Majoritarian Theft in the Regulatory State, or What's a Takings Clause For?

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MAJORITARIAN THEFT IN THE REGULATORY STATE: WHAT'S A TAKINGS CLAUSE FOR?

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Oliver Wendell Holmes, Jr., most famously expressed the idea that regulation is theft in a 1922 epigrammatical aside: “the petty larceny of the police power.” That this oft cited phrase was an aside—indeed said sotto voce,

1. This remark is contained in a letter to Harold J. Laski dated October 22, 1922: “In this one [Jackman v. Rosenbaum Co., 260 U.S. 22 (1922)] my brethren, as usual and as I expected, corrected my taste when I spoke of relying upon the petty larceny of the police power, dele ‘the petty larceny of’.” I HOLMES-LASKI LETTERS 338 (Mark DeWolfe Howe ed., 1963) [hereinafter LETTERS]. That remark was contained in the following passage with the “dele” in brackets: “But if...it has been the [longtime] understanding that the burden exists, the land owner does not have the right to that part of his land except as so qualified and the statute that embodies that understanding does not need to invoke [the petty larceny of] the police power.” jackman, 260 U.S. at 31. In Jackman, Holmes made this earlier reference to the police power:

   In the State Court the judgment was justified by reference to the power of the State to impose burdens upon property or to cut down its value in various ways without compensation, as a branch of what is called the police power. The exercise of this has been held warranted in some cases by what we may call the average reciprocity of advantage, although the advantages may not be equal in the particular case.

Id. at 30.

The following inferences can be made from the above: (1) the other members of the Court did not believe that police power reduction of property values was theft; (2) Holmes thought petty theft could only be justified by “the average reciprocity of advantage,” i.e., we are all in the thievery together, stealing from one another; (3) a grand theft will likely not be covered by reciprocity and therefore might be a taking (thus presaging Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)) and (4) the rest of the Court, not having bought (1), did not believe (2) or (3) either. Thus “average reciprocity of advantage” was not, doctrinally, the justification for not requiring compensation for property values lost due to regulation. An alternative justification, one with which this article resonates, is that we hold all private property subject to police power interference such that value-giving uses of the things of property are not “property rights” (subject to being “taken”) until the uses become possessory. Holmes recognized that he was insinuating a
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off stage—is significant. His fellow judges thought it an impertinence. When a month later he made his views as to regulatory theft appear to be the basis of a takings decision, he muted the strident sound of police power thievery by talking about the "extent of the diminution." Moreover, he did not use any phrase that unmistakably identified value in land as property—"values incident to property" imply the opposite. Nonetheless, his reasoning seems to say—and has long been held by constitutional scholars as saying—that the market value of land is "property" within the meaning of the Takings Clause and that the state rationale not shared by his brethren, which is shown by the next line in the letter quoted above: "But I saved something that I really wanted by giving it a turn as if it might have come from the Court below—no false representations, only a slight ambiguity." LETTERS, supra, at 338. Obviously what he saved was "the average reciprocity of advantage" rationale by "giving it [the] turn" that "has been held warranted in some cases." Id.

The New York Landmark Preservation case, Penn Central Transportation Company v. New York City, 438 U.S. 104, 138 (1978) (Rehnquist, J., dissenting) shows this talk about "average reciprocity of advantage" to be no mere quibble. Penn Central, 438 U.S. at 147. 2. See, e.g., Jackman, 260 U.S. 22. Without dissent, Holmes held that the lower court judgment was "justified by the power of the State to impose burdens upon property... without compensation, as a branch of... the police power." Id. at 30. 3. Mahon, 260 U.S. at 413.

4. The idea that all uses of the things of property, actual and potential, are "property rights" subject to taking when barred by regulation seems quaint to me, but it is not an old idea. It began more or less with Holmes's opinion in Mahon. But see infra note 6. See Lawrence M. Friedman, A Search for Seizure: Pennsylvania Coal Co. v. Mahon in Context, 4 LAW AND HIST. REV. 1, 6-13 (1986). Thus Holmes's idea of property is quaint, not because the technical jural notion of "property" thereby implied was old-fashioned, but because the word "property" was used by Holmes to mean wealth. Legal culture has been seen as primarily concerned to protect the wealthy—the propertied class—in the era between the Civil War and the Great Depression. Substantive due process was a primary weapon in such protection. Holmes was seen as allied with Justice Louis Brandeis against the conservatism of legal doctrine, especially substantive due process. Now here is Holmes using another doctrine—the Takings Clause—to protect property as wealth and using the term "property," as a layman would to mean wealth. So I guess I am jarred by the notion of this progressive lawyer's lawyer (Holmes is the apotheosis of legal culture) using the word "property" like a layman and for a conservative cause.

Surprisingly, in THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, Professor Morton J. Horwitz asserts in a chapter entitled "The Progressive Transformation in the Conception of Property":

Though the broadest implications of Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871)] only gradually emerged, the case immediately presented a challenge to the prevailing idea that a taking constituted either a physical trespass or appropriation of title. Instead, it soon came to stand for the increasingly prevalent proposition that all restrictions on the use of property that diminished its market value were takings in the constitutional sense. By 1893, Pumpelly was being cited to support the expansive conclusion that any interference with the future income stream of an owner constitutes a taking of property.

can take some of this property, but if it "goes too far" it is an unconstitutional taking.\(^5\) In other words, the constitution will tolerate state petty larceny but not grand larceny.\(^6\) Whoops! Judges ought not to say such things,\(^7\) and they usually

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6. This idea of "property" meaning "value" may have seemed especially odd coming from Holmes. Louis Brandeis thought his old friend was, in the modern vernacular, "losing it." See *Liva Baker, The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes* 567 (1991):

   Brandeis concluded that Holmes's apparent turnabout should be attributed to a "heightened respect for property" he believed had become part of Holmes's growing old, a reversion to "views not of his manhood but childhood."

   Brandeis was one of Holmes's few friends who realized how hard it always had been for Holmes "to rid himself of undue regard for property" intellectually and that emotionally Holmes was entirely incapable of it.

   But even more, Brandeis ascribed Holmes's vote in *Pennsylvania Coal Co.* to an unaccustomed intellectual weakness that followed Holmes [major medical] surgery of the previous summer.

   *Id.* at 569. But see *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908) (Holmes as early as 1908 laying the groundwork for *Mahon*):

   For instance, the police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.

   *Id.* at 355.

   This tossed off bit of dictum, a mere aside in the case, shows that Holmes thought that "rights of property" included future or contemplated uses of property and that "rights of property" were property within the meaning of the Takings Clause. Moreover, he also clearly believed that "property" (within the Takings Clause meaning) can be taken without compensation. The state simply may not "take" so much as to make the "lot wholly useless." Thus, he suggests the all/some line for diminished value (if all value is lost, a taking; if some (any) value left, no taking). Therein lies the embryo for *Mahon* and *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

   See infra notes 112-27 and accompanying text.

7. See *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting):

   In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its
don’t, but that seems to be what Holmes said if we take his “talk” seriously. So for about seventy years the Supreme Court did not take his “talk” seriously in the sense of making a decision that depended on it, although they often cited the Holmes diminution of value dictum. But that changed in 1992.

In Lucas v. South Carolina Coastal Council, the Court, speaking through Justice Scalia, actually relied on the diminution of value theory for the first time. The whole nonsensical mess—property is market value, take some but not too much—was actually necessary to the result in Lucas. Although Justice Scalia sugarcoats his nonsense, the diminution of value theory is unmistakably necessary to the result. Furthermore, the diminution of value theory as an interpretation of the Takings Clause is unmistakably constitutional nonsense, as I shall make clear.

The burden of this article is not merely to make clear that Lucas was a true expression of the diminution of value theory (and is nonsense) but also to propose a reading of the Takings Clause consonant with its text, its history and constitutional sense. Moreover, I shall suggest an alternative basis for judicial review of the regulatory diminution of values, especially in land, and will argue that it is important to use this alternative as it has been used by state courts for years. To this end, I begin with a brief general discussion of constitutional interpretation and the text of the Takings Clause in Part I. In Part II, I discuss the development of the takings doctrine until Lucas. Part III describes the alternative to takings review, substantive due process. In Part IV, I propose my own formulation of Takings Clause interpretation and apply it to several paradigm cases including Lucas. In Part V, I sum up my view: subject to a “reasonable” due process review, the state may regulate uses of land to the hilt, but it may not steal (petty or grand) one’s property in one’s land.

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Holmes also dissented from the opinion of Chief Justice Taft that admitted illegally obtained wire-tap evidence because wire tapping was not literally a “search and seizure” within the Fourth Amendment. In particular, Holmes stated, “for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.” Id. at 470.

9. 112 S. Ct. 2886.
I. JUDICIAL REVIEW AND TAKINGS: SOME CONSTRAINTS ON DOCTRINAL DEVELOPMENT

A. The Letter of the Takings Clause

Three formal constraints exist on formulations of constitutional doctrine: text, context and judicial precedent. I begin with text both because the Constitution is important and because it is too often ignored. The text is important because it is a written document that is being interpreted.\(^{10}\) The

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10. Even Professor Ronald Dworkin, who advocates a very non-intentionalist program for legal interpretation, reminds us that central to his interpretation of a text is that it is the text being vivified not remade. RONALD DWORKIN, A MATTER OF PRINCIPLE 146-77 (1985) [hereinafter MATTER OF PRINCIPLE]; RONALD DWORKIN, LAW'S EMPIRE 45-86, 359-79 (1986) [hereinafter LAW'S EMPIRE]. “Interpretation of a text attempts to show it as the best work of art it can be, and the pronoun insists on the difference between explaining a work of art and changing it into a different one.” MATTER OF PRINCIPLE, supra, at 150 (emphasis in original). “The text provides one severe constraint in the name of identity: all words must be taken account of and none may be changed to make ‘it’ a putatively better work of art.” Ronald Dworkin, Law as Interpretation, 60 TEX. L. REV. 527, 531 (1982).

It is true that Professor Stanley Fish has famously skewered Dworkin for his interpretive theory by showing Dworkin to be an interpretive positivist (believing that words and texts have perspicuous meaning independent of any interpretation—the meaning is just “out there”). Stanley Fish, Wrong Again, 62 TEX. L. REV. 299, 309-11 (1983). Fish has also criticized Dworkin’s belief that there can be interpretation independent of attribution of a speaker’s intention. Id. at 313-16. My position—that texts are constraints on interpretation and that arguments about the Constitution’s meaning must begin and end with the words of the Constitution in order to be persuasive—is not inconsistent with Fish’s seemingly radical position. To outline Fish’s position:

1. There is no such thing as an uninterpreted text—a text is every particular (sensible) reading of the marks on paper. Every reading is an interpretation; there is no objective or “just out there” or positivist’s meaning. Texts do not constrain as if there were a preinterpretive object there. Id. at 301-03.

2. Interpretation is constrained by the convention of practice within a profession, discipline or community—conventions of description, argument, judgment and persuasion. Id. at 313.

3. Interpretation necessarily (psychologically, not analytically) includes intention: one cannot think of the meaning of something uttered without an intended agent; the agent is usually, but not necessarily, a historical person. Id. at 313-16.

With this in mind, if there is no Takings Clause “text” independent of any reading of the Clause, nonetheless the “constraining” interpretive practice of the legal and political culture includes a convention that words do have real, stable core denotative meaning which may change over time. Persuasion about what the marks on paper mean includes appeal to that deeply held belief. Moreover, if “intention” there always be, let that intention be like “the spirit of the age” or “the intentional structure of language.” Id. at 315. See BRUCE ACKERMAN, WE THE PEOPLE, FOUNDATIONS 3-31 (1991); James McLaughlin, What Has the Supreme Court Taught? Part II, 72 W. VA. L. REV. 326, 326-33 (1970).

I am not saying, in any event, that the text is the beginning and the end of argument about its meaning. Instead, any argument about the meaning of a text of written law ought to begin and end with the marks on paper conventionally called the “text.” This is because interpretive practice
formulation must flow plausibly from the words in the text. The use of the words in the text must seem natural to those who speak our language as informed by our legal culture. This is a constraint from the idea of written law itself. Since the institution of judicial review is premised on our Constitution being written law, this formalist constraint is imperative to legitimacy. To some the formalist constraint will seem but a truism; to others it will seem a relic of the age of classical legal orthodoxy—an orthodoxy swept away by "legal realism," "progressivism" or "pragmatic instrumentalism," i.e., swept away by dominant

in our polity concerning the meaning of the Constitution assumes that there is an external, objective text that constrains; it is that assumption that justifies judicial review in some part (for Marshall, it was the whole justification). Therefore, our argumentative practice dictates that we refer to the words of the text in a manner showing that we take the assumption seriously. Beginning and ending with those words is a methodology that shows adherence to that argumentative practice. See infra note 11.

11. "Begging" for a moment Chief Justice Marshall's begging the question in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the opinion is pregnant with the idea that a written constitution must be applied by courts like other law, and when the legislature acts so as to transgress the words of the Constitution, then the act is void. ("Thus, the particular phrasing of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument." Id. at 180 (first emphasis added)).

What Marshall assumed was that words, and words in sentences and sentences in . . ., etc., have plain meanings and, indeed, true (or what we might now say as "objectively true" or just "objective") meanings. He did not assume that every reading is an interpretation, nor that every interpretation is subjective. To Marshall, words do not usually need to be interpreted (the word "interpret" appears once in the opinion) and when they must be "construed" their true meaning in context must be retrieved. Listen to Marshall in Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 441 (1827) (emphasis added):

The power [to tax persons and property within their territory], and the restriction on it, though quite distinguishable, when they do not approach each other, may yet, when the intervening colors between white and black, approach so nearly, as to perplex the understanding, as colors perplex the vision, in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise.

Would we not say, "yet the distinction must be made, and we are the ones who have to make it"? Marshall had earlier referred to "the true meaning of a clause." Id. at 437.

When our Constitution was written and the institution of judicial review developed, Marshall's assumptions were the assumptions of legal culture and most educated people, and they still may be. See Fredrick Schauer, Easy Cases, 58 S. Cal. L. Rev. 399 (1985) [hereinafter Easy Cases]. No matter how naive (or clever) we now think Marshall had been (See William W. VanAlstyne, A Critical Guide to Marbury v. Madison, 1969 Duke L.J. 1), his assumptions are how we, as a polity, are constituted. To be true to ourselves, legal argument about the meaning of the Constitution ought to begin and end with its words no matter how wide the argument might range in between.


13. See Horwitz, supra note 4.
However, even conceding that the premises of realism dominate modern thought, "pragmatic instrumentalism" has never advocated throwing out the formal "baby" with the non-functional, non-contextual "bath water."\footnote{15}

How might this make a concrete difference in formulating an interpretation? Two examples of violations of the textual constraint illustrate my point. The Court resurrected the Contract Clause\footnote{16} in 1977.\footnote{17} Justice Blackmun wrote the opinion in which the Court struck down a New Jersey modification of the terms of a contract with investors in New York Port Authority bonds.\footnote{18} He could have said, consistent with prior doctrine, that the modification concerned a central undertaking of the contract and therefore was an "impairment" in violation of the absolute language of the Constitution that "No State shall... pass any... Law impairing the obligation of Contracts."\footnote{19} Instead, Blackmun wrote that the "impairment" could be sustained if it was both "reasonable and necessary to serve an important public purpose."\footnote{20}

The only logical conclusion from this is that the language of the Constitution has been changed and now should read: "No state shall pass any law impairing the obligation of contract except when reasonable and necessary to serve an important public purpose." What warrant is there for such amendments to the Constitution? None, of course.\footnote{21} The argument that every interpretation


16. U.S. Const. art. I, § 10: "No State shall... pass any... Law impairing the Obligation of Contracts."

17. Lynch v. United States, 292 U.S. 571 (1934) (applying the same principle to the federal government through the Due Process Clause of the Fifth Amendment).


21. Justice Blackmun did say that the reason every "technical impairment" was not a violation of the Contract Clause was that the Contract Clause must be reconciled with the "essential attributes of sovereign power" reserved to the states. Id. at 21 (quoting Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 435 (1934)). This logically means that every limitation on state or federal power is subject to an ad hoc reasonableness test that balances the limitation against the essential attributes of sovereign power—including the First Amendment. This seems an odd way to write a constitution: to put things in absolute sounding language but imply an exception for all absolute limitations in the name of sovereign necessity. Thus it was unnecessary to qualify expressly the proscription on suspending habeas corpus or on states laying imposts and duties on imports or exports.
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is an amendment simply defies the usual and generally accepted use of the terms interpretation and amendment. Interpretation gives meaning to terms used in the text to be interpreted. It does not add terms. To be faithful to the text, the Court could have said: the word “impairing” is fairly strong; every “modification” of contract terms is not an impairment; an “impairment” requires a modification of a central, bargained for, undertaking of the contract. The Court alternatively might have deviated from prior doctrine by concluding that only modifications of central undertakings which are wholly unforeseeable are “impairments.” But within the constraints of the ordinary understanding of the meaning of words in our language, one could not say that a “modification of the terms of a central undertaking of a contract” is not an “impairment” (or “a law impairing the obligation”) if state exigencies require such modification. The word “impair” will not bend so far.

The ordinary user of our language in our culture, and informed by our legal culture, would say of such a proposed meaning: “You have given ‘impairing’ an entirely new meaning. You have either modified the word

When Chief Justice Hughes used the language “essential attributes of sovereignty,” he was referring to the well-established doctrine that the power of the state to regulate behavior and activity for the public good cannot be qualified by the fact that some people may have in the past agreed inter se to engage in the now proscribed activity. Blaisdell, 290 U.S. at 435. By contracting into the future one may not freeze regulation for the parties to the time of the contract. Therefore, without qualifying the absolute language in the Contract Clause, the Court has always held that in order for a law to impair a contract obligation it must concern the contract impaired or focus on contracts of the kind impaired, as in Blaisdell. See also El Paso v. Simmons, 379 U.S. 497 (1965) (upholding the contract because there was no impairment); United States Trust, 431 U.S. 1 (striking down an impairment). Lack of such focus caused the Court to find no violation in Energy Reserves Group, Inc. v. Kansas Power & Light, 459 U.S. 400 (1983), and Exxon Corp. v. Eagerton, 462 U.S. 176 (1983). In the latter two cases, the impact on contracts was simply “incidental” to a law generally regulating behavior or activity.

22. See El Paso, 379 U.S. at 506-07, 514. Justice White’s words were that “not every modification of a contractual promise that impairs the obligation of a contract” was a violation of the Contract Clause and that the “promise of reinstatement” lost by state enactment “was not the central undertaking of the seller nor the primary consideration for the buyer’s undertaking.” Id. (emphasis added). Therefore, to White, the “modification” was not an “impairment.” See also Blaisdell, 290 U.S. 398. Chief Justice Hughes began and ended with the words of the Contract Clause. His argument for upholding a mortgage moratorium act contained language defending the reasonableness of the measures taken but emphasizing the limited nature of the intrusion on contract rights, an intrusion not amounting to “impairing.”

23. See Energy Reserves Group, 459 U.S. 400. Justice Blackmun noted that, because Energy Reserves Group knew at the time of contracting that it was subject to both state and federal regulations of prices, a change in those very regulations would not constitute the “substantial impairment” required to trigger the contract clause. Id. at 415-16. If he had said that because the changes were foreseeable they did not constitute an impairment within the meaning of the clause I would not quibble, but Blackmun found warrant to add “substantial” to the constitutional language. He then went on to add that even if a “substantial impairment” were found, it would not be unconstitutional unless it was determined to be “unreasonable.” Id. at 411-12.
‘impairing’ with a word not in the text, such as ‘unreasonably,’ or you have substituted another word for ‘impairing’ as the true word of the text.” In either event, the patient user of the interpretation will want an explanation for this implied emendation of the text. Perhaps a satisfactory explanation can be made, but my point here is that fidelity to text (written law, perhaps law itself, is at stake here) forces the interpreter into a different kind of justification than one premised in the radical pragmatism of Justice Blackmun in United States Trust Co. v. New Jersey. Not just the spirit or the letter alone, but the letter and spirit taken together are essential to the idea of law.

Holmes in Mahon makes the same mistake of ignoring the letter of the Constitution. He said, in essence, that the state can “take private property for public use, without just compensation”—exactly what the Constitution says it cannot do—“but if it takes too much property without just compensation” then it is unconstitutional. Remember, Mahon and, of course, now Lucas are

24. 431 U.S. 1.
25. See LAW’S EMPIRE, supra note 10, at 378 (referring to “a virulent form of legal pragmatism” as “activism”). Dworkin stated that “[a]n activist justice would ignore the Constitution’s text, the history of its enactment, prior decisions of the Supreme Court interpreting it, and longstanding traditions of our political culture.” Id.
26. The precise words Holmes used are as follows: “The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” Mahon, 260 U.S. at 415. Holmes further added: “As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions.” Id. at 416. He also noted:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.

Id. at 413.

As pointed out below, see infra text accompanying notes 54-71, the decision in Mahon can be justified (and indeed was justified by Holmes in other language) as a question of kind, not degree and thus a violation of the language of the Takings Clause (“nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V). Nothing, however, about this constitutional language invites matters of degree except to say that a de minimus interference might not be a “taking.” But, even an arguably de minimus interference with palpable physical possession has been held to be a taking. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Professor Lawrence Tribe criticized the decision in Loretto on just that ground: “This obsession with permanent physical invasions of even the most de minimus variety borders on fetishism.” LAWRENCE H. TRIBE, CONSTITUTIONAL CHOICES 177 (1985) (emphasis added). On the other hand, the language of the Due Process Clause, “nor be deprived of life, liberty, or property without due process of law,” U.S. CONST. amend. V, invites matters of degree in its substantive component.
vulnerable to the criticism that their doctrine is analytically impossible to use, that it is seldom followed in a decisive way by courts and that it ought not to be followed in any event. The criticism rephrased is that it cannot, has not and ought not to be followed. I am making a different kind of criticism here. Mahon amends the text. It amends the text without explanation of its warrant to so amend.

Context and precedent are also important formal constraints on interpretation. “Context,” in the setting of constitutional interpretation, is not only the rest of the constitutional text, but the historical setting of the creation of the text and the fact that it is a constitutional, i.e., foundational, text. The precedential gloss applied by two centuries of Supreme Court (and other court) use, no matter how unappetizing the potpourri of recipes provided, is a constraint of considerable depth and breadth. Obviously, inconsistent precedent ought to be reconciled if possible, but some precedent simply will not fit, as we shall see. Nonetheless, the main line of precedent must be followed. The idea of law requires it. 27

Holmes did not explicitly state that contemplated uses of property were “rights of property.” His reference to “rights of property” was to a recognized estate in land that was destroyed, but he proceeded on the premise (from what is quoted above) that “values incident to property” were themselves “property” subject to being “taken” by regulation. Mahon, 260 U.S. at 413. In one phrase he recognized the distinction between “value” and “property” but then went on to confuse that meaning into the one word “property” in the text. Id. at 414. Thus Holmes’s atextualism is dual: he ignores careful definition or any real analysis of the word “property” in the text, and he assumes that “be taken” is a matter of degrees of interference without explaining how the verb “to take,” which does not intuitively invite such use, means “to interfere too much” in the context of the constitutional clause.

27. Indeed, except for the diminution of value “talk” in Mahon and the recent decision in Lucas, the United States Supreme Court doctrine has been quite consistent with text, context and precedent and makes considerable sense as a whole, although individual opinions are often muddled. See, e.g., Justice Brennan’s opinion in Penn Central Transportation Company v. New York City, 438 U.S. 104 (1978), discussed in the text below. Commentators are fond of saying that the doctrine is in an awful mess. See, e.g., Jeremy Paul, The Hidden Structure of Takings Law, 64 S. CAL. L. REV. 1393 (1991), referring to our being “perplexed” by the question and “the Supreme Court’s professed inability to provide a general solution.” See also Carol M. Rose, Mahon Reconstructed: Why the Takings Issue Is Still a Muddle, 57 S. CAL. L. REV. 561 (1984); Andrea L. Peterson, The Takings Clause: In Search of Underlying Principles (pt. 1), 77 CAL. L. REV. 1301, 1303-04 (1989) (“[I]t is difficult to imagine a body of case law in greater doctrinal and conceptual disarray.”); Lawrence Blume & Daniel L. Rubinfeld, Compensation for Takings: An Economic Analysis, 72 CAL. L. REV. 569, 570 (1984).

Had Holmes not put his oar in the water in Mahon and had economic substantive due process not been so thoroughly discredited (in part by Holmes in his famous dissent in Lochner v. New York, 198 U.S. 45 (1905)), the muddled talk in individual cases would not occur. See discussion infra part III.
B. The Spirit of the Takings Clause

The "spirit" of any constitutional text is the set of underlying purposes and values implied in the text. How is such spirit divined? It is certainly not some crude original intent or founders' intent—though that, if somehow discoverable, is relevant. It is, rather, the present people's collective intuition as divined by the collective intuition of the Court as informed by text, context, precedent, constitutional history, legal history, political history and social history. It is rhetorical and argumentative. It is also important.

What is the societal intuition that informs the spirit, which is to say the purpose and function, of the Takings Clause? It is the concept of theft. The Takings Clause bars state theft, official theft and majoritarian theft. As the debtor majority may not vote forgiveness of its debts, so also the less wealthy majority may not simply award itself land and other wealth of the more fortunate minority.

Before examining existing formulations of the taking rules, two other constraints of a common sense nature can be identified for the new formulation of a takings rule, attributes which have special relationship to its being a rule of property law as well as constitutional law. These attributes are but two aspects of the same consideration: When government action causes a loss in property values, compensation should be the same for all losers commensurate with the market value of the "thing" lost at the time of its "taking" by the government. While this proposition may seem self-evidently to be the only fair method of determining the extent of compensation, it has two implications for compensability which have been missed apparently by some commentators, although not and should be added by the courts. These two implications are that compensability must not turn on: (1) when the owner acquired the apparent right to use the land in a certain way, which use is now "lost" because of some

28. See supra note 16.
29. Theft as to land no doubt includes the idea of trespass, an action for which a remedy exists in common law, the ancient Writ of Trespass. Moreover, theft is a concept immanent in the state as conservator of private ownership and private deals and transfers of ownership; the Lockean State—what Morton Horwitz calls disparagingly the "night watchman state." Horwitz, supra note 4, at 19. See also Lloyd Weinreb, Natural Law and Justice 76-83 (1987). When the Takings Clause was formulated and enacted in 1791, the state as conservator was its chief role and end. The state as provider and regulator was mostly in the future. The state's role in 1791 was to preserve existing "natural" arrangements (minus natural aggression—already condemned in John Locke's vision by strong moral proscription, i.e., natural aggression was naturally condemned) by restoring them through civil law and punishing gross transgressions through criminal law.
government action; or (2) whether the apparent right to use the land in a certain way (now lost) was divided from the fee simple estate in the land. In other words, time of acquisition and divided ownership of the fee "cut no ice." The speculator who only owns the mineral rights in a hundred acre tract should be in no better position to claim a compensable loss when stripping as a method of removal of the mineral is banned than a speculator who owns the whole fee or a farmer who owns the whole fee and has never had any intention of strip-mining the coal in his land. Similarly speculator "A" who bought the mineral rights in 1950 when no public ferment to ban stripping was brewing should be treated the same as speculator "B" who bought the mineral rights in 1970 when there was such public ferment. Either the ban is compensable to both or to neither. And this should be so, despite the fact that the price in 1970 noticeably and significantly reflected the risk of a potential ban. The same is true of three identical parcels: one inherited in 1930 as farm land of modest value, one bought in 1950 as farm land of modest value, and one bought in 1980 as the potential site for a housing subdivision at fifty times the 1950 price. In 1990, all three lots are worth 100 times the 1950 price when the housing subdivision use is nixed by a subdivision ban. Either the ban is a taking for all three or for none.

II. A Description of Existing Takings Doctrine

A. Introduction

The Supreme Court's doctrine is eclectic in rhetoric but less so in results—at least until Lucas. The Court's rhetoric moves along three natural paths, each having its own history and conceptual foundation. First and foremost, there is the rhetoric of physical invasion. When the government physically invades your property, you must be compensated. Most cases finding a taking ultimately hinge on this basis. Indeed, Mahon can best be explained by the rhetoric of physical invasion rather than diminution of value. Second in importance is the rhetoric of governmental purpose—the harm/benefit test. If the governmental action is aimed to eliminate an evil, then it is not a taking; if it merely confers a benefit, it may be a taking. Third is the rhetoric of lost value or sacrificed worth—the Holmesian rhetoric of Mahon. The Supreme Court never actually decided a case on this basis until Lucas. It is nonsense, but a most appealing nonsense.

30. See infra text accompanying notes 76-79.
33. Mahon, 260 U.S. 393.
34. Id.
I shall briefly expand on this description and in the three following sections, critique each approach. Additionally, the Court and commentators have sometimes talked of “balancing” and “reasonableness” as if they are part of takings rhetoric, but such talk is plainly the rhetoric of substantive due process. Unfortunately, economic substantive due process has been so thoroughly discredited by the progressive judges of the post-New Deal era that nobody has seriously made arguments under the substantive due process rubric for some sixty years.35

Physical invasion rhetoric is resonant with the notion that all private property is held with the understanding, and thus the expectation, that property in something is not absolute. Property is subject to the paramount power of the state under three headings: eminent domain power, police power and taxing power. Moreover, it is limited by the judicially developed doctrine of common law nuisance.36 In other words, the state may force you to sell your “property,”

35. See John H. Garvey & T. Alexander Seinikoff, Modern Constitutional Theory: A Reader 483-502 (1991); Robert G. McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 SUP. CT. REV. 34. The Court used substantive due process to strike down a land use regulation in Nectow v. City of Cambridge, 277 U.S. 183 (1928), but since then it has not been used. Since 1937 no economic regulation has been struck down under substantive due process by the Supreme Court. See Geoffrey R. Stone, et al., Constitutional Law 812 (2d ed. 1991). State courts, however, regularly use substantive due process, especially to review zoning regulations. “Constraints on municipal adoption of inefficient zoning controls spring almost entirely from the Due Process Clause of the Fourteenth Amendment, which is construed to require that each zoning restriction be reasonably related to a legitimate government objective.” Robert C. Ellickson & A. Dan Tarlock, Land-Use Controls, Cases and Materials 63 (1981). Nonetheless, the due process language of efficiency and reasonableness is used by the Supreme Court in upholding state legislation. See, e.g., Penn Central, 438 U.S. at 136-38. See infra part III.

36. For an excellent history of the development of American nuisance law, see Jeff L. Lewin, Boomer and the American Law of Nuisance: Past, Present and Future, 54 ALB. L. REV. 189 (1990). The common law of nuisance is rooted in the notion of sic utere tuo ut alienum non laedas (“so use your own as not to injure that of another”). William Aldred’s Case, 77 Eng. Rep. 816 (K.B. 1611). This meant that no matter how valuable the use of your land was to you or your community, if it injured another, you were liable for damages or could be enjoined. “[O]n the eve of the American Revolution, the rule of sic utere tuo provided absolute protection against interference with the essential attributes of land ownership.” Jeff L. Lewin, The Silent Revolution in West Virginia’s Law of Nuisance, 92 W. Va. L. Rev. 235, 244 (1990) [hereinafter The Silent Revolution]. The correlative proposition to this “absolute protection” was that one had an absolute limitation on the use of one’s property so as not to injure others. This could be seen as a limitation on, or qualification of, one’s property interests in the interest of others. Only an actual use (as opposed to a contemplated future use) could be a nuisance, and thus nuisance always applied to existing or established uses of land and the declaration by a court of the existence of a nuisance always looks back to the beginning of the hurtful use. The court makes a finding of nuisance as a matter of fact. Such finding has a retrospective aspect about it like all common law tort findings. The sense of retrospectivity is a function of the vagueness of the legal standard applied, the esoteric nature of the standard and the newness of the standard. Indeed, if the standard is novel, then it creates the same feeling as an ex post facto law—great unfairness. But where the standard is both vague and
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the state may regulate the uses of your “property,” and the state may tax your “property,” i.e., make you pay rents to the state on your property. Moreover, your use and, to some extent, possession have been forever limited in the interests of your neighbors and community. Whether these qualifications on property are esoteric, as it is with nuisance, novelty can be hidden. My point, and what is important to my thesis, is that “nuisance” is fundamentally different from “police power” as a justification for interfering with property uses. Nuisance always looks back to the beginning of existing uses; the police power looks forward to future uses.

37. In Jackman, Justice Holmes, in upholding as not a “taking” a law allowing an actual physical encroachment, relied on the preexisting qualification on the property owner’s possessory interest in a strip of his land six inches to a foot wide on the edge of his property, rather than the Pennsylvania Party Wall Law. “It is enough to refer to the fact also brought out and relied upon... below, that the custom of party walls was introduced by the first settlers in Philadelphia under William Penn...” Jackman, 260 U.S. at 30. That allowed Holmes to conclude:

[I]f, from what we may call time immemorial, it has been the understanding that the burden exists, the landowner does not have the right to that part of his land except as so qualified, and the statute that embodies that understanding does not need to invoke the police power.

Id. at 31.

In context this shows more than Holmes’s reluctance to invoke the police power to uphold regulation against a takings claim. The taking in Jackman clearly involved a physical invasion which ordinarily cannot be accomplished without compensation merely by invoking the police power. (See infra part II.B). So Holmes’s reluctance to use the police power was consistent with past and future doctrine. Moreover, a preexisting qualification on the property right has always been, and naturally seems to be, a better justification for state regulation of land use than the mere police power: the state is merely defining and formalizing existing rights, not upsetting rights and their attendant expectations. States will often invoke this kind of rationale in justifying a particular regulatory measure by invoking the common law nuisance doctrine. The state will define some existing use of property as a nuisance and thus invoke the notion that it is merely defining and formalizing existing rights. The nuisance has all along existed; the state is simply announcing that fact, defining precisely the parameters of the nuisance and formalizing procedures to remedy the injury. See Miller v. Shoene, 76 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915). Indeed, an argument can be made that that is the only way existing uses of property can be regulated out of existence. Existing uses, I argue below, are possessory; they create fixed and settled expectations, i.e., they are property subject to regulatory taking. The mere police power cannot touch them. See infra note 39.

The difficulty with invoking nuisance rather than a police power justification for regulation is pointed up by contrasting “nuisance” as a preexisting qualification on preexisting property right with the qualification in Jackman. The party wall qualification was well-established and defined by clear understanding since colonial times. A nuisance exists only in theory—it awaits judicial action for its definitive announcement, definition and remedy. Thus when a legislative body tries to preempt the judicial task and “declare a nuisance,” judicial review of such “declaration” ought not to be deferential. Where the court is investigating not insignificant interference with an existing or established use of land, then a thorough judicial review of whether in fact a nuisance existed ought to be conducted. Only in that way can the court be satisfied that a preexisting qualification on the property right existed. Only in that way can the regulation of established uses be justified without compensation.

Justice Scalia does exactly that in Lucas, 112 S. Ct. 2886. Unfortunately for the Council, (and for history, text, and good sense) Scalia for the first time applies this doctrine to a
nonestablished use, a future use, a use in contemplation only. Such uses have always been regulated by strict police power control subject only to a highly deferential reasonableness review in the name of substantive due process.

38. Pre-political rights are akin to natural rights, the rights we have in a state of nature from which John Locke and others would have us form governments. Generally they are the right to physical integrity and to possess unmolested our land and goods. They are not a product of political choice or political will but exist in the very nature of individual human striving within a community. Those who believe in pre-political rights (e.g. Jefferson, Madison) believe that most of our important rights are pre-political. See Horwitz, supra note 4, at 196-97.

39. Post-political rights are rights embodied in legal entitlements. They are the product of political choice and of political will. They are obviously subject to change or repeal. Those who believe that all rights, including constitutional rights, are post-political are called legal positivists. Legal positivism in some form or other dominates legal culture today. Professor Horwitz posits that a shift in dominant attitude within the legal community as to the nature of property rights from their being pre-political to post-political (he says "political," not "post-political") was necessary in order for the Progressive Regulatory State to thrive. Holmes was foremost in leading this change. Brandeis was close behind. But, alas, as Brandeis lamented after Mahon he was more committed than Holmes. See supra note 6. See also Horwitz, supra note 4, at 203-05. That shift makes no difference in fact or theory to the development of the takings doctrine.

But see Paul, supra note 27, who believes this problem to be central to such development. In theory, if property rights are all post-political, then the state can at any time redefine or redesignate "property rights" by positive enactment—"you had a right to develop your land, now you do not"—and thus there are no limits on the state's power to regulate your land (or other things of property) save reasonableness. This translates into a very weak standard (substantive due process) for judicial review. Thus legal positivism emasculates the Takings Clause.

But legal positivism also posits that the written constitution is positive law, and thus the words "nor shall private property be taken for public use" must be given specific content and applied to ordinary enactments. A positivist can comfortably interpret that language to mean that when the state says a particular claim rises to the level of being "property" then it is not changeable without due process (substantive or procedural) and without compensation. The positive words of the constitution must be followed. The word "property" can be said to be some sort of natural concept with a "true" content or at least a historically "true" content (i.e. is a pre-political idea not subject to political change) or it can be said to be a social construct, a mere convention. Moreover, part of the received convention is that property is an idea of central importance to social life and that once the label "property" attaches it cannot be altered except as constitutionally prescribed. In other words, whether the concept is a natural one or a conventional one once it attaches, change can only be by a constitutionally prescribed way.

The development of civil procedural due process is an example of this. After Goldberg v. Kelly, 397 U.S. 254 (1970), a state-created entitlement was thought to be included in the concept of property such that one could not be deprived of an entitlement without a fair process, and, while the state could place prospective substantive qualification(s) on the entitlement (including destroying it), the state could not retroactively destroy it and the state could not qualify the entitlement with processes for determining its individual instances that are deemed by the court to be unfair. See Charles Reich, The New Property, 73 Yale L. J. 733 (1964); Arnett v. Kennedy, 416 U.S. 134 (1974) (Powell, J., concurring) ("While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.") Id. at 167 (emphasis added). Powell's statement became doctrine in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).
makes no difference; the expectation of owners is the same—the state may take, regulate, tax or declare noisome the things of property. The restrictions on these qualifications in the name of limited government, the Lockean social contract, or the rights of free citizens are that takings must be for public use and justly compensated, that regulation must be reasonable and that taxing must be based on reasonable classifications. Thus, the “Takings Clause” is, at least principally, a limitation on eminent domain power, and this clause is often called the Eminent Domain or Just Compensation Clause.

The Court’s physical invasion rhetoric is an attempt to separate taking property, which must be compensated, from the regulation of property, for which no compensation is necessary so long as the intrusion is reasonable. The following intuitive reasoning explains this separation: If the state may regulate the things of property, it obviously must be the human uses of such things that the state may limit or ban. This logically invites a separation between “uses” and “things.” Because it is deeply embedded in our legal culture that “property” is not exactly the “thing” (although the word “property” is very often used this way), we say “property” is rather a right or set of claims in the “thing.” Now, that set will include claims to use the things of property in an infinite variety of ways, many or most of which will affect other human beings and their “things” of property and thus may be regulated. The claims to use are thus modifiable. The right to the thing itself is not subject to regulation but only to confiscation. The right to the thing itself versus the right to use the thing is thus the line between expropriation (eminent domain) and regulation. This distinction is the basis for the physical invasion test.

41. See, e.g., GARVEY & SEINIKOFF, supra note 35, at 254.
42. See, e.g., TRIBE, supra note 26, at 179.
43. “Things” of property are usually, or at least most commonly, thought of as physical (land, chattels); there are many intangible “things” of property—the going concern worth of a business, its good will, for one.
44. They should perhaps be called privileges and not rights. See HORWITZ, supra note 4, at 152-56, explaining Wesley N. Hohfeld’s famous fundamental jural relationships. For example, Horwitz states:

The right of ownership in a manufacturing plant is, to use Hohfeld’s terms, a privilege to operate the plant, plus a privilege not to operate it, plus a right to keep others from operating it, plus a power to acquire all the rights of ownership in the products. The analysis is not meant to be exhaustive. Having exercised his power to acquire ownership of the products, the owner has a privilege to use them, plus a much more significant right to keep others from using them, plus a power to change the duty thereby implied in the others, into a privilege coupled with rights.

Id. at 164 (quoting Robert L. Hale, Rate Making and the Revision of the Property Concept, 22 COLUM. L. REV. 209, 214 (1922)).
Physical invasion is a way of talking about affecting rights to the thing itself as opposed to rights to use the thing. Rights to the thing itself are captured by the word "possession," and we can talk of possessory property rights or "core" property rights. The rights to use are non-possessory interests or perhaps "privileges" or "powers." So the physical invasion test is a way of drawing the takings line by focusing on the kind of property interest that is being altered by the governmental action. It is intuitively very appealing. The distinction between possession and use seems obvious and simple to mark out. Of course, it's not so simple to "mark out" as our later discussion will explore—but for the time being, note that the physical invasion test focuses on the kind of property interest being affected.

By contrast, the harm/benefit rhetoric focuses on the kind of governmental power being exercised. The simple premise is that the exercise of eminent domain power is subject to the just compensation principle, while the exercise of the police power must only be reasonable. In the nineteenth century, the police power, which we now think of as simply the power of internal or domestic regulation, was circumscribed by a set of limiting concepts. Thus, it could be defined as the power to protect "public health, safety, morals and general welfare." Perhaps the most important word in the nineteenth century was "protect" as contrasted with "promote." In any event, the police power was the power to prevent, mitigate or cure social ills—evil was its target. On the other hand, eminent domain was exercised to acquire resources to benefit the public. Generally, the exercise of one power or the other took a distinct form such that looking at the form of legislative action would tell a court whether to use the Just Compensation Clause or the Due Process Clause. A regulatory act does not look like an expropriation bill. Thus we have an easy way to sort out the cases. But what if a clever legislature used the form of regulation to achieve the ends of eminent domain? Thus instead of attacking an evil, it confers a benefit on the public but without having to pay for the benefit. The courts ought to be vigilant against such craft. Alas, as we shall see below, the harm/benefit distinction is much less satisfactorily marked out than the use/possession distinction.

Finally, the rhetoric of lost value cares not about distinctions between kinds of property interests or kinds of governmental action but about degrees of lost value. Its remarkable appeal in the face of daunting conceptual and functional objections is that it gets us where our sense of justice lives—in our pocket books. What hurts about onerous property regulations is not so much the loss of use or possession of land or chattels, but the loss of their value. Indeed, this is a truism. So why not focus on the value lost when testing regulation for a Takings Clause violation? In America most things of property, that is things that can be owned, can be traded, so we have a ready measure of our lost

45. See infra note 47.
46. ERNST FREUND, THE POLICE POWER § 29 (1904).
value—the lost market value.\textsuperscript{47} Since the loss of market value is what discomforts us when government regulates, the constitutionality of regulation ought to be tested by loss of market value. But because government regulation affects the market value of the things we own in a myriad of ways, every loss of market value cannot be a taking.\textsuperscript{48} So how much loss is enough? That’s the hard part. "At least it must be a taking if all market value is lost."\textsuperscript{49} When all market value is destroyed by regulation, then the state must compensate. But that’s not much of a rule because regulation will essentially never destroy all market value. In law, however, “all” seldom remains unmodified—first “essentially all,” then “substantially all.” Logically if the loss of “all” is compensable, why should “almost all” not be compensated? And if “almost all” why not “almost, almost all” and so forth. So the all/some line will break down unless there is some reason, beyond needing a bright line, to sustain it. One reason for a pristine all/some line which might be suggested is that when one loses all valuable uses of one’s land, one is effectively dispossessed—i.e., the value test becomes a possession/use test. But, if the loss of all valuable uses is an ouster of possession, then why is not the loss of almost all valuable uses not a partial ouster, and even minuscule ousters of possession are compensable.

Thus, the value lost test (diminution of value) is left in a true dilemma: either it draws a “logical” all/some line which cannot be otherwise justified and which will, in any event, decide no cases, or it draws an arbitrary “some percentage” line which for several reasons described in the next section, makes no sense even beyond its mere arbitrariness.

B. The Rhetoric of Property Concepts: The Physical Invasion Test

As suggested above, the dominant rhetoric of takings cases elaborates a theory of property rights in order to distinguish between legal interests in things that are subject to the Eminent Domain Clause and those that can be regulated without exercising eminent domain and its requirement of just compensation. The argument from historically established property concepts is as follows: Possessory interests in things can be bought and sold, whether the possession is partial or complete, temporary or permanent. "Use interests" in things are rarely bought and sold separate from possession. The particular use of things possessed can be a condition of possession, but the consequence of violating the condition is usually loss of possession. Although there are ways to configure use so that it too can be the subject of alienation, usually to allow another person "to use"

\textsuperscript{47} "Just" compensation for the “taking of private property for public use,” has uniformly been held to be its “fair market value.” See 8 PHILLIP NICHOLS, THE LAW OF EMINENT DOMAIN § 14E.02 (Julius Sackman ed.) (rev. 3d ed. 1973).

\textsuperscript{48} Justice Holmes, of course, conceded this in Mahon.

one’s “property” is to turn some part of possession over to that person. Thus, the notion of the saleability of uses is the exceptional case—an occasional servitude or covenant. Possession is thus associated with transferability; it’s the “right” to the “thing” that is transferred. The “thing” transferred is usually physical, and transfer is associated with the change of physical dominion. Even an easement is a right to a certain physical presence.

Thus, anything that physically invades land or other “things” of property is an interference with possession and hence with the property itself. For the state to authorize or legitimate a physical invasion without the owner’s consent is to take the property—to take possession of and dominion over some part of the thing itself. That taking of possession always requires payment when the government is not involved. If it is not paid for, such taking is called theft or trespass.

Thus, when government action causes the flooding of private land, the owner is physically ousted from his land. Technically, the owner owns the space, but the space now has something not of the owner’s choosing. The land is now possessed by the water. The water is a clear instrument of trespass. Similarly, if airplanes fly low over a farmer’s house and barns, his air space is physically invaded. He still owns the space, but someone not of his choosing is occupying the space, even if very briefly. If the flyovers are regular, then an easement has been taken and easements must be paid for. Almost every case finding a taking by the United States Supreme Court can be explained in the aforementioned fashion. Even Mahon falls in this category. The apparent exception to the rule is Lucas. 53

1. Mahon as a Physical Invasion Case

But how does Mahon fall into this category? Mahon seems like a “use” rather than a “possession” case. After all, the Kohler Act “forbids the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a human habitation, with certain exceptions, including [among the exceptions] land where the surface is owned by the owner of the underlying coal.” In other words, where the surface is owned by another, one may not use the land so as to cause the surface to subside. The owner of the coal still “owns” the coal; nobody and no thing interferes physically with the coal underground. The owner simply may not use his subsurface possession, the

52. 260 U.S. 393.
53. 112 S. Ct. 2886.
owned thing, so as to cause injury to another person's property. Indeed, the prohibited use is the removal of the thing possessed. Under the ground it has no value at all except to hold up the surface. So having to leave it in the ground makes it totally worthless to someone who does not also own the surface. From this idea, one can easily see what prompted the "diminution-in-value" idea. The coal owner can possess his coal (his deed is still good) and sell it in the ground, but he cannot remove it, so the possession is worthless.

It would appear that in applying the classic possession/use test, the Kohler Act is a mere exercise of the police power and thus not subject to the Just Compensation Clause unless one can say that possession that is worthless is no possession at all.\(^{56}\) (But Holmes does not put it quite that way.\(^{57}\) The Kohler Act is simply a proscription of certain activity on land that will cause injury to someone else's land. The only difference between this case and the standard "use your land so as not to injure others" case is that the "other land" is configured vertically not horizontally.

Up to this point, it would appear that in order to conclude that the Kohler Act works a "taking," something other than the possession/use line of the traditional physical invasion test must be used. And if the adjacent land (here vertically contiguous) that is injured was the subject of an unqualified property right (like two horizontally adjacent fee simple lots without mutual covenants) then a new non-traditional test would be necessary if the result desired were to find the Act unconstitutional. But the adjacent land protected by the Kohler Act ban is qualified, for the deed granting the ownership interest in the surface "in express terms reserves the right to remove all the coal under the same and the grantee takes the premises with the risk and waives all claim for damages that may arise from mining out the coal."\(^{58}\) So what the surface owners "possessed" was a surface of land subject to a particular transformation and disfigurement, i.e. they owned a fragile surface, a house built on sand.\(^{59}\)

Now property in land is the rights to possession and use contained in the deed conveying the land—no more, no less. The description usually is of horizontal physical space only—metes and bounds. Horizontal spatial domain is the usual meaning of possession, thus the literal physical invasion. But deeds often describe temporal domain which have contingent conditions (e.g., the

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56. See supra note 19 and accompanying text.
57. See supra note 6, quotation from Hudson Water Co. v. McCarter, 209 U.S. 349, 355 (1908), and Holmes's opinion in Mahon.
58. Mahon, 260 U.S. at 412.
59. He is like a man who had the sense to build his house on rock. But what of the man who hears these words of mine and does not act upon them? He is like a man who was foolish enough to build his house on sand. The rain came down, the floods rose, the wind blew, and beat upon that house; down it fell with a great crash.
Moreover, spatial domain may have vertical dimension—i.e., the coal underground is excepted from your domain. The usual assumption of owning from the sky to the center of the earth is thus excepted. Because the coal supports the surface and because coal in the ground is of no value except to support the surface, there is an obvious conflict as to what is really possessed between a surface owner and a subjacent owner. The deed may or may not resolve the conflict.\textsuperscript{60} If the deed resolves the conflict, that resolution is part of the description of what is possessed—just like metes and bounds. The deed tells the grantee, “you have not an acre of rock, you have an acre of sand.” Because the grantee knows that he owns (“possesses”) only what the deed describes, the grantee pays for sand, not rock. Moreover, the coal owner from his complementary deed knows that he possesses “removable coal,” not “subjacent support coal,” and pays for what he gets.

Now if the state came along and said, “Look, I know, you coal owners possess a lot of what you call ‘removable coal,’ but the \textit{activity} of removal is going to cause damage to a great number of people and their property (what we call the general public). Most of those people that will be harmed by your removal do not have a deed that says they bought only sand. In order to avoid this harm to the general public, we ban your removal activity.” This is a classic exercise of the police power—a regulation of land use requiring no compensation.

But as Holmes and seven other judges read the Kohler Act, it did not ban use in order to benefit the general public, but only that part of the public that had bought “sand.” The evil was that they had bought only “sand,” and they wanted “rock.” The cure was to transfer, through a law that appeared to regulate use only, rock to the sand owner without the sand owner paying or the rock owner being paid. The rock owner loses; the sand owner gains. It looks like the rock owner’s property has been taken. With less metaphor, the possessor of coal has his valuable removable coal physically transformed into supporting rock that is worthless to him, while the fragile surface possessor is awarded supporting rock he had not previously possessed. Theft pure and simple!

This statement clarifies Holmes’s interpretation of the Kohler Act:

A source of damage to [a single private] house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public. The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal.\textsuperscript{61}

\textsuperscript{60} If the deed does not resolve the conflict, then a court or legislature will, if asked, resolve the dispute as the decision maker thinks justice or the public good requires.

\textsuperscript{61} \textit{Mahon}, 260 U.S. at 413-14 (citation omitted).
He concludes: "So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them [of] greater rights than they bought." Holmes makes it clear from the above that he believed that the Kohler Act was not aimed to benefit (or prevent harm to) the general public, but only that small part of the public (Holmes would say not the public at all but a set of private persons) that had bought and now owned only a soft surface. The Kohler Act was a naked transfer of one private person’s physical property, “moveable coal,” to another private person as “rock foundation” without payment—a transfer of the thing itself and not merely a ban on the use of the physical thing.

Justice Brandeis, dissenting in Mahon, used the pure rhetoric of the possession/use distinction. He paid little attention to Holmes’s conclusion that the Kohler Act was not designed to benefit the general public, but rather was designed to benefit only a subgroup of private owners. Brandeis assumed that Congress designed the Kohler Act to prevent harm to the general public. "But where the police power is exercised, not to confer benefits upon property owners, but to protect the public” is one statement among several that directly contradicts the basic premise of Holmes’s opinion. Brandeis, however, failed to

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62. Id. at 416 (emphasis added).
63. Id. at 417 (Brandeis, J. dissenting).

The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The State does not appropriate it or make any use of it. The State merely prevents the owner from making a use which interferes with paramount rights of the public.

Id.

64. Brandeis used the word “public” numerous times, always implicitly meaning the general public. However, the following is the only reference that he makes as to why the Kohler Act was intended to benefit the general public:

This case involves only mining which causes subsidence of a dwelling house. But the Kohler Act contains provisions in addition to that quoted above . . . . These provisions deal with mining under cities to such an extent as to cause subsidence of—

(a) Any public building or any structure customarily used by the public as a place of resort, assemblage, or amusement, including, but not being limited to, churches, schools, hospitals, theaters, hotels, and railroad stations.
(b) Any street, road, bridge, or other public passageway, dedicated to public use or habitually used by the public.
(c) Any track, roadbed, right of way, pipe, conduit, wire, or other facility, used in the service of the public by any municipal corporation or public service company as defined by the Public Service Company Law.

A prohibition of mining which causes subsidence of such structures and facilities is obviously enacted for a public purpose; and it seems, likewise, clear that mere notice of intention to mine would not in this connection secure the public safety.

Id. at 421-22.
65. Id. at 422.
make a convincing argument as to how the general public was benefited by the Kohler Act. Had Brandeis pitched his argument to persuade his colleagues that the general public was benefited, perhaps his dissent would not have been solo. Given the Kohler Act, perhaps that was a hard argument to make.\textsuperscript{67} On the other hand, given the rest (and "arresting" part) of Holmes’s argument pitched in the new rhetoric of diminution of value, perhaps Brandeis missed the critical importance of the "general public/select subset" distinction made by Holmes. That distinction is not, after all, crucial to a pure diminution of value theory.\textsuperscript{68}

In \textit{Keystone Bituminous Coal Association v. DeBenedictis},\textsuperscript{69} the Court found specifically that the general public benefited from prohibiting mining so as to cause subsidence; the prohibition was not designed to, nor did it, prevent harm only to "soft surface" owners.\textsuperscript{70} Thus, although the prohibition has the effect of returning to soft surface owners what they had bargained away, that was not its purpose at all. The Act prohibited the use of the land in order to protect the general public; the return of property without compensation was incidental and of no importance. The state cannot be prevented in, or inhibited from, stopping harmful activity because some private arrangements about that activity are thereby upset.\textsuperscript{71}

\begin{itemize}
\item \textsuperscript{66} Such arguments could have been plausibly made and were, to some extent, made by Brandeis. \textit{See supra} note 64. Nonetheless, the Kohler Act’s exemption of combined ownership of surface and mineral rights property from its proscription on mining that might cause subsidence strongly suggests that the legislature was not concerned with the harm to the general public caused by any subsidence of surface areas, but only that subsidence which hurts the surface owners who had given up the right to subjacent support. The ordinary rule (cited by Brandeis) that private parties cannot by their private dealings foreclose the regulation of behavior in the public interest (which applies to the Contract Clause as well as the Takings Clause) seems not to apply to the Kohler Act because it appears, by its exemption, to focus on the private dealings (a classic impairment of the obligation of contracts) or, put another way, to be concerned only with that small part of the public who were privy to the private dealings. Brandeis needed to explain away the exemption and otherwise emphasize more than he did the ways that the general public is injured, in fact, by surface subsidence. "The injury to me caused by my neighbor’s house collapsing" was perhaps so manifest to the communitarian-minded Brandeis that he could not believe that his more individualistic brothers did not agree. \textit{See supra} note 66.
\item \textsuperscript{67} \textit{See supra} note 66.
\item \textsuperscript{68} Indeed, it is entirely irrelevant to the diminution-in-value theory. \textit{See infra} part II.D. One can only guess that it was the glaring novelty and wrongheadedness of the seemingly decisive diminution of value theory that caused Brandeis to focus on that theory as well as the apostasy of his fellow progressive implied in that theory. \textit{See supra} note 6.
\item \textsuperscript{69} 480 U.S. 470 (1987).
\item \textsuperscript{70} \textit{See id.} at 485-89 (discussing the difference between the Kohler Act and the Subsidence Act).
\item \textsuperscript{71} "The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil." \textit{Mahon}, 260 U.S. at 419 (1922) (Brandeis, J., dissenting). The majority in \textit{Mahon} would have agreed with this essentially unassailable rule.
\end{itemize}
2. Use of Land as Possession Subject to Physical Invasion

Even though most cases can be explained by the possession/use distinction, the distinction becomes somewhat problematic in cases where land seems to be possessed literally by a use. Any development of land is a use of the land that transfigures the space in a more or less permanent way—the use becomes attached to the land. Instruments of title often do not reflect this attached use. I use my land as a dwelling site by attaching a house thereto. I seem to possess the land with my house. Under the law of real property, the house becomes part of the land.

However, there are two types of established developmental uses, one less possessory than the other. One is the attached structures or modifications of the land resulting from development, and the other is the daily activities that go on in those attachments. The latter is clearly a use subjected to police power regulation. However, in most zoning litigation, the prohibition or phase out of non-conforming, preexisting uses, even of the structural variety, is judged by a reasonableness test even though many mumble about a “taking.” Moreover, if the conclusion is that the law is unreasonable, a state court will sometimes declare a violation of the Takings Clause rather than a violation of substantive due process.

Where the use by structural modification (or activity) is in the future, no taking of property occurs under the possession/use test even where the market value of the property has been substantially enhanced by the contemplated use. Perhaps a violation of due process takes place, but that is a different constitutional constraint with a different test and different remedies.

3. When Use Becomes Possession: The Distinct Investment-Backed Expectation

There may be some difficult questions as to whether a proposed use has been sufficiently established such that it gives the property owner a “vested right,” as many state courts call it, in the proposed use. The idea of “distinct investment-backed expectations” is appropriately used here to determine whether

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72. See Harbison v. City of Buffalo, 152 N.E.2d 42, 46 (N.Y. 1958) (non-conforming structure can be phased out by gauging it to the “normal life” of the structure); Harris v. Mayor of Baltimore, 371 A.2d 706, 710-12 (Md. 1977).
73. ELLICKSON & TARLOCK, supra note 35, at 212.
74. See Harris, 371 A.2d at 710.
75. “Mumbling about taking” is no doubt a function of the regulation appearing to upset a “possessor use”—possession of the land with the structure.
76. See ELLICKSON & TARLOCK, supra note 35, at 203-07. See e.g., Clackamas County v. Holmes, 508 P.2d 190, 192-94 (1973) (finding that the landowners had made sufficient investments and improvements to establish a vested right prior to the enactment of the zoning ordinance).
77. See Agins v. Tiburin, 447 U.S. 255, 262 (1980); Penn Central, 438 U.S. at 124, 127. The phrase is used in these cases but not in the limited way suggested here.
enough activity has taken place to say that a “contemplated use” has been sufficiently established that it is now part of the property and cannot be prohibited without paying the owner for its loss. One thing state courts do not do is count the price enhancement of the lot due to the contemplated use (often a huge percentage of the lot’s value) as a “distinct investment-backed expectation.” To count the lot price enhancement as a “distinct investment-backed expectation” (the common sense thing to do after all) would either reward recentness of purchase and call for treating similar parcel owners differently or abandon totally the search for determining when a use becomes possessory (and thus “property”) and to embrace the diminution-of-value theory.

For example, take two identical contiguous lots each worth $1 million as apartment sites and each worth $20,000 if no development is allowed at all. One lot was bought in 1992 for $1,000,000; the other was inherited in 1952 by the present owner. If you count the 1992 purchase price as a “distinct investment-backed expectation” which shows that the buyer has begun the contemplated apartment use such that it is now “vested” (or, as I have suggested, is now part of the “possession” of the lot), then the 1992 purchaser is allowed to build (or get damages) while the 1952 inheritor must suffer his 98% loss of value. If this example seems unfair so that you also count the 1952 inheritor’s loss of $980,000 as a “distinct investment-backed expectation,” then the “distinct investment-backed expectation” cannot be used to infer the beginning of a development project such that it is an established use. Rather the loss of value is itself lamented. It appears to be a loss of most of the inheritor’s “property” (as with the 1992 purchaser), and thus, under a diminution of value theory, recovery should be had. But to recover you would have had to switch theories from “possession/use” to “loss of value,” and loss of value rhetoric makes no sense as a “takings” theory, as I began to show above and will elaborate on below. Loss of value rhetoric necessarily converts every potential use of a thing of property into property itself, and lost is the possession/use distinction necessary to the regulatory state—necessary to the solving of collective problems through legislation.

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78. Ellickson & Tarlock, supra note 35, at 204: The authors ask the question, “Why do most courts ignore the developer’s land acquisition costs in these [establishing an ‘established use’ as a ‘vested right’] cases?” Id. In Town of Paradise Valley v. Gulf Leisure Corp., 557 P.2d 532 (Ariz. Ct. App. 1976), land acquisition costs were allowed as the kind of investment that counts toward establishing an “established use.” Paradise Valley, 557 P.2d at 540. However, the $1.1 million spent for land acquisition was “[i]n reliance upon the issuance of this permit [a ‘Special Use Permit’ authorizing development of the property, 18.84 acres, as a resort hotel of 148 three-room suites]” to Gulf Leisure who then exercised an option procured in 1971 and purchased the property for $1.1 million. Id. at 535 (emphasis added).

79. See supra part I.B.
4. **Established Uses that Are Too Bad To Be Possessory**

As suggested above, some established uses are possessory but can be phased out through regulation if compatible with their own normal life cycle. But some uses can be put to death immediately because they never become possessory, despite appearances, due to the fact that they are so obviously harmful to the public. These harmful uses are of two kinds: activities on land (as opposed to appurtenant structures) that the owner ought to know from their general character are viewed as so harmful to the health, safety, morality, peace and general welfare of the community as to be subject to future prohibition. These are not "private nuisances" because they do not cause identifiable harm to neighboring land or its occupants. The harm is to the general public and, therefore, a public nuisance or a potential public nuisance. *Mugler v. Kansas*, one of the Supreme Court's earliest regulatory taking cases, is a prime example of this non-possessory use. When a use is not fixed to the land by structure or otherwise, it never seems like "property"—a term conceptually tied to a physical thing. The activity of distilling liquor, as in *Mugler*, does not require special land or structures that cannot be built most anywhere. It, therefore, seems conceptually more like the regulation of mere activity than a regulation, let alone a taking of property.

The second kind of non-possessory established uses are those that are similar to private nuisances in that they put a would-be developer on notice that some structural changes may not be forever lawful, i.e., the communities' apparent condoning of a use by the absence of positive prohibition may not be permanent. Prime examples of this are cases such as *Goldblatt v. Town of Hempstead* and *Hadacheck v. Sebastian*, where the Court upheld the regulatory outlawing of a longstanding gravel pit and a seven-year-old brickyard that predated the housing development with which it was incompatible.

A case like *Miller v. Schoene*, which upheld the uncompensated destruction of an established use, is more problematic because the established use (a grove of ornamental trees) gives little notice to the owner that it might be a public or private nuisance. But most of the trees that were ordered destroyed

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80. See supra note 72.
81. 123 U.S. 623 (1887).
82. 369 U.S. 590 (1962).
83. 239 U.S. 394 (1915).
86. 276 U.S. 272 (1928).
87. The cost of removing the trees was paid by the state, and the landowner retained the cut trees. What was not compensated was the loss in value to the land which, according to the state court, was small. *Miller v. State Entomologist*, 135 S.E. 813, 818-19 (Va. 1926); *aff'd sub nom.*, *Miller v. Schoene*, 276 U.S. 272 (1928).
were indigenous and not cultivated. Thus "distinct investment-backed expectations" were not involved in Miller. Moreover, the lower court found that the trees added little to the value of the land. In any event, the Virginia legislature declared the red cedar trees to be a "public nuisance" within two miles of any apple orchard and that they must be abated at the behest of "ten freeholders." Thus, relying on the idea that a fixed use of land that is a nuisance can be abated without full compensation to the owner, the legislature declared the red cedars to be a nuisance. Implicit in all this is that one never owns a property interest in even an established use of land where such use is a nuisance, even if it is not declared a nuisance until after the use has been established. It is in the nature of the concept of nuisance that it is a "fact" to be discovered and declared, not a rule to be created. Moreover, even though the legislature declared it to be a public nuisance instead of a private nuisance (legislatures cannot declare private nuisances, only courts can), it was in the nature of a private nuisance because it injured neighboring property holders.

5. Established Uses That Are Too Good To Be Possessory

Where an established structural use is so "good" that the state will not allow the owner to destroy, modify or allow deterioration of the structure, physical invasion analysis would appear to find a taking. The interference with physical possession is almost palpable. Indeed, the owner is compelled to possess his property (to occupy the space in exclusive dominion) with something not of her choosing. This would be as physically invasive as requiring an owner to raze an established structure—an interference that is seldom required or upheld. But with a razed structure, the owner can at least start anew. Thus, landmark preservation laws seem vulnerable to a taking claim.

The creators of such acts felt the need to guard against this vulnerability by mitigating the loss. The acts provide careful procedures and generous non-

88. One property owner had planted a row of red cedars on either side of his driveway and distinct investment-backed development of an existing valuable use was lost. Id. at 819. Nonetheless, that existing use was a nuisance waiting to be declared, and therefore no possessory property interest in that use existed.
89. Id. at 814 n.1 (quoting § 886 of the Virginia Code).
90. See supra note 36.
91. Like a private nuisance, it could be abated only at the behest of private citizens, the ten freeholders. See supra note 88.
92. Penn Central, 438 U.S. 104 (Rehnquist, J., dissenting). "Penn Central is prevented from further developing its property basically because too good a job was done in designing and building it." Id. at 146.
93. "Nearly all zoning ordinances provide that a use may continue if it lawfully preexists the adoption of a zoning ordinance ...." DONALD G. HAGMAN & JULIAN C. JUERGENSMUEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 114 (2d ed. 1986). I can find no cases where existing structures are ordered destroyed because they are non-conforming uses.
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monetary compensatory concessions—but not cash. Such procedures and non-
monetary compensation were sufficient in state court to preserve New York City’s
Landmark Preservation Law against a claim by Penn Central Transportation
Company. Penn Central argued that not being allowed to build its chosen
structure over Grand Central Station was a taking without just compensation. But Justice Brennan denied that non-monetary compensation was the basis for the
decision to uphold the Act. Rather, Justice Brennan turned to substantive due
process articulated in eclectic takings rhetoric.

Can one defend the result in Penn Central against a physical invasion
argument? Try this. The established use of the property is not disturbed:
"[Grand Central Station’s] designation as a landmark not only permits but
contemplates that appellants may continue to use the property precisely as it has
been used for the past 65 years: as a railroad terminal containing office space
and concessions." It would appear that forced razing is much different from not
allowing razing. Requiring razing physically interferes with an established use—a
use that is fixed and settled. But requiring a fixed and settled use to continue is
like forbidding a land owner to fill an estuary; it is simply a disallowance of
future uses—all future uses except the present use. The Landmark Preservation
Act is environmental legislation—by disturbing the present environment of the
city, the lot owner-developer will upset the ecology—an urban, human ecology,
to be sure, but ecology nonetheless. New York City would not be the same
without Grand Central Station. It is an organic part of the interdependent life of
the city and is a landmark. Once the requirement that Grand Central Station be
maintained is seen not as a physical invasion (because it is not a disturbance of

95. Penn Central, 438 U.S. at 120-22.
96. Id. at 122; but see id. at 137.
97. Id. at 136 (“W]hat must be regarded as Penn Central’s primary expectation concerning the use
of the parcel.”).
98. Id. “[C]ontemplates” in this quotation is a somewhat misleading term, “requires” would be
more accurate. But apparently having to maintain an existing use was not claimed by Penn Central
as a taking. Id. at 129. Given Penn Central’s argument that it was the loss of the right to exploit
developmentally the airspace above the Grand Central Station building, “contemplates” seems
appropriate. On the other hand, Justice Rehnquist seemed to feel that having-to-continue-an-
existing-use was his long suit, but his partner, Penn Central, would not bid it. Id. at 146; see also
id. at 152.

On the other hand, future uses, his shorter suit, was biddable because future uses are,
according to Rehnquist, “substantial property rights” within the meaning of “property” in the
Takings Clause. Id. at 142-44 (citing United States v. General Motors Co., 323 U.S. 373 (1945);
Boom Co. v. Patterson, 98 U.S. 403 (1878)). These “just compensation” cases determine what part
of the loss to the owner must be compensated. Of course, once a loss of possession is
acknowledged, then it is clear that the market value of that lost possession includes contemplated
uses that the market has always recognized in setting the current value. “Just compensation” must
include the full value of the property taken. Id. at 143 n.6.
the established use, i.e. the possessory property), then no taking can be based on physical invasion; the regulation of the airspace above Grand Central Station is simply a regulation of use and not of property. The regulation is subject to substantive due process—but the carefully crafted Landmark Preservation Act easily passed muster. Justice Brennan was right after all.

6. *A Critical Summary of Physical Invasion Rhetoric*

The rhetorical analysis of property concepts resolves most regulatory taking claims in favor of the regulation and against the claim of taking. The analysis draws a conceptual line between the possession of property and its use, separating the concepts of “possession” and “use” as they are intuitively held in our culture (including, but not limited to, our legal culture). In fact, the Supreme Court, through its physical invasion test, has upheld most regulations against taking claims and has been faithful to the letter and spirit of the Constitution.

Although the results reached through this rhetoric are politically satisfying to progressive judges (those who believe in the regulatory state), its methodology can seem retrograde. This rhetoric of concepts, mere conceptualism, seems a throwback to classical legal thought, to nineteenth century natural law formalism. To progressive judges, such conceptualism, is a creaking, smelly old bus which may get them where they want to go, but it’s a most unsatisfactory trip. It is underdeveloped as a rhetoric of explanation. (Brennan made a mess of it in *Penn Central*; Holmes would not use it in *Mahon.* I have tried to develop it to show that it plausibly explains every case.

The Court has sought a modern functional approach. It wants to explain its results in terms of the function of the Takings Clause. Its meaning should be spelled out in terms of its purpose, in terms of the human values it serves. The following two sections show that the Supreme Court’s doctrinal rhetoric of functionalism for the Takings Clause has been an abject failure—if the rhetoric of benefit/harm or diminution of value can be called functional approaches at all. These approaches have led to *Lucas*!

C. *The Rhetoric of Governmental Purpose: The Harm/Benefit Test*

An alternative way to conceptualize the takings issue is as a clash between governmental powers. When a constitutional government of limited powers acts, it must exercise a specific power. So the issue of the constitutionality of any governmental action must begin by asking, “which power is being exercised?” Then the further questions can be asked: “does the acting governmental unit have such power, and, if it does, what limitations are there on the exercise of the power?” For instance, the eminent domain power can be exercised only for public use and by paying just compensation. Similarly, the police power may be exercised only if the resulting regulation is reasonably related to a legitimate governmental purpose. The issue as to which power is
being exercised turns on the concepts of the powers. So the rhetoric involves analyzing the concepts of eminent domain, police power, taxing power.

The argument takes this form: The regulation of a use of land purports to be an exercise of the police power, but the goal of the police power is to eliminate harm to the public. The instant regulation does not purport to eliminate harm because it requires the maintenance of an existing use, as in a landmark preservation case. Therefore, the government must have found that the existing use is beneficial to the public. The instant regulation, therefore, confers the continuation of a beneficial use to the public at the expense of the property owner. Thus, it is not the exercise of the police power. Rather, it is the exercise of eminent domain power, which is the power to confer benefits on the public by obtaining things for public use. Under eminent domain, “obtaining” must be by “buying.” To take or seize property is unconstitutional.

In other words, when governmental activity does “good” for the public, losses occasioned thereby must be paid for, but when it stops “bad” from injuring the public, nothing need be paid to the losers. Thus stated, the theory is self-refuting: stopping an “evil” use surely confers a more beneficial use on society. The conferring of a beneficial use is more attractive than others deemed less beneficial to society. The choice of a socially non-beneficial use by a private owner in defiance of a more socially beneficial use surely is bad. For example, if a railroad is required to build an overpass over a highway, is it being required to confer a benefit on the public of a safer, more comfortable highway, or is it being required to abate an obnoxious safety hazard? Is the prohibition of brickmaking in a residential neighborhood conferring a benefit of a noiseless, smoke-and-dust-free neighborhood or abating a noisy, dusty, i.e., evil, use of property that interferes with others? Does the requirement of the preservation of a landmark structure on private property confer a benefit of continued beauty or prevent the evil of losing treasured beauty, social continuity and ties with the past?

This theory turns on semantics of the glass-half-filled-or-half-empty variety. Moreover, it is a semantic difference which poorly checks majoritarian abuse of power. In any public debate over whether to restrict the use of property, each side will not only contend that the desired use will produce greater net satisfaction or happiness for society but will likely characterize the opposing use as evil and its advocates as evil people. The debate in the 1970s over the banning of strip mining certainly produced such rhetoric. The winner of such debate—the side which produces a majority in its favor—will probably have convinced people that the opposite use is “evil” or “bad.” In other words the majority will define

"evil." "The loss of historical landmarks is bad." "The erosion of beaches is bad." In a democracy, the public designation of evil is a political question determined by majority rule. Moreover, it is not unlikely that the courts, especially an elected state court, will share the majority's characterization or simply defer to it. Without more, the benefit-harm test upholds majoritarian power.101

Professor Frank Michelman has suggested that the core of the truth of the harm/benefit rule lies elsewhere.102 There is evil about which there is nearly unanimous agreement such that it is safe for a court to allow constitutional cases to turn on it— theft for example. It may be that the majoritarian purpose in passing a particular regulation is not to maximize net social benefits by adjusting the market's allocation of resources; it may be to undo a theft. For example, if a quiet, peaceful, but unzoned, residential neighborhood is invaded by a noisy, dirty industrial plant, then that plant steals the peace and comfort of the neighboring land users. However, the crux of the evil in this example turns on something that the harm/benefit test does not purport to deal with: time. The crucial thing to the existence of theft is who had possession first. The metaphor "pig in the parlor"103 by itself simply states a conflict in the use of space. It becomes a theft situation only if the added fact is given that the pig was brought into the parlor. A regulation forbidding "pigs in the parlor" would require no compensation to the pig owner deprived of the use of the parlor to house his pig. But if the pig were in a barnyard and the parlor was built in the barnyard around the pig, then the builder is the thief and the regulation forbidding pigs in parlors would require compensation to the pig owner. Although Michelman makes a valiant effort to find some saving fairness-finding aspect of the harm/benefit test—and in the process isolated an important factor for compensability—it is the very absence of this fairness-finding factor in the harm/benefit test as it has been used that is its greatest weakness.

Although the harm and benefit of the harm/benefit test have yet to be defined in a manner that allows the inference that the test isolates situations of thievery there is another reason for its strong intuitive appeal. Professor Alison Dunham suggested that a regulation that confers a benefit on the public is one that affirmatively enjoins a particular use of property, effectively eliminating all alternative uses.104 The liberty to enjoy one's property diminishes as does its

103. This is Justice Sutherland's metaphor from Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).
market value. Such a regulation effectively does what a physical takeover of property does, at least insofar as the owner is concerned. For example, a regulation requiring the owner of an undeveloped wooded hillside to use the land only as a wooded hillside effectively eliminates all other uses. On the other hand, a regulation that is said to prevent or arrest a harm is one which negatively enjoins a particular use, leaving the property owner the liberty of all other uses. Thus, a regulation banning strip-mining negatively enjoins only one use, leaving many potential uses still available to the owner. The stripping ban, because it aims at one particular use, is felt to be focusing on whatever harm to the public is caused by stripping. The woodland retention requirement is felt to give the public the benefit of a visual prospect and a wildlife preserve. The distinction parallels the loss of value theory except that, instead of the loss of the economic value of the use, Dunham's harm/benefit test focuses on the loss of the liberty to use regardless of economic value. Perhaps the distinction between degrees of lost liberty to use one's property is important to the owner's sense of the justice of the regulation.105 But the harm/benefit test as used very imperfectly focuses on that sense of justice or injustice. Moreover, even if "loss of liberty" is an important consideration to the sense of justice, it is only one of several, and it "feels" less important than profitability or lost expectations—neither of which is considered.

Yet another reason for the "strong intuitive appeal" of the harm/benefit test is suggested by the analysis of Professor Joseph Sax.106 A regulation said to be preventing or abating a "harm" usually prevents a use of property that interferes with other people's use of their property. The nuisance case is the paradigm. On the other hand, a regulation that confers a benefit on the public is one that forces a use in order to give the public something it did not have before, rather than preventing an interfering use. The former prevents or stops loss of value to surrounding property; the latter adds value to surrounding property and the public. The former occurs in situations where there is a conflict in the uses of the land and the latter where there is no conflict.107

A pristine example of a benefit conferring regulation is almost impossible to conceive of, let alone find in fact.108 Perhaps a regulation requiring the use of

105. Id. at 80-81.
107. Id. at 37.
108. Fred F. French Inv. Co. v. New York, 350 N.E.2d 381 (N.Y. 1976). The rezoning of building-worthy private land, presently being used as a private park, as land to be used exclusively as a public park is one example. By zoning regulation, the city gives the public a park it did not have before. Ironically, no "taking" was found (an interference with exclusive possession and thus a physical invasion could also have been found), but the court used substantive due process reasonableness to say it was a "deprivation of property without due process of law." Id. at 388. "Absent factors of governmental displacement of private ownership, occupation or management, there was no 'taking' . . . . There was, therefore, no right of compensation as for a taking in eminent domain." Id. at 386 (citations omitted). This suggests that where substantive due process is a meaningful check on unjust regulation, "takeings" are limited to the pristine case of government
property only as a playground for children would serve as an example. But unless the word “regulation” is to lose all its meaning, it must be a “private” playground, i.e., one over which the owner retains the power to exclude. But there is very little public benefit in that. On the other hand, if it must be a public playground, then there is a palpable physical invasion; such invasions certainly need no harm/benefit analysis to determine compensability.109 Purely regulatory laws which confer a pure benefit do not exist. The wooded hill example discussed above does not give the public something it did not have before. Rather, it allows the public or neighboring owners to retain what they currently possess—an open vista and wildlife preserve. The use of such hill to farm would threaten the present enjoyment of neighboring land owners and the public in seeing natural country-side, not to mention that even a seemingly innocuous use of land such as farming can cause physical spillover from fertilizers, pesticides or altered drainage patterns.

takeovers. The use of substantive due process requires no damages for “inverse condemnation.” Id. at 388-89.

109. Mahon, 260 U.S. 393. The rare case where public access to private property is mandated is almost always struck down. See e.g., Kaiser Aetna v. United States, 444 U.S. 164 (1979); Lorrette, 458 U.S. 419; Nollan v. California Coastal Comm’n, 483 U.S. 825 (1987); Dolan v. Tigard, 114 S. Ct. 2309 (1994). The lone exception can be distinguished by the public nature of the private property. In Prunyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980), the state-mandated access (by state supreme court interpretation of the state constitution) to a privately-owned shopping center that invites the public onto its premises was upheld because the property owner’s interest in selecting who would enter its premises or stay there is almost totally compromised by the dedicated use (or one might say, the distinct investment-backed expectation) of the property as a public place for shopping.

Nollan, 483 U.S. 825, involved a palpable physical invasion authorized by state law (a public beach-access easement across private land) requiring conveyance of a recordable easement. In other words, the state knew it was “taking” property. The state attempted to “pay” for this forced conveyance by granting a building permit it otherwise could reasonably have withheld. This case raises interesting “just compensation” issues: Can compensation in some form other than money ever be “just”? If so, how can the court determine a just and equivalent exchange? Neither of these issues is addressed by Justice Scalia’s opinion. Rather than answer the real question in the case, Justice Scalia made a non-deferential substantive due process (sub-silentia) reasonableness analysis of the requirement of conveyance and concluded that the reason a building permit could be withheld must be directly related to the reason the conveyance is required. He then held that visual access to the ocean from the road (the reason a building permit could be denied) was unrelated to the required transfer (“utterly fails to further the end”) of a property right (physical access to the ocean). Where his “nexus” requirement comes from he does not say. Is it part of the “just compensation” doctrine or is it substantive due process? Frankly, it sounds like substantive due process. But by treating this case like a “regulatory taking” case, the deference barrier is lowered, for surely if the usual substantive due process deference had been given, “access to the ocean” would be a sufficient nexus between the granting of a building permit and the conveyance requirement. Perhaps deference should be lowered (scrutiny raised) in this kind of substantive due process analysis, but that “lowering” should be explained and justified—not mystified by hiding behind another doctrine. The Court could have faced the just compensation issue and explained why compensation must always be in money. See also Dolan, 114 S. Ct. 2309, discussed infra part IV.
The cases of *Hadacheck*110 and *Mahon*111 yield examples of regulations which gave the public something it did not have before, but they are cases requiring resolution of conflicting uses of land; the use of harm/benefit analysis was a hindrance to their sound resolution, not an aid. The harm/benefit theory is, as Justice Scalia demonstrated in *Lucas*, a feckless way of arguing a takings claim, but it might well be a part of substantive due process.

D. The Rhetoric of Lost Value: The Diminution of Value Test

While the physical invasion test may be too conceptual to identify injury to the regulated owner, the realism imparted by looking at the degree of loss yields no usable standard. No one has fixed or seems able to fix a point on the continuum of harm beyond which compensation is required. The diminution of value test is really no “test;” rather it is the manifestation of a strong feeling that the degree of harm ought to be considered in order to be “fair” about compensability.

Besides the obvious difficulty of picking a point on the scale of loss as a tipping point, there is the equally difficult task of determining what “the loss” actually is. Presumably it is a relative loss, i.e., a fraction of the absolute loss (say, $5,000) divided by the value before loss (say, $10,000, 1/2 or 50%). But what value before the loss? The rest of the owner’s assets? That would be the best measure of how much it actually hurts each owner-loser, yet under such a formula the poor get paid; the rich do not. Maybe such a formula could be used as a deliberate legislative policy for redistribution of wealth, equal protection notwithstanding; as a rule of constitutional law it is unthinkable. Is “what is left” the rest of the owner’s land holdings? That is more groundless than the first suggestion. Perhaps the rest of the particular land holding, or the rest of the loser’s interest in the land, is the proper measure? The latter formula would involve, for example, an owner of mineral rights only in a parcel of land, where regulations of land use make it economically impossible to extract the mineral, reducing the value of this functional interest (essentially, the right to extract) to zero; because this functional interest was owned separately, the relative loss would be 1/1 or 100%. This has been suggested to be the correct formula—*Mahon* stands for such a proposition.112 But this formula, in ascertaining the extent of loss, would violate one of the fundamental tenets of the constitutional takings rule set out above—the takings rule may not get different results depending on the functional division of ownership.113 Moreover, neither

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110. 239 U.S. 394.
111. 260 U.S. 393.
112. Id.
113. See Sax, supra note 106, at 68.
This leaves a formula based on the loss of value divided by the total value of the affected land. Thus, if the banning of surface mining makes mineral rights nearly valueless then a comparison of the total value of any particular "piece" or parcel of land before such ban (say, $15,000) and after (say, $2,000) yields the fraction, 13/15 or 87%; that is the loss, the diminution in value. But if this fraction is used to determine compensability, then the ban will be a taking as to some mineral rights, but not as to others, depending on other available profitable uses for the surface. A ban on stripping would require compensation where the surface is "useless" rocky, mountainous wilderness but would not where the surface has immediate value as a subdivision site. This is true in spite of the fact that the law would allow either land owner equal liberty to otherwise (than the stripping ban) use his property. Moreover, this test would create substantial settlement or transaction costs. Each property would have to be examined as to value with mineral rights extractable by stripping and compared to present value without such right. A difficult and uncertain task not only as to appraisal, but as to finding all the affected mineral rights.

Moreover, the calculus described above is not for the purpose of determining the amount of compensation, but compensability vel non. If property "A" is reduced in value from, say $100,000 to $15,000, and assuming that because the diminution in value line must be drawn somewhere, it is drawn at 85%, then the owner of property "A" is compensated - presumably the full $85,000. If property "B" is reduced in value from $100,000 to $25,000, then (the line being 85%) the owner is not compensated. Owner "A" gets $85,000; Owner "B" must suffer his $75,000 loss. If you protest that the line was arbitrarily placed, then the short answer is that it must be placed somewhere. At some point those above get full compensation for their loss, those below no compensation. Is it possible to pick a point on the continuum that is not arbitrary? Are not arbitrary lines grossly unfair except under special circumstances where they are an absolute necessity and they affect every one equally over time, such as with the age requirement for voting?

The diminution of value test generates an unfair rule in another way, distinct from the arbitrariness of the point picked. It is the arbitrariness of picking a point at all. Why should a loser of 90% of the value of a piece of property get paid his $5,000 loss but a "25% loser" not get paid his $5,000? Where there is a palpable physical invasion (of as much as one square inch of a owner's one hundred acres—an infinitesimal fraction), the state must pay. There is a difference between palpable physical invasion and prohibition of a former legal use, but the quantity of harm tests accounts for it only in an imprecise and unsatisfying way.

114. Id. at 60.
The bill of particulars of the indictment of the diminution of value or quantity of the harm theory goes beyond the fact that it yields neither a manageable nor a "fair" rule. Professor Sax has shown that it: (1) presupposes a false definition of property,\textsuperscript{115} (2) is inconsistent with the early history of the compensation principle,\textsuperscript{116} and (3) is not supported by the contemporaneous history of the amendment.\textsuperscript{117} In addition, he adds "the test imports an unworkable problem of definition."\textsuperscript{118}

In the face of these rather overwhelming weaknesses, why is it that the test persists as the most "popular"\textsuperscript{119} or dominant rhetoric of compensability, at least in state courts? Two reasons are suggested. First, by focusing on the size of the loss rather than the method of the infliction, the rhetoric seems to focus on that attribute which makes regulatory losses most painful. After all, we treat petty larceny as a different order of crime from grand larceny—one a misdemeanor the other a felony—and the line drawn between them is purely arbitrary. But, of course, Holmes knew that the government ought not to steal at all—petty or grand—but he further believed that regulation in the public interest was necessary, and regulation of the use of land was in the public interest, ergo public necessity required a little public theft.\textsuperscript{120} But only "property" can be stolen. If Holmes had not believed that every potential use of land was "property," the limiting or banning of potential uses would not be seen as theft at all.\textsuperscript{121} That would eliminate most of the "petty larceny of the police power."\textsuperscript{122} The regulation of existing uses would be subject to takings scrutiny because perhaps some, or even most, existing uses of land are "property" in the land.\textsuperscript{123} But in that event, even if the theft is petty, it ought not to be condoned; such regulation would clearly be the taking of property without just compensation. The diminution of value theory conflates the value of land, the use of land and the property in land. A faulty concept of property is the basic flaw of the diminution of value theory.

A second, somewhat ironic reason for the ascendency of loss of value theory in compensability law is that its weakness in generating a useful rule allows courts to reach the result it intuitively feels is fair without any articulated

\textsuperscript{115} Id. at 51-53.
\textsuperscript{116} Id. at 54-57.
\textsuperscript{117} Id. at 58-60.
\textsuperscript{118} Id. at 60.
\textsuperscript{119} Id. at 50. Although Sax stated this in 1964, there is little reason to believe that this popularity has abated. The popularity is primarily academic because the value theory is rarely decisive in its result (as with the U.S. Supreme Court). However, a series of wetlands cases (mostly out of New England) is an exception where diminution of value did play a crucial role. See e.g., Just v. Marinette County, 201 N.W.2d 761, 770-71 (Wis. 1972).
\textsuperscript{120} See supra notes 2-7.
\textsuperscript{121} SeeMahon, 260 U.S. at 414; but see id. at 415-16.
\textsuperscript{122} See supra note 1.
\textsuperscript{123} See supra text accompanying notes 72-79.
analysis. A rule so imprecise as to be no rule at all frees a court from having to demonstrate how the rule applies to the facts of the case at hand. In an area of the law that appears to defy analysis, it is comforting to have a theory that obviates the painful necessity to analyze—i.e., to have to think about the problem.

Finally, Professor Michelman suggested that the diminution of value rule is really a test of kind, not degree, and as such it has a useful place in compensability doctrine. If one posits that a regulation that restricts the use of land so as to deprive the owner of all practical use is a taking, then one needs a practical definition of “all.” Such a definition is bound to be somewhat less than an absolute 100% deprivation of use, otherwise the posited “taking rule” would apply only where the state would be so foolish as to disallow the owner from even walking about his land. But if “all” is less than 100%, as it surely was in Lucas in spite of the state court finding, then an arbitrary line is being drawn. In the “foolish state” case of no use remaining whatsoever, there is a physical ousting subject to the physical invasion rule.

III. USING THE SUBSTANTIVE DUE PROCESS REASONABLENESS TEST TO REVIEW THE REGULATION OF PROSPECTIVE USES OF LAND

Part III addresses three issues by: (a) making a formalist defense of substantive due process against a recent formalist attack by Justice Scalia, (b) arguing that a reasonableness test is different from a rational basis test—that “reasonableness” has some bite but is still deferential to the “legislative” judgment, and that American courts use this test, and (c) defending the proposition that a reasonableness test ought to be the only test used to review the prospective uses of land and is so used for the most part.

I take up the first point summarily because few can doubt that substantive due process is a viable constitutional doctrine. Nonetheless, Justice Scalia called the very phrase “substantive due process” an oxymoron. This formalist

124. See supra note 49 and accompanying text.
125. 112 S. Ct. at 2889 n.2. The owner could still put wooden walkways and small wooden decks on his lot.
127. See supra note 49 and accompanying text.
129. In United States v. Carlton, 114 S. Ct. 2018, 2026 (1994), Scalia began his concurrence: “If I thought ‘substantive due process’ were a constitutional right rather than an oxymoron, I would think it violated by bait-and-switch taxation.” Later he added, “I welcome this recognition that the Due Process Clause does not prevent retroactive taxes, since I believe that the Due Process Clause guarantees no substantive rights, but only (as it says) process.” Id. at 2027.
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attack on the doctrine deserves a formalist defense, especially as I have defended the idea here that formalism (of a sort) is necessary to legitimacy. So we start with the constitutional language: "nor shall any State deprive any person of life, liberty, or property, without due process of law." Surely the word "liberty" can encompass the right to use one's land. It may not be a preferred liberty, such as speech or familial privacy, but it is a "liberty" nonetheless. If one is "deprived" of a use of one's property by state regulation surely the first part of the text is "literally" satisfied. Now comes the harder part. For Scalia, a regulation duly enacted according to constitutional forms and enforced by judicial due process is quite literally "due process" of law so that the deprivation is not "without" due process of law. But, there are two distinct ways we can quite logically review the substance of the regulation through this text. Both ways focus on the word "law".

In order for a set of words to gain the status of law, they must be duly enacted which requires not only that the proper form be followed (moved, voted on, etc.), but that the enacting legislative body be exercising a power appropriate to it. In the nineteenth century, the rhetoric of proper legislative powers was freely engaged in. A purported regulation of land use would be a "police power" exercise. Because the concept of "police power" has limits, a court might inquire as to whether a particular regulation of land use was really an exercise of police power. The court would, of course, do this by spinning out the concept of police power into a limited set of purposes (health, safety, morals and welfare) and then examining the regulation to see if in fact it served one of those purposes. Of course, that is exactly what the Court did in Lochner v. New York.

The second way of getting at substance through the words "due process of law" is again to focus on the word "law." The due process clause traces its origin to the Magna Carta and the latin phrase "per legem terre" or the "law of the land." This immediately suggests reasoned judgment versus arbitrary fiat or will. "Law" is contrasted with arbitrary fiat. A rule laid down by a legislative


133. Lochner, 198 U.S. at 53.

134. Id.

135. Id.
body is not law unless it is reasonable, or so the argument goes—and has gone since at least Dr. Bonham’s Case. A legal positivist may disagree with this concept of law, but it is a concept long held by American jurists.

Of course, I am only making a formal defense of the claim that the due process clause has a substantive component. Clearly the text can support such a reading. The sin of Lochner is not its being atextual. Rather the sin lay in Justice Peckham’s obliviousness to the subjective and political nature of his judgment and the resultant total lack of deference to the New York legislative judgment.

I shall now examine briefly two deferential substantive due process tests, describe their differences and argue why one, the reasonable test, has been and ought to be used by the judiciary to review land use regulation.

A. The Difference Between a Reasonableness Test and a Rational Basis Test

In TXO Production Corp. v. Alliance Resource Corp., the Supreme Court clearly rejected a substantive due process “rational basis” test in favor of

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By the law of the land is most clearly intended the general law; a law, which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land.

See ELY, supra note 130, at 190.

Certain historical antecedents of the phrase suggest an additional and somewhat distinct meaning. To the extent that its roots are in the French term process de ley, the phrase would seem to convey the requirement that serious injury be inflicted only in accord with a (process of) law, as opposed, presumably, to a process of anarchy or unbridled discretion. Cf. E. Coke, 2 THE INSTITUTES OF THE LAWS OF ENGLAND 46, 50 (1671). See Dunham, Magna Carta and British Constitutionalism, in THE GREAT CHARTER 26 (1965).

137. 77 Eng. Rep. 646 (1610). Sir Edward Coke stated, “for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void.” Id.

138. See, e.g., Hurtado v. California, 110 U.S. 516, 535 (1884):

Law is something more than mere will exerted as an act of power . . . . [It] excludes, as not due process of law, acts of attainder [etc.] . . . and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifest as the decree of a personal monarch or of an impersonal multitude.


139. See supra note 133.

140. 113 S. Ct. 2711 (1993).
a "reasonableness" test. The plurality then made a complete muddle of what reasonableness meant in the context of a claim of excessiveness in awarding punitive damages in a state civil law suit. Nonetheless from TXO's various opinions and from other cases, it is clear that there is a reasonableness test distinct from a rational basis test and that use of the varying tests can achieve varying results. The rational basis test is satisfied (and the legislation or other governmental action saved) if the government action can be shown to have some plausible factual relationship to some arguably legitimate public interest that it is plausible to believe the legislative enactor sought to promote, without having any regard for how onerous the burden might be on the regulated party. The reasonableness test, on the other hand, takes into account the extent of the burden on the regulated party and requires that the public interest promoted be proportionate to that burden. In other words, the greater the burden, the greater must be the justifying public interest. It is a rough cost/benefit or balancing test. The judgments that need to be made to apply such a test are, of course, contestable and difficult—sometimes said to be "subjective," which is only to say that a human being must make the judgments, which are a combination of "facts" and "values"—legislative and adjudicative facts, public and private values.

So there is an obvious difference between a unilateral rationality test and a bilateral rationality test. If proper deference is paid to the initial legislative judgment, then the government must be brain dead to lose under the unilateral test. But even if proper deference is paid, the bilateral test will catch an occasional case of regulatory carelessness; the Court can conclude that the public gain is not worth the private candle.

Unfortunately, the Supreme Court is not usually clear about which test it is using. For example, in Nectow v. Cambridge Justice Sutherland, speaking for a unanimous court (that included Justices Brandeis, Stone and Holmes), made the following statements in the course of a three page opinion striking down a zoning restriction on Nectow's property:

(A) "The attack upon the ordinance is that, as specifically applied to plaintiff in error, it deprived him of his property without due process of law in contravention of the Fourteenth Amendment." 

(B) "It is made pretty clear that because of the industrial and railroad purposes to which the immediately adjoining lands to the south and east have been devoted and for which they are zoned, the locus [Nectow's property] is of comparatively little value for the limited uses permitted by the ordinance."

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141. Id. at 2719-20.
143. See TXO, 113 S. Ct. at 2721.
144. 277 U.S. 183.
145. Id. at 185.
146. Id. at 187.
We quite agree with the opinion expressed below that a court should not set aside the determination of public officers in such a matter unless it is clear that their action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.'  

The inclusion of the locus in question is not indispensable to the general plan [which the Court upheld].

Nevertheless, if that were all, we should not be warranted in substituting our judgment for that of the zoning authorities primarily charge with the duty . . . of determining the question.

The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.

Here, the express finding of the master, already quoted, confirmed by the court below is that the health, safety, convenience and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question. This finding of the master, after a hearing and an inspection of the entire area affected, supported, as we think it is, by other findings of fact, is determinative of the case.

That the invasion of the property of plaintiff in error was serious and highly injurious is clearly established; and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be sustained.

A quick analysis of the quoted statements shows the Court's ambiguity. (A) announces that the Court is using due process, not takings, doctrine. In (B) the Court notes that the regulated private land has lost considerable value. In (C)
the Court stresses the deference it must pay the legislative judgment to the point of sounding as if (“has no foundation in reason,” a mere arbitrary or irrational exercise of power) it must use a rational basis test, but then the Court qualifies the absoluteness of its language with “no substantial relation,” making it again sound like a question of degree. Then (D) sounds a further note of degree “not indispensable” to the public purpose. (E) is a further caution about deference, and (F) uses another phrase suggesting degree: “substantial relation.” But (G) sounds the absolute tone of rational basis—public purposes “will not be promoted” and that this is “determinative of the case”. Then (H) sounds again the note of balancing and comparative harm and benefit: “serious and highly injurious” to one side and the lack of “a necessary basis for the support of that invasion” by the other side.

Taken together, a kind of rough balancing is evident in Justice Sutherland’s opinion, but in two distinct sets of phrases, (C) and (G), he takes a rational basis tone. This ambiguity is probably the usual judicial discomfort with balancing tests—such tests seem unjudicial and too political (the lack of certain quantification makes palpable the subjectiveness of the judgment). At least in Nectow, the Court unambiguously relies on due process and not on takings doctrine. In more recent cases, the Court is unclear whether it uses due process or takings but is fairly clear, as in Penn Central, that it is using a balancing test which, of course, is only appropriate to the due process clause.

B. Judicial Use of a Reasonableness Test in a Land Use Case

Nectow is a prime example of the avowed use of the substance component of the due process clause with a deferential reasonableness test (although ambiguously expressed). Why have state and federal courts used this reasonableness test and why should they? I believe the reasons are obvious: (1) our legal tradition of protecting private property values insofar as is practical (from non-market losses especially) and our legal tradition’s abiding faith in the judicial process combine to give us a collective commitment expressed in the cliché “government of law not men” where “law” means order, stability, and predictability guaranteed by our traditional adversarial judicial process; and (2) protecting private property values through the Takings Clause is, for all the reasons stated in this article, inappropriate, whereas protecting property value through the Due Process Clause fits its language, its history and good sense. Moreover, use of the Takings Clause creates the enormous problem of inverse condemnation which has a potentially crippling, “chilling effect” on regulatory

154. 277 U.S. 183.
155. 438 U.S. 104.
156. 277 U.S. 183.
157. See, Horwitz, supra note 4, at 213-46 (detailing the unsuccessful battle to free the regulating bureaucracy from the control of courts of law).
action.\textsuperscript{158} As the recent case \textit{Dolan v. Tigard}\textsuperscript{159} demonstrates, if balancing is done within takings doctrine it is non-deferential.

So why have courts, especially the United States Supreme Court, been so reluctant to use unambiguously the substantive component of due process to review the regulation of potential uses of property? Here the reasons are complex. As is well-known, "substantive due process" got such a bad odor about it that by the end of the 1930s the United States Supreme Court all but disclaimed its use.\textsuperscript{160} When the Court did want to review the substance of state regulatory action it resorted to subterfuge that allowed it to deny it was doing "substantive due process" analysis even while using the Due Process Clause of the Fourteenth Amendment to review the substance of state action. This inventive subterfuge became the incorporation doctrine which has its own rich history.\textsuperscript{161} When the incorporation doctrine would not fit an obnoxious and aberrational Connecticut regulation of sexual conduct, the ever inventive Justice Douglas extended "incorporation" from express rights to "implied express" rights, stating that a fundamental right of privacy was immanent in, or implied by, rights expressed in the Bill of Rights.\textsuperscript{162} But academic lawyers began to see through the subterfuge, especially after the far more controversial use of the subterfuge in \textit{Roe v. Wade}.\textsuperscript{163} By 1977, in \textit{Moore v. East Cleveland},\textsuperscript{164} Justice Powell was able to use the words "substantive due process" in an opinion striking down a property use regulation.\textsuperscript{165}

Moreover, the Court never actually killed "substantive due process." It simply reduced it to a formula that was essentially no review—the rational basis test. Therefore, when substantive due process reappeared under its own name, it was thought to have two branches, "heightened scrutiny" and "rational basis," which meant in practice state loses and state wins, respectively. Heightened

\begin{footnotesize}
\begin{enumerate}
\item[158] First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987).
\item[159] 114 S. Ct. at 2316.
\item[163] 410 U.S. 113, 152-54 (1973).
\item[165] \textit{Id.} at 502-03.
\end{enumerate}
\end{footnotesize}
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scrutiny itself was divided into two branches with the gender cases. I suggest that "lower scrutiny" also has two branches, and always has: rational basis and reasonableness.

Only recently has the Court actually acknowledged two tests within lower or deferential scrutiny. But in the following kinds of cases it has used a deferential balancing test for some time: punitive damage awards review, retroactive legislative impact review and certain equal protection cases where the complainant has a sufficient interest to merit heightened concern but not enough to qualify under either prong of the heightened scrutiny doctrine. In each of these three types of cases, the interest asserted by the individual to be lost is different from and greater than mere economic value. In the punitive damages and retroactive impact cases, the interest is economic loss coupled with unfair surprise; in "certain equal protection cases" it was noneconomic interests that were lost.

Is loss of land use potentially more than mere economic loss? Land use cases are analogous to retroactive impact cases and are indeed a species of retroactive impact cases. When one owns land one expects to be able to use it in any way that will not be a nuisance and that is not positively proscribed. When a new proscription is legislated, one loses not only the economic value such potential use added to the land but also the reliance on that use and value, not a fixed and settled expectation amounting to "property" but a reasonable expectation nonetheless. This suggests that the same kind of balancing test, long been used in retroactive impact cases, is appropriate here, that is, the consideration is not mere private economic value lost versus public interest gained. Rather, the test is the economic value lost times the reasonableness of the expectation of having that value versus the gain to the public. Thus, in a case where the potential use at the time just prior to the proscriptive enactment not only added great market value to the land and was not positively proscribed but was in fact positively allowed,

168. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976). In Pension Benefit Guaranty Corp. v. R.A. Gray & Co., the Court first acknowledged "that retroactive legislation does have to meet a burden not faced by legislation that has only future effects" but went on to reject the articulated reasonableness test of Nachman Corp. v. Pension Benefit Guaranty Corp., 592 F.2d 947 (1979), which was based on Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330 (1935). 467 U.S. 717, 727-34 (1984). The Court then purports to use a "rational legislative purpose test" but shows the bilateral (rough balancing) nature of its review by stating the enactment of retroactive statutes "confined to short and limited periods required by the practicalities of producing national legislation" is acceptable. Pension Benefit, 467 U.S. at 731. See Landgraf v. USI Film Prods., 114 S. Ct. 1483 (1994).
one's expectations for the continuing legality of the use are considerably enhanced. Thus, if one buys vacant land to use as a business site which when bought was "zoned" by positive law for business use, one's expectations of the land retaining its business-use value are considerably greater than if there were no land use regulations in place at the time of purchase. This does not mean, of course, that a city may not change any zoned area from less restrictive to more restrictive, but only that if it does rezone down, that change (and its relative unexpectedness) will be part of the calculus of reasonableness when reviewed by a court.

Let me also make clear that existing zoning laws do not create a property interest in those potential uses of the zoned land that are consistent with the zoning law. The owner of a lot used for residential purposes in a business zone does not have a "property" interest in that business use, although she does have a property interest in the continuance of the existing residential use (assuming it's legal in the business zone). Nonetheless, such existing laws create expectations, the nature and extent of which will be a factor in the calculus of reasonableness under due process of law. To put it in the language I use in the next section, existing land use regulations do not create a fixed and settled expectation in every potential use thereby allowed. Existing regulations do create a greater expectation than no regulation at all, therefore they figure in the calculation of reasonableness.

The reasonableness test has both flexibility and bite. But because, as Justice Sutherland emphasized, it is deferential, it is no crippling predator as Pinckney-style *Lochner* was or heightened scrutiny is. It ought to keep and has (at the state court level) kept land use regulators honest and careful without overcaution born of fearfulness. Using a diminution of value takings test to reach the regulation of potential uses is either so flexible as to be totally arbitrary or so inflexible, as with the all/some line of *Lucas*, as to be useless, for no fact finder will find that no value is left after regulation. Thus, it can keep regulators neither honest nor careful (one has to have some standard of care before one can be careful). At the same time, the reverse condemnation feature of takings doctrine makes broad use of the Takings Clause as a source of regulatory overcaution. The result is not careful regulation, but rather fearful regulation. Moreover, the reasonable test has sufficient bite to breed carefulness unlike the rational basis test which is utterly toothless.

**IV. MAJORITARIAN THEFT: WHAT A TAKINGS CLAUSE IS FOR**

Because judicial review of land use regulation by a deferential substantive due process reasonableness test is in place at the state and federal levels awaiting only the Supreme Court's official acknowledgement and blessing, what is left or ought to be left of the Takings Clause? In other words, what is a Takings Clause for? "Not much" in terms of doctrine actually used to review regulations. The Takings Clause is a promise almost always kept. The occasional transgression of the Takings Clause is easily identified and rectified. The Takings Clause is,
nonetheless, important as a symbol of our national commitment to Lockean individualism and the concomitant commitment to the privileges of private property. It is a foundational doctrine. The rhetoric that elaborates it must make manifest its function by defining property as a foundational concept in its foundational role. The state may not take one’s property unless it pays for the property. The state must treat private property as if the state were a private person, except the state can force the sale. The foundational idea of property as a legal concept is that the state will defend it against theft—against other people taking it without paying for it. Although there are plenty of public laws against theft, the most aggressive and egregious form of taking, one also should note the numerous private law remedies against taking property where the act of taking is less aggressive and often is accomplished under a claim of right.

In each case, whether under public or private law, the claim is that the defendant got something without paying for it against the owner’s desires. Property is about rights in things that can be bought and sold and given away and borrowed and lent and stolen! In short, property is about the exclusive possession of “things” and the transferring of that possession at the sole discretion of the owner except where there is a public interest of substantial magnitude that allows the state to regulate transfers. Therefore, the right to transfer is not itself “property,” but a part of the definition of property. “Property” is something capable of transfer. (Moreover value is not property, although transfers are often for value.) And, of course, the “something” in which a “person” has property, which usually has exchange value and usually can be exchanged, also can be used. Such use is subject to anticipatory regulation and is not itself “property” except where one possesses one’s possession with a use.

All of this seems very primitive and unsophisticated. Of course, the legal idea of “property” described above is primitive and unsophisticated—it’s a foundational idea, and it’s still part of the foundation. The rhetoric that grows from this primitive (but up-to-date) notion of property and its taking will appear more sophisticated if it can be described by the function it serves in terms of human welfare: property creates fixed and settled expectations in its holder, and taking is the upsetting of those fixed and settled expectations. The honoring of expectations is an essential ingredient in the pie of human happiness and flourishing.

A. *Majoritarian Theft, the Concept*

“Majoritarian theft” is any deliberate act by the majority either through government or persistent public behavior which has as a purpose the gain of something by the public or some identifiable segment of it and which is necessarily attended with the loss of a fixed and settled expectation to identifiable members of the public where such loss is not paid for at the price that the private market would dictate. The further definitions which are crucial to this concept are gain, something, and fixed and settled expectations.
“Gain” is like “benefit” as it is often used in the harm/benefit test but without any moral connotation. The word “gain” focuses on time—the public’s having something after the act which they did not have before it. It is used here in distinct contrast to “retain” and “regain.”

The “something” that is “gained” is anything that could make for individual happiness, satisfaction, comfort, etc. For want of a better generic—one that is descriptive and not value laden—I shall use the word “want.” The “something” then is anything some people will, at least figuratively, want. The list of wants includes the possession and use of space, and of things in space, and many intangibles like quiet, cleaner air, cleaner water, clearer sky, a visual prospect, lower risk of injury, lower risk of disease, and subjacent support of land. This list is endless.

The “fixed and settled” expectations that must be upset before the theft is complete are those expectations that are fixed as to time and settled by means that give notice to the world that, as between “these parties,” certain expectations exist. Often the expectations are created as between one person or a small group and the rest of the world. A deed to land in fee simple to “A” gives “A” the right to exclude, the privilege to possess, etc., as against the whole world.170 If “A” gives “B” a deed to the minerals in his land and the privilege of stripping the land to get them, this creates fixed and settled rights as between “A” and “B” to strip, but as against the world unless “A” had a fixed and settled right to strip his land as against the world.171

But mere ownership, which certainly implies a right to possess and enjoy, does not imply a right to use in any manner the owner wants.172 Surely a basic tenet of “property law” is that one has a right to use one’s property in any way that does not “hurt” others.173 Whether a particular use “hurts” others is determined by land use regulations or by the common law of nuisance.174 Obviously either of these sets of rules and standards can change or else there could be no law limiting uses, for at one time no particular use would have hurt others as there were no others. If the law as to “uses” of land can change, then does any “use” ever become a “fixed and settled” expectation? The line must be between uses-in-being and uses-not-in-being (a slightly larger group than uses-in-contemplation). If, when a use comes into being, as when one turns the spade in a bona fide beginning of an apartment building, and it is not unlawful to so use one’s land, then such use becomes “fixed” as to time and scope and “settled” in that it gives general notice to the community that it is the way the property will be used. As discussed above, a use-in-being made unlawful does not necessarily

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171. Id. at 343-45.
172. Id. at 40.
173. Id. at 397.
174. Id. at 362, 397.
mean majoritarian theft. On the other hand, uses-in-being do not exhaust the entire class of “fixed and settled expectations” as to the use of land as a second examination of Mahon will shortly disclose.

Let us look at several paradigm cases in light of the simple concept of majoritarian theft: the regulating State upsets the fixed and settled expectations of private parties, expectations revered by long tradition and deep conviction as “property,” in order to gain something it never had.

B. Application to Some Paradigm Cases

1. Hadacheck v. Sebastian, an Existing Use Case

Hadacheck owned eight acres of clay rich land outside of the city limits of Los Angeles and “distant from dwellings and other habitations and [such] that he did not expect or believe . . . that the territory would be annexed to the city.” He had “erected expensive machinery for the manufacture of bricks of fine quality” and the property was worth $800,000 as a brickyard, $60,000 as a residential site. The city grew up around the brickyard, and after seven years of existence the city passed an ordinance outlawing the brickyard.

Did Hadacheck have a fixed and settled expectation as to the continued use of his property? It was “fixed” as to time and location and nature, but it was not settled as between Hadacheck and the rest of the world. No deed or other permit existed granting such right. The fact of use was such that Hadacheck might well have known that other people would not like it if they moved nearby. In effect, the Court held that Hadacheck could not hold the surrounding property hostage to his use:

A vested interest cannot be asserted against it because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community. The logical result of the petitioner’s contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground and that if it grows at all it can only grow as the environment of the occupations that are usually banished to the purlieus.

175. See discussion supra at part II.B.4.
176. 239 U.S. 394.
177. Id. at 405.
178. Id.
179. Id. at 405-06.
180. Id. at 410 (citation omitted).
The court has effectively said "the use is not a nuisance per se, but you ought to have known it would be obnoxious to residential users that might move nearby. Therefore, as between you and the future residents it is not 'settled' that you have a 'vested right' to continue such use forever." Hadacheck had no proper expectation in continuing use under the circumstances; therefore, no "vested right"—and thus no "property"—was taken.

It is true that in Hadacheck, the people, through government, required a nonuse of property so as to gain something. When people built around Hadacheck's lot, they did not have "brickyardless" quiet; so they gained quiet, and that is a "want." But since no fixed and settled expectation existed in the brickyard use near a burgeoning community, no property existed to be stolen. Nonetheless, Hadacheck is a very close case. The expectation as to use was "fixed" and only "not settled" because it was near a burgeoning community.

2. Pennsylvania Coal Co. v. Mahon, a Deeded Use Case

Given the fact most relied on by Holmes, that the Kohler Act was intended to only benefit superjacent owners and not the general public, Mahon is a classic example of majoritarian theft. The right to pull the pillars out from under the surface was fixed in a recorded deed (scores of such deeds) and settled as between the parties and successors to the deeds. Those parties, and apparently only those parties, were the intended beneficiaries of the Act, at least according to Holmes. The Act simply took the property right and transferred it by regulation from a politically weaker to a politically stronger set of people, and thereby was a classic case of majoritarian theft. A contemporaneous commentator saw this as an abuse of the "popular will" stripping "a person of his property rights without compensation." On the other hand, if the Kohler Act were designed to and would in fact benefit the general public, then clearly there is no taking. The right to pull the pillars was a property right as against the surface owner only. The deed did not create, and did not purport to create, any settled right to usage as against the

181. The "might move nearby" perhaps should read "would more than likely move nearby." It would seem that an existing use in a location not likely to become bothersome to other land users in the foreseeable future ought to create a "settled expectation" in that use.
182. "Coming to the nuisance" arguments are seldom accepted by common law courts. See The Silent Revolution, supra note 36, at 323-30. Thus, if one engages in an activity which is generally annoying to other nearby land users, then, even if there are currently no "other nearby land users" annoyed, one does not gain an expectation settled as to the world to continue in perpetuity the "generally annoying" activity. Hadacheck, a unanimous decision, seems to stand for that proposition—a proposition with deep roots in nuisance law as Lewin suggests.
183. But see the dissent of Justice Brandeis supra note 64.
184. See supra text accompanying notes 72-76.
whole world. As Brandeis pointed out: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." 186 One could hardly have a fixed and settled expectation about a future use of land. Such future use is neither fixed nor settled. One can have an expectation, even a reasonable expectation, about a future use and bet a lot of money on its value. But it is not fixed as to time and extent and settled with other people, namely the general public, until the use is well begun or a public authority grants permission in such a way as to create reliance. 187

3. Penn Central Transportation Co. v. New York City, 188 an Existing Use and Future Use Case

Penn Central clearly had no fixed and settled expectation about future use of the air space over Grand Central Station. Did it have a fixed and settled use in its existing structure and attendant activity? Obviously! Then can it be forced to maintain that fixed and settled use? The "fixed and settled use" is a fixed and settled set of expectations about use—it is fixed, for some seventy years with a Beaux Art structure, and settled, for the whole world sees the occupancy of the site. Thus one has a right, a property right, to continue that structure and activity. Any new use the owner might want to make is simply a use-in-contemplation, not fixed nor settled and thus subject to police power regulation, which is subject to judicial review for reasonableness. This is exactly what Justice Brennan did—review for reasonableness. 189

4. Lucas v. South Carolina Coastal Council, 190 a Pure Future Use Case

This is an easy case. South Carolina only prohibited a future use of property, a use-in-contemplation. There is nothing fixed or settled about the use such that a ban is the equivalent of interference with, or destruction of, the kind of expectations we call and have called "property" for over 200 years. Only when the state ousts one from possession has there ever been a taking held. As shown above, this is true in every case. Being ousted from possession must mean

186. Mahon, 260 U.S. at 421 (Brandeis, J., dissenting) (quoting Hudson Water Co. v. McCarter, 209 U.S. 349, 357 (1908)).
187. See supra text accompanying notes 72-76.
189. Penn Central, 438 U.S. at 136-38. The "reasonableness" review of the Landmark Preservation Act restrictions is prefaced with a citation from Mahon about the magnitude of lost value. That citation has no coherence with what follows which is a fairly straightforward reasonableness analysis. But the citation to Mahon and its "magnitude" standard greatly adds to the sense of muddle of the opinion.
that one cannot physically occupy his land, or some part of it, or that he must share his occupancy with someone not of his choosing.

Moreover, in this case South Carolina is not gaining something it did not have. It is preventing a terrible harm to the ecosystem. If the state discovers that the only developmental use for my property is inconsistent with my neighbors' quiet enjoyment of their property, the court had always, prior to Lucas, upheld the ban on the development. Only a thin line of dictum about having a right to some economically valuable use of one's land stretching back to dictum in Mahon and further back to Hudson Water Co. v. McCarter, where the phrase "wholly useless" was used by Justice Holmes, give Justice Scalia's ahistoric and atextual reading of the Takings Clause any glimmer of integrity with our constitutional heritage.191

Fine, but a majority of the court concurred in Justice Scalia's rationale in Lucas. What happened? Well, a funny thing happened on the way to Lucas. First, the Supreme Court of South Carolina agreed to decide the case on the assumption, which was effectively a stipulation, that "Lucas's two beachfront lots [had] been rendered valueless by [the South Carolina Coastal Council's] enforcement of the coastal-zone construction ban."192 Ghostly precedent—throw away lines for impossible situations, the classic dismissal of the paraded horrible—would now have a chance for nonspectral appearance—the impossible fact made real.

The South Carolina Supreme Court made a second mistake. They relied on the rhetoric of governmental purpose—the harm/benefit test—to defend their State's practice against Lucas' charge that a value wipe-out is a taking.193 As pointed out above, the harm/benefit analysis is fine as a moral justification for regulation, but it is terrible as a line drawing theory.194 As Justice Scalia pointed out with devastating effectiveness, the line it draws would only be tripped over by a "legislature [with] a stupid staff."195

The Supreme Court takes this case with truly aberrational facts and a straw-man sent to defend it. Justice Scalia then takes the dictum of Mahon, Penn Central,196 Nollan v. California Coastal Commission,197 Hodel v. Virginia Surface Mining and Reclamation Association,198 Keystone Bituminous199 and Agins v. Tiburon,200 and claims that the Court has since Mahon had a diminution of value

192. Lucas, 112 S. Ct. at 2896 (emphasis added), 2896 n.9.
193. Id. at 2896.
194. See supra text accompanying notes 101-118.
196. 438 U.S. 104.
199. 480 U.S. at 495.
test with at least an all/some line. He obviously assumes, like Holmes in *Mahon*,
that uses of property are "rights in property" and "rights in property" are
"property" subject to being taken and that the state can take some of this
"property" but it cannot take it all. Justice Scalia's opinion includes no rationale
for the all/some line. All he does is cite *Mahon* and dictum. He hints that "all"
is like ouster. "Ouster" suggests physical dispossession (he uses the word
"confiscation"), so he may be relying on the physical invasion test after all. If
that is the rationale, then *Lucas* will prove a curious aberration and have no effect
on the law.

However, Justice Scalia had to know that there was no physical ouster in
this case like either *Loretto v. Teleprompter Manhattan CATV Corporation*,
or *Nollan* or even like *Mahon*. The whole tenor of his opinion assumes that
future uses are "property" subject to be taken. The all/some line will not hold
because, for the reasons stated earlier, it makes no sense. It will become a
purely grand larceny versus petty larceny line. "Grand" will be defined as what
feels like "most" to "most people." Indeed, Scalia uses the phrase "essential use"
of land. And listen to his charge to the state if it wishes to uphold its statute on
remand:

South Carolina must identify background principles of nuisance
and property law that prohibit the uses he now intends in the
circumstances in which the property is presently found. Only on
this showing can the State fairly claim that, in proscribing all
such beneficial uses, the Beachfront Management Act is taking
nothing.205

He does not invite the state to show that some market value remains in
the lot or that some uses, even slight developmental uses, are left. In effect he
has already abandoned the all/some line. Because it is clear in *Lucas* that South
Carolina could show and would show that some uses and some value remain in
the Lucas lots, Scalia obviously thinks that it does not matter. The next step
is to say expressly "essentially all," then "substantially all." Soon we could have

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201. Indeed, he knew that there was no complete loss of value, for he writes that "[t]he Act did
allow the construction of certain nonhabitable improvements." *Lucas*, 112 S. Ct. at 2889 n.2
(1992). See also id. at 2904, 2908 (Blackmun, J., dissenting).
203. 483 U.S. 825.
204. See supra text accompanying notes 119-127. Indeed, if the all/some (or put affirmatively and
perhaps more logically the "no value/some value") line were truly adhered to, it would surely be
a legislature with "a stupid staff" that would trip over it. See supra note 196 and accompanying
text.
206. See supra note 203.
full blown recognition that potential uses of the things of property that add present market value to the “thing” are “property,” subject to the Takings Clause, and that the state ought never to steal. Besides, it’s too hard to draw a line between petty and grand larceny. So, except under the most exigent circumstances or clear historic limitations on uses of property, the state may not regulate the use of privately owned land. Professor Richard Epstein\textsuperscript{207} will have arrived, and the Regulatory State will be dead. Of course, that will not happen. I only suggest that is where Lucas logically leads. But then the life of the law has not been “logic”.

5. Dolan v. Tigard,\textsuperscript{208} an Exchange of Property for Use Case

Dolan v. Tigard is a case like Nollan\textsuperscript{209} where the state requires an exchange of property as compensation to the public for the cost to the public of granting a developmental use of land. Justice Rehnquist, writing for four others,\textsuperscript{210} seized on the fact that the “state,” in fact, took what is incontestably “property” from a private citizen in order to invoke “takings” doctrine and to treat the case more or less as a just compensation case.\textsuperscript{211} In then deciding whether the developmental privilege granted by the city was “just compensation” for the grant of property, the Chief Justice used a “rough proportionality” test.\textsuperscript{212} Sounds good so far—a reasonableness test to limit regulatory action. But because this reasonableness test is part of takings doctrine\textsuperscript{213} it is not deferential. Indeed, the state must demonstrate the reasonableness of the exchange. Doubts are therefore

\textsuperscript{208} 114 S. Ct. 2309 (1994).
\textsuperscript{209} 483 U.S. 825.
\textsuperscript{210} Justices Scalia and Thomas, of course, and Justices O'Connor and Kennedy not quite so, of course. Dolan, 114 S. Ct. 2309.
\textsuperscript{211} This was presaged by Nollan, 483 U.S. 825, discussed supra note 109.
\textsuperscript{212} Dolan, 114 S. Ct. at 2319.
\textsuperscript{213} Technically, there is a taking of a “property” interest in land in this case so, in that sense, it is a “takings” case. But since the state acknowledges the taking and recognizes its duty to compensate, the case falls into that part of the Takings Clause doctrine dealing with assessing just compensation. See, e.g., United States v. General Motors, 323 U.S. 373 (1945). See supra note 96 discussing General Motors.
resolved against the state. In this case, burden of proof made all the difference.

So the question comes down to this: who has the burden of persuasion as to reasonableness? The question of burden of persuasion (or deference) turns on how the case is conceptualized, i.e., into what constitutional doctrine the analysis is plugged. There are three sockets here: (1) just compensation, (2) regulatory taking without compensation, or (3) pure regulation of economic interests with no uncompensated taking. If the case is conceived of as one of just compensation, then the initial decisionmaker's decision (here the planning commission and city council) ought to be upheld as long as it was reasonable, just as an appellate court would uphold a jury's judgment in an eminent domain case. If the case is conceived of as regulatory taking without compensation, then the incorporation doctrine's preferred liberties dogma puts the burden on the state to justify its action. If the case is conceived of as the mere regulation of

214. [Justice Stevens] is correct in arguing that in evaluating most generally applicable zoning regulations, the burden already rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation the burden properly rests on the city. [citing Nollan, 483 U.S. at 836].

Dolan, 114 S. Ct. at 2320 n.8 (citation omitted).

The citation to Nollan is strange. Nowhere does Justice Scalia mention "deference" or the burdens of justification, demonstration, or proof. He assumes in his analysis of the state's justification that the burden is on the state. Nollan, 483 U.S. at 838. In his own words, however, "we find that this case does not meet even the most unstrained standards of 'fit' between the condition lateral beach easement and the burden to the public of loss of visual access. Id. So Scalia says that even if we pay deference, this "condition" is unreasonable or is not justly compensated. See supra note 109 for a discussion of what Scalia does in Nollan. Does the Chief Justice want us to ignore what Justice Scalia actually said and follow only what he did?

215. Dolan, 114 S. Ct. at 2320-22. Aside from the blunt assertion that the "strong presumption of constitutional validity" does not apply here; "[w]e see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances," and then "[w]e turn now to analysis of whether the findings relied upon by the city here, first with respect to the floodplain easement, and second with respect to the pedestrian/bicycle path, satisfied these requirements." Id. at 2320. By analogy to First and Fourth Amendment cases, then clearly the "presumption" here works against the state.

Then the Court concludes "that the findings [with respect to the floodplain easement] . . . do not show the required reasonable relationship." Id. at 2321 (emphasis added). As to the pedestrian/bicycle pathway, "the city has not met its burden of demonstrating." Id. at 2321 (emphasis added). Then the Court vividly illustrates what the burden of persuasion means: "[t]he findings of fact that the bicycle pathway system 'could' offset some of the traffic demand is a far cry from a finding that the bicycle pathway system will, or is likely to, offset some of the traffic demand." Id. at 2322 (alteration in original) (emphasis in original) (quoting Dolan v. Tigard, 854 P.2d 437, 447 (Or. 1993) (Peterson, J., dissenting)). If the burden is on the state, only "would" will do; if the burden is on the challenger "could" is good enough.

216. Id. at 2320-22.
economic interests which happens to include a provision for payment by the
regulated of some regulatory costs, then this is a substantive due process case
requiring the deferential reasonableness test discussed in the previous section.

Thus of the three doctrinal options here, two put the burden of persuasion
on the challenger of government action and one puts it on the government. Chief
Justice Rehnquist picked the latter. He assumed that, because a possessory
interest in real estate was to be transferred to the state, this was a "regulatory
takings case," which meant to him a takings-sans-compensation case. But wait,
this is certainly not a typical regulatory takings (or eminent domain) case. The
state did not initiate the transfer. The state has the power to grant something that
the owner has no positive right to have, a developmental use of her land. Under
the existing law she has a right to ask the state for such a developmental privilege
and a further constitutional right to be treated reasonably by the state which
includes both a fair process and a reasonable decision. Now, Rehnquist says, it
may not be a typical forced sale Takings Clause case, but it's an "unconstitutional
conditions" Takings Clause case. The state, he says, "may not require a person
to give up a constitutional right—here the right to receive just compensation when
property is taken for public use—in exchange for a discretionary benefit
conferrable by the government where the property sought has little or no
relationship to the benefit." But wait, the state says it will give and she will receive just compensation
for the sacrificed property. The owner is not, as she claims, "forced . . . to
choose between the building permit and her right under the Fifth Amendment to
just compensation for the public easements." Rather she must choose between
a building permit and the public easement for which the permit is just
compensation. Now if the owner should say "but the permit is not just
compensation," then the first question would be who gets to decide what just
compensation is? And, of course, that is the all important question, for whoever
"gets to decide" initially will have a presumption of correctness (that's what
getting to decide means) to be overcome by one who challenges the decision.

Therefore, in order to maintain that this case is one of an unconstitutional
condition, it must be shown that the constitutional right of the Takings Clause
contains a right to a certain decisionmaking process to determine just
compensation. In other words, it must be shown that takings or just
compensation doctrine itself mandates a certain process for determining just
compensation. If such a right to traditional process is mandated by the Takings
Clause, then and only then is this an unconstitutional conditions case. Of course,
the traditional process for determining just compensation is the judicial process

217. Id. at 2317.
218. Id.
219. Id.
and the form of compensation is money. But is such process mandated by the Takings Clause? The words of the Takings Clause give no clue to this procedural right. Moreover, the Due Process Clauses of the Fifth and Fourteenth Amendments mandate due procedures for affecting rights, and the procedures guaranteed to be due are not necessarily a full adversarial hearing and especially not one before a traditional court of law. To find civil procedural rights outside the Due Process Clauses would be novel constitutional jurisprudence.

Furthermore, the Court in Nollan and again in Dolan does not quibble with the regulatory process that determined the claimant’s rights. In Dolan, the Court merely said that the Fifth Amendment Takings Clause “rough proportionality” standard requires “no mathematical calculation ... but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” Just such an individualized finding was apparently made by the City Planning Commission. With a minor change the Tigard City Council approved the Commission’s final order. The Land Use Board of Appeals affirmed on the grounds that the “reasonable relationship” test (the state equivalent of the “rough proportionality” test) findings were supported by substantial evidence. In turn, the Oregon Court of Appeals and the Oregon Supreme Court affirmed.

In this case then, an elaborate procedure was followed. The first step was essentially non-adversarial where substantial individualized findings were made, followed by a quasi-adversarial hearing before the city council which made an essentially de novo review, followed by three steps of review using review standards. But when the case got to the United States Supreme Court, the Court made a de novo finding and assumed that the burden of proof was on the city. It did this in spite of affirming in principle the standard used by the lower review

220. There is muttering to the effect that only money will do. Robert H. Buesing, Money Isn’t Everything: Nonmember Benefits in Eminent Domain Settlements, in CURRENT CONDEMNATION LAW, TAKINGS, COMPENSATION AND BENEFITS 182-94 (Alan T. Ackerman ed., 1994). Buesing states, “[g]enerally speaking, it is held that the Constitution requires a monetary payment for just compensation.” Id. at 184. He cites 8 NICHOLS, THE LAW OF EMINENT DOMAIN § 802 (Julius Sackman ed.) (rev. 3d ed. 1973); a 1795 U.S. reporter which turns out to be the opinion of two justices on circuit, Van Horne’s Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 315 (1795); and a 1955 Idaho case. None of these cites even supports his proposition. His own article belies it as do other articles in the same volume. See, e.g., Stephen W. Swartz, The Effect of Special Benefits in Determining Compensation, in CURRENT CONDEMNATION LAW, TAKINGS, COMPENSATION AND BENEFITS 102 (Alan T. Ackerman ed., 1994).


222. Nollan, 483 U.S. 825.


224. Id. at 2319-20.

225. Id. at 2314-15.

226. Id. at 2315.

227. Id.

228. Id.
courts, saying “we do not adopt [the ‘reasonable relationship’ test] as such, partly because the term ‘reasonable relationship’ seems confusingly similar to the term ‘rational basis’ which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as ‘rough proportionality’ best encapsulates what we hold to be the requirement of the Fifth Amendment.” In other words a reasonableness test, not a rational basis test, is appropriate, and “reasonable relationship” was exactly the standard used by the courts below. The Court nowhere says the courts below used the wrong standard.

It is clear then that Dolan is a mistake: the initial decisionmaker used the right substantive standard to make its findings, the finding that the substantive standard was supported by substantial evidence was correct, and the process used to make that finding violated no constitutional norm (indeed, was not even constitutionally suspect). The Supreme Court’s mistake was in assuming, quite unconsciously apparently, that “just compensation” implies a certain adversarial adjudicative process—an assumption which is contradicted by constitutional text and precedent.

229. Id. at 2319 (emphasis added).

230. The question of the burden of persuasion in a case like this has more analytical complexity than at first meets the eye. There are three contexts for the use of burdens of persuasion: trial, appellant review and constitutional review. In each context, it has a rhetorical and a normative aspect. As a norm, it dictates who loses in close cases before juries and courts. At the trial level its normative aspect is most explicit and the rules about burdens of proof are well-understood by lawyers. The “standards of proof” (required clarity) are “preponderance,” “clear and convincing” and “beyond a reasonable doubt.” The burden of proof at this level means identifying the side in a bipolar dispute who loses if the standard of required clarity of facts is not met. The one initiating the law suit usually has the burden for most issues in the case.

At the appellate level, the burden of persuasion falls almost automatically on the party seeking to overturn the initial decision. The “standard of review” replaces the “standard of proof,” and three review standards can be used by the human brain: reasonableness, de novo, and the seldom-used bad faith. De novo is essentially not “review” but a new decision based on a cold record and written briefs. Bad faith is only used where there is no power to review, but the reviewing court nonetheless asks, “was the initial court decision an honest judgment?” Reasonableness is the only true review standard, although one can roughly see a rational basis (look only at the prevailing sides evidence—the old “scintilla” test) and a reasonable weighing (substantial evidence on the record as a whole) division.

In the context of constitutional review, the burden of persuasion is much more a rhetorical device than a normative standard. Nonetheless, it counts heavily. Constitutional courts talk about “close scrutiny,” “high and low scrutiny” and levels of “deference.” Such talk is seldom formulated into rules of decision per se. Rather, the court will say the “government must show” or “where there is a strong presumption of constitutionality then . . . .”

Why are constitutional review standards of persuasion underdeveloped as explicit norms and often understated even as rhetoric? First, the nature of constitutional review is very different from appellate review. Constitutional review is not the review of an explicit and discrete finding of fact and law by a lower court as with appellate review. The appellate court has a role spelled out in explicit rules. The constitutional court is constantly defining its role as part of its self-assumed constitutional review mission. The constitutional court reviews implicit findings of social (often called “legislative”) facts and political judgments made about those social facts by co-equal
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But let’s assume a different unstated assumption. Let’s assume that the court used a heightened scrutiny substantive due process test. Let’s assume the Court reasoned as follows: the Takings Clause right to no-taking-of-property-without-compensation is incorporated in the word “liberty” in the Fourteenth Amendment, and when “liberties” are so incorporated any state action affecting them loses its presumption of constitutionality and the court should subject such action to close scrutiny. Such close scrutiny always puts the burden of demonstration on the state. Fine. But wait, the right to no-taking-sans-compensation was not violated by the forced dedication aspect of the City of Tigard’s action. The city knew that such forced dedication was “taking” and that some kind of “roughly proportional” compensation was necessary, and its action clearly evinces its efforts to comply with the requirement of just compensation and its belief that it had complied. Unless one claims that every determination of just compensation in eminent domain must be subject to heightened scrutiny, then the forced dedication here creates no such claim. But if we dig even deeper, it may not be the “forced dedication” that creates the “takings” mentality in the Chief Justice; it may merely be the regulation of the future use of Dolan’s 1.67 acre lot in the City of Tigard. Now we are back to Mahon and Lucas and the essential sin of those cases—treating the future use of land as “property” within the Takings Clause. Now we perhaps see the wages of crying “petty larceny of the police power.” It is “to Lochner.” “Lochnering” is exactly what the court did in Dolan. Justice Rufus Peckham lives, revived by Holmes, after all. Isn’t constitutional law grand!

V. A BRIEF SUMMING UP

The Holmesian rhetoric of property as value had festered in the legal system for seventy years causing no real harm to constitutional jurisprudence until Justice Scalia brought it to life in Lucas. Disguised somewhat by the “all/some line,” which suggests a dispossession/possession line, the doctrine of Lucas (including the all/some line) is nonetheless clearly and firmly embedded in the idea that property is value and that the word “property” as used in the Takings Clause has this vernacular meaning.

branches of government whose role it is to make those judgments—“co-equal” meaning “those judgments” are final.

Second, constitutional review is very different from de novo decision making. De novo decision making is never the review of someone else’s decision about a dispute, but a fresh and usually firsthand examination of the factual evidence and a fresh application of political judgment (legislatures, administrative rulemakers) or legal judgment (courts, administrative rulemakers and adjudicators). Constitutional review is just that: “review” of someone else’s judgment. Third, constitutional review only takes place in the context of either a de novo trial or appellate review. That itself can be the source of much confusion.

231. LETTERS, supra note 1, at 457.
This vernacular meaning of "property" has not been, and ought not to be, the meaning ascribed to "property" in the Takings Clause. The meaning of the word "property" as used in the Due Process Clause was somewhat expanded in the civil procedural due process cases to include entitlements granted by positive governmental action. But such entitlements, because announced in clear language or a positive course of action, create the kind of expectation that is both fixed and settled. The aberrational case is *Mahon* where the future use was fixed in a deed and settled as between the owners and that part of the public the Kohler Act (as interpreted by the Holmes-led majority, but not by Brandeis) sought to benefit. Moreover, the word "property" as used in the Takings Clause should, because of context and precedent, have a narrower meaning than as used in the Due Process Clauses.

Substantive due process ought to be used and is used in state courts to review legislative and administrative action that restricts the future use of land (and other things of property). The future use of property is surely a "liberty" within that clause. Because of the subjective balancing nature of the substantive due process inquiry such review will be deferential to the initial political decision. But deference ought not to mean "no review" as it has in the federal courts since its Holmesian-inspired demise in the 1930s.232 *Nectow*233 (concurred in by Holmes and Brandeis) is a good working example of how substantive due process can be, has been and ought to be used to review restrictions on the future use of the things of property. Substantive due process does not involve the doctrine of "inverse condemnation"234 which must after *Lucas* hang like the sword of Damocles over every public body attempting to regulate land use in the public interest.

Finally, I hope it is clear from the above that Holmes and Scalia in *Mahon* and *Lucas* have created a doctrine that is atextual and ahistoric. The court's holdings make clear that it has always and only drawn the "possession is property and property is possession" line in actual decisions. This concept of "property" as "possession" serves the function of identifying those interferences with use that create the fundamental injustice of theft—the injustice that animates the Takings Clause. This is so because possession creates fixed and settled expectations. A fundamental basis of a just government in a just society is to identify and then protect and defend the fixed and settled expectations of its individual citizens. Because the concept of possession serves to identify fixed and settled expectations, it is a very functional concept. The concept of possession includes developmental uses of land once they come into existence—we possess

232. Although technically an "equal protection" case, *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980), is a good example of what I mean by high deference being no review at all.
the land with our building, pond, enclosure. Existing developmental uses are the only kind of use of land (and other things) that creates fixed and settled expectations. Uses-in-contemplation, developmental or otherwise, are, except in the rare case like *Mahon*, neither fixed nor settled. Moreover, uses-in-contemplation do not "feel" possessory—one does not yet possess the land with the building that exists only in the mind's eye.

Thus it is that the concept of possession has served well to identify fixed and settled expectations and, thus, to identify the occasions when the Takings Clause is violated by uncompensated regulation. By showing the identity between "possession," and "fixed and settled expectations," I have attempted to show that the conceptual approach actually used by the Court (often with consternation and embarrassment) has been functional all along.

The talk in *Mahon* and the talk and decision in *Lucas* are an alien but seductive rhetoric—a siren song. But that siren song has not seduced past Courts and will not, in spite of *Lucas*, seduce this one.