

AN ABSTRACT OF THE THESIS OF

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This study explores the extent to which the United States has conformed to the tenets of classical liberalism and/or civic republicanism with regard to private property and takings law. Mainstream scholarship suggests that classical liberal theory has played a dominant role in American property law since the founding. In the 1960s, however, some scholars began to challenge the assertion that America ever exhibited a monist approach to property, proposing instead that two traditions have always existed in tandem: property as “commodity” (the familiar liberal view) and property as “propriety” (the less familiar view of civic republicanism). I propose that the chain of twentieth century takings jurisprudence supports the dual tradition hypothesis. Eminent domain jurisprudence (specifically, the reading of public *purpose* from the Public Use Clause in the Fifth Amendment) represents adherence to the principles of civic republicanism. Regulatory takings jurisprudence, in contrast, corresponds strongly with the classical liberal view of private property.

Key words: property, eminent domain, regulatory takings, classical liberalism, civic republicanism

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Twentieth Century Takings Jurisprudence: A Dual Expression of Classical Liberalism &
Civic Republicanism

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Shayna M. Rogers, Author

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Twentieth Century Takings Jurisprudence: A Dual Expression of Classical Liberalism & Civic Republicanism

Introduction & Research Question

Mainstream scholarship proposes that classical liberal theory played an integral role in early American domestic policy, particularly with regard to questions of property. The protection of private property rights is one of liberalism's most fundamental postulates, and the dominant analysis suggests that the founders carefully integrated this principle into the political fabric of national life.¹ Over two centuries have passed since the founding, and the American body of property law has undergone significant change. The emergence of industrial capitalism, the reforms of the Progressive Era, and the modern environmental movement are but a few of the social developments that altered traditional notions of ownership.

Among those that adhere to the liberal account, concerns have arisen about how well the founding ideas around property rights have weathered this evolution. Today, state land use plans and zoning ordinances provide strict parameters for private development, a recent Supreme Court decision has substantially broadened the government's power of eminent domain, and protective environmental regulation restricts even potentially lucrative activities on private land. Given these changes, many property rights activists challenge the status quo as an affront to their rights and a distortion of the nation's founding principles.

Since the 1960s, however, other scholars have begun to challenge the notion that America ever possessed a single tradition of property (and therefore the perception that

¹ See: Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt, Brace & World, 1955), 1-348.

recent events represent a departure from original intent).² Rose argues that two views of property have existed in dynamic interplay since the earliest years of the republic: property as “preference satisfaction” and property as “propriety.”³ Alexander elaborates on this interpretation, which he calls the “dialectic of commodity and propriety.”⁴ Property as a market commodity is the familiar half of the dialectic, he explains, because it aligns with the overriding liberal view of the founding.

The role of the second conception, property as propriety, has been less fully explored in the United States. The description comes from the idea that “property” is the foundation of “propriety” and that the founders recognized property as a precursor to social stability.⁵ In this view, the acquisition of private land was promoted not for the private good of the individual, but for the public good of society.⁶ Proponents of the propriety view are less likely to share their liberal colleagues’ concerns about the erosion of property rights because, having rejected the liberal narrative of the founding, they might not recognize such an erosion at all.

As MacPherson points out, the meaning of property has never been constant. It is both an institution (a human-made entity) and a concept (how people see that entity), and these two aspects have influenced one another over the course of history.⁷ Rose and Alexander contend that property as commodity (the liberal conception) and property as

² See: Joyce Appleby, *Liberalism & Republicanism in the Historical Imagination* (Cambridge: Harvard University Press, 1992); Gregory S. Alexander, *Commodity & Property* (Chicago: the University of Chicago Press, 1997); and Carol M. Rose, *Property & Persuasion: Essays on the History, Theory, & Rhetoric of Ownership* (Boulder: Westview Press, 1994) (specifically Chapter 3, “‘Takings’ and the Practices of Property: Property as Wealth, Property as ‘Propriety’”).

³ Rose, 52 & 58.

⁴ Alexander, 4.

⁵ Ibid. & Rose, 58. As classical liberalism is commonly associated with John Locke (1632-1704), civic republicanism is often associated with the philosophy of James Harrington (1611-1677).

⁶ This is not to suggest that the “property as propriety” model (associated with the civic republican tradition) was inherently nonhierarchical or egalitarian. In this paradigm, too, white men were dominant and women and people of color were subordinated. See Rose, 5.

⁷ C.B. MacPherson, ed. *Property: Mainstream & Critical Positions* (Toronto: University of Toronto Press, 1978), 1.

propriety (which they associate with civic republicanism) have been in continual tension in the United States since the beginning. If legitimate, this poses a challenge not only to the liberal narrative, but also to allegations that the current property scheme is out of line with founding principles.

American property law has undergone substantial change over the past two hundred years; this much is indisputable. Nonetheless, the degree to which this transformation represents a divergence from first principles remains contested in scholarly circles. Indeed, even the character of those founding principles appears to be up for debate. By examining the evolution of takings jurisprudence over the course of the twentieth century, I hope to ascertain the degree of influence that classical liberalism and civic republicanism have exercised on the American system of property.

Methodology

This study will be confined to the institution of *private* property; that is, the exclusive individual right which gives an owner the ability to exclude others from use or benefit of a particular entity.⁸ It will focus on *physical* property, as opposed to those assets that are intangible. Private physical property falls into two categories: private *real* property (owned land) and private *personal* property (owned portable possessions). This paper is concerned specifically with land use, and subsequent uses of the term “property” will generally denote *private real property* unless otherwise specified.

After a brief discussion of founding-era political theory, I will focus specifically on the Fifth Amendment Takings Clause. I will examine both historic and modern understandings of “takings,” emphasizing United States Supreme Court jurisprudence in the

⁸ MacPherson, 2.

twentieth century. By analyzing these cases with respect to the tenets of classical liberal and civic republican theory, I will be able to discern the relative influences of these ideologies on the American institution of property.

Founding Approaches to the Property Question

Given the marked influence of theorists like Thomas Hobbes and John Locke, the Declaration of Independence and the United States Constitution are commonly accepted as products of liberal thought.⁹ Even prior to its inclusion in America's founding documents, however, the tenets of liberalism appear to have permeated colonial life.

In pre-revolutionary America, Samuel Adams invoked aspects of liberal theory in his 1772 speech "The Rights of the Colonists."¹⁰ Relying on Lockean natural rights philosophy, Adams proclaims, "Among the natural rights of the Colonists are these: first, a right to life; secondly, to liberty; thirdly, to property; together with the right to support and defend them in the best manner they can." With the Declaration of Independence still four years from inception, Adams went on to declare the "grand end" of civil government to be the protection of those very rights.¹¹

Adams, like Locke, perceived the right to property as natural or inherent, predating the establishment of the state or the codification of the law. This calls into question exactly

⁹ Salvadori identifies four keystone principles of liberalism as a political movement: religious tolerance, free inquiry, self-government, and market economy. Here I focus on the fourth element, which encapsulates the liberal commitment to private property. Specifically, liberal theorists seek to protect individual property ownership from external interference (commonly understood as government action). Classical liberalism does not stipulate that all property should be privately owned, nor does it deny that there are circumstances under which private property may in fact be justly seized. Liberal ideology only dictates that privatization is the best means of preserving individual autonomy and that safeguarding individual interests should be the foremost priority of government. See Massimo Salvadori, *Liberal Heresy: Origins & Development* (New York: St. Martin's Press, 1978), 2.

Shapiro divides the origin of classical liberalism into two phases: (1) the transitional moment and (2) the classical moment. The transitional moment is best represented by the political theory espoused by Thomas Hobbes in seventeenth century England, most notably in 1651's *Leviathan*. The classical moment arrived half a century later, with John Locke's *Second Treatise of Government* in 1690. See Ian Shapiro, *The Evolution of Rights in Liberal Theory* (Cambridge: Cambridge University Press, 1986), 23 & 80.

¹⁰ A report of the Committee of Correspondence to the Boston Town Meeting, November 20, 1772.

¹¹ Hanover Historical Texts Project, "Samuel Adams, The Rights of the Colonists: The Report of the Committee of Correspondence to the Boston Town Meeting, Nov. 20, 1772," Hanover College Department of History, <http://history.hanover.edu/texts/adamss.html>.

what Adams conceived of when he used the word “property.” It seems that the right to real property, in the form of a title to a piece of land, actually presupposes the existence of a social contract between people and government. How, then, does Adams define it? Most likely he adhered to Locke’s labor theory of property, which stipulates that ownership is derived from the combination of labor and resources.¹²

Several years after Adams’s speech, in June 1776, the Virginia Convention of Delegates adopted the Virginia Declaration of Rights. This document, drafted by George Mason, functioned as both a precursor to and an influence on the United States Declaration of Independence. The Virginia Declaration of Rights asserts that all men possess certain inherent rights that cannot be undermined by entrance into the social contract. Specifically, the document mentions the “enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”¹³

Two aspects of this sentence are worth addressing separately. First, the Declaration contends that a man’s “means of acquiring and possessing property” cannot be deprived by the social contract (i.e. the government). As with Adams’s speech, Mason’s choice of words imply adherence to Locke’s natural rights philosophy. Second, this particular sentence echoes Locke’s “life, liberty and property” but also foreshadows Thomas Jefferson’s substitution of “pursuit of happiness” for the word “property” in the United States Declaration of Independence.

¹² In his *Second Treatise of Government*, Locke articulates what has come to be known as the labor theory of property: “Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for other” (Chapter 5, Section 27).

¹³ The Avalon Project: Documents in Law, History & Diplomacy, “Virginia Declaration of Rights,” Yale Law School, http://avalon.law.yale.edu/18th_century/virginia.asp.

Locke's influence on the document seems indisputable, but the discrepancy between his original statement and Jefferson's slightly modified version is noteworthy. The Declaration reads, "We hold these truths to be self-evident... [that all men] are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."¹⁴ Could this substitution be symbolic of an ideological break with classical liberalism?

Some scholars suggest this is plausible. There is no generally accepted explanation for the anomaly, but Appleby proposes that Jefferson held certain beliefs that were decidedly anti-Lockean. He saw the responsibility of government not as the protection of private property, she says, but as the promotion of *access* to private property (i.e. opportunity, as exhibited by his policies regarding the diffusion of public lands).¹⁵ "It was in deference to this distinction," Appleby writes, "that he changed Locke's 'life, liberty and property' to make the Declaration of Independence affirm the natural rights to 'life, liberty, and the pursuit of happiness.'"¹⁶

In 1812 Jefferson declared, "A right of property in moveable things is admitted before the establishment of government. A separate property in lands, not till after that establishment."¹⁷ Here Jefferson distinguishes between two kinds of property: that which is vested in "moveable things" and that which is vested in land. Whether Adams and Mason made similar distinctions is unclear; perhaps they believed that natural rights theory applied

¹⁴ Thomas Jefferson, et al., "A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 – 1875," *Journals of the Continental Congress*, Volume 5, Library of Congress, <http://memory.loc.gov/cgi-bin/ampage?collId=lljc&fileName=005/lljc005.db&recNum=94>.

¹⁵ Appleby, 301 & 304. At the same time that he suggested a fifty-acre qualification for suffrage in Virginia (linking property and civic virtue), Jefferson proposed offering fifty acres of property to every white, landless adult male.

¹⁶ Ibid. Appleby notes that Jefferson made the same modification a decade later, when Lafayette shared with him the draft of the declaration of rights for France.

¹⁷ John P. Foley, ed. *The Jeffersonian Cyclopaedia: a Comprehensive Collection of the Views of Thomas Jefferson* (Funk & Wagnalls Company, 1900), p. 467.

not only to moveable objects but also to the immoveable land itself. It seems that the same cannot be said for Jefferson.

He goes on, “Government must be established and laws provided, before lands can be separately appropriated, and their owner protected in his possession. Till then, the property is in the body of the nation, and they, or their chief as trustee, must grant them to individuals, and determine the conditions of the grant.”¹⁸ Here Jefferson conceives of property as an essentially social institution subject not to higher law but to the constantly evolving character of the government.

Liberals dispute an anti-Lockean reading of the Declaration, pointing to support for the theory that Jefferson’s “pursuit of happiness” was actually also a derivative from Locke’s work. Locke’s 1690 *Essay Concerning Human Understanding* contains the exact phrase.¹⁹ In it Locke writes,

The necessity of pursuing happiness [is] the foundation of liberty. As therefore the highest perfection of intellectual nature lies in a careful and constant pursuit of true and solid happiness, so the care of ourselves, that we mistake not imaginary for real happiness, is the necessary foundation of our liberty.²⁰

Locke’s brief meditation on happiness was never as integral to his ideology as his extensive discussion of property. Nonetheless, if Jefferson derived his modification from Lockean scholarship (albeit a less well-known text than *Two Treatises of Government*), the support for an anti-liberal motive on Jefferson’s part all but disappears.

¹⁸ Foley, 467. Benjamin Franklin was even stronger in the conviction that property was inherently social than Jefferson. As a “creature of society,” Franklin said, “[private property is] subject to the calls of that society, whenever its necessities shall require it, even to its last farthing.” Beyond the few items “absolutely necessary for subsistence,” Franklin believed that all property should be subject to the limits of “public convention.” Quoted in Eric Freyfogle, *The Land We Share: Private Property & the Common Good* (Washington: Island Press/Shearwater Books, 2003), 4.

¹⁹ Original source was Carol Hamilton, “The Surprising Origin & Meaning of the ‘Pursuit of Happiness,’” George Mason University’s History News Network, <http://hnn.us/articles/46460.html>.

²⁰ John Locke, *An Essay Concerning Human Understanding*, ed. Alexander Campbell Fraser (Oxford: the Clarendon Press, 1894), 348. For further insight into Jefferson’s view of the property question, see Henry George’s essay “Jefferson & the Land Question,” included in Albert Ellery Bergh’s *The Writings of Thomas Jefferson*, Vol. 16.

Competing theories of origin persist, but there is no disputing that the founders took private property seriously. As the primary architect of the Bill of Rights, James Madison appended three amendments to the Constitution to address the question of individual property. In the absence of the protections accorded by the Third, Fourth, and Fifth Amendments, ratification of the Constitution would likely have been impossible. Conversely, without constitutional protections, Appleby contends that private property rights probably never would have “achieved their rhetorical status as sacred.”²¹

While the Third Amendment restricts the conditions under which homeowners can be required to quarter soldiers, and the Fourth Amendment protects against unreasonable searches and seizures, the Fifth Amendment is most explicit in its protection of privately owned land.²² The Fifth Amendment Takings Clause provides that no person shall be “deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”²³

The Fifth Amendment does not prohibit the federal government from “taking” private land (thus exercising its power of eminent domain), but prescribes the circumstances under which doing so can be a valid action. Derived from English common law, the power of eminent domain is rooted in the theory that all land is held in allodial title by the sovereign power.²⁴ In England, the sovereign was the monarch and the people were his

²¹ Appleby, 220.

²² The Fifth Amendment Takings Clause was originally written as “No person shall be...obliged to relinquish property, where it may be necessary for public use, without just compensation,” but this language was inexplicably rejected and replaced with the current text. See Caryn L. Beck-Dudley & James E. MacDonald, “*Lucas v South Carolina Coastal Council*, Takings, & the Search for the Common Good,” *American Business Law Journal* Vol. 33, No. 2 (Winter 1995): 153-178.

²³ As of 1999, all but three states (Kansas, North Carolina, and New Hampshire) had included analogous takings clauses in their state constitutions. Of the forty-seven, some constitutions quote the federal Takings Clause verbatim while other states have crafted their own language. For this statistic and a more thorough discussion of the relationship between the federal and state clauses, see Meltz, et al, *The Takings Issue: Constitutional Limits on Land Use Control & Environmental Regulation* (Washington D.C.: Island Press, 1999), 20-23.

²⁴ Jesse Saginor & John F. MacDonald, “Eminent Domain: a Review of the Issues,” *Journal of Real Estate Literature* Vol. 17, No. 1 (2009): 3-41. Saginor and MacDonald define the *allodial system* as “the legal system that grants full property rights to individuals, who may enjoy fee simple ownership—full property rights subject only to governmental powers of taxation, police power, and compulsory purchase (eminent domain).”

tenants. In the young American republic, however, that allodial title had been transferred from the King to the states. Rather than establishing the right of eminent domain (which was already inherent to the sovereign states), the Fifth Amendment represents a limitation of its power.

In order for the government to “take” the land of a private citizen, it must be able to demonstrate that the taking is (1) intended to further a legitimate “public use” and (2) accompanied by “just compensation” for the landowner. The definitions of “taking,” “public” and “just” were not specified but left open to judicial interpretation. Their legal meanings would evolve dramatically over the next two centuries.

Area of Focus

Following a brief summary of relevant nineteenth century jurisprudence, I have divided my review of twentieth century takings litigation into two main categories: (1) *eminent domain* cases in which the government “takes” private land for either (a) public use or (b) public purpose; and (2) *regulation* cases in which government policies so restrict activity on private property that they constitute uncompensated “takings” in the eyes of the landowner.²⁵ These cases often involve but are not limited to the following areas of regulation: legislative remedies for private externalities, zoning laws, historical preservation, land-use permitting and environmental conservation.²⁶

In the first category of cases, the government has actually initiated *condemnation* proceedings and the landowners are generally disputing the constitutionality of the use or

²⁵ A third category of cases that will not be discussed here might be called “physical intrusions.” In such a case, a landowner files an inverse condemnation suit in response to an intrusion on their land that they believe constitutes a taking. These cases often deal with the traditional boundaries of private property, such as *United States v. Causby* 328 U.S. 256 (1946).

²⁶ In an economic context, an “externality” is a cost/benefit (either positive or negative) that is incurred by a party who did not consent to the terms of the agreement. In the context of this paper, the term will refer to negative externalities only.

purpose in question. In the second category, however, no such proceedings have begun; the state government is merely regulating activity on private land in a manner alleged to be within the scope of its police powers. Here, finding the regulations overly cumbersome, landowners are filing *inverse condemnation* claims to compel the government to initiate eminent domain proceedings (and thus trigger the just compensation requirement). In general, the eminent domain cases discussed here are related to the Public Use Clause of the Fifth Amendment, whereas the regulatory takings cases implicate the Just Compensation Clause.

The Status of “Takings” in Nineteenth Century Jurisprudence

The Fifth Amendment to the Constitution (1791) prohibits federal “takings” of private land in the absence of (1) a legitimate public use; and (2) just compensation for the property owner. It also stipulates that any deprivation of property requires due process of law. By the end of the nineteenth century, the exercise of takings power by state governments was equally constrained. In *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago* 166 U.S. 226 (1897) the Supreme Court used the Due Process Clause of the Fourteenth Amendment to apply or “incorporate” the Fifth Amendment Takings Clause to the states.²⁷ Just as the Fifth Amendment protected citizens from takings abuse by the federal government, the Fifth and Fourteenth Amendments in conjunction now granted the same defense against state action.

Prior to incorporation, however, property owners had to rely on different legal doctrines to challenge state regulatory power. In *Brown v Maryland* 25 U.S. 419 (1827), the plaintiffs in error challenged Maryland’s regulation of foreign goods on the basis that the imposition of licensing requirements and fees on out-of-state business interests violated the

²⁷ Bruce A. Ackerman, *Private Property & the Constitution* (New Haven: Yale University Press, 1977), 192. Under the incorporation doctrine, the Supreme Court applies portions of the Bill of Rights to the states via the Due Process Clause of the Fourteenth Amendment. In 1868, the Fourteenth amendment extended the protection of the Due Process Clause to action initiated by the states. It reads, “[No state shall]...deprive any person of life, liberty, or property, without due process of law...”

interstate Commerce Clause.²⁸ Maryland responded that such regulations must be upheld in order for a state to adequately protect its citizens against dangerous imports (citing gunpowder as an example). Though the Court declared the regulations in question unconstitutional, Chief Justice Marshall introduced the term “police power” into Supreme Court jurisprudence when he acknowledged, “The power to direct removal of gunpowder is a branch of the *police power*, which unquestionably remains, and ought to remain, with the states” [emphasis added].²⁹

Justified by the text of the Tenth Amendment, the police powers were slowly expounded over the course of the nineteenth century.³⁰ In *Mayor of New York v Miln* 36 U.S. 102 (1837), the Court upheld a city regulation requiring ship captains to divulge information about their passengers to local authorities. Both the majority opinion (written by Justice Barbour) and the concurrence (authored by Justice Thompson) cited the “police power” to justify the decision. Both justices noted the distinction between the regulation of interstate commerce (reserved to Congress) and the regulation of the “internal police” (reserved to the states by the Tenth Amendment).

A decade later, the *License Cases* 46 U.S. 504 (1847) and the *Passenger Cases* 48 U.S. 283 (1849) established the police power as a natural offshoot of state sovereignty.³¹ Inherent to the state, the police powers are constrained only by the federal Constitution and the self-

²⁸ Article I, Section 8, Clause 3 of the U.S. Constitution grants Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” In the context of *Brown v Maryland* 25 U.S. 419 (1827), Brown was contending that Maryland had violated the Commerce Clause because only the U.S. Congress, not the state governments, are constitutionally permitted to regulate interstate commerce.

²⁹ D. Benjamin Barrows, “The Police Power & the Takings Clause,” *University of Miami Law Review* Vol. 58, No. 2 (2004): 474. Although Marshall did not coin the term until *Brown v Maryland*, Barrows notes that decades of case law had been heading in this direction. He cites *Trustees of Dartmouth College v Woodward* 17 U.S. 518 (1819) and *Gibbons v Ogden* 22 U.S. 1 (1824) as examples of this trend. Furthermore, although the Supreme Court did not give a name to the police powers until 1827, state and local governments had long been exercising them. For more details, see William J. Novak, *The People's Welfare: Law & Regulation in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 1996).

³⁰ The text of the Tenth Amendment reads: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

³¹ Barrows, 477.

imposed limitations of a state's own constitution. Under this interpretation, states can legally regulate activities on private land so long as the interference falls under the broad umbrella of protecting the "health, safety, morals, and general welfare" of the public.³²

Munn v Illinois 94 U.S. 113 (1877) and the related *Granger Cases* were an early example of this precept in action. In *Munn*, Chief Justice Waite's majority opinion upheld an Illinois state law (a "Grange Law") that regulated rates for private grain warehouses and elevators.³³

Siding with the legislature, Justice Waite took a broad view of the police powers. He claimed that the regulatory power of the state rested in English common law, quoting Lord Chief Justice Hale when he writes, "when private property is 'affected with a public interest, it ceases to be *juris privati* only.'" Justice Waite explains,

Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good...³⁴

In sustaining the Granger Laws, the Court upheld the power of state governments to regulate private industry in the name of the public interest.

The Court echoed this republican rationale one decade later in *Mugler v Kansas* 123 U.S. 623 (1887). Mugler claimed that a state temperance law had reduced the property value of his brewery to such an extent as to violate the Due Process law of the Fourteenth Amendment.

³² *Lochner v. New York* 198 U.S. 45 (1905). It is important to note the difference between the Fifth Amendment's "public use" requirement and the police power's "public purpose" constraint. Fischel notes that conflating the two leads to an "erroneous syllogism" that would "read the Just Compensation Clause out of the Constitution" (i.e. since the public purpose of the police power does not require compensation). See William A. Fischel, *Regulatory Takings: Law, Economics, & Politics* (Cambridge: President & Fellows of Harvard College, 1995), 176.

³³ Justice Field famously dissented from the majority opinion in *Munn*, contending, "There is no magic in the language, though used by a constitutional convention, which can change a private business into a public one, or alter the character of the building in which the business is transacted. A tailor's or a shoemaker's shop would still retain its private character, even though the assembled wisdom of the State should declare, by organic act or legislative ordinance, that such a place was a public workshop, and that the workmen were public tailors or public shoemakers. One might as well attempt to change the nature of colors, by giving them a new designation." See 94 U.S. 113, 16.

³⁴ 94 U.S. 113, 10. The quotation cited above is excerpted from Lord Chief Justice Hale's (1609-1676) treatise *De Portibus Maris*, 1 Harg.Law Tracts 78.

His attorney posited both a takings argument as well as a substantive due process argument, but Justice Harlan rejected the case on both counts. He dismisses the former when he insists,

[The 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 anyone for certain forbidden purposes is prejudicial to the public interests.³⁵

He goes on to reject the latter, explaining that the Fourteenth Amendment is not triggered unless the intent behind the statute in question is “not to...promote the general wellbeing, but, under the guise of police regulation, to deprive the owner of his liberty and property without due process of law.”³⁶ Legislative intent, not statutory effect, is the definitive factor for the Court.

A Court accustomed to safeguarding individual liberty now had another protectorate to consider when reviewing state action: the evolving and somewhat amorphous “public interest.” Police power jurisprudence legitimized state regulation even when the law substantially interfered with a private owner’s preferred use of his property. Though common law regulations to this effect had not been unusual in the early republic, these cases represent the Supreme Court’s first explicit endorsement of such rules.³⁷

How broadly would states construe their license to defend the public’s “health, safety, morals, and general welfare?” Generally, how would the Supreme Court balance its historic commitment to defending individual rights (as illustrated by the Takings Clause) with the evolving understanding of the public as a social organism worthy of state protection

³⁵ 123 U.S. 623, 27.

³⁶ Ibid.

³⁷ Novak argues that the representation of nineteenth century America as the golden age of liberalism is inaccurate. At the local level, society was highly regulated and governed by a fully developed body of bylaws, ordinances, statutes, and common law restrictions. See William J. Novak, *The People's Welfare: Law & Regulation in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 1996).

(exemplified by the development of the police powers)?

On the eve of the twentieth century, United States takings law could be summarized as follows: (1) the federal government could exercise its eminent domain power in accordance with the Fifth Amendment; and (2) the state government(s) could exercise eminent domain power in accordance with the Fifth and Fourteenth Amendments *and* could regulate activity on private land (i.e. exercise its police power) in accordance with the Tenth Amendment.

Eminent Domain Jurisprudence & the Public Use Clause in the Twentieth Century

Public Use

Americans typically think of the Fifth Amendment as the tool the government uses to facilitate the construction of projects like highways, hospitals, and military bases. These three functions clearly fall within the “public use” limitation – the government seizes private land for public ownership after providing “just compensation” for the property-owner.³⁸ Another relatively noncontroversial use of eminent domain power involves the transfer of private property to other private parties (generally common carriers, such as public utilities) who subsequently make the property available for use by the public (again, restrained by the Just Compensation Clause).³⁹ Though perhaps contested by the owner of the property in question, straightforward public use cases rarely generate significant legal challenges. Public

³⁸ In her dissenting opinion in *Kelo v New London* 545 U.S. 469 (2005), Justice O'Connor cites *Old Dominion Land Co. v United States* 269 U.S. 55 (1925) and *Rindge Co. v County of Los Angeles* 262 U.S. 700 (1923) as examples of transfers of private property to public ownership.

According to the Supreme Court, “just compensation” is that which constitutes “a full and perfect equivalent for the property taken”; *Monongahela Navigation Co. v United States* 148 U.S. 213 (1893). Attorney expenses are not included; *Dohany v Rogers* 281 U.S. 362 (1930). The most lucrative use must be considered; *Olson v United States* 292 U.S. 246 (1934). The owner's loss (not the gain of the taker i.e. the government) is relevant to the calculation; *United States ex rel. TVA v Powellson* 319 U.S. 266 (1943) & *United States v Miller*, 317 U.S. 369 (1943). Generally understood to be fair market value; 317 U.S. 369, 319 U.S. 266, 292 U.S. 264, also *United States v. Chandler-Dunbar Water Power Co* 229 U.S. 53 (1913), *United States v New River Collieries Co.*, 262 U.S. 341 (1923) & *Kimball Laundry Co. v United States* 338 U.S. 1 (1949).

³⁹ In her dissenting opinion in *Kelo v New London* 545 U.S. 469 (2005), Justice O'Connor cites *National Railroad Passenger Corporation v Boston & Maine Corp.* 503 U.S. 407 (1992) and *Mt. Vernon-Woodberry Cotton Duck Co. v Alabama Interstate Power Co.* 240 U.S. 30 (1916) as examples of transfers of private property for use-by-the-public.

purpose cases, on the other hand, have consistently been sources of bitter constitutional battle.

Public Purpose

Under certain conditions, the Supreme Court has held that takings destined for private use can be rendered constitutional if found to serve a legitimate public *purpose*.⁴⁰ This evolution of thought can be traced back more than a century, with Justice Holmes's opinion in *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906).⁴¹ Ruling in favor of the state, Justice Holmes reflects on the Court's decision the previous year in *Clark v. Nash* 198 U.S. 361 (1905) when he writes, "In discussing what constitutes a public use, it recognized the inadequacy of use by the general public as a universal test."⁴² Though the public purpose test would not be made explicit until the middle of the century, Justice Holmes and his colleagues believed even in 1906 that requiring every taking to pass a public *use* test was unnecessarily restrictive.

The public purpose standard was first articulated *Berman v. Parker* 348 U.S. 26 (1954). In what remains one of the most prominent eminent domain decisions in American history, the justices unanimously ruled that the Takings Clause implicitly includes public *purpose* within the explicit language of public *use*. According to the *Berman* decision, the government can use its eminent domain power to seize land for a public purpose (under the constitutional umbrella of public use) as long as the just compensation requirement is fulfilled.

⁴⁰ Most notably *Berman v. Parker* 348 U.S. 26 (1954), *Hawaii Housing Authority v. Midkiff* 467 U.S. 229 (1984), and *Kelo v. New London* 545 U.S. 469 (2005).

⁴¹ In *Kelo v. New London* 545 U.S. 469 (2005), the majority opinion notes, "For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power" (16).

⁴² 200 U.S. 527, 4.

The rhetorical shift from “public use” to the broader “public purpose” dramatically extended the reach of the government’s eminent domain power. In this particular case, the Court upheld a legislative act that granted a five-member agency the power to acquire property for the “redevelopment of blighted territory in the District of Columbia and the prevention, reduction, or elimination of blighting factors or causes of blight.”⁴³ While public use cases had historically entailed the transfer of property from private hands into the public domain, the new public purpose cases were subject to a different standard: like *Berman*, they might involve the compulsory reallocation of one owner’s property into the hands of another private entity with no guarantee of future use by the public.

Speaking for the Court, Justice Douglas takes an expansive view of the public purpose when he writes,

The concept of the public welfare is broad and inclusive...The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled.⁴⁴

Justice Douglas dismisses the claim that the redistribution of land from one private individual to another (in this case, a private developer) renders the Act invalid. Deferring heavily to legislative authority, he explains, “[The Congress might conclude that] [t]he public end may be as well or better served through an agency of private enterprise than through a department of government...We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.”⁴⁵

⁴³ 348 U.S. 46, 10. Quoted from Section 4 of the District of Columbia Redevelopment Act of 1945.

⁴⁴ *Ibid.*, 11.

⁴⁵ *Ibid.*

The *Berman* decision expanded the kinds of takings that could be deemed lawful under the Fifth Amendment and is generally viewed as a precursor to the more dramatic extensions of the 1980s-2000s.⁴⁶ It was significant for three main reasons: (1) it introduced the phraseology of “public *purpose*” into the Fifth Amendment debate; (2) it implicitly legitimized eminent domain property transfers from private hands into private hands (with no guarantee of use by the public); and (3) it set a precedent of extreme legislative deference.⁴⁷

In *Hawaii Housing Authority v Midkiff* 467 U.S. 229 (1984), the Court upheld a law designed to reduce a monopoly in landownership through the state’s exercise of eminent domain. Hawaii’s Land Reform Act of 1967 had permitted the state government to take title in real property with just compensation and transfer it from unwilling lessors to lessees. A landholder subsequently challenged the Act as a violation of the Public Use Clause of the Fifth Amendment. Writing for the Court, Justice O’Connor echoes *Berman*’s call for legislative deference. She cites the 30-year-old precedent and infers that the public use requirement is “coterminous with the scope of a sovereign’s police powers.”⁴⁸

Again privileging the perceived interests of the public over the preferences of the private landowner, the Court finds this particular exercise of the eminent domain power to be “rationally related to a conceivable public purpose.” Justice O’Connor observes, “The

⁴⁶ Brett Talley, “Restraining Eminent Domain Through Just Compensation,” *Harvard Journal of Law & Public Policy* Vol. 29, No. 2 (Spring 2006): 757-768.

⁴⁷ The next important public purpose case would come not out of the federal judiciary but through the state courts. In *Poletown Neighborhood Council v Detroit* 304 N.W.2d 455 (Mich. 1981), the Michigan Supreme Court upheld Detroit’s decision to condemn the homes of approximately 3,438 people to make way for the construction of a General Motors plant. As in *Berman*, property would be transferred from private hands to private hands. What was novel in *Poletown* was the justification for the condemnation. Rather than condemning “blighted” property (as was the case in *Berman*) Detroit sought to condemn over 1,000 *unblighted* properties to boost the city’s economic position and increase its taxable base. Though the case never made it past the Michigan Supreme Court (and would later be overruled by the same court’s decision in *County of Wayne v Hathcock* 684 N.W.2d 765 (Mich. 2004)), it is of note for two reasons: first, for its influence, as the *Poletown* decision has been cited by no less than nine other states along with the Seventh Circuit; and second, for the striking similarities between it and the facts of the case in *Kelo v New London* 545 U.S. 469 (2005), which resulted in a very different outcome. Given the emphasis here on Supreme Court jurisprudence, an extensive discussion of this case would not be appropriate. For more information, see Timothy Sandefur, “A Gleeeful Obituary for *Poletown*,” *Harvard Journal of Law & Public Policy* Vol. 28 No. 2 (Spring 2005): 651-678.

⁴⁸ 467 U.S. 229, 10.

mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose.”⁴⁹ Here the Court defines a new kind of taking, one that is “purely private” and “executed for no reason other than to confer a private benefit on a particular private party.”⁵⁰ Declaring that such a taking could never meet the public use requirement, and simultaneously upholding the Land Reform Act, the Court implies that the private character of the taking in question is merely incidental.

Justice O'Connor would be singing a very different tune two decades later when the Supreme Court delivered its 5-4 decision in *Kelo v New London* 545 U.S. 469 (2005). In the *Kelo* case, the Court held that the Fifth Amendment permits the exercise of eminent domain for pure economic development in the name of public purpose.⁵¹ New London, Connecticut had been experiencing a pronounced economic depression and the city government adopted a development plan to revitalize the local economy. After purchasing the bulk of the requisite property from willing sellers, the city initiated condemnation proceedings against those landowners who refused to sell. One of those holdouts, Suzette Kelo, filed a lawsuit in response and alleged that the city's plan violated the Public Use Clause of the Fifth Amendment.

If permitted to continue, the plan would involve the compulsory transfer of Kelo's property to the New London Development Corporation, a private entity. The Court had already upheld such a private-to-private transfer in *Berman*, but there remained a fundamental

⁴⁹ 467 U.S. 229, 17.

⁵⁰ Ibid. Justice O'Connor concludes, “The Hawaii Legislature enacted its Land Reform Act not to benefit a particular class of identifiable individuals, but to attack certain perceived evils of concentrated property ownership in Hawaii -- a legitimate public purpose. Use of the condemnation power to achieve this purpose is not irrational.”

⁵¹ Trent Christensen, “From Direct ‘Public Use’ to Indirect ‘Public Benefit’: *Kelo v New London*’s Bridge from Rational Basis to Heightened Scrutiny for Eminent Domain Takings,” *Brigham Young University Law Review* Vol. 2005, No. 6 (2005): 1669-1712.

difference between the two cases: unlike the property in question in *Berman*, Kelo's property could not be categorized as particularly "blighted." Writing for the majority, Justice Stevens acknowledges this but finds the community "sufficiently distressed" to justify the proposal (ostensibly intended to increase New London's taxable base and provide jobs for the depressed community).⁵²

Justice O'Connor, who favored legislative deference in 1984, authored a fierce dissent in *Kelo*. She distinguishes the circumstances of *Kelo* from *Berman* and *Hawaii Housing Authority* by quoting her own 1984 opinion. She explains that the previous cases "hewed to [the] bedrock principle [that a] purely private taking could not withstand the scrutiny of the public use requirement" but the *Kelo* decision represents a deviation from this standard.⁵³ While *Berman* addressed the blight of extreme poverty and *Hawaii Housing Authority* the oligarchy of extreme wealth, Justice O'Connor reasons, *Kelo* offers no such pretext.

Economic development cases are, generally speaking, troublesome for takings law. Private benefit and incidental public benefit are, almost by definition, "merged and mutually reinforcing."⁵⁴ It is extremely difficult, Justice O'Connor points out, to distinguish private profit from promised public gains in the form of taxes and jobs. Furthermore, she argues, the Court's traditional "purpose" test is theoretically ill-equipped to handle cases such as this one. If incidental public benefits are enough to legitimize a fundamentally private taking, then the original inspiration for the taking is moot as far as the Fifth Amendment is concerned.

⁵² 545 U.S. 469, 16.

⁵³ *Ibid.*, 24.

⁵⁴ *Ibid.*, 25.

Ultimately, she laments, the Court's line of reasoning in *Kelo* was drawn from the "errant language" of *Berman* and her own opinion in *Hawaii Housing Authority*. By conflating the police powers with the Fifth Amendment's Public Use Clause in the previous cases, the Court mistakenly equated the two in *Kelo*.⁵⁵ The result, to hear Justice O'Connor tell it, was disastrous:

Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process. To reason, as the Court does...is to wash out any distinction between private and public use of property—and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment.⁵⁶

The swift legislative reaction suggests that Justice O'Connor was not the only one to perceive the *Kelo* precedent as a threat to the integrity of the Fifth Amendment. (Even Justice Stevens, in his majority opinion, noted explicitly that states were free to enact tighter restrictions on eminent domain than the federal standard).⁵⁷ Members of both the United States House and Senate immediately introduced legislation to curb the *Kelo* effect. Although neither chamber passed a bill, in 2006 President Bush issued an analogous Executive Order titled "Protecting the Property Rights of the American People." The order restricted the use of eminent domain power by the federal government to exclude those projects to advance the purely economic interests of private parties.⁵⁸

⁵⁵ 545 U.S. 469, 25. "In discussing whether takings within a blighted neighborhood were for a public use, *Berman* began by observing: 'We deal, in other words, with what traditionally has been known as the police power.' 348 U.S., at 32. From there it declared that "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." *Id.*, at 33. Following up, we said in *Midkiff* that "[t]he 'public use' requirement is coterminous with the scope of a sovereign's police powers." 467 U.S., at 240."

⁵⁶ *Ibid.*, 21.

⁵⁷ Steven J. Eagle & Lauren A. Perotti, "Coping With *Kelo*: a Potpourri of Legislative and Judicial Responses" *Real Property, Trust and Estate Law Journal* 42.4 (2008): 799+.

⁵⁸ Saginor & MacDonald, 7.

As of 2008, 42 states had legislation on the books to limit the state governments' exercise of eminent domain power as well.⁵⁹ In the wake of *Kelo*, most of these new provisions were intended to clarify the Public Use Clause. Three years after the *Kelo* ruling, only Arkansas, Hawaii, Massachusetts, Mississippi, New Jersey, New York, Oklahoma, and Rhode Island had not followed suit.⁶⁰

Given *Berman* and *Hawaii Housing Authority*, it seems the *Kelo* decision did not represent a dramatic departure from precedent. What, then, made this case so explosive? What prompted the furious legislative and popular response that followed? As for the popular response, Mihaly points to “simple ignorance” of the nature of land-use development. He notes that although most Americans enjoy the benefits of urban revitalization, they generally do not understand the process by which the transformation occurs. Furthermore, the average citizen is certainly unaware of how the nature of urban development has evolved to “erase traditional boundaries” between what constitutes a public use and what constitutes a private use.⁶¹

But activists on both sides of the political aisle disagree with this analysis, condemning the implications of the *Kelo* rationale. While conservatives saw *Kelo* as one more manifestation of eroding private property rights, many progressives lamented the disparate

⁵⁹ Eagle and Perotti categorize the statutory reaction to *Kelo* as follows:

- 1) *Inclusionary* definitions of public use (i.e. legislatures provide lists of the types of projects that will qualify as public use): Alaska, Arizona, Georgia, Florida, Illinois, Indiana, Iowa, Kentucky, Louisiana, Minnesota, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Utah, Virginia, West Virginia, and Wyoming (note that Iowa, Georgia, Minnesota, Montana, New Hampshire and Virginia all include the elimination of blight)
- 2) *Exclusionary* definitions of public use (i.e. legislatures provide lists of the types of projects that will *not* qualify as public use): Alabama, Colorado, Connecticut, Michigan, Nebraska, North Dakota, Oregon, Pennsylvania, Tennessee, Texas, and South Dakota.
- 3) *Hybrid* definitions of public use (i.e. legislatures provide lists of the types of projects that will qualify as public use but also note general prohibitions): Alaska, Arizona, Florida, Georgia, Kentucky, Louisiana, Minnesota, New Hampshire, New Mexico, Virginia, and West Virginia.

⁶⁰ Saginor & MacDonald, 7.

⁶¹ Marc B. Mihaly, “Public-Private Redevelopment Partnerships & the Supreme Court: *Kelo v City of New London*,” *Vermont Journal of Environmental Law* Vol. 7, No. 41 (2005): 41-61.

impact that the *Kelo* precedent could have on low-income communities.⁶² On purely ideological grounds, the *Kelo* decision clearly struck a chord with the American people. Main contends that the circumstances surrounding the case “tapped into deep-rooted questions of money and class” and that its result “threatened to violate that most sacred of American domains: the home.”⁶³

Popular sentiment aside, this is where Fifth Amendment eminent domain jurisprudence stands today. According to the *Kelo* precedent, pure economic development is a wholly legitimate basis for the exercise of eminent domain power. As Justice Stevens noted in the majority opinion, it remains up to individual states to enact restrictions on this power.

Regulatory Takings Jurisprudence & the Just Compensation Clause in the Twentieth Century

The legal concept of regulatory takings originated at the end of the Progressive Era, following a period that saw dramatic shifts in attitudes toward both personal and real property.⁶⁴ As society struggled to reorient itself in a newly industrialized and corporatized world, without the historical buffer of the frontier, classical notions of ownership came under fire. To prevent the exploitation of labor power by business interests, reformers pushed for protective workplace legislation. At the same time, citizens concerned about the exploitation of real property (i.e. land) for corporate profit began agitating for protective conservation measures.

These movements, though functionally separate, were both ideological reactions to emerging forms of production. The Progressive Era evolved out of a period of extraordinary

⁶² Edward J. López & Sasha M. Totah, “Kelo & its Discontents: The Worst (or Best?) Thing to Happen to Property Rights,” *The Independent Review* Vol. 11, No. 3 (Winter 2007): 397-416.

⁶³ Carla T. Main, “How Eminent Domain Ran Amok,” *Policy Review* Issue 133 (Oct-Nov 2005): 3-24.

⁶⁴ For more background on the concept of regulatory takings, see pages 9 & 10 of this document.

dependence; the recent appearance of large enterprises and transcontinental corporations meant that business was impacting the everyday lives of Americans like never before.⁶⁵ As such, the classical frontier notions of selfhood and property were becoming less relevant.⁶⁶

In keeping with the scope of this analysis, this section will focus on real property and the conservation movement that burgeoned during the Progressive Era.⁶⁷ During this period, organized conservationists were primarily concerned with the fate of the nation's lands both public and private. Although protecting public lands became a cornerstone of Progressive efforts, regulation of private property was another tool wielded by conservationists. As President Theodore Roosevelt, famed Progressive and conservationist, remarked, "Every man holds his property subject to the general right of the community to regulate its use to whatever degree the public welfare may require it."⁶⁸

At this time the exact definition of what could constitute a taking remained unclear. Prior to the early 1920s, only two kinds of state actions could be interpreted as "takings": (1) the physical taking of a title to a property to be utilized for public use (i.e. a highway) known as "eminent domain" and (2) the physical invasion of private property (i.e. flooding caused by a public water project).⁶⁹ Since landowners were not owed compensation unless one of

⁶⁵ Michael McGerr, *A Fierce Discontent: the Rise & Fall of the Progressive Movement in America, 1870-1920* (New York: Free Press, 2003), 149.

⁶⁶ Currin V. Shields, "The American Tradition of Empirical Collectivism," *The American Political Science Review*, Vol. 46, No. 1 (Mar., 1952): 111. It is important to distinguish between two kinds of real private ownership: the American ideal of widely dispersed small holdings in the hands of individual owners, and the relatively recent development of corporate property ownership founded on absentee ownership. As Shields notes, the latter institution has never been on equal footing with the former in the American psyche. Yet it was not until the years immediately preceding the Progressive Era that the American public was forced to grapple with this distinction, as finance capitalism began changing the face of the market. The conservation movement, then, was a reaction to a specific form of private real property, that of the corporate holding.

⁶⁷ For a more extensive discussion of Progressive Era jurisprudence regarding protective labor legislation, see Howard Gillman, *The Constitution Besieged: the Rise & Demise of Lochner-era Police Powers Jurisprudence* (Durham: Duke University Press, 1995), 1-328. Gillman argues that *Lochner v New York* (and other "Lochner-era jurisprudence") was not, as is commonly believed, an example of conservative judicial activism to protect classical free market ideals. He contends that *Lochner* must instead be understood in the context of the founders' fear of factions and class-specific legislation.

⁶⁸ Shields, 111. Shields attributes this quote to *The New Nationalism* (New York, 1910), pp. 23-24.

⁶⁹ James R. Pease, "Property Rights, Land Stewardship & the Takings Issue," Oregon State University Extension Service (Corvallis: Oregon State University, 1998), 3. An example of (2) would be *Pumpelly v Green Bay County* 80 U.S. 166 (1871), in which the Court held that property owners are entitled to compensation "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness."

the above conditions was met, it can be inferred that the government had fairly broad regulatory jurisdiction over private land.

Furthermore, any government regulation pursued in the name of the public welfare was exempt from compensation.⁷⁰ Back in 1851, in *Commonwealth v Alger* 61 Mass. (7 Cush) 53, the Massachusetts Supreme Court had formulated the following principle:

Every holder of property...holds it under the implied liability that his use of it may be so regulated that is shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.”⁷¹

The majority opinion, written by Justice Lemuel Shaw, suggests that the title to a piece of property does not carry with it the right to unrestricted freedom of use. On the contrary, a landowner’s property right extends only so far as his community will permit him to exercise it.⁷² Under this interpretation, regulation for the public interest would never be construed as a taking.⁷³

The Birth of Regulatory Takings

At the dawn of the 1920s, “taking” was a narrowly defined legal concept and “public welfare” was conceived in fairly broad terms. Progressive Era conservationists favoring greater regulation of private activity were pleased with the state of affairs, but many property owners (particularly businessmen who derived earnings from resource extraction) were growing uneasy with the accepted scope of the police powers. *Pennsylvania Coal v Mahon* 260 U.S. 393 (1922), then, was a boon to the latter group’s cause. By introducing “regulatory

⁷⁰ Pease, 3.

⁷¹ Geo H. Smith, Reporter, “Cases Argued & Determined in the Supreme Judicial Court of Maine: July 13, 1907 – February 25, 1908, Vol. 103” (Portland: Librarian of Congress, 1908), 510.

⁷² This echoes the common law doctrine “*sic utere tuo ut alienum non laeda*” or each must use his own property so as not to injure the property of his neighbor.

⁷³ A common goal of regulation was to remedy private “nuisances” which affected the public. In *Mugler v Kansas* 123 U.S. 623 (1887) and *Hadacheck v Sebastian* 239 U. S. 394 (1915), the United States Supreme Court ruled that laws and ordinances that required the closures of businesses could be constitutional if intended to eliminate a nuisance imposed on society. *Mugler* and *Hadacheck* dealt with the nuisances inflicted by a brewery and a brick-making operation, respectively. In such scenarios, no compensation was due to the business owner.

takings” into American jurisprudence, the Court substantially broadened the legal definition of what qualified as a Fifth Amendment taking.⁷⁴

When a Pennsylvania statute restricted mining under private houses, a coal company filed suit. Because it held mining rights beneath the land belonging to the homeowners, the company argued that the new law was effectively “taking” their property. “As applied to this case, the statute is admitted to destroy previously existing rights of property and contract,” Justice Holmes wrote. “The question is whether the police power can be stretched so far.”⁷⁵

What, Justice Holmes pondered, was the threshold for the police power? When did regulation of private property constitute a legitimate exercise of the police power, and when did it cross the threshold into eminent domain territory? Under what circumstances, if any, should the government be required to compensate landowners for the inconvenience caused by regulations?

The Court ruled in favor of the company, finding the Act unjustified as an exercise of the police power and declaring it to be a taking. Justice Holmes relied on what would become known as the “diminution of value test,” explaining that “when [the taking] reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.”⁷⁶ Though he did not elaborate further, Holmes felt that the Pennsylvania statute had surpassed this particular threshold. He continues, “The

⁷⁴ See also *Portsmouth Co. v. United States* 260 U.S. 327 (1922). Also authored by Justice Holmes and decided the very same month as *Pennsylvania Coal*, this opinion again dealt with the concept of regulatory takings. The Court ruled that when the U.S. government opened a shooting range and began firing over the plaintiff’s land, the noise pollution that ensued effectively constituted a taking.

⁷⁵ 260 U.S. 393, 12.

⁷⁶ *Ibid.* Justice Holmes’s opinion in *Pennsylvania Coal* is interesting not only because it created the concept of regulatory takings (thereby restricting the reach of the regulatory state) but also because it appears to diverge so dramatically from his previous writings on private regulation (most prominently, his dissent in *Lochner v. New York* 198 U.S. 45 (1905)). See William Michael Treanor, “Jam for Justice Holmes: Reassessing the Significance of Mahon,” *Georgetown Law Journal* Vol. 86, No. 813 (1998) for a more thorough discussion of this apparent inconsistency.

general rule is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.”⁷⁷

Prior to 1922, the takings test required either (1) physical confiscation; or (2) physical invasion of property. *Pennsylvania Coal* created the concept of a “regulatory taking” and extended the test to any government rules that “go too far.”⁷⁸ Just as he had indirectly invited the “public purpose” test into eminent domain jurisprudence in 1906, Justice Holmes effectively founded regulatory takings jurisprudence in 1922. The long-term impact of his decision in *Strickley* (1906) would be to substantially broaden the scope of the government’s eminent domain power. In contrast, his decision in *Pennsylvania Coal* (1922) would *limit* the scope of the government’s police power.⁷⁹

The Changing Character of the Court

Although the New Deal did not generate any landmark decisions for regulatory takings, a brief digression into the period’s jurisprudence is appropriate here. Legal scholars have identified 1937 and the Court’s decision that year in *West Coast Hotel Co. v. Parrish* 300 U.S. 379 as the conclusion of the so-called “*Lochner*-era.” The decades that followed *Lochner v. New York* 198 U.S. 45 (1905) were riddled with Supreme Court decisions that overturned economic regulations. During this period, the Court invalidated nearly 200 pieces of federal

⁷⁷ 260 U.S. 393, 12.

⁷⁸ Pease, 4. The *Pennsylvania Coal* case was decided 8-1, with only Justice Louis Brandeis dissenting. As Fischel notes in *Regulatory Takings*, however, Brandeis’s lone dissent has become almost as famous as Holmes’s majority opinion. In it Brandeis articulated what has become known as the “nuisance exception,” or the idea that the state may regulate a landowner’s use of his property without compensation if the use in question constitutes a “public nuisance.” Brandeis goes on to argue that the “diminution in value” test that Holmes uses to justify his decision was misapplied. Brandeis believes that the Court should have considered the value of the restricted coal only *in relation to* the value of the rest of the land. “The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil,” Brandeis writes. “The sum of the rights in the parts can not be greater than the rights in the whole” (14). Rather than considering the lost value of the coal in isolation, Brandeis advocates for a holistic evaluation of the property in question.

⁷⁹ In *Keystone Bituminous Coal Association v. DeBenedictis* 480 U.S. 470 (1987), takings litigation came full circle and returned to Pennsylvania 65 years after the landmark decision in *Pennsylvania Coal*. In *Keystone*, the Court was again asked to review a Pennsylvania statute related to subsidence mining. After applying the two-prong *Agins* test (from *Agins v. City of Tiburon* 447 U.S. 255 (1980)), the Court found the *Pennsylvania Coal* precedent non-controlling in this case. First, the Court found that the Subsidence Act in question had been enacted as a legitimate protection to the public welfare (in contrast to the *Pennsylvania Coal* legislation, which Justice Holmes identified as benefiting private parties). In regards to the second prong, the Court rejected petitioners’ tripartite division of their property into surface, mineral, and support estates. In *Keystone*, the Court reiterated that takings claims must be evaluated in the context of one’s cumulative property or complete ‘bundle’ of rights (essentially adopting Brandeis’s position in his *Pennsylvania Coal* dissent).

and state legislation intended to regulate the economic sphere.⁸⁰ Though most of this legislation was unrelated to real property (it tended to focus on personal property in the form of labor, contract, etc.), its theoretical implications for regulatory takings make it worth noting.

West Coast Hotel Co. signaled a jurisprudential shift when it upheld a minimum wage law for women on the basis of a “special state interest.” Chief Justice Hughes explains this divergence from *Lochner*-era rationale when he writes, “The Constitution does not speak of Freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law.”⁸¹ By refusing to identify an implicit liberty of contract in the Constitution for the first time since 1905, the Court effectively legitimized government regulation of the economic sphere.⁸²

The following year, *United States v Carolene Products Co.* 304 U.S. 144 (1938) simultaneously built on this new tradition and produced one of the most famous footnotes in the history of constitutional law. The case itself was unremarkable, but “Footnote Four” (as it has come to be called) would prove momentous. The Court applied rational basis review (i.e. minimal scrutiny) to the economic regulation in question, and Justice Stone used Footnote Four to propose different levels of review for other types of cases.⁸³

⁸⁰ Christopher S. Dodrill, “In Defense of Footnote Four: A Historical Analysis of the New Deal’s Effect on Land Regulation in the U.S. Supreme Court,” *Law & Contemporary Problems* Vol. 72, No. 191 (Winter 2009): 191-204. Interpretations of the *Lochner* era rationale vary. Some attribute the Court’s distaste for regulation to a laissez faire political ideology, but the most recent scholarship suggests that this body of decisions is more consistent with a preference for a “neutral-state” and a fear of class-specific legislation (see Howard Gillman, *The Constitution Besieged: The Rise & Demise of Lochner-Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993).

⁸¹ 300 U.S. 399, 10. In *Lochner* (1905), Justice Peckham found liberty of contract to be inherent to the liberty of the individual protected by the Fourteenth Amendment.

⁸² When Roosevelt’s early programs were met with resistance by the Supreme Court, he unveiled the Judiciary Reorganization Act of 1937 (better known as his infamous “court packing” plan). Though this proved to be an empty threat, Fischel notes that the plan “may have accomplished by threat what it failed to do in deed.” The “switch in time that saved nine,” as the scheme has come to be known, coupled with his later (unrelated) appointment of nine new justices to the bench, may have helped to shift the culture of the high court in favor of more stringent government regulation. See Fischel, 111.

⁸³ 304 U.S. 144, 10. Justice Stone explained that the “presumption of constitutionality” (as applied in *Carolene Products*) would not always be sufficient, and that certain conditions might require a more “exacting” level of scrutiny. He writes, for example, that “[t]here may be

The explicit exceptions that he proposed would have important implications for Equal Protection cases, but it was actually what Justice Stone did *not* mention that would have a bearing on takings questions. By applying minimal scrutiny to economic regulation, and proposing a more stringent scrutiny only for that legislation which “appears on its face to be within a specific prohibition of the Constitution” (i.e. those statutes that are prejudicial toward “discrete and insular minorities”), Stone implies that the Court should defer to the legislature under all other circumstances.⁸⁴

This “presumption of constitutionality” approach, coupled with the dismissal of the *Lochner* precedent, signaled the Court’s increasing willingness to uphold economic regulations.⁸⁵ Neither *West Coast Hotel Co.* nor *Carolene Products Co.* addressed real property, nor did the latter case once cite the former. Nonetheless, both would arguably have an indirect bearing on takings jurisprudence through the ideological shift they represented on the Court.⁸⁶

The Holmesian concept of regulatory takings was first put to the test in *Village of Euclid v Ambler Realty Co.* 272 U.S. 365 (1926). In this case, Ambler Realty Co. alleged that a local zoning ordinance had resulted in a reduction of its property value. Claiming the ordinance (which “down-zoned” a portion of the company’s property from industrial to residential) constituted a taking, Ambler Realty filed suit under the Due Process Clause of

narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution...”

⁸⁴ 304 U.S. 144, 10.

⁸⁵ As exhibited by the Court’s decision in *Wickard v Fillburn* 317 U.S. 111 (1942), in which it ruled that Congress has jurisdiction over noncommercial local activities which “[exert] a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect’” (3).

⁸⁶ Dodrill argues that although *Carolene Products* had a dramatic impact on the Court’s approach to social and labor legislation, its effect on real property rights was inconsequential. According to Dodrill, real property legislation had never been subject to the heightened scrutiny that the *Lochner* Court had applied to economic legislation. While the Court frequently invalidated laborer’s claims against their employers, it generally rejected landowner’s takings claims during the same era. See “In Defense of Footnote Four: A Historical Analysis of the New Deal’s Effect on Land Regulation in the U.S. Supreme Court,” *Law & Contemporary Problems* Vol. 72, No. 191 (Winter 2009): 191-204.

the Fourteenth Amendment.⁸⁷ Comprehensive zoning of the type observed in this case was a relatively recent social development, arising for the first time during the Progressive Era.⁸⁸

In *Village of Euclid* the Court upheld the zoning ordinance despite its negative impact on Ambler Realty's property value. Justice Sutherland, writing for the majority, explains that there is not a clearly defined threshold for what constitutes a "public nuisance" and thus justifies regulation. Rather, it "varies with circumstances and conditions," and "may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."⁸⁹

The *Village of Euclid* decision was notable for three reasons. First, it marked the Court's first endorsement of a comprehensive zoning plan.⁹⁰ Second, it established that a landowner must lose *all* beneficial use of his land in order for the regulation to constitute a taking.⁹¹ According to the Court's rationale, although Ambler Realty's property value had declined, the company could still develop and sell its land (albeit under different conditions). Finally, it established the "presumption of validity" principle, which holds that the Court will presume a piece of legislation to be valid unless the challenger can successfully demonstrate it to be arbitrary or unreasonable.⁹² Otherwise, the Court holds, "If the validity of the

⁸⁷ 272 U.S. 365. Though the outcome of the case would implicate the Takings Clause of the Fifth Amendment, the plaintiff filed suit under the Fourteenth Amendment. Ambler Realty Company alleged that the statute in question deprived the company of its property without due process of law *and* denied it the equal protection of the law. The company also contended that the statute violated certain provisions of the Ohio state Constitution.

⁸⁸ Novak, 67. Novak notes here that although comprehensive zoning plans were a product of the Progressive Era, they were a kind of urban land-use regulation that differed "only in degree" from city ordinances commonly seen in the early nineteenth century. In the *Village of Euclid* majority opinion, Justice Sutherland characterizes zoning laws as a relatively recent development in American law, beginning around the turn of the century. He writes, "Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive" (272 U.S. 365, 13). Freyfogle points to this opinion specifically as evidence that the Court possessed a "surprising lack of awareness" of the history of land use planning. He takes issue with Justice Sutherland's assertion that urban life was relatively simple a quarter century ago, arguing that extensive ordinances had governed city life as far back as the colonial period. See Eric T. Freyfogle, *The Land We Share: Private Property & the Common Good* (Washington: Island Press/Shearwater Books, 2003), 86.

⁸⁹ 272 U.S. 365, 13. Justice Holmes does briefly mention the "public nuisance" in his majority opinion for *Pennsylvania Coal*, writing, "This is the case of a single private house...A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places" (260 U.S. 393, 12). It is in Justice Brandeis's *Pennsylvania Coal* dissent, however, that the nuisance exception is more fully articulated.

⁹⁰ Fischel, 23.

⁹¹ Pease, 4.

⁹² *Ibid.*

legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.”⁹³

The Expansion of Regulatory Takings

If *Pennsylvania Coal* had been a boon for property rights activists, they were to be sorely disappointed by the jurisprudence that followed the conclusion of the *Lochner* era. Even Justice Holmes’s vague declaration in *Pennsylvania Coal* that any regulation going “too far” can be construed as a taking would have little impact. Regulatory takings law remained relatively stagnant for decades.

More than half a century elapsed before the Court handed down its notorious decision in *Penn Central Transportation Co. v City of New York* 438 U.S. 104 (1978). Until *Penn Central*, the Supreme Court studied takings claims through the lens of the Fourteenth Amendment Due Process Clause.⁹⁴ Under the due process analysis, a government action constituted a taking only when it exceeded the legitimate boundaries of the state’s police power. *Penn Central* signified a break with this tradition and reoriented takings law in favor of individual property owners.

In *Penn Central*, the Court shifted from a purely due process approach to a multifactor test that combined Due Process Clause and Takings Clause analysis.⁹⁵ It was, as

⁹³ 272 U.S. 365, 4. The Court affirmed the *Village of Euclid* decision in *Zahn v Board of Public Works of City of Los Angeles* 274 U.S. 325 (1927) and *Gorrie v Fox* 274 U.S. 603 (1927). A year later, in *Nectow v. City of Cambridge* 277 U.S. 183 (1928), the Court did find the application of a particular zoning ordinance invalid. Using the *Village of Euclid* test, the Court held that “...the health, safety, convenience, and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question... That the invasion of the property of plaintiff in error was serious and highly injurious is clearly established; and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be sustained.” Also in 1928, the Court invalidated another zoning ordinance in *State of Washington Ex Rel. Seattle Title Trust Co. v Roberge* 278 U.S. 116. For more details about both *Nectow* and *State of Washington Ex Rel.*, See Christopher S. Dodrill, “In defense of ‘footnote four’: a historical analysis of the new deal’s effect on land regulation in the U.S. Supreme Court,” *Law and Contemporary Problems* 72.1 (2009): 191-205.

⁹⁴ Dodrill, 202.

⁹⁵ Dodrill, 2. According to Meltz et al, substantive due process is primarily concerned with the relationship between chosen means and desired ends; it is rationality-based. Takings law, on the other hand, tends to focus on the impact of government control (i.e. economic harm, level of intrusiveness). For a more thorough discussion of the substantive due process analysis in takings jurisprudence, see Meltz, et al, *The Takings Issue: Constitutional Limits on Land Use Control & Environmental Regulation* (1999): 17-18.

Eagle explains, an “incomplete break,” from the previous tradition, a conflation of two approaches rather than a rejection of one in favor of another.⁹⁶ According to Dodrill, this effectively changed the question of law from “Did the state have the power to enact this regulation?” to “What is the effect of this regulation?”⁹⁷ While the previous method had focused entirely on the interest of the government’s action, the inclusion of Takings Clause analysis allowed the Court to consider the impact on the landowner in an unprecedented way.⁹⁸

The *Penn Central* case involved a challenge to the New York City Landmarks Law enacted in 1965. When the Penn Central Transportation Company suggested an update to its historic Grand Central Terminal, the city’s Landmarks Preservation Committee rejected the proposal under the 1965 statute. Alleging that the law resulted in an uncompensated taking of its property, the company filed suit. Though ultimately decided in the city government’s favor, the case’s long-term impact was to bolster private property rights considerably against the regulatory state.

Writing for the Court, Justice Brennan reviewed the applicable precedents and highlighted the relevant factors for a takings claim. He explains,

The Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations... So, too, is the character of the governmental action.⁹⁹

⁹⁶ Eagle, 910.

⁹⁷ Justice Holmes, author of the 1922 *Pennsylvania Coal* decision and intellectual founder of regulatory takings, is also commonly associated with the school of legal thought known as “sociological jurisprudence” or “legal realism.” The emphasis of the *Penn Central* decision on practical effect (rather than substantive intent) echoes of the Holmesian approach to judicial decision making and suggests that sociological jurisprudence was a significant tool in both the conception and the evolution of regulatory takings law. For more information about sociological jurisprudence and the role of Justice Holmes, see Wilfrid E. Rumble, Jr., “Legal Realism, Sociological Jurisprudence, & Mr. Justice Holmes,” *Journal of the History of Ideas* Vol. 26, No. 4 (Oct-Dec 1965): 547-566.

⁹⁸ Dodrill, 202.

⁹⁹ 438 U.S. 104, 20.

Of the three factors identified, Dodrill notes that two of them focus explicitly on the *impact* of the regulation, while only one emphasizes the *nature* of the regulation.¹⁰⁰ In a dramatic departure from the previous due process approach (which tended to favor the state), *Penn Central* proposed a new test weighted on the side of the property owner.

According to the *Penn Central* rationale, a landowner could now be eligible for compensation *even if* the Court determined the state action in question to be valid. Even if the government were legitimately exercising its authority to preserve the public health, safety, and morals, this would no longer nullify a property owner's takings claim (as it would have prior to the *Penn Central* decision).

Agins v City of Tiburon 447 U.S. 255 (1980) represented the Supreme Court's first application of the *Penn Central* precedent and articulated a new two-prong standard for takings claims. In *Agins*, the Supreme Court held that a government regulation constitutes a taking if (1) it does not "substantially advance legitimate state interests;" *or* (2) it "denies an owner economically viable use of his land."¹⁰¹

There were now *two* possible avenues for a successful takings claim whereas previously there had only been one. Even if a landowner could not call the state's professed interest into question (as was required prior to *Penn Central* and *Agins*), s/he could now challenge the action purely on the basis of personal economic injury. Given the Court's history of deference to the legislature in cases involving the police power, this new development offered a promising alternative strategy for property owners facing cumbersome regulations.

¹⁰⁰ Dodrill, 202.

¹⁰¹ 447 U.S. 255. In this case, the government action in question was a zoning ordinance. The Court cites *Nectow v Cambridge* 277 U.S. 183 (1928) in support of (1) and *Penn Central* in support of (2). In this particular case, the Court found not only that the ordinances advanced a legitimate governmental interest, but also that the owner's property remained economically viable in accordance with the *Penn Central* criteria. Thus, no taking could be said to have occurred.

Land Use Permitting Enters the Takings Debate

When Congress enacted a flurry of environmental legislation in the early 1970s, among the statutes passed was the Coastal Zone Management Act (1972). The Act mandated that coastal states outline a plan for providing access to “public coastal areas of environmental, recreational, historical, aesthetic, ecological or cultural value.”¹⁰² The state of California promptly followed suit, with the voters approving such a program in 1972 and the state legislature making the change permanent with the enactment of the California Coastal Act in 1976 (CCA).¹⁰³

Under the Act, the California Coastal Commission was granted permitting authority for beachfront property. When the Commission approved the Nollan family’s request to build a 2,500 square foot home in the place of their small beachfront bungalow, it did so on the condition that the Nollans construct a public easement in front of the house to maintain visual access of the beach. The Commission alleged this was a legitimate exercise of the state’s police power, but the Nollans thought it more akin to an uncompensated taking of their property.

The Supreme Court agreed with the Nollans. Writing for the majority in *Nollan v California Coastal Commission* 483 U.S. 825 (1987), Justice Scalia describes the easement requirement as a “permanent physical occupation” since the “[the Court has] repeatedly held that...the right to exclude others is ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’”¹⁰⁴ He notes, however, that the Court has

¹⁰² 16 U.S.C. §11454(b) (7). For more information about public beach access and the Coastal Zone Management Act, see Pamela Pogue & Virginia Lee, “Providing Public Access to the Shore: The Role of Coastal Zone Management Programs,” *Coastal Management* Vol. 27, No. 2 (April 1999): 219-237.

¹⁰³ Devyani Kar, “Public Access & Importance of Offers to Dedicate on California’s Coastline,” *Journal of Coastal Research* Vol. 23, No. 2 (March 2007): 472-486.

¹⁰⁴ 483 U.S. 825, 8. The “bundle of sticks” metaphor is commonly associated with the “law and economics” approach to property. See Abraham Bell & Gideon Parchomovsky, “A Theory of Property,” *Cornell University Law Review* Vol. 90, No. 3 (March 2005): 535.

neither articulated a definition of a “legitimate state interest” nor elaborated a standard for determining the kind of connection that must exist between that interest and the regulation in question for the latter to “substantially advance” the former.

To that end, Justice Scalia introduced the “essential nexus” test into takings jurisprudence by way of the *Nollan* decision. If the permit condition advanced a legitimate state interest and an “essential nexus” could be said to exist between that interest and the requisite condition, the government action would not constitute a taking.¹⁰⁵ Under the *Nollan* test, the state’s means must be sufficiently related to the ends for the action to qualify as a valid exercise of the police power. If no such relationship can be shown, the action will be determined a taking and compensation must be forthcoming.

Justice Scalia found no such nexus in this particular case, explaining, “...the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was.”¹⁰⁶ For the Court, a requirement that people already on the beach be able to traverse the Nollans’ property could not be said to alleviate the visual blockage created by the new home. Given the lack of nexus, the justices ruled that the permit condition indeed constituted a taking.

In 1994, the *Nollan* standard was applied to *Dolan v City of Tigard* 512 U.S. 374. Dolan, an Oregon storeowner, had filed for a permit to expand her business. When the city of Tigard made the permit conditional upon Dolan’s inclusion of a greenway and bicycle path in the plan (ostensibly to prevent flooding and reduce traffic congestion), she contended that the land requirements were not related to her proposed development and thus tantamount

¹⁰⁵ This allowance was significant because the Court had historically recognized the right to exclude as a fundamental component of the “bundle of rights.” In *Kaiser Aetna v. United States* 444 U.S. 164 (1979), the Court described the right to exclude others as “one of the most essential sticks in the bundle of rights that are commonly characterized as property” (12).

¹⁰⁶ 483 U.S. 825, 11.

to an uncompensated taking. The Court put the constitutionality of the case to a two-prong test: first, an essential nexus must exist between a legitimate state interest and the conditions imposed on the permit (the *Nollan* prong). If one is identified, the second prong (the *Dolan* prong) stipulates that the “degree of the exactions” must bear a requisite relationship to the anticipated impact of the proposal.¹⁰⁷

After finding the first prong satisfied, the Court balked at the second. Employing the “rough proportionality” standard (analogous to the reasonable relationship test adopted by state courts), Chief Justice Rehnquist explains, “No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”¹⁰⁸ The Court concluded that neither the floodplain easement nor the bicycle path were reasonably related to the projected impact of Dolan’s expansion, making the permit conditions an uncompensated taking of her property.

In the meantime, Justice Scalia had authored another critical decision for regulatory takings related to coastal permitting: *Lucas v South Carolina Coastal Council* 505 U.S. 1003 (1992). When Lucas purchased coastal property in 1986, he did so with the intention to erect single-family homes on the lot. In 1988, however, the South Carolina legislature passed the Beachfront Management Act, which effectively prohibited future development of his property.¹⁰⁹ When the South Carolina Coastal Council denied Lucas the necessary permit to build, he challenged the statute in question as an uncompensated taking. Not disputing that the Act represented a valid exercise of the state’s police power, Lucas instead argued that the

¹⁰⁷ 512 U.S. 374.

¹⁰⁸ *Ibid.*, 17.

¹⁰⁹ S.C.Code Section 48-39250.

complete extermination of his property value entitled him to compensation regardless of the statute's validity.

Writing for the majority, Justice Scalia again rules for the private landowner against the state. Returning to the “bundle of rights” metaphor, he argues that the State cannot establish new regulations that deny a property owner all economically productive use of his or her land without appropriate compensation. If, on the other hand, the State has simply enacted legislation that makes explicit what has already been held implicitly by the common law, no compensation is demanded. In order to meet the criteria for the first scenario and qualify for compensation, a claim must be subjected to the “total takings” test.¹¹⁰

Justice Scalia delineates between compensable and non-compensable actions based on the degree of economic impairment resulting from the regulation in question. A land-use restriction constitutes a “total” taking when it deprives its owner of “all economically beneficial uses” of his or her property. While a “total” taking necessitates landowner compensation, those regulations leading to a partial devaluing of property do not.¹¹¹

The total takings test, like previous Supreme Court standards for regulatory takings, assumes that a property owner's “bundle of rights” includes an economic entitlement. At face *Lucas* may seem like a victory for private property owners, but the language of the decision would indirectly raise the stakes for future claimants. *Lucas* held that an owner's economic privilege is not inviolable; it can be infringed upon to a substantial extent without triggering the compensation requirement.

¹¹⁰ According to Justice Scalia, the following aspects of a claimant's proposed activities must be considered for the government action to be determined a “total taking”: (1) the degree of harm exacted on public lands and resources, or adjacent private property; (2) their social value and their suitability to the locality in question; (3) the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners); and (4) the extent to which a similar use has been engaged in and by similarly situated owners. See 505 U.S. 1003.

¹¹¹ Henry N. Butler, “Regulatory Takings After *Lucas*,” *Regulation* Vol. 16, No. 3 (Jan. 1993): 76-81.

Property Owners Challenge Environmental Regulations

The following year, another Oregon takings case rose to the Supreme Court, this time in response to federal legislation. In *Babbitt, Secretary of Interior et al. v Sweet Home Chapter of Communities for a Great Oregon et al.* 515 U.S. 687 (1995) persons within the state’s timber industry filed suit against the Interior Secretary, alleging that his interpretation of the word “harm” within the Endangered Species Act (ESA) (1973) was flawed. In accordance with the ESA, no person can “take” an endangered or threatened species, which the Act defines as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”¹¹²

Although the Act does not elaborate on the meaning of the word “harm,” federal regulations characterize it as “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.”¹¹³ By including habitat modification in this interpretation and applying it to the red-cockaded woodpecker (listed as an endangered species) and to the northern spotted owl (a threatened species), the respondents alleged that their timber activity was so restricted as to hurt them economically. They challenged the regulation on its face, arguing that Congress had not intended the term “harm” to extend to habitat modification.

The Court disagreed. Justice Stevens, writing for the majority, based his ruling on a reluctance to interpret statutory terms as extraneous. He explains, “[U]nless the statutory term ‘harm’ encompasses indirect as well as direct injuries, the word has no meaning that

¹¹² Endangered Species Act of 1973, as amended by P.L. 94-325, June 30, 1976; P.L. 94-359, July 12, 1976; P.L. 95-212, December 19, 1977; P.L. 95-632, November 10, 1978; P.L. 96-159, December 28, 1979; P.L. 97-304, October 13, 1982; P.L. 98-327, June 25, 1984; and P.L. 100-478, October 7, 1988; P.L. 107-171, May 13, 2002; P.L. 108-136, November 24, 2003.

¹¹³ The Secretary of the Interior, through the Director of the Fish and Wildlife Service, originally promulgated the regulation in 1975 and amended it in 1981 to emphasize that actual death or injury of a protected animal is necessary for a violation. See 40 Fed. Reg. 44412, 44416 (1975); 46 Fed. Reg. 54748, 54750 (1981).

does not duplicate the meaning of other words that Section 3 uses to define ‘take.’”¹¹⁴ If, as the respondents alleged, Congress had only intended to proscribe direct applications of force, there would have been no reason to include the term “harm” in the litany of prohibited acts that already included “kill,” “wound,” and “hunt,” among others. In upholding the constitutionality of the regulation, the Court dismissed the claim.¹¹⁵

Unlike the previous regulatory takings cases discussed in this section, *Babbitt* was not an inverse condemnation claim. Although the respondents alleged that they had experienced economic distress, they were not requesting payment for their injuries; the term “compensation” is nowhere to be found in either the majority or the dissenting opinions.¹¹⁶

Analysis of Takings Jurisprudence

There is ample scholarly support that the American conception of property has been dually influenced by classical liberal theory and civic republicanism. The evolution of takings jurisprudence reinforces this theory. I propose that the chain of eminent domain jurisprudence (specifically, the reading of public *purpose* from the Public Use Clause in the Fifth Amendment) represents adherence to the principles of civic republicanism. Regulatory takings jurisprudence, in contrast, corresponds strongly with the classical liberal view of private property.

¹¹⁴ 515 U.S. 687, 9.

¹¹⁵ The *Babbitt* decision came at a time when American environmentalism was on the decline. The movement’s own success had contributed to a waning sense of urgency and ordinary citizens were growing increasingly uncomfortable with the impact of government regulations on their daily lives. Capitalizing on this sentiment, the Wise Use movement had begun to gain traction in the political sphere. By adopting populist rhetoric and portraying itself as a grassroots movement, Wise Use was able to recast environmentalists as elite members of a special interest group disconnected from the needs of rural America. One of the movement’s top agenda items has consistently been the protection of private property rights, and Wise Use activists have devoted substantial effort to expand the legal definition of “regulatory taking.” Bills and ballot measures to restrict state exercise of the police power on private property began cropping up across the country during this time. Oregon’s own Measure 37 (passed by the voters in 2004) represents a late example of this trend. Measure 37 allowed property owners whose land value was reduced by government regulations to file compensation claims against the state. It was substantially amended by the passage of Measure 49 in 2007. See Phil Brick, “Determined Opposition: The Wise Use Movement Challenges Environmentalism,” *Environment* Vol. 37, No. 8 (October 1995).

¹¹⁶ 515 U.S. 687. The rationale behind the decision to challenge the regulation on its face, rather than file an inverse condemnation suit, is unavailable.

Public Purpose: A Republican Conception of Property

The initial framework of eminent domain takings aligned well with classical liberal theory: any physical seizure or invasion of private property on the part of the government necessitates compensation. Yet the twentieth century judicial interpretation of the Public Use Clause dramatically shifted the ideological underpinnings of eminent domain. I argue that the current legal understanding of “public purpose” indicates an philosophical conviction more in line with civic republicanism.

Berman (1954), *Hawaii Housing Authority* (1984), and *Kelo* (2005) represent a chain of decisions that have outraged property rights activists. It was a libertarian-inspired public interest law firm, the Institute for Justice (IJ), which agreed to take Suzette Kelo’s case. IJ’s strategy portrayed the city of New London as greedy and Constitution-flouting, arguing that the *Kelo* case represented a shocking departure from first principles.¹¹⁷ Certainly, IJ would be correct in this assertion if the liberal view of property had dominated the American founding to the exclusion of other ideologies. However, although the *Kelo* decision may have been disturbing, it did not represent a dramatic break with legal tradition. The reading of public purpose (and the subsequent approval of economic development under this banner) corresponds with another “first principle”—the principle of civic republicanism.

In *Berman*, the Court upheld a plan to condemn private land and utilize the space for the construction of streets, schools, and other public facilities, as well as private redevelopment that included low-cost housing. In *Hawaii Housing Authority*, the Court upheld a statutory decision to transfer fee titles from lessors to lessees in order to reduce a monopoly in landownership. Finally, in *Kelo*, the landowners were located in the midst of a massive redevelopment plan. If approved, their property would be converted to 90,000

¹¹⁷ Jeff Benedict, *Little Pink House: A True Story of Defiance & Courage* (New York: Grand Central Publishing, 2009).

square feet of research and development office space (Parcel 3) and parking and retail services (Parcel 4A).¹¹⁸ Taken in conjunction with *Berman* and *Hawaii Housing Authority*, the *Kelo* decision seems to represent a culmination of the “public purpose” rationale expressed in the previous cases—a logical next step.

The Court’s broad interpretation of “public purpose” in each of these cases suggests an understanding of private property not as an individual market commodity but as a fundamentally social institution. Certainly, the offer of just compensation is a gesture to the alienability of land (which is recognized in both liberal and republican tradition). In a truly free market setting, however, the buyers and sellers would agree on a price. In *Berman*, *Hawaii Housing Authority*, and *Kelo*, there was no such agreement. These cases rose to the Supreme Court specifically because the property owners were compelled to sell the land against their will. The market had indeed put a price on their property, but the compulsory nature of the sales made them decidedly incompatible with classical liberal theory.

When the Court expanded the definition of “public purpose” to legitimize compulsory transfers of private property to private entities in *Kelo* (with no guarantee of use by the public), property rights activists were outraged by what they perceived as a redistribution of wealth. The majority opinion offers a different theoretical framework to justify the holding: Justice Stevens explains that the “public end” may in fact be as well or better served through a private enterprise than through a government agency—or so Congress could conclude.¹¹⁹

The republican conception relies much less heavily on the public-private dualism than the liberal tradition. Liberal scholarship emphasizes the division of American life into

¹¹⁸ 545 U.S. 469.

¹¹⁹ *Ibid.*

two distinct spheres: the public sphere of the government and the private sphere of the individual. In this context, the law becomes not a protector of property, but a tool through which the government can interfere with the private sphere.¹²⁰ Civic republicanism, in contrast, draws much softer distinctions between public and private—as does the conceptual framework of the *Kelo* decision.

The call for legislative deference echoes strongly throughout this line of cases. By declining to second-guess the decisions of local and state governments, the Court has implicitly allowed the definition of public purpose to expand. State and local governments have historically utilized property as an instrument of social order, and the Court's deference suggests a conviction in support of this view.

Novak identifies three core features of proprietary regulation: (1) an adherence to the common law as a source of value and guidance; (2) a prevailing concern with common, rather than private goods and interests; and (3) a commitment to the commonwealth and a guarantor of the general welfare.¹²¹ Under this rubric, it is not inconceivable that economic development could pass for proprietary regulation. By consistently deferring to legislative judgments, the Court implicitly agrees.

This line of cases also indicates that private property is far from sacrosanct. Unwilling individuals can be compelled to sell their property to the government if the intended use for the land can be interpreted as fulfilling a public *purpose*—a loose designation that the Court has shown itself increasingly unwilling to question. Such is a classic demonstration of the state placing the (perceived) public good above the interests of the

¹²⁰ Freyfogle, 80.

¹²¹ Alexander, 9.

individual citizen. As Alexander explains, the proprietary view is “always committed to some particular substantive view of how society should be ordered.”¹²²

Ultimately, the Court’s decisions in *Berman*, *Hawaii Housing Authority*, and *Kelo* suggest an interpretation of private property that seems out of sync with classical liberal theory—and it most certainly is. That is not, however, to say that this line of reasoning is anomalous to American social and legal traditions; it is merely derived from the less familiar half of the property dialectic—civic republicanism.¹²³

Regulatory Takings: A Liberal Conception of Property

The police power, the basis for the regulatory state, was developed from the work of progressive legal theorists.¹²⁴ Conceived during the mid-nineteenth century as a “check” on liberal individualism, the police power was imbued with a republican spirit. Ironically, however, by the end of the twentieth century the regulatory state would be curbed by another legal development—the liberal concept of regulatory takings.¹²⁵

If liberal theorists have been incensed by public purpose jurisprudence, they can rest assured that regulatory takings law is situated in their favor. I argue that the line of cases discussed here (*Pennsylvania Coal* (1922), *Village of Euclid* (1926), *Penn Central* (1978), *Agins* (1980), *Nollan* (1987), *Lucas* (1992), and *Dolan* (1994)) represent, generally, a liberal approach to the property question.¹²⁶

¹²² Alexander, 3.

¹²³ Ibid., 4.

¹²⁴ Jeffrey Sklansky, *The Soul's Economy: Market Society & Selfhood in American Thought, 1820-1920* (Chapel Hill: University of North Carolina Press, 2002), 212. Sklansky highlights Charles Cooley as the leader of this intellectual movement.

¹²⁵ This is not to say that such was the intention of Justice Holmes when he authored the infamous *Pennsylvania Coal* decision in 1922, particularly given his reputation as a founder of the school of “sociological jurisprudence.” Instead of seeking to weaken the police powers, Holmes may have been trying to justify their exercise in a rapidly changing society. For more information about sociological jurisprudence and the role of Justice Holmes, see Wilfrid E. Rumble, Jr., “Legal Realism, Sociological Jurisprudence, & Mr. Justice Holmes,” *Journal of the History of Ideas* Vol. 26, No. 4 (Oct-Dec 1965): 547-566).

¹²⁶ *Babbitt* will be exempted from this discussion. As noted previously, this particular case involved a facial challenge of regulations and not an inverse condemnation claim per se.

Not all of these cases were decided in the landowner's favor; in fact, *Village of Euclid*, *Penn Central*, and *Agins* resulted in victories for the state. Yet overall, with the possible exception of *Village of Euclid*, the language of these decisions had the effect of broadening the notion of regulatory takings and establishing increasingly clear standards for successful inverse condemnation claims. *Pennsylvania Coal* introduced regulatory takings as those rules that "go too far," and *Penn Central* and *Agins* adopted a new approach that emphasized (owner) impact over (government) intentions. *Nollan* proposed the "essential nexus test," (which *Dolan* expanded), and *Lucas* brought the "total takings" test.

Alexander attributes three normative commitments to the liberal view (what he refers to as "property as commodity"): (1) the individual takes moral and political priority over the community; (2) values manifest as preferences (and are thus subjective); and (3) the market is the ideal mechanism to regulate individual preferences.¹²⁷

Regulatory takings jurisprudence has, in general, placed individual economic preferences above the perceived needs of the community or public at large. While eminent domain jurisprudence has emphasized legislative deference, the Court has been much more willing to check legislative action in regulatory takings cases. Taken in tandem, the *Penn Central* and *Agins* decisions established that even legitimate government regulations necessitate compensation if they "deny an owner economically viable use of his land."¹²⁸

The result of such decisions might be to deter the state's exercise of its police powers on private land in the first place. If a governmental entity knows that it could face a compensation requirement even if the regulations it promulgates are legitimate, it may refrain from promulgating them at all. Since the government clearly lacks the financial

¹²⁷ Alexander, 3.

¹²⁸ 447 U.S. 255.

resources to compensate individual landowners for the economic impact of all of its policies, the overall trend may be in favor of less government intervention on private property.

For those who have long been uncomfortable with the broad scope of the police powers, this is but one positive side effect of regulatory takings jurisprudence. The main victory is, of course, a liberal understanding of what constitutes a private property right and the recognition that even indirect infringements will not be tolerated without some form of compensation.

Implications

This is not to suggest that classical liberalism and civic republicanism are the lone ideologies that have shaped American property law; it is not my intention to replace the monist view with a strictly dualist one. Nor do I mean to imply that takings jurisprudence is the only or even the best way to gauge attitudes towards private property; it is just one barometer among many. Nonetheless, my findings demonstrate that classical liberalism is not the sole rhetoric of American property but one of several ideological strains that have defined the meaning of ownership in the United States. As Alexander notes, classical liberalism and civic republicanism are merely “ideal types”—the bulk of the American experience lies somewhere in between.¹²⁹ This study has only begun to describe the complexity of the property question in the national psyche.

Private property is both a shared value and a persistent terrain of struggle for the American people. Like “liberty” or “freedom,” property has always been an amorphous concept that means different things to different people, both ideologically and substantively. Furthermore, the Courts have offered little clarity on the subject. Twentieth century jurists

¹²⁹ Alexander, 3.

have largely defined private property in the negative, by what the so-called bundle of rights does *not* encompass.¹³⁰ By declining to outline the parameters of what it really means to own land in a contemporary context, the judicial system has allowed the American people to draw their own (often antithetical) conclusions.

Private property in land has always been particularly contested ground. As far back as the founding, Thomas Jefferson was careful to distinguish between property in “moveable things” and the “separate” property a man could acquire in lands.¹³¹ Ownership of the earth itself has always been understood in a different context than ownership of the earth’s resources.

Property in land means different things to different people because the significance of “the land” is subjective. For some, the land represents a livelihood; for others, a vacation. Land can be for cultivating, for recreating, or for conserving. Form follows function, and a person’s perception of property rights is almost always tied to his or her relationship with the land.

Furthermore, our collective understanding of land has undergone a conceptual transformation; the framework of the discourse has changed. As originally understood, the Just Compensation Clause of the Fifth Amendment was designed to protect private property from physical seizure or intrusion. Once perhaps the most tangible kind of property (hence the designation “real”), land has become increasingly abstracted from its physical character. What began as a means of subsistence has since acquired a new kind of intangible worth—an investment value.

The development of regulatory takings law represents society’s attempt to

¹³⁰ Freyfogle, 260.

¹³¹ Foley, 467.

acknowledge anticipated income as a new element of the “bundle of rights.” As land has come to be appreciated more for its investment value, its physical character has been subordinated to a less important role. Locke’s labor theory of property, which proposes that ownership is derived from mixing labor and resources, has become increasingly irrelevant in the new system. Whereas “improvement” was once understood as a prerequisite for American ownership (as stipulated by the Homestead Act of 1862), even uncultivated land held by absentee owners can accrue investment value today.¹³²

Henry George wrestled with the emerging notion of unearned land value back in 1879 when he published *Progress & Poverty*. His proposal, the single tax on economic rent, was intended to diffuse the benefits of unimproved land value throughout society (rather than allowing it to accumulate in private hands).¹³³ George, like other adherents to civic republicanism, believed that private property can and should be harnessed to serve a public function.

Though George and Locke are generally associated with divergent ideological traditions, Freyfogle argues that Henry George’s single tax was an attempt to reconcile changing social conditions with the original Lockean labor theory.¹³⁴ The new mode of valuation has rendered aspects of both liberal and republican property theory anachronistic. (Even classical liberalism, to which I attribute the borrowed conception of “property as commodity,” could not have accounted for unearned income in its understanding of land). Perhaps we will require a new rhetoric of property for the twenty-first century.

¹³² LeeAnn Potter, “The Homestead Act of 1862,” *Cobblestone* Vol. 20, Issue 2 (Feb 1999). To “improve” under the Homestead Act meant to grow crops and building a dwelling that measured at least twelve by fourteen feet. Then, after the required five years had elapsed, the homesteader would be eligible to file for a land patent or deed of ownership. Once approved, the land became alienable.

¹³³ See Henry George, *Progress & Poverty: An Inquiry Into the Causes of Industrial Depressions* (Garden City: Doubleday, Page & Co., 1879). George did not propose the socialization of land, nor did he advocate for making the land itself inalienable.

¹³⁴ Freyfogle, 129.

To criticize the current state of affairs as a divergence from “first principles” (be they liberal or republican) may be accurate, but it would be misleading to place the entirety of the blame on contemporary jurists. This kind of analysis, though common, is incomplete. It ignores the fundamental reality that property today is far removed from the conceptualization of property in the eighteenth century. The “bundle of rights” has changed, but so too have the social conditions those rights are embedded in.