

ValpoScholar

Valparaiso University Law Review

Volume 36

Number 2 *Symposium on Land Use Law: Rights with Responsibilities*

pp.413-442

Symposium on Land Use Law: Rights with Responsibilities

"Takings" as Due Process, or Due Process as "Takings"?

Kenneth Salzberg

Follow this and additional works at: <https://scholar.valpo.edu/vulr>

 Part of the [Law Commons](#)

Recommended Citation

Kenneth Salzberg, *"Takings" as Due Process, or Due Process as "Takings"?*, 36 Val. U. L. Rev. 413 (2002). Available at: <https://scholar.valpo.edu/vulr/vol36/iss2/4>

This Symposium is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



"TAKINGS" AS DUE PROCESS, OR DUE PROCESS AS "TAKINGS"?

Kenneth Salzberg*

I. INTRODUCTION

The United States Supreme Court has decided yet another "takings"¹ case, *Palazzolo v. Rhode Island*.² At best, the decision did nothing to clarify this area of law, and, at worst, the decision further confused the issues surrounding the Fifth Amendment. In *Palazzolo*, the owner of eighteen acres of salt marshes and his predecessors in interest proposed a number of different schemes to develop the land: first, an eighty-lot subdivision; then, a seventy-four-lot subdivision; and, finally, a private beach club. Any such significant development would require draining the land, which is subject to state and federal laws and regulations protecting wetland environments. The trial court and state supreme court rejected the landowner's applications, in part, because the owner bought the land after the state regulations were in force. The United States Supreme Court remanded the case back to the state in a "splintered ruling" where even the more conservative Justices could not seem to agree on the timing issue.³ Justice Kennedy, in the majority opinion, contended that a "takings" cause of action may survive transfers to new owners, at least if the new owners take the land before the claim is ripe.⁴ Justice O'Connor suggested that the timing of the regulation is only one factor to be

* Associate Professor of Law, Hamline University School of Law, Saint Paul, Minnesota.

¹ Several articles about the clause in the Fifth Amendment to the United States Constitution, which reads "... nor shall private property be taken for public use, without just compensation" refer to the issues and jurisprudence surrounding that clause as "takings," in quotation marks to signal that the government does not actually take anything physical. This Article uses "takings" to signal something other than straightforward physical takings. See, e.g., Jack H. Archer & Terrance W. Stone, *The Interaction of the Public Trust and the "Takings" Doctrines: Protecting Wetlands and Critical Coastal Area*, 20 VT. L. REV. 81 (1995); Matthew Clifford & Thomas Huff, *An Essay on "Takings,"* 59 MONT. L. REV. 9 (1998); Craig A. Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 HASTINGS L.J. 335 (1988); Stephen Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1 (1986).

² 121 S. Ct. 2448 (2001).

³ Eric Pianin, *Landowners Given New Rights on Environmental Curbs*, WASH. POST, June 29, 2001, at A18.

⁴ "It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner." *Palazzolo*, 121 S. Ct. at 2463.

414 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36

balanced with others.⁵ Justice Scalia thought that the existence of the regulation at the time of purchase made no difference at all.⁶ Justice Stevens dissented, saying that successors have no right to compensation for “takings” from their predecessors.⁷

Palazzolo illustrates the problem generated by the Supreme Court’s confusion over the Fifth Amendment. Since the mid-1970s, the Supreme Court has attempted to fit one clause of the Fifth Amendment into a role intended for another. During this period, the Court has decided over thirty major cases attempting to clarify its rationale, and there have been well over one thousand law review articles attempting to clarify and explain those cases.

This Article contends that the United States Supreme Court has been using the “takings” clause of the Fifth Amendment⁸ as a basis for limiting or overturning land use regulations⁹ where the Court should have been analyzing the cases using the Due Process Clause of the same Amendment.¹⁰ In trying to use one phrase of the Fifth Amendment to do the job of the other, the Court has created a body of law that has been described as paradoxical, muddled, chaotic, confused,¹¹ and even “a

⁵ “Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred.” *Id.* at 2467 (Scalia, J., concurring).

⁶ “In my view, the fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking.” *Id.*

⁷ “Most importantly for our purposes today, it is the person who owned the property at the time of the taking that is entitled to the recovery.” *Id.* at 2469 (Stevens, J., concurring).

⁸ “. . . nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

⁹ Although not the only sort of regulation to which the clause has been applied, land use regulations comprise the vast majority of the cases.

¹⁰ “. . . nor be deprived of . . . property, without due process of law . . .” U.S. CONST. amend. V.

¹¹ Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1078 n.2 (1993) (“For characteristic characterizations of takings doctrine over the last three decades, see BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 8 (1977) (“a chaos of confused argument”); Allison Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 63 (“crazy-quilt pattern”); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law*, 80 HARV. L. REV. 1165, 1170 (1967) (“liberally salted with paradox”); Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1524 (1991) (“chaos”); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles* (pt. 1), 77 CAL. L. REV. 1299, 1303-04 (1989) (“in far worse shape than has generally been recognized”); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984) (“muddle”); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964) (“a welter of confusing and apparently incompatible results”); and the unsurpassed John A.

farrago of fumbings."¹² To explain the Court's "takings" jurisprudence, one needs to bend whatever notions of logic one has. This situation has prompted John Rooney, in an e-mail discussion of formal logic, to say:

One piece of contemporary logic is non-monotonic reasoning. I put this to some use in teaching the constitutional law of land use regulation.

Land use reg is valid under the police power
 unless the owner can't get a yield on his investment
 but that's OK if a serious public concern such as safety trumps that
 unless the regulation results in a wipeout of the owner
 in which case he must be compensated
 unless he's putting a nuclear power plant on a fault line, ie, a traditional
 nuisance(!).¹³

The Court should use the clauses in the roles originally intended. Then, the state courts would be better able to apply United States constitutional strictures to land use regulations, which are, after all, primarily an area of state and local concern. Changing the approach to application of constitutional law to land use regulations would not result in a significant change in the outcomes of the cases that are litigated, but such a change would clarify and rationalize much of the confusion that

Humbach, *A Unifying Theory for the Just Compensation Cases*, 34 RUTGERS L. REV. 243, 244 (1982) ("a farrago of fumbings which have suffered too long from a surfeit of deficient theories."); see also Alison J. Midden, Case Note, *Property—Taking of Access: Minnesota Supreme Court Declines to Allow Admission of Evidence of Diminished Access Due to Installation of a Median in a Takings Case*, 25 WM. MITCHELL L. REV. 329, 329 n.1 (1999) (citing Daniel R. Mandelker, *Waiving the Taking Clause: Conflicting Signals from the Supreme Court*, 1995 INSTITUTE ON PLANNING ZONING & EMINENT DOMAIN § 7.01 (blaming recent Supreme Court takings cases such as *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), for confusing takings law "more than ever"); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 53, 56 (1990) (describing the task of determining what constitutes a taking as "intractable"); Rubinfeld, *supra*, at 1078-81 (describing the Takings Clause as "engulfed in confusion" and takings law as "out of joint," stating that "[t]hroughout constitutional jurisprudence, only the right of privacy can compete seriously with takings law for the 'doctrine-in-most-desperate-need-of-a-principle-prize'" and defining "eminent domain" as referring "to the state's prerogative to seize private property, dispossess its owner, and assume full legal right and title to it in the name of some ostensible public good"); William Michael Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151, 1151 (1997) (noting that the "Takings Clause" is "famous for inspiring disagreement" and that the Supreme Court "has been unable to offer a coherent vision of when compensation is required").

¹² John A. Humbach, *A Unifying Theory for the Just Compensation Cases*, 34 RUTGERS L. REV. 243, 244 (1982).

¹³ Posting of John Rooney, Thomas M. Cooley Law School, to lawprof@chicagokent.kentlaw.edu (Sept. 21, 2001, 10:36:45 CST) (copy on file with author).

416 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36

this last twenty-five years of Supreme Court "takings" jurisprudence has generated. Although the outcome of many cases would stay the same because all regulations are subject to the Due Process Clause, the outcome of some cases would change because regulations that are valid under the Due Process Clause would not be subject to the "Takings" Clause, unless the state physically took the land for public use.¹⁴

This Article will test this hypothesis by applying due process analysis to five of the leading United States Supreme Court cases dealing with land use regulations, which should not have been subject to the Takings Clause. One of the key issues to be addressed is whether the Supreme Court is giving the state courts any guidance to enable them to decide these cases in a manner that is consistent with the federal Constitution. This Article will also look at six recent cases from Minnesota to see if the Minnesota courts are able to work through this muddle and to see if the suggested approach would have resulted in different outcomes in those cases.

This Article contends that the Court should treat real takings as real takings and require the state to pay for them. It should treat unfair and unjust regulations as denials of due process and tell the state that it cannot do that. The Court should stop treating regulations as if they are taking property for public use, which they are not, and begin treating them as what they are: regulating what owners of property may or may not do with their property. This simpler approach to these cases would generate similar outcomes but in a more consistent and understandable manner.

II. BACKGROUND JURISPRUDENCE

The confusion in *Palazzolo* is typical of the confusion in the United States Supreme Court's "regulatory takings" jurisprudence in general.¹⁵ In a long line of cases, starting with *Penn Central*¹⁶ and continuing with the major cases of *Lucas*,¹⁷ *Nollan*,¹⁸ *Dolan*,¹⁹ and *First English*,²⁰ as well as

¹⁴ See, e.g., Mark Turick, *Constitutional Protections of Private Property: Decoupling the Takings and Due Process Clauses*, 3 U. PA. J. CONST. L. 885, 889-93 (2001).

¹⁵ *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001).

¹⁶ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

¹⁷ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

¹⁸ *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

¹⁹ *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

²⁰ *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

less central cases like *Suitum*²¹ and *Loretto*,²² the Supreme Court developed a series of tests theoretically designed to determine when government regulation of a landowner's use of land is or is not a compensable taking. The tests have included a wide variety of approaches: the average-reciprocity-of-advantage test,²³ the excessive burden test,²⁴ the does-it-confer-a-benefit-on-the-public-or-prohibit-a-harm test,²⁵ the undo-interference-with-investment-backed-expectations test,²⁶ the nuisance test,²⁷ and, now, the did-you-have-the-right-to-do-the-prohibited-use-under-your-state's-common-law-total-takings test.²⁸

All of these confusing and inconstant tests arise out of a fundamental mistake in analysis. This inconstancy causes a problematic reading of both the Just Compensation Clause of the Fifth Amendment and a mistake in the policy analysis the Court should apply to such difficult questions. A brief review of the jurisprudence and commentary dealing with the Fifth Amendment's Takings Clause up to this time is in order here. The many recent articles in the scholarly literature give a long list of other articles and books on this aspect of a rather overwritten subject.²⁹

The confusion and inconstancy in this area arise out of misreadings of the actual language of the Amendment, of *Pennsylvania Coal v. Mahon*,³⁰ and of a misunderstanding of the purposes behind the Fifth Amendment's property clauses. For instance, the Court in *Palazzolo*, per Justice Stevens, said about *Mahon*:

²¹ *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997).

²² *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982).

²³ *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922) (containing the first discussion of this test).

²⁴ Lynda J. Oswald, *The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1447, 1448 (1997) ("Although the government action at stake is undeniably legitimate—protection of public access to public beaches—the means chosen to achieve it bear little relationship to that interest, and the burden inflicted upon the property owner is excessive. The regulation should thus be struck down as an invalid exercise of the police power."); see also *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

²⁵ See, e.g., *Pennell v. City of San Jose*, 485 U.S. 1 (1988); see also Oswald, *supra* note 24 (discussing this test).

²⁶ See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978); see also R. S. Radford & J. David Breemer, *Great Expectations: Will Palazzolo v. Rhode Island Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449 (2001) (commenting on *Palazzolo* in this regard).

²⁷ See *Mugler v. Kansas*, 123 U.S. 623 (1887) (providing an early example).

²⁸ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

²⁹ See *supra* note 11.

³⁰ *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

[T]he Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. In Justice Holmes' well-known, if less than self-defining, formulation, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking."³¹

Justice Stevens's reading of *Mahon* may be an attempt to limit state control over private uses of land. If one believes that it is a bad idea for the state to regulate private uses of land, then this may be the only way a judge will be able to strike down such regulations and not appear to be "legislating from the bench."

Instead of trying to fit the question of how much to regulate property, and other similar difficult questions of public policy, into an inappropriate and formalistic constitutional rule,³² such questions need to be left, by and large, to the discretion of the legislatures, with only the most egregious overreaching overruled by the courts. This is why the courts have previously given legislatures wide latitude in all of the areas that the Due Process Clause addresses: life, liberty, and property.³³

What is wrong with a simple reading of the Takings Clause that would apply it to occasions when the government actually physically takes and uses the land in question? What limitations could there then be on the government's overreaching by regulation? What should a court do when the government goes too far? If "goes too far" means the same thing as interfering with due process rights in property, then the more consistent, predictable, and traditional result would be to strike down the regulation as an unconstitutional denial of due process. Treating it as a "regulatory taking"³⁴ confuses the issue and leads to the kinds of muddled rules exemplified in the rationales in *Palazzolo*.³⁵

The issue is the difference between actually using someone else's land and (figuratively) "using" someone else's land. After all, when someone picnics on your field, they physically use your land. When someone picnics in the city park and enjoys the lovely lake and stand of

³¹ *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2457 (2001) (citation omitted).

³² If the government takes your property for public use, they must pay for it.

³³ See, e.g., *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26, 32-33 (1954) (discussing judicial deference to legislative judgments).

³⁴ Others have suggested much the same thing. See, e.g., Tunick, *supra* note 14, at 892-922.

³⁵ See *supra* notes 4-7.

trees across the way on your land, they also "use" your land, albeit figuratively. If the second type of use is what is referred to in the Fifth Amendment as the public use of land, then *all* regulation of land results in the public use of land and must be compensated.³⁶ Surely this outcome was not intended by the Framers of the Amendment, nor should it be the rule today. If the figurative "use" goes too far, then the court has the mechanism to strike down the regulation, but not as a "taking," because we have to remember, as we do not very often, that the constitutional prohibition is against takings for public use: not diminutions of value, nor dashing of expectations, nor "taking" of anything except taking physical property for public use.³⁷

A. Ways to Criticize Takings Cases

Commentators have long criticized the Supreme Court's "takings" cases since *Mahon* for a variety of reasons. For example, commentators such as Barton Thompson and William Michael Treanor have suggested flaws in the logic of "takings" jurisprudence in general.³⁸ Additionally, many others have taken more limited, specific issue with the Court.³⁹ The criticisms are varied. They have included historical criticism, calling on the "plain meaning" of the Amendment, pointing out the poor policy implications of the cases, criticizing the Court's usurping of the legislature's role, pointing out the internal logical fallacies of the Court's decisions, and pointing out the conservative members of the Court's mistrust of legislation and those Justices' dislike of the policies behind many of the regulations in question.

1. Historical Criticism

Historical critics, like Treanor and Brauneis, argue that the Court has misread or ignored the history of and the purpose behind the Takings Clause. They have also criticized the Court for the too literal reading of Justice Holmes's phrase in *Mahon* that "if regulation goes too far it will

³⁶ See generally RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

³⁷ See Rubinfeld, *supra* note 11.

³⁸ Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990) (suggesting that courts do not look at their own decisions as "takings"); William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 708-15 (1985) (arguing that much of the discussion of the meaning of the Fifth Amendment is based on a flawed view of history).

³⁹ See, e.g., Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1393, 1524 (1991).

420 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36

be recognized as a taking."⁴⁰ They try to explain that the Court would not be in the difficult position it is today if the Court would recognize the history and historical understanding of the clause.⁴¹

In *Mahon*, Holmes stated that some regulations can have as harsh an effect on those regulated as if their property had been taken for public use. The regulation was struck down because, in the Court's view, it would normally be unfair to put such a burden on landowners. This is not a literal application of the Takings Clause but, instead, a figurative one. Holmes is clear that the invocation of the Takings Clause in *Mahon* was not literal because, among other things, the clause states that if the clause applies, the remedy is "just compensation." In *Mahon*, compensation was not suggested, discussed, or ordered. On the other hand, the Due Process Clause of the Fifth Amendment forbids the government from depriving people of property without due process. In *Mahon*, the Pennsylvania statute was treated as if it deprived the mine owners of their property without due process of law. Consequently, the government was forbidden to apply the law to the coal owners, and the statute was struck down.

2. "Plain Meaning" Criticism

Connected with historical criticism is "plain meaning" criticism. Jan Laitos, for instance, argues that if the Court would apply the plain meaning of the clause (bolstered by a historical understanding of the intention of the Framers), the Court would realize that the clause was not meant to apply to "mere" regulations but only to "real" takings.⁴²

Taking is different from "regulating." Even the proponents of the prevailing view of the Fifth Amendment realize this on some level

⁴⁰ Pa. Coal Co. v Mahon, 260 U.S. 395, 414 (1922).

⁴¹ 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, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 783 (1995).

⁴² Jan G. Laitos, *The Public Use Paradox and the Takings Clause*, 13 J. ENERGY NAT. RESOURCES & ENVTL. L. 9, 11 (1993).

The plain meaning of the Takings Clause thus indicates three requirements for just compensation: (1) there must be private property, (2) the private property must be taken by government action, and (3) the government action must be for a public use. If these three conditions are satisfied, then the text of the Constitution provides that just compensation must be paid by the government to the affected property owner.

Id.; see also Rubenfeld, *supra* note 11, at 1119.

because they refer to this area as "regulatory taking," thereby changing the name of their conclusion to conform to their understanding of the process of getting there. Proponents of this view still refer to the *Loretto* type of problem as "real" or "actual" takings.⁴³ As Treanor has observed, "[e]ven Justice Scalia acknowledges that the Takings Clause did not originally extend to regulations."⁴⁴

3. Policy Criticism

Commentators of different theoretical persuasions agree that the present Court's takings jurisprudence results in bad policy. Linda Oswald argues that the Court's takings rules result in "incorrect analysis and muddled outcomes."⁴⁵ Michael Burger says "[i]t breeds unpredictable litigation results, undermining confidence in the judicial system."⁴⁶ William Brewer sees "inconsistent results."⁴⁷ David Buck notes that "[t]he results of numerous cases support the contention of some commentators that politics, not principles, guide the decisions in regulatory takings cases."⁴⁸ All of this results in bad Supreme Court jurisprudence and policy and motivates those affected by regulations, with which they may well agree, to sue merely to get some money from the taxpayers.

4. Role of Government

Another criticism of the current state of "takings" jurisprudence is that the Court usurps the role of the legislature. This argument is similar to criticisms by right-wing critics that were leveled against the Warren Court's "activist" civil rights decisions. The notion that the Warren Court was activist and the current Court is not is ludicrous.⁴⁹ Commentators like Barry Friedman remind us that courts should not

⁴³ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

⁴⁴ William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L. J. 813 (1998).

⁴⁵ Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91, 139 (1995).

⁴⁶ Michael M. Berger, *Silence at the Court: The Curious Absence of Regulatory Takings Cases From California Supreme Court Jurisprudence*, 26 LOY. L.A. L. REV. 1133, 1143 (1993).

⁴⁷ William L. Brewer, Note, *Developments in Federal Regulatory Takings Jurisprudence and Its Potential Impact in Connecticut*, 13 BRIDGEPORT L. REV. 953, 979 n.153 (1993).

⁴⁸ David C. Buck, Note, *"Property" in the Fifth Amendment: A Quest for Common Ground in the Maze of Regulatory Takings*, 46 VAND. L. REV. 1283, 1310 (1993).

⁴⁹ See Donald H. Zeigler, *The New Activist Court*, 45 AM. U. L. REV. 1367 (1996); see also HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT 273 (1991).

422 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36

take away the planning and regulatory role of the legislatures.⁵⁰ The Supreme Court is not equipped to hear the presentations of all of the interested parties and then make the types of decisions that need to be made to regulate the use of property.⁵¹

5. Internal Logic

The Court's decisions are contradictory, even taken at face value. The Court has said that a taking occurs when there is an "undue burden" on a land owner; or when the regulation interferes with the "investment-backed expectations" of the land owner; or when the diminution in value of the parcel is too great; or when there is (in the Court's analysis) no value left (or perhaps no reasonable value, or maybe no economic value, or some other value). These observations sound reasonable until considered in context.

One way to see the contradictions is to compare two neighboring landowners. If one land owner has a large parcel of land with a market value of \$1,000,000, a regulation that diminished the market value of that land by, for instance, \$50,000 would be a "minor" burden and, thus, not a taking. The neighbor whose small parcel of land had a market value of \$60,000 subject to the same diminution would have suffered a "taking" because of the "undue burden."

Another difficulty arises between two landowners who received their land in different ways. There is no logical reason why people who receive their land through gift or inheritance, and thus have no "investment-backed expectations," should be treated differently from those who "invest" in the land. Further, there is no reason to reward someone who invests not knowing of impending regulation, thus having a reasonable expectation, but not one who invests knowing about the likely regulation and whose expectations would not be reasonable.⁵²

⁵⁰ See Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 Nw. U. L. REV. 1437 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L.J. 1383, 1385 (2001).

⁵¹ Glyn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892 (1992).

⁵² Susan Rose-Ackerman, *Against Ad Hocery: A Comment On Michelman*, 88 COLUM. L. REV. 1697, 1700 (1988) ("[A]s many economically oriented writers have argued, no taking can legitimately be claimed if the property owner correctly anticipated that an uncompensated state action was possible and if this belief affected the price paid for the asset."); see also

6. Trusting Judges, Not Legislatures, to Decide: Inconsistencies with *Lucas*

Commentators like John Humbach have pointed out the difficulties in the *Lucas* Court's analysis. Because *Lucas* holds that regulations that enact prohibitions against common law nuisances are not "takings," but regulations that recognize new nuisances may be, the *Lucas* decision takes away the ability of state legislatures to change the law of nuisance in their state.⁵³ Thus, the *Lucas* decision makes the results of litigation under federal constitutional law dependent upon a state's common law.⁵⁴

Determining when a statute denies someone due process of law is difficult. The Court's due process analysis needs to balance the public's interest in the subject of the regulation against the individual's interest in not being regulated unfairly or unnecessarily. The balancing should not be the same thing as simply looking at the historical common law of a state and finding no "taking" if the state law had prohibited the regulated conduct, but allowing the claim if the common law historically did not prohibit the regulated conduct. Are we going to have fifty different Clean Air Acts,⁵⁵ each prohibiting only that which a state's common law of nuisance would have prohibited in cases where the Act renders property devoid of value, and some smaller number of Acts in cases where the diminution of value is only partial? There are some regulations that need to be uniform throughout the country.

7. Regulatory Policy

Carol Rose mentions the worry "that newly emboldened developers may destroy the landscape and inflict immense damage on the public, while our cowed, overcautious officials refrain from imposing regulations that might otherwise properly restrain depredations on our communities."⁵⁶

Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 584-87 (1984).

⁵³ John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1 (1993).

⁵⁴ (Hon.) John M. Walker, Jr., *Common Law Rules and Land-Use Regulations: Lucas and Future Takings Jurisprudence*, 3 SETON HALL CONST. L.J. 3, 4 (1993).

⁵⁵ 42 U.S.C. §§ 7401-7671q (1994).

⁵⁶ Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577, 581 n.25 (1990) (citing to John Mixon,

424 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36

III. WHAT GUIDANCE IS THE UNITED STATES SUPREME COURT GIVING THE STATE COURTS? THE EXAMPLE OF MINNESOTA

The Minnesota courts have dealt with the confusion and uncertainty of the United States Supreme Court's "takings" jurisprudence as well as could be expected.⁵⁷ While some have suggested that one or the other of their "takings" cases was more or less mistaken,⁵⁸ the Minnesota courts, at both the intermediate appellate level and at the supreme court, reached the correct results. By examining a representative sample of Minnesota cases applying the Takings Clause, one can determine what guidance the state has received from the Supreme Court.

A. Arcadia Development Corp. v. City of Bloomington⁵⁹

The City of Bloomington required mobile home park owners who decide to close their mobile home park to pay any displaced residents "the reasonable cost of relocating a mobile home to another park located within a twenty-five-mile radius of the park being closed."⁶⁰ Arcadia Development Corp., the owner of a mobile home park in Bloomington, decided to close it and sell the land to Wal-Mart. After paying relocation expenses of \$363,128.71 to the displaced residents, Arcadia realized \$2,338,842.66 from the sale. Arcadia agreed that this was not a per se taking (a real taking), but argued that because the value of their property was lowered due to this statute, it constituted a "taking." The Minnesota Court of Appeals rejected this characterization of the applicable rule.⁶¹

The court said that once the city could show a "legitimate governmental purpose" for the regulation, they would not find that a "taking" had occurred.⁶² The court refused to apply the more stringent

Compensation Claims Against Local Governments for Excessive Land-Use Regulations: A Proposal for More Efficient State Level Adjudication, 20 URB. LAW. 675, 686 (1988)).

⁵⁷ See Orlando E. Delogu, *The Law of Taking Elsewhere and, One Suspects, In Maine*, 52 ME. L. REV. 323 (2000); Brian W. Ohm, *Towards a Theory of Wisconsin Regulatory Takings Jurisprudence*, 4 WIS. ENVTL. L.J. 173 (1997) (providing examples of how other states have done).

⁵⁸ See, e.g., Midden, *supra* note 11, at 330 n.10.

⁵⁹ 552 N.W.2d 281 (Minn. Ct. App. 1996).

⁶⁰ *Id.* at 284.

⁶¹ *Id.*; see also *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (noting that a "mere diminution" in value of property, however serious, is insufficient to demonstrate a taking).

⁶² *Id.* at 286.

Dolan standard⁶³ because this statute is not in the nature of an exaction. The court went on to point out that if an ordinance is found valid under the Takings Clause, it would be surprising for it to be invalid under the Due Process Clause.⁶⁴

*B. In re the June 9, 2000 Fence Viewing Petition of Gary Bailey*⁶⁵

In *Bailey*, the Minnesota Court of Appeals dealt with a statute that required adjoining landowners to share in the cost of "a partition fence . . . reasonably necessary to achieve the public purpose of keeping animals confined in a farmed cervidae⁶⁶ operation."⁶⁷ When Mr. Bailey wanted to construct a fence to contain his domestic deer, he asked, under the statute, for his neighbors to contribute to the cost of the fence. The contributing neighbors argued, among other things, that the statute worked a taking of their property without just compensation. The court said that "[a] showing that the property has merely diminished in market value is not sufficient.⁶⁸ The result would be similar under the federal constitution."⁶⁹

In determining whether a statute results in an unconstitutional taking when applied to a specific piece of property, the court said that the controlling test requires the landowner to "demonstrate that he had been deprived, through governmental action or inaction, of all the reasonable uses of his land."⁷⁰ Interestingly, to explain the court's reasoning, it cited to pre-*Mahon*⁷¹ cases. For instance, the court cited to a 1916 United States Supreme Court case when it stated, "the single fact that a party must make substantial expenditures to comply with a regulatory statute does not render the statute unconstitutional."⁷²

⁶³ *Dolan v. City of Tigard*, 512 U.S. 374, 381 (1994) ("[C]ompliance with governmental conditions bear a 'rough proportionality,' in both nature and extent, to the impact of those conditions.").

⁶⁴ *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 288 (Minn. Ct. App. 1996) (citing *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993)).

⁶⁵ 626 N.W.2d 190 (Minn. Ct. App. 2001).

⁶⁶ "Cervidae" refers to deer (and elk). *Id.* at 193 n.1.

⁶⁷ MINN. STAT. ANN. § 344.03 (West 1990 & Supp. 2001).

⁶⁸ *Bailey*, 626 N.W.2d at 194-95.

⁶⁹ *Id.* (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 105 (1978)).

⁷⁰ *Id.* (citing *County of Pine v. Minn. Dep't of Natural Res.*, 280 N.W.2d 625, 630 n.4 (Minn. 1979) (quoting *Czech v. City of Blaine*, 253 N.W.2d 272, 274 (Minn. 1977)).

⁷¹ See *supra* note 23.

⁷² *Northwestern Laundry v. City of Des Moines*, 239 U.S. 486, 492 (1916).

C. Zeman v. City of Minneapolis⁷³

The Minnesota Supreme Court was asked to decide if mistakenly revoking a rental license on a building with no market value was a temporary taking. In beginning its analysis, the court agreed that this area of law makes little sense.⁷⁴ The court agreed that because the revocation was invalid, the taking, if indeed there was one, was a *First English* "temporary taking."⁷⁵ The court cogently stated:

Modern regulatory takings law stems from the nebulous notion that when the exercise of state police power regulation of private property "goes too far" it will amount to a taking. Unfortunately, the law does not become clearer with later cases. In general, it can be said that no firmly established test exists for determining when a taking has occurred, instead takings law turns largely on the particular facts underlying each case.⁷⁶

The court then had to decide how to weigh the *Penn Central* factors. In doing so, the court said that if the regulation is one designed to prevent harm,⁷⁷ and it "seems able to achieve this goal, then a taking has not occurred."⁷⁸ What the court did then was rather extraordinary: it said that because the ordinance was designed for a valid harm-prevention purpose, it cannot be a taking, regardless of the fact that the ordinance was wrongly applied to Zeman's property.⁷⁹ The trial court had suggested that Zeman's cause of action really sounded in tort, but hinted that the city's immunity may bar that action.⁸⁰

⁷³ 552 N.W.2d 548 (Minn. 1996).

⁷⁴ *Id.* at 552 ("Thus, to determine an answer to the question confronting us today, we must attempt the unenviable task of sorting through the complex law of takings."); *see also* San Antonio River Auth. v. Garrett Bros., 528 S.W.2d 266, 273 (Tex. Civ. App. 1975) (labeling takings law a "crazy-quilt pattern of judicial doctrine").

⁷⁵ *Zeman*, 552 N.W.2d at 553; *see also* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987).

⁷⁶ *Zeman*, 552 N.W.2d at 552 (citations omitted).

⁷⁷ *Id.* (citing to *Keystone v. Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Miller v. Schoene*, 276 U.S. 272, 279-80 (1928); *Hadacheck v. Sebastian*, 239 U.S. 394, 410-11 (1915); *Mugler v. Kansas*, 123 U.S. 623, 656-57 (1887)).

⁷⁸ *Id.* at 554.

⁷⁹ *Id.* at 555.

⁸⁰ *Id.* at 551.

D. *Olsen v. City of Ironton*⁸¹

In *Olsen*, the Minnesota Court of Appeals was faced with a case that raised issues very much like those decided in *Palazzolo*:⁸² whether one who purchases land can make a takings claim based on regulations in place when the land was purchased. To get to that issue, the court first rehearsed the traditional march of takings jurisprudence. They started out with the proposition that "[t]he Takings Clause originally applied only to physical appropriations of property, but in the 1920s, the United States Supreme Court recognized that regulations on property may also be considered takings if the regulation goes 'too far.'"⁸³ They continued the analysis with:

In determining whether a regulation goes "too far," the United States Supreme Court has recognized two distinct classes of regulatory takings: (1) categorical takings, in which the regulation "denies all economically beneficial or productive use of land" under *Lucas* . . . ⁸⁴; and (2) case-specific takings, which involve consideration of the economic impact of the regulation, the interference with reasonable investment-backed expectations, and the character of the regulation.⁸⁵

The court rejected the plaintiff's *Lucas* claim on the basis that he had not "established that the . . . zoning deprives him of 'all economically beneficial or productive use' of his property." It pointed out that there were several uses to which the property could be put, noting that "[t]he undisputed record indicates that the 'O' zoning has several permitted and conditional uses, including recreational uses, tree nurseries, recreational areas, and 'open spaces uses' allowed by the city council."⁸⁶ Because there was some substantial value left under the present regulation, the court did not reach the *Palazzolo* issue.

⁸¹ No. CX-00-1371, 2001 WL 379010 (Minn. Ct. App. Apr. 17, 2001).

⁸² *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001).

⁸³ *Olsen*, 2001 WL 379010, at *2 (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

⁸⁴ *Id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)).

⁸⁵ *Id.* (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)); see also *Agins v. City of Tiburon*, 447 U.S. 255, 261-62 (1980).

⁸⁶ *Olsen*, 2001 WL 379010, at *3.

428 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36

E. Woodbury Place Partners v. City of Woodbury⁸⁷

Woodbury decided whether a two-year development moratorium was a taking on its face. Acting rather precipitously, the owners of a parcel of land subject to the City of Woodbury's moratorium brought the action about five months after they had applied for the initial approvals for development. The moratorium applied to this property for about two years in total.⁸⁸ The court quoted the three-part *Penn Central* test with approval.⁸⁹ In attempting to avoid that analysis, the property owner argued that there had been a "total taking" for the two years of the moratorium.⁹⁰ The Minnesota court refused to divide the owner's interest in the land into two-year segments, citing *Keystone*⁹¹ and *Agins*.⁹² Rejecting a reading of *First English*⁹³ that ignores the ultimate result of that case, the court concluded that it did not apply to valid regulations like the one at issue in *Woodbury*,⁹⁴ but only to regulations that ultimately are ruled invalid and, thus, were invalid when applied to the property. Because the moratorium was reasonable, and the effect on the total property value minimal, the claim was denied. This reading of *First English* seems to be inconsistent with the language of that case and opposite of the reasoning that led the United States Supreme Court to its conclusion in *First English*.⁹⁵

⁸⁷ 492 N.W.2d 258 (Minn. Ct. App. 1992).

⁸⁸ *Id.* at 260.

⁸⁹ *Id.* (characterizing the test as: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government regulation"); see also *Parranto Bros. v. City of New Brighton*, 425 N.W.2d 585 (Minn. Ct. App. 1988) (holding that restrictive zoning ordinance not a taking after applying three-factor inquiry).

⁹⁰ *Woodbury*, 492 N.W.2d at 261.

⁹¹ *Id.* at 261-62 (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987)).

⁹² *Id.* (citing *Agins v. Tiburon*, 447 U.S. 255, 263 n.9 (1980)).

⁹³ *Id.* at 262 (citing *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987)).

⁹⁴ *Id.* ("*First English* does not create a new liability standard to determine when a 'temporary' taking occurs, but clarifies the appropriate remedy after a taking is recognized. It is uncertain whether the term 'temporary taking' as employed by *First English* was even intended to apply to planning moratoriums. The opinion seems to presuppose that 'temporary regulatory takings' means 'regulatory takings which are ultimately invalidated by the courts.'"); see also *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 310 (1987).

⁹⁵ In *First English*, the Court used, among others, World War II cases where the government took over landowners' property to use for the war effort and was ultimately required to pay the reasonable rental value for the period of use. *First English*, 482 U.S. at 318. Clearly a valid act by the government, but temporary. See *id.*

F. *Westling v. County of Mille Lacs*⁹⁶

In *Westling*, the Minnesota Supreme Court was asked if a tax⁹⁷ that is payable by a property owner whose land is rendered less valuable by contamination that the owner caused is a "taking." The court said no. After deciding that the tax was not discriminatory and furthered a legitimate governmental objective,⁹⁸ the court discussed the "takings" claim. Interestingly, the court mixed up the discussion of the *Penn Central* issues with issues related to striking down a tax because it violates the Due Process Clause.⁹⁹ The court concluded that a valid tax cannot be a taking because exercising taxation power can cause economic impact but is necessary to the operation of government.¹⁰⁰

IV. WHY ARE WE IN THIS FIX?

Why is the United States Supreme Court using a confusing and historically inaccurate interpretation of the Takings Clause to analyze land use regulations? The Court cannot overtly use direct substantive due process analysis on economic legislation, such as these types of regulations.¹⁰¹ Earlier, the Court had been content to strike down regulations and statutes that had "gone too far" under whichever "explanation" of the doctrine the Court decided was appropriate. Although in those cases the Court argued that they were using the Takings Clause as the authority for invalidating the regulations, the remedy granted in each of those cases¹⁰² was not the one called for in the Takings Clause. The clause says that the government must pay just compensation if the government takes private property. The Court acted as if the clause said that any governmental action that "takes" your property without compensation is invalid.

There is a not so subtle difference in those two formulations. In the former, when the Court finds a taking, the Court awards compensation (as in any successful inverse condemnation action). In the latter, the remedy is invalidation. After careful analysis, what we have is really

⁹⁶ 581 N.W.2d 815 (Minn. 1998).

⁹⁷ Minn. Stat. §§ 270.91-.98 (1996).

⁹⁸ *Westling*, 581 N.W.2d at 822.

⁹⁹ *Id.* at 823 (discussing *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369 (1974)).

¹⁰⁰ *Id.*

¹⁰¹ Robert Brauneis, *supra* note 41, at 680 ("The constitutional revolution of the late 1930s rejected the Due Process Clause as a textual home for substantive economic rights."); *see, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

¹⁰² *See generally Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

430 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36

two lines of cases: first, the “real” physical takings cases: inverse condemnation, *Loretto*, etc.; and second, the anomalous takings cases: like *Nollan*, where the Court says it finds a taking but then strikes down the regulation rather than awarding compensation. In other words, the Court acted as if the problem with the regulation was that it denied the landowner due process of law by being unfair.

The Court’s actions may be explained either by simplicity or cupidity. If it was simplicity, the present Court did not realize that the takings language in these older regulation cases was figurative.¹⁰³ Instead, the Justices read Holmes literally that invalid regulations constitute “takings,” rather than reading him figuratively that unfair regulations could have as significant effect on a land owner *as if* the government had taken their land. The current Justices simply missed the metaphor.¹⁰⁴ The alternative interpretation, cupidity, is that the Justices knew that Holmes’s language was meant figuratively, but chose to use the metaphoric language to bring about a resurgence of economic substantive due process “by the back door,” without letting on what they were doing.

To decide between these two possibilities, one must decide if the Justices who are drafting and debating these positions are “simple” thinkers and writers or are “subtle” thinkers who may not always mean what they say. What is behind the willingness of the current Court to let the metaphor take over? Hostility to government control of land, harking back to the pre-1930s hostility toward governmental regulation, is one possibility.¹⁰⁵

The restrictive Takings Clause¹⁰⁶ of the Fifth Amendment has been expanded beyond the possible scope of its “original intention,” while the permissive Due Process Clause¹⁰⁷ has been dismissed as irrelevant and ignored. If both clauses mean what they say, the government, when

¹⁰³ See, e.g., Rubinfeld, *supra* note 11.

¹⁰⁴ See Louise A. Halper, *Tropes of Anxiety and Desire: Metaphor and Metonymy in the Law of Takings*, 8 YALE J.L. & HUMAN. 31 (1996).

¹⁰⁵ Maurice J. Holland, *Ill-Assorted Musings About Regulatory Takings and Constitutional Law*, 77 OR. L. REV. 949 (1998) (“For law, preeminently including constitutional law, these social changes precipitated transformative consequences both profound and wide-ranging. Most pertinent to the topic of regulatory takings was a markedly altered attitude on the part of American courts, the U.S. Supreme Court in particular, toward a wide variety of legislative and regulatory reforms whereby sympathetic support replaced systematic, doctrinaire hostility.”)

¹⁰⁶ The government may not take your property unless it pays for it.

¹⁰⁷ The government may regulate your property, if they do it right.

operating in the public interest, can regulate how an owner uses land, even if that regulation substantially diminishes the value of some land.

What is wrong with this "simple" reading of the Takings Clause to limit its use to occasions when the government physically takes and uses the land in question?¹⁰⁸ Nothing, except that such a reading would make the use of land subject to the public interest. This reading will concern those who wonder what limitations there could then be on the government's regulations. What prevents the government from going too far? If "going too far" involves the regulation interfering with property without due process, then the regulation would be struck down as a violation of the Due Process Clause. The issue here is to clarify the difference between literally using someone else's land and (metaphorically) "using" it.

The Takings Clause itself is clear. It even sets out the remedy for breach, which the Due Process Clause does not. That is what the Framers seemed to intend, although as Mark Tunick has pointed out,¹⁰⁹ "[r]ecords of what the Founders intended by the specific language of the Takings Clause are scarce."¹¹⁰ The clause was written and, for

¹⁰⁸ John D. Echeverria, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695, 710 (1993) ("In its recent property decisions, the Court appears to have ignored the potential significance of the differences in language between the Due Process and Takings Clauses. Even those vigorously opposed to the notion that the Constitution can be given a literal, mechanical application would likely concede that the language should be consulted in determining how to interpret these two clauses.")

¹⁰⁹ Tunick, *supra* note 14, at 88 n.10.

¹¹⁰ *Id.* ("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, 283 (1988) ("[T]he clause was one of the least controversial provisions in the Bill of Rights, occasioning no recorded substantive comment at all."). James Madison seems to have meant the Clause to apply only to direct, physical takings of property. In a speech from June 9, 1789, proposing texts of early amendments to the Constitution, Madison suggested the following formulation of the Takings Clause: "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation." James Madison, *Amendments to the Constitution (June 8, 1789)*, in 12 THE PAPERS OF JAMES MADISON 201 (Charles F. Hobson et. al. eds., 1979). No account seems to exist as to why the change in language was made from "relinquish" to "take." Treanor, *supra* note 38, 711 n.95 ("The accounts of the congressional debate over the Bill of Rights provide no evidence as to why the change in language was made."). Treanor argues that Madison intended the Takings Clause not only to provide narrow legal protection against direct physical takings, but also to serve at least symbolically a broader educative function, providing a moral protection for property. *Id.* at 711-12. Both Justice Scalia and Justice Blackmun seem to agree that Madison meant the Takings Clause to offer legal protection only to direct, physical takings. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992); *id.* at 1057 n.23 (Blackmun, J., dissenting) [; cf.] J. Peter Byrne, *Regulatory Takings and "Judicial Supremacy,"* 51 ALA. L. REV. 949, 955 (2000) ("Historical research has established

432 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36

approximately 175 years, interpreted to have a very limited and clear scope, what are tellingly called real takings. There were going to be many situations in which the government would need private property: for post offices, roads, IRS buildings, etc. Because it was not clear whether the government ought to pay for those appropriations, the issue was debated and ultimately decided. The government would pay just compensation in those instances.¹¹¹ Again, as Treanor notes, “[e]ven Justice Scalia acknowledges that the Takings Clause did not originally extend to regulations.”¹¹²

It is often difficult to determine when a statute denies someone due process of law, where the court needs to balance the public interest against the individual’s interest in not being regulated unfairly or unnecessarily. Defining the due process standard in these cases may be difficult, but it is possible. If, under that standard, a regulation’s effect is unfair, then the Due Process Clause suffices to strike it down. Courts ought not use a tool designed for totally different uses when the use of this tool in such cases will result in only profiting land owners who have the resources to fight such inappropriate regulations. Instead, those regulations, as they were until 1987,¹¹³ ought to be struck down under the Due Process Clause, not under a dubious reading of the Takings Clause.

If the purpose of a regulation is to impoverish the land owner or otherwise deprive the land owner of property, rather than to fulfill some reasonable police power purpose, then the city council or planning commission or other appropriate authority will be liable under United

beyond reasonable dispute that the Framers intended the Clause only to apply to physical seizures.”); Bernard Schwartz, *Takings Clause—“Poor Relation” No More?*, 47 OKLA. L. REV. 417, 419-21 (1994) (stating that according to the original understanding of the Takings Clause, a taking was an appropriation or acquisition of property). *But see* Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis “Goes Too Far,”* 49 AM. U. L. REV. 181 (1999) (arguing that for Madison and the Founders, takings originally included nonphysical regulatory takings of property). For criticism of Gold’s position, see *supra* note 41. For discussion of why Madison’s views are uniquely important when examining the intentions behind the amendments, see JACK RAKOVE, *PARCHMENT BARRIERS AND THE POLITICS OF RIGHTS, IN A CULTURE OF RIGHTS* 98, 124-26 (Michael J. Lacey & Knud Haakonssen eds., 1991).”).

¹¹¹ Treanor, *supra* note 38, at 695 (“Neither colonial statutes nor the first state constitutions recognized a right to receive compensation when the government took property from an individual.”).

¹¹² Treanor, *supra* note 44, at 814 n.6.

¹¹³ The year in which *First English* was decided. See *First English Evangelical Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987).

States Code § 1983, and that (the illegal animus), not some "taking," will be the measure of damages.

A. What Is Wrong with Substantive Due Process Analysis?

What is wrong with invoking substantive due process? Its high point, of course, was *Lochner v. New York*,¹¹⁴ which held that the state could not regulate bakery workers' working conditions or hours. The Court struck down those regulations under the Due Process Clause of the Fifth Amendment, holding that the right to contract one's labor was protected by the Fourteenth Amendment,¹¹⁵ which impelled the dissenting Justice Holmes to protest that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."¹¹⁶ Economic substantive due process was rejected by the United States Supreme Court in 1917,¹¹⁷ albeit with some state courts continuing to employ the doctrine.¹¹⁸ Just as the Constitution does not enact Herbert Spencer's economic theories,¹¹⁹ it also does not enact any more contemporary economic theorist's views.¹²⁰ The Court should not be able to invalidate legislative judgments about land use by imposing its view of who is (and

¹¹⁴ 198 U.S. 45 (1905) (striking down a state law setting maximum work hours for bakers by a five to four vote).

¹¹⁵ Brauneis, *supra* note 41, at 631 n.75 ("The Court still interpreted the Contract Clause to protect particular contractual obligations once made, rather than a right to create contractual obligations. The significance of that limitation, however, was greatly diminished by the discovery of substantive "liberty of contract" under the Due Process Clause. See, e.g., *Adair v. United States*, 208 U.S. 161 (1908) (invalidating federal criminal law prohibiting discharge of employees of interstate carrier for belonging to labor organization as violating liberty to contract); *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating law restricting hours of labor as violating liberty to contract); *Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897) (invalidating insurance regulation as violating "the liberty to contract" under Due Process Clause).").

¹¹⁶ *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting); see also *Bunting v. Oregon*, 243 U.S. 426 (1917) (overruling *Lochner* by finding laws regulating hours of service consistent with due process). See generally W. LOCKHART, ET AL., *CONSTITUTIONAL LAW*, 439-41 (5th ed. 1980) (discussing post-*Lochner* developments).

¹¹⁷ *Bunting*, 243 U.S. at 426.

¹¹⁸ Brauneis, *supra* note 41, at 665 n.238 ("The continued reliance on Mahon in state courts after 1935 may well be related to the persistence of state court use of economic substantive due process after its rejection by the Supreme Court, a phenomenon that was noted in several law review articles in the 1950s"); see also John A.C. Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U. L. REV. 13 (1958); John A. Hoskins & David A. Katz, *Substantive Due Process in the States Revisited*, 18 OHIO ST. L.J. 384 (1957); Monrad K. Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

¹¹⁹ *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

¹²⁰ See, e.g., HENRY HAZLITT, *ECONOMICS IN ONE LESSON* (1946); AYN RAND, *THE AYN RAND READER* (Gary Hull ed., 1999).

434 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36

who is not) the right group to bear the burdens of environmental degradation or land use development.

This analysis is not new. For example, William S. Brewbaker III has commented that:

The political and economic similarities between Lochner-era substantive due process review and regulatory takings analysis help explain the Court's reluctance to read the Takings Clause expansively. However, at least two objections can be made to the analogy. First, the Due Process Clause and the Takings Clause are theoretically distinct. Unlike the Due Process Clause, the Takings Clause does not prevent government from regulating in particular ways or for particular purposes; it merely requires it to "pay its way" by compensating affected property holders.¹²¹ There is thus no logical tension between rejection of Lochner-era substantive due process review and regulatory takings scrutiny. Nevertheless, the likely real-world effect of requiring compensation whenever regulation diminishes property values would be substantially to mandate a laissez-faire economic system on constitutional grounds. There is thus a practical tension between rational-basis review of economic regulation and an expansive regulatory takings doctrine.¹²²

In clear cases of unfair or overreaching regulation, the Court should face the issue head on and strike down faulty legislation on the basis of violations of the Due Process Clause.

¹²¹ The "public use" component of takings doctrine requires that exercises of eminent domain be made for public, as opposed to private, purposes. But this requirement has been interpreted as to place no substantial limitations on the purposes for which government may effect a taking. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954); see also *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2894 (2001); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (noting that the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests"); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986) (arguing that the "public use" component of the Takings Clause mandates judicial scrutiny of whether eminent domain is an appropriate means of achieving a legitimate governmental end).

¹²² William S. Brewbaker III, *Health Care Price Controls and the Takings Clause*, 21 HASTINGS CONST. L.Q. 669, 675 n.30 (1994).

B. Using the Takings Clause to Take the Place of Substantive Due Process

The present Court is using the Takings Clause to play the same role that the *Lochner* Court afforded the Due Process Clause: to impose its concept of how the economic life of the country ought to be organized.¹²³ This strategy is as questionable now as the *Lochner* Court's actions were then. Where the *Lochner* Court used phrases like "[w]e do not believe in the soundness of the views which uphold this law"¹²⁴ and "[t]here is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker,"¹²⁵ the present Court talks about the expectations of investors in land. Exactly why investors in land should have more protections than others adversely affected by the proposed use of the land is never made clear. Nor did the Court make clear why employees ought to be given less protection than employers,¹²⁶ or why farmers ought to be given more or less protection than their customers.¹²⁷ The concerns that the Court brings to bear on "takings" questions today are comparable to those of the *Lochner* Court: whether it is better to regulate more, less, or about at the same level is not a constitutional question but a legislative one.

This Article represents the mirror image of Richard Epstein in his recent book.¹²⁸ Epstein argues that any diminution of wealth is equivalent to any other, and that any government regulation that diminishes private property or wealth more than the owner is compensated by payment or by "in-kind" government service or benefit constitutes a "taking." He does not differentiate one diminution of value from another, so *any* such regulation is a taking.

This Article contends that any regulation that does not result in the government actually using your property cannot be a taking. At that point, the problem of the impossibility of meaningfully differentiating among regulations that diminish the value of your property ceases to be a Takings Clause problem.

¹²³ *Lochner*, 198 U.S. at 45.

¹²⁴ *Id.* at 61.

¹²⁵ *Id.* at 57.

¹²⁶ *Id.*; cf. *Holden v. Hardy*, 169 U.S. 366 (1898).

¹²⁷ *People v. Beattie*, 89 N.Y.S. 193 (App. Div. 1904).

¹²⁸ See EPSTEIN, *supra* note 36.

V. EFFECT OF PROPOSAL ON UNITED STATES SUPREME COURT AND
MINNESOTA CASES

To determine whether the use of the Takings Clause to analyze only “real” takings cases and the Due Process Clause to analyze cases of land use regulations would change any outcomes, this Article considers the five leading United States Supreme Court “takings” cases and the six Minnesota cases discussed above. It finds that very few of those cases, and, therefore, one would expect, very few other cases, would have different results for the litigants.

A. *United States Supreme Court Cases*

1. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*¹²⁹

In *First English*, a church had a summer camp in a canyon in Los Angeles County, California. After one of the regularly occurring summer fires in the hills above the canyon, there was a series of winter rain storms, also not unexpected. Those storms caused extensive flooding, which destroyed the permanent structures at the camp (as well as many other structures up and down the canyon). Los Angeles County passed a short-term moratorium on rebuilding any permanent structures in the canyon until they could study the situation and determine if it would be safe to build in any locations in the canyon. The church sued for compensation for a “taking” during the moratorium.

Because the church’s property was not taken away, the question is: does the moratorium on rebuilding in the flooded area of the canyon result in a denial of due process? Was it unfair, overly burdensome, or a denial of any other aspect of due process? Under normal conceptions of due process, this regulation would not have been a denial of due process. However, it was not found, ultimately, to be a taking either, because the church could continue to operate the camp in temporary enclosures during the moratorium, and the moratorium was found to be a reasonable length.

Would the regulation be a denial of due process under the assumptions the Court made in deciding to hear the case? They assumed that if there had been a taking, temporary or otherwise, compensation would have been due. Because that assumption takes

¹²⁹ 482 U.S. 304 (1987).

away the analysis of the justification for the regulation, there is no way to decide if the Court would have found a denial of due process. However, it is expected that it may well have been unexceptional under due process analysis as it was, in the end, under "takings" analysis.

2. *Nollan v. California Coastal Commission*¹³⁰

The Nollans had a small beach house in Ventura, California, and they wanted to build a very large house on the lot. The house would block the view of the ocean from the street, creating a harm to the public. The California Coastal Commission decided that the Nollans would have to dedicate a public easement between their house and the ocean to ameliorate that harm.

How much burden was put on the Nollans by the regulation? Very little.¹³¹ Under normal takings analysis, then, this would not be a taking. Thus, the Court looked more explicitly at the due process argument by looking at the nexus between the statute and the application to the Nollans. Under this approach, a statute regarding beach access combined with the Commission's rationales regarding access resulted in an administrative decision that the Nollans had to give up an easement that seemed to have very little to do with beach access and created a "nexus" problem. Thus, there was no need for "undue burden" analysis or "investment-backed expectations" analysis. In fact, there was no need for a balancing test at all because the Court found, under a normal takings analysis, that no violation occurred. So to reach the correct result, the Court had to use a more "obvious" due process analysis.

3. *Dolan v. City of Tigard*¹³²

In *Dolan*, the owners of a hardware store in the Seattle area wanted to expand the store. Their store was located next to a stream, and the local zoning authority conditioned the granting of permission to expand on the Dolans granting a public easement for a bike path along the stream and dedicating a portion of their property that was near the river for conservation and wetland protection. The authority justified these requirements as necessary to ameliorate the harm that the increased

¹³⁰ 483 U.S. 825 (1987).

¹³¹ The public may well have already had the right to pass on the sand in front of the Nollans' house, and, in any case, the value of the easement was small, compared to the value of the lot, to say nothing of the value of the lot with the proposed large house on it.

¹³² 512 U.S. 374 (1994).

438 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36

traffic the larger store would cause and the increased run-off that paving their parking lot would cause.

Again, if balancing, the burden on the Dolans is not very large, compared to the benefits of being able to expand their store and install a modern parking lot. It is unlikely that a reasonable study of the impacts of the expansion would have resulted in any such haphazard findings as the lower court dealt with here. This case, under a due process analysis, would be a very factually dependent case. If the harm from the increased traffic and increased nonporous surface was actually significant, then the requirement that the Dolans grant the easements to the public would be fine. If the harm really is *de minimus*, then the required exactions would be overbearing, or irrational, and hence a violation of due process.

4. Lucas v. South Carolina Coastal Council¹³³

Taking the majority opinion's view of the facts in this case, the Lucases bought a beachfront lot intending to build a home on it. The lot was subject to a regulation that prohibited permanent structures seaward of a line determined by the historical "storm surge" line. After they bought the property, but before they began to develop it, new data showed that the line should be farther west, making their lot unbuildable. The Supreme Court decided that because "all" of the value of the land had been "taken," the Lucases were owed compensation under the Takings Clause.

This is the most problematic case under this Article's interpretation of the Takings Clause. Using the Takings Clause only for physical takings of property, this is not a Takings Clause case at all because there is no actual taking of any property, only a regulation of what the Lucases could do with their land. The question then becomes, as before, whether applying the regulation to their land was a denial of due process?

The regulation was reasonable. It makes quite good sense to forbid building structures where they will very likely be destroyed by the next hurricane that hits the coast. The Lucases were not "singled out," as the regulation applies to all beachfront landowners. Thus, there seems to be no violation of any of the normal due process requirements. But, the Lucases were substantially harmed by the regulation.

¹³³ 505 U.S. 1003 (1991).

In *Lucas* and similar cases, the Court's hidden substantive due process analysis is most obvious. The Court believes this is unfair and unduly burdensome. If one accepts the findings of the lower courts, the Lucases did not know this would happen. They invested nearly one million dollars in the land, assuming that they would be able to build on it. After the regulation was changed, their land was worthless. This is unfair, so it must be a denial of some fundamental right.

Because the government does not have the one million dollars,¹³⁴ nor does it have the title to the land,¹³⁵ nor can it use the land,¹³⁶ it has not taken anything physical. If the regulation is reasonable, but the Court believes that government should not be able to do this, the Court would presumably find the application of this regulation to the Lucases to be a denial of the right to develop land.

Where is this right to develop land to be found? Look at the language from *Lochner* interpreting the Due Process Clause:

In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the 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 to his personal liberty. . . .¹³⁷

If the Due Process Clause is the source of the right to develop land, then the Court should say so and abandon the notion of "regulatory takings."

5. *Loretto v. Teleprompter Manhattan CATV Corp.*¹³⁸

This is an easy, albeit disconcerting case. In *Loretto*, an apartment house owner in New York was forced to allow the use of the roof to string television cables. While the actual harm was very small,¹³⁹ there was nonetheless an actual taking of her land - about two square feet total

¹³⁴ Their seller does, if anyone does.

¹³⁵ The Lucases still do.

¹³⁶ Only the Lucases can, and they can still do anything any other landowner can do, except build seaward of the storm surge line.

¹³⁷ *Lochner v. New York*, 198 U.S. 45, 56 (1905).

¹³⁸ 458 U.S. 419 (1982).

¹³⁹ The "just compensation" was ultimately fixed at one dollar.

440 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36

in adding up the boxes for suspending the cable and the cable itself. The Court again showed that it understood that takings are different from "takings." As Michael Heller said: "Loretto . . . is the modern paradigm for analyzing regulations that abolish private ownership of a physical fragment." In *Loretto*, the Court evoked the inchoate intuitions of the thing-ownership metaphor to devise the ostensibly simple boundary rule that when a regulation results in "permanent physical occupation," a taking occurs "without regard to whether the action . . . has only minimal economic impact on the owner."¹⁴⁰

B. Minnesota Cases

1. Arcadia Development Corp. v. City of Bloomington¹⁴¹

The Court of Appeals in *Arcadia* rejected the suggestion by Arcadia that it should apply "takings" analysis to this case and suggested that any regulation that was valid under "takings" analysis would be valid under due process analysis. Under due process analysis, the court would decide the case the same, but without all the discussion dealing with the issue of why this was not a "taking."

2. In re the June 9, 2000 Fence Viewing Petition of Gary Bailey¹⁴²

In *Bailey*, the question of "total value" of the land and takings would be replaced with an analysis of the burden on the contributing land owners, balanced against the benefits that they and the rest of the nearby residents would gain. Keeping domestic deer and elk away from wild herds and from incursions into neighbors' land is of great benefit to the community. Thus, the law is clearly valid. The issue would then be whether it is unfair to the immediate neighbors to force them to contribute to the necessary fence. As long as such a domestic deer operation is lawful, and next door neighbors are benefited somewhat more directly than others, a burden on those next door neighbors would probably again be found to be valid.

¹⁴⁰ Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1203 (1999) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982)).

¹⁴¹ 552 N.W.2d 281 (Minn. Ct. App. 1996).

¹⁴² 626 N.W.2d 190 (Minn. Ct. App. 2001).

3. *Zeman v. City of Minneapolis*¹⁴³

Because the court agreed in *Zeman* that the application of the regulation to the apartment building owner was invalid, the Due Process Clause would simply forbid the state from imposing the sanction (revoking the rental license) with no question of damages for "takings." Notwithstanding an interesting discussion of *First English*, the court here did just that. In fact, the court dismissed the complaint for a temporary taking. Again, while the analysis would be different, the outcome of the case would not.

4. *Olsen v. City of Ironton*¹⁴⁴

Olsen provides more challenge to the Due Process Clause, and the outcome is much harder to project. Because the issue involves balancing the hardship to the owner versus the good to the public, analysis similar to that done under the *Penn Central*¹⁴⁵ rubric would be appropriate. However, how much of the same analysis and whether having some "substantial" value left would always move the court to uphold the regulation is unclear.

5. *Woodbury Place Partners v. City of Woodbury*¹⁴⁶

Assuming that the City of Woodbury presented a good public policy reason for a relatively short development moratorium, it is unlikely that such regulation would be a denial of due process as applied to any landowner subject to the moratorium. Thus, this case would have the same outcome, with much less discussion and little notice.

6. *Westling v. County of Mille Lacs*¹⁴⁷

The court in *Westling* "mixes up the discussion of the *Penn Central*¹⁴⁸ issues with issues relating to striking down a tax because it violates the Due Process Clause."¹⁴⁹ Without that confusion, the court would proceed directly to the issue of whether this tax violates the Due Process

¹⁴³ 552 N.W.2d 548 (Minn. 1996).

¹⁴⁴ No. CX-00-1371, 2001 WL 379010 (Minn. Ct. App. Apr. 17, 2001).

¹⁴⁵ See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

¹⁴⁶ 492 N.W.2d 258 (Minn. Ct. App. 1992).

¹⁴⁷ 581 N.W.2d 815 (Minn. 1998).

¹⁴⁸ *Penn Cent. Transp. Co.*, 438 U.S. at 104.

¹⁴⁹ *Westling*, 581 N.W.2d at 823 (discussing *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369 (1974)).

442 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36

Clause. Because they decided that this tax did not violate the Due Process Clause, the outcome would be the same.

VI. CONCLUSION

If the United States Supreme Court were to decide land use regulation cases under the Due Process Clause, it would have only little effect on their outcomes. Very few of the major United States Supreme Court cases would have different ultimate results, and none of the state cases listed would have a different result. The effect, however, would be to eliminate the confusion and illogic of the present "takings" jurisprudence. Clarity would return to land use law, and we would be better able to assess the Court's underlying reasons for its decisions.

As for *Palazzolo v. Rhode Island*,¹⁵⁰ the question of a due process claim would not depend on when one became an owner of the property. If the regulation were unreasonable, it would not be enforceable against anyone, no matter when they bought the property. If the government physically took the property, the owner would be due the compensation; there would not be anyone who could be in the position of getting the property after the government took the property. Thus, *Palazzolo* would not have been of any particular interest to the Supreme Court and would not add to the very confused state of "takings" law.

¹⁵⁰ 121 S. Ct. 2448 (2001).