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Regulatory Takings: A Chronicle of the Construction of a Constitutional Concept

*Garrett Power**

I. INTRODUCTION

American concepts of sovereignty and property are rooted in Roman law. As described by U.S. Supreme Court Justice Felix Frankfurter: “Dominion, from the Roman concept *dominium*, was concerned with property and ownership, as against *imperium*, which related to political sovereignty.”¹ The *dominium*, bestowed on individuals and firms, granted exclusive rights to possession and enjoyment over parcels of land and other resources. On the other hand, the *imperium*, held by the people in their sovereign capacity, reserved a residuum of power to divest the private owners of their entitlements by “regulations that [were] necessary to the common good and general welfare.”² In the history of American private ownership, property was in the first instance a creation of the sovereign states, each of which “possesse[d] the power of disposing of the unappropriated lands within its own limits, in such manner as its own judgment shall dictate.”³

With its historical roots, exclusive ownership of land in the U.S. proved useful in the creation of a productive market-driven capitalist economy. The existence of private property encouraged owners to invest capital to improve their entitlements with an assurance of their “investment-backed expectation”⁴ that they could “reap that which they had sowed.”⁵ Adam Smith touted private property as leading an

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1. *United States v. California*, 332 U.S. 19, 43–44 (1947) (Frankfurter, J., dissenting) (emphasis added).

2. *See, e.g., Commonwealth v. Alger*, 61 Mass. 53, 84 (1851).

3. *Fletcher v. Peck*, 10 U.S. 87, 128 (1810).

4. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1213 (1967).

5. *Galatians 6:7* (King James) (“Be not deceived; God is not mocked: for whatsoever a man soweth, that shall he also reap.”).

“invisible hand” so that each individual in pursuit of his private interest served the common weal.⁶

While it helped create a market-driven economy, the principle of exclusive ownership can be used inefficiently. The use of private property might pose a risk to the health and safety of the community. Or the state might simply want to reclaim the resources (the land or the goods) for public purposes. The sovereign created the private property in the first place, so what if it subsequently changed its mind and enacted legislation that diminished the value of previously existing rights of private property?

The Fifth Amendment to the United States Constitution proscribes that: “No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.”⁷ All scholars agree that a formal taking of property under the constitutional power of eminent domain would require the sovereign to pay just compensation. And “[a]ll agree that the legislature cannot bargain away the police power of a State.”⁸ But should the owner of private property in all “fairness and justice”⁹ be compensated when a regulation diminishes the economic value of her private property?

The question of whether a sovereign regulation has “taken” private property without just compensation has puzzled the United States Supreme Court for over two hundred years in over four hundred cases.¹⁰ And today’s Supreme Court remains fundamentally divided into two blocs on this issue. This “great divide” is sometimes attributed to a difference in judicial philosophy. Those in the Court’s conservative wing are typically described as practitioners of “judicial restraint” who defer to the decisions of legislatures. Those in the Court’s liberal wing are said to be “judicial activists” who are intent on reconstructing the Constitution’s language to meet the exigencies of the times. The Court’s “constitutional property” jurisprudence belies this stereotype. Its right wing seeks to expand the Takings Clause beyond its original meaning so as to second-guess legislatures and to discourage government activity. Conversely, the

6. 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 423 (Edwin Cannan ed., Random House, Inc. 1937) (1776).

7. U.S. CONST. amend. V. These clauses do not comprise the full text of the Fifth Amendment. The Fifth Amendment provides other protections as well.

8. *Stone v. Mississippi*, 101 U.S. 814, 817 (1879).

9. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960) (“The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”).

10. A Lexis Terms and Connectors search (“taking or take and fifth amendment or fourteenth amendment and just compensation”) in U.S. Supreme Court Cases, Lawyers’ Edition, yielded 480 cases (last visited Apr. 23, 2008).

left wing limits the text to its original meaning and thereby passively allows legislative bodies greater freedom to make public choices. This paper chronicles the leading cases and finds that the Court's present interpretation of "regulatory takings" sits upon a shaky foundation of split decisions; the Court's construction of "constitutional property" remains a work in progress.

II. SOVEREIGNTY

A. *Chain of Title*

Sovereignty in the United States of America can be metaphorically linked into a chain of title dating back to William the Conqueror's conquest of England in 1066 A.D.¹¹ William claimed all of the kingdom, and having established himself absolute ruler, he divided the land among his comrades in arms and the other great landlords who had not opposed him. It was not until the Magna Carta two centuries later in 1215 that the Crown agreed to limit its sovereignty by promising to be subject to the due process of law.¹²

In the fifteenth century the English Crown claimed North America by "right of discovery."¹³ Through various agencies it established colonies; some were trading corporations, others religious congregations, and still others proprietorships.¹⁴ Subject always to the preeminence of the Crown, the colonial agents were empowered both to enact laws for the governance of their colonies and to grant their lands in return for whatever other consideration the market would bear. They adopted the English institution of property.

In 1776 the American colonists declared their independence from the English Crown. The U.S. Supreme Court later described the consequences of their victory as follows: "Upon the American

11. See GEORGE W. KEETON, *THE NORMAN CONQUEST AND THE COMMON LAW* 25–26, 35–36 (1966).

12. See *MAGNA CARTA* 39 (1215), translated in J.C. HOLT, *MAGNA CARTA* app. 6, at 461 (2d ed. 1992) ("No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement [sic] of his peers or by the law of the land.").

13. See *Johnson v. M'Intosh*, 21 U.S. 543, 576–77 (1823); see also CHARLES A. BEARD, MARY R. BEARD & WILLIAM BEARD, *THE BEARDS' NEW BASIC HISTORY OF THE UNITED STATES* 22–23 (1960) [hereinafter BEARD] ("Under English law all the territory claimed in America belonged to the Crown.").

14. One colony established by trading company was Jamestown, which was founded in 1607 under the London Company. See BEARD, *supra* note 13, at 24. One religious congregation was the Pilgrims, who established Plymouth Colony in 1620 on land that belonged to the Plymouth Company. See *id.* Maryland and Pennsylvania are examples of proprietorship colonies. Maryland was granted to Lord Baltimore in 1632, and Pennsylvania was granted to William Penn in 1681.

Revolution, [all rights of the Crown and of the Parliament] vested in the original states within their respective borders, [were] subject to the rights surrendered by the constitution to the United States.”¹⁵

B. State and Federal Sovereignty

Nineteenth-century jurist Thomas M. Cooley described the sovereign powers of these thirteen newly independent states in his *Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union*.¹⁶ He opined that under the emergent American system of constitutional democracy the state legislatures had three inherent sovereign powers: the power of eminent domain, the power to tax, and the police power.¹⁷ Eminent domain arose from natural law as the government’s inherent power to take private property for public uses.¹⁸ The “power of taxing the people and their property [was] essential to the very existence of government” so as to leave a state “the command of all its resources.”¹⁹ And the common-law concept of the police power provided the states with “the power of promoting the public welfare by restraining and regulating the use of liberty and property.”²⁰

In 1787 the thirteen states joined into a federal union and adopted a constitution whereby the states surrendered a limited number of their powers to a national government. The national government was preeminent within the realm of its delegated powers.²¹ And the most expansive delegation provided: “The Congress shall have power to lay and collect Taxes, . . . [t]o regulate Commerce . . . among the several

15. *Shively v. Bowlby*, 152 U.S. 1, 57 (1894).

16. *See generally* THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (Boston, Little, Brown, & Co. 5th ed. 1883). Cooley was a Professor of Law at the University of Michigan Law Department from 1859 through 1884. He also served as a judge on the Michigan Supreme Court from 1864 through 1885. *See* Michigan Supreme Court Historical Society, <http://www.micourthistory.org/bios.php?id=35> (last visited Feb. 19, 2009).

17. *See* COOLEY, *supra* note 16, at 593–746.

18. *See* 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 385, 807 (James Brown Scott ed., Francis W. Kelsey trans., William S. Hein & Co. 1995) (1625).

19. *See* Justice Marshall’s dicta in *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428–30 (1819).

20. ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS*, at iii (photo. reprint 1976) (1904).

21. *See* U.S. CONST. art. VI, cl. 2 (“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.”).

States, . . . [a]nd [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers”²²

C. *Constitutional Limitations*

As originally enacted, the U.S. Constitution was primarily a delegation of power to the national government, not a limitation on the powers of governments to impinge upon the citizenry’s personal liberties or property rights. The one notable exception existed in Article I, Section 10, which provided: “No State shall . . . pass any . . . Law impairing the Obligation of Contracts”²³ The founding fathers—many of whom were wealth creditors—drafted this provision conscious that the “widespread distress following the revolutionary period, and the plight of debtors, [would call] forth in the States an ignoble array of legislative schemes for the defeat of creditors and the invasion of contractual obligations.”²⁴

Four years later in 1791, Congress adopted the Bill of Rights—in the form of the first ten amendments to the Constitution—for the express purpose of limiting the sovereign’s power over the people. Two clauses in the Fifth Amendment expressly called for the protection of property. The first provided that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law”²⁵ This “due process” language was “old history”—essentially a restatement of the Magna Carta.²⁶ But the second clause was original. It provided: “[N]or shall private property be taken for public use, without just compensation.”²⁷ This Takings Clause implicitly granted Congress the power to take property through an eminent domain condemnation procedure and explicitly required that the national government pay “just compensation” when it exercised that power. But, the Fifth Amendment left two unanswered questions. First, did the Takings Clause limit the expropriatory powers of all sovereigns (local, state, and federal), or did it only apply as against the newly created national government? And second, what constituted the “private property” that it protected?

22. U.S. CONST. art. I, § 8.

23. U.S. CONST. art. I, § 10.

24. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 427 (1934); *see also* *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 354–55 (1827).

25. *See* U.S. CONST. amend. V.

26. *See* MAGNA CARTA, *supra* note 12, at 461 (“No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement [sic] of his peers or by the law of the land.”).

27. *Id.*

The first question was answered and re-answered in two nineteenth-century Supreme Court cases. In the 1833 case of *Barron v. Mayor & City Council of Baltimore*,²⁸ a shipwright sought just compensation from the City of Baltimore (a creature of the State of Maryland) when sediment from the city's street grading project destroyed the value of his wharf-property.²⁹ The Supreme Court denied relief on jurisdictional grounds, holding that "the fifth amendment . . . is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states."³⁰

In the immediate aftermath of the decision in *Barron*, there were no national constitutional constraints on the taking of private property by state or local governments. Most of the state constitutions, however, provided some protections for private property. Many had "due process" language, and some copied the Fifth Amendment with language expressly requiring just compensation for a "taking."³¹ But until 1868, the constitutional limitations against state actions taking private property varied from state to state.

During the reconstruction following the American Civil War, the Fourteenth Amendment to the U.S. Constitution was ratified in 1868.³² Although its primary thrust was to extend the privileges and immunities of citizenship to the newly emancipated slaves, it also included a property clause. It imposed a due process requirement on state (and local) governmental actions with language nearly identical to that in the Fifth Amendment: "[N]or shall any state deprive any person of . . . property, without due process of law . . ."³³ But the Fourteenth Amendment did not include language expressly requiring that state "takings" of private property be supported by "just compensation," and the question persisted of whether compensation was due.

The question was answered in 1897 when the U.S. Supreme Court decided *Chicago, B. & Q. R. Co. v. City of Chicago*.³⁴ The Court opined that "the due process of law enjoined by the *Fourteenth Amendment* requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a state."³⁵ Hence, the Fifth and Fourteenth Amendments, taken together, imposed a

28. 32 U.S. 243 (1833).

29. *See id.* at 243–44.

30. *Id.* at 250–51.

31. *See, e.g.*, MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 63–66 (1977).

32. *See, e.g.*, BEARD, *supra* note 13, at 274.

33. U.S. CONST. amend. XIV.

34. 166 U.S. 226 (1897).

35. *Id.* at 235.

nationwide requirement that private property can only be taken for a public use and only upon the payment of just compensation. But, a larger question remained unanswered: what was the nature of the private property that the Fifth and Fourteenth Amendments protected from federal or state expropriation?

III. PROPERTY

A. *Original Conception of Private Property*

In the aftermath of American independence, the thirteen sovereign states embraced the “Common Law of England . . . which, by experience, [has] been found applicable to their local and other circumstances”³⁶ After confiscating all property belonging to the Crown, the next order of business for America’s landed revolutionaries was to confirm their entitlement to all properties they had previously been granted by the colonial proprietors. The English common-law concept of property incorporated into American post-revolutionary law corresponded with Sir William Blackstone’s description in his *Commentaries on the Laws of England*.³⁷ He conceptualized property as that “de[s]potic dominion which one man claims and exerci[s]es over the external things of the world, in total exclu[s]ion of the right of any other individual in the univer[s]e.”³⁸ The “things” Blackstone had in mind corresponded with the Roman law lexicon of either land or movables, but he rechristened them as either *real property* (land) or *personal property* (“goods; money, and all other movables”).³⁹

According to Blackstone’s view, the owner of private property was entitled to possession of some tangible thing with the accompanying right to exclude all others from using it. The Supreme Court’s original understanding of the Takings Clause of the Fifth Amendment embraced Blackstone’s notion of private property as the right to exclusive physical possession of a tangible resource. In the Court’s view, the clause protected an owner’s property from seizure but did not protect it against regulations or taxes affecting its value.⁴⁰

36. See, e.g., MD. CONST. DECL. OF RTS. art. 5.

37. 2 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (photo. reprint 1978) (9th ed. 1783).

38. *Id.* at 2.

39. *Id.* at 16.

40. See, e.g., John F. Hart, *Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1253 (1996); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782–83, 794–98 (1995). Treanor traces the history of the just compensation principle and surveys early Supreme Court

The application of this distinction can be seen in two nineteenth-century Supreme Court cases. In *Pumpelly v. Green Bay Co.*,⁴¹ a navigation improvement project authorized by the Wisconsin legislature resulted in the construction of a dam that flooded the claimant's land.⁴² The Court held that "where real estate is actually invaded . . . so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution . . ."⁴³ Conversely, in *Mugler v. Kansas*,⁴⁴ the Court held an alcohol prohibition statute enacted by the Kansas legislature to be a legitimate exercise of the police power, even though it materially diminished the value of the building and equipment that the plaintiff employed in the manufacture of beer.⁴⁵ Although the value of the plaintiff's property may have been reduced, his brewery building was not invaded, and his equipment and personal property were not confiscated.

Less well-delineated was the nineteenth-century rule employed to determine whether the "exaction from the owner of private property of the cost of a public improvement . . . [was] a taking, under the guise of taxation, of private property for public use without compensation."⁴⁶ In the opinion of Thomas Cooley, "[t]here can be no justification for any proceeding which charges the land with an assessment greater than the benefits; it is a plain case of appropriating private property to public uses without compensation."⁴⁷ In *Village of Norwood v. Baker*,⁴⁸ the Supreme Court accepted this view and held it to be a violation of the Fourteenth Amendment when imposition of "special assessments to meet the cost of public improvements . . . [are] in substantial excess of the special benefits accruing" to the private owner.⁴⁹

decisions interpreting the Takings Clause and concludes that "[t]he predecessor clauses to the Fifth Amendment's Takings Clause, the original understanding of the Takings Clause itself, and the weight of early judicial interpretations of the federal and state takings clauses all indicate that compensation was mandated only when the government physically took property." *Id.* at 798.

41. 80 U.S. (13 Wall.) 166 (1871).

42. *Id.* at 167-69.

43. *Id.* at 181.

44. 123 U.S. 623 (1887).

45. *See id.* at 653-57, 668-70. Justice Harlan, delivering the opinion of the Court, wrote that "[s]uch legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interest." *Id.* at 669.

46. *Vill. of Norwood v. Baker*, 172 U.S. 269, 279 (1898).

47. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION, INCLUDING THE LAW OF LOCAL ASSESSMENTS 661 (Chicago, Callaghan & Co. 2d ed. 1886).

48. 172 U.S. 269 (1898).

49. *Id.* at 278-79.

B. Twentieth-Century Conception of Property

As the century turned, so too did the jurisprudential concept of *property*. Blackstone's definition of *property* required that an owner have "[s]ole and de[s]potic dominion"⁵⁰ over a corporeal, physical asset. But under twentieth-century conditions, this definition proved to be anachronistically narrow.⁵¹ Blackstone's view failed to account for intangible assets such as business goodwill, trademarks, trade secrets, and copyrights.⁵² Bills of exchange ("choses in action"), accounts receivable, and contract rights were being bought and sold notwithstanding the absence of any specific, underlying tangible asset. A creditor, for example, might assign his right to repayment of a debt to a buyer, who would then have enforceable property rights in the debtor's obligation of contract. None of these transactions related to a physical "thing," but all were treated by financial markets as creating valuable interests. Moreover, real estate markets had severed usufructuary property interests from possessory property interests. The creation of easements and servitudes ("incorporeal hereditaments") left the owner in possession with rights that were neither exclusive nor absolute. Perhaps it was these market realities that prompted a young Yale law professor named Wesley Newcomb Hohfeld to conclude that in the twentieth century, property was nothing more than a "very complex aggregate of rights . . . which . . . naturally have to do with the [asset] in question"⁵³ and which might be separated and made distinct with a "freedom of alienation and circulation."⁵⁴

IV. REGULATORY TAKINGS

A. Pennsylvania Coal v. Mahon (1922)

Perhaps Supreme Court Justice Oliver Wendell Holmes Jr. had Hohfeld's "aggregate of rights" notion in mind when, in a 1922 letter to British political scientist Harold Laski, he lamented the "petty larceny of

50. 2 BLACKSTONE, *supra* note 37, at 2.

51. See Francis J. Swayze, *The Growing Law*, 25 YALE L.J. 1, 9–11 (1915); see also Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 329–30 (1980).

52. See, e.g., *Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918) (acknowledging a "quasi" property right in news matter that is distinguishable from unpublished works and upholding, on the basis of unfair competition, the district court's injunction against the appropriating news agency).

53. WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* 12 (Walter Wheeler Cook ed., 1919).

54. *Id.* at 105.

the police power.”⁵⁵ Just months later, Justice Holmes would memorialize such sentiments in a landmark decision.

In the case of *Pennsylvania Coal Co. v. Mahon*,⁵⁶ an 1878 deed had severed ownership of land between a surface owner and subsurface owner.⁵⁷ The deed expressly provided that the surface owner waived all claims for damages that might arise from use of the subsurface, giving Pennsylvania Coal (the subsurface owner) the right to mine coal without regard for the condition on the surface.⁵⁸ But in 1921, a surface owner (on the authority of a newly enacted Pennsylvania statute) obtained an injunction preventing the owner of the subsurface from mining in such a way as to cause subsidence.⁵⁹

Justice Holmes pointed out that “[f]or practical purposes, the right to coal consists in the right to mine it.”⁶⁰ On the facts, he found that the statute made it commercially impracticable for the coal company to mine, and as a result it deprived the coal company of its entitlement.⁶¹ Moreover, the statute impaired the surface owner’s contractual obligation to assume the risk of damages arising from coal mining.⁶² Justice Holmes concluded that the “the statute . . . destroy[ed] previously existing rights of property and contract.”⁶³

Justice Holmes looked to the facts to determine whether compensation was constitutionally required. He concluded for the majority that the diminution in value had reached such a “magnitude” that the police power was stretched “too far,” so as to amount to an unconstitutional taking of property under the Fourteenth Amendment in the absence of just compensation.⁶⁴ Justice Holmes’s expansive view

55. 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916–1935, at 457 (Mark DeWolfe Howe ed., Harvard University Press 1953) [hereinafter HOLMES-LASKI LETTERS]. See also an excerpt from a letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock dated February 9, 1921, in which Holmes describes Hohfeld as “an ingenious gent, taking, as I judge from flying glimpses, pretty good and keen distinctions of the kind that are more needed by a lower grade of lawyer than they are by you and me.” 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874–1935, at 63–64 (Mark DeWolfe Howe ed., Harvard University Press 2d ed. 1961).

56. 260 U.S. 393 (1922).

57. *See id.* at 412.

58. *Id.*

59. *Id.*

60. *Id.* at 414 (quoting *Commonwealth ex rel. Keator v. Clearview Coal Co.*, 100 A. 820, 820 (1917)).

61. *See id.* at 414–15.

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

63. *Id.* at 413.

64. *See id.* at 413–16.

conflated property rights with obligations of contracts and required just compensation if either were impaired by government action.⁶⁵

Justice Brandeis, in lone dissent, recalled the nineteenth-century understanding of “constitutional property” by observing that the coal beneath the surface remained in the exclusive possession of the coal company.⁶⁶ It was not trespassed upon, appropriated, nor destroyed.⁶⁷ The restriction was merely the prohibition of a creation of a nuisance.⁶⁸ Therefore, Justice Brandeis argued, it was not compensable.⁶⁹

Justice Brandeis’s dissent forewarned that under Justice Holmes’s expanded twentieth-century definition of property: “[e]very restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgement by the State of rights in property without making compensation.”⁷⁰ And as Justice Holmes’s majority opinion recognized, “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”⁷¹ Perforce, it fell upon the Court in future cases to determine whether rights of property and contract must “yield to the police power” or whether legislatures had gone beyond their constitutional powers and stretched the police power “too far.”⁷² With those words, the concept of a “regulatory taking” of “constitutional property” was created.

B. Regulatory Takings in the Supreme Court (1926–1962)

During the mid-twentieth century, the Supreme Court’s Fourteenth Amendment decisions were more concerned with personal liberties than with property rights.⁷³ For the most part the Court abstained from considering regulatory takings claims, leaving it to the state courts to determine whether regulations had gone “too far.” But in a few of its cases, the Court laid down ground rules for judicial review.

65. *Compare with* U.S. CONST. Art. VI, cl. 2 and accompanying text.

66. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 417 (1922).

67. *Id.*

68. *Id.*

69. *Id.* at 422.

70. *Id.* at 417.

71. *Id.* at 413.

72. *Id.* at 412, 415.

73. *But see* *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (“That rights in property are basic civil rights has long been recognized.”).

1. *The usual presumption of constitutionality*

The beginning of the twentieth century witnessed the growth of a “progressive” political and social movement. Participating state legislatures passed laws that promised to promote the general welfare by aggressively regulating and restricting economic activity.⁷⁴ When overseeing the constitutionality of these laws, the Supreme Court had to first decide upon an appropriate standard of judicial review.

In the 1926 case, *Village of Euclid v. Ambler Realty Co.*,⁷⁵ the Supreme Court ruled that its standard of review would be deferential; laws should only be declared unconstitutional upon a finding that their “provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”⁷⁶ After adopting this “presumption of constitutionality,”⁷⁷ the Court legitimized a comprehensive building zone law which, as applied, reduced the market value of an owner’s property by approximately seventy-five percent.⁷⁸

Two years later in *Nectow v. City of Cambridge*,⁷⁹ the Court reaffirmed the proposition that it would not set aside a public choice unless it was clear that the regulator’s actions had no “foundation in reason.”⁸⁰ But it then struck down a residential-use-only classification on property after accepting the master in chancery’s factual findings that the restriction had no substantial relationship to “the health, safety, convenience, and general welfare of the inhabitants of that . . . city”⁸¹ Hence, the presumption of constitutionality could be rebutted by detailed fact-specific analysis.

2. *Utilitarian comparison of public benefit and private loss*

When engaging in a fact-specific inquiry to determine whether the police power had been stretched “too far,” the Supreme Court’s mode of analysis was to balance public benefits against private loss. When the government was responding to a substantial threat to public health and safety, the precedents—borrowed from tort law—tipped the balance to

74. See Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, CATO SUP. CT. REV., 2002–2003, at 21–22, available at <http://www.cato.org/pubs/scr/2003/revolution.pdf>.

75. 272 U.S. 365 (1926).

76. *Id.* at 395.

77. See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

78. *Euclid*, 272 U.S. at 384.

79. 277 U.S. 183 (1928).

80. *Id.* at 187.

81. *Id.*

the public's side and excused any requirement that compensation be paid to the private losers. For example, the government was excused from any obligation to compensate when it destroyed buildings to prevent the spread of fire⁸² and destroyed bridges out of necessity during the Civil War.⁸³ A similar excuse was extended to air pollution controls that abated "noxious uses" when, for instance, the government closed down a fertilizer plant⁸⁴ and a brickyard,⁸⁵ notwithstanding the private loss to the owners. And in *Goldblatt v. Town of Hempstead*,⁸⁶ the Court upheld as a public safety measure an ordinance that shut down a landowner's quarry operation within town limits.⁸⁷

On occasion, however, the Supreme Court has taken this benefit analysis a step further and permitted state governments to make a public choice between incompatible land uses on purely economic grounds. For example, Virginia passed legislation in 1920 ordering the cutting down of property owners' cedar trees as a means of preventing the spread of a plant disease to the state's apple orchards.⁸⁸ The Court in *Miller v. Schoene*⁸⁹ held that the "state [had] not exceed[ed] its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public."⁹⁰ "Preferment of [the public] interest over the property interest of the individual," the Court reasoned, "is one of the distinguishing characteristics of every exercise of the police power which affects property."⁹¹

Although the Constitution had not delegated the police power to Congress,⁹² its exercise of other "necessary and proper"⁹³ powers might nonetheless diminish the value of private property. The presumption of constitutionality was said to extend to actions by the national government,⁹⁴ but this presumption was left unmentioned in the several cases involving

82. See *Bowditch v. Boston*, 101 U.S. 16 (1879).

83. See *United States v. Pac. R.R.*, 120 U.S. 227 (1887).

84. See *Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878).

85. See *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

86. 369 U.S. 590 (1962).

87. *Id.* at 590–91.

88. *Miller v. Schoene*, 276 U.S. 272, 277 (1928).

89. *Id.*

90. *Id.* at 279.

91. *Id.* at 280.

92. The text proves too much. Congress does have an inherent police power in federal territories and the District of Columbia. See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923), *overruled on other grounds*; *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

93. U.S. CONST. art. I, § 8, cl. 18.

94. *Adkins*, 261 U.S. at 544 ("This court, by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt.")

private losses caused by the federal government's pursuit of business activities. For example, in *United States v. Causby*,⁹⁵ the Court considered the legal liability of the United States for its low-altitude military flights into the private airspace over a chicken farm, which frightened one-hundred fifty chickens to death.⁹⁶ The Federal Torts Claims Act had not yet been enacted, thereby protecting the United States under sovereign immunity from tort liability for nuisance or trespass, but the Court treated the low-altitude flights as the taking of an easement through the property owners' superadjacent airspace and awarded him the right to just compensation.⁹⁷

In the 1960 case of *Armstrong v. United States*,⁹⁸ the United States confiscated and claimed clear title to the work in progress under a military contract between the U.S. Navy and a defaulting ship builder.⁹⁹ By doing so, the United States extinguished the liens held by materialmen that would have had priority under state law.¹⁰⁰ These lienholders were foreclosed by the doctrine of sovereign immunity from directly enforcing their liens against the federal government, but after considering the circumstances, the Court determined that the United States had unconstitutionally taken the lienholders intangible property and ordered payment of just compensation.¹⁰¹ In explaining the Court's reasoning, Justice Black articulated what has come to be known as the "Armstrong principle"¹⁰²: "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."¹⁰³

In *Causby* and *Armstrong*, the federal government was not using its regulatory power to promote the public health, safety, and general welfare. It was instead acting as an enterpriser and market participant in the fulfillment of other "necessary and proper" powers. Under these circumstances, the Court was inclined to make the federal government pay compensation to the private losers.¹⁰⁴

95. 328 U.S. 256 (1946).

96. *Id.* at 258–59.

97. *Id.* at 261–62. The "self-executing" character of the Fifth Amendment has been held to trump the sovereign immunity doctrine. *See, e.g., United States v. Clarke*, 445 U.S. 253 (1980).

98. 364 U.S. 40 (1960).

99. *Id.* at 41.

100. *Id.* at 41–42.

101. *Id.* at 46–49.

102. *See e.g., William M. Treanor, The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151 (1997).

103. *Id.* at 49.

104. *See Joseph L. Sax, Takings and the Police Power*, 74 YALE L.J. 36, 61–64, 67–69 (1964).

C. The Burger Court (1969–1986)

At the start of the tenure of Chief Justice Warren Burger in 1969, the U.S. Supreme Court found itself with a “crazy-quilt pattern of Supreme Court doctrine”¹⁰⁵ to stitch upon. The members of the Burger had very diverse political views, ranging from liberal activists William Brennan and Thurgood Marshall on the left, to a practitioner of judicial restraint, John M. Harlan, on the right. But with respect to the regulatory takings question, the Court did not ideologically divide into two blocs. Instead, its decisions were moderated by a centrist majority of non-doctrinaire pragmatists.¹⁰⁶ The precedents suggested that the constitutional review of government regulations should be procedurally deferential but substantively open-ended. Under the standard of judicial review, a “presumption of reasonableness [was] with the State.”¹⁰⁷ If the Court chose to overcome the presumption, it could, after a utilitarian comparison of public benefit and private loss, determine whether “fairness and justice” required that the costs should be borne by the public at large.¹⁰⁸

But in 1972, when William Rehnquist replaced Justice Harlan on the Court, there was a new voice on the Court with respect to regulatory takings. Justice Rehnquist is now remembered as a conservative jurist and as a practitioner of judicial restraint who, as Chief Justice, sought compromise to reach a broad majority on contentious issues. But this reputation is inconsistent with his opinions in regulatory takings cases. He re-opened the regulatory takings debate, and over his thirty-three-year tenure he fervently argued in scores of cases that regulators were going

Sax theorized:

[W]hen economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required But losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a non-compensable exercise of the police power.

Id. at 63.

105. Allison Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 63.

106. The centrist justices were Lewis Powell, Harry Blackmun, John Paul Stevens, Byron White, and Potter Stewart. This description of the Burger Court is supported throughout THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES (Kermit L. Hall et al. eds., 2d ed. 2005).

107. See *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 596 (1962) (citing *Salsburg v. Maryland*, 346 U.S. 545, 554 (1954)).

108. See, e.g., *Armstrong*, 364 U.S. at 49. *But cf.* *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 29 (1976) (“We do not accept this invitation to engage in a utilitarian comparison of public benefit and private loss.”).

beyond their constitutional powers. In majority and dissent, Rehnquist proved to be a relentless and almost unwavering judicial activist when it came to the defense of constitutional property.¹⁰⁹

I. Penn Central Transportation Co. v. City of New York

Justice Rehnquist first voiced his constitutional defense of private property in the landmark case of *Penn Central Transportation Co. v. New York City*.¹¹⁰ Therein the City's historic preservation commission had denied Penn Central Railroad permission to construct a skyscraper atop Grand Central Station, a 1913 architectural landmark.¹¹¹ The magnitude of Penn Central's economic loss was significant. As a result of the railroad's inability to develop this air space, it forfeited a lease with a capitalized value of approximately \$40 million.¹¹² On the other hand, Penn Central was left with a reasonable, beneficial use of the station that was consistent with its original investment-backed expectations.¹¹³ The substantial increase in value of the air space was a result of its serendipitous location at the nation's economic and commercial hub, rather than a product of the railroad's initiative or

109. Rehnquist defended an expansive constitutional notion of private property rights by voting with the majority in the following cases: *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *E. Enters. v. Apfel*, 524 U.S. 498 (1998) (plurality opinion); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Hodel v. Irving*, 481 U.S. 704 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *United States v. Clarke*, 445 U.S. 253 (1980). He voted with the dissenters in the following cases: *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); and *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978). In only two cases did he openly agree with the legitimacy of challenged regulations on the merits: *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), and *Andrus v. Allard*, 444 U.S. 51 (1979).

110. 438 U.S. 104 (1978). The opinion of the Court was delivered by Justice Brennan.

111. *Id.* at 115–17.

112. The Court explained how Penn Central planned to increase its income:

Penn Central . . . entered into a renewable 50-year lease and sublease agreement with appellant UGP Properties, Inc. (UGP) Under the terms of the agreement, UGP was to construct a multistory office building above the Terminal. UGP promised to pay Penn Central \$1 million annually during construction and at least \$3 million annually thereafter. The rentals would be offset in part by a loss of some \$700,000 to \$1 million in net rentals presently received from concessionaires displaced by the new building.

Id. at 116.

113. *Id.* at 136.

speculative acumen. And the character of the restriction was principled and non-invasive—the architecturally iconic Grand Central Station was left physically intact and under the ownership of the Penn Central Railroad.¹¹⁴ The Court’s majority¹¹⁵ indulged in the customary presumption of constitutionality and upheld the landmark designation after engaging in this ad hoc fact-specific analysis.

In his dissenting opinion, Justice Rehnquist (joined by Chief Justice Burger and Justice Stevens) reminded the majority that the U.S. Supreme Court had come to recognize that

the term “property” as used in the Taking Clause includes the entire “group of rights inhering in the citizen’s [ownership].” The term is not used in the “vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] . . . denote[s] the *group of rights* inhering in the citizen’s relation to the physical THING, *AS THE RIGHT TO POSSESS, USE AND DISPOSE OF IT*. . . . [T]he constitutional provision is addressed to *every sort of interest* the citizen may possess.”¹¹⁶

Justice Rehnquist pointed out that New York City had “destroyed—in a literal sense, ‘taken’—substantial property rights of Penn Central.”¹¹⁷ He reminded the majority that “a multimillion dollar loss has been imposed on [Penn Central] . . . for the general benefit of all [New York City’s] people,” and that “[i]t [was] exactly this imposition of general costs on a few individuals at which the ‘taking’ protection [was] directed.”¹¹⁸ In Justice Rehnquist the Court now had a member who was ideologically devoted to the defense of “constitutional property.”

2. *Post-Penn Central decisions (1978–1986)*

The *Penn Central* decision signaled an upsurge in the Court’s interest in “constitutional property.” Between 1978 and Chief Justice Burger’s retirement in 1986, the Court considered more than ten regulatory takings cases.¹¹⁹ During these years the Court continued to

114. *Id.* at 136–38.

115. Written by Justice Brennan and joined by Justices Stewart, White, Marshall, Blackmun, and Powell.

116. *Penn Cent.*, 438 U.S. at 142–43 (emphasis and alterations in original) (citations omitted).

117. *Id.* at 143.

118. *Id.* at 147.

119. *See generally, e.g.*, MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986); Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); Loretto v. Teleprompter Manhattan

pay lip service to a presumption of constitutionality but sometimes overcame that presumption and found a “taking” on the merits after “a weighing of private and public interests.”¹²⁰

Pennsylvania Coal had considered the “extent of the diminution” in value of the property to be the most important fact to be considered when determining whether “there must be an exercise of the power of eminent domain and compensation” to sustain a regulation.¹²¹ But unanswered questions made the measurement of the magnitude of the owners’ loss hopelessly problematic.

Because, as Justice Brandeis had observed in his dissent in *Pennsylvania Coal*, “values are relative,”¹²² the physical segment of property subject to the magnitude measure would often prove the difference when determining whether the regulation had gone “too far.” For example, after dividing the physical dimension of the land between surface and subsurface, Justice Holmes’s majority opinion treated the prohibition on mining as if it amounted to a 100 percent diminution of the economic value of the subsurface coal seam. Justice Brandeis, on the other hand, answered that the economic impact was not excessive when measured against the value of the “whole property” (surface and subsurface).¹²³

Likewise, in *Penn Central*, the majority and the dissent measured the magnitude of the loss against different physical segments. The majority opinion noted that the landmark designation retained the economic value of Grand Central Station and left the subsurface rail yards undiminished.¹²⁴ Justice Rehnquist, in dissent, argued that there had been a 100 percent diminution in the value of the air rights above the station.¹²⁵

Moreover, since private property was nothing more than an “aggregate of rights”¹²⁶ that may be separated and made distinct,¹²⁷ what if a regulation took some of the owner’s rights but left the others intact? The Burger Court struggled to answer this question with the metaphor of

CATV Corp., 458 U.S. 419 (1982); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Andrus v. Allard*, 444 U.S. 51 (1979); *Lake Country Estates, Inc. v. Tahoe Reg’l Planning Agency*, 440 U.S. 391 (1978).

120. *Agins*, 447 U.S. at 261.

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

122. *Id.* at 419.

123. *Id.* at 419–20.

124. *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 136–38 (1978).

125. *Id.* at 146.

126. HOHFELD, *supra* note 53, at 12.

127. *Id.* at 92.

the “bundle of sticks.”¹²⁸ The sticks in the bundle were said to be the various functions that might be served by the underlying property resource—they included the right to exclusive use, the right to income, the right to transfer in whole or in part during life, and the right to transfer at death.¹²⁹

The use of the “bundle of sticks” metaphor proved more obfuscatory than explanatory. Two cases from the 1979 Term of Court illustrate the point. In *Kaiser Aetna v. United States*,¹³⁰ Justice Rehnquist considered the legitimacy of a U.S. Army Corps of Engineers regulation requiring a public access to a privately-titled tidal lagoon.¹³¹ He focused upon the “essential sticks in the bundle of rights that are commonly characterized as property . . .”¹³² Speaking for a six-member majority he discounted the long-established precedent that gave the federal government free navigation servitude over all tidal waters.¹³³ He concluded, without explanation or citation, that the “right to exclude” was “so universally held to be a fundamental element of the property right” that its infringement constituted a regulatory taking regardless of the benefits to the public.¹³⁴

The result of *Kaiser Aetna* seems problematic on all counts. The magnitude of the landowners’ actual loss seems small. Since free public access to navigable tidewaters had been a background common law principle for over four hundred years, the reasonable expectations of the landowner were much in doubt. And the regulation could be literally and accurately characterized as promoting the best interest of the general public. Justices Blackmun, Brennan, and Marshall dissented.¹³⁵

In *Andrus v. Allard*,¹³⁶ the Court considered the constitutionality of a federal regulation that prohibited commercial transactions in ceremonial Indian artifacts composed of eagle feathers or talons.¹³⁷ The plaintiff was a retail trader with an inventory of “pre-existing” legally acquired headdresses, amulets, and necklaces; shut down and put out of business, he challenged the regulation as a Fifth Amendment taking of his

128. *E.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Andrus v. Allard*, 444 U.S. 51 (1979).

129. *Id.*

130. 444 U.S. 164 (1979).

131. *Id.* at 166–69.

132. *Id.* at 176. Such sticks are said to include rights to: exclusive possession, exclusive use, income and enjoyment, and transfer the res in whole or part, during life or at death.

133. *Id.* at 181–87 (Blackmun, J., dissenting).

134. *Id.* at 179–80 (Rehnquist, J., majority).

135. *Id.* at 180.

136. 444 U.S. 51 (1979).

137. *Id.* at 53–55.

property.¹³⁸ Justice Brennan, speaking for the majority of the Court, disagreed:

[A] significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full “bundle” of property rights, the destruction of one “strand” of the bundle is not a taking, because the aggregate must be viewed in its entirety.¹³⁹

Justice Brennan considered it crucial in this case that the retail dealer retained “the rights to possess and transport their property, and to donate or devise the protected birds.”¹⁴⁰ Justice Brennan, without dissent from the other justices (including Justice Rehnquist), wrote off the dealer’s loss as “the advantage of living and doing business in a civilized community.”¹⁴¹

Although *Andrus* reached a conclusion opposite the one in *Kaiser Aetna*, the decision seems just as problematic. The magnitude of the dealer’s economic loss seems total, and it was of no solace to the trader that he retained personal safe-keeping of his retail inventory. The outcomes of the decisions were unpredictable and—some would say—unprincipled and unfair.

Three years later in 1982 the Court used the “bundle of sticks” metaphor once more, but this time to justify a change in its mode of analysis. In *Loretto v. Teleprompter Manhattan CATV Corp.*,¹⁴² a New York law authorized a cable television company to install cable equipment on private property.¹⁴³ The intrusion into the owner’s property was economically and aesthetically insignificant while the advantage to the community was substantial.¹⁴⁴ Speaking for the majority, Justice Marshall (rather than engaging in an ad hoc factual analysis that balanced the private loss against the public benefit) held “that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.”¹⁴⁵ His only explanation for this new per se rule was that: “[T]he government does

138. *Id.* at 54–55.

139. *Id.* at 65–66 (citations omitted).

140. *Id.* at 66.

141. *Id.* at 67 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting)).

142. 458 U.S. 419 (1982).

143. *See id.* at 421.

144. *Id.* at 421–24.

145. *Id.* at 426.

not simply take a single ‘strand’ from the ‘bundle’ of property rights: it chops through the bundle, taking a slice of every strand.”¹⁴⁶ The property owner seems to have suffered no significant economic loss, and the general public interest was well served. As observed by Justice Blackmun in his dissent, this “curiously anachronistic decision” reduced the “constitutional issue to formalistic quibble.”¹⁴⁷

No authority or reason is provided for the aggrandizement of the “right to exclude” in *Kaiser Aetna* and *Loretto*, nor is any authority or reason provided for the minimization of the “right to income” in *Andrus*. The trope of the “bundle” proved more a rationalization and less a ratiocination. Or in the wise words of Judge Benjamin Cardozo: “Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”¹⁴⁸

The Burger Court left one more nagging question unanswered, namely what remedies are available to the property owner when the Court finds that there has in fact been a regulatory taking? The courts in the states of New York and California had taken the position that the property owner was limited to declarative or injunctive relief and had denied compensatory relief. In three cases the majority on the Burger Court used a procedural ruse to avoid providing an answer to the *damage* question.¹⁴⁹ The Court required proof of a “final decision regarding the application of the [regulation] to its property” as a prerequisite of assertion of a regulatory taking claim.¹⁵⁰ But since the claimant might almost always apply for additional reconsideration or a variance, “[the] final and authoritative determination of the type and intensity of development legally permitted” was hard to come by.¹⁵¹

*MacDonald, Sommer & Frates v. Yolo County*¹⁵² was the last regulatory takings case that Chief Justice Burger considered. In the majority opinion, Justice Stevens summarized the nature of regulatory takings jurisprudence of the Burger Court as follows:

To this day we have no “set formula to determine where regulation ends and taking begins.” Instead, we rely “as much [on] the exercise of

146. *Id.* at 435.

147. *Id.* at 442. Justice Blackmun was joined in his dissent by Justices Brennan and White. The “formalistic quibble” language is borrowed from Sax, *supra* note 104, at 37.

148. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926).

149. *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

150. *Williamson*, 473 U.S. at 186.

151. *MacDonald*, 477 U.S. at 348.

152. 477 U.S. 340. Chief Justice Burger joined Justice White's dissenting opinion.

judgment as [on] the application of logic.” Our cases have accordingly “examined the ‘taking’ question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action—that have particular significance.”¹⁵³

The “genius of the common law”¹⁵⁴ system offered optimism that the nine justices of the Burger Court could, by “sticking close to [the] facts [instead of] relying upon overarching generalizations” eventually foster and develop a just and predictable body of law “case-by-case, . . . one-step-at-a-time.”¹⁵⁵ But this had not proven to be true. Even though the justices more or less agreed on the standard of review and the mode of analysis, the results of the takings cases were left in a “mess”¹⁵⁶ and a “muddle,”¹⁵⁷ neither foreseeable nor fair.

D. The Rehnquist Court (1986–2005)

In September of 1986, Chief Justice Warren Burger resigned and President Ronald Reagan appointed Associate Justice William H. Rehnquist as the sixteenth Chief Justice of the Supreme Court.¹⁵⁸ Judge Antonin Scalia was appointed Associate Justice to fill the seat vacated by Chief Justice Rehnquist.¹⁵⁹ President Reagan touted his new appointees as champions of “judicial restraint.”¹⁶⁰ The Court’s altered membership would prove to have a profound effect on the law of regulatory takings.

153. *Id.* at 348–49 (alterations in original) (citations omitted).

154. See generally SIR FREDERICK POLLOCK, *THE GENIUS OF THE COMMON LAW* (1912).

155. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989). *But cf.* K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 56–69 (1960) (discussing the case system and precedent and concluding that “[p]eople . . . who think that precedent produces or ever did produce a certainty that did not involve matters of judgment and of persuasion . . . simply do not know our system of precedent in which they live”).

156. Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 279 (1992) (citations omitted).

157. See generally Carol M. Rose, Mahon, *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

158. See the address of former Chief Justice Warren Burger upon the appointment of Chief Justice Rehnquist and Associate Justice Antonin Scalia, in 478 U.S. REP., at vii–ix (1989).

159. *Id.*

160. Speech by President Ronald Reagan at the Swearing in of Chief Justice William H. Rehnquist and Justice Antonin Scalia at the White House (Sept. 26, 1986), in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 95, 97 (Steven G. Calabresi ed., 2007) (“Chief Justice Rehnquist and Justice Scalia have demonstrated in their opinions that they stand with Holmes and Frankfurter on [judicial restraint]. I nominated them with this principle very much in mind. And Chief Justice Burger, in his opinions, was also a champion of restraint.”).

Throughout his previous fourteen years on the Court, Chief Justice Rehnquist had been a strong proponent of constitutional property rights. Now, in Justice Scalia he found a fellow conservative with a similar distrust of government. Together they would undertake to find the cases, and the votes, to change the constitutional law. During the next two decades, in at least eleven decisions,¹⁶¹ the Rehnquist Court would divide and come together, and disagree and agree over whether regulations were “forcing some individuals to bear burdens which, in all fairness, should be borne by the public as a whole.”¹⁶²

The regulatory takings jurisprudence that the Rehnquist Court had inherited from the Burger Court had two basic aspects: a standard of judicial review and a mode of analysis. Those precedents established a deferential standard of judicial review of the constitutionality of exercises of the police power: “The presumption of reasonableness is with the State,”¹⁶³ or the “exercise of police power will be upheld if any state of facts either known or which could be reasonably assumed affords support for it.”¹⁶⁴ One exception had been judicially created—if the exercise of the police power authorized “a permanent physical occupation” of the property, then the presumption was reversed and the government action was a “taking without regard to the public interests that it may serve.”¹⁶⁵

The principle of *stare decisis* mandated a multi-factor mode of analysis. In the words of Justice Blackmun:

As has been admitted on numerous occasions, “this Court has generally ‘been unable to develop any “set formula” for determining when “justice and fairness” require that economic injuries caused by public action’” must be deemed a compensable taking. The inquiry into whether a taking has occurred is essentially an “ad hoc, factual” inquiry. The Court, however, has identified several factors that should

161. See *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *E. Enters. v. Apfel*, 524 U.S. 498 (1998) (plurality opinion); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

162. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting) (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

163. See, e.g., *Salsburg v. Maryland*, 346 U.S. 545, 553 (1954).

164. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 596 (1962) (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938)). Also, see *Goldblatt* generally for a summary of the regulatory takings precedents.

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

be taken into account when determining whether a governmental action has gone beyond “regulation” and effects a “taking.”¹⁶⁶

Justice Scalia challenged these propositions in both theory and practice. In the 1989 *Oliver Wendell Holmes Jr. Lecture* at Harvard Law School, he questioned the legitimacy of judicial discretion. After “explor[ing] the dichotomy between general rules and personal discretion within the narrow context of *law that is made by the courts*,”¹⁶⁷ he concluded that it was “[m]uch better . . . to have a clear, previously enunciated rule that one can point to in explanation of the decision.”¹⁶⁸ He preferred a mode of analysis with “clear and definite rules”¹⁶⁹ rather than “standardless balancing”¹⁷⁰ so as to promote both the appearance and reality of equal treatment and a “Rule of Law.”¹⁷¹ And years later on the speaker’s circuit, Justice Scalia questioned the presumption of constitutionality. He was heard to say:

My Court is fond of saying that acts of Congress [or the state legislature or town council] come to the Court with the presumption of constitutionality. That presumption reflects [the legislative body’s] status as a co-equal branch of government with its own responsibilities to the Constitution. But if [the legislature] is going to take the attitude that it will do anything it can get away with and let the Supreme Court worry about the Constitution . . . then perhaps that presumption is unwarranted.¹⁷²

Justice Scalia’s “theory” of judicial review favored a close oversight of public actions to ensure that officials were comporting with the clear and definite principles of constitutional law. “There are times,” he observed, “when even a bad rule is better than no rule at all.”¹⁷³

166. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (citations omitted).

167. Scalia, *supra* note 155, at 1176 (emphasis in original). Justice Scalia’s essay was first delivered on February 14, 1989 at Harvard University as the Oliver Wendell Holmes, Jr. Lecture.

168. *Id.* at 1178.

169. *Id.* at 1183.

170. *Id.* at 1185.

171. *See id.* at 1176–79.

172. THE REHNQUIST LEGACY 284 (Craig M. Bradley ed., 2006) (quoting Justice Scalia based upon a transcription from a videotape at the Telecommunications Law and Policy Symposium on April 18, 2000).

173. Scalia, *supra* note 155, at 1179.

1. *The Supreme Court's 1986 October term*

At the Supreme Court's 1986 October term, Chief Justice Rehnquist and Justice Scalia wasted no time in their efforts to reform the regulatory takings jurisprudence of the Burger Court. In *Nollan v. California Coastal Commission*,¹⁷⁴ Justice Scalia was joined by Chief Justice Rehnquist and three other justices in holding that the regulatory commission's attempt to exact an easement across a private beachfront in return for the issuance of a building permit was an unconstitutional taking.¹⁷⁵ He convincingly argued that when this kind of "leveraging of the police power" was attempted, the burden of proof for an "essential nexus" should be shifted to the government.¹⁷⁶ In this context, at least, Justice Scalia had accomplished his goal of eliminating the presumption of constitutionality. Justices Brennan, Marshall, Stevens, and Blackmun dissented.¹⁷⁷

Chief Justice Rehnquist's majority opinion in *First English Evangelical Lutheran Church v. County of Los Angeles*¹⁷⁸ (with Justice Scalia and four other justices in concurrence) closed the loophole that allowed regulators in New York and California to impose excessive controls with impunity. Since the courts in those states had understood the Fourteenth Amendment to only allow for "invalidation unaccompanied by payment of damages,"¹⁷⁹ their overzealous regulators had little to lose. Even if the disappointed property owner paid the "transaction costs" necessary to win his regulatory takings lawsuit, the government agency faced no threat of economic loss.¹⁸⁰ *First English Evangelical Lutheran Church* changed that by establishing that the states could not constitutionally limit the remedy for a taking to declarative relief; thereafter, if the overzealous regulator repealed the offending law it still owed monetary damages for the "temporary taking" during its period of enforcement.¹⁸¹ This threat of damages effectively discouraged the regulators from engaging in the scofflaw strategy of simply replacing

174. 483 U.S. 825 (1987).

175. *See id.* at 837–41.

176. *Id.* at 837 n.5.

177. Three separate dissenting opinions were filed. Justice Brennan's dissent was joined by Justice Marshall. *Id.* at 842. Justice Blackmun filed a separate dissenting opinion, and also joined the dissent of Justice Stevens. *Id.* at 865–66.

178. 482 U.S. 304 (1987).

179. *See, e.g., San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 655 (1981) (Brennan, J., dissenting). ("Invalidation unaccompanied by payment of damages would hardly compensate the landowner for any economic loss suffered during the time his property was taken.")

180. *See id.*

181. *First English*, 482 U.S. at 306, 318–19.

any invalidated regulation with another unconstitutional enactment.¹⁸² Three justices dissented, arguing that the risk of damages in the uncertain world of regulatory takings would have a chilling effect on the enactment of legitimate regulation.¹⁸³

In the third test case from the 1986 Term, Chief Justice Rehnquist and Justice Scalia would suffer a setback. *Keystone Bituminous Coal Ass'n v. DeBenedictis*¹⁸⁴ was a carbon copy of *Pennsylvania Coal Co. v. Mahon*.¹⁸⁵ Once again the Pennsylvania legislature had prohibited the mining of coal by means that could result in subsidence of the surface.¹⁸⁶ And once again an owner of the underground coal sued, alleging an unconstitutional taking of its property.¹⁸⁷ A majority of five held, after engaging in an ad hoc factual analysis, that the magnitude of the owner's loss was small relative to his overall holding of underground coal; the Commonwealth's interest in protecting against environmental damage was strong, and, therefore, the regulation did not go "too far" and no compensation was due.¹⁸⁸ In dissent, Chief Justice Rehnquist and Justice Scalia were only able to convince two other justices to join with them in treating the twenty-seven million tons of coal that the act required to be left in place as a separate property interest that had been totally taken.¹⁸⁹

182. Justice Brennan provided an interesting example of this strategy in his dissent in *San Diego*, 450 U.S. at 655 n.22:

At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow City Attorneys the following advice:

"IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN. If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. . . . [T]he City [can] change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again."

183. See the dissent of Justices Stevens, Blackmun, and O' Connor in *First English*. 482 U.S. at 340.

184. 480 U.S. 470 (1987).

185. 260 U.S. 393 (1922).

186. *Keystone*, 480 U.S. at 474.

187. *Id.* at 478-79.

188. *Id.* at 485-88, 492-99.

189. Justices Powell and O'Connor joined Chief Justice Rehnquist and Justice Scalia in the dissent, *id.* at 506, and agreed that the 27 million tons of coal left in place constituted a taking, even if it was accomplished by regulatory action rather than physical invasion, *id.* at 515-16.

2. Lucas v. South Carolina

In 1991 the conservative Clarence Thomas was appointed to fill the seat left vacant on the Supreme Court by the resignation of the liberal Justice Thurgood Marshall. Justice Thomas's appointment enabled Justice Scalia to gain the majority's approval in supplanting the "standardless balancing" law of regulatory takings with a new "clear and definite rule."¹⁹⁰ In *Lucas v. South Carolina Coastal Council*,¹⁹¹ the South Carolina trial court had found that a prohibition on construction on the beach "deprive[d] Lucas of any reasonable economic use of the lots"¹⁹² On certiorari, Justice Scalia's majority opinion¹⁹³ accepted this fact-finding and by doing so accomplished two of his goals for the law of regulatory takings (1) it defined a new bright-line "categor[y] of regulatory action as compensable without [regard] into the public interest advanced,"¹⁹⁴ and (2) it eliminated (more or less) an old fact-specific rule that gave jurists too much "personal discretion to do justice."¹⁹⁵ In the past, "the severity of the burden that government impose[d] upon private property rights" had always been considered the most important factor in determining whether a regulation went "too far."¹⁹⁶ Justice Scalia convinced four of his colleagues to join with him in holding a "total takings" to be per se compensable.¹⁹⁷ In dissent, Justice Blackmun criticized the majority for creating a new "categorical rule" not "rooted in our prior case law, common law, or common sense" to "decide such a narrow case."¹⁹⁸ He feared that "the Court's new policies [would] spread beyond the narrow confines of the present case."¹⁹⁹ This kind of predicted judicial expansion appears to have been the shared goal of Chief Justice Rehnquist and Justices Scalia and Thomas.

190. See Scalia, *supra* note 155, at 1183–85.

191. 505 U.S. 1003 (1992).

192. *Id.* at 1009 (alteration in original) (citation omitted).

193. Justice Scalia was joined by Chief Justice Rehnquist and Justices White, O'Connor, and Thomas. Justice Kennedy concurred in the judgment. Justices Blackmun, Stevens, and Souter would avoided the decision on procedural grounds. Justice Blackmun states, for instance, "[m]y disagreement with the Court begins with its decision to review this case. This court has held consistently that a land-use challenge is not ripe for review until there is a final decision about what uses of the property will be permitted." *Id.* at 1041.

194. *Id.* at 1015 (describing how the Court has used a "set formula" in only two categories of regulatory takings).

195. Scalia, *supra* note 155, at 1176.

196. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

197. *Lucas*, 505 U.S. at 1019 ("We think . . . that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, . . . he has suffered a taking.").

198. *Id.* at 1036.

199. *Id.*

Of perhaps more importance than the new categorical rule was Justice Scalia's disregard of the doctrine of stare decisis. The Petitioner *Lucas* had never challenged the legislative finding that a building ban was necessary to prevent serious harm to property and life. And the Court's precedents had persistently and consistently held that "when a regulation respecting the use of property [was] designed 'to prevent serious public harm,' no compensation [was] ow[ed] under the Takings Clause regardless of the regulation's effect on the property's value."²⁰⁰ Justice Scalia recognized that a number of prior Supreme Court opinions had suggested that "'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation."²⁰¹ But his majority opinion discounted these precedents and instead found that such "noxious-use logic cannot serve as a touchstone to distinguish regulatory 'takings'—which require compensation—from regulatory deprivations that do not require compensation"²⁰² because of the absence of "an objective, value-free basis"²⁰³ for contra-distinguishing between "'harm-preventing' and 'benefit-conferring'"²⁰⁴ regulations.

In a single case, Justice Scalia had crafted an opinion that both created a new bright-line limitation on the police powers of government and eliminated an old line of precedents conferring discretionary powers on judges to make exceptions to the requirements of the Takings Clause. His opinion did, however, admit to one exception to his per se rule requiring compensation for "total takings." No compensation need be paid, he said, if the "limitation . . . newly legislated or decreed (without compensation) . . . inhere[d] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."²⁰⁵ But the "originalist" cast of this rhetoric seems designed to keep the exception a dead letter and a closed category. For example, the filling of wetlands in the eighteenth century served the public interest by eliminating malarial marsh; by contrast, the filling of wetlands in the twentieth century is understood to destroy vital

200. *Id.* at 1010 (citing the Supreme Court of South Carolina's ruling in *Lucas* prior to review by the Court). See *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (law effectively preventing continued operation of quarry that presented a safety risk to nearby residents); *Miller v. Schoene*, 276 U.S. 272 (1928) (order to destroy diseased cedar trees to prevent infection of nearby orchards); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (law barring operation of brick mill in residential area); *Mugler v. Kansas*, 123 U.S. 623 (1887) (law prohibiting manufacture of alcoholic beverages).

201. *Lucas*, 505 U.S. at 1022.

202. *Id.* at 1026.

203. *Id.*

204. *Id.* at 1024.

205. *Id.* at 1029.

ecosystems. A regulator, to avail itself of the exception, might have to show that the regulated practice was understood to be a “nuisance” when the title originated in the eighteenth or nineteenth century; it might not be enough to show that the regulation was designed to curtail a noxious use or to prevent serious harm under the conditions of today. Whether the Court will be forward-looking or backward-looking in its understanding of this exception remains to be seen.

3. *Post-Lucas takings jurisprudence (1992–2005)*

In the post-*Lucas* era the law of regulatory takings had come to be an admixture of categorical rules and ad hoc balances. According to *Loretto*, regulations resulting in the “permanent physical occupation” of private property were per se compensable.²⁰⁶ And in his majority opinion in *Dolan v. City of Tigard*,²⁰⁷ Chief Justice Rehnquist held that when the police power came with a demand for the exchange of money or property in return for regulatory approval, then the ordinary presumption of constitutionality was reversed, and the burden of proof was placed on the government to show that the exacted condition was related in a “‘rough proportionality’ . . . to the impact of the proposed development.”²⁰⁸ Justices Stevens, Blackmun, and Ginsburg dissented from the majority’s “abandon[ment of] the traditional presumption of constitutionality” and “resurrection of a species of substantive due process analysis that [the Court] firmly rejected decades ago.”²⁰⁹ Finally, according to Scalia’s majority opinion in *Lucas*, compensation was categorically required where “regulation denies all economically beneficial or productive use of land.”²¹⁰

Seven years after the ruling in *Lucas*, the Court considered the appropriate judicial process for a “total taking” finding. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,²¹¹ a split and splintered Court held that the jury could reasonably find that “a landowner has been deprived of all economically viable use of his property”²¹² after “five years, five formal decisions, and 19 different site plans” had been

206. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

207. 512 U.S. 374 (1994).

208. *Id.* at 391.

209. *Id.* at 405.

210. *Lucas*, 505 U.S. at 1015 (citations omitted).

211. 526 U.S. 687 (1999).

212. *Id.* at 720.

rejected.²¹³ The four dissenters would have relegated this constitutional question to a judge, not a jury.²¹⁴

Regulations that deprived property owners of some of their rights of enjoyment but that fell outside of the three special categories from *Lucas* (deprivations of all economically feasible use),²¹⁵ *City of Monterey* (regulations conditioning approval of development on the dedication of property to the public use),²¹⁶ and *Loretto* (“permanent physical occupation”),²¹⁷ remained subject to fact-specific inquiry under the factors set forth in *Penn Central*.²¹⁸ The Supreme Court cases had “identified three factors [of] ‘particular significance’”²¹⁹ for consideration in answer to the original quixotic question of whether the police power had been stretched “too far.” It is said that the “inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation’s economic impact”²²⁰ Of related importance is the extent of the regulations’ “interference with reasonable investment backed expectations, and the character of the governmental action”²²¹ In evaluating these factors the Rehnquist Court reached inconsistent and often inconclusive results.

E. Magnitude of the Loss

Measurement of the *amount* of the loss an owner suffers as a result of regulation is formulaic. It is the difference between the fair market value of the property before imposition of the regulation and the fair market value after. But measurement of the *magnitude* of that loss is problematic because of the difficulty in determining the appropriate baseline.

Lucas’s “deprivation of all economically feasible use”²²² rule failed to define the portion of the property against which the loss of value was to be measured. Scalia acknowledged the imprecision of his bright-line rule with an example:

213. *Id.* at 698.

214. *Id.* at 733 (Souter, O’Connor, Ginsburg, and Breyer, JJ., dissenting).

215. *Lucas*, 505 U.S. at 1015.

216. *City of Monterey*, 526 U.S. at 702–03.

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

218. *See supra* Part IV.C.I.

219. *See, e.g., Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224–25 (1986) (citing, among other Supreme Court cases, *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978)).

220. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005).

221. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (citation omitted).

222. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992).

When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.²²³

And differences of opinion regarding the appropriate measure of the diminution of value haunted the precedents. Did *Pennsylvania Coal* entail a total taking of all the coal required to be left in place, or was it just a partial taking of the company's overall mineral rights? Was there a wipe-out of the railroad's air rights in *Penn Central*, or just an interference with its rights to further develop the Grand Central Station site? Was the Native American testator totally deprived of his right to make a will in *Hodel*, or was he merely limited in one of the ways in which he might alienate his land?

The *Penn Central* Court had conceptualized the magnitude of loss as a deprivation of value fraction that might be expressed as a percentage. Using the allegations in the *Euclid* case as an illustration, the majority expressed the diminution in value as seventy-five percent.²²⁴ The percentage was derived by using as the numerator the amount of lost value (\$7,500) and using as the denominator the value of the property interest if unrestricted (\$10,000).²²⁵

By the late twentieth century, the Supreme Court's understanding of property had taken on a multi-dimensional cast:

[T]he dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest).²²⁶

But there is no clear rule as to the dimensions of the "property interest" (i.e., the denominator) against which the loss of value is to be measured in the deprivation fraction. And the determination of this factor was

223. *Id.*

224. *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 131 (1978).

225. *See Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926).

226. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 318 (2002) (quoting from the Court of Appeals' opinion in the same case).

crucial under the regulatory takings jurisprudence. When there was a partial taking, the magnitude of the loss remained the primary factor in determining whether regulation went “too far,” and if there was a finding of a “total taking” then the regulations were per se compensable.

In his *Lucas* dissent, Justice Blackmun expressed concern that “the Court’s new policies will spread beyond the narrow confines of the present case.”²²⁷ This spread may be seen in the state and local courts, which have filled with cases in which the pivotal question was whether there had been a “total taking.”²²⁸ Therein the claimants fervently argued that there had been a “deprivation of all economically feasible use” of their property so as to categorically entitle them to compensation and to avoid the vicissitudes of ad hoc balancing.

*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*²²⁹ was one such case arguing total economic deprivation that made it to the Supreme Court. Therein a planning agency had imposed a moratorium, which prohibited virtually all use of the land for thirty-two months.²³⁰ The owners disavowed any argument that the regulations constituted a taking under the ad hoc balancing approach in *Penn Central* and instead argued there had been a per se compensable total taking for the term of the moratorium.²³¹ The Court majority denied relief, but Justice Thomas’s dissent argued that it should have awarded compensation for the total “temporal deprivation.”²³²

Justice Scalia had expressed regret in *Lucas* that “uncertainty regarding the composition of the denominator in [the] ‘deprivation’ fraction has produced inconsistent pronouncements by the Court.”²³³ That uncertainty persists.

F. Reasonable Investment Backed Expectations

Basic notions of fairness dictate that when governments actively encourage owners to invest in property, they should pay compensation if they retroactively change the rules so as to interfere with the owners’ reasonable expectations. Conversely, takings challenges should be dismissed if they “[do] not interfere with interests that were sufficiently

227. *Id.* at 1036.

228. A Lexis Terms and Connector Search of “Lucas” and “total taking” in the Federal & State Cases, Combined database on April 10, 2008, <http://w3.lexis.com/lawschoolreg/research/login08.asp?t=y&fac=yes>, found ninety-four federal and state cases.

229. 535 U.S. 302 (2002).

230. *Id.* at 306.

231. *Id.* at 320–21.

232. *Id.* at 355.

233. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) (citations omitted).

bound up with the reasonable expectations of the claimant to constitute ‘property’ for Fifth Amendment purposes.”²³⁴ The Rehnquist Court found itself profoundly divided when applying these propositions. For example, in *Eastern Enterprises v. Apfel*,²³⁵ the Court assessed the constitutionality of a Coal Act that Congress had passed in 1992, which assigned retiree health care benefit obligations for over one thousand miners to a coal company that had left the industry twenty-seven years before.²³⁶ In a five to four split judgment, a pro-property rights majority on the Court characterized the legislation as having imposed “severe retroactive liability on a limited class of parties that could not have anticipated the liability” and then struck down the law as violating the Takings Clause.²³⁷ The dissent argued that since there had been an implicit understanding in coal labor negotiations of the 1960s that the company owed lifetime health benefits to the miners, the company’s claim was unsupported by disappointed expectations.²³⁸

In *Palazzolo v. Rhode Island*,²³⁹ the claimant acquired title to a parcel of land subject to a pre-existing regulation that placed substantial limitations on its development.²⁴⁰ Prior to review by the Supreme Court, the Rhode Island Supreme Court denied relief under a takings claim, reasoning that the claimant was on notice of the regulation, and therefore, lacked the requisite investment-backed expectation.²⁴¹ In a fractured decision consisting of six overlapping opinions, a majority of five reversed and held that the post-enactment purchase did not necessarily defeat the takings claim.²⁴² The case was remanded to consider the claim under the *Penn Central* rule.²⁴³ The Court was in agreement that “fairness and justice” required the protection of a property owner’s reasonable investment-backed expectations, but it was unable to agree if and when such expectations were reasonable.

234. *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 125 (1978) (citations omitted).

235. 524 U.S. 498 (1998) (plurality opinion).

236. *Id.* at 503–04, 516–17.

237. *Id.* at 528–29.

238. *Id.* at 550–53.

239. 533 U.S. 606 (2001).

240. *Id.* at 626.

241. *Id.* at 616.

242. *Id.* at 627–28. The Court reasoned that “[a] State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule.” *Id.* at 627. And the Court continued, “[a] blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken.” *Id.* at 628.

243. *Id.* at 632.

G. Character of the Governmental Action

The “character of the governmental action” is also to be considered when the Court engages in its ad hoc fact-specific analysis to determine whether the police power has been stretched too far. The Court has not spoken much of this factor in the years since *Lucas* but related precedents suggest how the battle line may be drawn when it is considered next. A body of precedent supports the proposition that regulation designed to prevent a “substantial threat to public health and safety” need not be supported by compensation to disadvantaged property owners.²⁴⁴ Justice Scalia debunked this principle in the *Lucas* case (in the context of “total takings”), but there were four dissenting justices who may well undertake to revitalize the exception in the context of “partial takings.” Moreover, even Justice Scalia reluctantly accepted the position that severe restrictions might be imposed with impunity so long as they are in keeping with the “background principles of the State’s law of property and nuisance already [in] place upon land ownership.”²⁴⁵ Hence, in future cases, a finding that the regulation was intended to prevent a “noxious use” may tip the balance in favor of a finding of legitimacy.²⁴⁶

In other contexts the characteristics of governmental actions may cast doubt on their constitutionality. We have already seen in *Eastern Enterprises* that the “retroactive” imposition of pension responsibility on an employer made the Coal Act a regulatory taking. And in a series of cases Justice Scalia has been on the look-out for governmental misbehavior. The majority dismissed *Pennell v. City of San Jose*²⁴⁷ on procedural grounds, but Justice Scalia dissented and argued that an ordinance that “singl[ed] out” landlords to privately fund a “welfare program [for] ‘hardship’ tenants” was a taking.²⁴⁸ And he dissented from the denial of certiorari in two cases out of his concern for “pretextual . . . rulings.” In *Stevens v. City of Cannon Beach*,²⁴⁹ Scalia wanted to review whether the State Supreme Court was “invoking nonexistent rules” of the

244. See *supra* notes 82–87 and accompanying text.

245. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

246. In a related context, the Court’s conservative bloc has embraced the harm-benefit dichotomy so as to delimit what constitutes a “public use” under the power of eminent domain. Slum clearance is a “public use” because it achieves a direct public benefit by eliminating an affirmative harm, but private economic redevelopment captures only incidental public benefits. See *Kelo v. City of New London*, 545 U.S. 469, 494, 498–501 (2005) (O’Connor, J., dissenting) (joined by Rehnquist, C.J., Scalia and Thomas, JJ.).

247. 485 U.S. 1 (1988).

248. *Id.* at 15, 22.

249. 510 U.S. 1207 (1994).

state law of real property so as to create inherent limitations on title.²⁵⁰ And in *Lambert v. City & County of San Francisco*,²⁵¹ he wanted to consider whether the City was “cloaking within the permit process ‘an out-and-out plan of extortion.’”²⁵²

V. LEGACY OF THE REHNQUIST COURT

Chief Justice William Rehnquist died in 2005. He had served on the Court as an Associate Justice from 1972 to 1986 and as Chief Justice from 1986 to 2005. While an Associate Justice, Rehnquist almost unfailingly supported the claims of disappointed property owners for compensation. As Chief Justice he presided over more than thirty regulatory takings cases, most of which were decided by a five-to-four or six-to-three majority.²⁵³ Over its last thirteen years the Rehnquist Court consisted of two blocs: the philosophical right, with Chief Justice Rehnquist, Justice Scalia, and Justice Thomas defending “constitutional property” against governmental infringement; and the philosophical left, with Justices Souter, Ginsburg, and Breyer acting as “progressive” supporters of the power of representative legislatures to act as the “laboratories of democracy” without paying for every change in the law.²⁵⁴ Justices Stevens, O’Connor, and Kennedy moved between the two camps, thereby shifting the balance of decision. Gone was any pretence that the Court was engaged in the congenial common-law process of agreeing to disagree while “deliberately, incrementally, one-step-at-a-time”²⁵⁵ growing and developing a law of regulatory takings that was both fair and just. The Rehnquist Court was fundamentally split.

The Rehnquist Court’s “Great Divide” is sometimes attributed to a difference in judicial philosophy. Those on the Court’s conservative wing are typically described as practitioners of “judicial restraint.”²⁵⁶ Their appointed task was to interpret the Constitution, not to expand

250. *See id.* at 1211.

251. 529 U.S. 1048 (2000).

252. *Id.* at 1551 (quoting *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987)).

253. *See generally*, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

254. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311–12 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments . . .”).

255. Scalia, *supra* note 155, at 1177.

256. *See ORIGINALISM supra* note 160 and accompanying text.

upon it. They would discern the “rule of law” from the “plain meaning” of the text and the “original understanding” of its import.²⁵⁷ Those on the Court’s left are said to be devotees of a “living Constitution.”²⁵⁸ From their viewpoint, if the Constitution is to endure over time it must be flexible and responsive to changing circumstances, and the task of the jurist is to reconstruct its language to meet the exigencies of the times.²⁵⁹

The Rehnquist Court’s Takings Clause jurisprudence belies this stereotype. Although Rehnquist is generally credited with fostering compromise in order to achieve broad majorities, in the context of the Takings Clause cases, he was unrelenting in his efforts to protect private property rights from the “petty larceny of the police power.”²⁶⁰ Working in concert with Justices Scalia and Thomas, he purposefully attributed to the text of the Takings Clause a meaning inconsistent with its “plain language” and “original understanding.”

“Property” in the vernacular refers to physical assets, and a “takings” amounts to physical seizures. Blackstone and his colonial contemporaries so understood the terms, and legal historians agree.²⁶¹ Even Justice Scalia, the leading proponent of constitutional property, reluctantly acknowledged that “early constitutional theorists did not believe the Takings Clause embraced regulations of property at all”²⁶² Chief Justice Rehnquist’s expansion of this definition so as to prohibit any regulations that diminished “the *group of rights* inhering in the citizen’s

257. See generally Scalia, *supra* note 155.

258. See, e.g., William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695 (1976) (“I have sensed a . . . connotation of the phrase ‘living Constitution,’ . . . quite different from . . . the Holmes version, but which certainly has gained [some] acceptance [N]onelected members of the federal judiciary may address themselves to a social problem simply because other branches of government have failed or refused to do so.”).

259. See, e.g., William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986). Brennan’s article, which was first delivered as a speech on October 12, 1985 at Georgetown University, states:

But the ultimate question must be: What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.

Id. at 438.

260. HOLMES-LASKI LETTERS, *supra* note 55, at 457.

261. See 2 BLACKSTONE, *supra* note 37, at 16 (defining real property as “permanent, fixed, and immovable, . . . as lands and tenements” and personal property as “goods; money, and all other moveables; which may attend the owner’s per[s]on wherever he thinks proper to go”); see also *supra* note 40 and accompanying text.

262. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992).

relation to the physical thing”²⁶³ was a calculated exercise in judicial activism.

Justices Stevens, Breyer, Ginsberg, and Souter, on the other hand, were quite willing to accept the Takings Clause at face value. Just compensation was due only when property was taken; “property” was land or chattel, and “taking” was seizure. Regulations had nothing to do with it. Perhaps these jurists were philosophically invested in a “living” Constitution, but in this context at least they willingly embraced the presumption of constitutionality and deferred to the regulatory choices of the legislatures. They were the practitioners of “judicial restraint.”

The division on the Rehnquist Court had more to do with political philosophy than judicial process. In his 1981 Presidential Address President Ronald Reagan had proclaimed that “government is not the solution to our problem; government is the problem.”²⁶⁴ Reagan’s 1986 appointees, Justices Rehnquist and Scalia, adopted this point of view with their expansive Takings jurisprudence. Along with Justice Thomas (and sometimes Justices O’Connor and Kennedy) they embraced the free-market cause of efficient competition by seeking to require that regulators “internalize” the full cost of prohibitions. In the words of Richard Posner “[t]he simplest economic explanation for the requirement of just compensation is that it prevents the government from overusing the taking power.”²⁶⁵ To this argument Justice Scalia would add a corollary:

The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved “off budget,” with relative invisibility and thus relative immunity from normal democratic processes. . . .

That fostering of an intelligent democratic process is one of the happy effects of the constitutional prescription [in the Takings Clause].²⁶⁶

Hence, from a conservative viewpoint, an expansive definition of the Takings Clause has the political advantages of both discouraging inefficient government activity and of making government more

263. *Penn. Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 142 (1978) (Rehnquist, J., dissenting) (citation omitted).

264. President Ronald Reagan, First Inaugural Address (Jan. 20, 1981), *available at* <http://www.reaganlibrary.com/reagan/speeches/first.asp> (speaking with regard to what he perceived, at that time, as an economic crisis).

265. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 58 (4th ed. 1992).

266. *Pennell v. City of San Jose*, 485 U.S. 1, 22, 23 (1988).

accountable.²⁶⁷ In the absence of judicial oversight, legislatures and executives might “do anything [they] can get away with.”²⁶⁸

The progressive vision, on the other hand, considered Congress, state legislatures, and local councils as well-intentioned promoters of the public health, safety, and general welfare; these legislative bodies could themselves be trusted to abide by the Constitution, and the unelected and non-representative judges should accept their public choices. The likeminded jurists on the Rehnquist Court (Justices Brennan, Blackmun, Marshall in the first generation and Justices Stevens, Breyer, Ginsburg, and Souter in the second) deferred to the democratically-elected branches of government; at least with respect to property rights, they were more than willing to give discretion to legislative bodies to enact regulations without paying for every change in the law. Exercises of the police power were presumed to be a good thing. In the words of Justice Thurgood Marshall, “burdens consequent upon government action undertaken in the public interest must be borne by individual landowners as concomitants of ‘the advantage of living and doing business in a civilized community’”²⁶⁹

AFTERWORD

John Roberts was appointed Chief Justice of the United States Supreme Court in 2005. The Roberts Court remains politically conflicted, one vote away from a clear conservative majority. The Court’s present interpretation of the Takings Clause sits upon a shaky foundation of split decisions; its construction of the constitutional property remains a work in progress. Justice Antonin Scalia, the chief architect of conservative change, will likely press for a further remodeling of regulatory takings jurisprudence. Perhaps he will foster a conservative consensus creating clear and definite rules requiring compensation to all persons who suffer a loss in property value because of government regulation. Or perhaps newcomers to the Court will solidify a moderate majority that adheres to the traditional presumption of constitutionality for well-intentioned exercises of the police power.

267. *See generally* RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

268. *See* THE REHNQUIST LEGACY, *supra* note 172 and accompanying text.

269. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 14 (1984) (citation omitted).