PRIVATE PROPERTY WITHOUT *LOCHNER*: TOWARD A TAKINGS JURISPRUDENCE UNCORRUPTED BY SUBSTANTIVE DUE PROCESS

GLEN E. SUMMERS†

INTRODUCTION

The Fifth Amendment to the Constitution of the United States provides that "[n]o 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."[1] The two preceding clauses, commonly referred to respectively as the Due Process Clause and the Takings Clause, have long been the focus of an historic battle over the proper scope of constitutional protection of private property rights. The academic and jurisprudential debates over the proper meaning and functions of the two clauses have generated a voluminous body of literature and case law.[2] Yet despite all the spilled ink, prominent academics and jurists continue to confuse the distinct functions of the Due Process and Takings Clauses.[3]

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† A.B. 1991, University of California at Berkeley; J.D. Candidate 1994, University of Pennsylvania.

[1] U.S. CONST. amend. V. The portion of the quotation appearing before the semicolon shall, in accord with common parlance, hereinafter be referred to as the "Due Process Clause." The part of the quotation following the semicolon shall hereinafter be referred to as the "Takings Clause," although it has also been termed the "Eminent Domain Clause" and the "Just Compensation Clause" by some authors.

[2] Some of the more widely recognized discussions of the takings issue are: BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) [hereinafter EPSTEIN, TAKINGS]; John J. Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983); Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1; Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967) [hereinafter Michelman, *Just Compensation*]; Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) [hereinafter Sax, *Police Power*].

[3] *See* Frank I. Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1607 n.40 (1988) ("[J]udges and commentators have [not] always maintained a clear distinction between the 'due process' and 'takings' inquiries . . . ."); *see also* William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1081 (1980) (decrying the failure to give proper place to due process).

A principal thesis of this Comment is that the Due Process and Takings Clauses of the U.S. Constitution have quite distinct and independent functions. While at first glance this position might appear to be rather basic, the following analysis will

The failure of jurists and academics to keep the respective roles of the Due Process and Takings Clauses in proper perspective has contributed to what is best described as the "blending" of due process analysis into takings jurisprudence.[4] This Comment provides an historical explanation of the source of this "blending." It also examines the most significant instances of this "blending" of Due Process and Takings Clause analysis, and suggests that the public use limitation, the substantial relation test, and balancing tests are all out of place in the field of takings jurisprudence, for they do nothing more than resurrect principles of substantive due process long ago discredited as unworkable judicial usurpations of legislative power.[5] Moreover, this Comment suggests that all

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demonstrate that even distinguished constitutional scholars have failed to keep it in mind. Some scholars have even advanced the proposition that analysis under the Takings Clause should either be subsumed by, or made indistinguishable from, that under the Due Process Clause. For examples of such approaches, see FRANK R. STRONG, SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE 207 (1986) [hereinafter STRONG, DICHOTOMY] (encouraging Justice O'Connor to take "the ultimate intellectual step of fusing the clauses into an operational unity"); Randall T. Shepard, *Land Use Regulation in the Rehnquist Court: The Fifth Amendment and Judicial Intervention*, 38 CATH. U. L. REV. 847, 866-69 (1989) (assuming the fungibility of the two clauses by advocating use of the Due Process Clause rather than the Takings Clause as a means of challenging government regulation); Frank R. Strong, *On Placing Property Due Process Center Stage in Takings Jurisprudence*, 49 OHIO ST. L.J. 591 (1988) [hereinafter Strong, *Due Process*] (criticizing those who have "failed to grasp the genius of [Justice] Holmes" who properly supported the interconnection between takings and due process jurisprudence).

[4] *See* Stoebuck, *supra* note 3, at 1081. Professor Stoebuck describes "blending" in the following way:

> Many decisions strike down land-use regulations on the stated ground that they are "arbitrary, unreasonable, confiscatory, and void" or some similar phrase. Analysis of these words shows that "arbitrary" refers to a governmental act that lacks due process and is thus "void." "Confiscatory" is, of course, a code word for "taking." "Unreasonable" refers to acts that lack due process. . . . The best that can be said of decisions that blend due process and eminent domain concepts is that they do not carefully analyze the words; it is not reasoning but a substitute for reasoning—little more than surplusage. . . . [A] decision ostensibly based on such vacuous language is scarcely better than an arbitrary conclusion.

Id. (footnote omitted). Although I have borrowed the term "blending" from Professor Stoebuck, I use the term in a somewhat more expansive sense. In this work "blending" refers not only to the amalgamation of Due Process and Takings Clause language in unclear judicial opinions, but also to the more fundamentally problematic transplantation of whole forms of due process analysis into takings jurisprudence. I believe that the two problems are sufficiently interrelated that they should be treated together as a single phenomenon. To a certain extent, it has been the "blending" of due process and takings language in older judicial opinions which has led more recent scholars and jurists to mistakenly treat due process cases as Takings Clause cases.

[5] It is now academic that the substantive due process doctrine associated with

inquiry into either the "ends" or the "means-ends fit" of government regulation should only be conducted under the rubric of due process. Although heightened "ends" or "means-end" scrutiny may promise greater protection of private property rights,[6] it may also ultimately doom takings jurisprudence to the same fate as *Lochner*-style substantive due process.

While other commentators have identified the "blending" of Due Process and Takings Clause analysis, they have done little more than identify the phenomenon and note that "such mixtures of issues generally have been regarded as analytically untidy and problematic,"[7] or that "[c]onfusion over the proper role of substantive due process and over the relationship between due process and takings is a pervasive problem in judicial decisions and in scholarly writing."[8]

This Comment goes further in several respects. First, it identifies the forces that fostered this "blending" phenomenon. Second, it traces the case law and proves that, as an historical matter, several elements of modern takings jurisprudence were directly borrowed from due process cases. Third, it shows how

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Lochner was rejected by the Court in the 1930s. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152-54 & n.4 (1938) (employing the "rational relation" test); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding minimum wage legislation); Nebbia v. New York, 291 U.S. 502, 537 (1934) ("[A] state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare."). The most poignant criticism of substantive due process is probably Justice Holmes's dissent in *Lochner* itself. *See* Lochner v. New York, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).

[6] Property rights merit the same degree of protection as other forms of personal liberties, not only because they encourage efficient resource allocation, but because all other personal liberties are potentially threatened if the individual is denied the means or resources to exercise them. For a modern illustration of this view, see DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION 147, 246-47 (1993) (noting that a majority of the justices of the California Supreme Court "support the classically liberal notion . . . that property is a guarantor of privacy"). For a different view, see C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741 (1986). Baker criticizes the "most progressive members of the Court," for "arguing 'that the dichotomy between personal liberties and property rights is a false one.'" *Id.* at 742 n.2 (quoting Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972)). In defense of the "most progressive members of the Court," it should be noted that Judge Learned Hand believed that "[t]he right not to have property taken without just compensation has . . . the same constitutional dignity as . . . freedom of the press or freedom of speech." LEARNED HAND, THE BILL OF RIGHTS 52 (1964).

[7] Michelman, *supra* note 3, at 1607 n.40.

[8] Stoebuck, *supra* note 3, at 1081.

recent cases such as *Nollan v. California Coastal Commission*[9] and *Lucas v. South Carolina Coastal Council*[10] have perpetuated this problem. Finally, it demonstrates the true risks associated with this "blending"—principally that it (1) subjects takings jurisprudence to the same problems and criticisms which ultimately destroyed *Lochner*-style substantive due process,[11] and (2) diverts attention from the central question of what constitutes a "taking."

The diversion of attention from the core issue of what constitutes a "taking" is not without consequences. If a workable body of regulatory takings law is not developed within a reasonable period of time, courts and commentators will likely conclude that the application of the Takings Clause to anything but the outright exercise of eminent domain is too difficult and hopelessly unprincipled to demand judicial attention.[12]

Part I of this Comment provides a general overview of the development of takings jurisprudence, placing emphasis on the social and historical factors which sparked its development. The Section demonstrates that the late development of takings jurisprudence, against the background of a more mature substantive due process model, made takings jurisprudence highly susceptible to due

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[9] 483 U.S. 825 (1987).

[10] 112 S. Ct. 2886 (1992).

[11] Modern social theory almost uniformly rejects the premises of the *Lochner* era. *See* C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 944-45 (1983) (approving the Court's shift away from *Lochner*-style social theory). For a rejection of *Lochner* from a different perspective, see J. Clifford Wallace, *Interpreting the Constitution: The Case for Judicial Restraint*, 71 JUDICATURE 81, 83 (1987) (describing the noninterpretivist judicial approach as vague, subjective, and ill-suited for the formation of broad social policy).

[12] A significant number of commentators have already given up hope of crafting a novel doctrine to govern the issue of regulatory takings. Many have concluded that legislation is the only answer. *See, e.g.*, John J. Costonis, *"Fair" Compensation and the Accommodation of Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021, 1081 (1975) (arguing that legislative initiatives in the area of takings would serve the interests of the courts, regulatory authorities, and the private sector); Allison Dunham, Griggs v. Allegheny County *in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 63 (describing Supreme Court doctrine on the law of expropriation as a "crazy-quilt pattern"); Michelman, *Just Compensation*, *supra* note 2, at 1246-53 (explaining courts' inability to stake out limits of fair treatment and the need for legislatures to intervene); Arvo Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 2 (1971) (characterizing as confusing and incompatible judicial efforts to establish a test "for determining when police power measures impose constitutionally compensable losses"). Of course, while legislation can require compensation in cases in which the Constitution does not, legislation cannot reduce the constitutional requirements of the Takings Clause. *See* Stoebuck, *supra* note 3, at 1080 & n.98.

process influences. Part I culminates in a discussion of the landmark case of *Pennsylvania Coal Co. v. Mahon*,[13] and shows that Holmes's opinion for the Court recognized neither a public use limitation, nor any form of balancing test.

Part II identifies three examples of the blending of due process and takings analysis: (1) the public use limitation, (2) the substantial relationship test of *Nollan v. California Coastal Commission*, and (3) balancing. First, it demonstrates that the public use limitation was directly borrowed from due process, and that the cases usually cited as recognizing such a limitation were decided strictly on due process grounds. After addressing the continuing problems associated with the public use limitation and explaining that the requirement serves no purpose other than to confuse state courts, it asserts that the public use limitation should be abandoned altogether. Second, it argues that the substantial relationship test of *Nollan v. California Coastal Commission*[14] has only dubious support in the case law and is subject to a number of criticisms. In particular, it asserts that the substantial relationship test does nothing more than create an exception to the minimum rationality standard of due process. Third, Part II suggests that balancing fails as a takings methodology because (1) the regulated individual's interests are not in conflict with those of society, (2) it does not adequately reflect the framers' concern for fairness, and (3) it subjects takings jurisprudence to the criticisms of *Lochner* without addressing the central question of who should bear the costs of regulation.

Unlike Parts I and II, which are largely historical and retrospective in nature, Part III provides a more prospective discussion of the possible future of takings jurisprudence. First, it attempts to suggest a rationale for the substantial relationship test which can be reconciled both with the social norms inherent in the famous *Carolene Products* footnote and with the position advanced in this Comment that all review of the "means-end fit" of a regulation should be conducted under the rubric of due process. Second, Part III examines the Court's recent decision in *Lucas v. South Carolina Coastal Council*.[15] Although it applauds the opinion for its implicit rejection of balancing, it proposes that the test established by *Lucas* is less meaningful than one might hope. It also points to question-

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[13] 260 U.S. 393 (1922).
[14] 483 U.S. 825 (1987).
[15] 112 S. Ct. 2886 (1992).

able language in the opinion which detracts from the otherwise positive step it takes.

I. THE GENESIS OF A MUDDLED TAKINGS JURISPRUDENCE: THE SOURCES OF "BLENDING"

The following Section discusses the forces which fostered the blending of due process and takings analysis. Part A outlines the overarching social and legal developments which made takings jurisprudence susceptible to due process influences. Part B then demonstrates how the failure of early opinions, such as *Pennsylvania Coal Co. v. Mahon*, to adequately distinguish their due process analysis from their takings analysis has allowed later courts and observers to attribute due process tests to the Takings Clause.

A. *The Social and Legal Dynamics Which Made Takings Jurisprudence Susceptible to Due Process Influences*

Compared to other areas of constitutional law, most of takings jurisprudence is of relatively recent vintage. During the first century of the republic, the federal government acted more as land-grantor than land-grabber.[16] With a fairly sparse population and a vast expanse of western land yet to be settled, the federal government freely gave land to the railroads, homesteaders, and state governments.[17] Moreover, the scope of the federal government's regulatory activity remained remarkably small; it engaged in little regulation of land use.[18] Interestingly, the federal government did not even assert its own power of eminent domain until 1875.[19] In addition, the Takings Clause of the Fifth Amendment had no application to acts of state governments before the Fourteenth Amendment was ratified in 1868.[20] In this context, the Takings Clause of the Fifth Amendment received scant attention, for there

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[16] For a good general discussion of the various ways in which the federal government made grants of land, see ROBERT E. RIEGEL & ROBERT G. ATHEARN, AMERICA MOVES WEST 381-84 (5th ed. 1971).

[17] *See id.* at 381-84, 493-508.

[18] *See* FRED BOSSELMAN ET AL., THE TAKING ISSUE 114-15 (1973).

[19] *See* Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 599-600 & nn.2-3 (1949) [hereinafter Note, *The Public Use Limitation*].

[20] *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833) (holding that the Takings Clause is not applicable to state legislation).

seldom existed either the need or the opportunity for litigants to invoke it.[21]

In response to the social difficulties created by the industrial revolution and the rapid industrialization of the United States in the latter half of the nineteenth century, state governments began to take a more active role in the regulation of economic affairs, including the regulation of working hours and conditions under the ill-defined, but ever expansive, "police power."[22] Similarly, President Roosevelt's New Deal legislation catapulted the federal government to prominence in the field of socio-economic regulation. The federal courts, however, true to their conservative, counter-majoritarian tradition, and steeped in the political philosophy of John Locke and Adam Smith, resisted such assaults on economic freedom.[23] The courts raised the Due Process and Contract Clauses[24] of the United States Constitution as swords to strike down social welfare legislation and other forms of economic regulation.[25] Armed with the Due Process and Contract Clauses, courts found not only state wage and workday restrictions to be easy prey, but also thoroughly impeded the first New Deal programs.[26]

Stymied by the Court's invalidation of his New Deal programs, yet desperate to lead the nation out of the Great Depression,

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[21] *See* Note, *Taking Back Takings: A Coasean Approach to Regulation*, 106 HARV. L. REV. 914, 918 (1993).

[22] *See* Lochner v. New York, 198 U.S. 45, 63 (1905) (noting an increase in the regulation of trade and working conditions). For an historic discussion of the nature of the police power, see ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 3 (1904) (stating that the police power "aims directly to secure and promote the public welfare").

[23] As one scholar has explained: "By forging constitutional doctrines under the Contracts Clause . . . giving constitutional status to "vested rights," this line of intellectual development sought basically to limit the ability of the legal system—more specifically, of the legislature—to bring about redistributions of wealth." MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 255 (1977).

[24] The Contract Clause states that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10. Unlike the Due Process and Takings Clauses, the Contract Clause applied to acts of state governments before the ratification of the Fourteenth Amendment. It was designed principally to protect creditors from politically popular debtor relief laws, and was interpreted by the Court to do that, as well as to protect private property in various other manners. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 613-28 (2d ed. 1988).

[25] *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 150-54 (4th ed. 1991).

[26] *See id.*; *see also* ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 86-235 (1941) (providing a detailed account of the crisis created by the Court's opposition to the New Deal); WILLIAM LASSER, THE LIMITS OF JUDICIAL POWER 111-60 (1988) (same).

President Roosevelt threatened to increase the size of the Supreme Court from nine justices to as many as fifteen in order to achieve a sympathetic majority.[27] Roosevelt's "court-packing" scheme eventually failed, largely because the Court quickly came to reject the doctrine of substantive due process in the economic context (and the analogous use of the Contract Clause).[28]

Thanks principally to its relative obscurity and quiet history, the Takings Clause emerged from this doctrinal shift, and reversal of judicial philosophy, essentially unscathed. With the gradual increase in the use of zoning and other forms of land use restrictions, however, the Takings Clause became a more important tool for property owners anxious to forestall government intervention. The importance of the Takings Clause was further enhanced by the absence of the Due Process and Contract Clauses as tools to invalidate economic legislation.[29] Regulations which might once have been challenged primarily as violating principles of substantive due process could still be challenged under the Takings Clause. Indeed, creative litigators soon recognized that a variety of economic regulations could be likened to a taking of property.[30]

With the demise of *Lochner*-style substantive due process in the 1930s,[31] the Takings Clause gradually emerged as the only remaining tool for invalidating regulations which interfered with property rights.[32] Unlike other constitutional doctrines which had been

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[27] *See* LASSER, *supra* note 26, at 153-54 (discussing Roosevelt's court-packing plan).

[28] Until the late nineteenth century, the Contract Clause was actually the "principal provision the Court used to void legislation that infringed on private property rights." NOWAK & ROTUNDA, *supra* note 25, at 394; *see also* TRIBE, *supra* note 24, at 588 (noting that in the nineteenth century "the contract clause of article I, § 10, was soon located as the centerpiece of the Constitution's protective armor"). Although the scope of the Due Process and Contract Clauses are different, the level of scrutiny accorded each has, in large part, developed similarly. *See* NOWAK & ROTUNDA, *supra* note 25, at 394-409.

[29] *See* TRIBE, *supra* note 24, at 587 (explaining that "[w]ith the demise of the *Lochner* era . . . there began a search for alternative methods of protecting individuals from majoritarian oppression").

Professor Tribe suggests that "two sets of restraints on governmental power" which had "antedated and informed the *Lochner* era" continued to retain vitality in the post-*Lochner* era. *Id.* He identifies these restraints as the norms of "regularity" and "repose," the former "expressed primarily through the ex post facto clauses, the bill of attainder clauses, and the procedural due process requirement" and the later reflected in takings jurisprudence. *Id.*

[30] *See infra* notes 145-47 and accompanying text.

[31] *See supra* note 5 and accompanying text.

[32] While attempts have been made to use the Equal Protection Clause and certain other constitutional provisions to invalidate economic regulation, they have generally

subject to frequent litigation and judicial interpretation, takings jurisprudence was largely undeveloped. The Supreme Court had addressed the regulatory takings problem in only a handful of cases. In fact, only two opinions had actually attempted to establish generally applicable principles of takings clause jurisprudence at the time substantive due process met its demise: (1) *Mugler v. Kansas*,[33] holding that a regulation enacted pursuant to the police power is never a taking;[34] and (2) *Pennsylvania Coal Co. v. Mahon*,[35] holding that a regulation constitutes a taking if it "goes too far."[36]

While the Court had addressed the constitutionality of comprehensive zoning in *Village of Euclid v. Ambler Realty, Co.*,[37] *Zahn v. Board of Public Works*,[38] *Gorieb v. Fox*,[39] *Nectow v. City of Cambridge*,[40] and *Washington ex rel. Seattle Title Trust Co. v. Roberge*,[41] these cases relied almost exclusively on established principles of nuisance doctrine and *Lochner*-style substantive due process.[42] Not only did they fail to contribute in a meaningful way to the development of a comprehensive regulatory takings doctrine, but they also served to confuse due process and takings analysis.[43]

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met with little success. *See, e.g.*, Exxon Corp. v. Eagerton, 462 U.S. 176, 195 (1983) (rejecting an equal protection challenge because the provisions do not adversely affect a fundamental interest nor are based on a suspect criterion); Texaco, Inc. v. Short, 454 U.S. 516, 540 (1982) ("Since the exception furthers a legitimate statutory purpose and has no adverse impact on persons like the appellants who own fewer mineral interests, the exception does not violate the Equal Protection Clause . . . ."); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981) ("The Equal Protection Clause does not deny the State of Minnesota the authority to ban one type of milk container conceded to cause environmental problems, merely because another type, already established in the market, is permitted to continue in use.").

[33] 123 U.S. 623 (1887).

[34] *See id.* at 668-69.

[35] 260 U.S. 393 (1922).

[36] *Id.* at 415.

[37] 272 U.S. 365 (1926) (upholding constitutionality of comprehensive zoning).

[38] 274 U.S. 325 (1927) (upholding constitutionality of comprehensive zoning scheme).

[39] 274 U.S. 603 (1927) (upholding set-back ordinances).

[40] 277 U.S. 183 (1928) (invalidating zoning measures as violative of the plaintiff's due process rights).

[41] 278 U.S. 116 (1928) (invalidating zoning measure requiring consent of neighbors as precondition of construction).

[42] *See* Robert A. Williams, Jr., *Legal Discourse, Social Vision and the Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in* First English Lutheran Church *and* Nollan, 59 U. COLO. L. REV. 427, 440-46 (1988) (explaining that the cases above were decided under principles of substantive due process and nuisance law).

[43] *See* Moore v. City of East Cleveland, 431 U.S. 494, 514 (1977) (Stevens, J.,

Thus, takings jurisprudence was forced to develop against the background of a fully-developed, albeit repudiated, substantive due process model. Indeed, the jurisprudential vacuum that was the Takings Clause could not avoid being filled in part by principles of due process analysis. Those who brought claims based on the Takings Clause undoubtedly desired the same results that might have been achieved in an earlier day by invoking the Due Process Clause. It seems logical that lawyers and jurists would borrow what they could, either consciously or unconsciously, from the forms of analysis with which they were already familiar.

B. *The Enlightened Path Not Followed: The Misunderstood Holding of* Pennsylvania Coal Co. v. Mahon

In 1922, Oliver Wendell Holmes's opinion for the Court in *Pennsylvania Coal Co. v. Mahon*[44] established the principle that a regulation limiting the use of property that "goes too far . . . will be recognized as a taking"[45] requiring just compensation in accordance with the Takings Clause of the Fifth Amendment.[46] *Mahon* therefore stands as a seminal case establishing regulatory takings analysis.[47] As such, it is correctly looked to as a fundamental source of takings jurisprudence.[48] Holmes's opinion in *Mahon*, however, has largely been misread by modern commentators.[49] Indeed, its misinterpretation may have "generated most of the current confusion about takings."[50]

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concurring) (explaining that *Euclid* "fused the two express constitutional restrictions . . . into a single standard").

[44] 260 U.S. 393 (1922).

[45] *Id.* at 415.

[46] The Takings Clause also applies to the states through the Fourteenth Amendment. Such was the case in *Mahon*. *See id.*

[47] Holmes's opinion in *Mahon* is generally credited with establishing what has come to be referred to as the "diminution in value test." *See, e.g.*, Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 562 (1984).

[48] One scholar has described Holmes's opinion in *Mahon* as "the most important and most mysterious writing in takings law." ACKERMAN, *supra* note 2, at 156. Interpreting it has been compared to "scaling Everest." *Id.*

[49] *See* Strong, *Due Process*, *supra* note 3, at 591 ("[C]ritics, on and off the High Bench, have consistently failed to grasp the genius of Holmes in his masterful exposition of the constitutional principles that controlled the decision.")

[50] Rose, *supra* note 47, at 562. Although some commentators have criticized *Mahon* for establishing what they see as a hopelessly unworkable diminution in value test, *see, e.g.*, Stoebuck, *supra* note 3, at 1063 ("[T]he 'too far' test is inescapably vague."), commentators have, with few exceptions, largely ignored other problems

In *Mahon*, the Pennsylvania Coal Company challenged the constitutionality of the Kohler Act, a 1921 Pennsylvania statute that prohibited "the mining of anthracite coal in such [a] way as to cause the subsidence of, among other things, any structure used as a human habitation."[51] Prior to the enactment of the Kohler Act, the Pennsylvania Coal Company had sold the surface rights to various parcels of land while expressly reserving not only the subsurface mineral rights, but the right to support of the surface as well.[52]

At the time, Pennsylvania recognized three separate estates in land: (1) the right to the surface; (2) the right to the subsurface minerals; and (3) the right to subjacent support of the surface.[53] Thus, the Kohler Act effectively transferred what was previously recognized as a distinct estate in land, the right to subjacent support, from the Pennsylvania Coal Company to the owners of the surface.[54]

Although *Mahon* is usually treated simply as a Takings Clause case,[55] the Pennsylvania Coal Company actually challenged the Kohler Act on three distinct grounds, alleging: (1) that the Kohler Act violated the Contract Clause; (2) that the Act violated the Due Process Clause; and (3) that the Kohler Act effected a "taking" requiring compensation.[56] Although commentators often treat the

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generated by Holmes's opinion in *Mahon*. In particular, the fact that it does not explain clearly which clause(s) were responsible for invalidating the Kohler Act and what the precise test for each should be.

[51] *Mahon*, 260 U.S. at 412-13. It is worth noting that the Kohler Act exempted "land where the surface is owned by the owner of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person." *Id.* at 413.

[52] *See id.* at 412. The original deeds expressly provided that "the grantee takes the premises with the risk, and waives all claim for damages that may arise from mining out the coal." *Id.*

[53] *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1060 (2d ed. 1988); E.F. Roberts, *Mining with Mr. Justice Holmes*, 39 VAND. L. REV. 287, 287-88 (1986); Rose, *supra* note 47, at 563.

[54] *See Mahon*, 260 U.S. at 414. As the Court explained, "[The Kohler Act] purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs." *Id.*

[55] *See, e.g.*, DUKEMINIER & KRIER, *supra* note 53, at 1060-61 (discussing the *Mahon* takings test).

[56] *See Mahon*, 260 U.S. at 394-404. Part I of the plaintiff's brief states that "[t]he statute impairs the obligation of the contract." *Id.* at 394. Part II alleges that "[t]he statute takes the property of the Coal Company without due process of law." *Id.* at 395. Part III and Part IV respectively assert that the regulation is neither "a bona fide exercise of the police power," *id.* at 396, nor "a valid exercise of the right of eminent

entirety of the opinion as simply an exposition on the Takings Clause, a close reading of the opinion suggests that it was roughly organized by Holmes into two fairly distinct parts, the first addressing the Due Process and Contract Clause challenges and the second addressing the Takings Clause argument.

In the first part of the opinion, Holmes postulated the following: "If we were called upon to deal with the plaintiffs' position alone, we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights."[57] Commentators have seized upon this language as evidence that Holmes intended to establish some sort of a balancing test, weighing the value of the public interest advanced by the regulation against the value of the private property taken or destroyed by the regulation.[58] This language is also used to support the proposition that the Takings Clause impliedly forbids the taking of private property for any use other than public use—that is, to take property merely for the private benefit of another.[59] What some observers have failed to understand, however, is that these comments were made in the context of a general discussion of the validity of the Kohler Act, not under the Takings Clause, but under the Due Process and Contract Clauses.[60] While Holmes had specifically made reference to the

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domain" which can only be accomplished with just compensation. *Id.* at 404.

[57] *Id.* at 414.

[58] *See, e.g.*, DUKEMINIER & KRIER, *supra* note 53, at 1061.

[59] *See, e.g., id.* at 991 ("The Fifth Amendment's mention of 'public use' [in the Takings Clause] is read to mean that property may be taken *only* for such uses . . . ."); Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 205 (1978) ("[C]ourts have universally read [the Takings Clause] as a proscription against takings for a private purpose.").

A noteworthy example of the application of this misunderstanding can be found in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987). In *Keystone*, the Court attempted to distinguish the case, though factually identical to *Mahon*, by asserting that "important public interests are served" by the regulation. *Id.* at 485. Recognizing that they were walking on very thin ice, however, the Court went on to argue in the alternative that "petitioners have also failed to make a showing of diminution of value sufficient to satisfy the test set forth in *Pennsylvania Coal* . . . ." Id. at 492-93. The *Keystone* Court, however, was somewhat disingenuous in suggesting that a land use regulation would survive scrutiny under the Takings Clause merely by satisfying the public use requirement. Even if the reference to "public use" in the Takings Clause does establish a requirement that a regulation be enacted for the benefit of the general public, making the public use limitation the entire takings test controverts the true import of the Takings Clause.

[60] This is confirmed by Holmes's comment that the implied limitation police power places on the enjoyment of property rights "must have its limits, or the contract and due process clauses are gone." *Mahon*, 260 U.S. at 413. It is conceivable

Due Process and Contract Clauses within the immediately preceding discussion, he had neither mentioned, nor impliedly invoked the language of the Takings Clause.[61]

As indicated, Holmes's opinion in *Mahon* was organized into two distinct parts. The first part of the opinion, culminating in the statement that "the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights,"[62] merely discussed the general failure of the Kohler Act to pass constitutional muster under the Due Process and Contract Clauses for want of an overriding public interest.[63] The first part of the opinion did not establish a "public use requirement" under the Takings Clause;[64] it simply held that the statute was not constitutionally permitted under the Due Process and Contract Clauses. Such analysis was required, since at the time these clauses had been held to provide substantive protection of property rights that could only be overcome by the advancement of a more weighty public interest.[65] As one distinguished constitu-

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that Holmes considered the Takings Clause to be part of the Due Process Clause and was therefore referring to it in the first part of the opinion as well. Such a conclusion, however, is belied by the fact that Holmes, later in the opinion, specifically referred to the language of the Takings Clause as "[t]he protection of private property in the Fifth Amendment," *id.* at 415, rather than simply referring to it as a part of the Due Process Clause.

[61] *See id.* at 412-14.

[62] *Id.* at 414.

[63] The belief that the Court should defer to the legislature's determination of what constitutes a legitimate public interest had not yet become dominant in American jurisprudence. When *Mahon* was decided in 1922, the nondeferential substantive due process analysis of Lochner v. New York, 198 U.S. 45 (1905) (invalidating regulation of bakers' working hours), was still controlling, Holmes's vigorous dissent in *Lochner* notwithstanding. It was not until 1934 that the Court began to reject the *Lochner* approach and adopt a more deferential standard. *See supra* note 5.

[64] Although the Court had previously held that takings for private use are forbidden by the Fourteenth Amendment, *see, e.g.*, Hairston v. Danville & W. Ry., 208 U.S. 598, 605 (1908), the Court had also specifically noted that the Takings Clause was not directly applicable to the states either of its own force or through the Fourteenth Amendment. *See id.* at 607. Indeed, the language of the Takings Clause had been purposefully omitted from the Fourteenth Amendment. *See* Davidson v. New Orleans, 96 U.S. 97, 105 (1877) ("If private property be taken [by a state] for public uses without just compensation, it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition in the fifth amendment with the [Due Process Clause], was left out . . . .").

[65] *See* Lawton v. Steele, 152 U.S. 133 (1894), where the Court stated:

> [To satisfy due process] it must appear . . . that the interests of the public generally, as distinguished from those of a particular class, require such interference. . . . In other words, [the legislature's] determination as to what

tional scholar of the period explained:

> To take property for other than a public purpose; to take, for instance, the property of one citizen and transfer it to another, would be a deprivation thereof *without due process of law*; and such a proceeding is equally unconstitutional when the appropriation is accompanied by full compensation. . . . For, under our Constitution, the State is incapable of itself interfering or of conferring any right to interfere with private property unless it is needed for public objects. . . .
> . . . [I]t devolves upon the courts to declare ultimately whether or not the appropriation is for a public purpose.[66]

Another treatise author wrote in 1909:

> It is . . . well settled that a taking for private use . . . is a deprivation of property without due process of law, and if a State attempts to authorize such a taking, and the owner, for any reason, cannot successfully invoke the [Takings Clause] the broad protection of the due process clause comes into play.[67]

Considering that a regulation challenged under the substantive component of the Due Process Clause had to advance the public interest in order to pass constitutional scrutiny,[68] a corollary public use requirement under the Takings Clause would have been merely duplicative. Indeed, it is hard to imagine that Holmes would have

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> is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.

Id. at 137.

[66] LUCIUS P. MCGEHEE, DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTION 255-56 (1906) (emphasis added) (footnotes omitted). McGehee was a Professor of Law at the University of North Carolina as well as an Associate Editor of the American and English Encyclopedia of Law, Second Edition. His comments appear to reflect the prevalent view of the time. Indeed, they substantially undermine the assertion made by Professor Strong that "historically it has been substantive due process that has drawn the line between taking and nontaking." STRONG, DICHOTOMY, *supra* note 3, at 205. Strong asserts that only those regulations which violate substantive due process require compensation. *See id.* ("[T]he Taking Clause simply dictates what must ensue when a taking has been found. It is necessary to look [to the Due Process Clause] to determine whether there has been a taking."). McGehee's statements, however, prove that the law has always been that a regulation which violates due process is void, regardless of whether it is compensated.

[67] PHILIP NICHOLS, THE POWER OF EMINENT DOMAIN: A TREATISE ON THE CONSTITUTIONAL PRINCIPLES WHICH AFFECT THE TAKING OF PROPERTY FOR PUBLIC USE § 31, at 33 (1909). The author continues by noting that: "Appeal to the [Due Process Clause] has been found necessary in several instances. It was made several times in States which had not adopted the [Takings Clause], and the due process clause in the State Constitution was held to carry the necessary protection." *Id.*

[68] *See supra* notes 65-67 and accompanying text.

wanted to establish another source of the very same judicial inquiry that he had opposed in his *Lochner* dissent.[69] Even if Holmes had begrudgingly come to accept the Court's approach in *Lochner* by the time of *Mahon*, it is highly doubtful that he would have desired to create another tool for that superlegislative inquiry.

Commentators have suggested that what they perceive to be the rather vague and general treatment of the Takings Clause[70] is simply a manifestation of the "deep difficulties"[71] the case presented for Justice Holmes.[72] Holmes, however, apparently had little difficulty with the case, and made little, if any, effort to provide a comprehensive exposition on the meaning of the Takings Clause.[73] Indeed, evidence suggests that although Holmes strongly believed his decision to be just,[74] the opinion may have been "dashed off in a great hurry."[75]

Even if Holmes perceived what we now refer to as the Takings Clause to be merely part of what he called the "Due Process Clause,"[76] it is highly unlikely that it was the language of what we now refer to as the Takings Clause which he found to establish the public use requirement.[77] As Holmes states later in the opinion, "[t]he protection of private property in the Fifth Amendment *presupposes that it is wanted for public use*, but provides that it shall

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[69] *See* Lochner v. New York, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).

[70] Note that commentators have erroneously perceived Holmes's balancing language and discussion of the lack of a public interest as part of his treatment of the Takings Clause. When they are correctly understood merely as part of a separate treatment of the case under due process, the remaining treatment of the takings can be seen as a rather simple expression of the "diminution in value test."

[71] ACKERMAN, *supra* note 2, at 163.

[72] *See id.* at 156-65.

[73] With the exception of the establishment of the "diminution in value test," Holmes's opinion in *Mahon* merely parallels the argument made in the brief for the plaintiff in error. *See supra* note 56.

[74] *See* 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, at 109 (Mark D. Howe ed. 1941) (stating that "the public only got on to this land by paying for it and . . . if they saw fit to pay only for a surface right they can't enlarge it because they need it now any more than they could have taken the right of being there in the first place").

[75] EPSTEIN, TAKINGS, *supra* note 2, at 63 n.2.

[76] *Mahon*, 260 U.S. at 413.

[77] Although Holmes's dissent in *Lochner* demonstrates that he personally believed in a more deferential standard of review than that employed by the court at the time, *see* Lochner v. New York, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting), it does not mean either that the legislation would have survived scrutiny under what he felt to be the properly deferential standard, or that he was so stubborn as to refuse to apply the standard established by the Court over his objection.

not be taken for such use without compensation."[78] The only grounds upon which Holmes could have confidently believed that the Takings Clause "presupposes," (i.e., "assumes") rather than "requires," a public use is the conviction that the Due Process Clause, either through its procedural or substantive component, independently bars governmental acts which do not serve the public interest.[79]

The significance of the specific reference to "public use" in the Takings Clause is not meant hereby to be diminished. Indeed, it communicates the view, undoubtedly held both by the framers of the Constitution and the *Mahon* Court, that the Constitution permits no governmental action inconsistent with the rule of law or enacted for the personal aggrandizement of a preferred group.[80] The specific reference to "public use" in the Takings Clause certainly implies that government cannot take property for private use, but it does not necessarily imply that the protection is provided by the Takings Clause. Rather, all it demonstrates is that the framers believed that the Due Process Clause—whether or not they believed due process to encompass substantive as well as procedural rights—would guarantee that government act only in the "public" interest.

Only after having addressed the Due Process and Contract Clause challenges in the first half of the opinion, and having concluded that the statute was unconstitutional for want of a sufficiently compelling public interest, did Holmes turn to the more novel question of whether a regulation can so deprive the owner of value as to essentially constitute a "taking" requiring compensation.[81] His analysis of the Takings Clause issue proceeds from the

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[78] *Mahon*, 260 U.S. at 415 (emphasis added).

[79] Such a view would have been fully consistent with the jurisprudence of the time. *See supra* notes 65-67 and accompanying text.

[80] *See* MCGEHEE, *supra* note 66, at 255, 271 (asserting that transfer of property from one private citizen to another is a violation of due process); *see also* Lawton v. Steele, 152 U.S. 133, 137 (1894) (finding that interests must be of the public, not of a particular class). One of the principal concerns which guided the framers in the design of the Constitution was the desire "to break and control the violence of faction." THE FEDERALIST NO. 10, at 41 (James Madison) (Max Beloff ed., 1987). Indeed, the framers recognized that "the most common and durable source of factions has been the various and unequal distribution of property," and that "[t]hose who hold, and those who are without property, have ever formed distinct interests in society." *Id.* at 43.

[81] Holmes's discussion of the Due Process and Contract Clauses ends with the conclusion that "the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights."

assumption that the regulation is warranted by a sufficiently compelling public interest.[82] In his discussion of the Takings Clause, Holmes emphasized that private property could "not be taken for [public] use without compensation,"[83] for it was his concern that "[w]e are in danger of forgetting that 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."[84] Holmes's language makes clear that the Takings Clause bars government actions which are deemed "takings" regardless of the existence of a public interest of the greatest magnitude. As he asserts in the final paragraph of the opinion,

> [w]e 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. But the question at bottom is upon whom the loss of the changes desired should fall.[85]

The foregoing analysis suggests that Holmes's opinion in *Mahon* was intended neither to establish a public use requirement nor to establish any form of balancing test under the Takings Clause. Although the language in the first part of the opinion has been interpreted to the contrary, a more compelling argument can be made that the first part of the opinion addressed only Due Process and Contract Clause analysis.[86] Regardless of what type of analysis

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Mahon, 260 U.S. at 414. After reaching that conclusion, Holmes embarks upon a discussion of the Takings Clause and makes no further reference to the Due Process Clause, the Contract Clause, or anything else resembling a public use requirement or balancing test. *See id.* at 414-16. The change in Holmes's subject of discussion is marked by a transitional paragraph which reads:

> But the case has been treated as one in which the general validity of the act should be discussed. The Attorney General of the state, the city of Scranton, and the representatives of other extensive interests, were allowed to take part in the argument below, and have submitted their contentions here. It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain.

Id. at 414.

[82] *See id.* at 415.

[83] *Id.* at 415.

[84] *Id.* at 416.

[85] *Id.*

[86] If all of the plausible interpretations of Holmes's opinion in *Mahon* were reduced to equations, they would look as follows:

1) No $I = T$
2) $I < P = T$

Holmes actually sought to establish in *Mahon*, it is clear that he failed to the extent that the opinion was unable to clearly settle even the most general principles of takings jurisprudence. Its lack of clarity, if nothing else, has contributed to the subsequent resurrection of elements of substantive due process.

II. THE MANIFESTATIONS OF THE BLENDING PHENOMENON

The desire to achieve the same results once obtained by resort to substantive due process gradually led the Court to embrace several tests that had once been employed under the rubric of due process. The principal manifestations of this blending phenomenon include the public use requirement, balancing, and the substantial relationship test of *Nollan v. California Coastal Commission*. The following Section discusses each of these in turn, explaining their illegitimate genealogy, discussing their flaws, and demonstrating how they threaten the long-term vitality of takings jurisprudence as a guarantor of private property rights.

A. *Ends Analysis: The Public Use Requirement*

Whether or not *Mahon* endorsed or employed such a doctrine, the principle that the reference to "public use" in the Takings Clause implicitly forbids takings for other than public use has become well accepted in takings jurisprudence.[87] The following

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3) $I < P$, or No $I = T$
4) $P > X = T$
5) $P > X$, or No $I = T$
6) $P > X$, or $I < P = T$

I = public interest advanced by regulation
P = value of private property rights destroyed by regulation
X = threshold at which a regulation constitutes a "taking"
T = "taking"

The foregoing analysis suggests that equation number four is the only correct interpretation of Holmes's opinion in *Mahon*, for only it contains neither a public use requirement nor a balancing test. The test it does contain is the only true legacy of Holmes's opinion in *Mahon*, the so-called "diminution in value test." *See supra* note 47.

I submit that Holmes would maintain that the absence of a valid public interest (equation 1) would prove fatal under the Due Process Clause, even though it would not under the Takings Clause.

The equations in this note were devised by Professor Frank I. Goodman of the University of Pennsylvania Law School and are printed with his permission.

[87] As Professor Merrill explains:

> American courts have long construed [the reference to "public use" in the Takings Clause] to mean that some showing of "publicness" is a condition

analysis demonstrates, however, that the historic foundations upon which the public use requirement has been justified are flawed. The cases cited as establishing the public use requirement were actually based on principles of natural law[88] and substantive due process[89] rather than the language of the Takings Clause. Although they have since been misinterpreted to be takings cases, such cases were never intended to stand for the proposition that the Takings Clause establishes a public use requirement. Moreover, the public use requirement serves no practical purpose in contemporary takings jurisprudence.[90] Yet while the public use requirement, according

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> precedent to a legitimate exercise of the power of eminent domain. Thus, when a proposed condemnation of property lacks the appropriate public quality, the taking is deemed to be unconstitutional and can be enjoined.

Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 61 (1986); *see also* DUKEMINIER, *supra* note 53, at 991 (stating that the prevailing view is that property may be taken only for "public use"); GERALD GUNTHER, CONSTITUTIONAL LAW 485-87 (11th ed. 1985) (arguing that the modern Court interprets "public use" broadly).

[88] *See infra* notes 94-107 and accompanying text.

[89] *See infra* notes 113-24 and accompanying text.

[90] The level of review demanded by the public use requirement was significantly diminished by Berman v. Parker, 348 U.S. 26, 32-34 (1954), and was essentially equated with the minimum rationality review of due process by Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 239-43 (1984). In *Berman*, the Court held that the legislature is "the main guardian of the public needs," and that the judiciary's role in "determining whether that power is being exercised for a public purpose is an extremely narrow one." *Berman*, 348 U.S. at 32. For further evidence of the great flexibility of the public use requirement, see Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 458-60 (Mich. 1981) (holding that the condemnation of land to convey it to General Motors as a factory cite had a sufficiently public purpose because it would benefit the community by creating jobs and tax revenues); City of Oakland v. Oakland Raiders, 646 P.2d 835, 841-44 (Cal. 1982) (holding that property rights in a professional football team are a legitimate subject for an exercise of eminent domain).

While I believe that Professor Merrill agrees with my characterization of the public use limitation as being devoid of practical significance because of its reliance on ends analysis, Merrill suggests that new life could be breathed into the public use limitation by transforming it into a form of means analysis. *See* Merrill, *supra* note 87, at 66-74. Merrill would recast the inquiry of the public use limitation from one which asks whether the object sought by the government act is legitimate to one which asks whether, assuming that the government end is legitimate, the use of eminent domain as a means of accomplishing that end is permissible. In defense of this reformulation of the public use requirement, Merrill suggests that means analysis is "more narrowly focused and judicially manageable" than examination of the ends of government action. *Id.* at 67. Unfortunately, Merrill's assumption that means analysis is somehow better than ends analysis is thoroughly indefensible. For the courts to independently determine the necessity or desirability of the use of eminent domain would require a fact-intensive inquiry into the feasibility of the use of other techniques, such as private bargaining in every case, and would thereby both open the

to most observers, is a "dead letter,"[91] it continues to serve as a source of confusion and redundancy, particularly in state courts.[92]

1. The Illegitimate Pedigree of the Public Use Requirement

The modern public use requirement has a long and mysterious history. It was not born suddenly in some landmark opinion of the High Court; rather, it has evolved slowly over time, waxing and waning with the winds of political philosophy and practical necessity.[93]

The first discernible roots of the public use requirement did not rely on the specific language of the Constitution. Rather, they were based on principles of "natural law"[94] and the "fundamental maxims of a free government."[95] In one of the earliest cases to which the public use requirement can be traced, *Wilkinson v. Leland*,[96] the Supreme Court stated:

> The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming, that the power to violate and disregard them; a power so repugnant to the common principles of justice and civil liberty; lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being . . . . We know of no case, in which a legislative act to transfer the property of *A.* to *B.* without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just

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gates to needless litigation and place the courts in a role for which they are poorly equipped. *See* J. Clifford Wallace, *The Jurisprudence of Judicial Restraint, A Return to the Moorings*, 50 GEO. WASH. L. REV. 1, 6 (1981). It would also place the courts in the position of second-guessing rational policy choices made by the other branches of government, and would thereby undermine the scheme of separation of powers. *See id.* at 8. The Constitution empowers the courts to independently evaluate neither the desirability of the aims of legislative action, nor the methods chosen to effectuate those aims, in the absence of a constitutional mandate to the contrary.

[91] Merrill, *supra* note 87, at 61.

[92] *See infra* notes 149-51 and accompanying text.

[93] *See generally* Note, *The Public Use Limitation*, *supra* note 19 (describing the development of the public use doctrine in state and federal courts).

[94] *Id.* at 600.

[95] Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657 (1829).

[96] *See id.* at 657.

> principles, by every judicial tribunal in which it has been attempted to be enforced.[97]

Without a reference to either the Due Process Clause or the Takings Clause, the Court held in *Wilkinson* that it was beyond the power of a state legislature to take property from one person merely to give it to another.[98] It is important to note that *Wilkinson* invalidated a Rhode Island statute which essentially had the effect of transferring property from one person to another, despite the fact that the Fourteenth Amendment had not yet even been ratified.[99] Moreover, the Fifth Amendment has always been understood to apply only to the federal government.[100] Thus, in *Wilkinson* a public use requirement was found to exist notwithstanding the absence of any directly applicable textual support in the Constitution.

Though it may shock our constitutional scruples today, what the Supreme Court did in *Wilkinson* was common practice in the state courts of the time.[101] Even when state constitutions did contain express constitutional provisions upon which a public use requirement could be based, state courts generally preferred to rely instead on principles of political philosophy and natural law.[102] Thus, the

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[97] *Id.* at 657-58.

[98] *See id.*

[99] *Wilkinson* was decided in 1829, 39 years before the Fourteenth Amendment was ratified in 1868.

[100] *See* Thorington v. Montgomery, 147 U.S. 490, 492 (1893) ("The Fifth Amendment operates exclusively in restriction of Federal power, and has no application to the States."); Spies v. Illinois, 123 U.S. 131, 166 (1887) ("[T]he first ten 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.").

[101] It is important to recall that until the Fourteenth Amendment was ratified, there was no provision in the federal Constitution prohibiting the states from taking property, even for private use. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (holding that the Takings Clause is not applicable to state legislatures). Moreover, the federal government did not assert its own power of eminent domain in federal court until 1875. *See* Note, *The Public Use Limitation*, *supra* note 19, at 599 & n.3. Thus, most of the earliest cases dealing with what we now call "takings" were based on state constitutional law. *See id.* at 599-600 & nn.2-3.

[102] *See* Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 616 (1940) [hereinafter Nichols, *The Meaning of Public Use*]; Note, *The Public Use Limitation*, *supra* note 19, at 600; *see also* 1 LEWIS, THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 10, at 21 (3d ed. 1909) (discussing law of eminent domain as a settled principle of universal law); 1 PHILIP NICHOLS, THE LAW OF EMINENT DOMAIN 118-19 (2d ed. 1917) [hereinafter NICHOLS, THE LAW] (treating the role of "natural justice" in takings law); *cf.* J.A.C. Grant, *The "Higher Law" Background of Eminent Domain*, 6 WIS. L. REV. 67, 70-71 (1931) (noting that in states without "takings" provisions, natural law was applied).

public use requirement was not at first extrapolated from the language of the Fifth Amendment, the Fourteenth Amendment, or even from analogous provisions of the constitutions of the several states. Instead, it was derived from a more basic conception of the limited nature of free government and a strong belief in the importance of the sanctity of private property to the security of liberty.[103]

Wilkinson was not the only case in which the Supreme Court invalidated redistributive measures which did not conform to the Court's natural law view of the "public interest." Fifty years later, in *Loan Association v. Topeka*,[104] the Court held that no tax could constitutionally be levied unless for a public purpose.[105] The Court expressly stated that "where the purpose for which the tax was to be issued . . . was purely in aid of private or personal objects, the law authorizing it was *beyond the legislative power*, and was an unauthorized invasion of private right."[106] Just as in *Wilkinson*, the Court failed to point to any specific provision of the Constitution which declared such a tax "beyond the legislative power," but rather rested its decision on general notions of political philosophy or natural law. The Court justified its holding by simply asserting that:

> [T]here are such rights in every free government beyond the control of the State.
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> . . . .
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> There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist,

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[103] As stated by one author:

> Modern American folklore assumes that democracy and liberty are all but identical. . . . But the Founding Fathers thought that the liberty with which they were most concerned was menaced by democracy. In their minds liberty was linked not to democracy but to property. . . . Freedom for property would result in liberty for men . . . [a]mong the many liberties, therefore, freedom to hold and dispose property is paramount.

RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 12-15 (1974); *see also* JOHN P. REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION 72-73 (1988) ("Property was liberty because property secured independence. Material goods were valued . . . as a guarantee of individual autonomy."); *cf.* Baker, *supra* note 6, at 776 ("[M]arket freedom and freedom of speech are fundamental aspects of liberty.").

[104] 87 U.S. (20 Wall.) 655 (1874).

[105] *See id.* at 664 ("We have established, we think, beyond cavil that there can be no lawful tax which is not laid for a public purpose." (emphasis omitted)).

[106] *Id.* at 662 (emphasis added).

> and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted . . . that the homestead now owned by *A.* should no longer be his, but should henceforth be the property of *B.*[107]

Justice Clifford's vigorous dissent, in an opinion somewhat reminiscent of Justice Holmes's famous dissent in *Lochner*,[108] forcefully asserted that "neither the State nor Federal courts can declare a statute of the State void as unwise, unjust, or inexpedient, nor for any other cause, unless it be repugnant to the Federal Constitution."[109] Further, he argued that "[c]ourts cannot nullify an act of the State legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the constitution, where neither the terms nor the implications of the instrument disclose any such restriction."[110] To do so, he maintained, would "make the courts sovereign over both the constitution and the people, and convert the government into a judicial despotism."[111]

With time, the positivist view advanced by Justice Clifford began to take root both on and off the Court.[112] Accordingly, the Court made greater efforts to ground its decisions in the specific language of the Constitution. The Court, however, had already embraced the public use limitation—a broad principle which could not easily be made to fit into one constitutional pigeonhole.

The Court at first rejected arguments that the Fourteenth Amendment prohibited states from taking private property without just compensation. In *Davidson v. New Orleans*,[113] the Court expressly rejected the notion that the Fourteenth Amendment made

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[107] *Id.* at 662-63.

[108] The issues presented by the Court's approach in *Wilkinson* are really quite analogous to those presented by *Lochner*. Ultimately, the question is one of the proper role of the Court as a coequal branch of government, and the proper degree of faith and deference owed to the legislative branch.

[109] *Loan Ass'n*, 87 U.S. at 668 (Clifford, J., dissenting).

[110] *Id.* at 669 (footnote omitted) (Clifford, J., dissenting).

[111] *Id.* (footnote omitted).

[112] *See* NICHOLS, THE LAW, *supra* note 102, at 119-20 (noting acceptance of doctrine that courts could not strike down a legislative act unless it violated a specific provision of the Constitution); Note, *The Public Use Limitation*, *supra* note 19, at 602 (describing courts' abandonment of "natural law" for strict constitutional interpretation). For an illustration of the rise of positivism and the decline of natural law see Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The . . . law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . . .").

[113] 96 U.S. 97 (1877).

the protection of the Takings Clause applicable to the states.[114] Although the Court in *Davidson* essentially held that a state could lawfully deprive an owner of property without compensation so long as procedural due process were afforded,[115] it never supposed that a state could take property for other than a public purpose.[116]

Interestingly, however, the Court did become receptive to the notion that the Fourteenth Amendment established a public use limitation.[117] When ultimately forced to decide the issue in

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[114] *See id.* at 105.

[115] *See id.* As the Court explained:

> If private property be taken for public uses without just compensation, it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition in the fifth amendment with the one we are construing, was left out, and this was taken. It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a Circuit Court of the United States, as we were in *Loan Association v. Topeka.* But . . . it is not possible to hold that a party has, without due process of law, been deprived of his property . . . when . . . he has . . . a fair trial in a court of justice . . . .

Id. (citations omitted).

[116] Just eight years later, in Cole v. City of La Grange, 113 U.S. 1 (1885), the Court explicitly reaffirmed the proposition that "[t]he general grant of legislative power in the Constitution of a State does not enable the legislature, in the exercise either of the right of eminent domain, or of the right of taxation, to take private property . . . for any but a public object." *Id.* at 6. The Court continued by explaining that "[t]hese limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject." *Id.* The Court also noted that "[t]he decisions in the courts of the States are to the same effect." *Id.* (citations omitted).

[117] The Court appears to have first seriously considered the argument in Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896). Although the Court did not ultimately rule on the issue, Justice Peckham explained:

> In the Fourteenth Amendment the provision regarding the taking of private property is omitted, and the prohibition against the State is confined to its depriving any person of life, liberty, or property, without due process of law. It is claimed, however, that the citizen is deprived of his property without due process of law, if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way 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.

Id. at 158.

It is also worth noting that although Justice Peckham alluded to the Takings Clause of the Fifth Amendment, thereby raising the suggestion that the mention of "public use" in the Takings Clause establishes a public use requirement, he refused to acknowledge it as establishing such a limitation and noted that, in any event, it "applies only to the Federal government." *Id.*

Missouri Pacific Railway v. Nebraska,[118] it expressly held that "[t]he 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*, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States."[119]

Although *Missouri Pacific* appears, at first glance, to directly overrule *Davidson*, which had held that the Fourteenth Amendment did not make the Takings Clause applicable to the states, the two opinions can be reconciled.[120] *Missouri Pacific* holds only that a state may not take private property "for the *private use* of another."[121] It does not go so far as to say that the Fourteenth Amendment prohibits states from taking private property *without compensation*.[122] Read together, *Missouri Pacific* and *Davidson* prohibit states from taking private property (even with compensation) for other than public use, but do not prohibit states from taking private property for public use without compensation. This result is shocking compared with our contemporary view that the entirety of the Takings Clause is made directly applicable to the states through the Fourteenth Amendment.[123]

Nonetheless, if the Court in *Missouri Pacific* believed its opinion to be consistent with *Davidson*, it must have believed that the public use requirement was a function of due process qua due process, rather than as a function of the Takings Clause operating in conjunction with the Fourteenth Amendment. Such a conclusion is further supported by the fact that the Court in *Missouri Pacific* made

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[118] 164 U.S. 403 (1896).

[119] *Id.* at 417 (emphasis added) (citing *Fallbrook Irrigation Dist.*, 164 U.S. at 112; *Cole*, 113 U.S. at 1; Davidson v. New Orleans, 96 U.S. 97 (1877); Loan Assoc. v. Topeka, 87 U.S. (20 Wall.) 655 (1874); Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855); Wilkinson v Leland, 27 U.S. (2 Pet.) 627 (1829); and State v. Chicago, M. & St. P. Ry. Co., 31 N.W. 365 (1887)).

In time, the Due Process Clause of the Fourteenth Amendment came to be seen as providing the kind of substantive protection of personal property rights which the Court had already found to exist in cases such as *Wilkinson* and *Topeka*. Due process became a bulwark for invalidating economic regulations that the Court deemed unnecessary for the advancement of legitimate public interests.

[120] The opinion in *Missouri Pacific* makes no mention of *Davidson* except to cite it for the very holding which it seems to directly contradict. *See Missouri Pac. Ry.*, 164 U.S. at 417. While it is possible that the Court merely ignored its previous opinion in *Davidson*, it is much more likely that the Court believed that the two were not in conflict.

[121] *Missouri Pac. Ry.*, 164 U.S. at 417 (emphasis added).

[122] *See id.*

[123] *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 239-45 (1984).

no mention of the language of the Takings Clause in its opinion, but merely stated that to take for private use "is not due process of law."[124] Thus, when the Court rejected the use of natural law and looked more scrupulously to the text of the Constitution to find support for the public use requirement, it turned not to the Takings Clause (as applied to the states by the Fourteenth Amendment), but rather to the Due Process Clause itself.[125] While more recent cases such as *Hawaii Housing Authority v. Midkiff*[126] have cited *Missouri Pacific* for the proposition that the Takings Clause establishes a public use limitation, the foregoing analysis demonstrates that both *Missouri Pacific* and *Wilkinson* were based purely on principles of natural law and substantive due process.

2. The Modern Function of the Public Use Requirement

Although the precise meaning of the public use limitation has evolved greatly over time,[127] it is clear that the public use requirement currently employed by the Court fails to serve any function that is not already satisfied by due process.[128]

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[124] *Missouri Pac. Ry.*, 164 U.S. at 417. It is interesting to note that most of the modern cases addressing the public use requirement of the Takings Clause either trace their origins to *Missouri Pacific* or explicitly cite it as establishing a public use requirement under the Takings Clause, despite the fact that it had absolutely nothing to do with the Takings Clause. *See, e.g.*, *Midkiff*, 467 U.S. at 241. While the opinion of the Court in *Midkiff* encouragingly phrases the public use requirement in the language of due process, its repeated references to the "Public Use Clause" are thoroughly disheartening.

[125] The Court's course of action was entirely proper, for "a land use regulation advancing an illegitimate public purpose . . . does not 'take' property in the customary sense because of its illegitimacy." Jerold S. Kayden, *Land Use Regulations, Rationality, and Judicial Review: The RSVP in the* Nollan *Invitation (Part I)*, 23 URB. LAW. 301, 320 (1991). Indeed, such an interpretation would have been consistent with the prevailing vision of the purpose and nature of the Due Process Clause. Among all of the provisions of the Bill of Rights, no clause so aptly and fundamentally embodies the principle that ours is a government of laws and not of men. *See* Giozza v. Tiernan, 148 U.S. 657, 662 (1893) ("[D]ue process of law . . . is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government." (citation omitted)). Indeed, the Due Process Clause was essentially designed to stand as a shield against arbitrary or capricious acts of government and to ensure the general and evenhanded enforcement of the rule of law. *See* MCGEHEE, *supra* note 66, at 60-64. As the Supreme Court has explained, "[t]he words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*." Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855).

[126] 467 U.S. 229, 241 (1984).

[127] *See generally* Note, *The Public Use Limitation*, *supra* note 19 (chronicling various past interpretations of the public use limitation).

[128] *See* Stoebuck, *supra* note 3, at 1066 (stating that public purpose analysis

Even when the Court was far less deferential in judging what constituted a bona fide public use, the public use limitation was simply a duplication of the first component of the three-part substantive due process analysis set forth in *Lawton v. Steele*.[129] That test required "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, [third,] not unduly oppressive upon individuals."[130]

With the decline of substantive due process,[131] a public use requirement within the Takings Clause might have continued to provide an opportunity for substantive judicial review of at least some forms of economic regulation. The same political and judicial philosophies which dealt a deathblow to *Lochner*-style substantive due process, however, were equally hostile to other types of judicial inquiry into the "ends" of legislative action.[132] This hostility toward all kinds of substantive judicial review likely arose from a feeling that when the judiciary acts as a "superlegislature," it matters not whether it does so under the rubric of the Due Process Clause or the Takings Clause, for in either case it serves to destroy the delicate constitutional scheme of separation of powers, and, in so

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confuses eminent domain with due process).

[129] 152 U.S. 133 (1894); *see also* Stoebuck, *supra* note 3, at 1065-66 (asserting the similarity of public purpose balancing test to the *Lawton* substantive due process test).

[130] *Lawton*, 152 U.S. at 137. The Court continued by noting:

> The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or 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.

Id. The belief embodied in the quotation above that the courts must somehow supervise the legislature's determination of what constitute desirable public purposes and the necessary means of their implementation was precisely what was rejected by the Court when it replaced the *Lawton* test with the minimum rationality test now employed by the Court. It would seem enigmatic, at best, to suppose that the Court would desire to abolish judicial supervision of "interference with private business, or . . . restrictions upon lawful occupations" under the ambit of the Due Process Clause while retaining that same capacity under the rubric of the Takings Clause.

[131] *See supra* note 5.

[132] In the words of Justice O'Connor, "[w]hen the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings--no less than debates over the wisdom of other kinds of socioeconomic legislation--are not to be carried out in the federal courts." Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 243 (1984).

doing, to undermine the intrinsic value and integrity of the democratic process.[133]

Indeed, "the crisis in democratic theory generated by judicial opposition to the New Deal"[134] provided the impetus not only for the rejection of substantive due process, but for the abandonment of de novo judicial review of "legislative declarations of public use."[135] The culmination of this judicial philosophy was Justice Douglas's opinion for the Court in *Berman v. Parker*,[136] in which he proclaimed that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[137] It is interesting to note that although the opinion in *Berman* cites a number of cases as supporting judicial deference to legislative determinations of public use, all of the cited cases are due process cases.[138] Assuming that the Court knew this, we can only conclude that the Court must have believed that the democratic principles which necessitated the rejection of *Lochner*-style substantive due process applied with equal force to the public use requirement of the Takings Clause.

Today, the much-reduced public use requirement[139] merely restates the minimum rationality test of contemporary substantive due process analysis.[140] As the Court recently explained, "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."[141] Indeed, the federal courts have found a public use in every takings case

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[133] For an insightful discussion of principles supporting judicial restraint, see generally Wallace, *supra* note 11; Wallace, *supra* note 90. From a somewhat different perspective, Professor C. Edwin Baker effectively argues that judicial usurpation of political decisions under the rubric of the Takings Clause "reduces the incentives for improving the political process." Baker, *supra* note 6, at 769.

[134] Merrill, *supra* note 87, at 68.

[135] *Id.*

[136] 348 U.S. 26 (1954).

[137] *Id.* at 32.

[138] *See id.*

[139] The extremely deferential public use standard now employed by the Court was established largely by *Berman*. *See id.* The opinion is a prime example of the manner in which the Court has repeatedly allowed its due process decisions to influence takings jurisprudence.

[140] *See* GUNTHER, *supra* note 87, at 487 ("[T]he modern Court is almost as disinclined to second-guess 'public use' determinations as to curtail police power ends in due process inquiries.").

[141] Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984). The Court further explained that "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers." *Id.* at 240.

since *Berman* established the highly deferential standard of modern public use review in 1954.[142]

There is no apparent reason for the Court to persist in the charade of a Takings Clause inquiry, when in so doing it merely employs the same test used in due process analysis.[143] As Professor Stoebuck explains:

> The existence of a public purpose is really one of the elements in the test for due process. The question of public purpose goes to the question of whether the governmental entity has the power to impose the particular regulation [even with compensation]. A regulation is void if the answer to the due process question is negative, and one need not—cannot—then ask if the regulation is a taking. Should the answer to the due process question be affirmative, then one may go on to the taking issue. If public purpose is considered again at this stage, the taking issue becomes a replay of the due process questions.[144]

What we refer to in the context of takings jurisprudence as the "public use requirement" is nothing more than "ends analysis"—that is, judging whether the end is sufficiently legitimate to empower government to impose the regulation. Ends analysis under the Takings Clause and due process should not be different. The concept of "property" need not be limited to physical, tangible items, but should more properly be seen as encompassing legal rights and privileges.[145] Some of the more interesting intangible

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[142] *See* Merrill, *supra* note 87, at 94-109 (cataloguing the treatment of takings cases decided since *Berman*). Merrill concludes that the federal courts have found a public use in every case between 1954 and 1986. *See id.* at 96. My research has disclosed no cases since 1986 in which the federal courts have failed to find a public use.

[143] Any regulation challenged as violative of the Takings Clause could also be attacked as violative of substantive due process, which is certainly in no danger of vanishing. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2804-05 (1992) ("[I]t is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure . . . ."); *see also* HAND, *supra* note 6, at ix ("No Twentieth Century Justice of the Supreme Court has acted on the principle that [due process] is limited to departures from procedural regularity. None has acted on the principle that it is limited to precluding [government] from denying rights specifically set forth in the Constitution.").

[144] Stoebuck, *supra* note 3, at 1066.

[145] *See* United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945) (describing property as "the group of rights inhering in the citizen's relation to [a] physical thing, as the right to possess, use and dispose of it"); EPSTEIN, TAKINGS, *supra* note 2, at 20-24 (discussing the linguistic vagueness and its effect on the conceptualization of property); Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676-78 (1988) (setting forth the doctrine of "conceptual severance," which asserts essentially that a

rights that have been held to be "property" for purposes of the Takings Clause include: the hunting rights of members of a duck hunting club,[146] and trade secrets taken in the course of pesticide registration by the Environmental Protection Agency.[147] Thus, virtually any economic due process challenge can easily be rephrased by a creative litigator into a takings challenge. To allow the ends tests of due process and the public use limitation inquiries to differ, therefore, is to dispense different brands of justice according to the form rather than the substance of the case.[148]

Clearly, the Court recognizes the dangers inherent in establishing different standards of public use under the Takings and Due Process Clauses. In *Hawaii Housing Authority v. Midkiff*, it took great pains to equate the public use requirement of the Takings Clause with the minimum rationality standard of due process. Nevertheless, I believe that the Court erred in its approach, and should instead have taken the opportunity to explain that the public use requirement is and has always been purely a product of due process and its natural law antecedents.

Although Due Process and Takings Clause inquiries into public use may be substantially identical in theory thanks to the Court's opinion in *Midkiff*, empirical evidence demonstrates that they are applied differently in practice. Although such dissimilar treatment is apparently not a significant problem in the federal courts, state courts are frequently "willing to depart from *Berman*'s virtual abandonment of judicial review" in their treatment of public use

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superficially temporary taking of property may in fact constitute a permanent, complete taking); *see also* ACKERMAN, *supra* note 2, at 166 ("Unlike our ancestors, we no longer count our wealth by looking first to our social property of land, farms, buildings. Instead, our principal means of support consist of legal property: stocks, bonds, pensions . . . ."); Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 787 (1964) (discussing the wealth and benefits distributed by government as a form of property). For an insightful introduction to the intellectual difficulties presented by attempts to define "property," see generally Thomas C. Grey, *The Disintegration of Property*, *in* PROPERTY 69, 69-85 (J. Roland Pennock & John W. Chapman eds., 1980).

At the time the Constitution was framed, the concept of "property" was certainly not limited to physical possessions, but included rights and liberties as well. *See* REID, *supra* note 103, at 72 ("[P]roperty, even the concept of property as material accumulation, was not limited to the physical in the eighteenth century.").

[146] *See* Swan Lake Hunting Club v. United States, 381 F.2d 238, 240 (5th Cir. 1967).

[147] *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003 (1984).

[148] Unless, of course, "property" as it is used in the Takings Clause is interpreted to mean only real property (i.e., land) or physical, as opposed to legal property (i.e., legal rights and privileges).

questions in Takings Clause analysis.[149] Between 1964 and 1985, over sixteen percent of all public use cases in state appellate courts invalidated proposed takings on the grounds that the taking did not serve a public use.[150] Moreover, the percentage of state court cases finding no public use has almost doubled, from 11.8% for the period 1954-1960 to 20.4% for the period 1981-1985.[151] Although the Court's reaffirmation of *Berman* in *Midkiff* may have been designed in part to stem this increase in the use of the public use requirement, *Berman* is cited in only three of the twenty-four cases in Merrill's survey decided after *Midkiff*.[152] Clearly, "judicial enforcement of the public use requirement is not a thing of the past,"[153] and it appears likely that only the outright abolition of the public use requirement will ensure that judicial review will conform in practice to the constitutionally-mandated[154] deferential standard of due process.

Furthermore, eliminating the public use requirement altogether would ensure that it never returns in a less deferential form. No matter how remote a possibility such a return might seem in the near future, the law is seldom static, and the distant future cannot be easily predicted. Indeed, prominent professors such as Frank I. Michelman and Richard Epstein have proposed public use tests which would vastly expand the scope and depth of judicial review of legislative ends in the eminent domain context.[155] Any doubt that the Court would ever use the public use requirement of the Takings Clause in a manner substantially different from due process should

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[149] Merrill, *supra* note 87, at 96.

[150] *See id.*

[151] *See id.* at 97. Merrill's survey found that the number of public use cases in each five-year period was "fairly constant, ranging from 42 to 61 cases in each period from 1954-1985." *Id.* Merrill also notes that "the percentage of cases holding that a taking does not serve a public use generally increases throughout the 31-year period. The percentages are as follows: 1954-1960, 11.8%; 1961-1965, 12.5%; 1966-1970, 13.1%; 1971-1975, 13.7%; 1976-1980, 21.4%; and 1981-1985, 20.4%." *Id.* Merrill's survey did not include state trial courts. Rather, it was limited to the presumably more competent appellate courts. *See id.* at 96.

[152] *See id.* at 96 n.115.

[153] *Id.* at 97.

[154] For an argument that a highly deferential standard of review is constitutionally required, see Wallace, *supra* note 90, at 6-8.

[155] *See* Epstein, *supra* note 2, at 166-69 (proposing the "public goods" test); Michelman, *Just Compensation*, *supra* note 2, at 1241 (discussing utilitarian property theory, which would mandate that only those uses of eminent domain which the court believes would produce a net benefit to society be deemed to serve the public use).

be tempered by the fact that the Court has done just that in the context of means-end scrutiny. As Jerold S. Kayden explains:

> The debate over whether a land-use regulation violates due process, equal protection, or just compensation is more than academic. To begin with, it is just such a quibble that Justice Scalia exploited to pen *Nollan's* footnote three. He embraced the undeniable fact that the just compensation clause is not the due process or equal protection clause to invest just compensation's "substantial" with a different meaning, thereby inventing a higher standard of rationality review than otherwise available.[156]

Purging the public use requirement from takings jurisprudence would also guard against even more dangerous misinterpretations of the requirement. In the past, for example, lawyers have argued that the reference to "public use" in the Takings Clause means not that the government may take property only for public use, but rather that government must compensate only when the taking lacks a public use.[157] The Supreme Court itself came very close to following this mistaken reasoning in *Keystone Bituminous Coal Association v. DeBenedictis*,[158] where the Court suggested that *Mahon* could be distinguished simply on the basis of a finding of a public use.[159]

Of course, so long as the public use requirement is applied by the courts in precisely the same manner they apply due process, there is little to fear, for the outcome in any case will be the same. The greatest danger lies in the potential for the requirement to be changed in subsequent decisions. Indeed, although the Court's ends analysis has been harmonized with that of due process, its means-ends scrutiny has recently diverged from that of due process.

B. *Heightened Means-End Scrutiny: The "Substantial Relationship" Test of* Nollan v. California Coastal Commission

Although the development of the public use limitation can almost be characterized as ancient history, *Nollan v. California Coastal Commission*[160] provides a modern illustration of how elements of substantive due process continue to be brought back to

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[156] Kayden, *supra* note 125, at 322-23.

[157] *See* HORWITZ, *supra* note 23, at 65; Merrill, *supra* note 87, at 71.

[158] 480 U.S. 470 (1987).

[159] *See id.* at 485-93. Of course, once a court determines that a legitimate public use exists, it must still address the question of whether compensation is required.

[160] 483 U.S. 825 (1987).

life under the rubric of the Takings Clause. In *Nollan*, James and Marilyn Nollan sought to replace their dilapidated beach-front bungalow with a three-bedroom house and an attached garage.[161] As required by state law, the Nollans applied to the California Coastal Commission for a development permit.[162] The Commission agreed to grant the development permit, but only on the condition that the Nollans dedicate a ten-foot wide easement just inland of the mean high tide line so that the public could cross the Nollans' private beach as they walked along the coast.[163] While the lateral access easement would certainly have provided legitimate benefits to the public,[164] the Court rejected the easement condition because the easement failed to advance the Commission's avowed goal of preserving visual access to the sea.[165] As the Court explained:

> It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand . . . how it helps to remedy any additional congestion on [the public beaches] caused by construction of the Nollans' new house.[166]

The opinion would not have stirred much controversy had it merely affirmed the due process requirement that a regulation bear some "rational relationship" to a legitimate government objective. Justice Scalia indicated, however, that the Court would apply a heightened standard of means-end rationality to at least some forms of takings challenges.[167] Justice Scalia's 5-4 opinion for the Court in *Nollan* asserted not only that land use regulations which condition development upon an exaction must "substantially advance"[168] a legitimate public interest, but that "the permit condition [must] serve[] the same governmental purpose as the development ban."[169]

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[161] *See id.* at 827-28.

[162] *See id.* at 828.

[163] *See id.* at 853.

[164] The Court merely assumed that the Commission's purposes were legitimate. *See id.* at 835.

[165] *See id.* at 838-39.

[166] *Id.*

[167] *See id.* at 834 n.3.

[168] *Id.* The traditional formula for means-end scrutiny is that the legislation must be "rationally related" to a legitimate state interest. *See, e.g.*, Railway Express v. New York, 336 U.S. 106, 109 (1949) (articulating the rational relation test).

[169] *Nollan*, 483 U.S. at 837.

Most importantly, Justice Scalia argued in footnote three, that the standards to be applied in Takings Clause cases are not the same as those to be applied in due process or equal protection cases. As Justice Scalia explained:

> Contrary to Justice Brennan's claim . . . our opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), not that "the State '*could rationally have decided*' that the measure adopted might achieve the State's objective." [Brennan Dissent] quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981). Justice Brennan relies principally on . . . an equal protection case . . . and two substantive due process cases . . . in support of the standards he would adopt. But there is no reason to believe . . . that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical . . . .[170]

While Justice Scalia criticizes Justice Brennan for relying "principally on an equal protection case . . . and two substantive due process cases"[171] to support the application of the deferential "rational relationship" test, he fails to recognize that his "substantially advance" formulation is "directly traceable"[172] to due process and equal protection cases as well.[173] As Professor Kayden explains, "Justice Scalia adopted the word 'substantial' from *Agins v. City of Tiburon*"[174]—a Takings Clause case. *Agins*,[175] however, merely cites *Nectow v. City of Cambridge*,[176] a due process case, as the source of the "substantially advance" language.[177] And *Nectow*, in turn, cites *Village of Euclid v. Ambler Realty Co.*,[178] also a substantive due process case, as the source of the adjective "substantial."[179]

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[170] *Id.* at 834 n.3 (some citations omitted).
[171] *Id.*
[172] Kayden, *supra* note 125, at 314.
[173] *See id.* at 314-16.
[174] *Id.* at 314.
[175] 447 U.S. 255 (1980).
[176] 277 U.S. 183, 188 (1928).
[177] *See Agins*, 447 U.S. at 260.
[178] 272 U.S. 365 (1926).
[179] *See Nectow*, 277 U.S. at 188.

Moreover, while the wording may be somewhat different, there is significant evidence that Justice Scalia's "substantially advance" terminology has historically had the same deferential meaning in the takings context as Justice Brennan's "could rationally have decided" formulation.[180] These "adjectives [have been] used interchangeably by the Court . . . for more than sixty years to describe the necessary relation between means and ends."[181]

While it intuitively seems just that government should only take property for uses directly connected with the avowed public use, the Court's holding in *Nollan* implicates many of the same concerns as the public use requirement.[182] In light of *Nollan* and its semantic underpinnings, analysis of the public use requirement suggests that all inquiry into the ends of economic legislation should be conducted under due process and its respective standard. It follows a fortiori that means-end analysis should thus also be conducted exclusively under the framework of due process. Surely, if the ends analysis of the public use requirement is to be defined by due process, or, in the words of the Court, is to be "coterminous with the scope of a sovereign's police powers,"[183] then means-end analysis under the Takings Clause should also be identical to that of due process.

Means-end rationality in the Takings Clause is similar to the public use limitation in that, "the customary meaning, structure, and purpose of the [Takings Clause] suggest that means-end rationality is not a core concern of takings inquiry."[184] Indeed, "a land-use regulation advancing an illegitimate public purpose or irrationally advancing a legitimate one does not 'take' property in the customary sense because of its illegitimacy or irrationality."[185] Means-end rationality is, however, the historic guardian against arbitrary and

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[180] *See* Kayden, *supra* note 125, at 302-09 (asserting that the pre-*Nollan* cases employed deferential review despite the use of the adjective "substantial"). Kayden further concludes that:

> [T]here is nothing in the just compensation clause . . . to suggest that "substantial" expresses a higher standard than "reasonable," "rational," or "conceivable". . . . As the Court originally made clear in *Euclid, Zahn, Gorieb,* and *Nectow,* the judicial role in reviewing rationales underlying land-use regulations (as with all forms of socioeconomic legislation) is greatly limited.

Id. at 316.

[181] *Id.*

[182] *See infra* part III.

[183] Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984).

[184] Kayden, *supra* note 125, at 320.

[185] *Id.*

capricious legislative action, and therefore, a particularly central concern of due process.[186]

Nollan should, by all right, have been a due process case,[187] for the central issue presented in the case is whether government should be able to deprive a person of a right he or she should have been able to enjoy for a purpose unrelated to the public interest by which the state justifies its restriction.[188] Perhaps Justice Scalia's discussion in the case should not be focused on efforts to expand the scope of the Takings Clause, but rather to suggest alternative methods of ensuring due process where the current minimum rationality standard fails. The Court has already held, in other contexts, that substantive due process is satisfied if any rational relationship exists between the means employed by government and a legitimate end sought to be achieved, regardless of what the government's actual purpose may be.[189] By requiring the permit condition to advance the same purpose as the development ban, Justice Scalia actually requires an examination of the *actual* or avowed purpose of the exaction, rather than a determination of whether a *conceivable* rational relationship exists. If, for example, the Coastal Commission had declared its public purpose to be increased use access, rather than visual access, an easement of lateral access would have substantially advanced a legitimate public purpose.

If the Court is now unhappy with the level of means-end scrutiny provided by due process, it should correct this problem at the source, rather than by making an end-run around due process via the Takings Clause.[190] Such efforts not only "direct[] attention

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[186] *See supra* note 125.

[187] One commentator has described *Nollan* as "an attempt to uphold the rule of law against the potential for official arbitrariness." Stewart E. Sterk, *Nollan, Henry George, and Exactions*, 88 COLUM. L. REV. 1731, 1751 (1988). The phrases "rule of law" and "official arbitrariness" smack of due process.

[188] As Professor William A. Fischel notes: "Whether some citizens should be denied the right to rebuild their homes in a manner that seems perfectly consistent with California beachfront housing patterns seems to have evaded the dialogue between Justices Scalia and Brennan." William A. Fischel, *Introduction: Utilitarian Balancing and Formalism in Takings*, 88 COLUM. L. REV. 1581, 1588 (1988).

[189] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (supporting the validity of legislation which "rests upon some rational basis within the knowledge and experience of the legislators").

[190] If *Nollan* were to invest the Takings Clause with a uniformly higher level of scrutiny than is permitted under the Due Process and Equal Protection Clauses, "judicial review of private property regulations under due process and equal protection [would become] nugatory." Kayden, *supra* note 125, at 323.

away from the Court's deeper concern with fairness,"[191] and subject takings jurisprudence to the same criticisms which ultimately discredited *Lochner*-style substantive due process,[192] but they also divert energy and attention away from the resolution of the most significant Takings Clause problem—the establishment of a principled and workable means of defining what constitutes a "taking."

C. *Balancing*

Much of the academic debate over the Takings Clause has focused on the relative merits of a balancing approach as compared to the categorical approach[193] gradually being established by the modern Court.[194] The purpose of this Section is not only to reiterate the general debate over the propriety of balancing or to explain broadly why balancing is an inefficient and unjust methodology for takings jurisprudence, but to address the ways in which

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Professor Michelman suggests that if *Nollan* is not narrowly construed as applying only to cases in which a permanent physical occupation is threatened, litigants will rush to plead "taking" in order to invoke heightened means-end scrutiny. As Michelman explains:

> What follows if we take at face value the proposition that takings claims, like free-speech claims, beget heightened scrutiny as compared with ordinary economic due process and equal protection claims? . . . *[W]henever* someone challenges a land-use regulation as a taking, rather than challenging it as a simple deprivation of property without due process, there will be an obvious problem of how to tell whether the case really and truly involves a takings challenge meriting intensified means-end scrutiny.
>
> One possible answer is that it is just a matter of pleading. . . . Any aggrieved owner prefers intensified scrutiny and thus would plead "taking," not "deprivation without due process" or "denial of equal protection."

Michelman, *supra* note 3, at 1613.

[191] Kayden, *supra* note 125, at 331.

[192] Indeed, active nondeferential judicial review of legislative "ends" and "means" is especially subject to criticism because of its anti-democratic nature and because of the threat it poses to the constitutional scheme of separation of powers. *See* Cass R. Sunstein, *Two Faces of Liberalism*, 41 U. MIAMI L. REV. 245, 245 (1986) (criticizing Richard Epstein's *Takings* as relying on the same set of beliefs as the *Lochner* Court and noting that they foundered, in part, because of the "institutional strain on so aggressive a judiciary").

[193] *See, e.g.*, Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1697 (1988) ("[E]ven a very imperfect, but clearly articulated, formal takings doctrine is likely to be superior to open-ended balancing.")

[194] Some commentators have suggested that the Court has reacted against balancing in its recent decisions and is moving toward a per se categorical approach. *See* Michelman, supra note 3, at 1621-22 (noting that the Court seems to be moving "towards a reformalization of regulatory-takings doctrine"); Radin, *supra* note 145, at 1681-82 (discussing the apparent move of the Court towards a more formal method of takings jurisprudence).

balancing merely duplicates substantive due process analysis, and thereby robs takings jurisprudence of its true and independent significance.

1. Is The Court Really Balancing?

To a large extent, commentators have been unable to reach a consensus on whether the Supreme Court actually employs a balancing approach, comparing the relative value of the private property rights destroyed to the value of the public interest being advanced,[195] or merely engages in ad hoc factual determinations regarding the magnitude and character of the destruction of private property rights.[196] Yet, regardless of whether the Supreme Court actually employs a balancing test, there is certainly "a balancing 'strain' running through the eminent domain opinions."[197] Indeed, practitioners generally believe that regardless of what methods the courts say they are employing, they are actually doing nothing more than balancing.[198]

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[195] For an explanation of the balancing test, see Michelman, *Just Compensation*, *supra* note 2, at 1193 (explaining that the "contemplated gain of society" should be compared with the harm to the individual).

[196] For commentary expressing the belief that the Court is actually engaged in balancing, see Van Alstyne, *supra* note 12, at 37-41 (arguing that courts consider "whether the public interest advanced is worth the price").

[197] Stoebuck, *supra* note 3, at 1065 (citing Turner v. County of Del Norte, 101 Cal. Rptr. 93, 96 (Ct. App. 1972) (balancing county's interest in control of flooding with remaining economic uses for plaintiff's land)); *see also* William Murray Builders, Inc. v. City of Jacksonville, 254 So. 2d 364, 366-67 (Fla. Dist. Ct. App. 1971) (holding that city's interest in preserving residential neighborhood was insufficient to deny property owner the only use of his land for which it was reasonably adapted), *appeal denied*, 261 So. 2d 845 (Fla. 1972); Trustees of Sailors' Snug Harbor v. Platt, 280 N.Y.S.2d 75, 78-79 (Sup. Ct. 1967) (comparing burden imposed on the Trustees with a disproportionately small benefit to the public welfare gained by preserving the building), *rev'd*, 288 N.Y.S.2d 314 (App. Div. 1968).

There is even language in the recent case of Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), suggesting that a balancing approach is actually employed when no per se test is applicable. *See infra* notes 226-32 and accompanying text.

[198] *See, e.g.*, Robert H. Freilich, *Update on the Taking Issue and Eminent Domain Decisions*, *in* 1 PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION 97, 103 (ALI-ABA Land Use Inst. ed., 1992) (noting that after *Lucas*, if an owner is not deprived of 100% of the value of land, "the inquiry will return to the balancing of interests").

2. Why Balancing Fails as a Takings Methodology

a. *Society's Interests Are Not Necessarily in Conflict with Those of the Individual*

Balancing suggests that "there are persons in society whose interests can somehow be excluded from, and counterpoised against, 'society's interests.'"[199] Imagining that the person from whom the government intends to take private property has interests opposed to those of society makes it easier to justify forcing him to yield. But the individual from whom property is being taken does not necessarily have interests which conflict with those of society. The owner of property being taken or regulated for the public benefit may himself believe the cause for which his land is being taken to be a noble one. His only conflict of interest with society is over who should bear the costs of the regulation or taking. Although society would like to force the burdened individual to bear the entire cost of the taking himself, the individual would prefer to have society compensate him for his loss and distribute the costs throughout society.

When viewed in this light, the individual's claim to compensation is more difficult to reject. Why should one individual bear the entire cost of a regulation which benefits others or society as a whole? Should not those who enjoy the fruits of government action contribute to defray the costs of such action?

b. *Balancing Fails to Ensure Fairness to the Politically Weak and Does a Poor Job of Maximizing Efficiency*

Although balancing may or may not be an efficient takings test,[200] the principal concern of the Takings Clause is not necessarily the net maximization of social value or utility.[201] While efficiency is undoubtedly an important aim, the most fundamental concern embodied in the Takings Clause is that of fairness—that government not advance public interests at the expense of particu-

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[199] Michelman, *Just Compensation*, *supra* note 2, at 1194.

[200] For arguments that balancing is an inefficient takings methodology, see Rose-Ackerman, *supra* note 193, at 1700-02.

[201] While efficiency concerns are certainly valid and important, they should be secondary to fairness concerns. The Constitution often tolerates inefficiency as the necessary price of securing liberty. The Constitution's elaborate system of checks and balances, for example, reduces the potential for tyranny but does so only at the expense of governmental efficiency.

lar individuals and minorities.[202] It is founded upon a justifiable fear of the evils of faction, and the framers' understanding of the potential for a democratic majority to oppress and exploit political minorities.[203]

Meaningful judicial review is most important under circumstances in which there is reason to believe that the political processes have failed.[204] Indeed, it is highly likely that the political processes will fail to protect the individual when government seeks to take his property for the use of society as a whole.[205] Since every member of society other than the burdened individual will gain through his loss, the individual will likely find few, if any, political allies.

Balancing, however, fails to provide the sort of meaningful judicial review needed to protect individuals from the natural shortcomings of the democratic processes in the takings context. For a court to uphold a regulation under a balancing approach, it must find that the value of the public interest advanced by the regulation is greater than the value of the private right being destroyed. Yet even if this condition is satisfied, balancing does not necessarily ensure that the site chosen for the exercise of eminent domain is the *most* cost-effective, rather than just the one which subjects the government to the least amount of political pressure. Thus, balancing tests fail to protect the politically weak or isolated

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[202] *See* Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1665 (1988) ("[A]voidance of disproportionately placed burdens is the essence of the just compensation requirement."); Sax, *Police Power*, *supra* note 2, at 57 ("[T]he English and American authorities writing at about the time of the adoption of the fifth amendment also viewed the provision as a bulwark against unfairness, rather than against mere value diminution.").

[203] *See* Fischel, *supra* note 188, at 1582 (noting that the real problem addressed by the Takings Clause is "of political majorities ganging up on effete minorities"); Sax, *Police Power*, *supra* note 2, at 57 ("What seemed to concern the early writers was . . . the exercise of arbitrary or tyrannical powers . . . . The examples they give suggest a principal fear of ill-considered, hasty, or even discriminatory impositions created by the pressing necessity of the state to get a job done . . . ."); *see also* JOHN H. ELY, DEMOCRACY AND DISTRUST 77-88 (1980) (discussing the plight of minority groups in representative government); THE FEDERALIST NO. 10 (James Madison).

[204] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (stating that "prejudice against discrete and insular minorities" might "seriously . . . curtail the operation of . . . political processes" and would, therefore, require "more searching judicial inquiry").

[205] *See* Kmiec, *supra* note 202, at 1640 (describing the "constitutional structure" as "designed to counteract the majoritarian tendency to isolate individual citizens for disproportionate burdens").

from bearing a disproportionate burden of the costs of regulation.[206]

Moreover, balancing clearly provides inadequate protection of property rights. In almost all cases, the government's interest will have a more lofty and noble-sounding purpose than that of the individual. Since the judiciary can only evaluate the subjective values of the private and public interests, it is very likely that the judiciary will find society's interests more compelling. In fact, between 1922 and 1987 the Supreme Court "never once clearly applied the open-ended balancing test in favor of a takings claim and against a regulating government."[207]

c. *Balancing Subjects Takings Analysis to the Criticisms of* Lochner *Without Answering the Central Question of Whether Society or the Individual Should Bear the Costs of Regulation*

Balancing also fails as a takings methodology because it is merely duplicative of the outmoded due process analysis of *Lawton*[208] and *Lochner*,[209] which has so thoroughly been rejected by the Court in other contexts.[210] Indeed, it is characterized by the same weaknesses and is susceptible to the same criticisms as *Lochner*-style due process.[211] It is now regarded as fundamental that judgments regarding the desirability of social and economic regulation—judgments which naturally rely on a balancing of the respective costs and benefits—are properly within the scope of the legislative, and not the judicial branch of government. As Professor C. Edwin Baker notes, even "[c]riteria like the Chicago-school

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[206] Although the person whose land is condemned is theoretically compensated fairly for the loss, such compensation does not include any idiosyncratic value which may be lost. Thus, from the perspective of the person whose land is being condemned, the compensation will almost always seem inadequate.

[207] Michelman, *supra* note 3, at 1621.

[208] 152 U.S. 133, 137 (1894) (stating that the state must exercise its police powers through reasonably necessary means and for the benefit of the general public).

[209] 198 U.S. 45, 64 (1905) (holding that the state cannot interfere with contract rights without legitimate and substantial justification for the use of its police power).

[210] *See* Stoebuck, *supra* note 3, at 1066 (arguing that it is inappropriate to use the *Lawton* balancing test as an eminent domain taking test in that it would lead to appropriation without compensation when a strong public need existed and "[t]hat no court would reach this result").

[211] For an enduring criticism of the substantive due process approach of *Lochner* and *Lawton*, see Holmes's dissent in *Lochner*, 198 U.S. at 74 (Holmes, J., dissenting) (arguing that "a constitution is not intended to embody a particular economic theory"); *see also supra* note 5 (discussing cases which reject the doctrine of substantive due process in the economic context).

economists' notions of 'efficiency' and 'wealth maximization' are meaningful only in relation to a given set of goals."[212] Thus, to attempt to effectuate the commandment of the Takings Clause with the intellectually and doctrinally bankrupt shell of substantive due process is to deprive the clause of its intended effect and to discard the protection of liberty which the Takings Clause affords. The Takings Clause demands a more exacting form of scrutiny than that now afforded by modern substantive due process, but to substitute the failed approach of *Lochner*-style substantive due process is unimaginative and unhelpful, if not certainly doomed to fail.

A balancing approach necessarily weighs the social gain contemplated by the regulation against the individual losses occasioned by it. While such a test ensures that the regulation will only be valid if it tends to increase net social value, it does not resolve the fundamental question of who should bear the costs of the regulation. As Justice Holmes noted in *Mahon*, "the question at bottom is upon whom the loss of the changes desired should fall"[213]—not whether the desired changes should be permitted at all. Balancing fails to answer the most difficult, partially normative, question of who should bear the costs of regulation. It does provide a framework for deciding when an exercise of eminent domain is socially advantageous, but that, in reality, is the type of analysis properly left to the legislative and not the judicial branch of government.

III. THE FUTURE

In recent years, the Supreme Court has demonstrated a desire to breathe new life into the Takings Clause and to ensure that private property rights receive meaningful constitutional protection. One can only wonder what further steps the Court might take to revitalize the Takings Clause. While the Court has enhanced the protection of private property in a number of ways, two developments are particularly relevant to the issues presented in this Comment.

The first is *Nollan*'s rejection of the minimum rationality standard of due process and its holding that an exaction must "substantially advance" a "legitimate state interest."[214] It is un-

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[212] Baker, *supra* note 6, at 767.

[213] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

[214] *Nollan*, 483 U.S. at 834 (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

clear whether the Court will, in the future, find the substantial relationship test to apply to all takings cases or whether it will limit or reject its application in cases other than those involving exactions. If the substantial relationship test is to endure, it cannot be justified simply on the ground that older cases such as *Nectow* and *Euclid* employed the "substantially advance" language. This is especially true considering that *Nectow* and *Euclid* were decided under due process analysis before the rejection of *Lochner*-style substantive due process.

The second development is an attempt, reflected first in *Loretto v. Teleprompter Manhattan CATV Corp.*,[215] and more recently in *Lucas v. South Carolina Coastal Council*,[216] to reduce the necessity for ad hoc determinations by establishing categorical rules delineating situations in which a per se taking has occurred. This effort is laudable not only because it will produce more workable rules and provide guidance to lower courts, but also because it implicitly rejects balancing and any other examination of the public use advanced by the regulation. What remains to be seen is whether *Loretto* and *Lucas* are the beginning of a process that will ultimately result in a general transformation of takings jurisprudence from a body of ad hoc decisions to a formal set of categorical rules or whether *Loretto* and *Lucas* will remain isolated exceptions from the general rule that takings will be judged by ad hoc factual determinations.

A. *Putting* Carolene Products *to Task: Can Landowners Be a Discrete and Insular Minority?*

As discussed earlier, *Nollan* rejected the application of the minimum rationality standard of due process to takings challenges and held that an exaction must "substantially advance" a "legitimate state interest," and that "the permit condition [must] serve[] the same governmental purpose as the development ban."[217] While the requirement that the permit condition serve the same governmental purpose as the development ban would seem to be limited by its very nature to the case of exactions, it remains to be seen just how broadly the Court will invoke the substantial relationship test. The Court has four options available to it: (1) it can reject the

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[215] 458 U.S. 419 (1982).
[216] 112 S. Ct. 2886 (1992).
[217] *Nollan*, 483 U.S. at 834, 837.

substantial relationship test and apply the rational relationship test employed in due process analysis generally; (2) it can limit the applicability of the substantial relationship test to cases such as *Nollan* in which the governments seeks an exaction; (3) it can establish a set of criteria for determining when heightened means-end scrutiny under the substantial relationship formula should be undertaken that would not necessarily limit its application to cases involving exactions; and (4) it can find that the substantial relationship test applies to all takings cases.

If the substantial relationship test is to endure in any form, however, it must be justified by more than semantics. Although the treatment of *Nollan* above suggests that the substantial relationship test is directly traceable to *Nectow*, *Euclid*, and the substantive due process analysis of the *Lochner* era,[218] it may be possible to justify an exception from the minimum rationality standard for certain types of regulatory takings.

This Comment has already suggested that the Takings Clause does not provide for any independent test of means-end rationality and that only the Due Process Clause requires such scrutiny. Thus, if a compelling rationale for the substantial relationship test is to be developed, it must conform to the principles enunciated by the Court in *United States v. Carolene Products Co.*[219] Although the Court's opinion in *Carolene Products* established the deferential standard of due process review of social and economic legislation known as the "rational relation" test, it did suggest that higher scrutiny would be appropriate to protect "discrete and insular" minorities which might not effectively be protected by the political process.[220] While racial minorities have typically been the beneficiaries of this notion, there is no reason why other types of minority groups should not benefit from an exception to the rational relation standard if there is reason to believe that their interests may be so discrete from the remainder of the population or their number so limited that they are unprotected by the political process.

A zoning measure, property tax, or other land use regulation which applies to a large number of individuals probably does not warrant review under any standard other than the deferential rational relation test. Since a large number of individuals would be affected, they would presumably have the economic and political

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[218] *See supra* notes 37-43, 160-90 and accompanying text.

[219] 304 U.S. 144 (1938) (establishing the "rational relation" test).

[220] *See id.* at 152-54 & n.4.

strength necessary to ensure that their interests are represented and to expose any unfairness or wrongdoing associated with the regulation.

Exactions such as those involved in *Nollan*, however, present a different set of circumstances. When individuals or small groups of individuals are singled out by government and forced to surrender property rights, they may have little ability to appeal to the political process. Few in number and possessing limited resources in the aggregate, they may have little or no ability to affect the outcome of the political process. If an exaction is required of an individual, she may not even be aware that there are other similarly affected individuals with whom she may unite for political purposes. Even if an appeal to the electorate at large were possible, the electorate may be unsympathetic to a rich individual. Worse still, the electorate may in fact be the beneficiary of the exaction or land use restriction. If, for example, one individual's land is so restricted that it can only serve as a green belt, neighboring landowners may sympathize with the plight of the affected landowner, but they may support the land use restrictions nonetheless since they may benefit in the form of enhanced property values due to reduced supply of improvable land and the environmental and aesthetic benefits of the green belt. In sum, a government which takes from a few and gives to many may be quite popular indeed.

In fact, Justice Stevens has noted that the "principle of generality is well-rooted in our broader understandings of the Constitution as designed in part to control the 'mischiefs of faction.'"[221] As Richard Epstein has explained:

> The generality requirement in turn is said to lead to the conclusion that regulations are suspect when they "single out" individual landowners to bear the brunt of special exaction, so that any broad based zoning plan is far less likely to meet with constitutional difficulty than a plan targeted to a small group of individuals.[222]

While members of the Court have noted that the scope of a regulation is a factor to be considered in determining whether a taking has occurred, they have failed to establish a nexus between the standard of review to be applied and the generality with which a regulation affects the electorate.

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[221] *Lucas*, 112 S. Ct. at 2923 n.7 (Stevens, J., dissenting).

[222] Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in* Lucas v. South Carolina Coastal Council, 26 LOY. L.A. L. REV 955, 967 (1993).

Situations exist under which heightened review of the means-end fit of government regulations affecting land is warranted. Although application of the substantial relationship test is not justified for all takings cases, it may be defensible when the regulation affects a limited class or number of individuals and where the majority of the electorate may actually benefit by imposing the costs of the regulation on a few individuals. The challenge before the Court now is to develop a set of standards for determining when application of the substantial relationship test is warranted and to demonstrate in its cases the empirical and logical necessity of its use.

B. *Signs of Hope and Despair in* Lucas v. South Carolina Coastal Council

In *Lucas v. South Carolina Coastal Council*[223] the Court held that any regulation which completely deprives the owner of all economically beneficial use of land is a taking requiring compensation, regardless of the importance of the public interest advanced by the regulation.[224] The establishment of this additional per se test is part of an effort by the Court to further the process of establishing straightforward principles of takings jurisprudence which will provide workable standards for lower courts to follow.[225] The opinion reflects a decision by the Court to reduce, to the extent possible, the ad hoc nature of takings jurisprudence and to institutionalize a more workable and practical categorical approach to the issue.[226]

While *Lucas* appears to create another category of regulations which are per se invalid under the Takings Clause, the test established by *Lucas* is somewhat less revolutionary than one might

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[223] *Lucas*, 112 S. Ct. at 2886.

[224] *See id.* at 2893-94. The Court previously suggested such a rule in Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

[225] The Court had previously recognized that a permanent physical occupation of property is a per se taking. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

[226] *See* Michelman, *supra* note 3, at 1621-25 (discussing the rise of "categorical takings doctrine" and the "demise of balancing"); *see also* Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752, 1753 (1988) ("Some commentators, including Frank Michelman and Margaret Jane Radin, have detected a methodological shift in recent takings decisions, a reaction against open-ended balancing. Specifically, they have pointed to the categorical reasoning of the Court in *Loretto* . . . ." (footnotes omitted)).

imagine. The per se test promulgated by the Court in *Lucas* only invalidates those regulations which leave the owner of land with no viable economic use. While this standard may be triggered in the most extreme cases, it will doubtless affect only a handful of cases, for few, if any, land use regulations leave the owner with absolutely no economically viable use of his land. Moreover, the most restrictive of all land use regulations may yet slip through the cracks of the *Lucas* test. For example, imagine a regulation which forbids the owner of a large tract of undeveloped land from building any structures or removing any resources from the land. While the land owner's property has essentially been taken by the government for use as a green belt, it may not be possible to say that the land owner is left without any economically beneficial use of the land. The owner could possibly charge a fee for nature lovers, bird watchers, or hunters to enter upon the land. Indeed, even land which was so restricted as to permit no use whatsoever might yet have some economically viable use—it would always have some speculative value since there would always be the chance that the government would lift the restriction.

There is also language in the opinion which raises questions about the depth of the Court's understanding of the fundamental issues involved in *Lucas*. In the same breath with which it proclaims the recognition of two classes of cases in which no ad hoc factual determination need be made,[227] it describes a balancing test for those cases which remain. The opinion posits that when the two classifications are not applicable to the case at bar, the Court will return to "case-specific inquiry into the *public interest* advanced in support of the restraint."[228] While it had always been clear that the Court would have to resort to "ad hoc, factual inquiries"[229] when no per se test disposed of the case, the language of Scalia's opinion takes a step backward by suggesting that the Court actually engages in balancing.

It is important at this juncture to highlight a critical distinction between "ad hoc, factual inquiries" and "balancing." While "balancing" certainly requires case-specific factual determinations, it is achieved by comparing the value of the private property rights

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[227] *See Lucas*, 112 S. Ct. at 2893 (discussing regulations that constitute a physical invasion of property and regulations that deny all economically beneficial or productive use of the land).

[228] *Id.* (emphasis added).

[229] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

destroyed to the value of the public interest advanced by the regulation.[230] "Ad hoc, factual inquiries" are precisely what Holmes mandated in *Mahon*, but the factual inquiries which Holmes envisioned in *Mahon* did not involve, in any way, an examination of the public interest advanced by the regulation.[231] Rather, *Mahon* suggested simply that the effect of a regulation should be evaluated to determine whether the regulation so significantly impairs the rights of the owner as to appropriately be characterized as a taking. The reference to balancing made in Justice Scalia's opinion must be an unintended error since the fundamental premises upon which the opinion stands are decidedly in opposition to the interjection of the magnitude of the public interest into the calculus of takings jurisprudence.[232] If the public interest could justify the elimination of 99% of the value of a landowner's property without compensation, why could it not warrant the elimination of 100% of the property's value? Obviously it could. If the Court believed in balancing, it would have held in *Lucas* that the deprivation of all economically beneficial use constitutes a taking unless warranted by a sufficiently compelling state interest. Instead, the Court chose to hold that the complete elimination of economically beneficial use constitutes a taking regardless of the public interest. What the justices may not have realized is that they simply applied Holmes's diminution in value test as it has been interpreted in this Comment. If that test is to have any significance at all, it must require the invalidation of a regulation which deprives the owner of all economically beneficial use, and as suggested above, that test presupposes that a public interest exists which warrants the taking but which also warrants the payment of just compensation.

Assuming, as I think we must, that the aforementioned language referring to balancing is but an inadvertent error, the fundamental holding of the Court's opinion in *Lucas* stands as a beacon of hope in the sea that is takings jurisprudence. Indeed, it represents an

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[230] *See* Michelman, *Just Compensation*, *supra* note 2, at 1193 (describing "balancing test" as weighing of social gains against private losses).

[231] *See supra* notes 44-86 and accompanying text.

[232] If a court may not examine the public interest when a regulation deprives the owner of all economically beneficial use of land, then why should a court ever examine the public interest? While application of Holmes's diminution in value may require "ad hoc, factual determinations", it certainly does not suggest that the public interest should in any way become a part of that calculus. *See supra* notes 44-86 and accompanying text.

implicit rejection of balancing,[233] and demonstrates fidelity to the takings jurisprudence established by Justice Holmes in *Mahon*.[234]

CONCLUSION

Takings jurisprudence is already hobbled by the lack of a clear and practical test of what constitutes a "taking." The principal thrust of the Court's efforts should thus be turned to defining more precisely the standards of its "ad hoc, factual determinations" and what that calculus should properly entail, as well as attempt to facilitate the continued advancement of a categorical approach to the takings problem. The Court must seek to find an independent baseline for judging when a regulation crosses the threshold and "goes too far." But the Court must reject efforts to use the Takings Clause as a means to accomplish what can no longer be done under the rubric of substantive due process. Thus, all forms of ends and means-end analysis, including the public use requirement, the substantial relationship test, and balancing should be purged from takings jurisprudence entirely. While heightened means-end scrutiny is probably justified when a regulation affects only a limited number of individuals who may not effectively be protected by the political process, the substantial relationship test should be established as an exception to the rational relation test of due process, rather than some product of the Takings Clause.

Our muddled takings jurisprudence desperately needs to be made clear and workable if it is not soon to befall the same fate as *Lochner*. Indeed, the erroneous infusion of due process analysis into takings jurisprudence has long been a source of confusion and redundancy in addressing the issue of regulatory takings. By understanding the functional independence of the Due Process and Takings Clauses, one can more clearly perceive the narrow, but vital function of the Takings Clause, and contribute to its effectuation.

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[233] If the Court were actually balancing, then the per se test of *Lucas* would not always be appropriate since there would still be occasions when the public interest outweighed the private loss.

[234] One commentator has suggested that the *Lucas* majority did little more than apply Holmes's analysis in *Mahon*. *See* Donald Large, *Lucas: A Flawed Attempt to Redefine the* Mahon *Analysis*, 23 ENVTL. L. 883, 883 (1993). For a discussion of *Mahon*, see *supra* notes 44-86 and accompanying text.