:

> Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which

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[308] *Id.* at 351 ("*Williamson County* all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee.").

[309] *Id.* at 348.

[310] 133 S. Ct. 2586, 2595, 2597, 2599 (2013).

[311] 483 U.S. 825, 837 (1987).

[312] 512 U.S. 374, 391 (1994).

[313] 133 S. Ct. at 2595.

[314] *Id.* at 2599.

> someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.[315]

While *Koontz* is an important case on its own merits, it also represents, as does *Horne*, a positive development in a trend to make injunctive and equitable relief available in takings cases.[316] It remains to be seen how the Florida courts on remand in *Koontz*, and other state courts in similar cases, will fashion a remedy for impermissible burdens on Takings Clause rights.[317]

Notably, the opinions for the Court in neither *Nollan*, nor *Dolan*, nor *Koontz* explicitly refer to *Nollan/Dolan* as employing a heightened scrutiny standard of review. However, Justice Kagan's dissent in *Koontz* made clear that the *Nollan/Dolan* "nexus" and "rough proportionality" standards do constitute "heightened scrutiny."[318] As the present author previously suggested, Chief Justice Rehnquist seemed to have contemplated in *Dolan* at least a standard of "rational basis in fact," or "meaningful rational basis."[319] This would comport with Professor Laurence Tribe's "covert heightened scrutiny,"[320] and with the analysis used by the Supreme Court in cases such as *City of Cleburne v. Cleburne Living Center*, where nominal rational basis review was conducted without deference, and with a penetrating examination comparing the city's asserted basis for regulation with the actual facts.[321]

In his dissent in *Dolan*, Justice Stevens stated:

> The Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan. Even more consequential than its incorrect disposition of this case, however, is

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[315] *Id.* at 2596.

[316] *Id.* at 2597.

[317] *Id.*

[318] *Id.* at 2604 (Kagan, J., dissenting).

[319] EAGLE, *supra* note 73, at § 7–10(b)(4).

[320] LAURENCE H. TRIBE & RALPH S. TYLER, JR., AMERICAN CONSTITUTIONAL LAW 1612 (2d ed. 1988).

[321] 473 U.S. 432, 448 (1985) (striking down, on ostensible rational basis review, a requirement that group homes for the mentally disabled obtain a special use permit in a district where fraternity houses and hotels could operate as of right).

> the Court's resurrection of a species of substantive due process analysis that it firmly rejected decades ago.[322]

Similarly, Justice Kagan's dissent in *Koontz*, while accepting the applicability of *Nollan/Dolan* to denials of development permits arising from refusals to submit to exactions, vociferously objected to its extension to monetary exactions.[323] "By applying *Nollan* and *Dolan* to permit conditions requiring monetary payments—with no express limitation except as to taxes—the majority extends the Takings Clause, with its notoriously 'difficult' and 'perplexing' standards, into the very heart of local land-use regulation and service delivery."[324]

The possibilities raised by these cases, including a significant increase in the scope of regulation of land use subject to heightened scrutiny, the weakening or abolition of the *Williamson County* requirement for state litigation of federal takings claims, and possible injunctive relief against regulations that unduly burden Takings Clause rights, all augur for significantly more federal judicial review explicitly or implicitly based on substantive due process principles.

1. Expectations of Fairness

As suggested in *Guggenheim v. City of Goleta*, the expectations factor in *Penn Central* is extremely important and can be fatal to a takings claim.[325] Professor Frank I. Michelman's account of government appropriation in his seminal article, *Property, Utility, and Fairness*,[326] provided the foundation for "investment-backed expectations" in *Penn Central*.[327]

Professor Michelman focused on the "demoralization costs" that arise from collective insecurity over property rights.[328] According to Michelman,

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[322] Dolan v. City of Tigard, 512 U.S. 374, 405 (Stevens, J., dissenting) (citing Ferguson v. Skrupa, 372 U.S. 726 (1963)).

[323] 133 S. Ct. at 2607 (Kagan, J., dissenting).

[324] *Id.*

[325] 638 F.3d 1111, 1120 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2455 (2011); *see supra* Part II.A.3.

[326] *See generally* Michelman, *supra* note 142.

[327] 438 U.S. 104, 127–28 (1978).

[328] Demoralization costs are defined by Michelman as "the total of (1) the dollar value necessary to offset dis-utilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized value of lost future production (reflecting either impaired incentives or social unrest) caused by the demoralization of un-

when an appropriation causes a visibly unfair or excessive burden, the Just Compensation Clause should prevent the reverberation of "demoralization costs," thus protecting the integrity of the system.[329] Correspondingly, under-the-radar appropriations should not be compensated, because the psychological impact on the expectations of property owners as a class is relatively minor when compared with the administrative burdens imposed on the State, what Michelman referred to as "settlement costs."[330]

While the "distinct, investment backed expectations" formulation in *Penn Central*[331] plays a large role in contemporary regulatory takings law, the meaning of the formula is woefully unclear.[332] One possible interpretation is that owners whose psyche has become particularly bound up with an essential use of their property should be singled out for judicial protection.[333] Since individuals derive some sense of personhood from their property,[334] and since entities as corporations and limited partnerships do not have such sensibilities, the formulation would seem to protect a certain class of owners as opposed to others.[335] In this sense, *Penn Central* intro-

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uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subject to similar treatment on some other occasion." Michelman, *supra* note 142, at 1214.

[329] *Id.* at 1214–18.

[330] *Id.* at 1214. While Michelman's concept had roots in the concept of transaction costs, as William Fischel observes, "Michelman's definition leaves room for behavioral factors. . . and so warrants a different label." *See* FISCHEL, REGULATORY TAKINGS, *supra* note 12, at 146.

[331] 438 U.S. 104, 128 (citing Michelman, *supra* note 142, at 1229–34 (asking whether a given regulation "can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation")).

[332] *See, e.g.*, Kanner, *supra* note 8, at 767–68 (noting that the factor "has been repeated by the Supreme Court a number of times, with no attempt by the Court to explain what it intended this phrase to mean, how it fits the scheme of constitutionally protected property rights, or how it is to be applied in land-use controversies . . . We should be grateful to Justice Brennan's clerk for not inserting Michelman's entire phrase - "distinctly perceived, sharply crystallized, investment backed expectations."); *see also* Steven J. Eagle, *The Rise and Rise of Investment Backed Expectations*, 32 URB. LAW. 437 (2000).

[333] For a justification drawn from G.W. Hegel, *see* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 971–79 (1982) (drawing an essential connection between identity and property).

[334] *See id.* at 987–91 (arguing that individuals' homes are central to their personhood and worthy of government solicitude).

[335] Individuals ultimately possess all beneficial ownership in assets held by corporations, trusts, or similar entities, but Radin distinguishes "purely instrumental" or "fungible" property,

duces a concept of reliance that is similar to theories of equitable estoppel applied in the States, but is based on personal attachment.[336] Under this view, *Penn Central* elevates personal "loss aversion" to constitutional status.[337]

But the role of expectations in takings law has not historically been so subdued. In *Connolly v. Pension Benefit Guarantee Corp.*, the Court discussed the investment-backed expectations rule, broadly stating that "those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."[338] Justice Scalia attempted to cabin broad speculation regarding expectations in *Lucas v. South Carolina Coastal Council*.[339] There, he both suggested that it would be better for expectations to focus on "how the owner's reasonable expectations have been shaped by the State's law of property,"[340] and that non-compensable deprivations of "all economically beneficial use of land . . . must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[341]

While Justice Scalia's intent might have been to limit strict land use regulations to those enforcing clear nuisance principles,[342] his attempt to impose a bright-line rule was not particularly successful.[343] Indeed, it might

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such as a wedding ring owned by a jeweler, as separate from "an object that has become part of oneself." *Id.* at 959–60.

[336] Daniel R. Mandelker, *Investment-Backed Expectations: Is There A Taking?*, 31 WASH. U. J. URB. & CONTEMP. L. 3, 5 (1987). *See generally* Stewart E. Sterk, *Estoppel in Property Law*, 77 NEB. L. REV. 756 (1998).

[337] Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AMERICAN PSYCHOLOGIST 341–350 (1983) (explaining "risk aversion" and the endowment effect).

[338] 475 U.S. 211, 226–27 (1986) (referring to the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, 29 U.S.C. §§ 1001 *et seq.*, and quoting from Pension Benefit Guarantee Corp. v. R.A. Gray & Co., 467 U.S. 717, 732 (1984)).

[339] *See generally* 505 U.S. 1003 (1992) (discussing whether a state act constituted a taking without just compensation).

[340] *Id.* at 1016 n.7.

[341] *Id.* at 1029.

[342] *See* Preseault v. United States, 100 F.3d 1525, 1537–39 (Fed. Cir. 1996) ("The background principles referred to by the Court in *Lucas* were state-defined nuisance rules.").

[343] *See, e.g.*, Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1338 (Fed. Cir. 2001); Good v. United States, 189 F.3d 1355, 1361–62 (Fed Cir. 1999) ("in view of *the regulatory climate* that existed at the time the Appellant acquired the subject property, Appellant could not have had a reasonable expectation that he would obtain approval.") (emphasis added).

have created the "unlikely legacy" of benefitting not landowners, but rather regulators who were able to tease out "background principles" supporting their restrictions.[344]

One notably overarching example of background principles is the "notice rule" pertaining to ordinances and government actions pertaining to land predating the claimant's purchase.[345] This has the effect of extinguishing grantee rights to litigate takings while simultaneously depriving grantors of the right to bundle legal claims along with the conveyance.[346] While the Supreme Court rejected the categorical application of the notice rule in *Palazzolo v, Rhode Island*, Justice O'Connor, who supplied the needed fifth vote in the case, wrote a concurrence stating that knowledge of the existing "regulatory regime . . . may also shape legitimate expectations."[347]

Professor Nestor Davidson has proposed an even broader, behaviorally based approach to expectations.[348] He referred to the concept of fairness in broad terms as the role of government in ensuring "property's morale."[349] Whereas Professor Frank Michelman's idea of "demoralization" costs[350] refers to changes in laws that unsettle property owners, Davidson wrote:

> As much as people worry about instability, unfair singling out, and majoritarian exploitation, people are also concerned about responsiveness, fair adjustment, and inclusion. In other words, some people are motivated to engage with property not because they take comfort that the law will not change but rather because they know at the outset that the system will be flexible. As a result, legal transitions can communicate to those people that the boundaries of

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[344] Michael C. Blumm & Lucus Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 367–68 (2005).

[345] *Id.* at 354–55.

[346] *Id.*; Justice O'Connor's concurrence in Palazzolo v. Rhode Island, 533 U.S. 606, 634–36 (2001), assured the continued viability of the "notice rule" under the rhetoric of balancing, as shown in *Guggenheim*; *See also* John A. Kupiec, *Returning to the Principles of "Fairness and Justice": The Role of Investment-Backed Expectations in Total Regulatory Takings Claim*s, 49 B.C. L. REV. 865, 886 (2008) (explaining that Justice O'Connor's concurrence means the Court will consider the pre-existence of a regulation under the expectations factor).

[347] Blumm & Ritchie, *supra* note 344, at 355; *Palazzolo*, 533 U.S. at 634 (2001) (O'Connor, J., concurring).

[348] Nestor M. Davidson, *Property's Morale*, 110 MICH. L. REV. 437 (2011).

[349] *Id.* at 481.

[350] Michelman, *supra* note 142, at 1214–18.

> risk inherent in property have reasonable limits; that society will, however imperfectly, provide processes to mediate competing property interests; and that the system of property will protect those perceived to be outsiders. In short, for some people, demoralization costs have an underappreciated obverse in what this Article calls "morale benefits."[351]

Professor Davidson concludes that the concept of "expectations" needs to be re-invigorated to include the morale benefits that arise from having the institutional flexibility to balance the need for public responsiveness, unfairness and exclusion, with expectations of stability.[352] If, as Professor Carol Rose argued, regulatory takings law broadly monitors the fairness of property transitions in an evolving regulatory regime,[353] perhaps *Penn Central*'s expectations of fairness should move beyond a narrow focus on the owner to consider the morale benefits that arise from institutional flexibility.

Professor Davidson's proposal of assessing the "morale benefits" of regulation is subject to several important practical caveats. First, although "morale benefits" is a more positive term than "demoralization costs," and intended to be more expansive in scope, the concept is no less vague, and would do little to clarify the already muddled field of takings law.[354] Second, expanding "ad hoc" inquiries to consider the effect of a regulation on the morale of "society as a whole," like the "demoralization costs to society as a whole," or Justice Brennan's relation of rights impaired with the "parcel as a whole,"[355] seemingly substitutes breadth for analytic depth and, additionally, might be inconsistent with the judiciary's proper role of resolving only justiciable controversies.[356]

Perhaps the main problem with Professor Davidson's proposal is its uncabined pragmatism respecting property arrangements. Common law jurists did not consciously undertake to monitor legal transitions in property rights

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[351] *See* Davidson, *supra* note 348, at 442.

[352] *Id.* at 474.

[353] Rose, *supra* note 10.

[354] *See* Davidson, *supra* note 348, at 459.

[355] Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 130 (1978).

[356] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) ("[T]he plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is . . . concrete and particularized.").

and assess their overall impact on social welfare.[357] Transitions occurred over time, reflecting the decentralized choices of society, and coalescing in sets of standardized practices commonly referred to as "custom."[358] The loss of "custom" as a way to understand transitions is neatly explained by Professor Daniel Hulsebosch:

> [O]ur post-realist legal culture lacks not just a convincing theory of evolutionary constitutionalism; it also lacks a sophisticated way of discussing the irregular changes in any body of law that Anglo-American legal thinkers used to capture under the rubric of custom. The positivist turn in legal theory has collapsed foreground and background, legislation and common law, the traditions of the interpretive community of common lawyers and who gets what, when, how.[359]

This debate is reminiscent of that regarding adoption of the *Restatement of Property—Third (Servitudes)*.[360] The Reporter, Professor Susan French, argued that an integrated and modern approach to the servitude should be adopted, giving the judge the opportunity to do what is reasonable under the circumstances.[361] Detractors countered that, although cumbersome, the old system of separate bodies of law for easements, covenants, and equitable servitudes would permit skilled real estate lawyers to draft precise agreements, without fear that a judge would arrogate the right to decide what really is best for the contracting parties.[362]

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[357] *See* Stop the Beach Renourishment v. Fla. Dept. Of Envtl. Prot., 130 S. Ct. 2592, 2606 (2010) (citing BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 69–70 (1765)). For a modern Supreme Court view, arguing that the Due Process Clause does not "freeze" common law rights, and that the State has the power to effect entitlement changes, *see* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 92–93 (1980) (Marshall, J., concurring).

[358] *See* Ghen v. Rich, 8 F. 159, 162 (D. Mass. 1881) (adopting a custom based approach toward determining whale ownership).

[359] Daniel J. Hulsebosch, *The Tools of Law and the Rule of Law: Teaching Regulatory Takings After Palazzolo*, 46 ST. LOUIS U. L.J. 713, 728 (2002).

[360] RESTATEMENT (THIRD) OF PROP.: SERVITUDES (2000).

[361] Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1304 (1982).

[362] Jeffrey E. Stake, *Toward an Economic Understanding of Touch and Concern*, 1988 DUKE L.J. 925, 933–74.

2. Resurrecting the "Character" Factor

Penn Central held that "the character of the governmental action" was of "particular significance."[363] "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[364] However, four years later, permanent physical invasions were deemed categorical takings in *Loretto v. Teleprompter Manhattan CATV Corp*.[365]

This leaves the question of what role "character of the regulation" might play in the future.[366] As discussed above, maybe the character factor incorporates the public benefit requirement.[367] Perhaps instead, "character" asks that judges examine the "nature" of the taking and gauge its fairness, in accord with norms of due process.[368]

According to the four-Justice plurality in *Eastern Enterprises*, the imposition of severely retroactive liability on a limited class of parties presents a case where "the nature of the governmental action . . . is quite unusual" and augurs in favor of a taking.[369] In *American Pelagic Fishing Co. v. United States*, the Court of Federal Claims found that a statute targeted a single fishing vessel for severe economic losses, as if it were mentioned by name.[370] "The character of the governmental action here, because that action, in both purpose and effect, was retroactive and targeted at plaintiff, supports the finding of a taking."[371]

It is unclear why the "character" of the regulation should be relevant to takings claims, in any event. Regulations are assumed to promote the public good, but that does not distinguish them from takings.[372] Regulations that

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[363] Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[364] *Id.* (citation omitted).

[365] 458 U.S. 419 (1982).

[366] *See* Steven J. Eagle, *"Character" as Worthiness": A New Meaning for* Penn Central*'s Third Test?*," 27:6 ZONING & PLAN. L. REP. 1, 1 (June 2004).

[367] *See supra* Part II.A.3.

[368] *See* Eagle, *supra* note 366, at 4.

[369] E. Enters. v. Apfel, 524 U.S. 498, 537 (1998) (plurality opinion).

[370] 49 Fed. Cl. 36, 51 (2001), *rev'd on other grounds*, 379 F.3d 1363 (Fed. Cir. 2004) (holding no property interest in fishing permit).

[371] *Id.*

[372] *See E. Enters.*, 524 U.S. at 545 (plurality opinion) (Kennedy, J., concurring in judgment and dissenting in part) ("The Clause operates as a conditional limitation, permitting the govern-

truly reflect reciprocity of advantage provide each affected owner with just compensation in kind.[373] Regulations that have the character of being arbitrary are susceptible to being struck under the Due Process Clause, antecedent to takings analysis.[374] Likewise, regulations that single out particular individuals might be violative of the Equal Protection Clause.[375] The inference from cases like *Eastern Enterprises* and *American Pelagic* seems to be that the remedy for regulations that are of bad character, but insufficiently so to be struck under a different constitutional doctrine, is for their character to count against the government under a generalized takings fairness test.

The Supreme Court might be drawn back to "character of the regulation" as a result of its recent holding in *Arkansas Game & Fish Commission v. United States*.[376] Although not emphasized in the Court's opinion, the U.S. Army Corps of Engineers decided to impose flooding that extensively damaged the Commission's valuable timber in order to protect agricultural areas downstream from even greater pecuniary losses.[377] The Court decided only "government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection,"[378] and remanded the case to the Federal Circuit.[379] The Court noted that the government raised at oral argument the novel issue of "[w]hether the damage is permanent or temporary, damage to downstream property, however foreseeable, is collateral or incidental; it is not aimed at any particular landowner and therefore does not qualify as an occupation compensable under the Takings Clause."[380]

The government's position might be that floodwaters are an enemy to all, that the release of such waters is an ad hoc exercise of the police power to prevent widespread harm. In 1928, in *Miller v. Schoene*, the Court held

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ment to do what it wants so long as it pays the charge. The Clause presupposes what the government intends to do is otherwise constitutional.").

[373] Examples include typical neighborhood setback regulations, and cases where all owners in the area benefit, such as in the Vieux Carre in New Orleans. *See* City of New Orleans v. Dukes, 427 U.S. 297 (1976).

[374] *See supra* notes 177–179 and associated text.

[375] *See* Village of Willowbrook v. Olech, 528 U.S. 562 (2000) (per curiam); *supra* Part II.A.4.

[376] 133 S. Ct. 511 (2012).

[377] *See id.* at 515–16.

[378] *Id.* at 522.

[379] *Id.* at 523.

[380] *Id.* at 521 (citing Tr. of Oral Arg. 3039).

that the decision of the Commonwealth of Virginia to destroy valuable cedar trees in order to protect much more valuable nearby apple orchards from blight emanating from the cedars was a valid exercise of the police power.[381] The Court did not analyze why the burden of preventing serious damage to the state's economy should fall on the cedar owners.[382]

It is possible that the Court in the future might, as did the U.S. Army Corps of Engineers in *Arkansas Game and Fish Commission*, judge the destruction of valuable timber to save more valuable crops downstream in a similar light.[383] Although *Miller v. Schoene* did not focus on landowners' respective burdens,[384] the Court's decision three decades later in *Armstrong v. United States* put the issue of whether the government could "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" front and center.[385]

A significant problem in the case of recurrent floodings is that what might have been an ad hoc response to an emergency in a singular instance becomes a regular pattern where the loss is perfectly predictable over time. Thus, in *Arkansas Game and Fish Commission*, the Court of Federal Claims stated that "a *temporary* flowage easement is a necessary foundation for the Commission's takings claim," and held "the timber [was] taken as the measure of the compensation due."[386]

The Supreme Court noted in *Arkansas Game and Fish Commission* that it had "drawn some bright lines, notably, the rule that a *permanent* physical occupation of property authorized by government is a taking."[387] However, "aside from the cases attended by rules of this order, most takings claims turn on situation-specific factual inquiries."[388]

If the Court decides to address a case similar to *Arkansas Game and Fish*[389] using a *Penn Central*[390] analysis, it might have to address, under the

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[381] 276 U.S. 272, 278–80 (1928).

[382] *Id.*

[383] 133 S. Ct. at 515–16.

[384] *See* 276 U.S. 272.

[385] 364 U.S. 40, 49 (1960).

[386] Ark. Game & Fish Comm'n v. United States, 87 Fed. Cl. 594, 617 (Fed. Cl. 2009), *rev'd*, 637 F.3d 1366 (Fed. Cir. 2011), *rev'd*, 133 S. Ct. 511 (2012).

[387] 133 S. Ct. at 518 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982)) (emphasis added).

[388] *Id.* (citing Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978)).

[389] *See id.* at 511.

[390] *See* 438 U.S. at 104.

"character of the regulation" rubric, whether *Miller v. Schoene,*[391] which predated the Court's *Penn Central* doctrine, is still viable.

III. THE FENCE AROUND *PENN CENTRAL*

We emphasize that our decision here turns on the specific facts presented in this case. Our determination follows the common law tradition of deciding only specific cases and controversies. . . . We also emphasize that ruling case law makes it very difficult to open the federal courthouse door for relief from state and local land-use decisions. The Supreme Court has erected imposing barriers in *MacDonald, Sommer & Frates v. Yolo County* and *Williamson County* to guard against the federal courts becoming the Grand Mufti of local zoning boards.[392]

Penn Central has provided federal judges with no clear standards to adjudicate regulatory takings cases, thus boxing them into serving as "Grand Mufti" of zoning.[393] Their solution was to fashion ways to avoid hearing regulatory takings disputes.[394] Thus, they create a fence around *Penn Central*.[395]

A. The Williamson County *Ripeness Doctrine*

The Supreme Court's regulatory takings ripeness doctrine was presaged by *Penn Central* itself, when it suggested that the appellants "did not avail themselves of the opportunity to develop and submit other plans" to the Preservation Commission,[396] and that counsel at oral argument "admitted" that the Commission might have been receptive to the original plan for a

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[391] *See* Miller v. Schoene, 276 U.S. 272, 272 (1928).

[392] Hoehne v. Cnty. of San Benito, 870 F.2d 529, 532 (9th Cir. 1989) (citing *MacDonald*, 477 U.S. 340 (1986); Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)).

[393] *Id.*; *See also* Kanner, *supra* note 8, at 687 (asserting that, by insisting on ad hoc review, the Supreme Court "de facto appointed itself a super zoning board of sorts," and that, "paradoxically," judges in cases like *Hoehne* "reveal their hostility to takings claims by proclaiming themselves to be opposed to this approach").

[394] *Penn Central*, 438 U.S. 104.

[395] The word "fence" is used here in a manner analogous to the concept of "make a fence around the Torah" in Jewish law. *See* WILLIAM BERKSON, PIRKE AVOT: TIMELESS WISDOM FOR MODERN LIFE 14 (2010) ("The 'fence' refers to cautionary rules designed to protect people from temptations to violate the commandments of the Torah.").

[396] 438 U.S. at 118–19.

20-story building on top of the Terminal, instead of the proposed 55-story building.[397]

As first enunciated by the Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, the ripeness doctrine for federal review of state and local regulatory takings cases requires that litigants (1) obtain a final determination of what development they will be allowed, and (2) have sought state compensation in state court.[398] It often is described as a "unique" test that a claim is ripe for adjudication,[399] and has been subject to numerous abuses.[400] However, Professor Thomas Roberts has asserted that "the misleading nature of the ripeness label used in *Williamson County*" obscures that the rule is "better viewed as an element in the unique Fifth Amendment takings cause of action."[401]

For purposes of this Article, it is sufficient to observe that, despite the complexities in its administration, the ultimate problem with *Williamson County*'s "final decision" prong is that planners cannot readily apply their tools so as to make final decisions in any linear sense, since the question is not how much development will be permitted, but rather, evaluating the myriad of interrelated details in the application.[402] Likewise, planning ad-

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[397] *Id.* at 116, 137 n.34.

[398] 473 U.S. 172, 186 (1983) ("Because respondent has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensation, respondent's claim is not ripe.").

[399] *See, e.g.*, Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U. J.L. & POL'Y 99, 129 (2000); J. David Breemer, *Overcoming* Williamson County*'s Troubling State Procedures Rule: How the England Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Cases*, 18 J. LAND USE & ENVTL. L. 209, 211 (2003).

[400] For example, government defendants may remove takings cases filed in state court pursuant to *Williamson County* to federal court. Chi. v. Int'l. College of Surgeons, 522 U.S. 156, 160, 163 (1997). Despite a strong hint by the Eighth Circuit that the Supreme Court permit similar removal by plaintiffs, it declined to reconsider. Kottschade v. City of Rochester, 319 F.3d 1038, 1041–42 (8th Cir. 2003). Recently the Fourth Circuit rejected as "procedural gamesmanship" an attempt by a town to remove a case involving property rights claims from state to federal court, and then asking for dismissal on the grounds there had been no *Williamson County* ripening. Sansotta v. Town of Nags Head, 724 F.3d 533, 547 (4th Cir. 2013).

[401] Thomas E. Roberts, *Facial Takings Claims Under* Agins-Nectow*: A Procedural Loose End*, 24 U. HAW. L. REV. 623, 625–26 (2002).

[402] The protections offered by the Supreme Court in *Del Monte Dunes* are a cold comfort to property owners. *See* City of Monterey v. del Monte Dunes, 526 U.S. 687, 698 (1999) (Govern-

ministrators and local legislatures do not want to make final decisions, since advising applicants to try again avoids giving them a ticket to federal court.[403] Moreover, a federal takings claim logically should be "ripened" for judicial review through the simple mechanism of denial of compensation. Other types of § 1983 claims, such as those involving free speech, may be filed in federal court without the need for prior state proceedings.[404]

Some courts have found *Williamson County* requires judicial exhaustion even when the claimant pleads a taking exclusively for private benefit.[405] Other courts more explicitly acknowledge that such a requirement lacks any prudential content.[406] In addition, the willingness of federal courts to expand *Williamson County* to Substantive Due Process and equal protection claims in land-use cases displays both the federal courts' unwillingness to hear land-use cases, and the continued conflation of takings and Substantive Due Process, even after *Lingle*.[407]

Supreme Court Justices themselves have expressed surprise and disbelief on how convoluted the mechanisms buttressing the *Penn Central* doctrine have become. In *San Remo Hotel, L.P. v. City and County of San Francisco*, the claimant had sued in state court, asserting only its state law

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ment authorities . . . may not burden property by imposition of "repetitive and unfair [land-use] procedures" in order to avoid a final decision.).

[403] *See generally* EAGLE, *supra* note 73, at § 8-6(b).

[404] *See, e.g.*, Cramer v. Vitale, 359 F. Supp. 2d 621, 626–31 (E.D. Mich. 2005) (holding that while the state litigation *Williamson County* ripeness prong precluded a § 1983 takings claim, an equal protection claim based on a First Amendment violation could proceed under § 1983); Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 90 (2d Cir. 2002) (holding that while due process and equal protection claims to zoning restrictions were not ripe under *Williamson County*, a claim for retaliation could proceed under the First Amendment, because of a "fear of irretrievable loss").

[405] *See* Daniels v. Area Plan Comm'n of Allen Cnty., 306 F.3d 445, 453 (7th Cir. 2002) ("Unlike some circuits, this Circuit has consistently maintained a strict requirement that Takings Clause litigants must first take their claim to state court . . . when plaintiffs . . . are alleging a taking for private purpose.").

[406] *See* Montgomery v. Carter Cnty., 226 F.3d 758, 767 (6th Cir. 2000) (holding that requiring state exhaustion when the only claim presented is a private taking "would have only one apparent purpose–to force the plaintiff to vet her claims in state proceedings . . . before the claims can be aired in federal court").

[407] *See* J. David Breemer, *Ripeness Madness: The Expansion of* Williamson County*'s Baseless "State Procedures" Takings Ripeness Requirement to Non-Takings Claims*, 41 URB. LAW. 615, 617 (2009) (showing how "many lower federal courts have extended the state procedures ripeness requirement to due process and equal protection claims arising from land use disputes" and offering a critical appraisal).

claims, to fulfill the mandate of availing itself of state procedures to obtain compensation in order to ripen its takings claim for federal court.[408] However, the Supreme Court held that, under the full faith and credit statute,[409] the very state fact finding necessary for San Remo to obtain the state determination served as collateral estoppel in federal court.[410] In other words, San Remo now could bring its Fifth Amendment takings claim in federal court, but was precluded from asserting any of the issues on which it could prevail.[411]

While the judgment that the full faith and credit statute applied was unanimous, four Justices, concurring in the judgment, noted with concern the anomalous nature of the *Williamson County* process.[412] That opinion noted, *inter alia*, that state litigation to obtain redress was not a condition for other § 1983 actions, that there was no reason why comity should favor such state review of federal claims, that state court familiarity with other local conditions did not preclude relief in federal courts, and that the issue-preclusive effect of prior state court review "ha[d] created some real anomalies, justifying our revisiting the issue."[413]

B. Twombly-Iqbal *Undercuts Claimants' Ability to Discover Violations*

The Supreme Court's broad reading of "public use" as encompassing "public purpose" in *Kelo v. City of New London* is a reflection of the *Penn Central* doctrine's lack of objective standards.[414] Just as *Penn Central* latched onto its three-factor test embodying fairness in the absence of an approach based on property law, *Kelo* latched onto the doctrine of "pre-

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[408] 545 U.S. 323, 326–27 (2005).

[409] 28 U.S.C. § 1738 (1948).

[410] *San Remo Hotel*, 545 U.S. at 336–38.

[411] *See generally* Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251 (2006) (discussing *San Remo* and other cases). "Reconsideration of the ripeness requirement, however, reveals that it is not merely a barren formality, but instead an essential pillar of the Court's emerging and unarticulated takings jurisprudence, which recognizes the primacy of background state law in takings doctrine, and delegates to state courts the primary responsibility for developing and enforcing limits on takings by state and local governments." *Id.* at 255.

[412] *San Remo Hotel*, 545 U.S. at 348 (Rehnquist, C.J., concurring in judgment) (joined by O'Connor, Kennedy, and Thomas, JJ.).

[413] *Id.* at 350–51 (Rehnquist, C.J., concurring in judgment).

[414] 545 U.S. 469, 489–90 (2005).

textuality," thereby attempting to substitute fairness for a robust law of public use.[415]

Justice Stevens's majority opinion stated that the State cannot "take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."[416] He promised that the condemnation of property from one person for retransfer for development to another, "executed outside the confines of an integrated development plan . . . would certainly raise a suspicion that a private purpose was afoot," and that "hypothetical cases [of abuse] . . . can be confronted if and when they arise."[417] In his concurring opinion, Justice Kennedy asserted, "There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause."[418]

Justice Stevens avowed that "[n]or would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."[419] Justice Kennedy added that "[a] court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits."[420]

However, these promises neither are conceptually sound, nor enforceable. As this author has elaborated upon elsewhere,[421] private developers are in business to seek gain, and both they and government officials are subject to prosecution for bribery. Assuming that officials apply their business judgment and seek the best deal for the city, why should it matter if that gain is greater or less than the redeveloper's benefit? Similarly, developers often are in a position to spot good redevelopment opportunities, and will not share this information with officials unless they obtain those ensuing redevelopment opportunities.[422]

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[415] *Id.* at 478, 491.

[416] *Id.*

[417] *Id.* at 487.

[418] *Id.* at 493 (Kennedy, J., concurring).

[419] *Id.* at 478.

[420] *Id.* at 491 (Kennedy, J., concurring).

[421] Steven J. Eagle, Kelo, *Directed Growth, and Municipal Industrial Policy*, 17 SUP. CT. ECON. REV. 63, 103–07 (2009).

[422] *See* Eagle, *supra* note 114, at 1078–79 for elaboration.

Furthermore, the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*[423] and *Ashcroft v. Iqbal*[424] make it almost impossible that schemes evincing "pretextuality" that are planned by seasoned and discrete professionals would be detected. In *Iqbal*, the Court reiterated its holding in *Twombly* that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[425] *Iqbal* added, "the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process."[426] A claim is facially plausible when the complaint's "factual content" permits the trial court "to draw the reasonable inference that the defendant is liable for the misconduct alleged."[427]

The requirement that plaintiffs develop a claim to relief "plausible on its face" prior to discovery, as a practical matter, precludes them from ferreting out facts that are discernible only through discovery.[428] That is why plaintiffs had no real opportunity to establish a case regarding the controversial Atlantic Yards project in Brooklyn.[429] Similarly the New York Court of Appeals overturned an appellate holding that the condemnation of a neighborhood adjoining its campus was done for the benefit of Columbia University, and chastising the judge writing the appellate opinion for going beyond the defendant redevelopment agency's own record in the process.[430]

Even apart from these procedural problems, lower federal courts have failed to respond to Public Use Clause abuses. For instance, in *Didden v. Village of Port Chester*, the Village had given a private redeveloper the power of eminent domain over an extensive revitalization district.[431] The plaintiffs alleged that the redeveloper had demanded a substantial sum to forbear from condemning their parcel, and the Village condemned it after they refused to pay.[432] The U.S. District Court said that their action was

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[423] 550 U.S. 544 (2007).

[424] 556 U.S. 662 (2009).

[425] *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570).

[426] *Id.* at 684–85 (citing *Twombly*, 550 U.S. at 559).

[427] *Id.* at 678.

[428] *See* Eagle, *supra* note 114, at 1045–69 (elaborating on pretextuality).

[429] *See* Goldstein v. Pataki, 516 F.3d 50 (2d Cir. 2008).

[430] Kaur v. N. Y. State Urb. Dev. Corp., 933 N.E.2d 721, 733 (N.Y. 2010).

[431] 322 F. Supp. 2d 385, 388 (S.D.N.Y. 2004).

[432] *Id.* at 387; *See* Didden v. Village of Port Chester, 304 F. Supp. 2d 548, 556 (S.D.N.Y. 2004) ("Didden I").

time-barred, since their cause of action accrued much earlier, when it was first announced that the redevelopment district served a public purpose.[433] A panel of the Second Circuit, including now-Justice Sotomayor, affirmed.[434]

The overall message is that the unwillingness of courts to carry out clear promises to police abuses underlines what reluctant muftis they are.

IV. CONCLUSION

Our view of the expropriation of others' property reflects whether we identify with their situations. In American history, as Professor Carol Rose reminds us, expropriations of the property of fleeing British loyalists or rebellious Southern slaveholders "gave rise to no demoralization among *us* . . . . *They* were not members of *our* moral and political community . . . . Disruption of such outsider's property seemed to carry very little threat to the property of insiders."[435] Our regrettable tradition of excluding "unworthy" groups from the benefits of property ownership should teach us one thing: we should be wary of relying on particularized compassion to police expropriations.

Similarly, Professor Laura Underkuffler reminds us that we should also be leery about classifying people based on status.[436] As she notes:

As a matter of legal institutional design, we assume that the rights, privileges, and obligations of property ownership are the same for all owners and all challengers, regardless of wealth, social status, political influence, or other factors. The actions (or inactions) of owners or challengers may impact the outcome of a case, but the identities of owners or challengers may not.[437]

Penn Central's "ad hoc" search for compassion legitimizes reliance on feelings of kinship and social status. The demoralization costs referred to by Frank Michelman are likely only to reverberate across "*our"* society when the losers happen to be kindred spirits.[438] When the losers are an invisible aggregation of consumers and investors, empathy is unlikely to be forthcoming.

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[433] *Didden*, 322 F. Supp. at 388.

[434] Didden v. Village of Port Chester, 173 Fed. Appx. 931 (2d Cir. 2006).

[435] Rose, *supra* note 11, at 29 (emphasis added).

[436] Laura S. Underkuffler, *The Politics of Property and Need*, 20 CORNELL J.L. & PUB. POL'Y 363 (2010).

[437] *Id.* at 373.

[438] *See supra* notes 325–330 and associated text.

The Supreme Court has not conceded as much. It has sometimes interpreted *Penn Central* as providing objective tests, developed a sensible exactions doctrine, and found regulatory takings in cases involving large corporations as well as sympathetic landowners.[439] But the Supreme Court's Laputian discussion over the proper allocation of public burdens under *Penn Central* has not yielded concrete results. In a form most stripped of *politesse*, and often attributed to Vladimir Ilyich Lenin, the problem of the divvying up of benefits and burdens is referred to as the "who whom" problem.[440] A similar thought was expressed by the preeminent political scientist Harold Lasswell, in his classic *Politics: Who Gets What, When and How*.[441]

By setting its lofty but opaque aspirations of fairness, the Supreme Court has posited a "who whom" problem incapable of principled judicial resolution. Uncabined pragmatism about social benefits and burdens, like Professor Davidson's search for the "morale of property," poses, to use Davidson's own words, "a conceptual quagmire."[442] While Professor Davidson argues that it is "possible to disaggregate the sources of expectations relevant to forming evolving 'common, shared understandings' of the limits of expectations,"[443] this author is less confident about the Court's ability to balance the psychological needs and wants of the community (assuming the relevant "community" could be ascertained).

If the Takings Clause is not to be a "poor relation," to other Bill of Rights provisions, regulatory takings cases should be adjudicated under the same standard as other fundamental rights.[444] The ultimate dictate of fundamental fairness is that individual rights be applied evenhandedly. At the least, claimants should be able to choose whether to press their federal claims in federal court.

There is no reason to single out claims that allege unconstitutional property deprivations for different treatment. While regulatory takings determinations generally are fact-intensive and involve community knowledge, this does not distinguish them from many other types of determinations that judges make. In *Miller v. California*, for instance, courts were asked to de-

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[439] *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); E. Enters. v. Apfel, 524 U.S. 498 (1998).

[440] *See generally* Philip Allott, *The European Community is Not the True European Community*, 100 YALE L.J. 2485, 2491 (1991).

[441] HAROLD LASSWELL, POLITICS: WHO GETS WHAT, WHEN AND HOW (1936).

[442] Davidson, *supra* note 348, at 480.

[443] *Id.*

[444] Dolan v. City of Tigard, 512 U.S. 374, 392 (1994).

termine, *inter alia*, "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest."[445] Any need to yield to the specialized knowledge of state courts can be managed through the *Burford* abstention doctrine, which will require federal courts to articulate more forcefully the reasons for denying federal review of constitutional rights.[446] In general, as Professor William Stoebuck suggested, "if one must make a choice between the government's convenience and the citizen's constitutional rights, the conclusion should not be much in doubt."[447]

In addition to eliminating inequitable procedural barriers, the Supreme Court should seek fairness in workable general rules, not ad hoc factual determinations. One helpful rule would be a Substantive Due Process test that comports with the realities of planning. The Court should also make clear that meaningful rational basis is required when scrutinizing land-use regulations. In the meantime, landowners, like Samuel Beckett's vagrants,[448] will continue waiting for fundamental fairness.

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[445] 413 U.S. 15, 24 (1973) (citations omitted).

[446] *See* Town of Nags Head v. Toloczko, 728 F.3d 391, 393 (4th Cir. 2013) (reversing district court abstention and holding that while "the claims asserted here do involve a sensitive area of North Carolina public policy, resolving them is not sufficiently difficult or disruptive of that policy to free the district court from its 'unflagging obligation to exercise its jurisdiction.'") (quoting In re Mercury Constr. Corp., 656 F.2d 933, 942 (4th Cir. 1981) (en banc), *aff'd sub nom.* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 14 (1983)).

[447] WILLIAM B. STOEBUCK, NONTRESSPASSORY TAKINGS IN EMINENT DOMAIN 135 (1977).

[448] *See* SAMUEL BECKETT, WAITING FOR GODOT: A TRAGICOMEDY IN TWO ACTS (1956), *available at* http://samuel-beckett.net/Waiting_for_Godot_Part1.html.