Article

The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle"

Bradley C. Karkkainen†

† Professor and Henry J. Fletcher Chair, University of Minnesota Law School. The author thanks Dan Farber, Eric Freyfogle, Eric Kades, Jim Krier, Mark Tunick, Joe Sax, and participants in the University of Minnesota Law School faculty works-in-progress workshop for helpful comments, and Peter Carlson and Thomas Witt for invaluable research assistance.

Regulatory takings law is by most accounts a "muddle."[1] Despite a series of high-profile decisions over the last three decades, the Supreme Court has failed to solve the riddle it posed for itself in the seminal case of the modern regulatory takings era, *Penn Central Transportation Co. v. City of New York*:[2] When does a regulation burdening property rise to the level of a compensable "taking"?[3]

Although current regulatory takings jurisprudence lacks theoretical coherence, the elements of the doctrine are easily enough stated. Regulations that result in permanent physical occupation[4] or deprivation of all economically viable use of land[5] are per se takings—except when they're not.[6] Exactions—conditioning land development approvals upon the surrender of a valuable property right—are subject to the *Nollan* "essential nexus"[7] and *Dolan* "rough proportionality"[8] tests, designed to

1. *See* John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695, 696 (1993) (labeling takings jurisprudence a "confused body of law"); Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 561–63 (1984) (describing takings law as riddled with "confusion"). *But cf.* Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 205–06 (2004) (arguing that the takings doctrine reasonably accommodates federalism and the limits of the Court's institutional role).

2. 438 U.S. 104 (1978).

3. The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

4. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (holding that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve").

5. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1004, 1028–31 (1992) (holding that regulations that "eliminate all economically beneficial use" of land are per se takings). The *Lucas* "total taking" test is limited to property in land. *See id.* at 1027–28 (distinguishing *Andrus v. Allard*, 444 U.S. 51, 66–67 (1979), which upheld a regulation destroying the economic value of personal property).

6. *See id.* at 1028–29 (stating that a regulation reflecting a "limitation" that "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership" is noncompensable).

7. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 836–37 (1987) (holding that if permit approval is conditioned on surrender of a property right, the condition must have an "essential nexus" to the purpose of the regulation).

8. *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (holding that the government "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").

prevent "extortion."[9] All other regulatory takings claims are decided under the *Penn Central* balancing test, requiring a case-specific weighing of the character of the government's action against the loss incurred by the property owner, taking into account "distinct investment-backed expectations."[10]

Because balancing incommensurables under the *Penn Central* test is difficult, courts often resorted to a more manageable short-form alternative set out in *Agins v. City of Tiburon*, requiring only two threshold determinations: a regulation is a compensable taking if it "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." [11] Recently, however, *Lingle v. Chevron U.S.A., Inc.*[12] expressly repudiated the *Agins* "substantially advances" formula, stating that it "prescribes an inquiry in the nature of a due process, not a takings, test," was "derived from due process, not takings, precedents," and "has no proper place in our takings jurisprudence."[13]

Lingle is an important clarification, pruning errant language in *Agins* that imported *Lochner*-style heightened substantive due process[14] review into modern takings law. The *Lingle* opinion is, moreover, a remarkably candid admission that the Court had lost its way in the takings thicket. But the conflation of takings law with substantive due process runs deeper than *Agins*,[15] and *Lingle* is an inadequate corrective.

This Article traces the roots of the doctrinal muddle to the Court's anachronistic misreading, from *Penn Central* forward,

9. *See id.* at 386–91 (quoting with approval the "extortion" language from *Nollan* and extending the test for exactions to include "rough proportionality"); *Nollan*, 483 U.S. at 837 (stating that if the permit condition does not serve the same governmental purpose as the development ban, the building restriction "is not a valid regulation of land use, but 'an out-and-out plan of extortion'") (quoting J.E.D. Assocs., Inc. v. Atkinson, 432 A.2d 12, 14–15 (N.H. 1981))).

10. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (identifying as factors of "particular significance" the "economic impact . . . on the claimant," the "extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action").

11. 447 U.S. 255, 260 (1980).

12. 125 S. Ct. 2074, 2082 (2005).

13. *Id.* at 2082–83, 2087.

14. The Fourteenth Amendment provides, inter alia: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

15. *See* Echeverria & Dennis, *supra* note 1, at 698 ("[A]s takings doctrine has evolved . . . the distinctive character of the due process and takings inquiries has become obscured.").

of late nineteenth- and early twentieth-century Fourteenth Amendment substantive due process cases as Fifth Amendment Takings Clause precedents—the same error *Lingle* discerned in *Agins*. The most important of these misplaced precedents are *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*[16] (*Chicago B & Q*)—said to have incorporated the Fifth Amendment Takings Clause against the states[17]—and *Pennsylvania Coal Co. v. Mahon*[18]—said to have established that a regulation that "goes too far" is a compensable Fifth Amendment taking.[19] Understood in proper historical context, however, neither *Chicago B & Q* nor *Mahon* said anything about the Fifth Amendment or its Takings Clause, which at the time applied only to the federal government.[20] Both cases were decided on Fourteenth Amendment substantive due process grounds.

Chicago B & Q did hold that due process requires states to pay "just compensation" when taking property by eminent domain,[21] and subsequent Courts noted parallels between that holding and the Fifth Amendment prohibition on uncompensated "takings."[22] But that did not mean that the Fifth Amendment Takings Clause applied to the states. For nineteenth- and early twentieth-century courts, the Takings Clause had a straightforward textual basis in an amendment that applied exclusively to the federal government,[23] while the just

16. 166 U.S. 226 (1897).

17. *See* Penn Cent. Transp. Co. v. City of New York, 428 U.S. 104, 122 (1978) (citing *Chicago B & Q* for the proposition that the Takings Clause "is made applicable to the States through the Fourteenth Amendment").

18. 260 U.S. 393 (1922).

19. *See, e.g.*, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 325 (2002) (stating that *Mahon* "gave birth to our regulatory takings jurisprudence").

20. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250–51 (1833) (holding that the Fifth Amendment Takings Clause applies only to the federal government). As Part II.C. shows, *Barron* remained good law until the 1950s.

21. *See Chi., Burlington & Quincy R.R. Co.*, 166 U.S. at 236 ("Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means . . . such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public.").

22. *See infra* Part II.B.

23. *See* Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893) (stating that in takings claims against the United States "we need not have recourse to . . . natural equity . . . for, in this Fifth Amendment, there is stated the exact limitation on the power of the government to take private property for public uses").

compensation principle that *Chicago B & Q* found in Fourteenth Amendment due process was derived from "universal law" and "natural equity."[24] *Mahon* was part of that same century-long line of Fourteenth Amendment substantive due process jurisprudence.[25]

During this period, the due process-based doctrine applicable to states and the Takings Clause applicable to the federal government were seen as parallel and independent, not identical, doctrines. The major difference reflected a fundamental point of federalism. State law was understood to be the principal source of property law, defining the nature and limits of the property rights held by the claimant. In Fifth Amendment takings cases, the federal government had to take state property law more or less as given, the outcome turning on whether the federal action so abridged state-recognized property rights as to constitute a "taking" of property.[26]

Due process-based claims against states played out differently. Because state law determined the scope of property rights, a claim that a state had deprived the claimant of property invited the defense that the claimant's property rights simply did not extend so far as claimed, so that no property had been "taken."[27] All states asserted as a foundational element of their property law that *all* property was qualified by, and held subject to, the state's reserved police power to regulate to protect the public health, safety, morals, and general welfare. The police power thus operated as an inherent limitation on property rights, part of the state-law definition of property itself.

24. *See Chi., Burlington & Quincy R.R. Co.*, 166 U.S. at 236–37; *see also* Twining v. New Jersey, 211 U.S. 78, 99 (1908) (stating that states must pay just compensation in eminent domain because that principle is "included in the conception of due process of law" and "not because those rights are enumerated in the first eight Amendments"), *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964).

25. *See* Robert Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon, 106 YALE L.J. 613 (1996); William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of* Mahon, 86 GEO. L.J. 813 (1998); *see also infra* Part II.E.

26. *See infra* Part II.D.

27. "Taking" was used interchangeably with "deprivation of property" in both Fifth and Fourteenth Amendment substantive due process cases in the nineteenth and early twentieth centuries, contributing to the modern confusion. *See, e.g.*, Heiner v. Donnan, 285 U.S. 312, 330 (1932) (holding federal estate tax provision "so arbitrary and capricious as to cause it to fall within the ban of the due process clause of the Fifth Amendment"). Nothing turns on this shorthand use of the term.

Because all property was subject to this indefinite limitation, property rights were also indefinite at the boundaries, and varied over time and across jurisdictions.

Regulatory takings claims against states under the Due Process Clause turned centrally on whether the challenged regulation fell within the legitimate bounds of the police power.[28] If the action was a valid police power exercise, that was dispositive: no deprivation of property had occurred. Because there was no federal analog to the states' police power, these arguments had no place in Fifth Amendment Takings Clause doctrine.[29] Genetically, analytically, and operationally, the two doctrines were distinct.

Penn Central changed all that, holding that the Fifth Amendment Takings Clause applies directly to the states, citing a single precedent, *Chicago B & Q*, which in fact said no such thing. From there, the *Penn Central* Court attempted to weave a unified takings doctrine out of a pastiche of Fourteenth Amendment substantive due process and Fifth Amendment Takings Clause precedents. The ensuing doctrinal merger effectively eliminated Fourteenth Amendment due process as a distinctive category of inquiry in takings law and eviscerated the states' police power defense. Elimination of that defense, in turn, diminished the role of state property law in defining the content and limits of property entitlements against which a "taking" would be measured, and sowed confusion as to what counts as "property" for purposes of takings analysis.[30] With state law deprived of its historic role, we are left with no principled way to determine the baseline of property rights to which a claimant is legitimately entitled.[31]

28. *See infra* Part II.A.

29. The federal government has general police power over the District of Columbia and federal territories. *See, e.g.*, Block v. Hirsh, 256 U.S. 135, 156 (1921) (upholding wartime rent controls in the District of Columbia as a legitimate police power measure). Congress's plenary power over public lands is also "analogous to" the states' police power. Camfield v. United States, 167 U.S. 518, 525–26 (1897).

30. *See* Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 318–20 (1993) (arguing that in recent takings cases it is not clear whether the Supreme Court is relying on a "legal-positivist" conception of property, general federal common law, or on a constitutional definition of property grounded in natural law).

31. *See id.* at 327 (warning that contemporary takings law threatens to make "the Federal Constitution, specifically the Taking[s] Clause, dictate to the States the jurisprudential spirit in which their general laws of property

Conflation of the two doctrines also introduced confusion about what counts as precedent in takings adjudication, and led to "reverse incorporation" of substantive due process concepts and principles into Fifth Amendment takings law—the problem that *Lingle* discerned in *Agins*, but that pervades contemporary takings jurisprudence.[32]

The conundrum is of the Court's own making. Its solution does not lie in further judicial parsing of the verb "to take" or its derivative noun form "taking,"[33] nor does it lie in metaphysical inquiry into the essential attributes of property in general. Instead, the solution must come from an inquiry into the nature and limits of private property rights in a democratic society, and the nature and limits of the states' concomitant power, on behalf of the demos, to define and adjust the legal boundaries determining the specific content of those rights. That discussion, predicated upon the understanding that the law of property—like any foundational social institution—must be dynamic and malleable to adapt to changing social needs, is one in which substantive-due-process-era courts and commentators constructively engaged through their discourse on the police power and its limits. It is a discourse that in the post-*Penn Central* era we have abandoned, to the impoverishment of property jurisprudence.

This Article is structured as follows: Part I offers a general introduction to the federalism principles that historically undergirded our constitutional law of property. Part II introduces the police power and its historic role as an inherent limitation on property rights, describes the distinguishing characteristics of the due process and Takings Clause branches of just compensation law, and places *Chicago B & Q* and *Mahon* in proper historical context as substantive due process, not Takings Clause, cases. Part III discusses how *Penn Central* misconstrued *Chicago B & Q*'s due process holding as a Fifth Amendment Takings Clause precedent, and suggests that the rising tide of selective incorporation rhetoric in the years before *Penn Central* may have contributed to the confusion. Part III also unpacks the elements of the doctrinal muddle that followed

and nuisance are to be read and construed, whether contained in legislative enactments or judicial decisions").

32. *See infra* Part III.C.

33. *See* Rose, *supra* note 1, at 562 (describing takings law as an effort to plumb the "elusive[] . . . meaning of 'taking' in our law").

conflation of substantive due process and the Takings Clause. Part IV discusses the rise and fall of the police power, and the conceptual gap its demise has left in our constitutional law of property. Part V concludes with a proposal to rehistoricize property jurisprudence by restoring the police power to its rightful place as a "background principle" of state property law.

I. PROPERTY FEDERALISM

In our post-*Erie v. Tompkins*[34] world, the ordinary legal presumption is that property law—like the law of tort and contract—is principally a matter of state law.[35] Indeed, even in the *Swift v. Tyson*[36] era of general federal common law, courts routinely invoked state law rather than general federal common law to determine the extent of claimants' property rights in federal constitutional adjudication.[37] As the Supreme Court explained in 1907 in *Sauer v. City of New York*, "this court has neither the right nor the duty . . . to reduce the [property] law of the various States to a uniform rule which it shall announce and impose."[38] This basic federalism principle followed from *Swift* itself, which said that "local law" should govern matters of a "strictly local" nature, including "rights and titles to things having a permanent locality, such as the rights and titles to real estate," while "questions of a more general nature" like

34. 304 U.S. 64, 78–80 (1938). The Court held that a federal court in diversity jurisdiction should apply state law and not general federal common law. *Id.* at 78.

35. *See* Thomas W. Merrill, *The Landscape of Constitutional Property,* 86 VA. L. REV. 885, 943–44 & n.224 (2000) (tracing the roots of "the understanding that property is a positive right largely (if not exclusively) defined by state law").

36. 41 U.S. (16 Pet.) 1, 18–19 (1842) (holding that section 34 of the Judiciary Act of 1789, providing that state laws "shall be regarded as rules of decision" in federal courts, did not apply to commercial law or other "questions of a more general nature"), *overruled by* Erie v. Tompkins, 304 U.S. 64 (1938).

37. *See* Merrill, *supra* note 35, at 943–44 n.224 and cases cited therein. *E.g.*, Hartford Fire Ins. Co. v. Chi., Milwaukee & St. Paul Ry. Co., 175 U.S. 91, 100–01 (1899) (holding that a dispute concerning damage to property from railroad operations is to be decided by state law and not general federal common law); Smith Middlings Purifier Co. v. McGroarty, 136 U.S. 237, 241 (1890) (holding that a diversity case concerning mortgage rights is to be decided by Ohio state law).

38. 206 U.S. 536, 548 (1907) (rejecting a due process property deprivation claim because "under the law of New York, as determined by its highest court, the plaintiff never owned the easements which he claimed, and . . . therefore there was no property taken").

contract interpretation and commercial law were subject to "general law."[39]

For most purposes we still adhere to the view that state law, not federal law, is the primary source and determinant of the scope and limits of property, and that view is only strengthened by the *Erie* doctrine. Bolstering this understanding is the Positivist- and Realist-inspired insight that property law, and *a fortiori* the scope of property entitlements, are grounded in neither universal principles of natural right[40] nor timeless common law precepts,[41] but instead grew out of judge-made common law as modified by subsequent case law and legislative enactments.[42] An owner's property rights thus ordinarily extend only as far as state property law says they do, and under federalism principles, states have considerable discretion not only to determine the primary rules of property in the first instance, but also to make necessary adjustments over time through legislative enactments and evolving judicial doctrines, just as they adjust their laws of tort or contract.[43]

39. *Swift*, 41 U.S. (16 Pet.) at 18–19.

40. *See* Eric T. Freyfogle, *Private Land Made (Too) Simple*, 33 ENVTL. L. REP. 10,155, 10,160 (2003) (stating that "natural-rights justifications" for property law "were wisely cast aside . . . and do not withstand scrutiny today"); Michelman, *supra* note 30, at 305 ("By an argument that reaches back at least to Bentham, property's scope and content—property's existence, even—are completely dependent upon standing law. . . . [Consequently,] the term 'property' in the Fourteenth Amendment denotes nothing except what some corpus of extant positive law happens to make into property."). For a contrary view, see Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549 (2003) (attempting to derive a theory of property from universal principles of natural right).

41. *See* Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295, 1295 (1998) ("The legal realists of the 1920s and '30s demonstrated that all law is 'public'—that is, dependent upon the state."); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 491 (1988) ("The realists argued that the concept of private property . . . encompassed competing values and principles. . . . [Courts] therefore could not deduce specific legal rules from the abstract concept of property.").

42. *See, e.g.*, Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379, 402–04 (2001) (describing property as the product of dynamic interplay between common law and legislation).

43. *See* Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1446 (1993) ("Historically, property definitions have continuously adjusted to reflect new economic and social structures, often to the disadvantage of existing owners."); *id.* at 1448 (citing major changes in property including abolition of feudal tenures and entails; changes in dower and curtesy; abolition of ripar-

With that background understanding, we should expect property rights in our federal system to be both dynamic and divergent, as state legislatures and courts create new property rules or extend, trim, or modify old ones. Thus property law in Louisiana, rooted in French and Spanish civil law traditions,[44] differs from property law in New York, which grafted English common law onto an earlier Dutch legal system[45] and was later modified by legislatures and judges.[46] Property law in Virginia also diverges from New York's, having developed on a unique evolutionary trajectory.[47]

On this federalist understanding, we might further expect that federal constitutional property guarantees like the Due Process and Takings Clauses must take state property law more or less as given. As the Supreme Court said in a leading procedural due process case: "Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ."[48] This division of legal labor is foundational to the architecture of our federalist system.

Curiously, however, despite property federalism's prominence elsewhere,[49] it often gets short shrift in contemporary

ian water rights in the West; and the rise of married women's property rights).

44. *See, e.g.*, Eldridge v. Trezevant, 160 U.S. 452, 463 (1896) (holding that construction of a levee on private waterfront land did not deprive owner of property because under Louisiana law derived from the Code Napoleon, lands abutting waterways are subject to a public servitude for levees).

45. *See* Joseph A. Ranney, *Anglicans, Merchants, and Feminists: A Comparative Study of the Evolution of Married Women's Rights in Virginia, New York, and Wisconsin*, 6 WM. & MARY J. WOMEN & L. 493, 503 (2000) (stating that early New York property law retained important strains of a community property system derived from Dutch law, later supplanted by English law).

46. *See id.* at 506–12 (tracing expansion of married women's property rights in New York through legislation, constitutional amendments, and case law).

47. *See id.* at 516–25 (describing divergent paths of New York and Virginia in recognizing married women's property rights).

48. Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972); *see also* Davies Warehouse Co. v. Bowles, 321 U.S. 144, 155 (1944) ("The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state.").

49. *See* Michelman, *supra* note 30, at 321 (describing the apparent "deviation" of some of the Court's takings rhetoric from its "standard legal-positivist mantra" that property rights are not created by the Constitution but by state law); *see also, e.g.*, Am. Mfr. Mut. Ins. v. Sullivan, 526 U.S. 40, 60–61 (1999) (rejecting procedural due process claim because plaintiff had no property in-

takings cases.[50] The Court faithfully recites that there is no federal constitutional definition of property, but seldom relies upon state law to inform its inquiry into the existence, nature, and limits of the property entitlement allegedly taken.[51] Indeed, on at least one occasion the Court expressly repudiated a takings claim based on the idiosyncrasies of state property law, dismissing such arguments as mere "legalistic distinctions."[52] More recently, in *Palazzolo v. Rhode Island*, the Court straightjacketed states' latitude to redefine property rights, rejecting Rhode Island's argument that its authority to "shape and define property rights" through regulation necessarily must inform what counts as a "reasonable investment-backed expectation" so that (on the state's theory) if the challenged regulation was already in effect when the property was acquired, a takings claim should not be available.[53]

In principle, the state's law of property ought to matter for purposes of regulatory takings analysis. If what counts as "property" is determined by state law, then a claim that property was "taken" by government action should depend in part on the logically antecedent inquiry whether the claimant's property rights under state law actually extend as far as the claimant alleges—that is, whether a constitutionally protectable property interest is implicated.[54]

terest under state law); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985) ("Respondents' federal constitutional claim depends on their having had a property right [under state law].").

50. *See* Michelman, *supra* note 30, at 303 (describing a "bad fit" between the "market conservative" project of contemporary regulatory takings doctrine and the "legal conservative" project of federalism which recognizes property rights are principally defined by state law). *But cf.* Sterk, *supra* note 1 (arguing that modern takings doctrine accommodates federalism).

51. *But cf.* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003–04 (1984) (holding that the Takings Clause protects health, safety, and environmental data recognized as a "trade-secret property right" under state law).

52. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 500 (1987) (stating that although Pennsylvania law recognizes the "support estate" as a separate interest in land, "our takings jurisprudence forecloses reliance on such legalistic distinctions"); *id.* at 518–20 (Rehnquist, J., dissenting) (chiding the Court for failing to credit state law in determining claimants' property rights). *Keystone Bituminous* upheld a statute requiring coal operators to provide subjacent support to surface property. *Id.* at 506. *Pennsylvania Coal Co. v. Mahon* relied upon the same "legalistic distinction" to hold a similar statute invalid. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) (stating that the statute "purports to abolish what is recognized in Pennsylvania as an estate in land").

53. 533 U.S. 606, 626–27 (2001).

54. *Cf.* Eric T. Freyfogle, *Regulatory Takings, Methodically*, 31 ENVTL. L.

The Court seemed to acknowledge as much in *Lucas v. South Carolina Coastal Council*[55] when it stated that property rights may be subject to "limitations" that "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[56] But having gotten that far, the *Lucas* Court lost its conceptual grip. What are these "inherent limitations" in "background principles of the state's law of property"? Without explicitly so holding, *Lucas* strongly implied that "inherent limitations" are confined to longstanding general common law principles of private and public nuisance.[57] But why should that be? After all, the common law no longer holds a privileged place in our legal order; in most circumstances it can be trumped by ordinary legislative enactments.[58] There is no obvious reason why property law should be any different in that regard.[59]

Lucas warned that legislative enactments cannot themselves become instant "background principles" at their enactment.[60] That seems reasonable enough. Perhaps new law

REP. 10,313, 10,314 (2001) ("A court in a takings case faces two, sequential questions. First, what are the plaintiff's property rights, under the various valid laws . . . [and second] has that property been taken?"); Sterk, *supra* note 1, at 222 ("[W]ithin our federal system, definition of property rights has generally been left to the states, [and] if state law did not create property in the first instance, then subsequent state action cannot take property.").

55. 505 U.S. 1003, 1029 (1992).

56. *Id.*

57. *Id.* (stating that regulation denying economically viable use of land must "do no more than duplicate the result that could have been achieved in the courts . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise"); *id.* n.16 ("The principal 'otherwise' that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of 'real and personal property . . . to prevent . . . fire' or to forestall other grave threats to the lives and property of others.").

58. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2107 (2002) (describing the "accepted hierarchy" that "the Constitution always trumps statutes, but statutes always trump the common law"); Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 904 (1987) ("The common law is not prepolitical. . . . [E]fforts to change the common law framework are not by virtue of the fact constitutionally suspect . . . .").

59. *See* Freyfogle, *supra* note 54, at 10,314 (arguing that takings analysis must consider the "rights crafted by the interaction" of "all laws, in all forms, from all levels of government," which determine "what the law generally, and hence the Constitution, deems property").

60. *See Lucas*, 505 U.S. at 1029 (stating that "confiscatory" regulations "cannot be newly legislated or decreed (without compensation)" but "must in-

should never pass instantly into background. It is more difficult, however, to see why legislative enactments might not become "background principles" with the passage of time—a possibility the Court came close to ruling out in *Palazzolo*.[61]

Moreover, despite the *Lucas* Court's rhetorical nod to the role of background principles of state law, the *Lucas* opinion trod perilously close to imposing a general federal common law baseline definition of property for purposes of takings analysis, pontificating at length on the generalities of public and private nuisance doctrine without tethering that discussion to South Carolina statutes, common law, or case law.[62]

II. THE POLICE POWER IN SUBSTANTIVE DUE PROCESS JURISPRUDENCE

A. THE POLICE POWER AS "BACKGROUND PRINCIPLE" AND "INHERENT LIMITATION"

Suppose a state were to claim that *its* longstanding "background principles of property law" include the following: "All property is held subject to, and inherently limited by, the state's reserved power to enact regulations to protect the health, safety, morals, and general welfare of its citizens."

here in the title itself" through "background principles" and "do no more than duplicate the result that could have been achieved in the courts" under private or public nuisance or "otherwise").

61. Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001) (holding that "[f]uture generations, too, have a right to challenge unreasonable limitations on the use and value of land" even if those restrictions pre-date their acquisition of the property). This was the dispute between Justices O'Connor and Scalia in their dueling concurrences in *Palazzolo*. Justice O'Connor emphasized that the existence of a regulation at the time property is acquired might serve as one factor in determining the landowner's "reasonable investment-backed expectations" under a *Penn Central* analysis. *See id.* at 633–36 (O'Connor, J., concurring). In Justice Scalia's view, the fact that a regulation existed at the time of acquisition "should have no bearing" on whether it constitutes a taking. *See id.* at 636–37 (Scalia, J., concurring). Since that principle would apply to each successive owner in a potentially infinite chain, it is difficult to see how a legislative enactment could ever pass into "background principle."

62. *See Lucas*, 505 U.S. at 1030–31 (citing *Restatement (Second) of Torts* for relevant common law nuisance principles before conceding that the "question . . . is one of state law to be dealt with on remand"); *see also* Michelman, *supra* note 30, at 319 (stating that Justice Scalia wrote parts of *Lucas* "as if there is just one American background law of property and nuisance—supportive, as it happens, of Lucas' claim—that is common to the national jurisdiction and all the state jurisdictions").

Thus, the state might argue, whenever a new regulation falling within the scope of this reserved power is enacted, it is not the new regulation that becomes a "background principle." Instead, the relevant background principle is that property is held, and always has been held, subject to the state's reserved power to make certain kinds of regulatory adjustments over time, as the need arises; and that limitation "inheres in the title" to all property. Under that background principle, a subsequent regulatory enactment falling within the scope of the state's reserved power could never result in a compensable "taking" or deprivation of property, for the scope of the claimant's property entitlement itself is—and always has been—limited by the possibility that a regulation of that kind might be enacted.

Such a broad and open-ended assertion of "inherent limitation" on property rights might sound odd, even radical, after three decades of post-*Penn Central* regulatory takings jurisprudence, especially in light of *Lucas*'s crabbed interpretation of "background principles" and "inherent limitations."[63] But it would not have sounded odd to nineteenth- and early twentieth-century courts and legislatures,[64] for this is precisely the claim that all states historically made in the name of the "police power"—the states' reserved power to regulate to protect the public health, safety, morals, and general welfare.[65] As

63. *See* James Burling, *The Latest Take on Background Principles and the States' Law of Property After* Lucas *and* Palazzolo, 24 U. HAW. L. REV. 497, 499 (2002) ("[T]he notion that a government can avoid the reach of the Takings and Just Compensation clauses by merely invoking a harm-preventing police power rationale were [sic] put to rest in *Lucas*.").

64. Two mid-twentieth century commentators stated the thesis concisely:

> Property values are enjoyed under an implied limitation imposed by the police power. This implied limitation reduces the aggregate of property rights which the landowner can assert *against the government*, and only those remaining constitute the "legally protected interests" which are his property as *against the government*. Accordingly, the assertion by the government of any of its powers within the area of this implied limitation is not a taking of property without compensation in derogation of the Fourteenth Amendment because property *as against the government* is not thereby affected.

Robert Kratovil & Frank J. Harrison, Jr., *Eminent Domain—Policy and Concept*, 42 CAL. L. REV. 596, 610–11 (1954) (quotations omitted).

65. *See, e.g.*, Fed. Land Bank of New Orleans v. John D. Nix, Jr., Enters., 117 So. 720, 723 (La. 1928) ("Every one holds his property, under the Constitution, subject to a legitimate exercise of the police power."); Appeal of White, 134 A. 409, 411 (Pa. 1926) ("No matter how seemingly complete our scheme of private ownership may be under our system of government, all property is held in subordination to the right of its reasonable regulation by the govern-

Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court explained in an early and influential case, *Commonwealth v. Alger*:

> We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth . . . is . . . held subject to those general regulations, which are necessary to the common good and general welfare.[66]

As a corollary, it followed that the exact scope, content, and limits of a property owner's rights could never be fully and precisely delineated, because they remained subject to the state's reserved power to adjust their outer boundaries through police power enactments.

Adoption of the Reconstruction Amendments did not alter this background understanding of the inherent limits and mutability of property rights. The Supreme Court explained in *Barbier v. Connolly*:

> [N]either the [Fourteenth] amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.[67]

---

ment clearly necessary to preserve the health, safety, or morals of the people."); Schiller Piano Co. v. Ill. N. Utils. Co., 123 N.E. 631, 632 (Ill. 1919) ("All property in a state is held on the implied condition or obligation that the owner will so use it as not to interfere with the rights of others and subject to such reasonable regulations as the Legislature may impose [under the police power]."); Schmitt v. F.W. Cook Brewing Co., 120 N.E. 19, 21 (Ind. 1918) ("[T]here can be no property rights which are not subject to this [police] power."); *Ex parte* Kelso, 82 P. 241, 242 (Cal. 1905) ("[T]he property owner . . . holds his property subject to the proper exercise of the police power . . . ."); Eichenlaub v. City of St. Joseph, 21 S.W. 8, 10 (Mo. 1893) ("[E]very citizen holds his property subject to [the police] powers. [S]uch . . . regulations . . . do not amount to the taking of private property . . . ."); People v. Gillson, 17 N.E. 343, 345 (N.Y. 1888) ("[A]ll property is held subject to the general police power of the state to so regulate and control its use, in a proper case, as to secure the general safety and the public welfare."); Pool v. Trexler, 76 N.C. 297, 297 (N.C. 1877) ("Every citizen holds his land subservient to such 'police regulations' as the General Assembly may in its wisdom enact . . . .").

66. 61 Mass. (7 Cush.) 53, 84–85 (1851).

67. 113 U.S. 27, 31 (1884).

If an action fell outside the legitimate bounds of the state's police power, however, it implicated due process. The Court stated in *Mugler v. Kansas*:

> Nor can [police power] legislation . . . come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.[68]

Thus a *legitimate* exercise of the police power could never give rise to a compensable taking,[69] but that did not mean that states had license to run roughshod over property rights. Some actions ostensibly taken pursuant to the police power might not be legitimate exercises of that power. Such actions might be deemed implied exercises of the state's complementary power of eminent domain, compensable under established due process principles;[70] or they might lie beyond any legitimate power of the state, and be held invalid.[71]

Under substantive due process review, then, the first and most important question for a court adjudicating a claim of un-

68. 123 U.S. 623, 669 (1887).

69. *See* Chi. & Alton R.R. Co. v. Tranbarger, 238 U.S. 67, 78 (1915) ("[I]t is well settled that the enforcement of uncompensated obedience to a legitimate regulation established under the police power is not a taking of property without compensation, or without due process of law, in the sense of the Fourteenth Amendment.").

70. *See, e.g.*, City of Belleville v. St. Clair Co. Tpk. County, 84 N.E. 1049, 1053 (Ill. 1908) (stating that a use restriction to prevent harm or advance the general welfare is "a regulation and not a taking, an exercise of the police power and not of eminent domain" but "the moment the Legislature passes beyond mere regulation, and attempts to deprive the individual of his property, or of some substantial interest therein, under the pretense of regulation, then the act becomes one of eminent domain").

71. The Takings Clause contains an express "public use" limitation, and states were similarly bound by Fourteenth Amendment due process. *See* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158 (1896) (holding that Fourteenth Amendment due process requires that a state "taking" be for "public use"). Regulations falling outside the police power and failing the "public use" test were void. *See, e.g.*, Mo. Pac. Ry. Co. v. Nebraska, 164 U.S. 403, 403 (1896) (*Missouri Pac. I*) (invalidating an order authorizing private grain elevator on railroad right-of-way as a "taking" of private property for private use, violating due process).

constitutional deprivation of property by a state was: "Is this action a legitimate exercise of the state's police power?" An affirmative answer precluded a judgment that compensation was due, for it meant there had been no interference with the claimant's property rights.

Federal regulations affecting property were subject to a very different analysis. Under most circumstances, the *federal* government does not have power to determine in the first instance what is, and what is not, "property." That, the Court insisted, is a matter of *state* law.[72] Nor does the federal government possess a general police power to regulate property in the interest of harm-prevention or promotion of the general welfare.[73] Unlike the states' police power, federal powers did not generally operate as an inherent limitation on property, nor was the inquiry into the validity of the assertion of federal power logically antecedent to, or dispositive of, the determination of the scope of claimant's property rights. Instead, all federal powers were said to be held "subject to" the constraints of

72. *See, e.g.*, Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 41–42 (1944) (finding that the rights of a mortgagee are a matter of state law and because state courts concluded that appellants "have never possessed under New York law such a property right as they claim has been taken from them[,] . . . appellants have no question for us under the Due Process Clause"); Fox River Paper Co. v. R.R. Comm'n, 274 U.S. 651, 655 (1927) (holding that the rights of riparian landowners to river beds and use of navigable waterways is a matter of state property law "to be determined by the statutes and judicial decisions of the state"); Waggoner Estate v. Wichita County, 273 U.S. 113, 117 (1927) (stating that whether property is classified as realty or personalty "is a question of local law upon which the local decisions and statutes control"); Edward Hines Yellow Pine Trs. v. Martin, 268 U.S. 458, 463 (1925) (finding that federal courts will follow decisions of state courts in interpreting state statutes or property rules affecting title to real estate); Sauer v. City of New York, 206 U.S. 536, 548 (1907) (holding that the existence and scope of easements are matters of state property law, and "this court has neither the right nor the duty . . . to reduce the law of the various States to a uniform rule").

73. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 618 (2000) (invalidating the federal Violence Against Women Act, and stating that "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime"); Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146, 156 (1919) ("That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true."); Brown v. Maryland, 12 Wheat. 419, 443 (1827) (stating that the police power "unquestionably remains, and ought to remain, with the States"); McCulloch v. Maryland, 4 Wheat. 316, 405 (1819) ("Th[e] [federal] government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted.").

the Fifth Amendment.[74] Thus, in a Fifth Amendment Takings Clause case, the court had to look first to state law to define the relevant property rights, and then determine whether the challenged federal action so truncated those state-defined property rights that it would constitute a compensable "taking" of claimant's property.[75] The federalist division of labor in the realm of property law, then, implied that different standards and modes of analysis would be used to determine whether a compensable "taking" or "deprivation" of property had occurred.

Courts continued to recognize this underlying federalist dualism in property law through all of the late nineteenth and most of the twentieth centuries in such celebrated cases as *Chicago B & Q*,[76] *Reinman v. City of Little Rock*,[77] *Hadacheck v. Sebastian*,[78] *Pennsylvania Coal Co. v. Mahon*,[79] *Village of Euclid v. Ambler Realty Co.*,[80] *Miller v. Schoene*,[81] and *Gold-*

74. *See, e.g.*, Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589 & n.19 (1935) ("The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment."); Monogahela Navigation Co. v. United States, 148 U.S. 312, 336 (1893) ("[L]ike the other powers granted to the Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment . . . . If, in exercising that supreme control, it deems it necessary to take private property, then it . . . can take only on payment of just compensation.").

75. *See Louisville Joint Stock Land Bank*, 295 U.S. at 590 ("In order to determine whether [property rights] have been taken, we must ascertain what [the plaintiff's] rights were before the passage of the Act. [For that, we] turn . . . first to the law of the State."); *see also* United States *ex rel.* Tenn. Valley Auth. v. Powelson, 319 U.S. 266, 279 (1943) ("Though the meaning of 'property' as used in . . . the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law.").

76. 166 U.S. 226, 236 (1897) (holding that due process requires payment of just compensation in eminent domain); *id.* at 252 (holding safety measures not compensable because "[t]he requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the state by reasonable regulations to protect the lives and secure the safety of the people").

77. 237 U.S. 171, 176–77 (1915) (upholding an ordinance restricting the location of livery stables as a legitimate police power exercise compatible with due process).

78. 239 U.S. 394, 410–11 (1915) (upholding an ordinance prohibiting brick making in designated zones as a valid police power regulation).

79. 260 U.S. 393, 414 (1922) (invalidating a statute requiring mine operators to provide subjacent support to surface owners because it "cannot be sustained as an exercise of the police power").

80. 272 U.S. 365, 395 (1926) (upholding a zoning ordinance as a valid police power regulation).

81. 276 U.S. 272, 279–80 (1928) (upholding a statute providing for destruction of infected trees as a valid police power measure).

blatt v. Hempstead.[82] Indeed, it remained a foundational element in constitutional takings jurisprudence right up until the Supreme Court's crucial 1978 decision in *Penn Central Transportation Co. v. City of New York*,[83] which retroactively rewrote a century of jurisprudential history.

B. *CHICAGO B & Q* IN HISTORICAL CONTEXT

It is now widely assumed that the Fifth Amendment Takings Clause was incorporated against the states in 1897 in *Chicago B & Q*.[84] Challenging conventional wisdom, this Part argues that it was not until 1978 in *Penn Central Transportation Co v. New York*[85] that the Supreme Court first explicitly held the Takings Clause applicable to the states. *Penn Central* treated the incorporation question as so obviously settled that it did not merit discussion or analysis, offhandedly stating the question before the Court to be "whether the restrictions imposed by New York City's law . . . effect a 'taking' of appellants' property for a public use within the meaning of the Fifth Amendment, *which of course is made applicable to the States through the Fourteenth Amendment*."[86] The Court cited a single precedent for that holding: *Chicago B & Q*.[87]

In fact, *Chicago B & Q* had nowhere mentioned the Fifth Amendment or its Takings Clause.[88] Instead, *Chicago B & Q* was argued and decided on Fourteenth Amendment due process grounds.[89]

82. 369 U.S. 590, 596 (1962) (upholding an ordinance prohibiting sand and gravel mining below the water table as "a valid police [power] regulation" and not a due process violation).

83. 438 U.S. 104, 138 (1978) (upholding New York City's landmarks ordinance against what it deemed a Fifth Amendment Takings Clause claim).

84. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 383 (1994) (citing *Chicago B & Q* for the proposition that "[t]he Takings Clause of the Fifth Amendment . . . [was] made applicable to the States through the Fourteenth Amendment").

85. 438 U.S. 104.

86. *Id.* at 122 (emphasis added).

87. *Id.*

88. *See Dolan*, 512 U.S. at 405 (Stevens, J., dissenting) (stating that *Chicago B & Q* "contains no mention of either the Takings Clause or the Fifth Amendment").

89. *See* Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 235 (1897) (stating the question before the Court as "whether the due process of law enjoined by the fourteenth amendment requires compensation to be made . . . to the owner of private property taken for public use under authority of a State"); *see also* Martin S. Flaherty, *History "Lite" in Modern*

Prior to the Reconstruction Amendments, the Takings Clause—like the rest of the Bill of Rights—had been held to apply only to the federal government, and not to the states.[90] Indeed, the Takings Clause was probably originally understood as a federalism amendment, to safeguard against overreaching by a distant central government that might be tempted to seize land and slaves from wealthy Southern planters[91] or to conscript military supplies in the high-handed manner of its imperial predecessor, the English crown.[92] This account accords with legislative history: the Bill of Rights emerged during the ratification debates in response to Anti-Federalist anxieties about concentrated, centralized power.[93]

Unlike the First Amendment,[94] however, the Fifth is not textually limited to the federal government,[95] leaving its scope of application initially uncertain. That issue was squarely resolved in *Barron v. Baltimore* when the Supreme Court dismissed a Fifth Amendment Takings Clause claim against the mayor and city council of Baltimore, reasoning that because the Takings Clause was added to the Constitution in response to

American Constitutionalism, 95 COLUM. L. REV. 523, 560–61 n.167 (1995) (stating that *Chicago B & Q* did not rely on incorporation but instead "characterizes the right not to be deprived of property for public use without just compensation as inhering in the concept of due process," based on "principles of republican institutions, the common law, natural equity, universal law as well as case law, and treatises relying on these sources").

90. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 79 (1998).

91. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 837–39 (1995) (arguing that Madison favored a Takings Clause to protect against seizures of land and chattels, including slaves); *id.* at 850–53 (stating that Madison regarded land and slaves as the property most vulnerable to majoritarian overreaching).

92. *See* AMAR, *supra* note 90, at 79–80 (stating that the Takings Clause was intended to safeguard states and their citizens against "impressment" of property for military use); Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 292 (1988) (arguing the Takings Clause was intended to keep a remote central government from aggrandizing itself by confiscating property).

93. *See* Akhil Reed Amar, *2000 Daniel J. Meador Lecture: Hugo Black and the Hall of Fame*, 53 ALA. L. REV. 1221, 1223–24 (2002) (describing the Bill of Rights as a response to "anxieties of Anti-Federalists" in "the shadow of a Revolutionary War waged by local governments against an imperial center").

94. U.S. CONST., amend. I.

95. "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST., amend. V.

fears of abuse by the federal government, it should not be construed to reach the states.[96]

Barron later came to stand for the proposition that the entire Bill of Rights applied only to the federal government.[97] Its core holding, however—the only legal issue strictly necessary to its outcome—was that the Takings Clause did not apply to states or their political subdivisions.[98]

That understanding persisted after ratification of the Fourteenth Amendment. In the 1871 case *Pumpelly v. Green Bay Co.*,[99] the Court noted that the federal Takings Clause does not apply to the states,[100] and instead applied a similar "takings" provision in the Wisconsin constitution, emphasizing its duty to defer to Wisconsin Supreme Court interpretations of that provision.[101] In *Nashville, Chattanooga & St. Louis Railway Co. v. Alabama*, the Court again cited *Barron* for the proposition that the Fifth Amendment "only applies a limit to Federal authority, not restricting the powers of the State," and elected to construe the railroad's challenge to allegedly confiscatory state regulations as stating a Fourteenth Amendment due process and not a Fifth Amendment takings claim.[102]

That understanding was reaffirmed in *Fallbrook Irrigation District v. Bradley*,[103] decided just a few months before *Chicago*

96. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250–51 (1833).

97. *See, e.g.*, Spies v. Illinois, 123 U.S. 131, 166 (1887) ("[T]he first 10 Articles of Amendment were not intended to limit the powers of the state governments in respect to their own people, but to operate on the National Government alone." (citing *Barron*, 32 U.S. (7 Pet.) at 247)).

98. *Barron*, 32 U.S. (7 Pet.) at 250–51 ("[T]he provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use, without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.").

99. 80 U.S. 166 (13 Wall.) (1871) (holding that a statutorily authorized mill dam flooding plaintiff's land was a compensable taking under the Wisconsin constitution).

100. *Id.* at 176–77 ("[T]hough the Constitution of the United States provides that private property shall not be taken for public use without just compensation, it is well settled that this is a limitation on the power of the Federal government, and not on the States.").

101. *Id.* at 180 ("As it is the constitution of that State that we are called on to construe, these decisions of her Supreme Court, that overflowing land by means of a dam across a stream is taking private property, within the meaning of that instrument, are of special weight if not conclusive on us.").

102. 128 U.S. 96, 101 (1888) (citing *Barron*, 80 U.S. (13 Wall.) at 243).

103. 164 U.S. 112 (1896). *Fallbrook* was decided on November 16, 1896, three and one-half months before the *Chicago B & Q* decision on March 1,

B & Q. Bradley, a California rancher, claimed that an irrigation district assessment had improperly taken her property, not for a "public use" but for the private benefit of other ranchers.[104] *Fallbrook* held that "[t]he Fifth Amendment, which provides, among other things, that . . . property shall not be taken for public use without just compensation, applies only to the Federal government . . . ."[105] The Court added, however, that Fourteenth Amendment due process placed states under a similar constraint.[106] Finding that irrigation could be a valid "public use" in an arid state like California, the Court affirmed the validity of the assessment on due process grounds.[107]

The language and structure of the *Fallbrook* opinion make it clear that the Court regarded the Fifth Amendment "public use" and the Fourteenth Amendment due process-based "public use" requirements as independent and parallel, not interdependent or identical requirements. *Fallbrook* not only reaffirmed *Barron* in unambiguous terms, but it also intimated that the precise contours of "public use" varied from state to state,[108] suggesting that the due process-based "public use" limitation had to embrace federalism principles—the Court would not impose identical constraints everywhere, nor would it equate the state and federal "public use" requirements.

Thus matters stood when the Court decided *Chicago B & Q*. The issue before the *Chicago B & Q* Court was whether Fourteenth Amendment due process was satisfied when a jury awarded one dollar in compensation for an easement the city had taken by eminent domain for a street crossing over the railroad's right-of-way.[109] The Court said that "[i]n determining

1897.

104. *See id.* at 156.

105. *Id.* at 158.

106. *Id.* (stating that as a matter of due process "the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the State instead of the Federal Government").

107. *Id.* at 164.

108. *Id.* at 159–60 (stating that "what is a public use frequently and largely depends upon the facts and circumstances," and although "the irrigation of lands in States where there is no color of necessity therefor" might not be valid, "in a State like California, which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power").

109. Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 230, 232 (1896).

what is due process of law regard must be had to substance, not to form."[110] In eminent domain cases, the Court held, "[d]ue process of law . . . means such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public."[111] The Court nonetheless upheld the compensation award, reasoning that the trial court had properly instructed the jury to base compensation on the reduction in fair market value of the railroad's property, and the Court would not disturb the jury's factual finding that the actual loss was trivial.[112]

The *Chicago B & Q* opinion cited no controlling precedent holding that Fourteenth Amendment due process required payment of just compensation,[113] but the decision broke no new conceptual ground. The Court had long insisted on that point in prior due process adjudication. In 1876, the Court said in *Munn v. Illinois* that the "power of the State over the property of the citizen" under Fourteenth Amendment due process "is well defined. The *State may take his property for public uses, upon just compensation being made therefore*," or it may tax or "control the use and possession of his property, so far as may be necessary for the protection of the rights of others, and to secure to them the equal use and enjoyment of their property."[114] The *Munn* case turned on other issues, however; the "just compensation" language was pure dictum.

A decade later in *Stone v. Farmer's Loan & Trust Co.*, the Court reiterated that under Fourteenth Amendment due process, "the State cannot . . . do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."[115] In *Mugler v. Kansas*, the Court opined that under the states' power of eminent domain, "property may not be taken for public use without compensation."[116] In *Georgia Railroad & Banking Co. v. Smith*, the Court explained that states could regulate intrastate railroad rates, "subject to the limitation that the carriage is not required

110. *Id.* at 235.

111. *Id.* at 236.

112. *See id.* at 255–56.

113. *Id.* at 237–38 (citing state and lower federal court cases holding that due process requires just compensation, and dicta in previous Supreme Court cases citing that doctrine with approval).

114. 94 U.S. 113, 145 (1876) (emphasis added).

115. 116 U.S. 307, 331 (1886).

116. 123 U.S. 623, 668 (1887).

without reward, or upon conditions amounting to the taking of property for public use without just compensation."[117] Two years later in *Searl v. School District No. 2*, the Court emphasized that a state's eminent domain power "cannot be exercised except upon condition that just compensation shall be made to the owner."[118] *Sweet v. Rechel* reaffirmed this principle, asserting that when "the legislature provides for the actual taking and appropriation of private property for public uses, its authority to enact such a regulation rests upon its right of eminent domain" and "it is a condition precedent to the exercise of such power that the statute make provision for reasonable compensation to the owner."[119]

Beyond these utterances, which were mainly dicta, the Court had heard and decided several cases predicated upon the legal theory that the Fourteenth Amendment required compensation when a state "took" property by regulation. In *Powell v. Pennsylvania*, the Court rejected a manufacturer's claim that a statutory prohibition on oleomargarine took its property without compensation, finding the regulation a legitimate police power measure, not a property deprivation.[120] In *Yesler v. Washington Harbor Line Commissioners*, the Court said that Fourteenth Amendment due process "undoubtedly forbids any arbitrary deprivation of life, liberty or property," and "assum[ed it had] jurisdiction to revise the judgment of a State tribunal upholding a law authorizing the taking of private property without compensation."[121] The *Yesler* Court, however, found that no property had been taken by the drawing of harbor lines, despite impairment to the value of claimant's wharf.[122] Similar is *Kaukauna Water Power Co. v. Green Bay & Mississippi Canal Co.*[123]

117. 128 U.S. 174, 179 (1888).

118. 133 U.S. 553, 562 (1890).

119. 159 U.S. 380, 399 (1895).

120. 127 U.S. 678, 686–687 (1888) (holding "without merit" the claim that the statute "is in conflict with the Fourteenth Amendment in that it deprives the defendant of his property without that compensation required by law" (citing *Mugler*, 123 U.S. 623)).

121. 146 U.S. 646, 655–56 (1892).

122. *Id.* at 656–57.

123. 142 U.S. 254, 269 (1891) (stating that although the state court had not explicitly addressed the federal constitutional question, it "could not have reached a conclusion . . . without holding, either that none of [defendant's] property had been taken, or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law"). The *Kaukauna* Court concluded, however, that

Clearly, then, the Court had understood throughout the entire course of its Fourteenth Amendment jurisprudence that due process required payment of just compensation when a state took property by eminent domain or otherwise. The significance of the *Chicago B & Q* holding was that it securely anchored that well-established conception of due process in binding Fourteenth Amendment legal precedent.

The *Chicago B & Q* case also required the Court to decide a second issue, implicating an equally important strand of due process doctrine. The railroad argued that in addition to compensation for the easement, it was entitled to compensation for the gates, operating tower, planking and fill, and additional operating costs necessitated by the grade crossing.[124] The Court rejected this claim, citing *Mugler* and other due process precedents,[125] and held that compensation was not required for losses incurred in consequence of a valid police power exercise,[126] because "all property . . . is held subject to the authority of the State to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people," and any property damaged or diminished in value by such regulations "is not, within the meaning of the Constitution, taken for public use, nor is the owner deprived of it without due process of law."[127]

Chicago B & Q thus perfectly mirrored the well-established nineteenth-century understanding that the state's powers, as constrained by due process, were bifurcated. When it exercised the eminent domain power, it owed just compensation. When it enacted a valid police power regulation, however, there was by definition no deprivation of property because all property rights were held subject to the inherent police power limitation, and no compensation was owed. In subsequent years, *Chicago B & Q* would be cited as frequently for this latter proposition as for the companion holding that due process did require compensation in cases of eminent domain.[128]

---

there "was no taking of the property." *Id.* at 282.

124. 166 U.S. 226, 251–52 (1896).

125. *Id.* at 252–55.

126. *Id.* at 252 ("The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the State by reasonable regulations to protect the lives and secure the safety of the people.").

127. *Id.*

128. *See, e.g.*, W. Chi. St. R.R. Co. v. Illinois *ex rel.* Chicago, 201 U.S. 506, 526 (1906) (holding that costs of removing obstructions to navigation "cannot

To reach its just compensation holding, the *Chicago B & Q* Court did not find it necessary to extend the Fifth Amendment Takings Clause to the states, nor did it cite to any Takings Clause precedent. Instead, the Court found that the just compensation principle was an "essential element of" the due process guarantee itself,[129] citing its own dicta in prior due process cases,[130] lower court due process holdings,[131] and Thomas Cooley's treatises as general "authority" for the proposition that "natural equity" and "universal law" so required.[132]

The *Chicago B & Q* Court also argued by analogy from precedents holding that due process barred a state from taking property without a "public use."[133] In all jurisdictions, the public use and just compensation requirements worked in tandem to constrain eminent domain, and since due process already required one, the reasonable inference was that it also required the other.

Nowhere did *Chicago B & Q* explicitly or implicitly equate the scope and contours of the Fourteenth Amendment due process just compensation requirement with that of the Fifth Amendment Takings Clause; such a holding was unnecessary to the outcome.

---

be deemed a taking of private property for public use" but are "only the result of the lawful exercise of a governmental power for the common good"); Fla. E. Coast Ry. Co. v. Martin County, 171 So. 2d 873, 876–77 (Fla. 1965) (holding that costs of safety measures are "the result of the exercise of the police powers of the state" and not compensable); *accord* Pa.-Reading Seashore Lines v. Bd. of Pub. Util. Comm'rs, 81 A.2d 28, 31 (N.J. App. Div. 1951), *aff'd*, 83 A.2d 774 (N.J. 1951); Houston & T.C. Ry. Co. v. City of Houston, 41 S.W.2d 352, 354–55 (Tex. Civ. App. 1931).

129. *Chicago B & Q*, 166 U.S. at 235.

130. *See id.* at 238 (citing Sweet v. Rechel, 159 U.S. 380, 398 (1895), and Searl v. Sch. Dist. No. 2, 133 U.S. 553, 562 (1890)).

131. *See Chicago B & Q*, 166 U.S. at 238–39 (citing state and lower federal court cases holding that due process required just compensation in eminent domain, including *Baker v. Vill. of Norwood*, 74 F. 997 (S.D. Ohio 1896), *aff'd*, 172 U.S. 269 (1898); *Mount Hope Cemetery v. Boston*, 158 Mass. 509, 519 (Mass. 1893); *Scott v. Toledo*, 36 F. 385, 395–96 (N.D. Ohio 1888); *Henderson v. Cent. Passenger Ry. Co.*, 21 F. 358 (D. Ky. 1884), *appeal dismissed*, 140 U.S. 633 (1891)).

132. *See Chicago B & Q*, 166 U.S. at 236, 240–41.

133. *See id.* at 235–36 (citing *Missouri Pac. I*, 164 U.S. 403, 417 (1896) ("The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law . . . ."); Davidson v. New Orleans, 96 U.S. 97, 102 (1877) ("[A] statute which declares . . . that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would . . . deprive A. of his property without due process of law . . . .")).

C. THE PUZZLING PERSISTENCE OF *BARRON*

The *Chicago B & Q* opinion did not overrule—or even mention—*Barron v. Baltimore*,[134] the well-known and widely cited precedent that had expressly limited the Takings Clause to the federal government. Nor did *Chicago B & Q* make any reference to *Fallbrook Irrigation District v. Bradley*,[135] which months earlier had reaffirmed *Barron*'s core holding.[136] The only reasonable inference is that the *Chicago B & Q* Court thought the scope of the Fifth Amendment was well settled and undisturbed by its own holding.

In the decades that followed, courts would continue to cite *Fallbrook* for the proposition that the Takings Clause did *not* apply to states.[137]

More importantly, courts also continued to cite *Barron* as good law, relying on it to limit the Takings Clause and other Bill of Rights provisions to the federal government, without acknowledging *Chicago B & Q* as having limited or disturbed its central holding. Two years after *Chicago B & Q*, the Supreme Court cited *Barron* for the proposition that "[t]he first ten amendments to the Federal Constitution contain no restrictions on the powers of the States," without mentioning *Chicago B & Q*.[138] The Court continued to cite *Barron* as good law until 1958, usually for the broad proposition that the entire Bill of Rights applied only to the federal government.[139] Remarkably,

134. 32 U.S. (7 Pet.) 243 (1833).

135. 164 U.S. 112 (1896).

136. *See supra* note 105 and accompanying text.

137. *See, e.g.*, Luedtke v. County of Milwaukee, 521 F.2d 387, 389 (7th Cir. 1975) (holding that the Takings Clause "applies only to a taking by the federal Government, and not to actions by state agencies" (citing *Fallbrook*, 164 U.S. at 158)); *accord* Riley v. Atkinson, 413 F. Supp. 413, 415 (N.D. Miss. 1975); City of Boston v. Mass. Port Auth., 320 F. Supp. 1317, 1319 (D. Mass. 1971); Elkins-Swyers Office Equip. Co. v. Moniteau County, 209 S.W.2d 127, 130 (Mo. 1948); Demeter Land Co. v. Fla. Pub. Serv. Co., 128 So. 402, 405–06 (Fla. 1930); Bemis v. Guirl Drainage Co., 105 N.E. 496, 499 (Ind. 1914).

138. Brown v. New Jersey, 175 U.S. 172, 174 (1899).

139. *See* Knapp v. Schweitzer, 357 U.S. 371, 376 & n.2 (1958) (holding that the first ten amendments "are not restrictions upon the vast domain of the criminal law that belongs exclusively to the States" (citing *Barron*, 32 U.S. (7 Pet.) at 250)); Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 366 (1952) (holding that "the first ten Amendments . . . . are not concerned with state action and deal only with Federal action" (citing *Barron*, 32 U.S. (7 Pet.) at 243)); Feldman v. United States, 322 U.S. 487, 490 (1944) ("[E]ver since *Barron v. Baltimore*, one of the settled principles of our Constitution has been that these [Bill of Rights] Amendments protect only against invasion of civil liberties by the [federal] Government . . . ." (citation omitted)); United

Barron has never been expressly overruled to this day, although it now seems incontrovertible that *Penn Central* abrogated it by implication.[140]

Nor does the historical evidence support the thesis that *Chicago B & Q* had carved out an exception to *Barron*.[141] Quite the contrary: on at least four occasions after *Chicago B & Q*, the Supreme Court summarily dismissed Takings Clause claims against states, citing *Barron* and derivative cases holding that the Fifth Amendment applied only to the federal government. In *Capital City Dairy Co. v. Ohio*, the Court dismissed a Takings Clause challenge to an Ohio statute, stating "it is elementary that [the Fifth] amendment operates solely on the National Government and not the States."[142] In *Winous Point Shooting Club v. Caspersen*, the Court dismissed another Takings Clause case against Ohio, asserting the familiar *Barron* rule that the Fifth Amendment "is a restriction on Federal power, and not on the power of the States."[143] In *Thomas Cusack Co. v. City of Chicago*, the Court refused to hear a Takings Clause claim against the city, citing *Barron*-derived precedents, but did consider plaintiff's alternative Fourteenth Amendment due process claim.[144] In *Palmer v. Ohio*, the Court summarily dismissed yet another Takings Clause claim against Ohio, labeling it "palpably groundless" under *Barron*.[145]

The question of the Takings Clause's applicability to states did not re-emerge in the Supreme Court for many years after

States v. Lanza, 260 U.S. 377, 382 (1922) (holding that "[t]he Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the Federal Government" (citing *Barron*, 32 U.S. (7 Pet.) at 250)); Gasquet v. Lapeyre, 242 U.S. 367, 369 (1917) (holding that the Fifth Amendment "is not restrictive of state, but only of national, action" (citing *Barron*, 32 U.S. (7 Pet.) at 250)).

140. Westlaw's KeyCite service lists *Barron* as having "some negative history but not overruled," citing only two lower court cases as "negative indirect history." Search of WESTLAW, Keycite service (Jan. 25, 2006) (search for cases citing *Barron*). One of those, *Silveira v. Lockyer*, cited *Barron* as a "now-rejected" precedent, without explanation. 312 F.3d 1052, 1067 n.17 (9th Cir. 2002). Similarly, *United States v. Emerson* questioned the applicability of precedents based on *Barron*. 270 F.3d 203, 221 n.13 (5th Cir. 2001).

141. This would have been inconsistent with *Barron*'s central holding that the Fifth Amendment Takings Clause did not apply to the states. *See supra* notes 96–98 and accompanying text.

142. 183 U.S. 238, 245 (1902).

143. 193 U.S. 189, 191 (1904).

144. 242 U.S. 526, 528 (1917) ("Obviously, claims made under the Fifth Amendment need not be considered . . . ." (citations omitted)).

145. 248 U.S. 32, 34 (1918).

Palmer, but this likely reflects widespread acceptance of *Barron* and its progeny. The issue did periodically arise in state courts, however, which until the 1970s continued to hold that the Fifth Amendment Takings Clause applied only to the federal government.[146] Lower federal courts concurred in this view until shortly before *Penn Central* was decided,[147] as did leading commentators in the post-*Chicago B & Q* era.[148]

146. *See, e.g.*, Citizens Util. Co. v. Metro. Sanitary Dist., 322 N.E.2d 857, 860 n.4 (Ill. App. 1974) (holding that the Takings Clause "is a limitation only on the powers of the federal government"); Farmington River Co. v. Town Plan & Zoning Comm'n, 197 A.2d 653, 658 (Conn. Super. Ct. 1963) (stating that the Takings Clause "does not restrain a state in the exercise of its authority"); Williams v. State Highway Comm'n, 113 S.E.2d 263, 265 (N.C. 1960) (ruling that the Takings Clause "is a limitation upon the federal government, and not upon the states"); *accord* State v. Kansas City, 262 P. 1032, 1034 (Kan. 1928); Nectow v. Cambridge, 157 N.E. 618, 620 (Mass. 1927); Camden Fire Ins. Ass'n v. Haston, 284 S.W. 905, 908 (Tenn. 1926); Smith v. Cameron, 210 P. 716, 718 (Or. 1922); Banner Milling Co. v. State, 191 N.Y.S. 143, 150 (N.Y. Ct. Cl. 1921); Wright v. House, 121 N.E. 433, 435 (Ind. 1919); Riley v. Charleston Union Station Co., 51 S.E. 485, 487 (S.C. 1905).

147. *See, e.g.*, Gagliardi v. Flint, 564 F.2d 112, 122 n.6 (3d. Cir. 1977) (stating that in *Chicago B & Q* and other cases against municipalities "the prohibition against taking without just compensation . . . is derived directly from the Fourteenth Amendment's Due Process Clause, without consideration of the applicability of the Fifth Amendment"); Oakland Club v. S.C. Pub. Serv. Auth., 110 F.2d 84, 88 (4th Cir. 1940) (holding the Takings Clause inapplicable because "no restrictions upon the States are imposed by this amendment"); Gulf & S.I.R. Co. v. Ducksworth, 286 F. 645, 647 (5th Cir. 1923) (ruling that the Takings Clause "bears alone upon the exercise of power by the United States government and affords no ground for relief against the state"); *accord* Clark v. Russell, 97 F. 900, 902 (8th Cir. 1899); Riley v. Atkinson, 413 F. Supp. 413, 415 (N.D. Miss. 1975); Wolfe v. Hurley, 46 F. 2d 515, 519 (W.D. La. 1930); Union Heat, Light & Power Co. v. R.R. Comm'n of Ky., 17 F.2d 143, 145 (E.D. Ky. 1926); Quinby v. Cleveland, 191 F. 68, 75 (N.D. Ohio 1911); Am. Loan & Trust Co. v. Grand Rivers Co., 159 F. 775, 778 (W.D. Ky. 1908).

148. Ernst Freund wrote seven years after *Chicago B & Q*, that "the first ten amendments apply only to the federal government" while "[t]he fourteenth amendment and the commerce clause are at present chiefly relied upon as checks upon the police power of the states." ERNST FREUND, THE POLICE POWER 65 (1904); *see also* JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 23 (3d ed. 1909) (stating that the Takings Clause "applies only to the operations of the federal government and is not a limitation on the power of the States," but the "correct view" is that an exercise of eminent domain "without compensation . . . [is not] due process"); PHILIP NICHOLS, THE LAW OF EMINENT DOMAIN 126 (2d ed. 1917) (stating the Takings Clause "is a limitation upon the power of the United States only and is not applicable to the states" (citing Winous Point Shooting Club v. Caspersen, 193 U.S. 189 (1904), and Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833))); C. Robert Beirne, *Excess Condemnation*, 6 U. CIN. L. REV. 196, 201–02 (1932) (stating that "[t]he Fifth Amendment . . . is a limitation only on the federal government" and "throw[s] no light" on constitutional limits to the

The historical record is unambiguous: *Chicago B & Q* was not understood at the time it was decided, nor for many decades thereafter, to have extended the Fifth Amendment Takings Clause to the states. That interpretation of *Chicago B & Q* is a latter-day contrivance, at odds with historical understandings.

D. DOCTRINE WITH A DIFFERENCE: DUE PROCESS-BASED TAKINGS

To be sure, *Chicago B & Q* did hold that Fourteenth Amendment due process requires just compensation when states take private property by eminent domain, a holding that bears a strong facial similarity to the Fifth Amendment Takings Clause. Does my argument, then, amount to empty formalism or mere semantic quibble, a "distinction without a difference"? It does not.

Courts and commentators certainly understood *Chicago B & Q* as an important due process precedent,[149] but at no time prior to *Penn Central* did the Court hold that Fourteenth Amendment due process-based "takings" doctrine was identical to, or coextensive with, that of the Fifth Amendment Takings Clause.[150] From *Fallbrook* and *Chicago B & Q* forward, the Fifth Amendment Takings Clause and Fourteenth Amendment due process-based "takings" doctrine operated as parallel and "similar,"[151] but nonetheless distinct and independent strands of constitutional doctrine, stemming from separate sources in the constitutional text, each with its own canonical precedents. Prior to *Penn Central*, courts did not borrow freely from Tak-

state's power of eminent domain); T.D. Havran, *Eminent Domain and the Police Power*, 5 NOTRE DAME LAW. 380, 381–82 (1930) (stating that the Takings Clause "is exclusively a restriction upon the powers of the federal government and not a restraint upon the states," but "a taking of property for a private use or without just compensation is a deprivation of property without due process" under the Fourteenth Amendment).

149. *See, e.g.*, FREUND, *supra* note 148, at 541–42 (stating that "the taking for public use without compensation has never in any civilised country been regarded as a legitimate exercise of state power, and the payment of compensation is therefore correctly held to be a requirement of due process under the Fourteenth Amendment").

150. The court did rule that the measure of compensation—"the market value of the property at the time of the taking"—is the same under both the Fifth and Fourteenth Amendments. Olson v. United States, 292 U.S. 246, 255 (1934). That did not mean, however, that the doctrines were identical as to what counted as a "taking."

151. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

ings Clause precedents to resolve Fourteenth Amendment due process-based claims, or vice versa.[152]

In *Wight v. Davidson*, the Court expressed serious doubts that prior Fourteenth Amendment decisions could have any precedential value in a Fifth Amendment Takings Clause case.[153] In *Wight*, a District of Columbia property owner challenged a special assessment for street improvements as a Fifth Amendment taking, citing as precedent *Norwood v. Baker* which on similar facts held an Ohio city had taken plaintiff's property without due process.[154] The *Wight* Court questioned *Norwood*'s relevance, pointing out that the Fourteenth Amendment Due Process clause "in terms, operates only to control action of the States," and "it by no means necessarily follows that a long and consistent construction put upon the Fifth Amendment, and maintaining the validity of the acts of Congress . . . is to be deemed overruled by a decision concerning the operation of the Fourteenth Amendment as controlling state legislation."[155]

The Court's insistence on the independence of the two provisions drew a sharp rebuke from Justice Harlan, who wrote in dissent:

> It is inconceivable to me that the question whether a person has been deprived of his property without due process of law can be determined upon principles applicable under the Fourteenth Amendment but not applicable under the Fifth Amendment, or upon principles applicable

152. *Compare* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (deciding a Fourteenth Amendment due process case based on due process precedents), *with* United States v. Causby, 328 U.S. 256 (1946) (deciding a Takings Clause case based on Fifth Amendment precedents). A singular exception is *Griggs v. Allegheny County*, 369 U.S. 84 (1962), where the Court relied on a federal Takings Clause case, *United States v. Causby*, to resolve a due process claim against a local government. *Id.* at 88–89. The legal question in both *Griggs* and *Causby* was whether government-authorized overflights at low altitudes had "taken" an easement on land near airports. *Compare Griggs*, 369 U.S. at 84–85 ("The question is whether respondent has taken an air easement over petitioner's property for which it must pay just compensation as required by the Fourteenth Amendment."), *with Causby*, 328 U.S. at 258 ("The problem presented is whether respondents' property was taken, within the meaning of the Fifth Amendment, by frequent and regular flights of army and navy aircraft over respondents' land at low altitudes."). Because *Griggs* turned on a physical invasion rather than the police power, it was atypical of Fourteenth Amendment just compensation cases of the pre-*Penn Central* era.

153. 181 U.S. 371, 384 (1901).

154. Norwood v. Baker, 172 U.S. 269, 294 (1898).

155. 181 U.S. at 384.

> under the Fifth and not applicable under the Fourteenth Amendment.[156]

Harlan's was the minority view, however. Lower courts continued to cite *Wight* for the proposition that the Fifth and Fourteenth Amendments were separate and independent constitutional requirements in the decades that followed.[157] Other cases expressed similar doubts about the relevance of Fourteenth Amendment precedents to Fifth Amendment cases, or vice-versa.[158]

The standard post-*Chicago B & Q* consensus was that states were obliged to pay just compensation when they took property by eminent domain not because the textual mandate of the Fifth Amendment applied to them, but rather because that obligation inhered in the nature of "due process" itself, as a matter of natural equity and universal practice.[159] As the Court explained in *Twining v. New Jersey*:

> [I]t is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. If this is so, it is *not because those rights are enumerated in the first eight Amendments*, but because they are of such a nature that they are *included in the conception of due process of law*.[160]

Indeed, the Court had some difficulty explaining how Fourteenth Amendment due process could require just compensation at all. The Fifth Amendment had both a due process guarantee and a separate Takings Clause. Reading just compensation into "due process" threatened to render the Takings

156. *Id.* at 387 (Harlan, J., dissenting).

157. *See, e.g.*, Neild v. District of Columbia, 110 F.2d 246, 250 n.10 (D.C. Cir. 1940); Lappin v. District of Columbia, 22 App. D.C. 68 (D.C. Cir. 1903).

158. *See, e.g.*, United States *ex rel.* Tenn. Valley Auth. v. Welch, 327 U.S. 546, 552 (1946) ("[W]hatever may be the scope of judicial power to determine what is a 'public use' in Fourteenth Amendment controversies, this Court has said that when Congress has spoken on this subject, [i]ts decision is entitled to deference until it is shown to involve an impossibility." (internal citation and quotation omitted)); People of Puerto Rico v. E. Sugar Assocs., 156 F.2d 316, 322 (1st Cir. 1946) (arguing that "public use" requirements of the Fifth and Fourteenth Amendments differ).

159. *See* Holden v. Hardy, 169 U.S. 366, 390–91 (1898) ("Recognizing the difficulty in defining, with exactness, the phrase 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the State, without compensation.").

160. 211 U.S. 78, 99 (emphasis added).

Clause superfluous.[161] But it was equally problematic to say that "due process" carried different meanings in the Fourteenth Amendment and the Fifth: for why would the drafters employ a term already used in the constitutional text, but attach a different meaning?[162] The Court attempted to resolve this dilemma—not entirely satisfactorily—by resorting to essentialism, explaining in *Powell v. Alabama* that the ordinary rule of interpretation "is not without exceptions" and is merely "an aid to construction" which "must yield to more compelling considerations."[163] The scope of Fourteenth Amendment due process, *Powell* said, turned on whether "the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"[164] The right to compensation in eminent domain was "of this fundamental character."[165]

This understanding, however, only reinforced the conceptual wall separating the Bill of Rights from Fourteenth Amendment due process. The mandates of the first eight amendments were specific and detailed, sprang from a precisely located textual source, and did not control the meaning or content of the more generally phrased Fourteenth Amendment due process guarantee,[166] although the requirements at

161. The Court had used this argument in *Hurtado v. California*, rejecting the claim that due process required grand jury presentment or indictment in state criminal cases:

> According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is, that in the sense of the Constitution, "due process of law" was not meant or intended to include . . . the institution and procedure of a grand jury in any case.

110 U.S. 516, 534 (1884).

162. *See id.* at 535. ("[W]hen the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense and with no greater extent [than in the Fifth Amendment].").

163. 287 U.S. 45, 67 (1932).

164. *Id.* (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).

165. *Id.*

166. *See* Betts v. Brady, 316 U.S. 455, 461–62 (1942) ("The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment . . . [but instead] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule."), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963).

times might be parallel or overlapping.[167]

Because a case would arise under one clause or the other, not both, the Court never had need to spell out exactly what the differences were, but examination of the doctrines reveals one overriding difference. That difference reflected the basic federalist understanding discussed in Part II.A: throughout the pre-*Penn Central* period, the Court adhered to the view expressed in *Munn*, *Mugler*, *Chicago B & Q*, and subsequent cases, that a valid exercise of the state's police power could never amount to a compensable deprivation of property under Fourteenth Amendment due process, because the state's reserved power to regulate in the interest of harm prevention and the public good operated as an inherent limitation on state-recognized property rights. In a due process-based challenge to a state or local regulation, the first step in the court's analysis was to ask: "Is this regulation a valid exercise of the police power?" An affirmative answer was dispositive: no property had been taken, due process was satisfied, and no compensation was owed.

In contrast, because property rights were defined by state and not federal law, federal regulations were *not* understood to operate as an inherent limitation on property rights, and could amount to a compensable "taking" under the Fifth Amendment even if otherwise valid as an exercise of federal power. As the Court explained in 1903 in *United States v. Lynah*:

> [L]ike the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment . . . . Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation.[168]

167. *See id.* at 462 ("[A] denial by a state of rights or privileges specifically embodied in . . . the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth."); *see also* Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting) ("The general principle of free speech . . . must be taken to be included in the Fourteenth Amendment [but] with a somewhat larger latitude of interpretation than . . . that [which] governs or ought to govern the laws of the United States.").

168. 188 U.S. 445, 471 (1903) (quoting Monongahela Navigation Co. v. United States, 148 U.S. 312, 336 (1893)), *overruled in part by* United States v. Chi., Milwaukee, St. Paul & Pac. R.R. Co., 312 U.S. 592 (1941); Scranton v. Wheeler, 179 U.S. 141, 153 (1900) ("[I]n its exercise of the power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use.").

This led to major differences in how cases were argued and analyzed. Consider the different analyses accorded federal and state efforts to grant relief to debt-burdened farmers and homeowners during the Great Depression. When states enacted debt relief schemes, the police power was dispositive in determining whether a Fourteenth Amendment property deprivation had occurred. For example, the Court upheld a Minnesota statute providing for an equitable stay of home mortgage foreclosures as a reasonable "emergency" exercise of the state's police power under the economic exigencies of the time.[169] But a more drastic Arkansas statute canceling the debts of defaulting mortgagors was overturned as beyond the reasonable bounds of the police power, the Court finding it "without moderation or reason" and "in a spirit of oppression" to mortgagees whose assets were stripped of all value.[170]

In contrast, when the federal government acted the police power played no role, nor did any other assertion of federal power operate as an inherent limitation on property rights. In *Louisville Joint Stock Land Bank v. Radford*, the Court held that a federal law creating a statutory five-year stay on farm mortgage foreclosures and limiting the mortgagor's repayment obligation to the present fair market value of the property was a Fifth Amendment taking.[171] The Court reasoned that although the measure might be a valid exercise of Congress's bankruptcy power, the "bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment."[172] Because the mortgagee's lien and right to take possession in foreclosure were considered property rights under Kentucky law, the Court determined that the federal statute "tak[es] . . . substantive rights in specific property acquired by the Bank."[173] In short, state law set the baseline of property rights against which the Court would determine whether a federal regulation had taken property under the Fifth Amendment, and neither the police power nor any enumerated federal power would insulate a challenged regulation from that Fifth Amendment inquiry.

169. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 447–48 (1934) (upholding a Minnesota statute as a reasonable police power measure).

170. W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56, 60 (1935).

171. 295 U.S. 555, 601–02 (1935).

172. *Id.* at 589.

173. *Id.* at 590.

This did not mean that states had carte blanche to rewrite property law at their whim, however. Courts insisted that some purported exercises of the police power might be pretextual or so unreasonable or arbitrary as to fall outside the legitimate bounds of that power. As the Court explained in *Atlantic Coast Line Railroad. Co. v. Goldsboro*:

> [I]f it appear that the regulation under criticism is not in any way designed to promote the health, comfort, safety, or welfare of the community, or that the means employed have no real and substantial relation to the avowed or ostensible purpose, or that there is wanton or arbitrary interference with private rights, the question arises whether the law-making body has exceeded the legitimate bounds of the police power.[174]

This placed the judiciary in the delicate position of policing the rather indefinite boundary separating valid police power regulations from arbitrary or unreasonable regulations or disguised exercises of the (compensable) power of eminent domain—the classic substantive due process inquiry.[175]

So, for example, in *Missouri Pacific Railway. Co. v. Nebraska (Missouri Pac II)*, the Court held that a state regulation requiring the railroad to construct, at its own expense, a side track to serve a grain elevator located adjacent to the railroad's right-of-way "goes beyond the limit of the police power," and therefore effected an unconstitutional deprivation or "taking" of property as a matter of Fourteenth Amendment due process.[176] Anticipating *Pennsylvania Coal Co. v. Mahon* by more than a decade, Justice Holmes for the Court wrote that while "the States have power to modify and cut down property rights to a certain limited extent without compensation, for public purposes, as a necessary incident of government—the police power," nonetheless "there are constitutional limits to what can be required of . . . owners under either the police power or any other ostensible justification for taking such property away."[177]

174. 232 U.S. 548, 559 (1914); *see also* FREUND, *supra* note 148, at 124 ("Under the Fourteenth Amendment the United States is competent to protect individual liberty and property against arbitrary or unequal state legislation enacted under color of protection of safety and health, but having in reality no such justification.").

175. *See, e.g.*, Block v. Hirsh, 256 U.S. 135, 156 (1921) ("For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law.").

176. 217 U.S. 196, 207 (1910).

177. *Id.* at 206.

E. *MAHON* IN THE MUDDLE

Placed in its proper historical context as one of a long line of Fourteenth Amendment due process cases policing the boundary between the police power and eminent domain, *Pennsylvania Coal Co. v. Mahon*[178] was unremarkable when it was decided and was uniformly recognized in the pre-*Penn Central* era as a rather ordinary substantive due process case.[179] Modern myth notwithstanding, it was not the first case to invalidate a regulatory enactment as an impermissible "taking" of property,[180] and it had relatively little subsequent doctrinal

178. 260 U.S. 393 (1922).

179. A 1927 Harvard Law review article listed *Mahon* as one of twenty-eight "police power cases" invalidating "substantive legislation of a social or economic character" on due process grounds. *See* Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 944 (1927); *see also* John J. Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021, 1034 (1975) (stating that "all that *Pennsylvania Coal* actually decided was that the statute challenged in that case was an invalid police power measure"); Thomas Reed Powell, *The Supreme Court and State Police Power, 1922–1930*, 18 VA. L. REV. 1, 10 (1931) (stating that *Mahon* held the Kohler Act "to go beyond proper police power" because "the statute is not necessary for safety"). Courts concurred. *See, e.g.*, Panhandle E. Pipe Line Co. v. State Highway Comm'n, 294 U.S. 613, 621 (1935) (stating that in *Mahon* "the court refused to sustain a Pennsylvania statute as an exercise of the police power"); Nashville, Chattanooga & St. Louis Ry. v. Walters, 294 U.S. 405, 415 n.7 (1935) (citing *Mahon* for the proposition that "[t]he police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably"); Hulen v. City of Corsicana, 65 F.2d 969, 970 (5th Cir. 1933) (citing *Mahon* for the proposition that the limits of the police power are "shadowy, vague, and shifting" and "it is in the last analysis for the courts to say" whether "the power is being exercised reasonably"); Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528, 532 (9th Cir. 1931) (stating that *Mahon* held the statute "so unreasonable an exercise of the police power that it was violative of the constitutional rights" of the coal company); Fred F. French Investing Co. v. City of New York, 385 N.Y.S.2d 5, 9 (N.Y. 1976) (stating that in *Mahon* "the gravamen of the constitutional challenge to the regulatory measure was that it was an invalid exercise of the police power under the due process clause" and the case was "decided under that rubric"); McCarthy v. City of Manhattan Beach, 264 P.2d 932, 939 (Cal. 1954) (stating that *Mahon* held the statute "beyond the legitimate scope of the police power").

180. *See, e.g.*, Truax v. Corrigan, 257 U.S. 312, 328 (1921) (overturning a statute prohibiting injunctions against labor picketing because it "deprives the owner of the business and the premises of his property without due process"); Buchanan v. Warley, 245 U.S. 60, 82 (1917) (invalidating an ordinance barring the sale of property to persons of color as "state interference with property rights" without due process because it lacks a legitimate police power justification); Chi., Milwaukee & St. Paul Ry. Co. v. Polt, 232 U.S. 165 (1914) (invalidating a statute doubling a railroad's liability as deprivation of property without due process); Eubank v. City of Richmond, 226 U.S. 137, 144 (1912)

impact.[181] *Mahon* was cited infrequently,[182] and then usually to invoke familiar nostrums about the scope and limits of the police power, such as: "[w]hile [the] police power is broad, there are limitations to its exercise,"[183] or "some values are enjoyed

(invalidating an ordinance authorizing two-thirds of property owners to establish building setback requirements as "an unreasonable exercise of the police power" depriving owners of property without due process); St. Louis, Iron Mountain & S. Ry. Co. v. Wynne, 224 U.S. 354, 360–61 (1912) (invalidating as "wanting in due process and repugnant to the Fourteenth Amendment" a statute doubling a railroad's liability for killing livestock, which "takes property from one and gives it to another"); Mo. Pac. Ry. Co. v. Nebraska (*Missouri Pac. II*), 217 U.S. 196, 205 (1910) (invalidating an order compelling construction of sidetracks to serve private grain elevators because it "take[s]" the railroad's property without compensation); Louisville & Nashville R.R. Co. v. Cent. Stock Yards Co., 212 U.S. 132, 143–44 (1909) (invalidating a statute requiring a railroad to deliver cars to another line as an "unlawful taking of its property" violating due process); Dobbins v. Los Angeles, 195 U.S. 223, 241 (1904) (invalidating an ordinance stringently regulating gas works as an "arbitrary and discriminatory exercise of the police power which amounts to a taking of property without due process of law"); Lake Shore & Mich. S. Ry. Co. v. Smith, 173 U.S. 684, 699 (1899) (invalidating a statute fixing preferential railroad rates as beyond the police power and a "taking of property without due process of law"); *Missouri Pac. I*, 164 U.S. 403, 417 (1896) (invalidating an order authorizing construction of a private grain elevator on a railroad right-of-way as "a taking of private property of the railroad corporation, for the private use of the petitioners" and "not due process of law"). In the Fifth Amendment Takings Clause context, see, e.g., *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914) (finding that the Takings Clause bars Congress from immunizing a railroad against private nuisance actions, which would be a "taking" of an adjacent landowner's property).

181. *See* Brauneis, *supra* note 25, at 665 (stating that *Mahon* was initially cited with moderate frequency but then "all but disappeared from the United States Reports for over two decades" from 1936 to 1957). *But cf.* Treanor, *supra* note 25, at 861–64 (stating that *Mahon* was neither a "minor case" nor "forgotten," receiving scholarly attention when decided and later becoming part of Holmes's widely cited "canon"). Treanor admits, however, that *Mahon* did not significantly influence the course of substantive due process jurisprudence, and that its pre-*Penn Central* prominence owed much to Holmes's stature, the opinion's epigramatic quality, and its apparent inconsistency with Holmes's generally deferential stance in substantive process cases. *See id.* at 862.

182. As of January 23, 2006, Westlaw's KeyCite service listed 1174 judicial citations to *Mahon* by federal and state courts. *See* Search of WESTLAW, KeyCite Service (Jan. 23, 2006) (search for court cases citing *Mahon* before and after 1978). In the 56 years before *Penn Central, Mahon* was cited 395 times, about seven citations per year. *Id.* In the 27 years after *Penn Central*, *Mahon* was cited 779 times, roughly 28 citations per year. *Id.*

183. Women's Kan. City St. Andrew Soc'y v. Kansas City, 58 F.2d 593, 598 (8th Cir. 1932); *see also* W. Int'l Hotels v. Tahoe Reg'l Planning Agency, 387 F. Supp. 429, 434–35 (D. Nev. 1975) (citing *Mahon* for the proposition that "police power regulation had its limits," an idea that "antedates even Holmes"); Appeal of Key Realty Co., 182 A.2d 187, 191 (Pa. 1962) (citing *Mahon* for the

under an implied limitation and must yield to the police power."[184] Rarely did *Mahon* supply the controlling legal principle in due process-based "takings" challenges to state[185] or federal regulation.[186] Nor did *Mahon* play a decisive role in any

proposition that police power regulations are valid if "necessary for the preservation of public health, safety, morals or general welfare, and not unjustly discriminatory, or arbitrary, or unreasonable, or confiscatory"); Creasy v. Stevens, 160 F. Supp. 404, 410 (N.D. Pa. 1958) (citing *Mahon* for the proposition that "[t]he ultimate decision as to proper exercise of the police power rests with the courts, and, if the exercise goes too far, there is a judicial duty to investigate and declare the exercise of the police power invalid"), *rev'd by* Martin v. Creasy, 360 U.S. 219 (1959).

184. *E.g.*, Brecciaroli v. Conn. Commr. of Envtl. Prot., 362 A.2d 948, 951 (Conn. 1975).

185. *Mahon* was mentioned prominently in *Panhandle Eastern Pipeline Co. v. State Highway Commission*, but that case turned on the lack of a public safety rationale. *See* 294 U.S. 613, 621–23 (1935) (holding regulation requiring alterations in gas transmission lines "arbitrary and unreasonable," depriving the plaintiff of property without due process). *Mahon* was not mentioned in other prominent due process "property deprivation" cases like *Williams v. Standard Oil Co. of Louisiana*, 278 U.S. 235 (1929) (overturning a state's regulation of gasoline prices); *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105 (1928) (overturning a state ban on ownership of drug stores by non-pharmacists); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (holding that a municipal zoning scheme as applied deprived the plaintiff of property without due process); and *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding a municipal zoning scheme against facial challenge). When *Mahon* was cited, it was seldom controlling. *See, e.g.*, Nebbia v. New York, 291 U.S. 502, 552 (1934) (citing *Mahon* for the proposition that the wartime rent control cases "involved peculiar facts and must be strictly limited"); *accord* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 479 (1934); Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U.S. 418, 437–38 (1927). *Goldblatt v. Town of Hempstead* cited *Mahon* for the proposition that a regulation might "be so onerous as to constitute a taking which constitutionally requires compensation" and that "a comparison of values before and after is relevant" to that determination, but *Goldblatt* went on to hold that such a comparison is "by no means conclusive" and that the question "narrow[ed]" to whether the challenged regulation was "a valid exercise of the police power." *See* 369 U.S. 590, 594 (1962).

186. Fifth Amendment due process challenges to federal regulations affecting property were more common than Takings Clause-based "regulatory takings" cases in the pre-*Penn Central* era. *See, e.g.*, N. Am. Co. v. SEC, 327 U.S. 686 (1946) (holding an SEC regulation not unreasonable and not a "taking" of property without due process); Valvoline Oil Co. v. United States, 308 U.S. 141 (1939) (upholding an ICC regulation against a claim that it "took" property without due process); Denver Union Stock Yard Co. v. United States, 304 U.S. 470 (1938) (holding federally regulated stockyard rates not "confiscatory" and not a due process violation); Kuehner v. Irving Trust Co., 299 U.S. 445 (1937) (holding a Bankruptcy Act provision did not destroy property and not arbitrary or unreasonable, and consequently not a due process violation); R.R. Bd. v. Alton R.R. Co., 295 U.S. 330 (1935) (holding compulsory participation in an employee pension scheme arbitrarily deprived railroads of property without

of the several dozen Fifth Amendment Takings Clause cases that reached the Supreme Court in the pre-*Penn Central* era.[187]

Then, like *Chicago B & Q*, *Mahon* was plucked from relative obscurity and anachronistically recast as a Fifth Amendment Takings Clause precedent by *Penn Central* and its progeny.[188] In that guise, it came to serve as one of the pillars of contemporary regulatory takings jurisprudence.[189]

That *Mahon* was a Fourteenth Amendment and not a Fifth Amendment case is apparent from the posture in which it reached the Court. *Mahon* involved the constitutionality of Pennsylvania's Kohler Act, which prohibited the mining of coal pillars providing subjacent support to certain surface owners.[190]

due process); Chi. Rock Island & Pac. Ry Co. v. United States, 284 U.S. 80 (1931) (holding an ICC regulation of rail cars reasonable and not arbitrary or confiscatory, consequently not a due process violation); Tyler v. United States, 281 U.S. 497 (1930) (holding a federal estate tax provision not arbitrary or confiscatory, consequently not a deprivation of property without due process); Bd. of Trade v. Olsen, 262 U.S. 1 (1923) (holding a federal regulation of the commodity futures market reasonable, and an incidental reduction in value did not deprive members of property without due process). *Mahon*, turning on the scope of the states' police power, was irrelevant to the resolution of these federal cases, and was not cited.

187. The Supreme Court cited *Mahon* in only four Fifth Amendment Takings Clause cases prior to *Penn Central*, and it played a minor role in all of them. *See* Armstrong v. United States, 364 U.S. 40, 48 (1960) (citing *Mahon* as an example of the "difficulty of trying to draw the line" in takings cases); United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958) (citing *Mahon* for the proposition that takings cases "turn[ ] upon the particular circumstances of each case"); United States v. Commodities Trading Corp., 339 U.S. 121, 134 (1950) (Frankfurter, J., dissenting) (citing *Mahon* for the proposition that "the question depends upon the particular facts"); Omnia Commercial Co. v. United States, 261 U.S. 502, 508 (1923) (citing *Mahon* for the proposition that a doctrine allowing uncompensated destruction of property to stop a fire "rest[s] on tradition").

188. *See* Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978) (citing *Mahon* as "the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking'").

189. *See, e.g.*, Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 325 (2002) (stating that *Mahon* "gave birth to our regulatory takings jurisprudence"); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) (stating that prior to *Mahon*, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property"); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 648–49 (1981) ("The principle [that a regulation can effect a Fifth Amendment 'taking'] . . . has its source in Justice Holmes's opinion for the Court in *Pennsylvania Coal Co. v. Mahon*." (citation omitted)).

190. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 412–13 (1922); Mahon v. Pa. Coal Co., 118 A. 491, 492–93 (Pa. 1922) (setting forth provisions of the Kohler Act), *rev'd*, 260 U.S. 393 (1922).

Mahon held title to surface rights under a deed from the Pennsylvania Coal Company that had expressly reserved the Company's right to mine all the subsurface coal without providing subjacent support.[191] When the company continued to mine and gave notice of possible subsidence, Mahon sought an injunction.[192] The Company argued that enforcement of the Kohler Act would deprive it of property without due process. The Pennsylvania Supreme Court upheld the Act on due process grounds as "a reasonable and valid exercise of the police power."[193] The Company filed a writ of error, seeking reversal. Thus the sole issue properly before the Court was, as Justice Holmes put it, "whether the police power can be stretched so far."[194]

As a conventional substantive due process case turning on the limits of the police power, *Mahon* broke no new conceptual ground. Holmes began his opinion with an elegant restatement of the difference between a valid police power regulation and an implied exercise of eminent domain:

> 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 all cases there must be an exercise of eminent domain and compensation to sustain the act.[195]

191. *Mahon*, 260 U.S. at 412; *Mahon v. Pa. Coal Co.*, 118 A. at 492 ("[S]o far as the contractual rights of the respective parties are concerned, as shown by the paper title to the properties involved, defendant is expressly authorized to mine the subjacent strata owned by it without any obligation to support the surface owned by plaintiffs.").

192. *See Mahon*, 260 U.S. at 412; *Mahon v. Pa. Coal Co.*, 118 A. at 492–93.

193. *Mahon v. Pa. Coal Co.*, 118 A. at 492. The Pennsylvania Supreme Court stated the controlling legal principle:

> [T]he state, under its police power, may lawfully impose such restrictions upon private rights as, in the wisdom of the Legislature, may be deemed expedient; . . . for 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community' . . . [and] a statute enacted for the protection of public health, safety or morals, can be set aside by the courts only when it plainly has no real or substantial relation to these subjects, or is a palpable invasion of rights secured by the fundamental law.

Id. at 493 (quoting Nolan v. Jones, 263 Pa. 124, 127–28 (Pa. 1919)).

194. *Mahon*, 260 U.S. at 413.

195. *Id.*

To Holmes, then, no bright line demarcated the boundary between legitimate noncompensable exercises of the police power and implied compensable exercises of eminent domain. Instead, government actions are arrayed along a continuum and may fall into either category depending upon the facts and circumstances. "One fact for consideration"—presumably one of several[196]—is the "extent of the diminution."[197]

This latter statement is widely cited as Holmes's enunciation of a "diminution of value" test for regulatory takings.[198] If any doctrinal innovation is to be found in *Mahon*, it is surely this. Yet while Holmes flirts with the proposition that every regulation effecting diminution of a "certain magnitude" must fall outside the police power, *Mahon* never squarely so holds. Strictly speaking, the statement that when "diminution . . . reaches a certain magnitude . . . there must be an exercise of eminent domain" is dictum.[199]

At bottom, and on arguments that closely track the dissenting opinion in the Pennsylvania Supreme Court,[200] Holmes

196. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962) ("There is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant, see *Pennsylvania Coal Co. v. Mahon*, . . . it is by no means conclusive.").

197. *Mahon*, 260 U.S. at 413.

198. *See, e.g.*, Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 40–42 (1964). Sax emphasized Holmes's statement in *Interstate Consolidated Street Railway Co. v. Massachusetts*, 207 U.S. 79, 87 (1907) (upholding a statute mandating half-price streetcar fares for school children), that "the question narrows itself to the magnitude of the burden imposed." *See* Sax, *supra*, at 41. But that statement must be considered in context. Weighing whether the regulation went too far, Holmes first noted that Massachusetts regards education as a police power purpose of the first magnitude. *See Interstate Colsol. St. Ry. Co.*, 207 U.S. at 87 ("Education is one of the purposes for which . . . the police power may be exercised. Massachusetts always has recognized it as one of the first objects of public care. It does not follow that it would be equally in accord with the conceptions at the base of our constitutional law to confer equal favors upon doctors, or workingmen, or people who could afford to buy 1000-mile tickets."). Only after placing great weight on the public interest side of the ledger did Holmes consider the private economic burden, and at that point "the question narrow[ed] itself to the magnitude of the burden." *Id.* Holmes concluded, however, that the public interest in education outweighed the private burden. *Id.* at 87–88. This was a balancing, not a diminution of value test.

199. *See Mahon*, 260 U.S. at 413.

200. *See Mahon v. Pa. Coal Co.*, 118 A. 491, 497 (Pa. 1922) (Kephardt, J., dissenting) (deriding majority's expansive conception under which "the exercise of this [police] power becomes nothing more than the will of the Legislature" and "property may be transferred, by the Legislature from one person to another without compensation"); *id.* at 499 (arguing that if the intent were to

simply finds the police power justifications for the Kohler Act wanting. As Holmes sees it, the Act's restrictions on subsurface mining protect the private interests of a narrow class of surface owners—those who had not bargained for subjacent support, as they clearly could have done under Pennsylvania law.[201] These owners gain a windfall at the direct expense of subsurface mineral owners who had bargained—and paid for—the right to mine the coal. With regard to subsidence affecting this narrow class, Holmes says, "the damage is not common or public."[202] The absence of any genuine public interest in preventing subsidence is confirmed, Holmes says, by the fact that subsidence is permissible where the mining company owns the surface rights.[203] Certainly, the legislature might proceed piecemeal to protect some property owners, and Holmes concedes that "there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth."[204] But the public interest here, Holmes concludes, is "limited,"[205] and is advanced only by stripping other property owners of

protect safety the statute "could have required a notice" before mining); *id.* (arguing the purpose of the statute was "merely to augment property rights of the few" and "the public generally, as distinguished from this particular class, is not interested"); *id.* at 500–01 (characterizing the Kohler Act as "class" legislation which does not "protect from all such subsidences" but operates "for the sole benefit of" surface owners who had expressly waived their right to subjacent support, "confiscat[ing] defendant's coal for plaintiff's benefit" and "forc[ing] the coal companies, who have already paid for this property right once, to pay for it again").

201. Pennsylvania law required subjacent support unless the surface owner expressly waived that right by grant or reservation. *See* Penman v. Jones, 256 Pa. 416, 422 (Pa. 1917) ("The law is firmly established in Pennsylvania that, in the absence of express waiver or the use of words from which the intention to waive clearly appears, the grantee of minerals takes the estate subject to the burden of surface support"). A waiver created a distinct interest or "estate" that could be separately assigned or conveyed. *See id.* at 427–29 (holding that although the coal company had expressly reserved the support estate, that interest did not pass to the purchaser of mineral rights unless expressly assigned or conveyed).

202. *Mahon*, 260 U.S. at 413; *cf. Mahon v. Pa. Coal Co.*, 118 A. at 510 (stating that the Act "transfers an independent property right to plaintiff, vesting the permanent use and perpetual enjoyment of this right in one who is not required to pay anything for what he so acquires, and which he may sell in selling his surface, with the increased value given it by this legislation").

203. *Mahon*, 260 U.S. at 413–14 ("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.").

204. *Id.* at 413.

205. *Id.* at 414.

their rights. To Holmes, that smacks of naked redistribution, not any genuine "public interest."

By the time *Mahon* was decided, there was ample precedent for striking down such redistributive regulations as impermissible "takings" of property under the Fourteenth Amendment Due Process Clause.[206] Holmes later explained in a letter to Frederick Pollock: "My ground [for decision in *Mahon*] is that the public only got on this land by paying for it and that if they saw fit to pay only for the surface rights they can't enlarge it."[207]

Holmes also concluded the statute could not be justified as a reasonable safety measure because for that purpose a simple notice requirement would suffice.[208] In any event, Holmes notes, the mining company gave actual notice in this case, so there was no threat to Mahon's safety.[209]

The *Mahon* analysis, while proceeding within the standard police power framework, nonetheless evidences a characteristically Holmesian departure from the more formalistic treatment a similar case might have received at the hands of other judges.

206. *See, e.g.*, St. Louis, Iron Mountain & S. Ry. Co. v. Wynne, 224 U.S. 354, 360–61 (1912) (invalidating as "wanting in due process of law, and repugnant to the Fourteenth Amendment" a statute doubling a railroad's liability for killing livestock, which "takes property from one and gives it to another"); *Missouri Pac. II*, 217 U.S. 196, 207–08 (1910) (invalidating an order compelling construction of sidetracks to serve private grain elevators because it takes the railroad's property without compensation); Louisville & Nashville Ry. Co. v. Cent. Stock Yards Co., 212 U.S. 132, 143–44 (1909) (invalidating a statute requiring a railroad to deliver cars to another railway line as an "unlawful taking of its property" violating due process); *Missouri Pac. I*, 164 U.S. 403, 417 (1896) (invalidating an order authorizing construction of a private grain elevator on railroad right-of-way as "a taking of private property of the railroad corporation, for the private use of the petitioners" and "not due process of law"). In contrast, when the Court perceived a strong public interest at stake, it upheld redistributive regulations. *See, e.g.*, Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242, 250 (1922) (upholding state wartime rent control laws similar to those in *Block v. Hirsh*); Block v. Hirsh, 256 U.S. 135, 156 (1921) ("All the elements of a public interest justifying some degree of public control are present" in emergency wartime rent control legislation, and the regulation does not "go[] too far" to be sustained as a reasonable police power measure).

207. FRED BOSSELMAN ET AL., THE TAKING ISSUE 244 (1973) (quoting HOLMES-POLLOCK LETTERS 108–09 (Mark de Wolfe Howe, ed., 1941)).

208. *Mahon*, 260 U.S. at 414; *cf.* Mahon v. Pa. Coal Co., 118 A. 491, 512 (1922) (Kephardt, J., dissenting) ("If the Legislature had desired to protect life and limb it could have required a notice . . . . [but] the real purpose of the Legislature and the framers of the act was in the interest of property, and property alone—not to prevent the 'terrible menace to human life, public safety and morals.'"), *rev'd*, 260 U.S. 393 (1922).

209. *See Mahon*, 260 U.S. at 414.

For Holmes, the determination whether a police power justification is sufficiently robust to support the challenged regulation is not susceptible to a simple, categorical "yes or no" answer. Instead, Holmes says, it is a "question of degree" and "cannot be disposed of by general propositions,"[210] requiring a case-specific balancing of the "public interest" advanced by the regulation against the burden imposed on private parties. Weighing the relevant factors in *Mahon*, Holmes concludes that the public interest in protecting surface owners who lacked the foresight to protect themselves is slight and easily outweighed by the substantial burden on subsurface coal owners. Consequently, the police power rationale fails Holmes's balancing test.[211]

Boiled to its core, the holding in *Mahon* was simply that the Kohler Act "cannot be sustained as an exercise of the police power"[212] and violated the Fourteenth Amendment due process guarantee. Although the Act might be justified as an exercise of eminent domain,[213] that would require just compensation.[214]

Even with respect to its sliding-scale methodology, however, *Mahon* was no pathbreaker. Holmes had outlined this approach fifteen years earlier in *Martin v. District of Columbia* (1907):

> [T]here should not be extracted from the very general language of the Fourteenth Amendment, a system of delusive exactness and merely logical form . . . . Constitutional rights like others are matters of degree. To illustrate: Under the police power, in its strict sense, a certain limit might be set to the height of buildings without compensa-

210. *Id.* at 416; *see also* BOSSELMAN ET AL., *supra* note 207, at 134 ("[I]n Justice Holmes' view the difference between regulation and taking was one of degree not kind.").

211. *See* BOSSELMAN ET AL., *supra* note 207, at 139 (describing Holmes's approach as a "balancing test"); Treanor, *supra* note 25, at 857.

212. *Mahon*, 260 U.S. at 414 ("It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved.").

213. *Id.* at 416 ("We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain.").

214. *Id.* at 415 ("The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment."); *id.* at 416 ("[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

> tion; but to make that limit five feet would require compensation and a taking by eminent domain.[215]

Amplifying his views in *Hudson County Water Co. v. McCarter*, Holmes argued that case-by-case balancing should be constrained not by abstract principles but by the incremental accumulation of constitutional precedents which would provide benchmarks and guideposts in the manner of the common law:

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side.[216]

In *Noble State Bank v. Haskell*, Holmes stressed the antiformalism of his approach:

> [W]e must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power.[217]

---

215. Martin v. District of Columbia, 205 U.S. 135, 139 (1907); *see also* Interstate Consol. St. Ry. v. Massachusetts, 207 U.S. 79, 86–87 (1907) (upholding a Massachusetts statute mandating half-price streetcar fares for school children). Bosselman, Callies, and Banta trace Holmes's balancing approach to the 1889 Massachusetts case *Rideout v. Knox*, see BOSSELMAN ET AL., *supra* note 207, at 124–25, where Holmes wrote in upholding a regulation limiting the height of yard fences:

> It may be said that the difference is only one of degree; most differences are when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing manifest evil; larger ones could not be except by the exercise of the right of eminent domain.

Rideout v. Knox, 19 N.E. 368, 372 (Mass. 1889).

216. 209 U.S. 349, 355 (1908) (upholding a New Jersey statute prohibiting exports of fresh water).

217. 219 U.S. 104, 110 (1911); *see also* Truax v. Corrigan, 257 U.S. 312, 342

Holmes's balancing approach to substantive due process adjudication had gained some traction in the Court in the years leading up to *Mahon*. In *Eubank v. City of Richmond*,[218] for example, Justice McKenna cited Holmes's opinions in *Noble State Bank* and *Hudson County Water Co.* for the proposition that the police power "necessarily . . . has its limits and must stop when it encounters the prohibitions of the Constitution," but the "point where particular interests or principles balance 'cannot be determined by any general formula in advance.'"[219] Similar are Justice Brandeis's dissent in *Truax v. Corrigan*[220] and Justice Brown's opinion for a unanimous court in *Camfield v. United States*.[221]

Holmes himself later placed *Mahon* in this procession of substantive due process cases turning on the limits of the police power. Dissenting in *Frost & Frost Trucking Co. v. Railroad Commission*, Holmes wrote:

> The only valuable significance of the much abused phrase police power is this power of the State to limit what otherwise would be rights having a pecuniary value, when a predominant public interest requires the restraint. The power of the State is limited in its turn by the constitutional guaranties of private rights, and it often is a delicate matter to decide which interest preponderates and how far the State may go without making compensation. The line cannot be drawn by generalities, but successive points in it must be fixed by weighing the particular facts. Extreme cases on the one side and on the other are *Edgar A. Levy Leasing Co. v. Siegel* and *Pennsylvania Coal Co. v. Mahon*.[222]

(1921) (Holmes, J., dissenting) (warning of the "dangers of a delusive exactness in the application of the Fourteenth Amendment").

218. 226 U.S. 137 (1912).

219. *Id.* at 143 (invalidating an ordinance empowering two-thirds of property owners to establish building setback lines).

220. *Truax*, 257 U.S. at 356–57 (Brandeis, J., dissenting) ("Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary, can ordinarily be determined only by a consideration of contemporary conditions [and] involves a weighing of public needs as against private desires and likewise a weighing of relative social values.").

221. Camfield v. United States, 167 U.S. 518, 524 (1897) (citing Holmes's opinion in *Rideout v. Knox* for the proposition that "the police power is not subject to any definite limitations, but is co-extensive with the necessities of the case and the safeguard of the public interests").

222. Frost & Frost Trucking Co. v. R.R. Comm'n, 271 U.S. 583, 601 (1926) (Holmes, J., dissenting) (citations omitted). *Frost* invalidated on substantive due process grounds a statute conditioning the right of private contract carriers to use public highways on their submission to regulations applicable to common carriers. *Id.* at 599. Holmes found the statute "well within the legislative power," *id.* at 601 (Holmes, J., dissenting), falling between the police power "extremes" of *Mahon* and *Edgar A. Levy Leasing Co.*, 258 U.S. 242

What of Holmes's famous epigram that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"?[223] Viewing *Mahon* in historical context, this statement merely reiterates, in Holmes's colorful language, the principle *Mugler* had articulated decades earlier:

> It belongs to . . . [the legislature] to exert what are known as the police powers of the State . . . .
>
> It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, *limits beyond which legislation cannot rightfully go.* While every possible presumption is to be indulged in favor of the validity of a statute, the courts must obey the Constitution . . . and . . . determine whether, in any particular case, these limits have been passed.[224]

Or, as the Court said in *Lochner v. New York*,

> [T]here is a limit to the valid exercise of the police power by the State . . . . Otherwise, the 14th Amendment would have no efficacy . . . . [T]he question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual . . . ?[225]

Holmes made the same point in *Block v. Hirsh*—pre-dating *Mahon* by two years—when he said that under the police power "property rights may be cut down, and to that extent taken, without pay"[226] but it is "open to debate . . . whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain . . . regulations of the present sort [if] pressed to a certain height might amount to a taking without due process of law."[227]

Notwithstanding its latter-day reinterpreters, *Mahon* did *not* hold that a valid police power regulation was a compensable Fifth Amendment taking if it "went too far." Instead, it used a balancing test to plumb the outer bounds of the police power it-

(1922), which upheld wartime emergency rent control laws.

223. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

224. Mugler v. Kansas, 123 U.S. 623, 661 (1887) (citation omitted) (emphasis added); *see also* Lawton v. Steele, 152 U.S. 133, 136–37 (1894) ("The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.").

225. Lochner v. New York, 198 U.S. 45, 56 (1905).

226. Block v. Hirsh, 256 U.S. 135, 155 (1921).

227. *Id.* at 156.

self—or as a contemporaneous commentator put it, to determine the "reasonableness" of the legislative enactment,[228] a classic substantive due process inquiry. The principle that a *valid* police power regulation was not compensable clearly survived *Mahon*, as the Court quickly made plain in subsequent cases,[229] and as lower federal courts[230] and state courts[231] continued to hold.

It should not be surprising, then, that prior to *Penn Central*, *Mahon* was understood neither to have launched a doctrinal revolution nor, as a Fourteenth Amendment due process case concerning the limits of the states' police power, to have much relevance to the Fifth Amendment Takings Clause.

228. *See* Thomas Reed Powell, *Reasoning, Reasonableness and the Pennsylvania Surface Subsidence Case*, 1 N.Y. L. REV. 242, 242–43 (1923) (characterizing Holmes's disagreement with Brandeis in *Mahon* as a "struggle between reasoning and reasonableness," with Brandeis reasoning from abstract principles and Holmes viewing reasonableness as a "question . . . of degree").

229. *See, e.g.*, United States *ex rel.* TVA v. Powelson, 319 U.S. 266, 284 (1943) ("A state may of course destroy or diminish values by an assertion of its police power without the necessity of making compensation for the loss."); New Orleans Pub. Serv. v. City of New Orleans, 281 U.S. 682, 687 (1930) ("It is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking of property without due process of law.").

230. *See, e.g.*, Marrs v. City of Oxford, 32 F.2d 134, 138–39 (8th Cir. 1929) (reiterating that "uncompensated obedience to a legitimate regulation established under the police power is not a taking of property without compensation, or without due process" but "[a]rbitrary and unreasonable regulations . . . will be stayed"); City of New York v. Davis, 7 F.2d 566, 572 (2d Cir. 1925) (stating that "where the property of any person is taken under the eminent domain power, whatever is taken must be paid for; but that doctrine is not applied to a taking under the police power" under which "property rights may be cut down, and to that extent taken, without compensation").

231. *See, e.g.*, Blancett v. Montgomery, 398 S.W.2d 877, 881 (Ky. 1966) (underscoring the proposition that "a valid exercise of the police power resulting in an expense or loss of property is not a taking of property without due process of law or without just compensation" under the federal constitution); N.M. Bd. of Exam'rs in Optometry v. Roberts, 370 P.2d 811, 816 (N.M. 1962) ("[P]roperty and property rights are held subject to the fair exercise of the police power and a reasonable regulation enacted [under that power] . . . is not [an] unconstitutional 'taking of property' . . . [under] the Federal Constitution."); Lombardo v. City of Dallas, 73 S.W.2d 475, 478–79 (Tex. 1934) (explaining that "[*a*]*ll property is held subject to the valid exercise of the police power*" and "compensation is not required to be made for such loss as is occasioned by the proper exercise of the police power" (quotations omitted)).

III. PHANTOM INCORPORATION AND THE MAKING OF THE MUDDLE

A. THE NONARGUMENT IN *PENN CENTRAL*

Penn Central came to the Supreme Court as it was decided in the courts below: as a Fourteenth Amendment substantive due process case, determining how far the police power legitimately allowed the state to go in adjusting the boundaries of property rights. While intimating that the case might be a close call, both the New York Appellate Division and the New York Court of Appeals had upheld New York City's landmark preservation ordinance as a valid police power regulation, constitutionally permissible under due process doctrine.[232] On appeal to the U.S. Supreme Court, appellee New York City continued to argue the case on Fourteenth Amendment substantive due process grounds.[233]

Appellant Penn Central took a different tack. Although stating that it sought injunctive relief and money damages to remedy a Fourteenth Amendment due process violation,[234] Penn Central relied heavily on Fifth Amendment Takings Clause precedents involving the federal government.[235] Perhaps recognizing the weakness of its position, Penn Central relegated its incorporation claim to a single brief footnote where it stated in conclusory fashion, without support or analy-

232. *See* Penn Cent. Transp. Co. v. City of New York, 366 N.E. 1271, 1273 (N.Y. 1977) ("[T]he regulation does not deprive plaintiffs of property without due process of law, and should be upheld as a valid exercise of the police power."); Penn Cent. Transp. Co. v. City of New York, 377 N.Y.S.2d 20, 27, 29 (N.Y. App. Div. 1975) (stating that "the line between a compensable 'taking' and a noncompensable 'regulation' is sometimes difficult to discern" but "New York City's Landmarks Preservation Law is a valid exercise of its police power").

233. New York City's brief argued that the Landmarks Ordinance was a valid police power regulation, therefore not compensable under due process precedents like *Goldblatt*, *Hadacheck*, *Euclid*, and *Village of Belle Terre v. Boraas*. *See* Brief for Appellees at 20–40, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (No. 77-444), 1978 WL 206883.

234. *See* Brief for Appellants at 12 n.10, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (No. 74-444), 1978 WL 206882 ("Penn Central argues here that the City of New York's action violates the Due Process Clause of the Fourteenth Amendment . . . ."); *id.* at 6 (stating that Penn Central sought "equitable relief and monetary damages, alleging, *inter alia*, that the actions of the Landmarks Commission . . . constituted a taking of private property without just compensation in violation of due process and equal protection of the laws").

235. *Id.* at 12–43.

sis, that *Chicago B & Q* had established that "the constitutional protections" of the Due Process and Takings Clauses "are the same."[236]

In the alternative, Penn Central argued in the same footnote that the "same result"—the identity of the Fourteenth Amendment Due Process and Fifth Amendment Takings Clauses—"is reached under the 'incorporation doctrine.'"[237] For this proposition it cited not *Chicago B & Q*, but *Gideon v. Wainwright*, the 1963 case that extended the constitutional right to counsel to state criminal proceedings.[238] *Gideon* had indeed made a passing reference to *Chicago B & Q* as a rough prototype for expansion of due process to include other "fundamental" rights guaranteed by the Bill of Rights.[239] But the precedent that the Penn Central brief mustered for its incorporation argument was meager and indirect, and discussion of the broader implications of such a holding entirely absent.

Neither New York City nor the states of New York and California as amici mounted a serious response to the railroad's incorporation argument,[240] which must have seemed farfetched under established property doctrines. At times, the city and state briefs professed astonishment at Penn Central's brazen disregard of applicable Fourteenth Amendment due process precedents[241] and its seemingly misplaced reliance on Fifth

236. *Id.* at 12 & n.10.

237. *Id.*

238. Gideon v. Wainwright, 372 U.S. 335 (1963).

239. *Id.* at 341–42 ("[T]hough not always in precisely the same terminology, the Court has made obligatory on the States the Fifth Amendment's command that private property shall not be taken for public use without just compensation . . . .").

240. *See* Brief for Appellees, *supra* note 233, at 20–39 (arguing that the City's action "did not deprive the owner of due process" because the Landmarks Ordinance was a legitimate police power exercise); Brief of the State of New York as Amicus Curiae Supporting Appellees, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (No. 77-444), 1978 WL 206891; Brief of Amicus State of California as Amicus Curiae Supporting Appellees, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (No. 77-444), 1978 WL 206888.

241. *See* Brief for Appellees, *supra* note 233, at 22 ("This Court has established a substantial body of precedent setting forth the appropriate criteria for determining whether a land use regulation is a valid exercise of the police power."); Brief for the State of New York as Amicus Curiae Supporting Appellees, *supra* note 240, at 17 ("Recognizing the extreme nature of their position, appellants seek to paint this case as one in which a different rule for landmarks [than for other police power regulations] is established. But that is not the case. The City's law is valid under the traditional police power rules within which this Court has steered for decades.").

Amendment Takings Clause precedents, dismissing Penn Central's arguments as "confused," "unwarranted," "misleading," "blatantly ignor[ing]" relevant precedent, constructed on a "faulty . . . premise," and "irrelevan[t]."[242] In the main, however, the city and states relied on standard Fourteenth Amendment arguments and canonical due process precedents to argue that the landmarks ordinance was a valid police power measure.[243] None of the parties or amici discussed the larger implications of the sweeping incorporation holding the *Penn Central* Court ultimately would make.

What is perhaps most puzzling about the *Penn Central* decision is how casually it swept away a century of Fourteenth Amendment due process jurisprudence, seeming not to entertain seriously the possibility that the case should be decided—as it was decided in the courts below, and as the parties had argued it—on Fourteenth Amendment due process grounds. Nor did the Court pause to consider the possibility that what counted as a "taking" of property by a state without due process under the Fourteenth Amendment might differ from what counted as a "taking" of property by the federal government under the Fifth Amendment Takings Clause, as had long been assumed.

Instead, almost *sua sponte*—without briefing on the incorporation question or prior adjudication of that issue in the lower courts—*Penn Central* collapsed a century of substantive due process precedent into Fifth Amendment Takings Clause doctrine, indiscriminately lifting concepts and principles from both lines of cases and weaving them into a new, unified "regu-

242. *See, e.g.*, Brief for Appellees, *supra* note 233, at 21 ("[A]ppellants have improperly confused the principles of eminent domain . . . with principles governing a lawful exercise of the police power."); Brief for the State of New York as Amicus Curiae Supporting Appellees, *supra* note 240, at 17 ("[A]ppellants' portrayal of this as a 'taking' case, as if it were eminent domain, is unwarranted and misleading."); *id.* at 21 ("The last-ditch attempt to portray this as an eminent domain case blatantly ignores the factual findings below and forty years of decisions broadening the police power of the municipalities . . . ."); Brief for the State of California as Amicus Curiae Supporting Appellees, *supra* note 240, at 4 ("Penn Central's legal analysis flows from the premise that the actions of New York City . . . constituted a taking of private property for public use. . . . Once the faulty nature of that premise is recognized, the irrelevance of much of Penn Central's argument becomes apparent.").

243. *See* Brief for Appellees, *supra* note 233, at 16 ("The appellants, without any analysis, have argued that the City of New York . . . has taken their property and must pay the appellants compensation . . . . It is our position that the designation of Grand Central Terminal as a landmark was a proper exercise of the police power.").

latory takings" doctrine applicable to the states and the federal government alike.[244] Henceforth, all takings adjudication would apply the text of the Fifth Amendment Takings Clause to the facts at hand, requiring endless judicial parsing of the opaque constitutional terms "take" and "taking." Lost in the shuffle was the notion, well understood by the courts of the substantive due process era, that as a logically prior question, before one could decide whether a claimant's property was "taken," it was necessary to ascertain whether the claimant's property rights extended as far as claimed; and that depended crucially upon state law and the state's reserved police power to alter such law within reasonable limits.

B. THE LONG MARCH TO INCORPORATION

How could the *Penn Central* Court have made such an egregious blunder? Had *Chicago B & Q* already been transubstantiated into an incorporation case before *Penn Central* was decided?

Eight decades of incorporation jurisprudence had passed between *Chicago B & Q* and *Penn Central*, and in the latter stages of that progression, *Chicago B & Q* came to be cited regularly as a harbinger, progenitor, and early prototype of selective incorporation. But no Supreme Court decision prior to *Penn Central* had actually held the Fifth Amendment Takings Clause applicable to the states. Nor had any majority Supreme Court opinion ever squarely attributed that holding to *Chicago B & Q*. *Penn Central* was wrong in its history. *Penn Central*, not *Chicago B & Q*, was the defining moment when the Fifth Amendment Takings Clause was extended to the states.

The incorporation saga began at the turn of the twentieth century with the first Justice John Marshall Harlan, who argued that all the rights citizens held against the federal government under the Bill of Rights had been fully incorporated against the states through the Fourteenth Amendment, either as "privileges and immunities"[245] or as "liberties" which may

244. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–28 (1978) (citing nine Fifth Amendment and nineteen Fourteenth Amendment cases in deriving a takings balancing test applicable to both state and federal governments).

245. Maxwell v. Dow, 176 U.S. 581, 606 (1900) (Harlan, J., dissenting) ("[P]rivileges and immunities embrace at least those expressly recognized by the Constitution of the United States and placed beyond the power of Congress to take away or impair."). Justice Harlan advanced similar arguments in other

not be "deprived" without due process.[246] Harlan lost that debate.[247] The incorporation idea would then lie dormant for four decades, although the scope of Fourteenth Amendment due process gradually expanded during this period to embrace principles cognate to some provisions of the Bill of Rights.[248]

The incorporation debate reemerged with full force in *Palko v. Connecticut*, deciding whether due process barred a state from subjecting a criminal defendant to double jeopardy.[249] *Palko* stoutly reaffirmed that the Fifth Amendment "is not directed to the states, but solely to the federal government,"[250] rejecting the petitioner's effort to revive Harlan's blanket incorporation thesis.[251] Justice Cardozo's majority opinion acknowledged, however, that certain "immunities that are valid as against the federal government by force of the specific pledges of particular amendments" had independently "been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states."[252]

Palko thus echoed the view expressed earlier in *Twining v. New Jersey* that if provisions of the Bill of Rights found parallels in Fourteenth Amendment due process, it was not because the original amendments had been extended, but because the

cases. *See, e.g.*, Twining v. New Jersey, 211 U.S. 78, 124–27 (1908) (Harlan, J., dissenting).

246. *Maxwell*, 176 U.S. at 614 (Harlan, J., dissenting) ("When . . . the Fourteenth Amendment forbade the deprivation by any State of life, liberty or property without due process of law, the intention was to prevent any State from infringing the guaranties for the protection of life and liberty that had already been guarded against infringement by the National Government.").

247. *See e.g.*, *Twining*, 211 U.S. at 113–14 (holding that neither the Privileges and Immunities Clause nor the Due Process Clause incorporate the Fifth Amendment privilege against self-incrimination against the states); *Maxwell*, 176 U.S. at 604–05 (holding the Fifth Amendment Clauses guaranteeing indictment by a grand jury and trial by jury are not applicable to the states either as "privileges and immunities" or as "due process of law").

248. *See, e.g.*, Near v. Minnesota *ex rel.* Olsen, 283 U.S. 697 (1931) (freedom of press); Fiske v. Kansas, 274 U.S. 380 (1927) (freedom of speech); Meyer v. Nebraska, 262 U.S. 390 (1923) (free exercise of religion).

249. 302 U.S. 319, 323 (1937).

250. *Id.* at 322.

251. *Id.* at 323 (rejecting petitioner's contention that "[w]hatever would be a violation of the original bill of rights . . . if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state" by stating that "[t]here is no such general rule").

252. *Id.* at 324–25.

concept of due process so required.[253] The *Palko* Court specifically included among these parallel but independent due process protections the *Chicago B & Q* principle that compensation was required in eminent domain.[254]

A decade later, Justice Hugo Black tried unsuccessfully to revive Harlan's blanket incorporation theory. By a 5–4 majority in *Adamson v. California*, the Court rejected blanket incorporation, holding that the "due process clause of the Fourteenth Amendment . . . does not draw all the rights of the federal Bill of Rights under its protection."[255] In an influential concurrence, Justice Frankfurter argued that the Fourteenth Amendment "neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government nor is it confined to them."[256] Instead, Frankfurter stressed, the Fourteenth Amendment has "independent potency" and an "independent function,"[257] and is not merely "a shorthand summary of the first eight amendments" for it "would be extraordinarily strange for a Constitution to convey such specific commands in such a roundabout and inexplicit way."[258]

By the 1960s, when the Court's pro-incorporation wing began to gain the upper hand, their success was not predicated upon blanket incorporation. Instead, they pressed for patient, piecemeal expansion of the list of "fundamental rights" protected by Fourteenth Amendment due process, coupling those incremental victories with a rhetorical turn to the original Bill of Rights to inform their understanding of the specific content of the new Fourteenth Amendment rights. This approach came to be known as "selective incorporation."[259]

253. *See* Twining v. New Jersey, 211 U.S. 78, 99 (1908) (stating that if "some of the personal rights" guaranteed against federal action by the first eight amendments were also protected against state action by due process, "it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law").

254. 302 U.S. at 326 & n.4 (quoting *Twining*, 211 U.S. at 99).

255. 332 U.S. 46, 53 (1947); *cf. id.* at 71–72 (Black, J., dissenting) (arguing that "one of the chief objects" of the Fourteenth Amendment was to overturn *Barron* and "make the Bill of Rights applicable to the states").

256. 332 U.S. at 66 (Frankfurter, J., concurring).

257. *Id.* at 66–67 (Frankfurter, J., concurring).

258. *Id.* at 62–63 (Frankfurter, J., concurring).

259. *See, e.g.*, Louis Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963) (outlining the origins and implications of selective incorporation).

With the rise of selective incorporation, citations to *Chicago B & Q* became almost obligatory. In every case, win or lose, pro-incorporation justices would recite the growing list of "fundamental rights" protected by due process and their cognates in the Bill of Rights; the right to just compensation was prominent on every such list by virtue of its durable years of service.[260] These rote citations to *Chicago B & Q* were, however, merely dicta.

Most references to *Chicago B & Q* during this period display a profound (and perhaps intentional) ambiguity as to exactly what that case meant, and what it implied about the relation of the Fifth Amendment to the Fourteenth. *Duncan v. Louisiana*, for example, said that the Court "increasingly looked to the Bill of Rights for guidance" to determine "the meaning" of Fourteenth Amendment due process, and that "many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause," including "the right to compensation for property taken by the State."[261] That proposition is decidedly ambiguous, however, as to whether the Takings Clause now literally applied to the states (as *Penn Central* would later hold), or whether the Fifth and Fourteenth Amendment requirements were still understood as separate, independent, parallel, and cognate, but possibly nonidentical guarantees, as per earlier understandings.[262]

260. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 148 (1968); Pointer v. Texas, 380 U.S. 400, 412 (1965) (Goldberg, J., concurring); City of El Paso v. Simmons, 379 U.S. 497, 534 (1965) (Black, J. dissenting); Malloy v. Hogan, 378 U.S. 1, 4 (1964); Gideon v. Wainwright, 372 U.S. 335, 342 (1963); Cohen v. Hurley, 366 U.S. 117, 155 (1961) (Brennan, J., dissenting).

261. 391 U.S. at 148. The citation to *Chicago B & Q* was curious in this context, for at no point had the *Chicago B & Q* Court "looked . . . to the Bill of Rights for guidance." *See id.*

262. A similar ambiguity enshrouds characterizations of *Chicago B & Q* in, for example, *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965) (stating that "the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal rights") and *Gideon v. Wainwright*, 372 U.S. 335, 341–42 (1963) (stating that "the Court ha[d] made obligatory on the States the Fifth Amendment's command that private property shall not be taken without just compensation"). Less ambiguous was Justice Black's opinion, expressing his views alone in announcing the judgment of a fractured Court in *Oregon v. Mitchell*, 400 U.S. 112 (1970). Justice Black, citing *Chicago B & Q*, placed the Takings Clause among "those protections of the Bill of Rights which we have held the Fourteenth Amendment made applicable to the States." *Id.* at 129. However, that citation represented the views of a single justice in a long string cite with no

Pro-incorporation Justices occasionally made bolder claims about *Chicago B & Q*'s meaning and effect in separate concurrences and dissents, but these had limited precedential value. In *Martin v. Creasy*, Justice Douglas cited *Chicago B & Q* in his dissent from the Court's dismissal of a due process property deprivation claim for failure to exhaust state remedies, arguing that "these property owners are entitled to a declaratory judgment" determining whether they had suffered a property deprivation "compensable under the Fifth Amendment (and made applicable to the States through the Fourteenth)."[263] Other Justices took similar positions in other cases.[264]

Then along came *Penn Central*. Justice Brennan, writing for the Court, led off his opinion with a flat pro-incorporation holding, buttressing it with the usual citation to *Chicago B & Q*. No dissent pointed out the import of that holding; indeed, the dissenters agreed with the majority on the incorporation question.[265] It is not clear whether by this time the Court had come to believe its own rhetoric under the steady drumbeat of nearly two decades of dissents and concurrences hailing *Chicago B & Q* as an incorporation case, or whether instead Justice Brennan's one-line disposition of the heretofore unresolved incorporation issue represented a sly piece of doctrinal legerdemain. Perhaps in the end it does not matter. What does matter is that the *Penn Central* Court squarely held for the first time that "the Fifth Amendment . . . is made applicable to the States through the Fourteenth Amendment,"[266] citing *Chicago B & Q* as its sole support.

analysis to support its interpretation. *See id.* It was also pure dicta, a clue to the Court's emerging mode of analysis, but nonetheless unnecessary to the disposition of a case concerning the constitutionality of a federal statute establishing a national voting age of eighteen.

263. Martin v. Creasy, 360 U.S. 219, 226 (1959) (Douglas, J., dissenting).

264. *See, e.g.*, Pointer v. Texas, 380 U.S. 400, 411–12 (1965) (Goldberg, J., concurring) ("Thus the Court has held that the Fourteenth Amendment guarantees against infringement by the States the liberties of . . . the Just Compensation Clause of the Fifth Amendment."); Cohen v. Hurley, 366 U.S. 117, 155 (1961) (Brennan, J., dissenting) (stating that *Chicago B & Q* "in fact if not in terms, applied the Fifth Amendment's just-compensation requirement to the States").

265. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 141 n.3 (1978) (Rehnquist, J., dissenting) (stating that the Fifth Amendment Takings Clause is "applicable to the States through the Fourteenth Amendment").

266. *Id.* at 122 (majority opinion).

C. MUDDLE ON ALL FRONTS

Conflation of substantive due process and Takings Clause doctrine muddled the "takings" issue in multiple ways. First, it introduced confusion as to what counts as precedent in Fifth Amendment Takings Clause cases. Recently in *Lingle v. Chevron*, the Court admitted that its Takings Clause jurisprudence had gone astray in *Agins v. Tiburon*, when it said that a challenged regulation would be a Fifth Amendment taking if it did not "substantially advance [a] legitimate [governmental] interes[t]."[267] That test, *Lingle* explained, is more appropriate to a substantive due process inquiry, and was derived from misplaced reliance on two early twentieth-century substantive due process precedents, *Nectow v. City of Cambridge*[268] and *Village of Euclid v. Ambler Realty Co.*[269]

The dirty little secret that *Lingle* did not address, however, is that the Court had relied on *Nectow* and *Village of Euclid,* together with their now-discredited derivative *Agins*, in most of the foundational Fifth Amendment takings cases of the modern era, from *Penn Central*[270] through *Loretto*,[271] *Nollan*,[272] *Lucas*,[273] *Dolan*,[274] and *Tahoe-Sierra*,[275] as well as numerous less celebrated cases.[276] For its part, the errant *Agins* "substantially advances" formula has profoundly influenced the course of takings jurisprudence, having been cited in hundreds of federal and state cases over the last twenty-five years.[277]

267. Lingle v. Chevron U.S.A., Inc., 125 S. Ct. 2074, 2087 (2005) (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

268. 277 U.S. 183 (1928).

269. 272 U.S. 365 (1926).

270. *See Penn Cent.*, 438 U.S. at 125, 131.

271. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 447 (1982).

272. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834–35 (1987).

273. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016, 1024 (1992).

274. *See* Dolan v. City of Tigard, 512 U.S. 374, 384–85, 387, 391 n.8 (1994).

275. *See* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 323, 334 (2002).

276. *See, e.g.*, Brown v. Legal Found. of Wash., 538 U.S. 216, 234 (2003); E. Enters. v. Apfel, 524 U.S. 498, 544, 545 (1998) (Kennedy, J., concurring); Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 645 (1993); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488 (1987); United States v. Riverside Bayview Homes Inc., 474 U.S. 121, 126 (1985); Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 15 (1984).

277. Westlaw's KeyCite service lists 923 court citations to *Agins* before it was overruled by *Lingle* on May 23, 2005. Search of WESTLAW, Keycite service (Jan. 25, 2006).

Nor does the problem of misplaced reliance on substantive due process precedents end with *Nectow, Village of Euclid*, and their bastard child *Agins*. Other notable Fourteenth Amendment substantive due process cases like *Mugle*r,[278] *Reinman*,[279] *Hadacheck*,[280] and *Miller v. Schoene*[281] make frequent cameo appearances in modern takings adjudication, cast as Fifth Amendment Takings Clause precedents.

Not all substantive due process precedents are afforded this privileged treatment, however. The Court selectively cites language that, stripped from its proper Fourteenth Amendment substantive due process context, appears to support elements of current Takings Clause doctrine, while ignoring the language and holdings of other substantive due process cases, or other parts of the very same cases the Court cites. *Chicago B & Q*, for example, is routinely misappropriated to stand for the proposition that the Fifth Amendment Takings Clause was made applicable to the states, but never for the companion holding, equally important in its day, that a valid police power regulation never gives rise to a compensable taking.[282] *Pennsylvania Coal Co. v. Mahon* is regularly—and erroneously—invoked to support the assertion that a valid police power regulation may constitute a compensable taking,[283] but more recent substan-

278. Mugler v. Kansas, 123 U.S. 623 (1887), was cited as a Fifth Amendment Takings Clause precedent in, *inter alia*, *Lucas*, 505 U.S. at 1023, 1026 n.13; *Keystone Bituminous*, 480 U.S. at 489, 492; and *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 126 (1978).

279. *Reinman v. Little Rock*, 237 U.S. 171 (1915), was cited as a Fifth Amendment Takings Clause precedent in, *inter alia*, *Lucas*, 505 U.S. at 102 n.13; *Keystone Bituminous*, 480 U.S. at 489–90; and *Penn Cent.*, 438 U.S. at 126.

280. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), was cited as a Fifth Amendment precedent in, *inter alia*, *Concrete Pipe*, 508 U.S. at 645; *Lucas*, 505 U.S. at 1023, 1026 n.13; and *Keystone Bituminous*, 480 U.S. at 489–90.

281. *Miller v. Schoene*, 276 U.S. 272 (1928), was cited as a Fifth Amendment Takings Clause precedent in, *inter alia*, *Texaco, Inc v. Short*, 454 U.S. 516, 530 n.23 (1982); and *Penn Cent.*, 438 U.S. at 125–26.

282. Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 251–52 (1897) (stating that "[t]he requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the State by reasonable regulations to protect the lives and secure the safety of the people" and that any property damaged or diminished in value by such regulations "is not, within the meaning of the Constitution, taken for public use, nor is the owner deprived of it without due process of law").

283. *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 853 (1987) ("The fact that the Commission's action is a legitimate exercise of the police power does not, of course, insulate it from a takings challenge." (citing Pa.

tive due process cases expressly holding to the contrary are ignored.[284]

Misplaced reliance on substantive due process precedent pervasively infects contemporary Fifth Amendment regulatory takings doctrine with substantive due process concepts and principles. Again, the problem extends well beyond *Agins*. *Penn Central* relied on no fewer than twenty substantive due process precedents, including *Nectow* and *Village of Euclid,* to conclude that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to effectuation of a substantial public purpose."[285] That standard, like the repudiated prong of *Agins*, sounds in substantive due process,[286] and is almost indistinguishable from the *Agins* "substantially advances" formulation.[287] Taking root as part of the "character of the government action" element of the *Penn Central* balancing test—a test the Court applies in all but a few exceptional categories of takings inquiries[288]—this formulation has become a touchstone of

Coal v. Mahon, 260 U.S. 393, 415 (1922))); Corn v. City of Lauderdale Lakes, 904 F.2d 585, 587 (11th Cir. 1990) ("[R]egulation may meet the standards necessary for exercise of police power but still result in a compensable taking." (citing *Mahon*, 260 U.S. at 414)).

284. *See supra* note 229.

285. *Penn Cent.*, 438 U.S. at 127. The Court cited *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), and *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) in immediate support of the quoted proposition, and *Atchison Topeka & Santa Fe Railroad Co. v. Public Utility Commission*, 346 U.S. 346 (1953), *Chicago Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897), *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36 (1944), *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), *Gorieb v. Fox*, 274 U.S. 603 (1927), *Griggs v. Allegheny County*, 369 U.S. 84 (1962), *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), *Miller v. Schoene*, 276 U.S. 272 (1928), *Mugler v. Kansas*, 123 U.S. 623 (1887), *Muhlker v. New York & Harlem Railroad Co.*, 197 U.S. 544 (1905), *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), *Reinman v. City of Little Rock*, 237 U.S. 171 (1915), *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), *Walls v. Midland Carbon Co.*, 254 U.S. 300 (1920), and *Welch v. Swasey*, 214 U.S. 91 (1909), in close proximity.

286. The *Penn Central* court cited no Fifth Amendment Takings Clause precedents in support of the quoted proposition, which had no history in Takings Clause doctrine.

287. *See Nollan*, 483 U.S. at 843–44 n.1 (Brennan, J., dissenting) (equating the *Agins* "substantially advances" test to the *Penn Central* "reasonably necessary" standard, stating that although "[o]ur phraseology may differ slightly from case to case," the "inquiry in each case is the same").

288. *See* Lingle v. Chevron U.S.A., Inc., 125 S. Ct. 2074, 2081 (2005) (stating that the *Penn Central* balancing test applies in all regulatory takings cases

modern Fifth Amendment Takings Clause jurisprudence.[289]

Indeed, the *Penn Central* balancing test itself, cobbled largely out of substantive due process precedents, bears an uncanny resemblance to Holmes's sliding-scale balancing test in substantive due process analysis. *Penn Central* instructs courts to weigh the "character of the government action"—the "public interest," in Holmes's formulation[290]—against the economic burden on the property owner, taking into account "distinct investment-backed expectations"—or the "private interest," in Holmesian language.[291] On either test, a regulation that "goes too far" as measured in the balance will run afoul of one or another constitutional property guarantee; for the modern Court it is a Fifth Amendment regulatory taking, while for Holmes it was an "unreasonable" regulation beyond the legitimate scope of the police power.[292]

The modern Court's misplaced reliance on *Pennsylvania Coal Co. v. Mahon* as precedent for a "diminution of value" test in Fifth Amendment takings doctrine has produced further doctrinal confusion.[293] This misreading of *Mahon* led the *Penn Central* court to incorporate the diminution of value standard into its balancing test for Fifth Amendment takings: both the "burden" and "investment-backed expectations" prongs of the three-part *Penn Central* balance reflect "diminution of value" concepts.[294]

except the "relatively narrow categories" of *Loretto*-type permanent physical occupations and *Lucas*-type "total regulatory takings," and the "special context" of land use exactions governed by *Nollan* and *Dolan*).

289. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 633–34 (2001) (O'Connor, J., concurring) (incorporating a "reasonably necessary" test into the "character of the governmental action" prong of *Penn Central* balancing); *accord* Rose Acre Farms, Inc. v. United States, 55 Fed. Cl. 643, 659 (2003); Qwest Corp. v. United States, 48 Fed. Cl. 672, 688–89 (2001); *see also* Dodd v. Hood River County, 136 F.3d 1219, 1228 (9th Cir. 1998) (incorporating the *Agins* "substantially advances" test into the "character of the governmental action" prong of *Penn Central* balancing); Ga. Outdoor Adver., Inc. v. City of Waynesville, 900 F.2d 783 (4th Cir. 1990) (same).

290. *See supra* notes 202–11 and accompanying text.

291. *See id.*

292. *See supra* notes 223–24 and accompanying text.

293. *See supra* Part II.E (arguing that *Mahon* employed a balancing test, not a simple diminution-of-value test, and was a substantive due process case turning on the legitimate scope of the police power, not a Fifth Amendment Takings Clause case).

294. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978) (citing *Mahon* as the "leading case" establishing that frustration of "distinct investment-backed expectations" is relevant to a takings inquiry); *id.* at

The *Mahon*-misbegotten "diminution of value" test was also foundational to the second (and presumptively still valid) prong of *Agins*, holding that a regulation that "denies an owner economically viable use of his land" is a taking.[295] *Mahon* and *Agins*, in turn, provided the conceptual and doctrinal foundations for the *Lucas* "total taking" test, a test based purely on diminution of value without regard to the character or importance of the governmental action.[296]

Finally, misplaced reliance on substantive due process precedents led to the importation of substantive due process standards into the *Nollan* "essential nexus" and *Dolan* "rough proportionality" tests for exactions. *Nollan*'s "essential nexus" holding—requiring that a "permit condition serves the same governmental purpose as the development ban" it is designed to avoid[297]—was derived directly from the discredited *Agins*'s "substantially advances" test and its *Penn Central* "reasonably necessary" counterpart.[298] Similarly, *Dolan*'s "rough proportionality" test was derived from the defective "substantially advances" prong of *Agins*,[299] the parallel "reasonably necessary" language in *Penn Central,*[300] and the *Dolan* Court's own syn-

124 (attributing "economic impact of the regulation on the claimant" and "interfer[ence] with distinct investment-backed expectations" standards to a passage in *Goldblatt* that cites *Mahon* (citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962))). The "diminution of value" test had no precedent in Fifth Amendment Takings Clause doctrine.

295. *See* Agins v. Tiburon, 447 U.S. 255, 260 (1980).

296. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014–16 (1992) (citing *Mahon* for the proposition that diminution of value can lead to a taking, and *Agins* for the proposition that "where regulation denies all economically beneficial or productive use of land" it will be deemed a categorical taking).

297. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

298. *Id.* at 834–35 (citing *Agins*'s "substantially advances" and *Penn Central*'s "reasonably necessary" formulations for the proposition that the Takings Clause demands means-end rationality, but stating that "[o]ur cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter"); *id.* at 837 (concluding that "the lack of nexus" between the permit condition and the original purpose of the regulation "converts that purpose to something other than it was" and therefore falls beyond the "outer limits of 'legitimate state interests'").

299. *See* Dolan v. City of Tigard, 512 U.S. 374, 384–85 (1994) (citing *Agins*'s "substantially advances" test along with *Euclid* and *Mahon*).

300. *Id.* at 388 (citing *Nollan*'s and *Penn Central*'s "reasonably necessary" formulation for the proposition that takings analysis "requires us to determine whether the degree of the exactions demanded bears the required relationship to the projected impact of petitioner's proposed development").

thesis of state court precedents, most based on state constitutional provisions[301] and many sounding in substantive due process.[302] At the end of the day, both the *Nollan* "essential nexus" and *Dolan* "rough proportionality" inquiries demand a tight means-end "fit" in exactions, echoing the heightened substantive due process standards of an earlier era from which these modern standards are derived.

Thus it fairly may be said that every major element in the Court's modern Fifth Amendment regulatory takings jurisprudence, with the possible exception of *Loretto*,[303] was founded in whole or in part on Fourteenth Amendment substantive due process precedents, and reflects substantive due process concepts and principles. *Penn Central*'s phantom incorporation of the Fifth Amendment Takings Clause against the states effected, in fact though not in name, a "reverse incorporation" of *Lochner*-era substantive due process jurisprudence into modern Fifth Amendment takings law.

The reverse incorporation was a selective one, however. Even as it imported heightened substantive due process review of economic regulations affecting property into modern Fifth Amendment takings doctrine, the doctrinal merger stripped states of what had been their most important defense in the substantive due process era. The police power, operating as an inherent limitation on property rights, gave states ample room

301. *See id.* at 388–91 (citing thirteen state court precedents to support the holding that 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," a test it denominated "rough proportionality"); Simpson v. City of N. Platte, 292 N.W.2d 297, 302 (Neb. 1980) (citing to state constitution); Jenad, Inc. v. Vill. of Scarsdale, 218 N.E.2d 673 (N.Y. 1966) (holding that a development impact fee was permissible under the state constitution).

302. *See, e.g.*, McKain v. Toledo Planning Comm'n, 270 N.E.2d 370, 373–74 (Ohio Ct. App. 1971) (finding that a required dedication for highway improvements unrelated to the proposed development is not a reasonable police power measure, and violates the state constitution); Billings Props., Inc. v. Yellowstone County, 394 P.2d 182, 188 (Mont. 1964) (ruling that a statute requiring dedicated park land was a reasonable and constitutionally permissible exercise of police power); Pioneer Trust & Sav. Bank v. Vill. of Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961) (finding that a dedication where the impact is not "specifically and uniquely attributable" to a developer is not a reasonable exercise of police power).

303. *Loretto* cited primarily Fifth Amendment precedents but also relied heavily on *Pumpelly v. Green Bay Company*, an 1871 dam flooding case decided on state constitutional grounds. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982) (citing Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871)).

to assert that new regulatory enactments had not deprived claimants of their property because private property rights simply ended where the states' police power began. Misconstruing *Mahon* to have reversed that historic understanding, the modern Court from *Penn Central* forward has insisted that valid police power regulations *could* effect Fifth Amendment regulatory takings, so the fact that a regulatory enactment is a legitimate exercise of the state's police power is no longer a defense.[304] For states, then, "reverse incorporation" of substantive due process into Fifth Amendment takings doctrine is a double bind: it subjects regulatory enactments affecting property (but no others) to heightened scrutiny akin to, and derived from, *Lochner*-era substantive due process, but denies states their most potent defense against such challenges.

The mischief does not end there. By collapsing the Fourteenth Amendment substantive due process and Fifth Amendment Takings Clause branches of just compensation law into a single doctrine revolving principally around concepts of diminution of value (*Penn Central*, *Lucas*, *Agins* prong two) and means-end rationality (*Penn Central*, *Agins* prong one, *Nollan*, *Dolan*), the modern Court has largely squeezed the law of property—and particularly the role of state law in defining, limiting, and modifying property rights over time—out of the equation. As Part II.D showed, prior to *Penn Central* courts adjudicating Fifth Amendment takings claims against the federal government looked first to state law to determine the scope and limits of the claimant's property rights, as a logically necessary predicate for determining whether a challenged federal action had so truncated a state-defined property right as to

304. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028–29 (1992) (stating that *Loretto* held a permanent physical occupation compensable "no matter how weighty the asserted 'public interests'" and "similar treatment must be accorded . . . regulations that prohibit all economically beneficial use of land"); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 853 (1987) (Brennan, J., dissenting) (citing *Mahon* for the proposition that "[t]he fact that the Commission's action is a legitimate exercise of the police power does not . . . insulate it from a takings challenge"); *Loretto*, 458 U.S. at 425 (stating that even if a statute is a valid police power measure, it is "a separate question . . . whether an otherwise valid regulation so frustrates property rights that compensation must be paid"); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978) (citing *Mahon* as "the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking'").

constitute a taking.[305] State law was also central to Fourteenth Amendment substantive due process analyses, through a different route: the state's usual defense was that because the claimant's property rights under state law were subject to the police power limitation, the measure did not "take" any property.[306] Through this mechanism, the precise boundaries of state-recognized property rights would evolve over time.

In the modern era, state property law has all but disappeared from the inquiry. The analysis of a regulatory takings claim typically begins by assuming that the claimant's constitutionally protectable rights include the right to capture the full fair market value of her economic expectations *ex ante* the challenged regulatory enactment—though why such expectations should be deemed "property" is never made clear.[307] Diminution of value measured against *ex ante* expectations becomes the gauge to determine whether the regulation "goes too far" and is a compensable taking. On this approach, what is "taken" need not even be "property" in a legal sense.

An example is *Eastern Enterprises v. Apfel*.[308] Eastern Enterprises challenged a federal statute imposing retroactive liability on current coal operators to fund employee pension, medical, and survivor benefits that were "orphaned" by previous industry closures and reorganizations.[309] Applying a *Penn Central* balancing analysis, Justice O'Connor's plurality opinion found the economic impact on Eastern Enterprises both substantial[310] and disproportionate to what the company could have reasonably expected given its history as employer and participant in previous benefit plans.[311] Moreover, the plurality said, the governmental action was suspect because it "singles out certain employers" to bear a heavy economic burden for "conduct far in the past" and "unrelated to any commitment the employers made or any injury they caused."[312] On balance, the

305. *See supra* Part II.D.

306. *See id.*

307. *Cf.* BOSSELMAN ET AL., *supra* note 207, at 240 ("The idea that a regulation of the use of land which prevents the owner from making money can amount to a taking assumes that a landowner has a constitutional right to use and develop his land for some purpose which will result in personal profit, regardless of the effect that such development will have on the public.").

308. 524 U.S. 498 (1994).

309. *Id.*

310. *Id.* at 529.

311. *Id.* at 530–31.

312. *Id.* at 537.

plurality said, the statute was a Fifth Amendment taking.[313]

Justice Kennedy, concurring in the judgment, said he would reach the same result on substantive due process grounds, pointing out that the plurality's reasoning sounded more like a substantive due process than a takings holding.[314] Kennedy noted that although the statute imposed a "staggering financial burden" on Eastern Enterprises, it "does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest"; instead, it merely placed a financial obligation on the company which remained free to meet that obligation by any means it chose.[315] In short, the only thing "taken" from Eastern Enterprises was some fraction of its total economic value, not any identifiable "property" interest as defined by state law or any other law.

In other cases, the court issues solemn pronouncements on the nature and content of "property," but rarely are these grounded in state law. Notwithstanding *Erie v. Tompkins*, the court sometimes appears to rely on general federal common law to inform its decisions. The *Lucas* Court's suggestion that ancient background common law principles of public and private nuisance stand as a singular exception to its otherwise categorical "total takings" rule is the best known example,[316] but other examples abound. *Phillips v. Washington Legal Foundation* held that for purposes of takings analysis, interest earned on Interest on Lawyers Trust Account (IOLTA) funds is the property of the clients whose money is held in trust, making a Texas statute assigning such interest to fund low-income legal services a Fifth Amendment taking.[317] The Court based this holding on the background common law rule that "interest follows principal" which the Court dated to English law of the mid-1700s, and which "has become firmly embedded in the common law of the various States"—including Texas, the Court

313. *Id.*

314. *Id.* at 545 (Kennedy, J., concurring in the judgment and dissenting). A strikingly similar case decided on substantive due process grounds is *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330, 374 (1935) (holding that a mandatory industry-wide pension scheme making present employers liable for employees of defunct carriers is arbitrary and unreasonable, violating Fifth Amendment due process).

315. *E. Enters.*, 524 U.S. at 540; *see also id.* at 554 (Breyer, J., dissenting) ("This case involves not an interest in physical or intellectual property, but an ordinary liability to pay money.").

316. *See supra* notes 55–57 and accompanying text.

317. 524 U.S. 156 (1998).

said, notwithstanding that state's specific statutory exception for IOLTA funds.[318] The Court acknowledged that the common law rule was not absolute in Texas, which recognized exceptions for income-only trusts and marital community property; but these exceptions, the Court said, "ha[ve] a firm basis in traditional property law principles"[319]—that is to say, they had passed into general common law by long practice. The IOLTA exception, without an ancient pedigree in general property law, was a Fifth Amendment taking.[320]

In another class of cases, the Court resorts to metaphysical arguments concerning the essential characteristics of property in general. An example is *Palazzolo v. Rhode Island*.[321] When Palazzolo took title to a seaside parcel, it was already subject to state wetlands regulations that effectively barred most development.[322] After repeated denials of development permits, Palazzolo brought a Fifth Amendment takings claim.[323] The State argued that Palazzolo should be precluded from challenging regulations to which the parcel was already subject when he acquired it, reasoning that he had not suffered any property deprivation.[324] The Court rejected the State's defense, stating that "some regulations are unreasonable and do not become less so through passage of time or title."[325] The State's proposed rule, the Court reasoned, "would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation," and the "State may not by this means secure a windfall to itself."[326] The Court, in short, implied that some changes in the law of property—including modifications to the general rule that an owner of a fee simple estate is entitled to transfer all of her present and future interest to another—so interfere with the essential nature of property itself that they are beyond the power of the state to make.

318. *Id.* at 165–66.
319. *Id.* at 167.
320. *Id.* at 168.
321. 533 U.S. 606 (2001).
322. *Id.* at 614.
323. *Id.* at 614–15.
324. *Id.* at 626.
325. *Id.* at 627.
326. *Id.* at 627–28 (citing, *inter alia*, Robert Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1368–69 (1993), for the proposition that the "right to transfer interest in land is a defining characteristic of the fee simple estate").

More commonly, the court cites the "right to exclude" as the defining, essential *sine qua non* of property. In *Kaiser Aetna v. United States*, the Court held that imposition of a federal navigational servitude on a privately owned pond effected a compensable "taking" because it invaded the "right to exclude" which is "so universally held . . . a fundamental element of the property right" that it "falls within this category of interests that the Government cannot take without compensation."[327] That view was echoed in *Loretto*, *Nollan*, and *Dolan*, all of which rest substantially on the asserted "essentiality" of the right to exclude as an irreducible core element of property rights upon which the state is not permitted to intrude.[328]

IV. THE RISE AND FALL OF THE POLICE POWER: WHAT WE'VE LOST

The police power was always a spongy, indefinite concept; courts readily acknowledged that its uncertain contours could never be fully specified. *Village of Euclid v. Ambler Realty Co.* offered a typical account: "The line which in this field separates the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions."[329]

Indeterminacy was both the police power's greatest virtue and its greatest vice. It left ample room for the law of property to evolve in response to changing social needs, conditions, and understandings. Ernst Freund explained that the police power should be understood "not as a fixed quantity, but as the expression of social, economic and political conditions. As long as these conditions vary, the police power must continue to be elastic, i.e., capable of development."[330]

More worryingly, indeterminacy left legislatures and property owners with *ex ante* uncertainty as to the ultimate scope of property rights and the constitutionally permissible bounds of the state's reserved power to regulate. Legal uncertainty invited litigation,[331] and left discretionary power in the hands of

327. 444 U.S. 164, 179–80 (1979) (citations omitted).

328. The right to exclude was described as "one of the most essential sticks in the bundle of rights that are commonly characterized as property" in *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (quoting *Kaiser Aetna*, 444 U.S. at 176). *Accord* Nollan v. Cal. Coastal Comm., 483 U.S. 825, 830 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982).

329. 272 U.S. 365, 387 (1926).

330. FREUND, *supra* note 148, at 3.

331. *Cf. id.* at 65 ("[T]here is hardly any important police legislation which

judges to determine—on a case-by-case basis, without the aid of clear rules or guiding principles—when a regulation "went too far" and overstepped the bounds.

These problems were compounded by the conceptual trajectory of the police power itself. Early formulations narrowly emphasized the state's power to supplement the retrospective doctrines of public and private nuisance with prophylactic regulation to prevent nuisance-like injuries to other property owners or the public generally, reflecting the common law maxim *sic utere tuo ut alienum non laedes*.[332] Chancellor Kent urged in his *Commentaries*:

> The government may, by general regulations, interdict such uses of property as would create nuisances and become dangerous to the lives, or health, or peace, or comfort of the citizens. Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam-power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, *on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community*.[333]

Kent's view gained general adherence in antebellum property jurisprudence.[334] Consequently, when the police power was

is not questioned in the Supreme Court as violating the Fourteenth Amendment.").

332. *See, e.g.*, Richmond, Fredericksburg & Potomac R.R. Co. v. City of Richmond, 96 U.S. 521, 528 (1877) (stating that prohibitions on the use of locomotives in the public streets "clearly rest upon the maxim *sic utere tuo ut alienum non laedas*, which lies at the foundation of the police power"); Munn v. Illinois, 94 U.S. 113, 124–25 (1876) ("[T]he establishment of laws requiring each citizen to so conduct himself, and so use his property, as not unnecessarily to injure another. . . . is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedes*. From this source come the police powers . . . .").

333. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 534 (John M. Gould ed., 14th ed. 1896); *see also* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 595–96 (1868) (listing examples of legitimate police power exercises including restrictions on "[t]he keeping of gunpowder in unsafe quantities in cities and villages, the sale of poisonous drugs, unless labeled [sic]; allowing unmuzzled dogs to be at large when danger of hydrophobia is apprehended; or the keeping for sale unwholesome provisions").

334. *See, e.g.*, Dorman v. State, 34 Ala. 216, 240 (1859) (holding that the police power "is derived . . . from a principle of the common law older than constitutions, and coeval with the earliest civilized ideas of property, namely, that every man shall so use his own as not to injure another"); Baker v. City of Boston, 29 Mass. (12 Pick.) 184, 194 (1831) (stating that the "[p]olice regulations to direct the use of private property so as to prevent its proving pernicious to the citizens at large, are not void, although they may in some measure interfere with private rights without providing for compensation, [because]

later absorbed into Fourteenth Amendment substantive due process doctrine, it arrived not as an artificially contrived "exception" to a general law of takings, but as part of a common understanding that it was foundational to every state's property law, central to the definition of property itself, and consequently was of central importance in the adjudication of claims of unconstitutional interference with property rights.[335]

Over time, a catch-all category of "general welfare" was added to "public health, safety, and morals" in the standard list of legitimate police power purposes, and courts and commentators came to regard the police power as exceeding the narrow bounds of nuisance prevention. Ernst Freund explained in 1904:

> [M]ost of the self-evident limitations upon liberty and property in the interest of peace, safety, health, order and morals are punishable at common law as nuisances . . . . But no community confines its care of the public welfare to the enforcement of the principles of the common law. The state . . . *exercises its compulsory powers for the prevention and anticipation of wrong by narrowing common law rights through conventional restraints and positive regulations which are not confined to the prohibition of wrongful acts. It is this latter kind of state control which constitutes the essence of the police power*.[336]

In the heyday of substantive due process, however, the term "general welfare" was construed narrowly to mean "for the mutual benefit of property owners generally"[337] or "for the

every citizen holds his property subject to such regulations"); Coates v. Mayor of New York, 7 Cow. 585, 585 (N.Y. Sup. Ct. 1827) (upholding an ordinance prohibiting interment of the dead in a portion of the city because it "stands on the ground of being an authority to make police regulations in respect to nuisances," and "[e]very right, from absolute ownership in property down to a mere easement, is purchased and holden subject to the restriction that it shall be so exercised as not to injure others").

335. *See, e.g.*, Cal. Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 318 (1905) (stating that it is "firmly established in the jurisprudence of this court that the States possess, because they have never surrendered, the power . . . to prescribe such regulations as may be reasonable, necessary, and appropriate for the protection of the public health, safety, and comfort" and "persons and property are subject to all kinds of restraints and burdens, in order to secure the general comfort, health, and general prosperity of the State"); Fertilizing Co. v. Hyde Park, 97 U.S. 659, 667 (1878) (stating that the police power "belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction.").

336. FREUND, *supra* note 148, at 6.

337. *See, e.g.*, Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 163 (1896) ("Statutes authorizing drainage of swamp lands have frequently been upheld independently of any effect upon the public health, as reasonable regulations for the general advantage of those who are treated for this purpose as

benefit of the entire public."[338] Importantly, the "general welfare" excluded "class legislation" redistributing rights or benefits from one person or class to another. The Court explained in *Barbier v. Connolly*: "Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated" is constitutionally permissible.[339] A decade later in *Lawton v. Steele*, the Court elaborated:

> To justify the State in thus interposing its [police power] authority in behalf of the public, it must appear,—first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.[340]

Later courts offered additional tests for determining the legitimacy of an asserted police power measure. A regulation would be presumed valid unless "arbitrary" or "unreasonable," or the means chosen bore no substantial relation to the end sought.[341] Under these restrictions, the police power, although

owners of a common property.").

338. *See, e.g.*, Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911) (ruling that the police power "extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare," such as "enforcing the primary conditions of successful commerce" (citations omitted)); Bacon v. Walker, 204 U.S. 311, 318 (1907) (holding that the police power is not confined "to the suppression of what is offensive, disorderly or unsanitary," but "extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of its people"); Chi., Burlington & Quincy Ry. Co. v. Illinois *ex rel* Drainage Comm'rs, 200 U.S. 561, 592 (1906) ("We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety.").

339. Barbier v. Connolly, 113 U.S. 27, 32 (1885).

340. Lawton v. Steele, 152 U.S. 133, 137 (1894).

341. *See, e.g.*, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 385 (1926) ("[I]t must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."); Truax v. Corrigan, 257 U.S. 312, 355 (1921) (Brandeis, J., dissenting). ("[T]he statute will not be declared a violation of the due process clause, unless the court finds that the interference is arbitrary or unreasonable or that, considered as a means, the measure has no real or substantial relation of cause to a permissible end.").

operating as an inherent limitation on property rights, also "had its limits."[342]

As the primary rubric under which due process claims of alleged regulatory deprivations of property were analyzed, the police power had real analytical bite. It both empowered the state to regulate to achieve broad public-regarding purposes, and simultaneously limited the scope of that power. A surprisingly large number and variety of regulations passed constitutional muster, even if they placed substantial economic burdens on property owners.[343] Yet the state could not assume that recitation of a police power justification would shield a regulatory enactment from due process challenge. Many regulations were held impermissible, either because the means did not exhibit a sufficiently close "fit" with the alleged legislative purpose,[344] or because the scheme drew "arbitrary" distinctions,[345] or burdened some for the private benefit of others,[346] or because courts deemed the police power justifications unreasonable, inadequate, irrational, or pretextual.[347]

342. *Cf.* Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("[O]bviously the implied limitation must have its limits or the contract and due process clauses are gone."); Mugler v. Kansas, 123 U.S. 623, 661 (1887) ("There are, of necessity, limits beyond which legislation cannot rightfully go.").

343. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590, 596 (1962) (upholding a prohibition on sand and gravel mining); Miller v. Schoene, 276 U.S. 272, 279 (1928) (upholding a statute requiring the destruction of disease-carrying trees); Gorieb v. Fox, 274 U.S. 603, 609 (1927) (upholding building setback requirements); *Vill. of Euclid*, 272 U.S. at 395 (upholding a municipal zoning ordinance); Erie R.R. Co. v. Bd. of Pub. Utils. Comm'rs, 254 U.S. 394, 410 (1921) (upholding a regulation requiring railroads to install costly grade crossing improvements); Hadacheck v. Sebastian, 239 U.S. 394, 408–09 (1915) (upholding an ordinance prohibiting brickyards in residential zones, destroying much of the value of petitioner's property); Welch v. Swasey, 214 U.S. 91, 107 (1909) (upholding building height restrictions); *Mugler*, 123 U.S. at 661–64 (upholding state prohibition on alcoholic beverages, making breweries virtually worthless).

344. *Cf.* Tyson & Bro.-United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418, 442 (1927) (invalidating a regulation of ticket brokers as "arbitrary and unreasonable" because it was overinclusive).

345. *See, e.g.*, Dobbins v. City of Los Angeles, 195 U.S. 223, 241 (1904) (striking down municipal regulation of gasworks as "arbitrary and discriminatory").

346. *See, e.g.*, *Truax*, 257 U.S. at 333 (invalidating a statute immunizing labor picketers against injunction as impermissible "class legislation" impairing business owners' property rights for the benefit of striking workers).

347. *See, e.g.*, Frost & Frost Trucking Co. v. R.R. Comm'n, 271 U.S. 583, 591 (1926) (striking down regulation of private motor carriers because it "is in no real sense a regulation of the use of the public highways" but a disguised protectionist measure subjecting competitors to the same rules that govern

Throughout this period, the term "taking" was routinely invoked as a casual synonym for a prohibited "deprivation" of property without due process.[348] But the substantive due process branch of "takings" law did not turn on judicial parsing of "take" or "taking." Instead, the analysis centered on the extent of the claimant's legitimate property entitlements in light of the state's reserved power to regulate. To delineate that boundary required careful, case-by-case scrutiny of the nature of, and justification for, the governmental action, and whether that action was fairly embraced within the police power.

The spotlight thus shone directly on questions of central importance in property law: how are we to understand the nature and limits of property rights in this case and in general, and what are the nature and proper limits of the state's power to alter and amend property rights over time in response to important and changing social needs? Substantive due process courts confronted these questions squarely and candidly. This is in marked contrast to today's regulatory takings jurisprudence, which answers the same questions obliquely through occasional delphic utterances on the deep interior meaning of "to take" and "taking," ahistorical forays into alleged "background" principles of general common law, or metaphysical pronouncements on the essential attributes of "property." Direct attention to the central issues in property regulation within a framework that expressly acknowledged and accommodated the need for dynamic change in the law of property as a vital social institution in a complex and ever-changing world should be regarded a singular virtue of substantive due process-era property jurisprudence.

But there was also a darker side. Because terms like "arbitrary" and "unreasonable" are indefinite and malleable, they are susceptible to inconsistent application, manipulation, and conscious or unconscious interposition of the policy preferences of the reviewing court. Placing broad discretionary power in reviewing courts, substantive due process review led to the abuses of the *Lochner* era, not least the tendency of courts to second-guess the political branches on basic questions of social policy. *Lochner*-ization led to the New Deal reaction repudiating substantive due process as the occasion for searching re-

common carriers).

348. *See supra* note 27.

view of economic and social regulation.[349]

The New Deal reaction, however, only compounded the police power's difficulties. As both cause and consequence of the courts' extreme deference to legislative enactments, the concept of the "general welfare" swelled to include almost any legislative finding of a "public interest," whether or not the benefit was confined to a particular class.[350] With unchecked expansion of one of its core components, the police power became increasingly bloated and lost its analytical bite. Inflation of the police power would reach its apex in *Berman v. Parker*,[351] an influential 1954 Supreme Court case in which that quintessential New Dealer, Justice William O. Douglas, pronounced the police power virtually without limits.[352]

Ironically, *Berman* need not have been a police power case at all; its utterances on that subject were unnecessary to the outcome of the case. The question in *Berman* was whether an urban renewal scheme to condemn and redevelop a blighted area of the District of Columbia embraced a valid "public use" satisfying the Takings Clause.[353] Justice Douglas's opinion began by equating the "public use" requirement with the police power,[354] obliterating the traditional understanding of the po-

349. *See, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937) (upholding a Washington statute setting a minimum wage for women over the dissent of four Justices who argued that the legislation arbitrarily interfered with the liberty of contract in violation of substantive due process); Nebbia v. New York, 291 U.S. 502, 537 (1934) (upholding a New York statute setting minimum prices for milk, stating that "[i]f the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied"); *see also* Lincoln Fed. Labor Union v. Nw. Iron & Metal Co., 335 U.S. 525, 536–37 (1949) (construing *Nebbia* and *West Coast Hotel* as repudiations of *Lochner*, and stating that "the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a straight jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare").

350. *See, e.g.*, Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 424–25 (1952) (upholding a statute entitling employees to four hours of paid release time on election day, reasoning that "the public welfare is a broad and inclusive concept," and that the legislature might reasonably decide to protect the community's interest and encourage voting by shifting costs to employers).

351. 348 U.S. 26 (1954).

352. *See id.* at 32 (defining the outer limits of the police power as "essentially the product of legislative determinations addressed to the purposes of government" and "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive").

353. *Id.* at 28–31.

354. *Id.* at 32 (stating that the principle that the legislature and not the

lice and eminent domain powers as complementary rather than coextensive categories—a valid police power measure being not compensable, and an eminent domain exercise not requiring a police power justification.[355] *Berman* then proceeded to recharacterize both the police power and "public use" in an unprecedentedly expansive way, stating that "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[356] In short, *Berman* held that the police power is pretty much whatever the legislature deems to be in the public interest, because "the concept of the public welfare is broad and inclusive,"[357] "[t]he values it expresses are spiritual as well as physical, aesthetic as well as monetary,"[358] and "[i]t is within the power of the legislature to determine that a community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[359]

With no apparent judicially enforceable limit to the "general welfare," expansion of the police power was complete. Without meaningful limits, the police power could no longer serve a useful purpose in delineating the boundaries of legitimate governmental assertions of authority. The project of judicial policing of the bounds of the police power, long the knife edge in the Court's substantive due process jurisprudence, was a spent doctrinal force.

In a 1964 law review article that profoundly influenced subsequent takings scholarship and doctrine, Joseph Sax argued that the police power defense in "takings" cases should be eliminated because its indefinite contours left it vulnerable to

courts should determine the proper boundaries of the police power "admits of no exception merely because the eminent domain power is involved" and that "[t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one").

355. The peculiar facts may have contributed to the confusion: Congress had offered a police power-like justification for the urban renewal statute, labeling substandard housing and blighted areas "injurious to the public health, safety, morals, and welfare," *id.* at 28, and simultaneously declared acquisition of property in these areas a "public use" justifying exercise of eminent domain. *Id.* at 29. For a trenchant critique of Douglas's reasoning, see Costonis, *supra* note 179, at 1036–37 ("Taken literally the opinion makes little sense.").

356. *Berman*, 348 U.S. at 32.

357. *Id.* at 33 (citing Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 424 (1952))

358. *Id.*

359. *Id.*

manipulation and inconsistent application.[360] Sax's critique is powerfully argued and in many respects persuasive, and was an important contribution to the late New Deal repudiation of *Lochner*-ization and legal formalism.[361]

Sax's account was also deeply ahistorical, however. He began by assuming a unified law of "takings," attributing incorporation of the Fifth Amendment Takings Clause to *Chicago B & Q*,[362] echoing the argument then being advanced by the Supreme Court's pro-incorporation wing. As Part III.B documented, however, the Takings Clause's applicability to the states was not yet the law of the land by the mid-1960s, and as Part II showed it certainly was not part of the understanding of late nineteenth- and early twentieth-century courts. Sax's retrospective readings of substantive due process cases from this era as a gloss on the meaning of the Takings Clause is therefore decidedly anachronistic.

Sax traced what he called the police power "exception" to takings law to a series of conceptual distinctions drawn by Justice Harlan in *Mugler v. Kansas*[363] and subsequent cases. On Sax's retelling, Harlan's view was that if a challenged governmental action merely regulates the *use* of property, it is a noncompensable exercise of the police power; but if it results in physical occupation or appropriation of a proprietary interest, it is a compensable taking.[364] In a later variant on Harlan's

360. *See* Sax, *supra* note 198, *passim*.

361. *See id.* at 37 (stating that "Harlan's theory reduces the constitutional issue to a formalistic quibble" and has not "proved able to produce satisfactory results").

362. *See id.* at 36 n.2 (stating that the Takings Clause "has traditionally been viewed as incorporated into the fourteenth amendment" (citing Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226 (1897))). An equally provocative and influential article by Frank Michelman soon repeated Sax's error of conflating the substantive due process and Takings Clause branches of just compensation law. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1168–70 (1967) (citing both substantive due process and Takings Clause precedents to illustrate that takings doctrine is "liberally salted with paradox"). Michelman's article, however, was more theoretical, less doctrinal, and less historical, disavowing any intention to "reformulate doctrine, redirect it, or overhaul it," instead urging "deemphasis of reliance on judicial action as a method of dealing with the problem of compensation." *Id.* at 1167.

363. 123 U.S. 623 (1887).

364. *See* Sax, *supra* note 198, at 38 (stating that *Mugler* held that a regulation of use "was not in any sense a 'taking' because it involved no appropriation of property for the public benefit but merely a limitation upon use by the

theory, Sax said, takings analysis turned on the character of the property owner's activity: a regulation to abate a "noxious use" was noncompensable, while regulatory interference with "unoffending property" was compensable.[365] Sax argued that Harlan's categorical approach reduced takings law to a "formalistic quibble,"[366] but he conceded this approach remained more or less workable so long as regulation had only a minor economic impact.[367]

By the early twentieth century, Sax said, the economic impact of regulation had grown dramatically, necessitating a doctrinal shift. Justice Holmes responded by introducing an economic calculus meant to ensure minimal fairness in the inevitable battle between established property interests and changing social demands.[368] Sax read *Pennsylvania Coal Co. v. Mahon* and previous and subsequent Holmes opinions to reduce takings law to a simple quantitative test based strictly on diminution of economic value.[369] Not only was this approach atextual and ahistorical, Sax argued, but it failed to recognize that expectations of economic gain or economic value do not necessarily rise to the constitutionally protected status of property interests. Consequently, it is not obvious where we should begin our calculation of diminution of value.[370]

owner for certain purposes declared to be injurious to the community," a "theory Harlan apparently derived from the literal language of the fifth amendment, which deals only with the 'taking' of property (citing *Mugler*, 123 U.S. 623 (1887))). Sax's account is wrong on several counts: *Mugler* was a Fourteenth Amendment due process case, made no mention of the Fifth Amendment Takings Clause, and pre-dated *Chicago B & Q*, when Sax says incorporation occurred. *Mugler* also acknowledged that some regulations of the "use" of property would not pass constitutional muster. *See Mugler*, 123 U.S. at 661 ("It does not at all follow that every statute enacted ostensibly for the promotion of these [police power] ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go.").

365. *See* Sax, *supra* note 198, at 39 ("Harlan distinguished innocent from noxious uses. . . . [He held that] abatement of a noxious use is not a taking of property, since uses in contravention of the public interest are not property.").

366. *See id.* at 37.

367. *See id.* at 39–40 ("Within a relatively narrow area Harlan's conceptual approach produces not only clear-cut distinctions, but also satisfactory results.").

368. *See id.* at 40–41.

369. *See id.* at 41 ("While he never flatly stated that degree of economic harm was *the* critical factor in his theory, a reading of his opinions leaves little doubt that this was indeed the theory he devised.").

370. *See id.* at 50–60 (criticizing the diminution of value theory and suggesting the need for a novel theory).

Sax's critique of the "diminution of value" test is devastating, and it applies with equal force to the many uses of that standard in contemporary regulatory takings law.[371] His historical account has several problems, however. First, Sax mistakenly characterizes the police power as a categorical "exception" to Fifth Amendment takings doctrine.[372] This stands the police power inquiry on its head. As Part II demonstrated, nineteenth- and early twentieth-century courts understood the police power to operate as an inherent limitation on state-recognized property rights; its doctrinal significance was not as an "exception" to takings law, but rather as an aid to determining whether the claimant had a constitutionally protectible property interest, a necessary antecedent to determining whether property had been "taken."[373] The police power, in other words, operated as a constitutive rule of the law of property whose function in Fourteenth Amendment adjudication was to address the very question Sax says is missing from the equation: does the claimant have a constitutionally protectible property entitlement, or not?

Second, Sax's account does justice neither to Harlan's nor to Holmes's version of the police power inquiry, which were subtler and more nuanced than Sax allows. The Harlan-era approach was conceptual and categorical, but the categories were far more numerous and richer than those Sax describes. Substantive due process courts continually probed and teased out the implications not only of "nuisance," "noxious use," and "regulation," but also the critical subunits that made up the police power: "public health," "safety," "morals," and "general welfare."[374] Sax wholly ignores the rich debate over how to distinguish the "general welfare" from "class legislation," and he is similarly inattentive to the courts' insistence on weeding out "arbitrary" and "unreasonable" property regulations that did

371. *See supra* part III.C.

372. *See* Sax, *supra* note 198, at 37, 39 (arguing that "Harlan's theory reduces the constitutional issue to a formalistic quibble"and "distinguish[es] takings from exercises of the police power by artful definition of the terms 'taking' and 'property'").

373. *See supra* Parts II.A and II.D.

374. *See* Mugler v. Kansas, 123 U.S. 623, 661 (1887) (stating that "[i]f . . . a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects," it will be deemed invalid as an invasion of constitutionally protected rights).

not substantially advance a legitimate police power objective.[375] To be sure, these debates were formalistic, and the categories indeterminate. But within those limitations, they were real debates over central issues in property law, going to the nature and limits of private property rights in a democratic polity and the legitimacy and limits of public-regarding legislation, with which courts of the substantive due process era grappled thoughtfully and intelligently.

Holmes introduced new subtleties and refinements, moving the discussion beyond formal categorization to recognize that quantitative values might also play a role.[376] Holmes thought some quantum of "public interest" could be found even in redistributive laws that might previously have been held impermissible "class legislation," and that the weight of the public interest served ought to count in determining whether a regulation passes constitutional muster.[377] Holmes introduced the notion that it was not the mere fact that a private party had incurred a loss, but the weight of that loss measured against the public interest served by the regulation that should count toward its reasonableness.[378]

At the end of the day, however, Sax was right. Substantive due process and the police power, hatched in the days of nineteenth-century formalism, had trouble adapting. Holmes's doctrinal innovations could not salvage these concepts which became more indeterminate than ever on his sliding-scale calculus, consequently subject to as much *Lochner*-like manipulation as Harlan's formal categories.[379]

375. *See supra* notes 339–41 and accompanying text.

376. *See* William Michael Treanor, *Understanding* Mahon *in Historical Context*, 86 GEO. L.J. 933, 933–34 (1998) (arguing that in *Mahon* and other cases Holmes was "breaking from the traditional categorical rules used by the Court" and developing a "balancing test in which diminution in value was the factor on the property owner's side of the balance").

377. *See, e.g.*, Block v. Hirsh, 256 U.S. 135, 156 (1921) ("Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present.").

378. *See supra* notes 210–17 and accompanying text (describing Holmes's balancing test).

379. Holmes is justly famous for his dissents in *Lochner* and other substantive due process cases turning on the scope of "liberty," but his views on the "property" branch of due process were within the *Lochner*-era mainstream. Reversals of economic and social regulation increased sharply during Holmes's tenure on the Court. *See* Brown, *supra* note 179, at 944 (stating that the Court reversed more social and economic legislation between 1920 and 1927 than in the previous 52 years). Holmes joined nine of the twelve reversals during this period decided primarily on property grounds. *See* Yu Cong Eng v. Trinidad,

Indeterminacy would lead to the near-total collapse of meaningful judicial review of police power claims in the deferential post-New Deal, post-*Berman* era. Once the pendulum swung that far, perhaps it was inevitable that *Penn Central* would arise to bring it back, albeit now disguised in the borrowed doctrinal garb of a Takings Clause previously thought inapplicable to the states.

By simply abandoning the police power defense and substantive due process review as a separate category of takings law, however, we have also lost something. We have lost the notion, central to substantive due process-era police power jurisprudence, that any regulatory "takings" inquiry must logically begin with a baseline assessment of the nature, extent, and limits of the constitutionally protectible property rights that the claimant is legitimately entitled to assert. We have lost sight of the idea that such an inquiry must be informed first and foremost by the applicable law of property—state law in the main, and variable by jurisdiction. We have lost sight of the notion that the state law of property might include, if the state so asserts, the "background principle" that all property is held subject to an inherent limitation consisting of the state's ongoing power to regulate for the public good. And we have lost sight of the notion, so clearly understood by substantive due process-era courts, that if a system of private property within a democratic polity is to have ongoing vitality, this reserved regulatory power cannot be wholly without limits, yet it must also be sufficiently flexible and dynamic to evolve over time, through an ongoing dialogue among courts, legislatures, private rights-holders, and the public at large.

Lacking these concepts, contemporary regulatory takings jurisprudence has lost its way.

271 U.S. 500 (1926); Mich. Pub. Utils. Comm'n v. Duke, 266 U.S. 570 (1925); Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924); Pa. Coal Co. v. Mahon 260 U.S. 393 (1922); Buchanan v. Warley, 245 U.S. 60 (1917); Chi., Milwaukee & St. Paul Ry. Co. v. Polt, 232 U.S. 165 (1914); Eubank v. Richmond, 226 U.S. 137 (1912); St. Louis, Iron Mountain & Southern Ry. Co. v. Wynne, 224 U.S. 354 (1912); Dobbins v. City of Los Angeles, 195 U.S. 223 (1904). Holmes wrote the majority opinions in three of these cases (*Polt*, *Chastleton*, and *Mahon*), and dissented in only three others. *See* Tyson & Bros.-United Theatre Ticket Offices v. Banton, 273 U.S. 418, 445–47 (1927) (Holmes, J., dissenting); Frost & Frost Trucking Co. v. R.R. Comm'n, 271 U.S. 583, 600–02 (1926) (Holmes, J., dissenting); Truax v. Corrigan, 257 U.S. 312, 342–44 (1921) (Holmes, J., dissenting).

V. REHISTORICIZING JUST COMPENSATION LAW

It is too late in the day to question the applicability of the Fifth Amendment Takings Clause to the states. After *Penn Central*, that is established constitutional doctrine, unlikely ever to be reversed. Nor is such a reversal normatively desirable; stare decisis and consistency with the overall thrust of selective incorporation, which has now "selectively" made most of the guarantees of the original Bill of Rights applicable to the states, counsel otherwise.[380]

It is not too late, however, to come to grips with the fact that incorporation of the Takings Clause against the states is a latter-day development whose appearance coincides precisely with the emergence of the Supreme Court's modern regulatory takings jurisprudence in all its muddled grandeur. It is not too late to recognize that much of the confusion stems from phantom incorporation, emerging full-grown from *Penn Central* without benefit of the normal gestation of briefing, informed argument, and adjudication in the courts below, which might have produced a more thoughtful synthesis of the merged doctrines and careful consideration of the implications of incorporation.

Where, then, do we go from here? At the outset this Article disclaimed any ambition to provide a comprehensive resolution to the takings muddle. Its principal contribution is to diagnose the malady, not to prescribe a cure—that is a future project. The remainder of the Article will only begin to sketch out some tentative directions that further inquiry might take.

First, the history of just compensation law suggests that state lawmakers—legislatures as well as courts—traditionally enjoyed broad latitude to define, interpret, and adjust the boundaries of property law in response to changing conditions, social needs, and evolving understandings of the appropriate role of property as a social institution. Nothing in the text, history, or pre-*Penn Central* doctrine of the Fifth Amendment Takings Clause requires that state lawmakers be deprived of that power. Nor is the post-*Penn Central* trend toward increasingly rigid and straightjacketing interpretations of the Takings Clause consistent with fundamental tenets of federalism in

380. *See* Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 423 (2004) (stating that the Supreme Court "spent several decades in the mid-Twentieth Century gradually incorporating most of the relevant Bill of Rights provisions").

property law. Nor, finally, is such a straightjacketing advisable on policy grounds if property is to continue to adapt and thrive as a dynamic social institution. From that perspective, the last three decades of Takings Clause jurisprudence represent a great historical aberration, one that must be corrected by doctrinal adjustments that restore substantial discretion to state lawmakers.

This is not to say, however, that state revisions to property law should enjoy blanket immunity from federal judicial scrutiny. Giving state judges and legislators carte blanche to rewrite the rules of property free from federal judicial oversight is an open invitation to abuse. Prior to the Reconstruction era amendments, any such abuse perpetrated by the states was no concern of federal law; prevailing doctrine held that the people themselves had power to correct the abuses of their own state governments through ordinary political means.[381] But the Civil War and the Reconstruction amendments forever changed the relation of federal to state power, and with it, the nature of "Our Federalism."[382]

From shortly after the Civil War until *Penn Central*, federal courts found in the Fourteenth Amendment Due Process Clause all the means they needed to provide a meaningful check on excessive, unfair, or unscrupulous exercises of state power to readjust property law, reviewing claims that some state measures "went too far" and fell outside the legitimate bounds of the police power.[383] That line was uncertain and shifted over time. Courts declined even to try to articulate a fixed standard for what counted as "too far." On the whole they exhibited considerably more deference toward the states even at the height of the *Lochner* era than has the post-*Penn Central* Court under its turbocharged, incorporated, and restrictive takings doctrine, but they did not hesitate to overturn state legislative enactments that appeared to reflect abuse or excess.

381. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 249–50 (1833) (opining that if the people had "required additional safeguards to liberty from the apprehended encroachments of their particular [state] governments: the remedy was in their own hands," but they directed the Bill of Rights "against the apprehended encroachments of the general government").

382. *See* Louis Henkin, Shelley v. Kraemer*: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 480 n.12 (1962) (arguing that the Fourteenth Amendment "intended a radical change in our federalism by subjecting to the control of the Federal Constitution and of a federal congress and judiciary large areas of state action and responsibility").

383. *See supra* Part II.D.

One way to set takings doctrine back on a sounder course, then, might be to revive substantive due process as the appropriate doctrinal category for review of state adjustments to property law. That approach is unlikely, however, and probably unwise. The language and categories of substantive due process and the police power now seem hopelessly antiquated, and the concepts excessively malleable and subject to judicial abuse. At first blush, this might seem to invite a return to the worst excesses of the *Lochner* era. The Court's post-*Penn Central* takings jurisprudence has been widely criticized on grounds that it bears a disturbingly close resemblance to *Lochner*-era substantive due process review, albeit dressed in new doctrinal garb that disguises its true character.[384] While an explicit return to substantive due process would at least bring some candor and transparency to this development, such a move might tend to entrench and re-legitimate a takings law that has gone seriously awry by refurbishing it with a new, rehistoricized doctrinal pedigree.

But substantive due process and the police power have also undergone a metamorphosis since their *Lochner*-era heyday. After *Nebbia*,[385] *West Coast Hotel*,[386] and *Carolene Products*,[387] the Court's standard approach to substantive due process review of economic regulation is the highly deferential "rational basis" test: if the enactment is rationally related to any legitimate public purpose the Court can imagine, it passes constitutional muster.[388] Additionally, as Part IV pointed out, since *Berman v. Parker* the police power has grown so broad as to be almost meaningless: any objective deemed by the legislature to be "in the public interest" is a legitimate police power justification. Under these highly deferential standards, a return to substantive due process is less likely to lead to re-*Lochner*-ization

384. *See, e.g.*, Echeverria & Dennis, *supra* note 1, at 699 (characterizing takings doctrine as "importing due process thinking into the takings issue").

385. Nebbia v. New York, 291 U.S. 502 (1934).

386. W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

387. United States v. Carolene Prods. Co., 304 U.S. 144 (1938). The Court stated that in a facial due process challenge "where the legislative judgment is drawn in question, [the inquiry] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it." *Id.* at 154.

388. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 491 (1955) (speculating on possible legislative purposes and concluding that because "[w]e cannot say that the regulation has no rational relation to that objective [it cannot be ruled] beyond constitutional bounds").

than to a threadbare doctrine affording little opportunity for meaningful judicial review.

But if rational basis review is too deferential and *Lochner*-style substantive due process—whether forthrightly so labeled, or disguised as Takings Clause doctrine—is too stringent, where is the middle ground?

The famous *Carolene Products* Footnote Four[389] provides a clue. *Carolene Products* drew two important distinctions: first, there "may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution"; and second, "prejudice against discrete and insular minorities" who are insufficiently protected by ordinary political processes "may call for a correspondingly more searching judicial inquiry."[390]

The first *Carolene Products* distinction offers little help. Although protection of property under the due process and takings guarantees is a robust constitutional norm arguably calling for a less deferential standard of review than the ordinary "rational basis" test, it would be deeply ahistorical and doctrinally problematic to deem every adjustment to property law presumptively unconstitutional, even as the starting point in the analysis.

The second *Carolene Products* distinction is more promising, for it goes to the heart of what has historically motivated takings law.

Rhetorically defending the necessity of a vital takings jurisprudence, the Supreme Court regularly invokes *Armstrong v. United States*, which stated that takings law seeks to prevent government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[391] This concern about the "singling out" of some property owners for exceptionally harsh treatment has strong normative resonance. The animating force behind the

389. *Carolene Prods.*, 304 U.S. at 152 n.4.

390. *Id.*

391. Armstrong v. United States, 364 U.S. 40, 49 (1960). Scarcely a major Takings Clause case has been decided in the post-*Penn Central* era without citation to *Armstrong*. *See, e.g.*, Lingle v. Chevron U.S.A., Inc., 125 S. Ct. 2074, 2080 (2005); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 304 (2002); Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring); Dolan v. City of Tigard, 512 U.S. 374, 384 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1071 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 836 n.4 (1987); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978).

Takings Clause itself was the antifederalist fear that a distant national government would be tempted to "single out" some local property owners to bear unfair and unreasonable burdens which would be of little concern to national majorities.[392] The "singling out" principle has found echoes throughout the history of takings doctrine.[393] It is also, at a deep level, the principle that animated the substantive due process era's concern with the legitimate bounds of the police power, which although malleable could extend neither to "arbitrary and unreasonable" deprivations of property, nor to "taking from A to give to B." More recently, such thoughtful scholars as William Fischel, Saul Levmore, Susan Rose-Ackerman, and Dan Farber have advanced their own formulations of the "singling out" issue as the central problem of takings law.[394] Despite the Court's recurrent invocation of *Armstrong* as rhetorical backdrop, however, that principle is not adequately reflected at an operational level in contemporary takings doctrine. None of the major takings tests—*Penn Central*, *Loretto*, *Lucas*, *Nollan*, or *Dolan*—squarely addresses the *comparative* question of how *this* owner (or class of owners) is treated relative to others similarly situated, the quintessential "singling out" inquiry. [395]

392. *See supra* notes 91–93 and accompanying text.

393. *See* Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893) (stating that takings law "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him").

394. *See* WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 6 (1995) (describing takings law as "the product of democratic constitution-making in which citizens wanted to promote development without unfairly distributing its burdens"); Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 307–08 (1992) (advancing a "uniformity theory" of takings law as prophylaxis against discrimination, recognizing that the politically disadvantaged need the protection of a formal rule); Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 306–07 (1990) (arguing that the Takings Clause protects "occasional individuals" because it is "unlikely that such individuals can compete effectively in the political arena"); Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1708 (1988) ("[T]he problem for takings jurisprudence is to decide when an individual has borne more than his or her 'just share of the burdens of government.'").

395. *See* Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892, 1927 (1992) (stating that the Court "has not . . . used this articulated purpose to identify the takings factors," and current doctrine "does not prevent the government from unfairly 'forcing some people alone to bear public burdens'"); Andrea L. Peterson, *The Takings*

The *Armstrong* "singling out" problem can be understood as an instance of the *Carolene Products* "discrete and insular minorities" caveat. Both *Carolene Products* and *Armstrong* focus on defects in the political process, in particular the non-self-correcting problems of political majorities trampling on minority rights.[396] While *Carolene Products* contemplated that readily identifiable racial, ethnic, or religious minorities would be most vulnerable,[397] the problem of majoritarian excess extends well beyond those groups. In the property context, unreasonable impositions on a *majority* of property owners are likely to generate strong political backlash, and stand a fair chance of being corrected through ordinary political means. But when majorities indulge the temptation to place special burdens on *minorities* of property owners—for example, nonresident (and nonvoting) property owners in a local municipality—ordinary political processes offer little meaningful recourse. It is as a safeguard against that sort of abuse that a judicially administered constitutional takings law, operating as a check on ordinary legislation, can play a legitimate and constructive role. A *Carolene Products*-like heightened scrutiny in cases that involve the "singling out" of some identifiable class of property owners owing to defects in the political process offers a promising middle ground between a too-stringent re-*Lochner*-ization on the one hand, and an excessively deferential "rational basis" standard on the other.

At the end of the day, however, a revival of substantive due process in any form as the basis for review of takings claims against the states appears unlikely. Nor is it necessary, for it may be possible to rehabilitate Takings Clause doctrine directly, following the broad outlines just suggested.

First, the Court must recognize that every takings case necessarily turns on the question: "Has a taking of *property* occurred in this case?" To answer that question, the Court must

Clause: In Search of Underlying Principles Part II—Takings as Intentional Deprivations of Property Without Moral Justification, 78 CAL. L. REV. 53, 56 (1990) (stating that despite rhetorical appeals to *Armstrong*, "the Court has made little effort to develop a principled basis for determining when fairness requires the payment of compensation").

396. *Cf.* FISCHEL, *supra* note 394, at 206–07 (arguing that government does not always consider aggregate social welfare in allocating the costs of governmental decisions, and may force disproportionate costs onto some property owners for others' benefit).

397. *See* 304 U.S. 144, 152–53 n.4 (1938) (listing "religious" and "racial minorities" as especially vulnerable).

advert to the relevant law of property—principally state law—to determine the legitimate extent of claimants' property rights, and in particular, what (if any) limits to those rights "inhere in the title" as a matter of state law. Not only must the Court begin to take the law of *property* seriously in its Takings Clause jurisprudence, but it must also take seriously the principle articulated in *Lucas*, that an exercise of state lawmaking authority expressing a "limitation that "inhere[s] in the title" as a matter of "background principles of the State's law of property and nuisance" can never count as a regulatory "taking," for the simple reason that such action takes no *property*.[398]

Next, the Court must take seriously the history of our law of property. History teaches that states have always claimed, as a "background principle of the state's law of property," the reserved police power to alter the law of property at the margins for purposes of protecting the public health, safety, morals, and general welfare; and further that under their law of property, all property is always held subject to this inherent limitation.[399]

That does not mean, however, that states have free rein to alter property rules as they will, without restraint. For here the Court can usefully interject, and for once take seriously, the *Armstrong* principle. If the Fifth Amendment Takings Clause does apply to the states, then it must be interpreted to stand as a safeguard against just the kinds of abuses of governmental power that led to its being appended to the Constitution in the first place—defects in the political process that lead to the arbitrary "singling out" of individuals or "discrete and insular" classes of property owners for harsher treatment than the rest, whether to benefit other identifiable individuals or classes, or to benefit of the public generally. The question then becomes not simply how much is "taken" from the claimant as measured against *ex ante* expectations of market value; for mere expectations, without more, are not "property" under anyone's law. The question is, has the state abused its claimed police power by arbitrarily imposing burdens on the few that ought legitimately be borne by the many, owing to defects in the political process?

This four-part readjustment of Takings Clause doctrine—in which the Court takes seriously what counts as "property," what counts as an "inherent limitation," the legitimacy of states' historic claim to an inherent and dynamic police power

398. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028–29 (1992).

399. *See supra* Part II.

limitation on property rights, and a robust and operational version of the *Armstrong* "singling out" principle as a judicial check on arbitrary exercises of state authority—could begin to chart the path out of the takings muddle.

CONCLUSION

For all its faults, Fourteenth Amendment substantive due process review in "takings" cases had some singular virtues. This jurisprudence kept its eye trained squarely on the principle that all property, everywhere, is always and inescapably subject to the "inherent limitation" that followed from the state's reserved power to adjust the precise boundaries and meaning of property rights over time in response to changing conditions and altered social understandings. The appropriate extent of that inherent limitation on property rights, and the corresponding outer constitutional limits to the state's reserved power, were the subject of continuous dialogue among the courts, the legislatures, and private property claimants. That dialogue was shrouded in the language and categorical distinctions of the police power, concepts that sound quaint to the contemporary ear. Although these concepts grew unsustainably leaky over time, at least they provided some underlying coherency to the Court's just compensation jurisprudence, founded on principles of property federalism and recognition that property is necessarily a dynamic institution that must respond and adapt to changing times. As Justice Sutherland eloquently put it in *Village of Euclid v. Ambler Realty*, upholding the then-novel regulatory technique of land use zoning:

> Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.[400]

May we be so wise as to rediscover that principle in the takings doctrine of the coming century.

400. Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).