

2008

The Police Power and 'Public Use': Balancing the Public Interest against Private Rights through Principled Constitutional Distinctions

Christopher D. Supino

Repository Citation

Supino, Christopher D., "The Police Power and 'Public Use': Balancing the Public Interest against Private Rights through Principled Constitutional Distinctions" (2008). *Student Award Winning Papers*. 2.
<https://scholarship.law.wm.edu/awardwinning/2>

THE POLICE POWER AND “PUBLIC USE”: BALANCING THE PUBLIC INTEREST AGAINST PRIVATE RIGHTS THROUGH PRINCIPLED CONSTITUTIONAL DISTINCTIONS

*Christopher Supino**

I.	INTRODUCTION	712
II.	METHODOLOGY	715
III.	“ROUND HOLES”: THE EARLY EVOLUTION OF THE “PUBLIC USE” CLAUSE	716
IV.	“SQUARE PEGS”: THE EVOLUTION OF THE POLICE POWER FROM <i>GIBBONS</i> TO <i>MILN</i>	722
V.	“FORCING THE ROUND PEG INTO THE SQUARE HOLE”: THE CONVERGENCE OF THE STATE POLICE POWER AND THE PUBLIC USE CLAUSE	728
	A. <i>The Conservative Model of Public Use and Police Power Interplay</i>	728
	B. <i>The Interplay of Public Use and Police Power Concepts After Miln and Head</i>	730
VI.	“WHEN THE PIECES DON’T FIT, PRETEND THEY DO”: THE INCOHERENCE OF POST-INCORPORATION TAKINGS JURISPRUDENCE	733

* J.D., College of William & Mary Marshall Wythe School of Law, 2006; Senior Articles Editor and Symposium Editor, William & Mary Environmental Law and Policy Review; A.B. *summa cum laude*, Cornell University, 2003. Mr. Supino is a member of the Virginia State Bar and currently practices commercial litigation in Virginia and the Washington D.C. Area. This article was the second prize winner of the Seventh Annual Program for Judicial Awareness Writing Competition, sponsored by the Pacific Legal Foundation. For more information, visit Pacific Legal Foundation’s website, <http://www.pacificlegal.org>.

The author gratefully acknowledges the assistance of the following individuals without whose support this article could not have been published:

Chancellor Professor of Law Lynda Butler at the College of William & Mary Marshall Wythe School of Law whose advice and insight helped to steer the direction of this article from its inception;

Meghann Thomas, who spent numerous hours checking sources for this article and patiently bearing with the author during numerous drafts and revisions;

Cindy Turpin, Legal Publications Coordinator of the Pacific Legal Foundation, who worked tirelessly to facilitate the publication of this article; and

Phyllis Supino, Associate Research Professor in Medicine, Weill Cornell Medical School, whose enthusiasm for this article and assistance with the editing of its many drafts greatly contributed to this work.

VII.	“IF NOT SENSIBLE, THEN PRACTICAL”: TAKINGS JURISPRUDENCE IN THE MODERN ERA	740
A.	<i>Ordering the Chaos: Achieving Practical Results from an Incoherent Analysis</i>	740
B.	<i>Stretching, Shrinking and Punting in Modern Supreme Court Jurisprudence: Berman, Midkiff, and Kelo</i>	741
	1. <i>Berman</i>	741
	2. <i>Midkiff</i>	744
	3. <i>Kelo</i>	751
VIII.	“SMALLER PEGS AND HOLES”: THE PRACTICALITY AND COHERENCE OF CONSERVATIVE APPROACHES TO TAKINGS JURISPRUDENCE.....	755
A.	<i>The High Price of Coherence: The Literalist Approach of Justice Clarence Thomas</i>	756
B.	<i>“Square Pegs, Round Holes, and a Few Rolls of Duct Tape”: Reading Coherence Back into Takings Jurisprudence through Epstein’s Theories</i>	759
	1. The Police Power, Crime, and Anti-Nuisance	759
	2. The Public Use Clause and “Public Goods”	762
	3. Duct Tape Can’t Fix Everything: Assembling Epstein’s Takings Theory	766
	4. The Problem of Analytical Rigidity.....	770
IX.	“FROM PEGS AND HOLES TO PRACTICAL HOLDINGS”: RESTORING COHERENCE TO THE TAKINGS DEBATE BY ALTERING ITS TERMS	772
A.	<i>Summary and Conclusions</i>	772
B.	<i>The Way Forward</i>	772
C.	<i>Concluding Comments on the Advantages and Utility of the Multi-Tiered Model</i>	778

I. INTRODUCTION

The United States Supreme Court’s recent decision in *Kelo v. City of New London*¹ has excited considerable debate, confusion and anxiety among American judges, scholars, politicians and property owners. Following the Court’s holding that a municipality can use the eminent domain power to condemn non-blighted residential property for an urban renewal project, many Americans have reacted with varying degrees of shock, disillusionment and anger over what they perceive is an attack on their—heretofore sacrosanct—property rights.² However, while the public is correct to view *Kelo* with deep

¹ *Kelo v. City of New London*, 545 U.S. 469 (2005).

² William Hoffman, *Supreme Court Decision Sets More Property Fights*, PAC. SHIPPER, Jul. 15, 2005 (stating that readers were concerned that “the ruling could make it costlier, financially and politically, to develop logistics facilities”); Lynne Jeter, *Eminent Domain Ruling From*

apprehension, this case does not represent a significant departure from the Supreme Court's early eminent domain jurisprudence. Rather, *Kelo* represents only the most recent and most publicized of a long series of decisions in which the Supreme Court has obscured the distinctions between governmental powers³ and restraints⁴ and, thus, eroded the Constitutional safeguards on private property.⁵

This Article argues that the intellectual uncertainty surrounding eminent domain or "takings" jurisprudence has led to the erosion of Fifth Amendment protections of private property. Specifically, this Article examines the two concepts at the core of takings jurisprudence: (1) the Fifth Amendment's Public Use Clause⁶ and (2) the "police power" of individual states. This Article argues that the Supreme Court's inability to articulate principled boundaries between these two concepts has deprived courts of the intellectual framework necessary for precise analysis of the conflicting principles and interests involved in takings jurisprudence, leaving courts and legislatures without a meaningful limiting principle for government takings. This results in haphazard and poorly justified court holdings, ad hoc judicial review and, ultimately, diminished property rights for private citizens. Sadly, the lack of an intellectual framework also has obscured possible solutions to the takings dilemma by denying critics an effective rubric for articulating alternatives to the Supreme Court's approach. As a result, proponents of greater private property protections find themselves either without a coherent alternative paradigm for advancing their interests or advocating a paradigm that actually derogates from these rights.⁷

There already is a great wealth of legal scholarship critiquing the incoherence of 20th century takings cases and suggesting different tests or theories

SCOTUS Stuns Developers: Many Are Leery of the Private Property Rights Implications, MISS. BUS. J. (SPECIAL SECTION), Aug. 8, 2005, at 6-7 (stating that the "news [of *Kelo*] sent ripple effects throughout real estate and land development circles").

³ Specifically, the court has obscured the amorphous "police power."

⁴ Specifically, the court has obscured the Fifth Amendment's restriction on government appropriations of private land, or "takings."

⁵ See, e.g., *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984); *Berman v. Parker*, 348 U.S. 26 (1954); *Mugler v. Kansas*, 123 U.S. 623, 8 S. Ct. 273 (1887).

⁶ Scholars variously refer to this as the "Takings Clause," the "Compensation Clause," or even the "Accommodation Power," depending on what facet they desire to emphasize. See, e.g., Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 149 n.1 (1971) ("takings provision" or "compensation provision"); Catherine R. Conners, *Back to the Future: The "Nuisance Exception" to the Just Compensation Clause*, 19 CAP. U. L. REV. 139 (1990) ("Compensation Clause"); David B. Fawcett III, Comment, *Eminent Domain, the Police Power, and the Fifth Amendment: Defining the Domain of the Takings Analysis*, 47 U. PITT. L. REV. 491, 492 (1986) ("just compensation clause"); John J. Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Takings Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975) ("Accommodation Power").

⁷ See discussion *infra* Part V.A.

for restoring order to this area of law.⁸ Some scholars have suggested that state-level legislation is the best method for striking a balance between private rights and public needs.⁹ Others advocate abandoning the Court's current expansive interpretations of the police power and the Public Use Clause in favor of a more restrictive—or 'conservative'—understanding. However, despite the volumes that have been written on takings jurisprudence and near-universal agreement that this subject is convoluted,¹⁰ there is almost no published literature directly addressing the question of why takings law became so muddled to begin with. Is the current confusion attributable to sloppy application of precedent by 20th century Supreme Court Justices, or is the problem more fundamental? Answering this question is an essential precondition to rebuilding the takings rubric into a tool capable of yielding consistent court holdings that are both logically defensible and capable of balancing private rights against public needs. As such, the "why" question is the focus of this Article.

This Article asserts that the current incoherence of Supreme Court takings jurisprudence is not a recent development but dates back to the 1830s. It further argues that the internal logic of takings analysis had become unviable much earlier than most scholars have imagined, and that the process of deterioration actually was complete by the end of the 19th century.¹¹

This analytic deterioration can be traced to three specifically-identifiable causes that are largely overlooked by mainstream takings scholarship. These are (1) the fact that the concept of a state police power first emerged in disputes over the division of state and national power, i.e. federal-

⁸ See generally Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVT'L. L. 1 (2003); Edward J. Sullivan & Nicholas Cropp, *Making it Up—"Original Intent" and Federal Takings Jurisprudence*, 35 URB. LAW. 203 (2003).

⁹ See, e.g., Alan T. Ackerman, *Condemnation Case of the Year: County of Wayne v. Hathcock*, 45 ALI-ALR COURSE OF STUDY 269, 364-65 (2005) (discussing the embodiment of eminent domain in state legislation); Frank A. Vickory & Barry A. Diskin, *Advances in Private Property Protection Rights*, 35 AM. BUS. L.J. 561, 605 (1997) (discussing state legislation that creates property rights that go beyond the constitutional guarantees).

¹⁰ William P. Barr, Henry Weissman & John P. Frantz, *The Gild That is Killing the Lily: How Confusion Over Regulatory Takings Doctrine is Undermining the Core Protections of the Takings Clause*, 73 GEO. WASH. L. REV. 429, 484 n.242 (2005) (stating that "the predominant characteristic of [takings] law is a welter of confusing and apparently incompatible results" (quoting Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964))). I do not suggest that all scholars reach the same conclusions about the direction that takings jurisprudence should take. My point is only that most scholars begin with the premise that this area of law is confusing.

¹¹ Many scholars begin their analysis with the 1887 case *Mugler v. Kansas*, 123 U.S. 623, 8 S. Ct. 273. See, e.g., Goutam U. Jois, *Can't Touch This! Private Property, Takings, and the Merit Goods Argument*, 48 S. TEX. L. REV. 183, 215 (2006); Michael J. Davis, *Lucas and Takings: Private Property Redefined*, KAN. J.L. & PUB. POL'Y, Spring 1993, at 83, 84; Michael J. Quinlan, *Lucas v. South Carolina Coastal Council: Just Compensation and Environmental Regulation—Establishing a Beach Head Against the Evisceration of Private Property Rights*, 12 TEMP. ENVT'L. L. & TECH. J. 173 (1993). This Article argues that *Mugler* merely brought the latent imprecision of earlier takings cases to the fore. Thus, *Mugler* is better viewed as an analytic endpoint in understanding the tangled web of takings jurisprudence.

ism; (2) the temptation to expand the scope of the Public Use Clause to encompass government takings for public needs beyond simple use by the public; and (3) the fact that the Public Use Clause and the police power evolved from two separate bodies of Supreme Court precedent, which did not begin to converge until the Fourteenth Amendment was passed in 1866 and the process of "incorporation" began.¹²

By analyzing the specific causes of takings jurisprudence deterioration outlined above, this Article identifies three driving mechanisms for liberalizing takings law, all of which developed before the end of the 19th century, and all of which are present in the major eminent domain holdings of the 20th century. A comparison of these mechanisms and their causes to the alternative theories advanced by the advocates of increased private property protection demonstrates that the incoherence of takings jurisprudence is a fundamental problem inuring in the current takings discourse and that proponents of increasing private property protections must establish a new analytical framework for takings jurisprudence before they can effect meaningful change.

II. METHODOLOGY

This analysis is divided into seven sections. Part III traces the Supreme Court's increasingly expansive interpretation of the Public Use Clause from the early "mill acts cases" through the 1850s when the Supreme Court began "incorporating" the various provisions of the Bill of Rights against the states through the Due Process Clause of the Fourteenth Amendment.

Part IV outlines the development of the "police power" beginning with Chief Justice John Marshall's first articulation of the concept in 1827 through the incorporation era. Part IV demonstrates how the Supreme Court increasingly broadened the application of the police power while retaining its narrow theoretical underpinnings in the common law of nuisance.

Parts V and VI analyze how forcibly conjoining the police power and Public Use Clause through incorporation transformed the latent imprecision in each line of cases into points of tension in the new combined takings analysis. Part VII then briefly addresses several prominent takings cases from the latter half of the 20th century and demonstrates that the Court's failure to address these points of tension when they first emerged in the mid-19th century directly

¹² Incorporation is the process by which the states adopted the Bill of Rights through the Due Process Clause of the Fourteenth Amendment. According to conventional wisdom, the Takings Clause was not officially incorporated until 1897 with the case of *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897). See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 478-79 (2d ed. 2002) (discussing the times when the various provisions of the Bill of Rights were incorporated against the states). However, the Supreme Court began using the language and logic of eminent domain analysis in state takings cases far earlier in the century. See discussion *infra* Part VI. This Article emphasizes the underlying logic of Supreme Court takings jurisprudence in the 19th century and does not view the Court's disclaimer of its analysis as a bar to discussion.

caused the three mechanisms of liberalization that muddle takings jurisprudence in the 21st century.

The final three sections argue that the dichotomous police power/public use analytic framework which underlies the Supreme Court's jurisprudence cannot be applied in a consistent and principled manner even by restoring these terms to their original narrow ideations, as conservative judges and scholars advocate. Part VIII examines the arguments of two of the most prominent conservative critics of the Supreme Court's expansive reading of the Public Use Clause, Supreme Court Justice Clarence Thomas and Professor Richard Epstein¹³ and demonstrates how their proposed formulations of takings jurisprudence ineluctably succumb to the same theoretical and practical flaws as the approach embraced by the *Kelo* majority. Part VIII argues that these failings stem from the fact that *Kelo*'s critics challenge only the modern application of takings jurisprudence rather than its flawed theoretical predicates.

This Article concludes that courts must abandon the flawed police power/public use dichotomy in favor of a more nuanced analytical framework and proposes a multi-tiered jurisprudential test based on the new framework, which allows for greater flexibility and precision than is possible under any re-formulation of the current takings model.

III. "ROUND HOLES": THE EARLY EVOLUTION OF THE "PUBLIC USE" CLAUSE

Though both the police power and the Public Use Clause inform takings jurisprudence, only the latter finds direct expression in the text of the Constitution.¹⁴ Specifically, the Fifth Amendment states "nor shall private property be taken *for public use*, without just compensation."¹⁵ The exact meaning of this pithy injunction is the subject of great scholarly debate, especially in the wake

¹³ Professor Epstein is the James Parker Hall Distinguished Service Professor of Law, Faculty Director for Curriculum, and the Director of the Law and Economics Program at the University of Chicago School of Law. See University of Chicago Law School, Richard Epstein, <http://www.law.uchicago.edu/faculty/epstein> (containing further biographical information) (last visited Nov. 6, 2007).

¹⁴ The term "Police Power" is not mentioned once in the Constitution. However, if one takes the argument that the police power is coterminous with a state's sovereignty to its logical conclusion, then it is possible to argue that the Tenth Amendment, which states that "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," enshrines this principle. U.S. CONST. amend. X.

¹⁵ U.S. CONST. amend. V (emphasis added).

of the *Kelo* decision.¹⁶ However, the contours of what constitutes a "public use" have never been clear, even in the earliest days of the Constitution.¹⁷

Commenting on the Supreme Court's haphazard use of the term "public use" in *Kelo*, Justice Sandra Day O'Connor stated that the Supreme Court's application of the "public use" requirement "wash[ed] out any distinction between private and public use of property—and thereby effectively . . . delete[s] the words 'for public use' from the Takings Clause of the Fifth Amendment."¹⁸ Without this clause, O'Connor further stated that "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with factory."¹⁹ As a result, O'Connor concluded that "the specter of condemnation [now] hangs over all property."²⁰

Justice O'Connor's now famous statements aptly capture many Americans' belief that the Supreme Court has destroyed the "public use" requirement. However, while *Kelo* may have many negative effects on the application, or non-application, of the Public Use Clause, it is doubtful that this decision will further erode the logical integrity of the clause. This is because the Public Use Clause had become unviable long before the *Kelo* decision. Writing in 1985, Professor Epstein commented that "[t]o judge from the cases and scholarship on the subject, this chapter [on public use] largely deals with an empty question."²¹ Indeed, as early as 1949, a published comment in the *Yale Law Journal* concluded that "so far as the federal courts are concerned neither state legislatures nor Congress need be concerned about the public use test in any of its ramifications."²² Given this long-standing doubt among scholars as to whether the Public Use Clause functions as a significant limitation on takings, it is necessary to ask whether this constitutional phrase ever has held meaning and, if so, what that meaning was.

Some of the earliest Supreme Court cases construing the Public Use Clause involve state statutes allowing a landowner to dam a waterway, and thereby flood upstream land in order to build a water-powered mill. These

¹⁶ See, e.g., Norm Pattis, *Not Public Use, But Necessity That Should Drive Land Takings*, CONN. L. TRIB., Jul. 25, 2005 (calling the *Kelo* decision "a grotesque perversion of the very rights and liberties we celebrate"); Robert Solomon, *Court Took Proper Tack in Kelo Case*, CONN. L. TRIB., Jul. 25, 2005 (praising "[t]he virtue of *Kelo*"); Jerry Stouk, *Unfinished Edifice Lex*, N.J. L.J., Jul. 25, 2005 (calling *Kelo* a "high water mark for eminent domain").

¹⁷ See, e.g., *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (1896) ("The question what constitutes a public use has been before the courts of many of the states, and their decisions have not been harmonious . . .").

¹⁸ *Kelo v. City of New London*, 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting).

¹⁹ *Id.* at 503.

²⁰ *Id.*

²¹ RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 161 (1985).

²² Comment, *The Public Use Limitation in Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 613-14 (1949).

“Mill Acts”²³ required the owner to pay compensation to the owners of the flooded land, sometimes in excess of 150% of that land’s value.²⁴ Further, the mills were available to all members of the public for processing their grain, albeit it at a fee.²⁵ Because these mills were so important to, and would be used by, the public at large, the Supreme Court in *Township of Burlington v. Beasley* had little difficulty holding that the use was just as public as a highway or railroad:

It would require great nicety of reasoning to give a definition of the expression ‘internal improvement’²⁶ which . . . would show that the means of transportation were more valuable to the people of Kansas than the means of obtaining bread. It would be a poor consolation to the people of this town to give them the power of going in and out of the town upon a railroad, while they were refused the means of grinding their wheat.²⁷

That mills which every citizen could use are “public uses” within the meaning of the Fifth Amendment is too obvious to require further elaboration. Indeed, Justice Thomas cites these in his *Kelo* dissent as the paragon of public uses, even while advocating for a narrow interpretation of the phrase.²⁸ However, although the *Beasley* Court’s holding clearly was consistent with the Public Use Clause, the Court’s rationale for the holding was highly problematic.

The *Beasley* Court actually advanced two rationales for upholding the constitutionality of this mill act. The most obvious rationale was that mills were like roads because they were publicly accessible. However, a brief examination of the above passage reveals that the Court, perhaps unintentionally, also grounded its holding on the fact that the mills were necessary for the public to have a “means of grinding their wheat.”²⁹ This public necessity argument is wholly irrelevant to the Fifth Amendment question of whether the mills actually were *used* by the public. Having concluded that the condemnations were for a “public use,” the *Beasley* Court need not—and should not—have continued its inquiry. Moreover, it is not even clear whether the public use rationale or the public necessity rationale was the driving force behind the holding. This unfor-

²³ *Kelo*, 545 U.S. at 512 (Thomas, J., dissenting).

²⁴ EPSTEIN, *supra* note 21, at 174.

²⁵ *Township of Burlington v. Beasley*, 94 U.S. 310, 314 (1876).

²⁶ “Internal improvement” was the language used by a Kansas statute to describe projects built on land condemned using eminent domain and which were required by law to be open to all members of the public, such as highways, railroads, canals, and government buildings. *Id.* at 313. Thus, the term is merely a synonym for “public use” even under the term’s strictest construction.

²⁷ *Id.* at 313-14.

²⁸ *Kelo*, 545 U.S. at 512 (Thomas, J., dissenting).

²⁹ *Beasley*, 94 U.S. at 314.

tunate dictum marks the beginning of the Public Use Clause's intellectual deterioration.

Nine years after *Beasley*, the Supreme Court addressed another mill act in *Head v. Amoskeag Manufacturing Co.*³⁰ The act under consideration in *Head* was a so-called "General Mill Act," which authorized property owners to use the eminent domain power to build mills for private uses such as manufacture.³¹ In holding this mill act constitutional, the *Head* Court blandly remarked that various lower courts had upheld these condemnations for private enterprise "by reason of the advantages inuring to the public from the improvement of water-power and the promotion of manufactures"³² and that such judicial practice was "confirmed by long usage or prior decisions."³³ The Court then proceeded to string cite prior state and lower federal court precedent without comment.³⁴

The *Head* decision should have refocused the public use inquiry. Instead, the *Head* Court chose to raise the public use question explicitly, comment on its breadth, and then duck the question entirely:

The question whether the erection and maintenance of mills for manufacturing purposes under a general mill act . . . can be upheld as a taking, by delegation of the right of eminent domain, of private property for public use, in the constitutional sense, is so important and far reaching, that it does not become this court to express an opinion upon it, when not required for the determination of the rights of the parties before it. We prefer to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all, and to the public good, is within the constitutional power of the legislature.³⁵

Commentators such as Epstein have been quick to point out that the *Head* Court utterly fails to provide "an explanation of how the confrontation with the [Public Use Clause] can be avoided."³⁶ The Court clearly states the property was taken under the power of eminent domain and even discussed possible rationales for including these kinds of "public necessity" takings within the "public use" rubric. In light of these statements, the Court's assertion that "the question . . . is so important and far reaching, that it does not become this court

³⁰ *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885).

³¹ *Id.* at 10.

³² *Id.* at 19.

³³ *Id.*

³⁴ *Id.* at 19-20.

³⁵ *Id.* at 20-21.

³⁶ EPSTEIN, *supra* note 21, at 171.

to express an opinion upon it” borders on the comic. However, as forceful as these criticisms are, they fail to capture the full extent of the violence that the *Head* Court did to public use jurisprudence.

The U.S. Supreme Court could have avoided a direct conflict with the Public Use Clause by categorizing the Mill Act Cases as a constitutional oddity justified by history, court precedent and little else. While such an approach would not have been wholly intellectually satisfying, it would have allowed the Court to reach the same result while confining the damage done to the Public Use Clause to one rarified subset of cases. Scholars and courts trying to read coherence back into the Supreme Court’s jurisprudence have favored this approach.³⁷ Indeed, when the Minnesota Supreme Court was faced with the same facts sixteen years before *Head*, the Court took this more honest approach, stating that:

It is difficult to reconcile these statutes, upon principle, with the constitutional rights of the citizen. The property in such cases is not taken into possession and use by the public in its corporate capacity to be devoted to some purpose supposed to be for the general good; nor (unless the mills when established are to be deemed public mills . . .) do[es] the . . . public derive any direct use, profit, or convenience from them³⁸

Once the Minnesota Supreme Court acknowledged this obvious constitutional reality, it went on to note that

the incidental benefit to the public from turning to use all the power in running streams may be very great, and that, such is the nature of property in and along these streams, the power cannot be made fully available without such a law as that we are considering.³⁹

Ultimately the court chose the socially useful—rather than the constitutionally defensible—result. However, the court was careful to note that its result was informed more by the overwhelming weight of precedent than by any attempt at a coherent takings analysis.⁴⁰

³⁷ See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 513-14 (2005) (Thomas, J., dissenting).

³⁸ See, e.g., *Miller v. Troost*, 14 Minn. 365, 366 (1869).

³⁹ *Id.*

⁴⁰ *Id.* at 366-67 (“[H]ad not similar laws, in states having constitutional restraints similar to ours, been uniformly sustained by the courts, we should hesitate long before upholding this one. The decisions, however, are so numerous, and by courts of so great authority, that we are constrained to hold the law to be constitutional.”).

Regardless of the merits of the Minnesota Supreme Court's holding, it is at least clear what factors informed its decision. Future courts attempting to apply *Miller's* reasoning would not be greatly confused by a judicial attempt to force the round peg of "public benefit" into the square hole of "public use." The same cannot be said in *Head*. By stating that "public use" is so broad that it can encompass private uses with incidental public benefits and yet so narrow that it is not implicated by a government-sanctioned taking of land for private enterprise, the *Head* court interprets the Public Use Clause out of existence. Indeed, because the breadth of the exception is so much greater than the narrow rule, the *Head* Court's holding actually has the dramatic effect of transmogrifying the public use *restraint* into an affirmative *grant* of power for government takings that incidentally benefit the public. This result would not have occurred if the Court either ignored the public use requirement or stretched it to encompass public benefits. However, by deviating from the Constitution in both ways, the Supreme Court was left with little choice but to concoct an inscrutable—and not surprisingly unnamed—governmental power possessing the precise dimensions of the void left by the public use restraint.

Based on the above cases, it is clear that by the mid-1880s the Supreme Court's precedent had evolved in such a way that a judge could uphold almost any taking by employing one of three rationales: (1) the taking conferred an incidental benefit on the public and, therefore, was a public use; (2) the taking did not implicate the Public Use Clause but, rather, some mysterious legislative power that acted as an affirmative grant in precisely the same situations where a "public use" requirement would appear to impose a restriction; or (3) the takings jurisprudence had become so convoluted that it was incapable of yielding principled results. Thus, courts should simply dispense with the public use analysis altogether and defer to the legislature's judgment as to whether the taking was valid or not. The three rationales will be termed *engines of liberalization* because they provide easy grounds for judges to expand the scope of the Public Use Clause in almost any conceivable situation.

The damage to the Public Use Clause that many people assume was done in *Kelo* actually was complete after the Supreme Court decided *Head* in 1885. All of the confusion evident in the Supreme Court's cases since *Head* can be traced to logical extensions of one or more of the three engines of liberalization. Parts V and VI will demonstrate how the Supreme Court employed these engines in late-19th and 20th century cases. However, it is first necessary to examine the other major conceptual actor in takings jurisprudence: the state police power.

IV. "SQUARE PEGS": THE EVOLUTION OF THE POLICE POWER FROM *GIBBONS* TO *MILN*

For most of the 19th century, the Public Use Clause only bound the federal government.⁴¹ Because the federal government possessed only those powers specifically enumerated in the Constitution, any action had to be rationalized in terms of one of those powers. Though the Public Use Clause was a restraint on government power rather than a grant, interpreting this clause broadly allowed the federal government to condemn land for anything that could be deemed a "public use" even where such an action could not be justified as "necessary and proper" for the advancement of another enumerated power, such as the commerce power.

In contrast to the federal government, the states retained plenary legislative power except where they had explicitly delegated the power to the federal government through the Constitution. Prior to the incorporation of the Takings Clause, the only limitations on a state's power to condemn land were its own constitution and laws.⁴² This is significant because, until the Fourteenth Amendment was ratified, courts expounding on the various types of state power would not need to consider any overlap with a federal public use restraint in their analyses. As a result, the body of case law surrounding the police power developed in isolation from the public use line of cases.

Unlike the public use limitation, the police power is not mentioned anywhere in the text of the Constitution. Nor do any of the founding-era documents reference this power as such. Rather, this power—at least insofar as it has a definitive legal meaning—is entirely of judicial creation.

The first explicit reference to a "police power" comes from U.S. Supreme Court Justice John Marshall's opinion in *Brown v. State of Maryland*.⁴³ In *Brown*, the Court was faced with the question of whether a state lawfully could require foreign importers to obtain a license from the state or whether this power had been ceded to the federal government through the Constitution. Because *Brown* was an early federalism case, the Supreme Court had an opportunity to discuss the various powers that states possessed vis-à-vis the federal government. The Court noted:

The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that

⁴¹ See James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 333 (1999).

⁴² It should be noted that many states either expressly provided for compensation in certain cases or provided this as a matter of state policy. However, this did not necessarily mean that the taken property had to be for a "public use."

⁴³ 25 U.S. (12 Wheat.) 419, 431 (1827).

power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a State.⁴⁴

In *Gibbons v. Ogden*, decided three years earlier, Justice Marshall stated that "[t]he acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject [commerce] to a considerable extent."⁴⁵

Courts and commentators have not been able to reach a stable consensus as to the scope of the police power. Some judges and commentators have held that this refers only to the states' powers to abate nuisances and protect against threats to the public health and safety.⁴⁶ Under this narrow view, the term "police power" is closely linked with the state's common law powers to abate nuisances.⁴⁷ Others have interpreted the term to encompass the entire array of powers remaining with the several states after they ratified the constitution.⁴⁸ Under this view, the "police power" is synonymous with the "residuary sovereignty" that James Madison described in *Federalist* 62⁴⁹ and is "coterminous with the scope of a sovereign's police powers."⁵⁰ Yet a third perspective, introduced by the Supreme Court in the now infamous *Lochner* opinion, attempts to find a middle ground between these two extremes by characterizing the police power as

certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by

⁴⁴ *Id.* at 443-44.

⁴⁵ 22 U.S. (9 Wheat.) 1, 208 (1824).

⁴⁶ See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 560 (1991) (stating that "[t]he States' traditional police power is defined as the authority to provide for the public health, safety, and morals"); Christopher Wolfe, *Moving Beyond Rhetoric*, 57 FLA. L. REV. 1065, 1075 (2005) (stating that "traditional police powers . . . extend to the protection of public health, safety, welfare, and morals").

⁴⁷ See, e.g., David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. COLO. L. REV. 497, 544 (2004) (asserting that "police power regulations are valid if related to preserving or protecting the public health, safety, morals, or welfare").

⁴⁸ See, e.g., D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 475 (2004); Thomas, *supra* note 47, at 510 (discussing the perception of "'police power' being commonly equated with powers of sovereignty, especially with respect to the states").

⁴⁹ THE FEDERALIST NO. 62, at 320 (James Madison) (George W. Carey & James McClellan eds., 2001) ("[T]he equal vote allowed to each state, is at once a constitutional recognition of the portion of sovereignty remaining in the individual states, and an instrument for preserving that residuary sovereignty."); see also Barros, *supra* note 48, at 475.

⁵⁰ *Kelo v. City of New London*, 545 U.S. 469, 501 (2005) (citing *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984)).

the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public.⁵¹

Each of these views finds some support in the early case law that developed the term.⁵² However, the overwhelming majority of modern scholars embrace the police power paradigm in which the police power is equivalent to the state's residual sovereignty.⁵³

Notwithstanding legal scholars' near-universal acceptance of the "police-power-equals-all-state-power" paradigm, this position is unsatisfactory in several important respects. First, to the extent that police power is a mere synonym for state power, the term possesses almost no analytical utility. Thus, justifying a state's actions as a "lawful exercise of the police power" merely substitutes conclusion for analysis and description. Read according to the majority view, this quote means only that "the state's action is lawful because it is lawful." There is good reason to be suspicious of logic this circular or to believe that the Supreme Court coined a term for a non-starter. A second reason to reject this rationale is that the fact that the text of the *Brown v. Maryland*⁵⁴ and *Gibbons v. Ogden*⁵⁵ opinions strongly suggest that Justice Marshall meant the term "police power" to connote something vastly more limited than the entire panoply of the states' "residual sovereignty."

Proponents of the "residual sovereignty" view of the early police power often point to the broader meaning that the word "police" held in the early 1800s as support for their position. One example of this is D. Benjamin Barros' recent article, *The Police Power and the Takings Clause*.⁵⁶ In this article, Barros argues that

[a]t the time, "police" had several meanings relating to government. The term was used to refer broadly to civilization or civil organization, and "public police" meant the equivalent of public policy. From these usages, the term "police" evolved to mean the regulation and administration of the civil community and the enforcement of the civil community's laws and public order.⁵⁷

⁵¹ *Lochner v. New York*, 198 U.S. 45, 53 (1905), *overruled by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

⁵² *See infra* Part VII.

⁵³ *See* Thomas, *supra* note 47, at 510.

⁵⁴ 25 U.S. 419 (1827).

⁵⁵ 22 U.S. 1 (1824).

⁵⁶ Barros, *supra* note 48.

⁵⁷ *Id.* at 475.

This Article does not quarrel with Mr. Barros' proposition that the word "police" may have included a wide range of meanings in the 1800s and that some of these were quite general. However, the fact that this term could have a broad meaning in some circumstances does not justify the assumption that Marshall intended this broad meaning to attach to the "police power." This is especially true where the earliest opinions using the term contain strong textual evidence of a narrower meaning.

Justice Marshall refers to the specific power that Maryland exercised in *Brown* as "the power of the State to tax,"⁵⁸ "the general power of taxation"⁵⁹ and "the taxing power"⁶⁰ at various points in his opinion. At no point does Marshall state that this power is a subset of the police power. Further, when speaking more broadly about state power as a whole, Marshall refers to this body of "residual sovereignty" simply as "State power"⁶¹ and "powers which remain in the States."⁶² If Marshall intended the police power to encompass the totality of state sovereignty, it is strange that he used these much broader terms in every reference to the full universe of state power. In fact, Marshall did not use the term police power when talking about "state power" *even once* in the opinion.

The fact that the Marshall Court intended the police power to refer only to laws relating to public health and safety is also evident from *Gibbons v. Ogden*. There, Justice Marshall explicitly acknowledged that other legal scholars had referred to police powers in terms broader than his own: "this exclusive grant is a law regulating commerce; although, in some of the discussions elsewhere, it had been called a law of *police*."⁶³ Nonetheless, Marshall took great care to distinguish *his* police power from other types of governmental power. "[W]ith regard to the quarantine laws, and other regulations of police, respecting the public health in the several States, they do not partake of the character of regulations of the commerce of the United States."⁶⁴ Thus, when Marshall refers to "[t]he acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens,"⁶⁵ it is clear that he intends this sentence to be read as a list of separate—though overlapping—categories of state power and that no one of these listed powers encompasses both itself and the other two. Were this not the case, then this text would be ludicrously redundant. Barros' conclusions regarding the general usage of "police" in the 18th century may be valid as general propositions, however, they cannot be more probative of what

⁵⁸ *Brown*, 25 U.S. at 441 (1827).

⁵⁹ *Id.* at 439.

⁶⁰ *Id.* at 442.

⁶¹ *Id.* at 435.

⁶² *Id.* at 441.

⁶³ *Gibbons v. Ogden*, 22 U.S. 1, 26 (1824) (emphasis in original).

⁶⁴ *Id.* at 178.

⁶⁵ *Id.* at 208.

the Supreme Court intended the police power to mean than the Court's own statements.

After *Ogden and Brown*, the fact that the police power is only a *subset* of "state power" is at least reasonably clear from Marshall's language. However, this clarity began to erode as early as ten years after the *Brown* decision. In 1837, the Supreme Court returned to the issue of whether a state could pass laws that affected interstate and international commerce in *Mayor of New York v. Miln*.⁶⁶ In *Miln*, the Court addressed a law passed by the City of New York that required the masters of ships coming into the Port of New York to provide the authorities with the names of all foreign passengers and which imposed large fines if foreign paupers were brought into the country. Miln challenged this law as an attempt by a state to regulate interstate commerce.⁶⁷ The city claimed that it had the power to regulate paupers as a health and safety law that fell within the state's police powers.⁶⁸ Writing for the Court, Justice Philip Barbour noted that this case was governed by Justice Marshall's earlier opinions in *Ogden and Brown*.⁶⁹ Relying heavily on these cases, Barbour stated that it was in "the general power of the states to regulate their own internal police, and to take care that no detriment come to the commonwealth."⁷⁰ Barbour further opined that it is as "competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported, or from a ship"⁷¹ By characterizing this law as a "precautionary measure" to protect the state from moral and physical hazards, Barbour brought the regulation in issue squarely within the ambit of the narrow health and safety conception of the police power articulated by Justice Marshall in *Ogden and Brown*. However, while the *Miln* Court correctly captured the principle articulated in those earlier cases, it confused some of their reasoning.

After characterizing the New York law as an exercise of the police power, Justice Barbour went on to discuss the police power more generally. In this regard he said,

[A] state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty

⁶⁶ 36 U.S. 102 (1837).

⁶⁷ *See id.* at 131.

⁶⁸ *See id.* at 142-43.

⁶⁹ *See id.* at 134.

⁷⁰ *Id.* at 142.

⁷¹ *Id.* at 142-43.

of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends. . . . *That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police*, are not thus surrendered or restrained⁷²

This statement is significant because Barbour equates the state's power "to advance the safety, happiness and prosperity of [the] people" with an "internal police" power.⁷³ This is a far broader statement of the police power than Justice Marshall advanced only ten years earlier. To the extent that all legislation is in some way related to safety, happiness, prosperity and general welfare, Barbour's statement of the police power swallows the whole of a state's "residual sovereignty."⁷⁴ Significantly, the list of examples of this power that Barbour finds in prior court opinions all fall within the narrower conception of the police power as preventing harm to the community from criminals and health hazards.⁷⁵

That the *Miln* Court significantly expands the conception of the police power is evident from comparing Barbour's statements with those made earlier by Justice Marshall. This, however, is not the full extent of the harm. By equating the police power with state sovereignty and then listing only examples of this power that relate to harm prevention, it becomes unclear whether *Miln* has expanded the police power to embrace all state powers, or shrunk state powers to include only those of harm prevention. This would have had severe repercussions for the federalist balance of power if Barbour's language had not been entirely dicta.⁷⁶ However, Barbour's equation of the police power with a state's sovereignty provided the model that future Supreme Court opinions would cite to and rely on.

The fact that the *Miln* Court misunderstood Justice Marshall's statement of the police power's function and limits should now be clear. This leaves the question of why the *Miln* Court became so greatly confused by Marshall's articulation of the police power only ten years after the term was coined. Existent legal scholarship has not addressed this question, however, this Article asserts

⁷² *Id.* at 139 (emphasis added) (words "internal police" emphasized in original).

⁷³ *Id.* at 103.

⁷⁴ *Id.*

⁷⁵ *Id.* at 139-42. One notable example that the court provides is that "a state has a right to punish any individual found within its jurisdiction, who shall have committed an offence within its jurisdiction, against its criminal laws." *Id.* at 139-40. However, no example of government power that does not involve restraining nuisance-like conduct or punishing criminals is given.

⁷⁶ *Miln* only decided whether the law in question was a valid state regulation. Thus, the court's further commentary on the scope of the police power was not needed to resolve the question before it.

that the Supreme Court's confusion is attributable to the fact that the police power first emerged in federalism cases.

The precise issue in *Ogden* and *Brown* was whether the state law in question was a law rooted in the power to regulate interstate commerce—which the states had ceded to the federal government and could no longer exercise—or some other type of power that remained with the state. To decide this constitutional issue, *Ogden* and *Brown* needed only to state whether the law was one rooted in the commerce power or not. It was not necessary to the Court's reasoning to decide precisely what power the state was exercising so long as it was some power other than commerce. By framing the state's law as one primarily designed to promote internal public health and safety, Justice Marshall effectively demonstrated that the law was not primarily designed to regulate interstate commerce. Read correctly, *Ogden* and *Brown* only state that the police power is not the interstate commerce power. These cases do not suggest that all state laws must be exercises of the police power; indeed, Marshall explicitly mentions a separate taxation power remaining with the state.⁷⁷ This distinction is subtle, but important.

The mistake that *Miln* makes is to treat Justice Marshall's merely illustrative example of a non-commerce-based state power as exhaustive. This is an easy mistake to make because in *Ogden* and *Brown*, the law in question so greatly affected commerce that it could only be characterized as the product of a commerce or police power. However, the fact that only one of two characterizations was possible in these two cases in no way meant that these were the only two characterizations that could be used in all cases. Unfortunately, *Miln* missed this subtle distinction and, as a result, deprived the term "police power" of its former ability to describe anything more specific than state power. This error would have profound effects on later takings jurisprudence.

V. "FORCING THE ROUND PEG INTO THE SQUARE HOLE": THE CONVERGENCE OF THE STATE POLICE POWER AND THE PUBLIC USE CLAUSE

A. *The Conservative Model of Public Use and Police Power Interplay*

At first blush, one would not think that the Public Use Clause and the police power ever would become entwined. In its narrowest conception, the Public Use Clause is implicated only when the government takes land for public uses such as a road or courthouse. The police power, in contrast, has its roots in the common law right of the state to prevent individuals from harming other citizens or the public at large.⁷⁸ The classic statement of this "anti-nuisance" conception⁷⁹ is embraced by the Latin maxim *sic utere tuo ut alienum non lae-*

⁷⁷ See *Brown v. Maryland*, 25 U.S. 419, 440-41 (1827).

⁷⁸ See Thomas, *supra* note 47, at 543.

⁷⁹ RESTATEMENT (SECOND) OF TORTS § 822 (2000) (elaborating on the elements of nuisance):

das, or "use your property so as not to damage another's."⁸⁰ Thus, when the state proscribes certain uses of property that do injure others, it is not taking away a right that the property owner had to begin with. The state simply is exercising the right of self-defense on behalf of other citizens. For this reason, the state has never been required to compensate a land owner for value lost due to reasonable restrictions on land use.

Because the wrongful conduct of a property owner is the touchstone of the common law of nuisance, this logic only extends to private actions that have been declared "noxious." Its theory cannot extend to preventing uses of property which cause harm, but which are not wrongful, and it has no sensible application to laws that force individual property owners to bear the costs of government improvements for the entire community.

Once incorporated against the states, the Public Use Clause falls on the opposite end of the state power spectrum from the law of nuisance. Under the narrow conception of the Public Use Clause, the state may exercise its power of eminent domain to take land for a "public use" only if it compensates the property owner. The logical distinction between these two inquiries becomes most clear by asking whose current or proposed usage the court is examining. Under a strict Public Use analysis, the question of whether the government can exercise eminent domain is focused entirely on what the state plans to do with the property after acquiring it. An anti-nuisance analysis, in contrast, focuses on what the private property owner did with the land prior to the government action. Properly understood, these inquiries not only are separate but utterly unrelated. This conservative model of the relationship between an "anti-nuisance police power" and the Public Use Clause is best illustrated graphically.

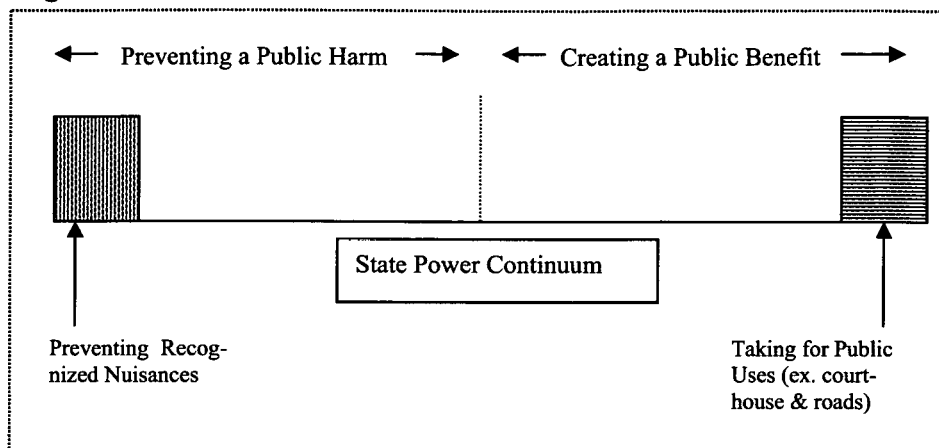
One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either

- (a) intentional and unreasonable, or
- (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Id.

⁸⁰

BLACK'S LAW DICTIONARY 1757 (8th ed. 2004).

Figure 1. Conservative Model of the Police Power and Public Use Clause

In theory, “public uses” are only a narrow category of public benefit because there are many ways in which the public at large can benefit from a property—e.g., providing tax revenue to fund municipal services, providing aesthetic beauty, etc. Public nuisances, in contradistinction, are only a small subset of private land uses that may harm neighbors or the public at large or wrongfully withhold benefits. Many perfectly lawful purposes that courts would not be prepared to categorize as nuisances can cause annoyance or harm to the community in the wrong circumstances. Between these two extreme sets of state actions, there is a vast logical gulf that encompasses all other state legislation designed to create a public benefit or prevent a public harm. Thus, under this rigid theoretical model, a police power analysis and a public use analysis would never parallel one another, much less be confused.

B. The Interplay of Public Use and Police Power Concepts after Miln and Head

The theoretical model of state power described above is in accord with the most conservative conceptions of the police power and the Public Use Clause. However, the Supreme Court never has embraced such narrow definitions in its jurisprudence. When Justice Marshall first coined the term “police power” in *Brown*, he grouped quarantine laws, restrictions on imports, siting requirements for storage of dangerous materials like gunpowder, criminal laws and other laws relating to public “health and safety” under the umbrella of the police power.⁸¹ Criminal laws and regulations on siting and storage of explo-

⁸¹ See *Brown*, 25 U.S. at 427-28.

sive materials are easy to reconcile with an anti-nuisance rationale.⁸² However, it strains the logic of nuisance too far to state that it encompasses every possible regulation designed to ameliorate hazards to public "health and safety." Thus, the police power, as originally conceived by Justice Marshall, can most logically be characterized as beginning with nuisances and covering all legislation aimed at harm prevention. Graphically represented, this brings the scope of the police power to the dotted middle line separating the prevention of public harm from conference of a public benefit. It does not encompass those laws that seek to improve public welfare through affirmative state action.

Both judges and scholars have remarked that the line separating harm prevention from benefit conference is often difficult to locate, because elements of both may be present in any given case.⁸³ Even Epstein acknowledges that "some uncertainty must be tolerated at the edges."⁸⁴ Nonetheless, acknowledging some "uncertainty at the edges" does not justify destroying the distinction altogether. To state that an initiative to give educational scholarships to all of its citizens is a law relating to "health and safety" is to stretch the term so far as to divorce it from any meaning. The same could be said of an attempt to characterize an average middle-class home that complies with all fire, zoning and health codes as a nuisance because it wrongfully deprives the state of the tax revenue that it would receive if a shopping mall was built on that property.

By conflating the police power with the whole of state sovereignty, *Miln* extended the scope of the police power up to the limits of state sovereignty.⁸⁵ At the very least, the post-*Miln* police power abuts the public use restriction. However, if the public use restriction is simultaneously misread as an affirmative grant of government power, then "public use" becomes just another subcategory of the police power. Displayed visually, *Miln* extended the scope of the police power all the way to the right end of the state power spectrum shown above.

Had the Supreme Court done no more than conflate the police power with the state's sovereignty, then the Public Use Clause and the police power always would collide. However, by extending the Public Use Clause to embrace all "public benefits," the Supreme Court extended public use leftward on the state power spectrum at least as far as the benefit creation/harm prevention dividing line. This is displayed graphically in Figure 2.

⁸² Notably, Epstein, by requiring an actual "physical invasion," apparently would not consider this to be an act of nuisance abatement.

⁸³ See, e.g., *Dep't of Agric. & Consumer Servs. v. Polk*, 568 So. 2d 35, 48 (Fla. 1990) ("'[H]arm prevention' and 'benefit conferment' are simply two different ways of describing the identical act."); *Cotton Harness, Lucas and the Rebirth of Lochner*, 2 S.C. ENVTL. L.J. 57, 66 (discussing "the debate of whether the law is aimed at 'harm prevention' or 'benefit conference,' a distinction most often in the eyes of the beholder").

⁸⁴ EPSTEIN, *TAKINGS*, *supra* note 21, at 114.

⁸⁵ See *supra* notes 66-72 and accompanying text.

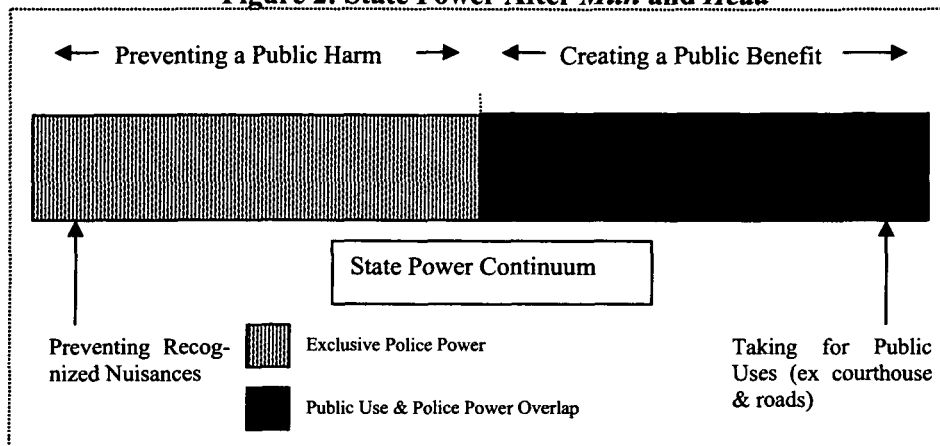
Figure 2: State Power After *Miln* and *Head*

Figure 2 demonstrates that the collision of the police power and the Takings Clause is indeed messy. By interpreting “public use” as “public benefit” and by interpreting “police power” as “state sovereignty,” the police power and the public use restraint overlap whenever a state government uses private property to create a public benefit. As a result, any exercise of state power that falls to the right of the harm/benefit line can be categorized either as an exercise of the police power or of eminent domain with equal accuracy. The confusion that this generates is obvious even to the casual observer. While the police power, through its common law ancestry, implies that the state need not pay for what it takes, the Public Use Clause specifically mandates compensation. However, the *Head/Miln* conception of state power simultaneously precludes and requires compensation in many of the same cases. The confusion that this framework creates should be distressingly evident. What is more perplexing, however, is why this confusion was not foreseeable. The Supreme Court was broadening its conception of the police power in *Miln* at almost the same time that it was expanding the scope of the Public Use Clause in *Beasley*. This begs the question of why the Court did not foresee that its two lines of jurisprudence were on course for a messy collision. Why did the Court decide *Head* without accounting for the inevitable overlap that the new “public benefit” would have with its “police-power-as-all-state-power” line of jurisprudence? These questions have not been answered in any published literature on takings jurisprudence. More alarmingly, these questions have not even been asked. The oversight by legal scholars is unexplainable. However, the oversight by the Court can be understood by reference to history.

Prior to 1866, the Bill of Rights, including the Takings Clause of the Fifth Amendment, applied only to actions by the federal government.⁸⁶ In that year, the states ratified the Fourteenth Amendment to the U.S. Constitution which provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law . . .*."⁸⁷ This amendment began the process of "Incorporation" which, in time, applied most of the substantive provisions of the Bill of Rights to the state governments through "Due Process." Before the passage of this amendment, the Takings Clause applied only to the federal government. To the extent that states had not delegated their powers to Congress in the Constitution, they retained plenary legislative power and were not bound by the Takings Clause. As a corollary, the federal government possessed only those powers delegated to it by the states and did not have "residual sovereignty" out of which a police power could be carved. Thus, when Justice Marshall first articulated the boundaries of the state police power in 1827, he could not have foreseen its eventual merger with the federal public use restraint. Indeed, even as Justice Barbour misapprehended Marshall's limited state police power, both the Civil War and the Fourteenth Amendment remained on the distant horizon. Thus, no matter how broadly he crafted the police power, Barbour could not have predicted its encroachment on the Court's public use jurisprudence. Viewed in this light, the imprecision of the Supreme Court's early public use and police power jurisprudence is far more understandable, even if no less unfortunate.

VI. "WHEN THE PIECES DON'T FIT, PRETEND THEY DO": THE INCOHERENCE OF POST-INCORPORATION TAKINGS JURISPRUDENCE

Once the Takings Clause was incorporated against the states, any exercise of that mysterious legislative power by a state would have to fall under the umbrella of the police power along with everything else. Thus, by the 1880s, the police power had become one of the primary engines of liberalization.

The increasing prominence of the police power as an engine of liberalization in takings jurisprudence is problematic because the Supreme Court still associated the police power with its anti-nuisance origins even as it was expanding its conceptions of that power. Thus, any taking that was justified as an exercise of the police power implicitly invoked anti-nuisance rationales which did not require landowner compensation. The Public Use Clause, in contrast, required that the taking be both for a "public use" *and* that it be compensated as necessary preconditions for an exercise of eminent domain. Merging the police

⁸⁶ Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 395 ("As generally recognized, the primary purpose of the Fourteenth Amendment was to provide freed slaves and other African-Americans greater federal protection from arbitrary exercises of state power.").

⁸⁷ U.S. CONST. amend. XIV, § 1 (emphasis added).

power into an eminent domain analysis made contradiction inevitable. This, in turn, added further confusion to takings analyses and increased the possibility that a judge would rely on the punting engine to escape from the takings maze.

Despite the obvious problems with this takings model, Parts III and IV demonstrate that this is exactly the rubric that the Supreme Court's earlier jurisprudence compelled them to adopt when attempting to reconcile the police power and the Takings Clause lines of jurisprudence post-Incorporation. This model, and the Supreme Court's discomfort with it, is evident in the early Prohibition-era case of *Mugler v. Kansas*.⁸⁸

In *Mugler*, the state of Kansas outlawed the manufacture of alcohol and statutorily declared all buildings and items used for such manufacture to be "nuisances" subject to confiscation or destruction by the police.⁸⁹ Mugler owned a brewery, which he operated lawfully prior to the prohibition law.⁹⁰ After the act was passed, Mugler continued to operate his brewery until the police destroyed the building and all of the bottles, beakers and other materials inside of it.⁹¹

Mugler and the state advanced two very different conceptions of the police power before the Court. Citing a long chain of court holdings, Mugler stated that "[a] legislative enactment cannot make that a nuisance which is not *such in fact*"⁹² and that

[s]uch a legislative determination would also be void, because, where the *fact* of injury to public health or morals did not exist, as here, it would be a violation of the absolute right of the citizen to follow such pursuit as he sees fit, provided it be *not in fact* "*injurious to the community*."⁹³

Based on this reasoning, Mugler argued that his brewery was not a nuisance and that its destruction deprived him of property as much as if the state had taken it for public use.⁹⁴ Mugler further argued that, even if brewing could be deemed a nuisance, this only would give the state the power to enjoin the activity, not to

⁸⁸ 123 U.S. 623, 8 S. Ct. 273 (1887).

⁸⁹ *Id.* at 656, 8 S. Ct. at 294 ("The thirteenth section declares, among other things, all places where intoxicating liquors are manufactured, sold, bartered, or given away, or are kept for sale, barter, or use, in violation of the act, to be common nuisances, and provides that upon the judgment of any court having jurisdiction finding such place to be a nuisance, the proper officer shall be directed to shut up and abate the same.").

⁹⁰ *Id.* at 656-57, 8 S. Ct. at 294. The arguments of counsel are only carried in the old Supreme Court Reporter. Thus, the page numbers for the parallel citation only will be provided.

⁹¹ *Id.* at 670, 8 S. Ct. at 302.

⁹² 123 U.S. 623, 8 S. Ct. at 290 (emphasis in original).

⁹³ 123 U.S. 623, 8 S. Ct. at 290.

⁹⁴ 123 U.S. 623, 8 S. Ct. at 291.

destroy the property.⁹⁵ This argument was consistent with the traditional nuisance law principle that "where a nuisance is to be abated, the abatement must be limited by its necessities, and no wanton injury must be committed."⁹⁶ Further, Mugler advanced the novel argument that the state should be obligated to compensate him for the loss of value even if he still retained possession of and title to the land.⁹⁷ In support, he cited Supreme Court precedent stating that "[all] that is beneficial in property is the use."⁹⁸

The arguments of the attorney for the State of Kansas are captured in the opinion of the Kansas Supreme Court.⁹⁹ In holding against Mugler, the Kansas Supreme Court articulated a wide interpretation of the police power consonant with that adopted by the U.S. Supreme Court in *Miln*.¹⁰⁰ After articulating this sweeping "public good" police power, the Kansas court noted that, prior to the ratification of the Fourteenth Amendment, the states always had the power to regulate the use of private property and that all property rights were held subject to the police power of the state.¹⁰¹ The Kansas court then concluded that the Fourteenth Amendment's incorporation of the Public Use Clause had not diminished this power through a rather compelling argument. First, the Kansas court stated that the purpose of the Fourteenth Amendment was to grant equality to the former slaves and that the amendment should be construed according to this goal.¹⁰² The Kansas court then noted that the protection of brewery owners had little relevance to this purpose.¹⁰³ Further, that court stated that "[n]either the real estate nor the personal property is 'taken' by the state for public use. The state obtains no title, no easement, no license—nothing. And the owner is in nowise *deprived* of his property"¹⁰⁴

Perhaps most convincingly, the Kansas court noted the practical consequences of requiring the state to pay landowners for any diminution in value to their property based on valid exercises of the police power:

We will suppose the case of a new state where, either because no apparent necessity existed, or from inadvertence or neglect,

⁹⁵ *Id.* at 292.

⁹⁶ 123 U.S. 623, 8 S. Ct. at 292.

⁹⁷ 123 U.S. 623, 8 S. Ct. at 293.

⁹⁸ 123 U.S. 623, 8 S. Ct. at 292.

⁹⁹ This opinion is reprinted in the old Supreme Court Reporter immediately preceding Mugler's arguments.

¹⁰⁰ 123 U.S. 623, 8 S. Ct. at 280 ("[A] government may regulate the conduct of its citizens towards each other, and, when necessary *for the public good*, the manner in which each shall use his own property.") (emphasis added)).

¹⁰¹ 123 U.S. 623, 8 S. Ct. at 286.

¹⁰² 123 U.S. 623, 8 S. Ct. at 283.

¹⁰³ See 123 U.S. 623, 8 S. Ct. at 283.

¹⁰⁴ 123 U.S. 623, 8 S. Ct. at 279.

no statute was enacted against the keeping of gambling-houses. . . . Must the state, as a condition precedent to the enforcement of legislation against the evil, purchase and pay for the houses, or their furniture and gambling devices, together with the goodwill of their business? . . . Think of the states being compelled to buy up gambling-houses, brothels, and lotteries . . . before any statute for their suppression could be enforced!¹⁰⁵

Based on the seemingly intolerable financial burden that compensation imposed on states, the Kansas court concluded that if the framers of the Fourteenth Amendment had intended “a construction so degrading to the states, and so subversive to their authority, it is doubtful if it would have been ratified by a single member of the Union.”¹⁰⁶ Thus, the Kansas court concluded that no compensation was due to Mugler for his loss.

The arguments of Mugler and the Kansas Supreme Court have been elaborated at such length for two reasons. First, each argument contains substantial logic and equity. It seems unfair for a business owner to invest heavily in a factory or brewery and then have it destroyed a few years later because the state legislature has outlawed his trade. In contrast, requiring the state to compensate everyone who it wants to regulate would prove so burdensome as to be unworkable. Second, despite the conflict between Mugler and the State of Kansas, each side perfectly captures one of the strands of Supreme Court takings jurisprudence. Mugler’s statement that a taking can occur even when the land is not directly ‘used’ by the public is well supported both by *Beasley* and *Head*. However, Kansas’ claim that the state police power encompasses all legislation that furthers the “public good” is equally well supported by *Miln*.

Many scholars critical of contemporary Supreme Court jurisprudence begin their inquiries with *Mugler*, implying that, before this case, there was a golden age of takings coherence.¹⁰⁷ Indeed, Justice Thomas, in his *Kelo* dissent, specifically references *Head* and earlier Mill Act Cases as examples of the correct approach to takings.¹⁰⁸ However, the fact that neither Mugler nor Kansas is able to advance a broad definition of one concept without embracing a narrow conception of the other forcefully demonstrates that the incoherence of takings jurisprudence dates back far earlier than the *Mugler* opinion. The incorporation of the Public Use Clause against the states only brought the latent imprecision of

¹⁰⁵ 123 U.S. 623, 8 S. Ct. at 283.

¹⁰⁶ 123 U.S. 623, 8 S. Ct. at 283.

¹⁰⁷ 123 U.S. 623, 8 S. Ct. at 283.

¹⁰⁸ See *Kelo v. City of New London*, 545 U.S. 469, 512-14 (2005) (Thomas, J., dissenting) (“Those early grist mills were regulated by law and compelled to serve the public for a stipulated toll and in regular order, and therefore were actually used by the public. They were common carriers-quasi-public entities. These were ‘public uses’ in the fullest sense of the word, because the public could legally use and benefit from them equally.” (internal quotations and quotation marks omitted)).

Supreme Court police power and public use jurisprudence to the fore. The fact that this conflict was both very real and quite unexpected in the 19th century is apparent from an offhand but telling remark made by the Kansas Supreme Court when hearing *Mugler*.

It is not a little remarkable that, while [the Public Use Clause] has been in the constitution of the United States as a restraint upon the authority of the federal government for nearly a century, and while during all that time the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum. . . . But while it has been a part of the constitution as a restraint upon the powers of the states only a very few years, the docket of this court is crowded with [takings cases]¹⁰⁹

This statement illustrates the fact that the Public Use Clause and the police power interacted in post-incorporation takings jurisprudence to create more confusion than either concept had created when applied on its own. This strongly suggests two conclusions. First, and perhaps most obviously, the Supreme Court did not consider the impact of its Public Use jurisprudence when designing the police power or the impact of the police power when interpreting the Public Use Clause. Second, the passage of the Fourteenth Amendment was a potent catalyst for generating confusion in later takings cases.

In *Mugler*, the Supreme Court could not ignore the glaring contradictions in its two lines of takings jurisprudence or the fact that each party had significant support from precedent. However, while the Court could not escape the need to redefine the borders of the Public Use Clause and the police power, it could have used this opportunity to acknowledge the unintended effects of incorporation on the logical coherence of takings jurisprudence and abandon the old Public Use and/or police power mode of analysis in favor of something more workable. Because no court could be expected to predict the Civil War and the ensuing changes in the federal balance decades in advance, the prestige of the Supreme Court would not have been diminished by admitting that the old rubric was unworkable and by making fundamental changes. Regrettably, the Court chose not to address the fundamental imprecision of its takings analysis and, instead, simply shifted the positioning of the public use limitation and the police power on the state power continuum. In so doing, the Court made several new errors that would further confound takings jurisprudence.

The *Mugler* Court resolved the conflicting theories of the litigants by increasing the scope of the police power while reducing that of the Public Use

¹⁰⁹ 123 U.S. 623, 8 S. Ct. at 277.

Clause. In so doing, the Court employed some highly suspect logic. First the Court noted that

[i]t would be a very curious and unsatisfactory result, were it held that 'if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent . . . without making compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision . . .¹¹⁰

However, less than a paragraph after announcing this logical and seemingly equitable rule, the Court stunningly announced that "[t]hese principles have no application to the case under consideration"¹¹¹ because the state's action was "exerted for the protection of the health, morals, and safety of the people."¹¹² The Court then went on to state that all property is held subject to the state's police power¹¹³ and that this power encompasses the state's ability to "prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity."¹¹⁴ According to the *Mugler* opinion, an act grounded in this broad police power "by the destruction of property which is itself a public nuisance . . . is very different from taking property for public use . . ."¹¹⁵ Finally, the Court noted that a state can declare specific property uses to be nuisances through "valid legislation."¹¹⁶

The Supreme Court's ultimate holding that leveling the *Mugler* brewery and destroying all of the objects in it was not an excessive abatement of the nuisance¹¹⁷ is not as disturbing as the logic that the Court used to achieve this result. First, by stating that "[a]ll rights are held subject to the police power" and then interpreting such power to include every possible act of state legislation, the Supreme Court effectively subjects all private property rights to the caprices of state legislatures. The only safeguard remaining on a person's property is the flimsy requirement that the law depriving them of such property be "valid."¹¹⁸

¹¹⁰ *Id.* at 667-68, 8 S. Ct. at 300 (quotation marks omitted).

¹¹¹ *Id.* at 668, 8 S. Ct. at 300.

¹¹² *Id.*, 8 S. Ct. at 300.

¹¹³ *See id.* at 663, 8 S. Ct. at 298.

¹¹⁴ *Id.*, 8 S. Ct. at 298.

¹¹⁵ *Id.* at 669, 8 S. Ct. at 301.

¹¹⁶ *Id.* at 668, 8 S. Ct. at 301.

¹¹⁷ *Id.*, 8 S. Ct. at 301.

¹¹⁸ *Id.* at 623, 8 S. Ct. at 287.

What is perhaps most alarming about *Mugler* is that the Court's reaffirmation of the police-power-as-all-state-power paradigm is accompanied by an intellectual retreat in the justification for the police power.¹¹⁹ *Mugler* repeatedly reasserts the links between the police power and its anti-nuisance origins. Through this device, the Court is able to conclude that all property is subject to the police power. This is an extremely significant statement, because it implies that property ownership is conditional and that any valid state legislation depriving an owner of his property extinguishes the owner's rights in that property *ipso facto*. Rather than a public use inquiry, this logic is a gross extension of anti-nuisance principles that effectively precludes compensation even if the "police power" regulation takes property for such purposes as developing natural resources or adding to the state's "wealth and prosperity."

Legal scholars interpreting *Mugler* are quick to point out that this case unfolded during the height of the prohibition movement, and the Supreme Court's holding that states can declare any long-legalized property uses to be nuisances probably would not be extended beyond prohibition cases.¹²⁰ There undoubtedly is much truth in this position. However, this is not a ground to dismiss the *Mugler* holding as an isolated historical accident. Regardless of what moral and political views may have influenced the Court to find no taking in this case, the Supreme Court reached its desired result by employing one of the same engines of liberalization developed in earlier cases; namely holding that the taking does not implicate the Public Use Clause but, rather, the state police power. The fact that the Supreme Court is unlikely to ever again hold that a state may declare whole industries to be per se nuisances does not defeat the fact that the Court used the same principles to achieve the desired result as it had in many past cases.

The only significant innovation in the *Mugler* opinion is the expansion of the narrow nuisance rationale to buttress all exercises of police power, even those that fall all the way to the right on the state power spectrum. It is possible that this decision was based on a genuine belief that alcohol production truly was a nuisance. However, the Court's forceful—yet unsupported—assertion that "the present case must be governed by principles that do not involve the power of eminent domain"¹²¹ also suggests a growing awareness by the Court that takings law had grown distant from its historical justifications. Thus, if the

¹¹⁹ These areas of legislation logically extend to such specific state actions as the damming of rivers, building of mills or mines, or other purposes more related to the public use limitation than any notion of public health and safety. Thus, after *Mugler*, the police power arguably swallows the Public Use Clause while mandating non-compensation in these instances. This achieves the perverse effect of creating public uses through nuisance law.

¹²⁰ See, e.g., Sidney J. Spaeth, Comment, *The Twenty-First Amendment and State Control Over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161, 169-71 (1991); Kevin Wendell Swain, Note, *Liquor by the Book in Kansas: The Ghost of Temperance Past*, 35 WASHBURN L.J. 322, 342 (1996).

¹²¹ *Mugler*, 123 U.S. at 668, 8 S. Ct. at 301 (emphasis added).

Court was not willing to reduce the scope of the police power and the public use limitation to reconnect these concepts with their original justifications then some new rationale would have to be superimposed onto the takings framework no matter how uneasy the fit.

Though the temperance movement ended almost a century ago, the engines of liberalization developed in early case law to justify the holding of *Mugler* remain viable and common today. Indeed, these engines are present in most of the major 20th century takings cases and the police power still retains its association with anti-nuisance principles.

VII. "IF NOT SENSIBLE, THEN PRACTICAL": TAKINGS JURISPRUDENCE IN THE MODERN ERA

A. *Ordering the Chaos: Achieving Practical Results from an Incoherent Analysis*

The specific techniques that the Supreme Court developed in the 19th century are (1) stating that the taking conferred an incidental benefit on the public and, therefore, was a public use, (2) stating that the taking did not implicate the Public Use Clause but, rather, some mysterious and extraordinarily flexible legislative power, or (3) arguing that takings jurisprudence had become so convoluted and incapable of yielding principled results that ad hoc review was justified.¹²²

Stated tersely, these three engines respectively can be labeled as "stretching," "shrinking," and "punting." Using the stretching engine, the Supreme Court can find the public use test to be satisfied by any public benefit. This allows takings, but still requires compensation. Using the shrinking engine, the Court can find that the Public Use Clause only requires compensation when property is taken for "public use" and that the government appropriation under consideration is not for a public use and, thus, does not trigger the requirement to compensate. Because the Public Use Clause is read out of existence, some other state power (the police power) must be present in these situations. The third engine can be used in those few cases where the taking is not defensible using the first two engines. This third engine also can provide auxiliary support for the other two and is named "punting" because it begins with an acknowledgement that takings jurisprudence is too convoluted to apply in a principled fashion. Based on this, the Court is justified in deferring to legislative judgments about what is a valid "public use." This third engine is, perhaps, the most powerful because the less comprehensible or more suspect the Court's opinion, the stronger this rationale becomes.

The characterization of Supreme Court justifications for liberalizing takings jurisprudence as "stretching," "shrinking" and "punting" confessedly pos-

¹²² See *supra* note 8 and accompanying text.

sesses an element of cynicism. However, this does not imply that the Justices of the Supreme Court are acting with dishonorable intentions or are intentionally distorting the takings law for activist purposes. In fact, the reason these three justifications are labeled "engines" is because they tend to operate on their own force even when the Court attempts to apply takings precedent to new situations in good faith.

By the end of the 18th century, the police power and the Public Use Clause had become so entangled and contradictory that a court simply could not engage in a credible takings analysis without redefining the boundaries of one concept or the other in individual cases. Thus, Justices engaged in takings discourse simply could not avoid employing one engine or the other. Similarly, because both a broad view of the police power and a broad view of the Public Use Clause were well entrenched in Supreme Court precedent, the decision of where to set the boundaries of the concepts in any given case could only be arbitrary or based on the Justices' personal views of how the case should be decided. For this reason, even the most assiduous Justice would be tempted to dispense with the pretenses of engaging in a thorough takings analysis in favor of deferring to the judgments of an elected body.

B. Stretching, Shrinking and Punting in Modern Supreme Court Jurisprudence: Berman, Midkiff, and Kelo

1. Berman

Many critics of 20th century takings jurisprudence believe that the Supreme Court substantially eviscerated the Public Use Requirement of the Fifth Amendment in *Berman v. Parker*.¹²³ Here, the Supreme Court upheld a plan by Congress to use the eminent domain power to acquire and revitalize large sections of a "blighted" or slum neighborhood in Washington, DC in which area Congress exercises the plenary powers of a state government.¹²⁴ One resident who owned a parcel of land in this neighborhood protested the condemnation because his particular property was commercial, not "slum housing."¹²⁵ This resident claimed that the government's proposal violated the Public Use Clause because the condemned properties would be turned over to a private agency for private development and whereas clearing unsanitary slums is necessary for the public health, safety and welfare, developing a "better balanced, more attractive community" by condemning non-blighted land is not a public use.¹²⁶

The *Berman* Court found in favor of the federal government largely through the punting engine. First, the Court found that "[a]n attempt to define

¹²³ 348 U.S. 26 (1954).

¹²⁴ *See id.* at 33.

¹²⁵ *Id.* at 31.

¹²⁶ *Id.*

[the police power's] reach or trace its outer limits is fruitless, for each case must turn on its own facts."¹²⁷ After invoking the futility of engaging in takings analysis, the Court stated that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs"¹²⁸ The Court then noted that this rule applies even where the government power in question is eminent domain.¹²⁹

After articulating the principle of near-absolute deference to the legislature, the *Berman* Court proceeded to make some of its most controversial statements. First, the Court noted that "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear"¹³⁰ and that Congress has substantial latitude to determine the amount of land and the procedures for effectuating this end.¹³¹ Second, and perhaps most infamously, the Court stated that "the rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking."¹³²

Critics have noted that these statements read the public use requirement out of takings jurisprudence.¹³³ This view is supported both by the Court's statements and by its refusal to scrutinize the government's means in any way. Indeed, the statement that "[o]nce the object is within the authority of Congress" strongly resembles a necessary and proper analysis.¹³⁴ This is inappropriate for two related reasons. First, the jurisprudential presumption that "no word [in the Constitution] was unnecessarily used, or needlessly added"¹³⁵ militates against reading the Public Use Clause as a mere duplication of the Necessary and Proper Clause,¹³⁶ which already prohibits the federal government from doing anything that does not advance one of its enumerated powers.¹³⁷ For the Public Use Clause to have meaning separate from the Necessary and Proper Clause it must impose an additional restriction on government power. This is buttressed

¹²⁷ *Id.* at 32.

¹²⁸ *Id.*

¹²⁹ *See id.*

¹³⁰ *Id.* at 33.

¹³¹ *See id.*

¹³² *Id.* at 36.

¹³³ GEORGE SKOURAS, *TAKINGS LAW AND THE SUPREME COURT* 44 (1998).

¹³⁴ *Berman*, 348 U.S. at 33.

¹³⁵ *Kelo v. City of New London*, 545 U.S. 469, 496 (2005) (O'Connor, J., dissenting) (quoting *Wright v. United States*, 302 U.S. 583, 588 (1938)).

¹³⁶ *See* U.S. CONST., art. I, § 8, cl. 18.

¹³⁷ *See* *Kohl v. United States*, 91 U.S. 367, 372 (1876); *see also* *Sabri v. United States* 541 U.S. 600, 613 (2004) (Thomas, J., concurring) (discussing the Necessary and Proper Clause in terms of Congress's spending power); *Kelo*, 545 U.S. at 511 (Thomas, J., dissenting) (discussing the Necessary and Proper Clause in terms of a taking).

by the fact that the phrase "nor shall" in the Public Use Clause connotes a restriction on government power and not an additional grant.¹³⁸

Second, if the Public Use Clause is a restriction on government power, it cannot accomplish its essential function when the task of determining when the restraint applies is entrusted to the party to be restrained. This is asking the fox to guard the henhouse.

Scholars and judges have paid substantial attention to these shortcomings in the *Berman* opinion. However, few of them have asked the more fundamental question of whether these shortcomings actually altered the outcome of the analysis. This Article asserts that they did not for several reasons. First, by employing the punting engine, *Berman* followed the overwhelming weight of precedent. While the Court's statement that the Fifth Amendment requires only compensation for property taken may be unsatisfying from a theoretical perspective, it cannot make any practical difference if the Court delegates the task of deciding what a public use is to Congress. Because "the legislature, not the judiciary, is the main guardian of the public needs,"¹³⁹ adjudicating the question of public use, even if done diligently, only serves to generate dicta.

The second basis for concluding that *Berman* reflected no meaningful departure from earlier takings jurisprudence is that even if the *Berman* Court had eschewed the punting engine, it still would be forced to apply either the stretching engine or shrinking engine. Under the Supreme Court's broad police power and public use constructs, the Court would be required to decide whether the taking would be characterized as valid either under the police power or the Public Use Clause. Thus, even if the Court decided to apply a public use analysis, the ultimate question of what shape this analysis must take would remain arbitrary.

The third consideration in evaluating the consequences of the *Berman* Court's blunder is the most important but also the most overlooked. Because the primary variable in post-incorporation takings jurisprudence is the determination of where to draw the boundary between the police power and the Public Use Clause, the only two outcomes are that the taking would be deemed a valid exercise of the police power or a legitimate taking.¹⁴⁰ Even assuming that it had been theoretically possible for the Court to choose one engine over the other in a non-arbitrary fashion—which it could not have done—this still would not have affected the outcome of the case. A broad reading of either the police power or the Public Use Clause would have allowed the government to appropriate the land. The only question would be whether the government must pay for this

¹³⁸ See *Kelo*, 545 U.S. at 511 (Thomas, J., dissenting).

¹³⁹ *Id.* at 519.

¹⁴⁰ Though not probable, it is theoretically possible that the court could find that the government's purpose did not fall within the expansive umbrellas of either the police power or the Public Use Clause. However, this is extremely unlikely considering the breadth ascribed to these two concepts and the fact that there is no assertion that the government desires to take the land exclusively to benefit an individual person or group.

appropriation or not.¹⁴¹ Thus, regardless of whether *Berman* decided to employ a public use analysis and regardless of which variant of the analysis they employed had they chosen to do so, compensation invariably would be the only question ultimately in play under the Fifth Amendment.

Based on these considerations, there is no reason to believe that *Berman* effected any meaningful substantive change in the practical application of takings jurisprudence even if one were to accept the highly questionable proposition that, by the time of *Berman*, it remained possible to mangle takings theory any further. The only innovation of the *Berman* Court is the discomfiting honesty with which it applied well-established precedent.

2. *Midkiff*

The Supreme Court returned to the question of what government purposes justified an exercise of eminent domain under the Public Use Clause in the 1984 case, *Hawaii Housing Authority v. Midkiff*.¹⁴² In *Midkiff*, the Hawaii State Legislature determined that a significant percentage of all private land was owned by a small number of citizens and that the vast majority of Hawaiian citizens leased their land from this small group.¹⁴³ The legislature further determined that this extreme concentration of land ownership dated back to feudal landholding system that was in place prior to Hawaii's admission to the union and that the continued existence of this pattern "was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public"¹⁴⁴

Because the private landowners feared the tax consequences of selling their land outright and because most tenants were too poor to purchase it, the legislature created a redistribution system that allowed tenant's to request condemnation of their leased land and to purchase the fee simple at a price determined by the state government.¹⁴⁵ The legislature further allowed tenants to borrow up to 90% of the purchase price from the government.¹⁴⁶ Shortly after this program was instituted, several large landowners brought suit, claiming that the legislature's explicit intent to transfer land from one group of private land-

¹⁴¹ Even this question is not clear cut. One of the few upshots for private property holders of the Supreme Court's conflation of the police power and the Public Use restraint is that even a valid exercise of the police power may require compensation of the property holder under the regulatory takings rubric when the regulation "goes too far." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

¹⁴² 467 U.S. 229 (1984).

¹⁴³ *Id.* at 232.

¹⁴⁴ *Id.*

¹⁴⁵ *See id.* at 234.

¹⁴⁶ *Id.*

owners to another was not a "public use" and that the state therefore lacked the power to use eminent domain.¹⁴⁷

The Supreme Court upheld the program as a valid public use after finding that "[r]egulating oligopoly and the evils associated with it is a classic exercise of a State's police powers."¹⁴⁸ Writing for the majority, Justice O'Connor noted that *Berman* was the "starting point" for an eminent domain analysis.¹⁴⁹ O'Connor then repeated the *Berman* Court's statement that "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear . . . [and that] the means of executing the project [also] are for Congress and Congress alone to determine, once the public purpose has been established."¹⁵⁰ This is the same punting engine employed in *Berman* and its consequences here are no different. Once the two questions of whether the government's stated goal is a public use and whether the eminent domain is the proper method of achieving this goal are ceded to the legislature, the Court has few remaining grounds for overturning the taking. O'Connor acknowledges the almost completely outcome-determinative effect of the punting engine through her statement that "[t]here is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But . . . it is 'an extremely narrow' one."¹⁵¹ However, despite O'Connor's extensive reliance on *Berman*, *Midkiff* evidences a somewhat different—though by no means novel—formulation of the public use analysis. In *Berman*, the Supreme Court noted that Congress' actions were designed to rectify the unsafe and unsanitary environment of a "blighted area."¹⁵² Though the *Berman* Court did not go so far as to hold that a run-down neighborhood was a common law nuisance, it is clear that this problem falls within the ambit of Justice Marshall's "public health and safety" formulation of the police power. This is significant because the *Mugler*-era takings cases tended to use the shrinking engine and references to the police power to uphold such actions,¹⁵³ whereas situations falling much farther to the right on the state power continuum tended to require employment of the stretching engine and a greater number of references to public use.

The issue in *Midkiff* is far more difficult to categorize than those in *Berman*, *Mugler*, *Miln* and *Head*. The Hawaii state legislature does not, and could not, state that the landowners are using their property in any way that harms the public. In fact, by leasing their land to others who could not afford to purchase it outright, they arguably are conferring a benefit on the public. How-

¹⁴⁷ *Id.* at 234-35.

¹⁴⁸ *Id.* at 242.

¹⁴⁹ *Id.* at 239.

¹⁵⁰ *Id.* at 240 (quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954)).

¹⁵¹ *Id.*

¹⁵² *Berman*, 348 U.S. at 28.

¹⁵³ See generally *Mugler v. Kansas*, 123 U.S. 623, 8 S. Ct. 273 (1887).

ever, this benefit is public only because so many people and properties are bound up in the leasing arrangement. Unlike a property owner who, by building a mill on his land that provides the benefit of needed agricultural processing for the community, the decision of one landowner to lease his or her property to one tenant has relatively limited effects. This not only obscures the line between preventing harm and conferring a benefit, but the line between public and private as well. A final level of confusion is revealed by observing that there is nothing about the way the physical property is *used* that is problematic. The public harm (or non-benefit) is solely a function of who holds title.

The multiple levels of analytical ambivalence presented by *Midkiff* frustrated principled application of a dichotomous (public use or police power) takings analysis because the Hawaii legislature did not propose a public use for the condemned land nor did it stop any harmful uses. In all likelihood, the leased land would be used in exactly the same way after condemnation as before. Thus, neither focusing on the conduct of the landowner nor the proposed use by the government can yield helpful clues about whether this is justified under the police power or the Public Use Clause. This forces the conclusion that the Hawaii legislature's sole motivation for the use of eminent domain was to effect the transfer of individual parcels of land from property owner A to lessee B for no other reason than that it believed that society would be better off if B owned the land than if A owned the land. This, on its face appears to contradict Justice O'Connor's own statement that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."¹⁵⁴

To be fair, the transfers in *Midkiff* did not simply transfer property from A to B, but from large groups of As to large groups of Bs. Thus, these private takings became public through their volume, if not their character. Additionally, there was a public purpose present in *Midkiff*. The thorny problem, however, is that the transfer *was* the purpose as well as the mechanism. This begs the question of whether the fact of redistribution can justify its exercise when there are economic benefits to the state. The fact that the *Midkiff* court did not answer this question directly is unsettling. More unsettling, however, is the fact that engaging in a public use analysis did not force the Court to confront this issue.

In discussing the Court's engines of liberalization as applied in *Berman*, this Article suggested that a traditional step in the takings analysis involved the Court making a decision regarding whether to use the stretching or the shrinking engine.¹⁵⁵ This Article further noted that the choice necessarily was arbitrary and ultimately would have little impact on the outcome of the case.¹⁵⁶ However,

¹⁵⁴ *Midkiff*, 467 U.S. at 241 (quoting *Thompson v. Consol. Gas Corp.*, 300 U.S. 55, 80 (1937)).

¹⁵⁵ See *supra* Part VII.B.2.

¹⁵⁶ This is especially true because the principle of regulatory takings often dictates that even the compensation question will have the same answer under a police power or public use rubric.

this does not suggest that the Court explicitly must choose between the stretching or shrinking engines. Even under the logic of the supposedly coherent 19th century takings cases, all three engines may be used in tandem.

As early as *Miln*, the Supreme Court stated that the state police power encompassed the state's power "to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends"¹⁵⁷ Once this power merged with takings analysis post-Incorporation, the police power extended all the way to the right of the state power spectrum. Because the public use "restraint" simultaneously had been expanded leftward towards non-public use benefits, a large area of overlap between the two powers developed.¹⁵⁸ This is precisely the confrontation that the Court faced in *Mugler* and is depicted in Figure 2. However, this overlap only represented a confrontation because an exercise of the police power did not require compensation whereas an exercise of eminent domain for a public use did.¹⁵⁹ Even the defendants in *Mugler* conceded the state's right to appropriate their property; they simply demanded compensation.¹⁶⁰ This compensation question was the only reason that the Court needed to decide between the stretching and shrinking engines.

By the late 20th century, however, the question of compensation had largely dropped out of takings inquiry. Once the Supreme Court addressed the unfairness of allowing wholesale deprivations of property to go uncompensated simply because it was premised on the police "power" by requiring compensation when the regulation went "too far," use of the police power no longer precluded compensation. In fact, in cases where the government action completely deprived the landowner of his or her land's value, compensation was customary.¹⁶¹ This simplified the analysis by mooted the arbitrary question of whether a taking would be called an exercise of the police power or a public use. Under one outcome, the government must provide compensation and, under the other, the government probably also must compensate.

An extended discussion of the regulatory takings doctrine is beyond the scope of this Article. However, two comments on its premise and consequences do bear on the takings analysis of *Miln*. First, the idea that compensation could be required where the "taking" was not for a public use, or where the government's action operated to diminish the value of, rather than seize, the land, represents a theoretically unjustified—if equitable—expansion of the Public Use Clause.

¹⁵⁷ *Mayor of New York v. Miln*, 36 U.S. 102, 105 (1837).

¹⁵⁸ See *supra* Parts IV and V for a discussion of this phenomenon.

¹⁵⁹ See WILLIAM B. STOEBUCK AND DALE A. WHITMAN, *THE LAW OF PROPERTY* § 9.4, at 524-26 (3d ed. 2000).

¹⁶⁰ See *Mugler v. Kansas*, 123 U.S. 623, 627, 8 S. Ct. 273, 274 (1887).

¹⁶¹ See STOEBUCK AND WHITMAN, *supra* note 159, § 9.4, at 533-34 (noting that the diminution in value must be "near complete" to warrant a finding that a taking has occurred).

The public use and compensation requirements are contained in the same clause of the Fifth Amendment and are part of the same broad restriction on government takings. If the Public Use Clause is interpreted to have narrow boundaries, there is no logical mandate for decoupling the compensation requirement and extending its boundaries. The constitutional injunction “nor shall private property be taken for public use, without just compensation,”¹⁶² does not indicate that “compensation” is any more important than “public use;” the two requirements stand on equal footing. Thus, basing a rule of compensation on whether the state asserts its police power—as opposed to a condemnation for public use—to a degree that infringes on a property’s value is an inherently misguided constitutional disjunction.

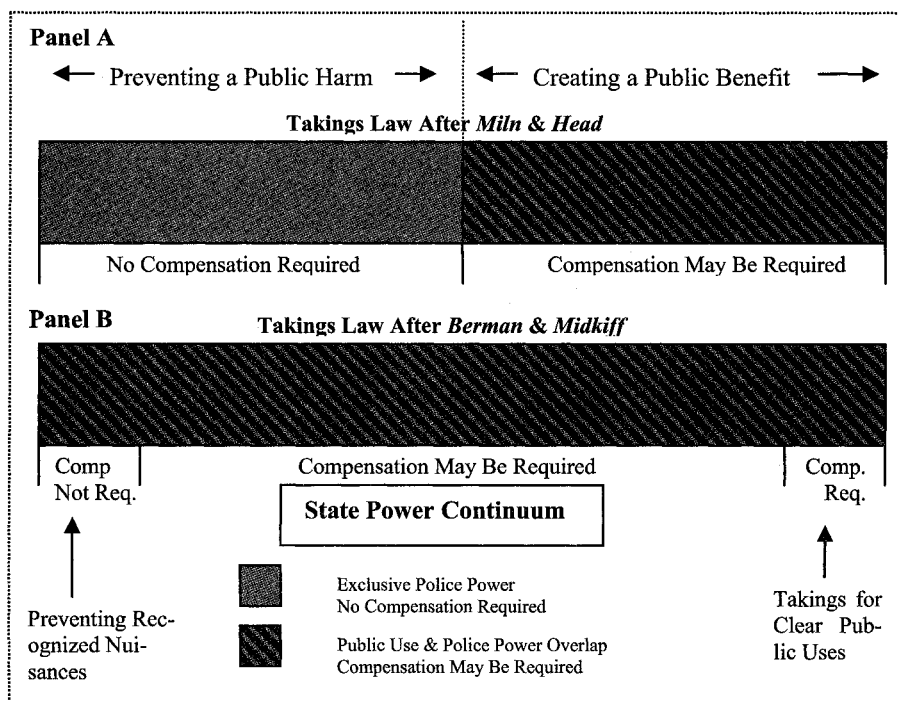
Despite the theoretical problems associated with compensating landowners when the Supreme Court decides that shrinking, rather than stretching, is the appropriate engine for upholding a government action, there is a great deal of equity in awarding compensation. As previously stated, the decision whether to shrink or to stretch is arbitrary and without practical consequence. Thus, imposing a narrow application of the compensation requirement in the name of logical coherence when no such sacrifice is demanded of public use is palpably unfair. Put bluntly, if the Court must mangle taking jurisprudence, the mangling at least should be evenhanded. Viewed in this light, an incoherent public use analysis mandates an incoherent “regulatory takings” doctrine.

The logic of regulatory takings bears direct relevance to the *Midkiff* decision. Justice O’Connor’s controversial assertion that “[t]he ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers,”¹⁶³ is as theoretically unsound as it is an unfortunately accurate description of the Court’s jurisprudence. Since the end of the 19th century, any taking could be upheld either through stretching the Public Use Clause or shrinking it to accommodate a police power. However, once the monetary implications of this decision are removed, there is no need to choose an engine. Either one works equally well and, with the assistance of the punting engine, the choice can be given to the legislature. This is illustrated below in Figure 3.

¹⁶² U.S. CONST. amend. V.

¹⁶³ *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984).

Figure 3: Takings Analysis in *Midkiff* Compared with the *Miln/Head* Conception



Panel A represents the state of takings law after *Miln* and *Head*. It is identical to the diagram appearing in Figure 2. Panel B represents the conception of takings law that existed after *Berman* and *Midkiff*. Under the *Miln/Head* model, the state's police power had already swallowed Public Use completely because anything that was in a state's power was unhelpfully labeled "police power." The public use line of jurisprudence had liberalized to a significant extent by this point. However, as much as "public use" had become "public benefit," neither *Miln* nor *Mugler* extended this into the arena of "harm prevention."

This Article argued that, prior to Incorporation, the Public Use Clause contained an implicit logical tension. Because federal powers were, and still are, not plenary, reading the Public Use Clause as an affirmative grant of power enabled it to condemn land for purposes not clearly in furtherance of an enumerated power. Broadening public use thus allowed the government to engage in takings that it otherwise could not. This provided an incentive for the federal government to urge a broad interpretation of this clause. The more broadly public use was construed, the more the government could do *if it paid compensa-*

tion. Though the compensation requirement would deter a government from labeling its taking as a public use, this price at least buys additional power.

Because the Supreme Court had articulated broad police powers for states, the natural temptation of the state would be to label an action an exercise of the police power whenever possible and avoid the requirement of compensation. This is most apparent in *Mugler*, where the State of Kansas urged the United States Supreme Court to find that the taking “must be governed by principles that do not involve the power of eminent domain.”¹⁶⁴ No state would want to pay to exercise power that it could use for free. To the extent that the *Mugler* Court was sympathetic to Kansas’ prohibition goal, it is understandable that the Court would employ shrinking instead of stretching. Based on these considerations, this Article speculates that few state attorneys assigned to takings cases would advocate for a construction of Public Use that superimposed a compensation requirement upon pre-existing power.

Panel B of Figure 3 graphically represents Justice O’Connor’s statement that “[t]he ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.”¹⁶⁵ It is absurd to think that a government restraint could cover the same area as a grant of power, at least in theory. The definition of a restraint entails the containment, not the broadening of power. However, as absurd as this statement may be from a theoretical perspective, post-*Mugler*, a state could accomplish anything permissible under the Public Use Clause by using the shrinking engine to invoke the police power instead. However, this does not mean that the two ‘powers’ were coterminous. No recorded case exists from the 19th century in which a state asked the Court to find a compensable taking where authority under the police power was clear.¹⁶⁶ Thus, while it is fair to say that the police power, post-*Mugler*, extended all the way to the left of the power continuum, the Public Use Clause probably did not extend nearly as far leftward.

The language of *Berman* marked a slight departure from earlier takings theory even though it achieved the same practical results. In *Berman*, the Court found a public use, apparently because it agreed with the state’s contention that the action was justified under the state’s police power.¹⁶⁷ This seemingly oxymoronic holding had no practical effect on takings law because compensation had become possible at every point of the state power continuum when government action went “too far” in diminishing the interest of the landowner.¹⁶⁸ Though the “character of the governmental action” prong of the regulatory takings test probably meant that the likelihood of a compensation award increased

¹⁶⁴ See *Mugler*, 123 U.S. at 623, 8 S. Ct. at 278.

¹⁶⁵ *Midkiff*, 467 U.S. at 240; see *supra* p. 747-49 and Panel B of Figure 3.

¹⁶⁶ Such as a case where the state was abating a common law nuisance.

¹⁶⁷ See *Berman v. Parker*, 348 U.S. 26, 33 (1954).

¹⁶⁸ See discussion of *Berman* *supra* Part VII.B.1.

significantly toward the right end of the continuum¹⁶⁹ and decreased as the action approached the left, the disappearance of a bright line practical distinction in the outcomes achieved by stretching or shrinking, eliminated the need to state which of the first two engines the courts had employed before punting. Because the practical differences between application of the police power or that Public Use Clause to any given case had so greatly eroded, Justice O'Connor's statement that the public use requirement is coterminous with the state's police power becomes true for all practical purposes.

Based on these observations, *Midkiff* does not represent any more of a departure from well-established takings law than did *Berman*. The practical consequences for compensation that stretching or shrinking entailed at the time of *Mugler*, were largely erased by the late 20th century due to the emergence of the regulatory takings doctrine. This, however, simply meant that the Court no longer needed to make an arbitrary choice in applying takings analysis, and the landowner no longer would be deprived of compensation based on the Court's choice. Takings jurisprudence may have been just as convoluted after *Midkiff* as it was after *Mugler*. However, to the extent that the *Midkiff* Court's analysis was not more arbitrary or unviable than *Mugler*'s, and to the extent that a property owner could obtain compensation in more situations in 1984 than he or she could in 1886, there is no basis for concluding that takings analysis had "deteriorated" in any new or meaningful way between *Mugler* and *Kelo*. The only new developments were an increased level of candor regarding the state of takings analysis and a greater possibility that a government action could require compensating the landowner.

3. *Kelo*

This Article began with the propositions that *Kelo* did not diminish the rights of private property owners or further erode the coherence of takings jurisprudence in any novel or meaningful way. Previous sections demonstrated how the pre-Incorporation era Supreme Court interpreted police power and public use broadly and without reference to each other, resulting in an unviable post-Incorporation takings rubric. The analytical takings framework of the late 19th century remained largely in place through the course of the 20th century and, to the extent that any theoretical deterioration had occurred, it had not further diminished property rights. The only remaining question regarding the Supreme Court's historical application of the public use/police power analysis is whether *Kelo* increased the incoherence of takings analysis in any way that the preceding century of case law had not.

In *Kelo*, the City of New London created a corporation called the New London Development Corporation (NLDC) for the purposes of implementing

¹⁶⁹ The right end of the continuum is the area where state actions most clearly resemble physical takings for actual public uses. See *Pa. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

the city's plans to revitalize its severely slumping economy.¹⁷⁰ As part of this effort, the NLDC developed a plan to condemn multiple tracts of private residential property bordering a local park for the purpose of tearing down the existing homes and building an upscale "urban village" containing office space, restaurants, stores and new homes.¹⁷¹ This development was expressly intended to capitalize on the Pfizer Pharmaceuticals Company's decision to build a large facility on adjacent land.¹⁷² To this end, the "urban village" was designed to provide attractive spending opportunities to the large influx of Pfizer employees and, thereby, generate needed revenue for the City.¹⁷³

Several homeowners whose land was condemned for the proposed development complained that the takings were not for a public use because their homes were not blighted and also because the condemnations were expressly intended to benefit the employees of a single private corporation.¹⁷⁴

The U.S. Supreme Court upheld the takings after noting that the "disposition of this case . . . turns on the question whether the City's development plan serves a 'public purpose'."¹⁷⁵ and that the category of public purposes is "broad and inclusive."¹⁷⁶ Writing for the majority, Justice John Paul Stevens stated that

[t]wo polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking.¹⁷⁷

Justice Stevens then noted that the Supreme Court "long ago rejected any literal requirement that condemned property be put into use for the general public"¹⁷⁸ and that "[p]romoting economic development is a traditional and long accepted function of government."¹⁷⁹ After articulating these propositions, Stevens then quoted *Berman* and *Midkiff*'s holdings that the gov-

¹⁷⁰ Kelo v. City of New London, 545 U.S. 469 (2005).

¹⁷¹ *Id.* at 474-45.

¹⁷² *Id.* at 473-74.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 475.

¹⁷⁵ *Id.* at 480.

¹⁷⁶ *Id.* at 481.

¹⁷⁷ *Id.* at 447.

¹⁷⁸ *Id.* at 479 (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984)).

¹⁷⁹ *Id.* at 484.

ernment's judgments regarding both the public interest and the means of attaining that interest were entitled to great deference.¹⁸⁰

Before disposing of the case, Stevens specifically addressed *Kelo*'s two arguments that the stated purpose of providing an attractive community for Pfizer employees violated the Public Use Clause and that there should be a per se rule against takings for the sole purpose of "economic development." To counter the first argument, Stevens observed that "the government's pursuit of a public purpose will often benefit individual private parties. For example, in *Midkiff*, the forced transfer of property conferred a direct and significant benefit on those lessees who were previously unable to purchase their homes."¹⁸¹ In response to the second argument, Stevens opined that there was "no principled way of distinguishing economic development from the other public purposes that we have recognized."¹⁸² Based on these rationales, Stevens found such takings to be valid public uses.

At first blush, the *Kelo* opinion appears rather unexceptional. The Court employed the stretching engine to include economic development within the ambit of the Public Use Clause and then the punting engine to avoid determining whether the use truly was public or reasonably suited to achieve its purpose. None of this is particularly new and none of Stevens's remarks contain any novel attack on a landowner's rights in private property. In fact, the Court's emphasis on the fact that condemnation plan was "comprehensive" and preceded by "thorough deliberation" could be read to suggest that the *Kelo* Court demanded more from the government before it would uphold a taking than did the *Berman* and *Midkiff* Courts.¹⁸³

The fact that *Kelo* employed the same engines of liberalization in much the same way that they have always been used raises the question of why the dissent so vigorously opposed what, essentially, was "more of the same." This question is all the more perplexing considering that Justice O'Connor wrote both a lengthy dissent in *Kelo* and the majority opinion in *Midkiff*.

In her *Kelo* dissent, O'Connor argued that the "Government may compel an individual to forfeit her property for the *public's* use, but not for the benefit of another private person."¹⁸⁴ However, she previously had found in *Midkiff*

¹⁸⁰ *Id.* at 488-89.

¹⁸¹ *Id.* at 485.

¹⁸² *Id.* at 484.

¹⁸³ *Id.* The condemnation plans both in *Berman* and *Midkiff* were every bit as systematic as that employed by the City of New London in *Kelo*. Significantly, however, the *Midkiff* Court did not use this fact to support its decision. The *Berman* Court did mention the systematic nature of the program, but only in the context of holding that one property owner's different circumstances did not justify departure from a general plan. Thus, neither of these cases emphasize the fact that property owners were afforded some measure of process, as *Kelo* does. This new emphasis could be read to suggest that the Supreme Court might require an increased level of due process protection for landowners who face condemnation.

¹⁸⁴ *Id.* at 497 (O'Connor, J., dissenting).

that the systematic transfer of land from wealthy landowners to their poor tenants was an acceptable public use even though no one except the tenants who previously lived on the land would use it afterwards.¹⁸⁵ In justifying the earlier *Midkiff* takings, O'Connor noted that the concentration of land "skew[ed] the . . . fee simple market."¹⁸⁶ The proposed solution entailed granting the direct benefit of land ownership to the individual tenants in the hope that, if done on a large scale, this would normalize the market.¹⁸⁷ The public good achieved through these measures can only be described as indirect. This simply does not accord with O'Connor's objection in *Kelo* that "if predicted (or even guaranteed) positive side effects are enough to render transfer from one private party to another [a word is missing here. Perhaps "Constitutional"?]. . . , then the words 'for public use' do not realistically exclude any taking"¹⁸⁸ O'Connor, of course, is right that the words "for public use" are a rather meaningless restraint. However, she was the same justice who opined that "the 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers."¹⁸⁹ Why the change of heart?

O'Connor attempts to distinguish *Midkiff* by stating that "[in *Midkiff*], the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm."¹⁹⁰ However, O'Connor's statement of the facts is simply wrong. In *Midkiff*, the problem at issue had nothing to do with how the land was used; the problems inured solely in the fact of ownership. There was no expectation that the former lessees would use their land in any new way that would increase tax revenue or that their land would itself be available to the public. Indeed, Hawaii's proposed solution, if it worked perfectly, would have resulted in the same people using the land in exactly the same way as they had before.¹⁹¹ O'Connor's claim that the public benefit in *Kelo*—where the city at least proposed lucrative new uses for the land—is any more of an indirect benefit than that in *Midkiff*, thus, is laughable.

That O'Connor is wrong in her belief that *Kelo* can be legally distinguished from *Midkiff* does not diminish the fact that there is something about the latter case that bothered her, which was absent in the former.¹⁹² If the indirectness of the benefit is not the cause, perhaps it is the fact that a single corporation stands to gain from the transaction in *Kelo*, whereas in *Midkiff*, thousands of individual tenants would gain. It also is possible that O'Connor simply thought

¹⁸⁵ See generally *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

¹⁸⁶ See *id.* at 232.

¹⁸⁷ See generally *id.*

¹⁸⁸ *Kelo*, 545 U.S. at 501 (O'Connor, J., dissenting) (emphasis omitted).

¹⁸⁹ *Midkiff*, 467 U.S. at 240.

¹⁹⁰ *Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting).

¹⁹¹ *Midkiff*, 467 U.S. at 241-42.

¹⁹² It is possible that this is explained by O'Connor's views having changed in the 20 years between *Midkiff* and *Kelo*, but such a proposition could only be speculative.

that correcting the evils of "oligopoly resulting from extreme wealth"¹⁹³ was a more compelling governmental objective than combating a severely slumping local economy. However, if the direct beneficiary is only the mechanism for effectuating the ultimate public use, then the fact that there is one mechanism or ten thousand should not be relevant to the question of whether the ultimate benefit is public. Similarly, if the Supreme Court punts the identification of both the public purpose and the means to best effectuate it to the legislature, it would make little sense for the Court to then weigh the importance of one identified public purpose with another. The fact that O'Connor's is unable to clearly articulate her objections to *Kelo* using the public use/police power rubric demonstrates the incoherence of the Supreme Court's takings analysis with as much force as the *Kelo* holding itself.

VIII. "SMALLER PEGS AND HOLES": THE PRACTICALITY AND COHERENCE OF CONSERVATIVE APPROACHES TO TAKINGS JURISPRUDENCE

As previously demonstrated, principled takings analysis cannot proceed unless a court first makes an arbitrary, and often meaningless, decision regarding where to draw the line between public use and the police power. The incoherent and arbitrary nature of this analysis breeds judicial frustration and encourages increased use of the punting engine.

The fact that labeling a taking as an exercise of the police power or a public use is no longer determinative of the compensation issue—and has long been irrelevant to the government's ability to appropriate—may explain why the punting engine has become the most visible of the three engines of liberalization in the 20th century cases. In fact, neither the *Kelo* majority nor concurring opinions mentions the words "police power" *even once!*¹⁹⁴ However, as exasperating as critics may find the Supreme Court's reflexive deference to legislative determinations, the punting engine does not frustrate judicial review; it merely saves courts from confronting the impossibility of such review.

The forgoing analysis forcefully suggests that the Supreme Court's takings rubric had become unworkable under its own terms. However, this leaves open the question of whether this rubric is unviable on all terms or whether clarity can be restored by narrowing the concepts of the police power and Public Use Clause to more conservative and literalist meanings. The answer to this question requires examination of the arguments of two of the most prominent conservative critics of the prevailing rubric, Justice Thomas and Professor Epstein.

¹⁹³ *Kelo*, 545 U.S. at 500. (O'Connor, J., dissenting).

¹⁹⁴ See generally *Kelo*, 545 U.S. at 469-93. The first time that the police power is mentioned is in Justice O'Connor's dissenting opinion. *Id.* at 501 (O'Connor, J., dissenting).

A. *The High Price of Coherence: The Literalist Approach of Justice Clarence Thomas*

In his *Kelo* dissent, Justice Thomas argues that it is “imperative that the Court maintain absolute fidelity” to the Public Use Clause.¹⁹⁵ According to Thomas, such fidelity requires that the clause be read literally to prohibit the government from taking property except “for public use.”¹⁹⁶

Thomas’s approach is very alluring for several reasons. First, the fact that the Public Use Clause would simply duplicate the Necessary and Proper Clause if the term “public use” did not have a fixed and narrow meaning militates in favor of interpreting the clause fairly literally to give it an independent effect under established canons of construction.¹⁹⁷ Second, Thomas persuasively argues that “the phrase ‘public use’ contrasts with the very different phrase ‘general Welfare’ used elsewhere in the Constitution.”¹⁹⁸ This demonstrates that the framers of the Bill of Rights knew how to suggest a broader meaning and chose not to do so in the Public Use Clause. Interpreting public use literally is the only method of giving effect to this textual distinction.

A third advantage of the literalist approach is its ease of application. Though there is some room for ambiguity on issues such as what percentage of the public must have access and whether a charge may be imposed,¹⁹⁹ determining whether the condemnation is for an actual public use usually should be as straightforward as deciding whether the construction plans call for a public road or a private mansion.

Fourth and most importantly, the literalist approach appears, at least on its face, to offer the promise of greater protections for private property owners against government takings because the reasons for a taking are so limited.

The apparent theoretical simplicity and practical advantages of a literalist interpretation are strong incentives, especially given the present incoherence of the broader takings analysis. However, the initial appeal of this approach disguises numerous fatal flaws.

Restricting government takings to those situations where a public use can be demonstrated necessarily mandates that, where the government cannot prove such a direct public use, no taking will be allowed. However, even the earliest Supreme Court cases demonstrate that there are many situations in which the government would have a need to employ eminent domain for non-

¹⁹⁵ *Id.* at 507. (Thomas, J., dissenting) (quoting *Shepard v. United States*, 544 U.S. 13, 28 (2005)).

¹⁹⁶ *Id.* (Thomas, J., dissenting).

¹⁹⁷ See *supra* note 26 and accompanying text.

¹⁹⁸ *Kelo*, 545 U.S. at 509 (Thomas, J., dissenting). See also Nathan Alexander Sales, *Classical Republicanism and the Fifth Amendment’s “Public Use” Requirement*, 49 DUKE L.J. 339, 368 (2000).

¹⁹⁹ See EPSTEIN, TAKINGS, *supra* note 21, at 162-66.

public uses that most people would acknowledge as reasonable and necessary. One such example appears in the *Beasley* opinion discussed in Part III. There the Supreme Court noted that "[i]t would be a poor consolation to the people of this town to give them the power of going in and out of the town upon a railroad, while they were refused the means of grinding their wheat."²⁰⁰ Unless the government is willing to forgo using the power of eminent domain to develop needed agricultural or industrial services where these operations are run by private businesses or not necessarily open for general public use,²⁰¹ strict adherence to a "use by the public" test exalts form over function.

Mills and other service providers are borderline examples because they could fall within the "common carrier" rubric of public use.²⁰² However, an even clearer example can be found in government condemnations of land for military bases. Few people would argue that a government should not take necessary steps to defend its citizens. Viewed from a layman's perspective, the government's power—if not its duty—to use the eminent domain powers for such purposes appears beyond obvious. However, applying the literalist interpretation of public use would invalidate such a taking unless these bases compromised their security by allowing general public use and access.

Justice Thomas attempts to circumvent the ramifications of a strict public use test even as he advocates its adoption. In analyzing the Supreme Court's adoption of a public purpose test in *Fallbrook Irrigation Dist. v. Bradley*,²⁰³ Thomas goes to great lengths to find an actual public use to justify the construction of an irrigation ditch.²⁰⁴ Thomas eventually concludes that a public use was present because a statute provided that citizens who "owned lands irrigated by the ditch—had a right to use it."²⁰⁵ Thomas's logic here is flimsy because, in his own words, only those landowners adjacent to the ditch had the right to use it. This does not allow use by the general public unless "general public" is defined to include only those people who own land that happens to be adjacent to the ditch. If a ditch is constructed in an area with large farms, this "general public" may include only six or seven landowners.

Thomas makes a second, even more suspect, effort to soften the rigidity of his literalist approach by stating that lands "owned by the government" are

²⁰⁰ See *Burlington v. Beasley*, 94 U.S. 310, 313-14 (1876).

²⁰¹ Not every such mill may allow members of the general public to use the facilities themselves. However, where the citizens of a town depend upon the finished product in their daily lives, there is good reason to deprive the local government of eminent domain powers because they have contracted with private business to operate the facility. This is much like the logic used for common carriers, which often may push the logic of public "use" despite the fact that they serve a compelling public need.

²⁰² See *generally Common Carriers*, MARYLAND CIVIL PATTERN JURY INSTRUCTIONS, 4TH EDITION (The Maryland Institute for Continuing Professional Education of Lawyers, Inc., 2004).

²⁰³ 164 U.S. 112 (1896).

²⁰⁴ See *Kelo v. City of New London*, 545 U.S. 469, 515 (2005) (Thomas, J., dissenting).

²⁰⁵ *Id.*

“public uses” *ipso facto*.²⁰⁶ Concededly, this assertion finds support in Supreme Court precedent.²⁰⁷ Nonetheless it is logically unsupportable. A strict public use test allows courts to ascertain the beneficiaries of the exercise of eminent domain by examining whether the public actually uses the land. Inquiry into who holds title to the land is relevant only to the extent that it is probative of the ultimate issue of use. Actual use must remain the touchstone of a literalist public use test for one very practical reason. Namely, if government retention of title to the land conclusively determined the question of public use, then the Public Use Clause could be circumvented by a local government retaining title to the land, while granting the benefits of its use to a private party. This possibility may appear laughable at first glance, however, the fact that the Public Use Clause was a *restriction* on the ability of government to appropriate land, suggests that the possibility of government misuse of the power was of great concern to the framers of the Bill of Rights.

Without employing artifices such as a “public ownership” exception, a court is left with only two possibilities in all situations where the government desires to acquire land for a public need beyond actual use. The first option is to preclude the government from acquiring the land, and force it to navigate such market forces as hold-outs and other opportunistic property owners. This would make the provision of many needed public benefits so expensive that the government often would not be able to provide them to citizens. Because this approach has such great potential to cripple many government efforts or force them to impose higher taxes on citizens, courts are unlikely to adopt this approach.

The second option that courts have is to allow the government to acquire the land through some other power. Given the Supreme Court’s expansive interpretation of the police power over the past one and a half centuries and the practical needs of society, it is overwhelmingly likely that the Supreme Court would adopt this approach. Because the requirements of the Public Use Clause could not be applied in such situations, courts would have no logical basis for mandating government compensation of landowners when a regulation or other government action that is not a public use “goes too far” and destroys the value of property. This would leave property owners with even less protection than they enjoy under the current system of jurisprudence.

These observations demonstrate that even those critics who advocate a strict public use requirement demand more from the takings analysis than its terms defensibly can provide. Unless conservatives are willing to allow numerous exceptions to the strict public use test, such a conception of the Public Use Clause is overwhelmingly likely to hurt the interests of both society and individual landowners. To the extent that these exceptions are allowed, however, the literalist approach loses much of its initial attractiveness.

²⁰⁶ *Id.* at 517.

²⁰⁷ *See, e.g.,* United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668 (1896).

B. "Square Pegs, Round Holes, and a Few Rolls of Duct Tape": Reading Coherence Back into Takings Jurisprudence through Epstein's Theories

Professor Epstein comprehensively examines the Public Use Clause and police power through the lens of John Locke's theories on the relationship between individuals, private property and the state in his book, *Takings: Private Property and the Power of Eminent Domain* ("Takings").²⁰⁸ It is beyond the scope of this Article to critique Epstein's use of Lockean Theory or to provide a general exegesis of his work on the broad subject of eminent domain jurisprudence. Instead, this section focuses on his interpretations of public use and the police power to determine whether his formulations of these concepts offer a better alternative to those developed by the U.S. Supreme Court.

1. The Police Power, Crime, and Anti-Nuisance

Epstein argues that "[a]ny adequate account of the ends served by the police power limitation should be congruent with the language and aims of the takings clause"²⁰⁹ and that neither the *Lochner* Court's articulation of the police power as containing "[t]hose powers . . . [that] relate to the safety, health, morals, and general welfare of the public"²¹⁰ nor the modern view of the police power as all state power are conceptually viable.²¹¹ Specifically, Epstein states that "[b]oth the traditional and the modern formulations go beyond the original Lockean conception and are too broad to be defended in analytical terms. The legitimate state interest test in vogue today is a bare conclusion, tantamount to asserting that the action is legitimate because it is lawful."²¹² This assertion is consistent with the analyses of the Supreme Court's application of the police power in the preceding sections of this Article. Epstein also is correct to observe that the incoherence of the police power is "the entering wedge to allow, encourage, and indeed justify judges to reach whatever result they prefer on any given state of affairs."²¹³ The Supreme Court's ability to set the boundaries of the police power at different points in individual cases is very much related to the shrinking engine postulated by this Article. However, the shrinking engine does not allow judges to reach "whatever result they prefer," as Epstein claims.²¹⁴

²⁰⁸ EPSTEIN, *TAKINGS*, *supra* note 21.

²⁰⁹ *Id.* at 108.

²¹⁰ *See Lochner v. New York*, 198 U.S. 45, 53 (1905).

²¹¹ EPSTEIN, *TAKINGS*, *supra* note 21, at 109.

²¹² *Id.*

²¹³ *Id.* at 116.

²¹⁴ *Id.*

Because the Supreme Court has refused to find a gap between the police power and the Public Use Clause on the state power continuum, shrinking can only function as an engine of liberalization, allowing the state to exercise more—never less—power. A narrow reading of the police power necessarily results in an expansive reading of the Public Use Clause. Thus, judges can justify “whatever result they prefer” only so long as they prefer to find the taking valid.²¹⁵

Epstein follows his criticisms of the modern Supreme Court’s interpretation of the police power by articulating a narrower variant of this principle:

The relationship between public use and the police power is well captured in an analogy drawn from private law—the distinction between self-defense and private necessity. Self-defense allows one to inflict harm without compensating the person harmed, while private necessity creates only a conditional privilege, which allows the harm to be inflicted but only upon payment [T]he police power gives the state control over the full catalogue of common law wrongs . . . involving force and misrepresentation, deliberate or accidental, against other persons, including private nuisances.²¹⁶

This conceptualization of the police power has several attractive features. First, the analogy to private law fits well within the Lockean position that a government obtains the rights those individuals formerly possesses in a state of nature.²¹⁷ Consonance with a particular philosopher’s social theory, of course, is not the touchstone of its constitutionality. Nonetheless, the fact that Epstein’s police power can be explained according to *any theory* is an advantage over the Supreme Court’s present jurisprudence. Second, the boundaries of Epstein’s police power are far easier to define and apply in practice. Where the government prevents wrongful conduct, it need not compensate. Where the conduct is not wrongful, compensation must be paid. A third advantage is that Epstein’s police power comports with a very basic sense of equity. A property owner does not have a right to commit wrongful acts. Thus, disrupting those acts should not require compensation. In contrast, a property owner does have a

²¹⁵ See *supra* Part VI. However, Epstein is correct to a certain extent because a judge can affect the outcome of the compensation question by manipulating the boundaries of the police power, as was done in *Mugler*.

²¹⁶ EPSTEIN, *TAKINGS*, *supra* note 21, at 109-11.

²¹⁷ Including the natural right of self defense and the right to preserve oneself through otherwise illegal means when it is necessary to prevent death or grave injury. An additional power in this group is the right to exact punishment when others commit wrongs. The idea is that, when people leave the state of nature and enter into society, they delegate much of their natural right to harm another who has previously committed a wrong against them. This becomes the job of the police. Because of this logic, Epstein’s conception of the police power has great intellectual appeal and this Article’s later articulation of a police power builds on Epstein’s logic.

right to engage in lawful acts and, thus, loses something when those acts are stopped. However, these attractive features of Epstein's police power disguise several conceptual and practical deficiencies.

The first problem with Epstein's police power is the difficulty of defining a "wrong." As Epstein defines the term, it encompasses crimes and torts involving "force or fraud" as well as common law nuisances.²¹⁸ In the first instance, the question of what constitutes a "nuisance" is not altogether clear. Epstein comments on this problem by reference to the difficult case of *Miller v. Shoene*, which stands at the periphery of nuisance law.²¹⁹ After stating his position on the case in qualified language, Epstein notes that "[t]he intellectual difficulty of these narrow points conceals their institutional importance. Some uncertainty must be tolerated at the edges; sound social institutions will never stand or fall on the marginal classification issues that test every legal doctrine."²²⁰ A coherent takings analysis need not account for every possible set of facts that can develop in society. However, it must be able to account for the most common scenarios. *Miller* falls within the not-uncommon category of situations where one person's use of land harms others but is not wrongful in and of itself. If there is "uncertainty at the edges" of nuisance law then this may not be the best place to draw a bright line between the police power and takings for public use.

Epstein's unexplained inclusion of crimes involving "force or fraud" within the police power exacerbates the uncertainty of his police power. No answer is given to the question, "What wrongs involve force or fraud and how does one use their property to commit them?" Assuming that a list of crimes and torts involving force or fraud can be developed, the next question is "Can this list change over time?" The question is important because if Epstein desires to freeze the list of wrongs that can trigger a police power response in time, then this area of law no longer will be able to change in response to new situations. However, if Epstein's police power allows the law to change—as it must—then there must be a system for determining what new crimes or wrongs would be included. Such a system invites at least as much legislative mischief and ad hoc review as it avoids.²²¹ To the extent that the police power has narrow bounda-

²¹⁸ EPSTEIN, TAKINGS, *supra* note 21, at 112.

²¹⁹ 276 U.S. 272 (1928). In *Miller*, a fungus that lived on the cedar trees of one person's land was destroying the apple trees on neighboring land. This fungus could not harm people, animals or most other types of trees. However, apple trees were an important local crop and the value of the apple trees was much greater than the cedars. Based on these facts, the Supreme Court upheld the state's destruction of the cedars without compensation. Epstein argues that there was nothing wrongful about owning the cedars and the fact that the apple trees were worth more should not defeat the cedar owner's property rights.

²²⁰ EPSTEIN, TAKINGS, *supra* note 21, at 114.

²²¹ Legislatures easily could craft statutes that define non-compliance with a particular zoning ordinance as deceit or require property owners to make representations that their land is compliant. Even where this is not done, courts still would be forced to decide which new "wrongs" are nuisances without the assistance of a clear limiting principle.

ries on the other side of which lies the compensation requirement, these boundaries must not be “uncertain.”

A second problem with Epstein’s formulation of the police power is its underinclusiveness. Epstein’s limitation of the police power’s bounds to nuisances, force and fraud leaves many important areas unaddressed. The most obvious of these are crimes that do not involve force or fraud. It is doubtful that Epstein seriously advocates that the state compensate landowners before closing down brothels, as the *Mugler* Court chided.²²² However, operating a brothel, though criminal in most jurisdictions, involves neither force nor fraud. Epstein’s strict “physical invasion” test requires the harm from one landowner’s property to cross the property line—such as when smoke, pollutions or noxious odors invade neighbors’ properties—before the harm can be declared a nuisance.²²³ Does a quietly-operated brothel meet this test? If not, would the average person deem it any less a nuisance if it was located next to his or her home?

The underinclusiveness of Epstein’s police power has implications beyond the exclusion of crime. Epstein further finds the police power inapplicable to legislation for the purposes of rent control,²²⁴ wetlands protection,²²⁵ flood control,²²⁶ and regulation of strip mining²²⁷ unless some “wrong” is committed. If the government desires to legislate on these subjects, Epstein’s analysis would require compensation for all property owners who lost value as a result.²²⁸ This certainly provides a high degree of protection for private property owners. However, the facility with which the borders of the police power can be crossed means that many types of legislation would become fantastically costly. Thus, as attractive as Epstein’s police power may appear to defenders of private property, it raises serious questions as to whether society would be prepared to pay the costs of these rights and whether courts would be willing to honor them consistently over time.

2. The Public Use Clause and “Public Goods”

Epstein links the issue of the Public Use Clause’s proper scope with a modified Lockean Theory. Stated very briefly, an organized society can produce wealth more efficiently than an equal number of individuals in a state of nature.²²⁹ The difference between the amount of wealth that a given number of individuals could accumulate in a state of nature and the amount of wealth that

²²² *Mugler v. Kansas*, 123 U.S. 623, 8 S. Ct. 273, 283 (1887).

²²³ EPSTEIN, TAKINGS, *supra* note 21, at 117-18.

²²⁴ *Id.* at 176-77.

²²⁵ *Id.* at 121-23.

²²⁶ *Id.* at 123-24.

²²⁷ *Id.* at 124-25.

²²⁸ *Id.* at 121-25.

²²⁹ *Id.* at 162.

the same number of individuals could accumulate in society is the "surplus."²³⁰ Epstein's conception of Lockean Theory demands that the government of the society return all surplus—minus that needed to operate the government—to the individual members of the society on a pro rata basis.²³¹ According to Epstein, one of the fundamental purposes of the Public Use Clause is to ensure that the government does not use its eminent domain power to grant disproportionate surplus to influential individuals or groups.²³²

This surplus theory is outlined above because it informs Epstein's conception of the Public Use Clause to such a high degree. However, this section argues that Epstein's emphasis on interpreting the Public Use Clause to fit within Lockean Theory—as opposed to within the text of the Constitution—is a significant analytical shortcoming.

Epstein asserts that there are three categories of permissible public use. The first is rooted in the economic theory of "public goods" and includes government services such as national defense. A public good requires two elements: (1) non-exclusivity and (2) minimal costs associated with increasing the number of beneficiaries.²³³ National defense is non-exclusive because "the act of providing protection for one citizen also provides it for his neighbor."²³⁴ A citizen cannot practically refuse the benefit of this service. Similarly, the marginal costs of providing this service to 100 citizens is not proportionally lower than the cost of providing it for 10,000 citizens.²³⁵ Thus, government condemnations for the purpose of building military bases, lighthouses and other generalized public services satisfy the Public Use Clause under the same logic as national defense.

Epstein's second category of public uses includes services such as parks and highways, which individual citizens can refuse to use. Epstein notes that these services do have proportionally increasing marginal costs and that they are public "only because the government chooses to provide them."²³⁶ Nonetheless, he concludes that the eminent domain power "surely [can] be used to acquire land . . . for these purposes."²³⁷

Epstein's labels the final category of valid public uses "private takings for public use."²³⁸ These takings encompass the controversial "indirect bene-

²³⁰ *Id.* at 162-63.

²³¹ *Id.* at 163. The basis actually is pro rata according to the individual's private holdings. It is not an equal distribution to all citizens.

²³² *Id.* at 163-64.

²³³ *Id.* at 166. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

²³⁴ EPSTEIN, *TAKINGS*, *supra* note 21, at 166.

²³⁵ See *id.*

²³⁶ *Id.*

²³⁷ *Id.* at 167.

²³⁸ *Id.* at 169.

fits" at issue in *Berman*, *Midkiff*, and *Kelo* where eminent domain is used to transfer property from one private citizen to another under the theory that the second citizen will use the property to provide a public benefit that the first citizen could not.²³⁹ For a taking in this category to be valid, Epstein asserts that two conditions must be met. First, there must be a "bilateral monopoly born of necessity."²⁴⁰ Second, "some effort must be made to divide the surplus between the [transferring and acquiring parties]."²⁴¹

Epstein asserts that the Supreme Court's early Mill Act Cases are explainable under the bilateral monopoly/surplus division framework. A bilateral monopoly exists where "there is only one buyer and one seller, resulting in transactional delays because each party can hold out for a better deal without fearing that the other party will turn [elsewhere]."²⁴² Epstein claims that this situation was in play with Mill Act Cases because damming a river for the mill always would cause upstream land to flood.²⁴³ The owner of the mill had no ability to choose between different parcels of land and, if the owner(s) of the upstream parcels refused to sell their land—perhaps in hopes of driving up the price—then the mill could not be built.²⁴⁴ Because mills were essential to local industry, the public would benefit if the government used eminent domain. Further, because the mill owner was constrained by the bilateral monopoly, there is less danger that he or she is using the government to "assert his will and dominion over the property of another,"²⁴⁵ or so Epstein's argument runs.

After identifying the existence of a bilateral monopoly in the Mill Act Cases, Epstein next notes that many of the states were required to pay 150% of the property's value before they could condemn it.²⁴⁶ Epstein reasons that, in such a situation, the owner of the mill and the owner of the property to be condemned became "the public" and each obtained a "pro rata share of the gain, to the extent that ordinary institutions can provide it."²⁴⁷ Thus, Epstein reasons that the surplus is evenly divided among the public, satisfying his second criterion.²⁴⁸

²³⁹ *Id.* at 169-80 (discussing what circumstances must be present for one of these takings to be valid).

²⁴⁰ *Id.* at 181.

²⁴¹ *Id.* Epstein propounds this general rule within the specific context of rent control statutes. This Article, therefore, distills his specific statement that the surplus must be divided between the "landlord and the tenant" into the underlying economic proposition on which it is based.

²⁴² BLACK'S, *supra* note 80, at 1028.

²⁴³ EPSTEIN, TAKINGS, *supra* note 21, at 170-73.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *See id.* at 174 (discussing the "pivotal role of the surplus" and referencing the New Hampshire Mill Act); *see also* *Burlington v. Beasley*, 94 U.S. 310 (1876).

²⁴⁷ EPSTEIN, TAKINGS, *supra* note 21, at 174.

²⁴⁸ *Id.*

There are many grounds for contesting the application of Epstein's bilateral monopoly/division of surplus theory to the Mill Act Cases on a theoretical level. However, because this section is concerned with the broader and more fundamental problems associated with Epstein's hypothesis, it is only appropriate here to point out the two most obvious problems.

First, "born of necessity" is a slippery concept that begs the question, "Whose necessity governs?" The mill may be beneficial for the local community but this does not mean it is necessary. Indeed, because so few improvements are *necessary* for the continued survival of a community, public necessity would be an unreasonably restrictive requirement for takings. It also would place non-elected judges in the position of deciding whether a taking that the entire population and their elected government finds *important* rises to the heights of necessity. If "born of necessity" means only that the mill owner must use the particular parcel of condemned land, then necessity is satisfied any time a person proposes a project that requires using his neighbor's land. Such a safeguard on property not only is easily bypassed, it is fundamentally misdirected, focusing on the needs of the mill owner as opposed to the needs of society.²⁴⁹

The second problem inuring in Epstein's hypothesis is that the 150% price actually divides the surplus equitably between the two parties. This simply is not realistic. There is no method of adequately valuating the surplus wealth that the mill will generate at the time of condemnation. Even Epstein acknowledges that "one should not demand perfect precision because there is no way to provide it."²⁵⁰ However, this "uncertainty at the edges" argument disguises two important facts: (1) there is no method of even roughly approximating the amount of surplus that a long-term project will bring, and (2) division of the surplus is not a fair method of valuating compensation—it has nothing to do with public use—because it encourages the owners of worthless land to hold out for condemnation whenever they think that the project will generate the surplus. Such heavy-handed protection of private property utterly divorces the compensation question from the land's subjective or market value.

Notwithstanding the "uncertainty at the edges" of Epstein's categories of valid public uses, they are fairly good descriptions of many of the Supreme Court's holdings. An analysis of Epstein's application of the bilateral monopoly/division of surplus rubric to the Mill Act Cases reveals that the rubric not

²⁴⁹ A third problem with the "born of necessity" argument arises in a situation where a project could be completed on any one of three parcels of land but no others. Does the necessity rule mean that it must be necessary to condemn a *particular* plot of land or can it be satisfied if *somebody's* land must be condemned but, within limits, it does not matter whose? If the former of these interpretations is accepted, then it would be impossible to find necessity except in those limited situations where only one property could be used effectively. Requiring the government to prove this has the potential to generate prohibitively long and expensive discovery processes. If the latter interpretation is employed, then "born of necessity" becomes an almost laughably easy test affording few protections for property owners.

²⁵⁰ EPSTEIN, TAKINGS, *supra* note 21, at 175.

only fits, it is tailor-made. However, therein lies the most fundamental problem with Epstein's categories of public use.

One of the great dangers in superimposing a new theoretical framework on past cases is that the theory can fit the facts perfectly while utterly failing to capture the underlying forces that caused the case to be decided as it was. Any number of theories, from "bilateral monopolies" to a special exception for mills can be crafted to fit the facts. However, the fact a theory can be made to fit does not mean that it should be used. Ultimately, Epstein's analysis of the Mill Act Cases is more concerned with Lockean Theory than it is with constitutional text or the realities of the case. As Supreme Court Justice Oliver Wendell Holmes famously observed in his *Lochner* dissent, "[t]he 14th Amendment does not enact Mr. Herbert Spencer's Social Statics."²⁵¹ Even conceding that the Mill Act Cases fit within the "bilateral monopoly/division of surplus" theory perfectly and that John Locke would approve of takings to provide "public goods," the question remains, "What does any of this have to do with whether a taking meets requirements of the Public Use Clause?"

The only answer that Epstein provides is the rather conclusory statement that his theory "is consistent with the general pattern of [the Founder's] argument and the words in which they expressed it."²⁵² With only this proof, Epstein's statement that "[t]he language of public use invites the theory of public goods"²⁵³ is more conclusion than argument.

3. Duct Tape Can't Fix Everything: Assembling Epstein's Takings Theory

The overriding theme in Epstein's conceptions of the police power and Public Use Clause is to greatly limit the situations in which the government can take property without compensation under the police power²⁵⁴ while dramatically expanding public use to require compensation for many types of government action previously categorized as exercises of the police power.²⁵⁵ However, Epstein's analysis accomplishes more than moving the boundary line between the police power and the Public Use Clause far to the left on the state power continuum. Epstein's theory also decreases overall state power to condemn in certain instances by excluding them from both the police power and the Public Use Clause. This is illustrated in Figure 4 *infra*.

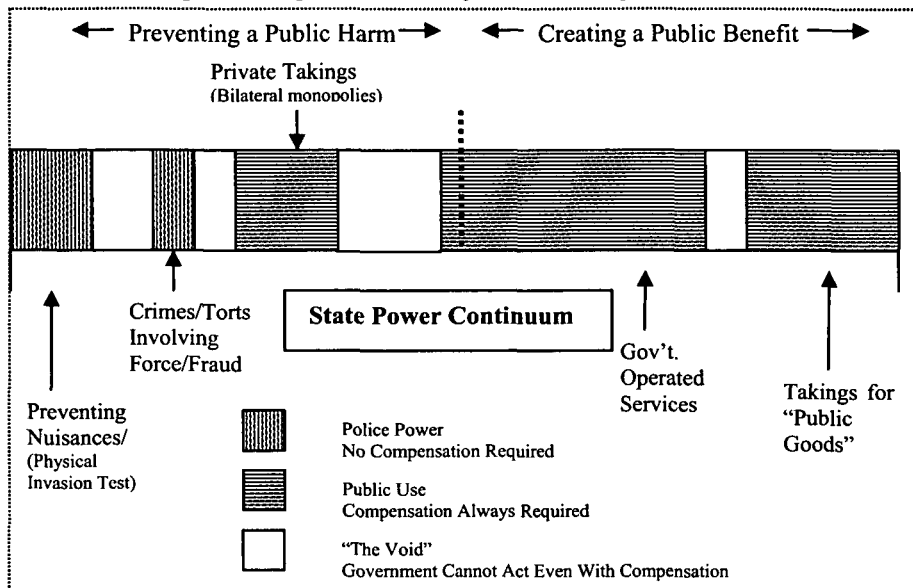
²⁵¹ *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁵² EPSTEIN, TAKINGS, *supra* note 21, at 166.

²⁵³ *Id.* at 166.

²⁵⁴ See *supra* Part VIII.B.1.

²⁵⁵ See *supra* Part VIII.B.1.

Figure 4. Epstein's Analytical Takings Framework

Epstein's police power encompasses only nuisances that physically invade neighboring land and crimes and torts involving force or fraud.²⁵⁶ Epstein's Public Use Clause encompasses takings to provide public goods that citizens must use, takings where the government retains ownership of the land and uses it to provide a service that citizens can choose to use, and private takings where there is a bilateral monopoly born of necessity. However, despite his innovative use of economic theory to draw the lines between these two concepts, Epstein retains the Supreme Court's overarching analytical dichotomy between public use and police power. Rather than articulating new categories, Epstein's focus is on "moderat[ing] the line drawing problem" between the existing categories.²⁵⁷ Thus, Epstein's analysis shares one essential trait—and one essential failing—with Thomas's and the majority's test in *Kelo*: an action must be characterized either as police power or public use.

Despite using the same dichotomous takings model as Thomas and the Supreme Court majority, Epstein injects a new dimension into the debate through his careful sculpting of the police power and public use concepts. Specifically, he raises the possibility that a taking designed to effectuate some public purpose might not be allowed under either the police power or the Public Use Clause. In essence, those purposes fall into an analytic "void" that either pre-

²⁵⁶ See *supra* Part VIII.B.1.

²⁵⁷ EPSTEIN, TAKINGS, *supra* note 21, at 166.

cludes state action or simply precludes analysis depending on whether Epstein's model is used for lawmaking or analysis. These voids are depicted by the white spaces on the state power continuum in Figure 4.²⁵⁸

Part VIII.B.1 demonstrated that Epstein's police power excludes many forms of harmful conduct and argued that a literal application of Epstein's theory would allow brothels to remain in business because they do not involve force or fraud category, are not physically invasive nuisances, and because taking them would deprive the owner of the property rights in their income.²⁵⁹ If the police power cannot be employed here, the question becomes whether the state can regulate through the public use rubric. Because Epstein limits public use to three categories, this question must be broken down into three parts: (1) whether the brothel presents a bilateral monopoly, the necessity of which justifies regulation; (2) whether closing the brothel results in the government using the land to provide a service; and (3) whether shutting down the brothel results in the creation of a public good. The irrelevance of the first two categories should be clear without further analysis. However, the question is a little more difficult with regard to the third category.

The elimination of the brothel arguably can be categorized as furthering the public purpose of health or morality (the traditional domain of the police power). The next inquiry is whether this benefit is exclusive and whether the marginal costs of providing it increase as the benefit is provided to more people. At this point, the analysis breaks down. It is possible to argue the exclusivity and cost questions either way without proving anything more than that the analysis is poorly suited to answering the question.

This Article does not seriously suggest that a court applying Epstein's analysis would allow the brothel to continue. Nor does it suggest that the court would make compensation a precondition of its termination. However, the fact that a strict application of Epstein's analysis would lead a court down this fairytale road suggests that there is something seriously amiss with Epstein's analysis. It is absurd to suggest that a judge would engage in an extensive analysis of the police power and the Public Use Clause to determine whether the property rights of a brothel owner have been violated. Certainly—read hopefully—common sense would prevail long before this. However, the fact that Epstein's formulations of the police power and Public Use Clause dictate such an analysis make one of two results inevitable: courts either will ignore the analysis altogether or expand the boundaries of the police power to fill in these voids. Where the example is as ridiculous as a pimp demanding his property rights in court, a judge most likely would pursue the former. However, in a more serious case, the latter route is more likely.

²⁵⁸ The location of the different public uses and voids in relation to each other is not important in this figure. They are laid out only to illustrate the fact that such voids exist. Thus, this Article does not argue that the public goods are to the right of bilateral monopolies even though the figure suggests as much.

²⁵⁹ See *supra* Part VIII.B.1.

The problem of "the void" exists on the benefit conference side of the state power spectrum as well. To illustrate this, it is helpful to borrow an example from the Supreme Court's past cases. In *Midkiff*, the state of Hawaii was faced with overly-concentrated land ownership that hurt the state's economy.²⁶⁰ This example will exaggerate the problem in two ways. First, the majority of the state's land will be held by only five or ten private citizens. Second, the effects of this concentrated land ownership on the state's economy will be so dire that they would threaten to undermine the state's solvency. These modifications are designed to put the state into a position where it must act. The question then becomes whether the Epstein model will allow the state to act.

Epstein's conception of the police power requires an invasive nuisance, force or fraud to operate. Unless the Hawaiian property owner acquired the property through force or fraud, the state will not be able to use the police power. The fact that the intangible concept of ownership cannot physically invade a neighbor's land precludes the finding of a nuisance. So far, this does not change the outcome of *Midkiff* because the legislature provided compensation despite the use of a police power rationale.²⁶¹ However, the outcome does change when the state resorts to Epstein's public use rubric.

The Hawaii legislature's action cannot be called a "public good" because each property must be targeted on an individual basis. The aggregated benefit may be public, but each instance of the taking is exclusive to the two parties involved. This legislature's action also fails the marginal cost test because for each new citizen covered, the state must loan up to 99% of the cost.²⁶² Thus, the marginal cost of extending the benefit is directly proportional to the number of people covered.

The title transfer program cannot be justified as a government-provided service because the legislature does not plan to occupy the land and make it available to the general public. This leaves only the bilateral monopoly argument. In *Midkiff*, the property owners did not want to sell because of the associated tax consequences and the tenants could not afford to buy.²⁶³ This represents a breakdown in commerce, but it is not a bilateral monopoly problem. The landowner would suffer the same tax consequences by selling to another tenant and the tenant's poverty would preclude purchase without regard to which property he or she desired. Second, the Hawaii legislature does not pay a premium to the landowner in an attempt to divide the surplus.²⁶⁴ Thus, the title transfer project flunks the bilateral monopoly test on both counts, and the legislature is left without a justifying public use for addressing the social problem caused by the pattern of land holding.

²⁶⁰ Haw. Hous. Auth. v. *Midkiff*, 467 U.S. 229, 229-30 (1984).

²⁶¹ *Id.* at 233-34.

²⁶² *Id.* at 234-37.

²⁶³ *Id.* at 233-35.

²⁶⁴ See generally *Midkiff*, 467 U.S. 229.

4. The Problem of Analytical Rigidity

The fact that Epstein's model precludes *Midkiff*-style takings does not necessarily reflect an analytical failure. In fact, people concerned with increasing the protections for private property may find the model attractive for precisely this reason. Such people also would see the voids more as zones of protection. However, even if the theoretical problems in Epstein's analysis could be removed, a rule requiring the government to compensate for environmental protection, rent control statutes and other such benefits it deemed desirable, Epstein's analytical framework still contains a fatal defect: rigidity.

Epstein's model is not a practical alternative for the Supreme Court because his analytical framework cannot be severed from his conservative position. The coherence of his overarching analytical framework is completely dependent upon acceptance of the boundaries that Epstein himself has set. Any attempt to depart from these causes the framework to collapse. The modified *Midkiff* example demonstrates this point simply.

The discussion of the modified *Midkiff* example²⁶⁵ ended with two conclusions, the first of which was assumed. First, the state needed to employ the title transfer program to remain economically viable. Second, the Epstein tests for public benefits did not allow it to do so. This problem does not rise to the theoretical level so long as a court is willing to enjoin the state from taking the necessary action and the state is willing to abide by the court's determination. However, such a situation places enormous pressures on a court to bend its analysis to accommodate the necessary state action. This pressure exists even where the state's need is not so dire but the benefit appears public and important.

If a judge wanted to accommodate Hawaii's program, it would be necessary to stretch one of Epstein's public uses. If the court stretched the public goods rubric, a possible rationale might weigh the perceived benefit against the marginal cost of extending the benefit to others and, concluding that the benefit was greater than the cost, would find a marginal cost of less than zero. Similarly, when analyzing "exclusivity," the court could aggregate the thousands of individual takings to find non-exclusivity or focus the exclusivity analysis on the indirect benefit of an improved economy. This mode of analysis has two important implications. First, it allows the court to achieve what appears to be the necessary or sensible result. Second, it eviscerates the public goods test, leaving an empty shell of a rule that can be satisfied by any private takings that confers an indirect benefit on the public. Once a court departs from Epstein's parameters—which over the course of decades it will repeatedly be tempted to do—no limiting principle remains that can be applied in the next case on the court's docket. This rigidity also is present in Epstein's other categories under

²⁶⁵ See *supra* Part VII.B.2.

both the police power and public use because each category demands that a taking meet stringent requirements.

The inflexibility of Epstein's tests replicates the problem of the original dichotomy between public use and police power. Once a court abandons the idea that a taking must be for an actual public use, no clear limiting principle remains. "Public need" is no closer to "public use" than "public benefit" or "public convenience." Thus, once a court retreats from its original position, no foothold exists to stop the analytical freefall. Epstein's analysis does more than simply replicate the Supreme Court's analytical difficulties in proxy form; his analysis necessarily reduces back to the same flawed model. Once Epstein's categories of public use and police power are stretched beyond their original parameters to fill the voids in state power, they lose their distinct theoretical identities and become broad, overlapping paths to the same ultimate destination: the question of whether the conduct is a valid exercise of the police power or valid public use. At this point, Epstein's analytical model is no more than the same dichotomous police power/public use analysis, with the boundary line between these two concepts pushed far to the left on the state power continuum to reflect Epstein's conservative views. Unfortunately for Epstein, without an analytical limiting principle, there is nothing to stop courts from pushing this line back to the right through the engines of liberalization.

The failure of Epstein's analytical framework to present a viable alternative to the Supreme Court's current model is not the product of any weakness in his theoretical innovations. In fact, many of his proposed categories have great analytic value. Epstein's essential failing is that, while vigorously challenging the Supreme Court's takings analysis, he passively adopts the same dichotomous model at the core of this analysis.

Because there is no room for a middle ground between public use and the police power in either Epstein's or the Supreme Court's models, and because the initial categorization of a government action is so outcome-determinative, there is an inherent pressure to extend the police power to all government actions that a court believes should not require compensation and the Public Use Clause to all government actions that the court thinks should require compensation. Where this process operates, categorization is reduced to conclusion. Even categories based on initially well-articulated principles ultimately break down as the government actions that each category encompasses become less and less unified by any common characteristic outside of the fact that some court, at some time, thought that one government action should be compensable and another not. Efforts to restore coherence by rearticulating the original categories in rigid and conservative terms is not sufficient to stop this process where the pressure of the conclusion is not removed from the issue of categorization.

It is not clear why Professor Epstein would go to the trouble of creating a comprehensive theory of takings just to build it atop the same shaky foundation as the theory he seeks to destroy. However, while it is impossible to definitively guess Epstein's motivations, his complete failure to discuss the problems occasioned by Incorporation in his comprehensive book, *Takings*, and his at-

tempts to ascribe reason to the later Mill Act-Era cases forcibly suggests that Epstein, like many eminent domain scholars, does not apprehend how far back into history the roots of the Supreme Court's incoherent takings jurisprudence extend. Unfortunately, Epstein's misplaced belief in an idyllic era of takings jurisprudence blinds him to the inherent imprecision of the dichotomous takings model. By building his own analysis on this flawed model, Epstein shackles even his most innovative solutions to the same analytical uncertainties that they are meant to overcome.

IX. "FROM PEGS AND HOLES TO PRACTICAL HOLDINGS": RESTORING COHERENCE TO THE TAKINGS DEBATE BY ALTERING ITS TERMS

A. *Summary and Conclusions*

The specific conclusions of the foregoing sections force a broader and more fundamental conclusion: the Supreme Court's analytical framework and the dichotomous model on which it is predicated are incapable of producing consistently principled and practical adjudication no matter how much they are restated and refined. Rejecting this flawed rubric is a necessary precondition to bringing coherence to takings law. This raises the final question that is addressed in this Article: With what can we replace this analytical framework?

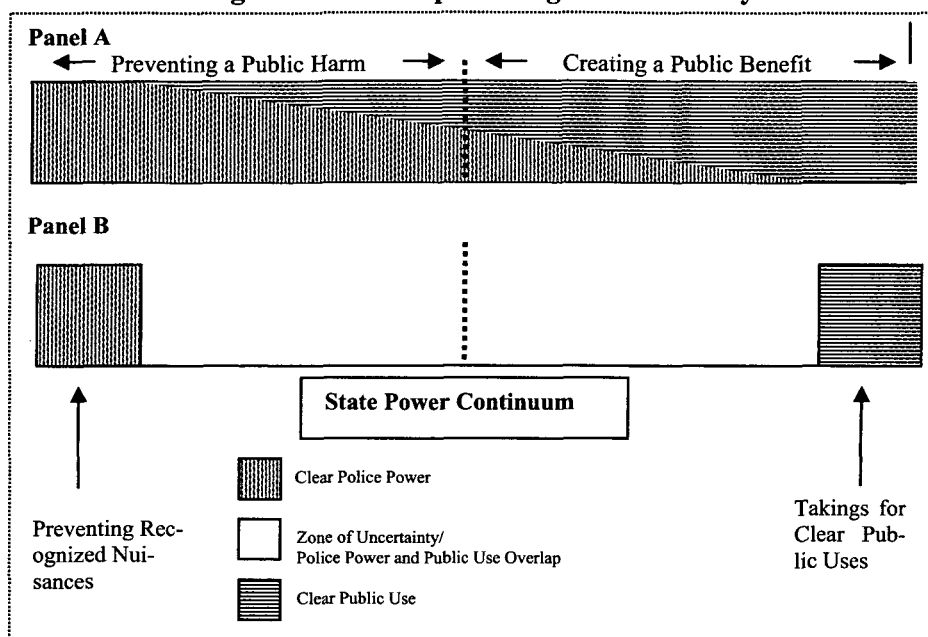
B. *The Way Forward*

The fundamental problem with the concept of public use is that it is not possible to stretch its rubric far enough to encompass every public appropriation that the majority of people would regard as necessary and legitimate without transmogrifying the term into something devoid of all intellectual integrity. At some point, honesty must compel courts to acknowledge the simple truth that no matter what labels or tests the court employs, there are only two categories of valid public uses: (1) those which society always regards as legitimate and (2) those that society sometimes regards as legitimate. Examples of the former include takings for a direct public use such as building a bridge or a road and takings where the land will be used by a "common carrier."²⁶⁶ Examples of the latter include takings for a "public benefit," such as urban development or economic growth. This principle applies with equal force to the police power. Some exercises of the police power, such as abating recognized nuisances, are universally deemed valid. Other exercises of the police power, such as for rent control or environmental protection, are more controversial.

²⁶⁶ The "common carrier" exception allows the government to condemn land and transfer it to private parties who operate services that all citizens may use on a non-discriminatory basis, often upon the payment of a fee. EPSTEIN, TAKINGS, *supra* note 21, at 168. Privately-operated railways and parks are common examples of this. *Id.*

Acknowledging that there are two categories of police power and public use underscores the problem with a dichotomous analysis. However, it also suggests what contours the solution should take. For two questions, there should be two analyses and two answers. Conceptually severing the categories leads to much greater analytic precision. Therefore, courts should reframe their takings analysis into two questions: (1) whether the taking be categorized as a clear exercise of the police power or a clear public use and (2) if not, then does the taking fall somewhere between the two categories or is it entirely private? Framing the inquiry allows a court both to determine where on the state power continuum a given government action falls and provides clues as to how the court should analyze it. This is represented graphically in Figure 5 below.

Figure 5: Reconceptualizing the Dichotomy



This schema depicts two ideations of the state power continuum. Panel A represents the analytical uncertainty of the prevailing dichotomous model. While there are certain government actions that clearly fall within the ambit of the police power and public use, state actions that fall within the vast area between these poles possess elements of both. No coherent principle justifies stretching one or both powers across the state power continuum because it forces courts into the zero-sum game of labeling an ambivalent state actions either as a “clear exercise of the police power” or a “clear public use.” Of course, where the state action is not clearly a public use or an exercise of the police power, calling it such only derogates from the precision of the categories, leading to muddled analysis. This results in categorization-by-conclusion problem discussed earlier.²⁶⁷

Panel B represents the conservative model of the police power/public use dichotomy from Figure 1.²⁶⁸ Under this model, to which Justice Thomas claims adherence, neither the police power nor Public Use Clause is stretched beyond their logically defensible parameters. Unfortunately, this analytic precision exacts a heavy price because, under a dichotomous framework, a state ac-

²⁶⁷ See *supra* Part VIII.B.4.

²⁶⁸ See *supra* Part V.

tion that neither is a public use nor an exercise of the police power cannot be valid.²⁶⁹ This creates a large void under which many practical state actions fall.

A comparison of Panels A and B points toward the solution argued for in this section: retain the clarity of Panel B and the practicality of Panel A by creating a third analytical category which embraces the zone of ambiguity. In practice, the four categories outlined above (two police powers and two public uses) reduce to a three-category analysis. This is because two of the categories—(1) possible exercises of the police power and (2) possible public uses—entirely overlap. Once a court finds that the government action is intended to serve some public purpose, then it remains only to determine whether the action is grounded in a state power which is not subject to the Public Use Clause's compensation requirement—what most scholars call "exercises of the police power"—or whether the action is grounded in state power that is subject to the Clause's compensation requirement.²⁷⁰ Thus, the categories of possible public use and possible exercises of the police power collapse into the broader category that Figure 5 labels the "zone of uncertainty." This category is defined by the practical consideration of whether compensation should or should not be required for a specific government action. Its boundaries are the point beyond which compensation clearly and uncontroversially *is* required, on the right of the continuum, and the point beyond which compensation clearly and uncontroversially *is not required*, on the left of the continuum. Thus, if the answer to the compensation question is not immediately clear from the nature of the government action, then such action falls within the zone of uncertainty.

The three categories outlined above, clear public use, clear police power, and zone of uncertainty, are the essential building blocks of the analysis urged by this Article. At this point, one might note that the zone of uncertainty appears more of a restatement of the problems in takings analysis than a solution. However, this assumes that an action falling within the zone of uncertainty eventually must be characterized as an act of the police power or of the Takings Clause. Notwithstanding the fact that the Supreme Court and most takings theorists feel compelled to label a taking as police power or public use, there is no logical reason to require this step. As the analysis in the preceding sections has shown, once a government action falls within the ambit of state power, the only question with any practical consequence is whether compensation should be required. Because the issue is not clear in the zone of uncertainty, there is no reason to apply the same bright-line rules that are appropriate in the clear police

²⁶⁹ See *supra* Part VIII.B.1 for a discussion of Justice Thomas's arguments in favor of limiting the reach of the Public Use Clause to effectuate takings.

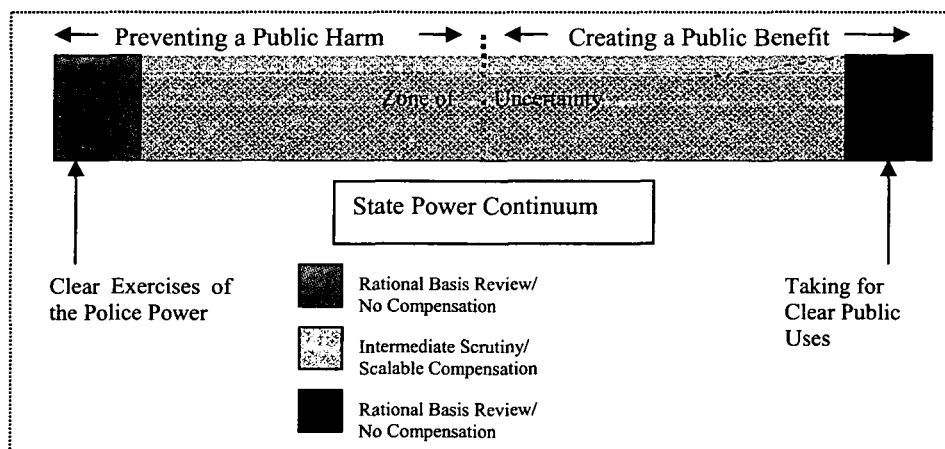
²⁷⁰ It is important to note the existence of a fifth category: government actions intended to effectuate entirely private purposes (i.e., actions designed solely to benefit or harm a single citizen or group of citizens). Such government actions are not within a state power and, thus, are not represented on the state power continuum. However, the fact that this category is not represented does not relieve a court from the duty to inquire whether the government action is public or private. This is a threshold question, and it is only proper for a court to engage in takings analysis after a public purpose has been found.

power and clear public use categories. A better approach is to apply an intermediate level of scrutiny to all actions in this category in order to determine whether compensation is fair under the circumstances of the particular case. This intermediate level of scrutiny should parallel the regulatory takings analysis and specifically focus on the degree to which the government action in question is designed to correct harm caused by the property owner—such as pollution, interference with the rights of other property owners, etc.—or confer a public benefit.

The line between conferring a public benefit and preventing harm is difficult to draw and employing the three-category framework urged in this Article, concededly, cannot bring it into sharper focus. However, what this framework can do is mitigate the practical consequences of this uncertainty by abandoning the all-or-nothing compensation approach. Many government actions, such as urban renewal, both abate harms caused by a landowner and confer additional public benefits. There is no reason to forbid a government that takes possession of blighted land from doing nothing more than restoring it to its non-blighted value. To the extent that the government can do more with the land, society benefits all the more. However, unless the public harm that the government seeks to abate is exactly equal to 100% of the property's value, all such takings must result either in a net benefit or net loss to the government. In such situations, all-or-nothing compensation is not appropriate and a more enlightened—and equitable—approach would be to assign a monetary value to the harm and use it to offset any compensation due to the landowner for the taking.²⁷¹

The complete analytical framework proposed by this Article appears in Figure 6 below.

Figure 6: Proposed Multi-Tiered Framework for Takings



²⁷¹ This Article merely introduces this rule as a general concept. The task of defining its precise contours is appropriately left to courts to decide based on specific facts.

Takings falling within the clear public use and clear police power categories retain the all-or-nothing compensation model whereas the zone of uncertainty employs scaleable compensation. This multi-tiered framework possesses numerous advantages over the Supreme Court's dichotomous model. However, before these advantages may be described, principled boundaries of these three categories should be articulated.

Three considerations must inform the process of setting boundaries for the police power and Public Use Clause in the proposed multi-tiered framework. First, the boundaries must be practical. When judges are forced to choose between abandoning established analyses and achieving equitable results, they must—or at least should—choose fairness. Therefore, a takings framework cannot force courts to make that choice if it hopes to endure. Second, the framework must be flexible. As argued in preceding sections, rigid frameworks tailored to accommodate specific political viewpoints will be upset completely by changes in judicial attitude.²⁷² Thus, a framework must be able to accommodate both conservative and liberal applications without losing its coherence. Third and finally, the framework must be constitutional. Where concepts derive from the text of the Constitution, their boundaries must be defensible according to the document's text.

Brief reflection on the aforementioned considerations suggests the boundaries that should be imposed on the three categories of the multi-tiered model. The Public Use Clause states "nor shall private property be taken *for public use*, without just compensation."²⁷³ The most obvious construction of this clause—or the one that involves the least stretching—is that it only applies to takings for an actual public use. Justice Thomas argues this point powerfully in his *Kelo* dissent.²⁷⁴ Unfortunately, Thomas's analysis is limited by the pressures of reaching socially-desirable results. The proposed model removes that pressure because its structure no longer requires judges to label actions a clear public use in order to reach specific conclusions regarding the compensation or validity questions. Under the proposed model, a court retains the flexibility to reach a desired outcome in the zone of uncertainty. The only consequences of such a categorization are (1) that the court will use intermediate tier scrutiny to determine the validity of the government action and (2) that scaleable compensation may be paid. Because this framework relieves the pressure on the Public Use Clause, there is no reason not to restore the most textually-defensible reading of the Clause. Therefore, the proposed model will treat only actual public uses as "clear public uses," subject to rational basis review and mandatory com-

²⁷² This is one of the defects in Epstein's model. See *supra* Part VIII.B.

²⁷³ U.S. CONST. amend. V (emphasis added).

²⁷⁴ See *supra* Part VIII.A.

pensation.²⁷⁵ “Public goods” and other public benefits will fall into the zone of uncertainty, where they will be subject to an intermediate tier of scrutiny.

Defining the scope of the police power does not require the same attention to constitutional interpretation as the Public Use Clause. Because the concept is a judicial creation, not subject to the same deference as constitutional text, the boundaries of the police power should be informed primarily by analytical utility. In other words, the line should be drawn where it would be most analytically useful. This almost certainly should be the point on the state power continuum beyond which compensation indisputably is not required. Thus, this Article largely agrees with Epstein that the police power should be limited to anti-nuisance and common-law crime.²⁷⁶ Restricting the police power in this way allows a court to use the term in a way that has a definitive meaning and a definitive consequence. However, because police power and residual sovereignty are decoupled, a court finding that an activity does not fall within the ambit of the police power would not automatically preclude the state from taking the action or require compensation.

The final category that requires definition is the zone of uncertainty. Now, with the boundaries of public use and the police power firmly in place, this zone no longer is uncertain. It encompasses all state power that is not police power and which does not involve an exercise of eminent domain for *use by the public*. This is the area with which the courts have struggled most. As a result, this is the area where heightened review will allow a court to develop a more complete factual record and actually wrestle with—as opposed to punt—the questions of whether (1) the activity generates a public benefit or prevents a public harm and (2) how much compensation, if any, is appropriate. With this rubric in place, the zone of uncertainty may broadly be renamed the *state stewardship power*, or be further reduced to several smaller categories once a sufficient body of case law exists to justify principled labels.

C. *Concluding Comments on the Advantages and Utility of the Multi-Tiered Model*

The multi-tiered model proposed in this section was developed to address the specific problems identified in the first six sections of this Article. The proposed framework should prove principled, flexible and, therefore, stable. However it is not a panacea for every takings problem facing modern courts.

²⁷⁵ It is, of course possible to argue that common carriers involve actual public use even if a citizen's physical body is not using the property. To the extent that the common carrier exception is non-controversial, this Article would not object to including them within the category of clear public uses. However, because a category is always easier to broaden than to narrow, the decision whether to include common carriers is properly left to later scholars and courts.

²⁷⁶ This model would, however, drop Epstein's “force or fraud” requirement for the reasons argued in *supra* Part VIII.B.1.

First and foremost, the proposed model is not a prescriptive test for takings—it is only a framework. The use of heightened scrutiny for analyzing government actions falling within the zone of uncertainty, or stewardship power, is intended to improve protections for private property holders. However, its specific purpose is to require the government to provide a court with clear reasons and data—instead of bare conclusions—so that the court can detect government abuse. Once a court possesses these data, it still must exercise its own judgment to resolve the compensation and validity issue. However, under the proposed model, the court will be able to articulate the principles that motivated its decision within a framework clear enough to enable litigants and scholars to understand its meaning and to propound coherent criticisms. This removes the problem of circular logic such as “it is legal because it is lawful (an exercise of the police power)” that precludes analysis and criticism of the Supreme Court’s current model.

The second important attribute of this model is that it balances the interests of private property owners and the government in a more meaningful way than a single-tiered model. Epstein proposes applying intermediate-level scrutiny to all government takings to enhance the protections for property owners.²⁷⁷ This objective is laudable, but the method is overkill. Where the government can demonstrate that the taking is designed to abate a nuisance *without conferring an additional public benefit* or that the property actually will be used by the public, courts should be able to weigh the merits of taking without extensive discovery or rigorous analysis. This is especially true of actual public uses, which can be decided by the government simply averring that the property will be used by the public and briefly describing the method of use.

Where a case falls under the stewardship power, intermediate scrutiny provides a valuable safeguard. The government would be required to present evidence that its condemnation plan is designed to achieve a public benefit and that the taking is reasonably related to achieving that public benefit. The court need not place itself in the uncomfortable position of weighing the importance of a benefit to the public. Rather, this scrutiny would focus on determining that some benefit would result from the plan and the condemned property is related to the plan. Here, again, the framework proves flexible because courts may adjust the quantum of proof of a benefit that they require from the government or the degree to which the property must be related to that benefit.²⁷⁸ This enables the framework to accommodate a conservative approach—where the government would bear a significant burden of proof, a liberal approach—where the government could pass the test with minimal discovery and argument, or anything in between.

²⁷⁷ EPSTEIN, TAKINGS, *supra* note 21, at 181.

²⁷⁸ This could range from the low threshold of “reasonably related” to the high standard of “reasonably necessary” without harming the integrity of the analysis.

A third attribute of this framework is that it balances the interests of private property owners and the public even outside of the courtroom. Some opponents of heightened scrutiny argue that it will place too great a burden on the government and increase the cost of many socially-useful projects.²⁷⁹ The multi-tiered model accounts for this on two separate levels. First, where there is a clear public use or exercise of the police power, the government need not go through the time and expense of satisfying a heightened level of scrutiny. Second, even where heightened scrutiny is used, the burden on the government will not always be onerous. Where the validity of the government's purpose is readily discernable and the connection between the action and the ultimate purpose is straightforward, intermediate-tiered scrutiny should not entail extensive discovery or a lengthy trial. However, the more questionable the government's purpose is or the more tenuous the connection between the action and purpose is, the harder it will be to satisfy this burden. Considering that an exercise of eminent domain can uproot one or many families, it is not unreasonable to require the government to prove that it has a practical and reasonably forward-thinking plan for using the properties to confer benefits.

A corollary of this principle is that if the government has invested the requisite amount of thought and preparation prior to condemning the land, then intermediate-level scrutiny will be less onerous as the government already should possess much of the evidence necessary to prove its case. Where the government has not been particularly diligent, the specter of intermediate-tiered scrutiny provides a potent incentive to think twice before condemning property and encourages negotiation with property owners.

The advantages of the proposed multi-tiered framework stand in stark contrast to the faulty dichotomous analysis employed both by the Court and its critics. A rigid analytic framework that forces courts to choose between coherence and practicality under multiple ideations and over several centuries should not be tweaked, restated, circumvented or amended; it should be immediately and unequivocally rejected. The multi-tiered framework provides a far superior alternative, capable of yielding consistently principled and practical judicial determinations even as judicial attitudes towards takings changes. Accordingly, this Article urges the Supreme Court to abandon its faulty dichotomous takings analysis and adopt the multi-tiered model described herein. Only by doing this, can the Court give expression to the myriad legal principles and normative values which define and drive takings jurisprudence.

²⁷⁹ John D. Echeverria, *Georgetown Environmental Law and Policy Institute "Top Ten" Takings Issues*, American Law Institute-American Bar Association Continuing Legal Education: Annual Advanced ALI-ABA Course of Study (2004).