CONSTITUTIONAL PROTECTIONS OF PRIVATE PROPERTY: DECOUPLING THE TAKINGS AND DUE PROCESS CLAUSES

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INTRODUCTION

The Supreme Court, in deciding whether a government enactment that restricts the use or decreases the value of property amounts to a violation of a constitutional right, focuses on the Takings Clause of the Fifth Amendment, which declares that private property shall not "be taken for public use, without just compensation."[1] This limitation on government applies to states by virtue of its incorporation in the Fourteenth Amendment's Due Process Clause.[2]

In deciding whether a government regulation amounts to a taking of property, the Court appeals to a variety of considerations: does the government regulation amount to a physical confiscation,[3] does it leave the property owner with economically viable use of the property,[4] was the regulation enacted to prevent a noxious use of property,[5] does the regulation unfairly single out some people and force them to bear a burden that should be borne by the public as a whole,[6] do the benefits of the regulation outweigh the detriment to the property owner,[7] and is the regulation necessary to effect a substantial

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[1] U.S. CONST. amend. V.

[2] *See* Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897) (holding that the Fourteenth Amendment's Due Process Clause requires compensation for private property taken by states for public use).

[3] *E.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014-15 (1992); Yee v. City of Escondido, 503 U.S. 519, 527 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427-28 (1982); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 125-26 (1978); United States v. Causby, 328 U.S. 256, 261-62 (1946).

[4] *E.g.*, Agins v. Tiburon, 447 U.S. 255, 260 (1980); *Penn Cent. Transp.*, 438 U.S. at 138 n.36.

[5] *E.g.*, Mugler v. Kansas, 123 U.S. 623, 668-69 (1887). *See generally* Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 485-93 (1987).

[6] *E.g.*, Armstrong v. United States, 364 U.S. 40, 49 (1960); Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[7] *E.g.*, *Loretto*, 458 U.S. at 436; Kaiser Atena v. United States, 444 U.S. 164 (1979); *Pa. Coal*, 260 U.S. at 414.

public purpose.[8] While all of these considerations may be relevant in deciding whether it is good morally or as a matter of public policy to allow the government to restrict the use of property without paying just compensation, the Court has never made clear why all of these considerations are relevant to the Takings Clause, the plain meaning of which requires only that government must not "take"—grasp, seize, lay hold of—property without paying compensation, not that its regulations must be fair or promote a sufficiently justified purpose. Without an account of why these considerations are relevant in deciding the constitutional issue, the Court's various appeals will remain "ad hoc," a description the Court itself has used to characterize property rights adjudication.[9]

The plain meaning of "do not take property" is not "do not regulate unfairly" or "do not fail to promote social utility," and the Court has never shown that the Framers of either the Fifth or Fourteenth Amendments understood "do not take property" in any way other than the plain meaning.[10] The Court's takings analysis has lacked

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[8] *E.g.*, Dolan v. City of Tigard, 512 U.S. 374, 385 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1986); *Agins*, 447 U.S. at 260; *Penn Cent. Transp.*, 438 U.S. at 127.

[9] *Loretto*, 458 U.S. at 432 ("[N]o 'set formula' exist[s] to determine, in all cases, whether compensation is constitutionally due for a government restriction of property. Ordinarily, the Court must engage in 'essentially ad hoc, factual inquiries.'" (quoting *Penn Cent. Transp.*, 438 U.S. at 124)).

[10] Records of what the Founders intended by the specific language of the Takings Clause are scarce. Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 283 (1988) ("[T]he clause was one of the least controversial provisions in the Bill of Rights, occasioning no recorded substantive comment at all."). James Madison seems to have meant the Clause to apply only to direct, physical takings of property. In a speech from June 9, 1789, proposing texts of early amendments to the Constitution, Madison suggested the following formulation of the Takings Clause: "No person shall be . . . obliged to *relinquish* his property, where it may be necessary for public use, without a just compensation." Amendments to the Constitution (June 8, 1789), *in* 12 THE PAPERS OF JAMES MADISON 201 (Charles F. Hobson et. al. eds., 1979) (emphasis added). No account seems to exist as to why the change in language was made from "relinquish" to "take." William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 711 n.95 (1985) ("The accounts of the congressional debate over the Bill of Rights provide no evidence as to why the change in language was made."). Treanor argues that Madison intended the Takings Clause to provide narrow legal protection against direct physical takings, but also to serve at least symbolically a broader educative function, providing a moral protection for property. *Id.* at 711-12. Both Justice Scalia and Justice Blackmun seem to agree that Madison meant the Takings Clause to offer legal protection only to direct, physical takings. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028 n.15 (1992); *id.* at 1057 n.23 (Blackmun, J., dissenting). *Cf.* J. Peter Byrne, *Regulatory Takings and "Judicial Supremacy,"* 51 ALA. L. REV. 949, 955 (2000) ("Historical research has established beyond reasonable dispute that the Framers intended the Clause only to apply to physical seizures."); Bernard Schwartz, *Takings Clause—"Poor Relation" No More?*, 47 OKLA. L. REV. 417, 419-21 (1994) (stating that according to the original understanding of the Takings Clause, a taking was an appropriation or acquisition of property). For a contrary reading of Madison's understanding of the Takings Clause, see Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 AM. U. L. REV. 181 (1999) (arguing that for Madison and the Founders, takings originally included nonphysical regulatory takings of property). For criticism of Gold's position, see *infra* note 41. For discussion of why Madison's views are uniquely important when examining the intentions behind the amendments, see Jack

moorings to the text of the Constitution, giving the impression that it has been guided by the Court's ideas of what the scope of property rights ought to be[11] rather than by what the text of the Constitution requires either in its plain meaning or according to the intent of the Framers or an understanding of its implicit principles.[12]

A principled and textually grounded basis for deciding the scope of property rights afforded by the Constitution will require the Supreme Court to recognize that there are, not one, but three distinct provisions protecting property rights. In addition to the Takings Clause, there are the Due Process Clauses of the Fifth and Fourteenth Amendments, both of which prohibit governments from depriving any person of "life, liberty, *or property*, without due process of law."[13] Many of the considerations weighed by the Court in its takings adjudication are irrelevant to the Fifth Amendment's Takings Clause, and some of these considerations can be grounded only in one of the Due Process Clauses. The Due Process Clauses themselves are, through a long line of cases, interpreted narrowly or broadly depending on what level of judicial review—minimal, heightened, or strict—the Court finds appropriate.[14] In its failure to link the considerations that it weighs in its property rights adjudication to the appropriate constitutional provisions, the Court creates a takings jurisprudence that is unprincipled and ad hoc.[15] By decoupling the Takings and Due Pro-

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Rakove, *Parchment Barriers and the Politics of Rights*, *in* A CULTURE OF RIGHTS 98, 124-26 (Michael J. Lacey & Knud Haakonssen eds., 1991).

[11] *See* Byrne, *supra* note 10 (arguing that the expansive reading of the Takings Clause is an example of judicial overreaching).

[12] *See generally* ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION (1987) (providing an overview of a variety of approaches to interpreting the Constitution).

[13] U.S. CONST. amends. V, XIV.

[14] Economic legislation receives minimal scrutiny. *See, e.g.*, Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978) (holding that economic regulations are presumed constitutional unless arbitrary and irrational); Ferguson v. Skrupa, 372 U.S. 726, 729-32 (1963) (stating that the Due Process Clause is no longer used to strike down laws felt to be "economically unwise"); Williamson v. Lee Optical, 348 U.S. 483 (1955) (holding that regulations of business and industrial conditions need only have a rational relation to the state's objective); Olsen v. Nebraska, 313 U.S. 236 (1941) (stating that the Court defers to Congress and states regarding the wisdom or appropriateness of economic regulations); Nebbia v. New York, 291 U.S. 502 (1934) (holding that a law regulating milk prices is consistent with due process if it is not unreasonable, arbitrary, or capricious). Legislation impinging on fundamental rights receives stricter scrutiny. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 164 (1973) (striking down a state abortion law as a violation of the fundamental right to privacy); Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (striking down, under the Equal Protection Clause, a welfare residency requirement as a violation of the fundamental right to travel interstate); Griswold v. Connecticut, 381 U.S. 479, 481-82 (1965) (striking down a state's contraception law as violating the fundamental right to privacy); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (striking down, under the Equal Protection Clause, a state criminal sterilization statute as a violation of the fundamental right to procreate).

[15] Commentators and judges have noted the failure to distinguish the Takings and Due Process Clauses. In *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 1036 (Cal. 1999), Justice Chin, dissenting, criticized the majority for citing Due Process Clause cases in a Takings Clause case and argued that the two clauses should be separated, but he gave no indication of

cess Clauses and identifying which Clause provides the anchor for each of its considerations, the Court's rulings on property rights can be made coherent. More importantly from a practical perspective, by properly linking each consideration to the appropriate textual provision, we can remove some of the ambiguities in the principles and tests that the Court formulates based on these considerations.

In Part II, I discuss the three clauses providing federal constitutional protection to property owners and explain the issue that the Court faces in confronting cases involving property rights—whether a regulation amounts to a taking. Part III examines the Court's various considerations in deciding whether a regulation amounts to a taking and explains how decoupling the Takings Clause from the Due Process Clauses provides a principled, nonarbitrary justification for giving these considerations any weight.

I. THE TAKINGS CLAUSE AND THE DUE PROCESS CLAUSES

A. The Three Clauses: An Overview

At the constitutional convention, the individual states agreed both to establish a federal government with certain enumerated powers and, at the same time, to limit those powers.[16] One such limit was a restriction on what the federal government could do with private property.[17] The states wrote into the Constitution express protections for property that the federal government is bound to respect as part of the compact through which it was established. With the passage of the Fourteenth Amendment, the states expressly agreed to limit their own powers by prohibiting themselves from enacting laws denying life, liberty, or property without due process of law.

When considering whether a state or federal regulation amounts to an unconstitutional usurpation of property rights, the Court has

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the distinct rationales for each clause. Glen E. Summers singles out three current takings tests—the public use limitation, the balancing test, and the substantial relations test—claiming they are appropriate only to a due process analysis. Glen E. Summers, Comment, *Private Property Without* Lochner*: Toward a Takings Jurisprudence Uncorrupted by Substantive Due Process*, 142 U. PA. L. REV. 837 (1993). Steven J. Eagle argues for distinguishing Takings and Due Process Clauses for the sake of coherence. Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 1005, 1009 (2000). Agreeing that it is helpful to decouple the Takings and Due Process Clauses, this Article advances this contention by providing a more systematic discussion that links all of the primary considerations currently used in Takings jurisprudence with the meaning and purposes of each clause. This Article takes issue with several of Eagle's conclusions, *see infra* note 131, and where Summers would banish the balancing and substantial relations tests, this Article attempts to show how these and other tests used by the Court can be applied more coherently once they are properly associated with their constitutional moorings.

[16] *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 324-26 (1816); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-77 (1803); *see also* U.S. Term Limits, Inc. v. Thorton, 514 U.S. 779, 847 (1995) (Thomas, J., dissenting).

[17] U.S. CONST. amend. V.

generally appealed to the Fifth Amendment's Takings Clause.[18] While the Takings Clause was originally intended as a limitation only on the federal government, Justice John M. Harlan held in *Chicago, Burlington & Quincy Railroad. Co. v. Chicago* that the Due Process Clause of the Fourteenth Amendment incorporated the Takings Clause, thereby applying it to the states.[19]

Since the argument in this Article depends on an appreciation of the distinct protections afforded by the Takings Clause and the Due Process Clause, it is useful to consider what protections against state regulations would be left to property owners under the Due Process Clause of the Fourteenth Amendment if Justice Harlan's dicta—that a taking of property without just compensation is, necessarily and always, a deprivation of property without due process of law—had not been followed by later Courts[20] and the Takings Clause never incorporated.

Since the revolt against *Lochner v. New York*[21] and its perceived use of strict scrutiny to strike down economic legislation as a deprivation of liberty without due process of law, the Court has given deference to legislatures and used only minimal scrutiny to evaluate the constitutionality of economic regulations.[22] If the Court interprets a state regulation of private property as essentially economic legislation, it will uphold the regulation as long as it is not wholly arbitrary, and thus, if the Takings Clause had never been incorporated, such a regulation would be valid, even if it "takes" property without providing just compensation. Only upon the theory of substantive due process

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[18] Cases in the early part of the 1900s involving regulations of property did appeal to the Due Process Clause, *see, e.g.*, Nectow v. Cambridge, 277 U.S. 183 (1928), and some cases invoked both the Due Process and Takings Clauses, *see, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). One commentator has argued that after the demise of substantive due process reviews of economic legislation with the rejection of *Lochner* in the 1930s, the Takings Clause "gradually emerged as the only remaining tool for invalidating regulations which interfered with property rights." Summers, *supra* note 15, at 845. Recently, courts have returned to the Due Process Clause as a possible source for property protections. *See, e.g.*, E. Enter. v. Apfel, 524 U.S. 498 (1998) (considering whether the Coal Act, which retroactively allocates liability to Eastern Enterprises for health benefits to its former employees, constitutes a taking or a violation of substantive due process; five Justices found that the Coal Act is invalid: four Justices found it to be an unconstitutional taking, five Justices found the Taking Clause to be inapplicable, and one Justice found the Act to violate the Due Process Clause); Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851 (Cal. 1997) (denying just compensation for rental income lost due to a rent control law, on the grounds that the law was a violation of due process but not of the Takings Clause and that just compensation is not the appropriate remedy for due process violations); Kavanua v. Santa Monica Rent Control Bd., 19 Cal. App. 4th 730 (Cal. Ct. App. 1993) (holding that a 12 percent limit on rent increases deprived Kavanau of a "just and reasonable return" in violation of his due process rights).

[19] 166 U.S. 226, 235 (1897) (holding that "[c]ompensation for private property taken for public use is an essential element of due process of law as ordained by the fourteenth amendment").

[20] *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 122 (1978) ("[The Fifth Amendment] of course is made applicable to the states through the Fourteenth Amendment.").

[21] 198 U.S. 45 (1905).

[22] *See* cases cited *supra* note 14.

would it be a permissible exercise of judicial review to strike down as a violation of the Due Process Clause an entirely arbitrary economic regulation that satisfied the requirements of procedural due process.[23]

In *Lochner* a majority of the Court struck down that part of a New York state regulation that limited the number of hours a baker could work.[24] The Court held that the law exceeded the state's police powers by limiting bakers' liberty to contract in violation of the Fourteenth Amendment's Due Process Clause.[25] The Court gave no indication that the law failed to meet the requirements of procedural due process: the law presumably was the product of due procedures for lawmaking, it was not vague,[26] and it required notification to those accused of its violation.[27] Nevertheless, the Court struck down the law on the ground that it failed to meet the demands of, not procedural, but substantive due process.

Under the Court's substantive due process analysis, a law that denies a person life, liberty, or property must be adequately justified, regardless of whether that law is enacted according to scrupulously fair and proper democratic procedures. The degree of justification required depends on the liberty interest effected.[28] In contrast, where the law is an economic regulation that does not deny people equal protection of the laws or violate fundamental rights, courts now use minimal scrutiny, demanding only that the law not be arbitrary or capricious.[29] While this is a fairly lax standard, it has been used to strike

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[23] Procedural due process has been regarded as requiring certain safeguards, such as the "right to be heard" and notice requirements. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'") (citation omitted); Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974) (hearing required); McVeigh v. United States, 78 U.S. (11 Wall.) 259, 267 (1870) (right to notification and a hearing); Baldwin v. Hale, 68 U.S. (1 Wall.) 223 (1863) (same).

[24] *See Lochner*, 198 U.S. at 45.

[25] *Id.* at 53 ("The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.") (citation omitted).

[26] *Cf.* Lanzetta v. New Jersey, 306 U.S. 451 (1939) (reversing conviction for violation of law found to be vague); Collins v. Kentucky, 234 U.S. 634, 638 (1914) (stating that the "fundamental principles of justice embraced in the conception of due process of law" are violated if a statute compels "men on peril of indictment to guess what their goods would have brought under other conditions not ascertainable").

[27] *See Lochner*, 198 U.S. at 46 ("If, in the opinion of the factory inspector, alterations are required in or upon premises occupied and used as bakeries, in order to comply with the provisions of this article, a written notice shall be served by him upon the owner, agent or lessee of such premises, either personally or by mail, requiring such alterations to be made within sixty days after such service, and such alterations shall be made accordingly." (quoting N.Y. Laws, 1897, ch. 415, § 115)).

[28] Where a right is regarded as fundamental, such as the right to travel or the right to privacy, then a law infringing on this right demands greater justification. *See* cases cited *supra* note 14.

[29] *See* cases cited *supra* note 14.

down legislation.[30] Many readers of the *Lochner* opinion assume that the Court used strict scrutiny to strike down the New York law,[31] but while its language is unclear and sometimes conflicting, a strong case can be made that the Court struck down the New York law using only minimal scrutiny. The Court found the law to have "no reasonable foundation" and to be "arbitrary."[32]

Had the Court never held that the Takings Clause applies to states through the Fourteenth Amendment, state regulations of private property would be permissible—even if they took property—so long as they were not arbitrary or capricious, assuming that, as economic regulations, they would be evaluated under minimal scrutiny. Even if the right to own property were held to be fundamental,[33] such regula-

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[30] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (using rational basis test to strike down law as a violation of the Equal Protection Clause); *cf.* Eastern Enter. v. Apfel, 524 U.S. 498, 550 (1998) (Kennedy, J., concurring and dissenting in part) (striking down the Coal Act using a "permissive" standard); Eagle, *supra* note 15, at 1026 (arguing that even a rational basis test requires making substantive evaluations about legislative goals).

[31] *E.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1346 (3d ed. 2000) ("*Lochner* itself provides the best example of such strict and skeptical means-ends analysis.").

[32] *Lochner*, 198 U.S. at 58 ("There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law."); *id.* at 62 ("[The law] is unreasonable and entirely arbitrary."); *id.* at 57 (declaring that "there is no reasonable ground" for the law and that "the end itself must be appropriate and legitimate"). The first of these quotations reveals just how unclear and conflicting the Court's opinion is. It conflates a law that is not "necessary" with a law that is not "appropriate" and later with a law that is "entirely arbitrary." In the same opinion the Court in fact invokes both minimal and strict scrutiny. The opinion notes that there are alternatives to the law, such as inspecting baking premises. Despite such instances of stricter scrutiny, numerous passages reveal that the Court concludes that the law is not only unnecessary, but arbitrary, capricious, and irrational. It seems to me the most compelling criticism of the *Lochner* decision should focus not on its use of substantive due process but on its assessment of whether the law is "arbitrary." The deepest flaw in the Court's decision is not its use of "subjective values" to strike down the will of the majority but its failed use of an objective standard of reasonableness. Even if the law resulted from pressure by unions opposed to cheap, exploitable immigrant labor, the law is not arbitrary.

[33] Relying primarily on the Takings Clause to protect property rights, the Court has not treated property as a "fundamental right" for the purpose of due process analysis. This is not to say that property is not regarded as important. The Founders, philosophers influencing them, and early state court decisions invoke the language of "natural" and "inalienable" right to characterize property. *See* Gold, *supra* note 10. But the Supreme Court's recent consideration of the scope of protection to property accorded by the Due Process Clause in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), appears to indicate a reluctance to use strict scrutiny in a due process review of regulations affecting property. Justice O'Connor, in her plurality opinion, expresses concern "about using the Due Process Clause to invalidate economic legislation." *Id.* at 537. *Cf.* Byrne, *supra* note 10, at 954 ("[R]egulatory takings sometimes seems to be the very same doctrine as substantive due process, attached to a different clause only as an alias to avoid the obloquy in which substantive due process is held."). It is important to note that the five Justices who *do* use the Due Process Clause employ a deferential standard of review. *See E. Enter.*, 524 U.S. at 550 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 553 (Stevens, J., with whom Souter, Ginsburg, and Breyer, JJ., join, dissenting,), *id.* at. 556 (Breyer, J., with whom Stevens, Souter, and Ginsburg, JJ., join, dissenting). However, we cannot infer from this that they would not treat property as a fundamental right were the Due Process Clause the only protection afforded to property. These five Justices invoke the Due Process Clause only because they do not think the law in question threatens a genuine property interest. For example, Justice Breyer characterizes the retroactive law in question as affecting a "liability to

tions would remain permissible—again, regardless of whether they took property—so long as they could be adequately justified under strict scrutiny review.[34]

Had the Court not only refused to incorporate the Takings Clause, but also never adopted the doctrine of substantive due process for economic legislation, then state economic regulations would simply need to meet the demands of procedural due process. Even laws that arbitrarily took property without providing just compensation would be valid so long as the laws resulted from fair and proper democratic procedures.

The protection afforded by the Due Process Clause in and of itself is conceptually distinct from the protection afforded by the Takings Clause. This must have been apparent to the authors of the Fifth Amendment; why else would they add the provision that private property shall not be taken for public use without just compensation if they intended this protection to be contained in the previous clause declaring that no person shall be deprived of property without due process of law? All takings are deprivations of property subject to the requirements of the Due Process Clauses. Not all deprivations of property, however, are subject to the requirements of the Takings Clause. The Takings Clause goes beyond the Due Process Clause in telling governments that even if their laws satisfy the requirements of due process, they still cannot take property for public use without paying just compensation.

The purpose of this Article is not to object to the position that the Due Process Clause incorporates the Takings Clause.[35] Rather, the purpose is to argue for the importance of recognizing how the protections afforded property owners by the Takings Clause and the Due

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pay money," which he distinguishes from a deprivation of physical or intellectual property. *See id.* at 554 (Breyer, J., dissenting). And Justice Kennedy says the Act regulates without regard to property. *See id.* at 540 (Kennedy, J., concurring in the judgment and dissenting in part). The Supreme Court of California, relying on the Due Process Clause to strike down limitations on rent increases, recently characterized the level of review as minimal, noting that due process guarantees protection against "arbitrary" laws or laws that lack "a reasonable relation to a proper legislative purpose." *See* Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851, 857 (Cal. 1997) (citations omitted).

[34] The Court uses strict scrutiny to review laws that appear to violate fundamental rights. *See* cases cited *supra* note 14.

[35] Though certainly this argument can be made, and Justice Stevens suggests as much in his dissent in *Dolan v. City of Tigard*, 512 U.S. 374, 406 (1994) (Stevens, J., dissenting). Commenting on Justice Harlan's opinion in *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897), Justice Stevens writes that "[i]t applied the same kind of substantive due process analysis more frequently identified with a better known case that accorded similar substantive protection to a baker's liberty interest in working 60 hours a week and 10 hours a day." *Id.* (citing Lochner v. New York, 198 U.S. 45 (1905)). Justice Stevens views the *Dolan* majority's use of more exacting judicial scrutiny of state regulations affecting property as a "resurrection of a species of substantive due process analysis that it firmly rejected decades ago." *Id.* at 405 (citation omitted). Justice Stevens does not seem to take at face value passages in *Lochner* in which Justice Peckham strikes down the New York law using a minimal scrutiny rational-basis test. For a discussion of Justice Peckham's reasoning in *Lochner*, see *supra* note 32.

Process Clauses are conceptually distinct. By decoupling the Takings and Due Process Clauses, we can see more clearly how the Court's considerations are grounded in the Constitution and how the Court's takings adjudication is integrated with its substantive due process analysis.

In the next Section, I examine the question of when a government regulation amounts to a taking of property.

B. Takings vs. Regulations

The words of the Takings Clause are clear: government may not take—that is, confiscate, appropriate, seize, remove, force one to relinquish or transfer title of—one's property, without providing just compensation. But the Court goes beyond the ordinary understanding of "taking property" to conclude that property is not merely a thing but a bundle of rights.[36] If enough "sticks" in the bundle of rights are removed, or particularly important ones such as the right to viably use property,[37] then the Court may conclude that property has been taken even though the state has not physically confiscated anything.[38]

The Court's conclusion relies on its unnatural use of the word "take." While one can be deprived of a use or a pleasure, that use or pleasure cannot be "taken" from someone.[39] To take is to grip, grasp, seize, lay hold of, capture. There are other uses of "take" (which receives seventeen pages of coverage in the 1989 edition of the Oxford

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[36] *E.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011 (1984) (observing that the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property" (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982) (same); Andrus v. Allard, 444 U.S. 51, 65-66 (1979) ("At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."); *see also* Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of 'Just Compensation' Law*, 80 HARV. L. REV. 1165, 1230-33 (1967).

[37] *See infra* Part II.B.

[38] *Cf.* BRUCE ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 26-29 (1977). Ackerman distinguishes the ordinary understanding of taking private property from the legal understanding. The legal view, he explains, holds that property is a bundle of rights—to possess, use, exclude, and alienate. If the state takes away some of the sticks in this bundle of rights, it has taken property even though it has not physically confiscated it. "*Whenever* the state takes *any* uses right out of Jones's bundle and puts it in *any* other bundle, private property should be understood to have been taken." *Id.* at 28.

[39] Sometimes we mean by "to take" not to appropriate or confiscate, but to extinguish, as when a person takes another's life. Destroying property takes it even when no title is transferred. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017 (1992) (holding that deprivation of beneficial use is the equivalent of a physical appropriation); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 181 (1871) ("[W]here real estate is actually invaded by super-induced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the Constitution."). In these instances, "take" does not refer merely to a deprivation of use. If I take your life, I have not merely denied you the use of something. By extinguishing you, I have removed the possibility of any use.

English Dictionary[40]), including the passive "to be affected," as when someone is taken with laughter, or a cold, or sleepiness. These passive constructions do not apply to the Takings Clause, in which "take" is a predicate of government. The uses of "take" associated with property or possession ("to take possession") imply not an affecting of property, but an appropriation, such as an occupation of or making use of for one's own purposes.[41]

The Court should limit the applicability of the Takings Clause to appropriations, seizures, and confiscations, and it should rely on the Due Process Clauses to assess the constitutionality of all other regulations affecting property. This argument appeals to the ordinary language meaning of "take," to the way "taken" is juxtaposed with "public use" (implying reference to an appropriation in which government takes control and makes use of the property), and to the juxtaposition of the Takings Clause with the Due Process Clause's proscription against "deprivations."[42] Yet the Supreme Court, reluc-

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[40] 17 OXFORD ENGLISH DICTIONARY 557-73 (2d ed. 1989); *cf.* Schwartz, *supra* note 10, at 420-21 (noting definitions of "take" from Samuel Johnson's dictionary, the only one available during the Framing era: "To seize," "To snatch," "To get; to have; to appropriate").

[41] Recent scholarship suggests that the Takings Clause originally referred to direct, physical takings, though it cannot conclusively prove this because of gaps in the historical record. *See supra* note 10; William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995) (claiming that the Takings Clause was intended to apply only to physical takings). Andrew Gold takes issue with this scholarship. To support his view that "taking" referred to both physical and non-physical, regulatory takings, Gold points to evidence that the Framers favored property rights. Gold, *supra* note 10, at 241. However, showing that the Framers wished to protect property rights does not establish that they intended the Takings Clause to protect against non-physical limitations on uses of property, since the Framers could have felt that such limitations would be protected against by the Due Process Clause. Some of Gold's own evidence suggests just this. Gold argues, for example, that "protection for nonphysical takings, contrary to some accounts, was recognized very early in the nation's history." *Id.* (citing Gardner v. Trustees of the Village of Newburgh, 2 Johns. Ch. 162, 163 (N.Y. Ch. 1816)). In *Gardner*, says Gold, Chancellor Kent "ruled on the basis of natural law, as due process of law" in protecting property from diversion of a stream. *Id.* at 229. Gold infers from this statement that property rights encompassed more than mere possession. But he has not shown that "taking" property meant anything more than physically appropriating it, because Kent was not appealing to the Takings Clause. Other evidence Gold points to in order to support his expansive reading of "taking" includes an unidentified transcription of a Lenox, Massachusetts town meeting before ratification in which someone said that men were born with rights, including "acquiring possessing protecting property of which rights they cannot be deprived but by injustice." *Id.* at 212. This, too, shows only that some colonists wanted a Due Process Clause to protect against deprivations of property; it does not imply that they viewed a proscription against taking property as a proscription against limitations of uses.

[42] Courts sometimes appeal to ordinary language in interpreting laws. *See, e.g.*, Hewitt v. Helms, 482 U.S. 755, 760 (1987) ("Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail."); Rieck v. Heiner, 20 F.2d. 208, 210 (W.D. Pa. 1927) (analyzing the "ordinary language" meaning of "basis"). However, some Justices have explicitly rejected reliance on ordinary language in interpreting the Takings Clause, referring to the ordinary language sense of property as the "vulgar and untechnical sense of the physical thing." *E.g.* United States v. General Motors Corp., 323 U.S. 373, 377 (1945); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 142-43 (1978) (Rehnquist, J., dissenting). For those who don't recognize the authority of ordinary language, or who hear no strain in the use of "taking" to characterize a mere restriction on use, there is

tant to rely on the other Constitutional protections afforded to property besides those of the Takings Clause, has been unwilling to concede that it is a stretch of language to classify as takings those regulations of property that do not appropriate or seize.[43]

Many regulations affecting property, such as zoning ordinances or rent control laws, constrain one's use of property. The Court approaches the issue of what protection the Constitution affords to owners of private property by asking when a regulation of private property is like a taking.[44] When the state requires a homeowner to move so that the house can be demolished to make way for a new freeway, it uses its power of eminent domain to take property and must pay just compensation.[45] But there are numerous ways in which the state properly regulates property through its police powers without having to pay just compensation. One sort of regulation is a restriction on use: a person cannot drive his car above the speed limit, use a hammer to smash someone's car window, or use his home for commercial purposes if it is situated in an area zoned exclusively for residential use. While such restrictions constrain one's use of property and may diminish its value, the state need not provide just compensation.[46]

The state can effectively confiscate certain property without paying just compensation. For example, if the state enacts a law prohib-

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no authoritative argument to support one reading or the other, no recently discovered documents written by the Framers indicating their intent to use "take" to refer only to appropriations. For these skeptics, the persuasiveness of the argument in this Article ultimately must rest on the claim that decoupling the clauses and relying on the ordinary language meaning of "take" results in a more coherent constitutional jurisprudence with greater integrity, a jurisprudence that is more principled and integrated with substantive due process doctrine.

[43] Other commentators have recently suggested that the Court clarify the distinct protections of the Due Process and Takings Clauses. *E.g.*, Eagle, *supra* note 15, at 980 (recommending that the Court first conduct a due process analysis of all deprivations of property and then a takings analysis where just compensation is appropriate); Summers, *supra* note 15, at 838-39, 885 (recommending the banishment of the balancing and substantial relations tests because these are appropriate only to a due process analysis and should not be used when interpreting the Takings Clause); *see also* Santa Monica Beach, Ltd., v. Superior Court, 968 P.2d 993, 1036 (Cal. 1999) (Chin, J., dissenting) (arguing against the use of due process standards when a takings standard should be used).

[44] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a 'taking.'"); Atlantic Coast Line R.R. Co. v. N.C. Corp. Comm'n, 206 U.S. 1, 33 (1907) ("[A] court . . . is confined to ascertaining whether the particular assertion of the legislative power to regulate has been exercised to so unwarranted a degree as in substance and effect to exceed regulation, and be equivalent to a taking of property without due process of law.").

[45] *See* ERNST FREUND, THE POLICE POWER 546-47 (1904) ("The constitutional prohibition against taking property for public use without compensation, applies to injury and destruction as well as to appropriation, and it applies no matter for what purpose the property is taken."); David B. Fawcett III, *Eminent Domain, the Police Power, and the Fifth Amendment: Defining the Domain of the Takings Analysis*, 47 U. PITT. L. REV. 491 (1986) ("[T]he individual's right to compensation is strictly enforced anytime it is found that the person's property has been 'taken.'").

[46] The Supreme Court has upheld zoning regulations that diminish the value of property as much as 75%. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

iting the production or sale of alcohol, it can require that the owners of distilleries cease operations even though the facilities have value only in producing alcohol, without having to provide compensation for their lost investment.[47] This government action does not violate the Takings Clause because the use of the property is illegal.[48] When government confiscates a crop of marijuana or infected cedar trees, it need not pay compensation.[49]

The state can require owners to maintain their property in certain ways without providing compensation.[50] Property owners are required by law to expend resources to purchase smoke detectors and to place these detectors on their ceilings. While this might appear to be a taking both of one's liquid assets and of a section of one's home, no court has held that the state must provide just compensation.[51] In each of these examples we can say that the government has regulated, not taken, property by virtue of its police powers. But if we refuse to be bound to the ordinary meaning of "take," it can also be argued that even when the state merely restricts the use of property and does not physically appropriate it, the state ought to provide just compensation.[52] Following this reasoning, the concept of a regulatory taking has emerged.

There are a number of principles to which the Court could appeal to decide which, if any, regulations amount to takings. Principles of

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[47] The principle is expressed by Justice Harlan:

> The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

Mugler v. Kansas, 123 U.S. 623, 669 (1887) (holding that a state can prohibit the manufacture and sale of alcoholic beverages without compensating owners of such operations). Forfeiture cases, in which an owner's interest in property is forfeited with no compensation based upon an illegal use of the property, appeal to the same principle. *See, e.g.*, Bennis v. Michigan, 516 U.S. 442, 452 (1996) (stating that "government needn't compensate an owner for property which it lawfully acquires under the exercise of government authority other than the power of eminent domain"); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-90 (1974) (reviewing the history of laws requiring forfeiture of property upon felony conviction and upholding statute permitting seizure of innocent lessor's boat used by his lessee to transport marijuana).

[48] *See infra* Part II.C.

[49] *See* Miller v. Schoene, 276 U.S. 272, 277 (1928) (holding that the state need not pay compensation when it orders the destruction of rust-infested cedar trees that are illegal under Virginia's Cedar Rust Act).

[50] *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 453 (1982) (Blackmun, J., dissenting) (noting that "New York landlords are required by law to provide and pay for mailboxes"); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (upholding a law that in part required owners of buildings designated "historic landmarks" to maintain the exterior of their buildings in good repair).

[51] *See* Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1104 (1993) (noting that states order countless "'permanent physical occupations' of rental property—in the form of fire escapes, window guards, roof railings, smoke detectors, and so on" with "apparent impunity").

[52] *See generally* RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (arguing that uncompensated state restrictions on use should be permitted only when the restrictions prevent force or fraud).

interpretation, for example, focus on how best to decide the meaning of ambiguous provisions of the Constitution's text. Other principles are concerned with the proper scope of property rights and of states' police powers. These might consider the economic consequences of allowing the restriction without requiring just compensation, and they might hold that no taking occurs where social wealth is increased by allowing the state to regulate in the particular instance.

There are important limitations to interpretive principles that appeal to the original intention of the Framers or ratifiers of the text, leaving aside the deep philosophical objections to privileging these intentions. There is little evidence of a clear conception on the part of the Framers or ratifiers of the Takings Clause, or of the Fourteenth Amendment, of how to distinguish a compensable taking from a noncompensable regulation.[53] There is some evidence that until the end of the nineteenth century, courts regarded the Takings Clause as protecting possession only, not value.[54] Still, it seems unlikely that the Court could conclusively discern an original intention on the part of the Framers or ratifiers to exclude as takings the complex regulations states now use to affect the value and use of property.

The words of the Takings Clause themselves offer no guidance for anyone averse to relying on the plain meaning of "do not take property" and wanting to invoke the legal conception of property as a "bundle of rights" in order to decide how many sticks in this bundle must be relinquished for a regulation to amount to a taking.

C. Using the Due Process Clauses to Protect Property Against Regulations That Are Not Really Takings

Undoubtedly, one reason why the Court is unwilling to rely on the ordinary understanding of "take"—to physically appropriate—and insists on including regulations that do not physically appropriate or seize property, is that this seems to be the only way to sufficiently protect property owners. Imagine the following situation. Mr. Potter has invested millions of dollars purchasing dilapidated buildings that operate as low-income housing in downtown Berkeley with the intention of converting these units into luxury condominiums. Potter is personally disliked by two members of the Berkeley City Council, because he funded their opponents in the previous election campaign.

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[53] *See* ACKERMAN, *supra* note 38, at 8 (asserting that "there is no indication that any individual Framer (let alone the whole bunch) had worked out a particular theory of compensation law that would suggest a determinate way of separating out those contexts in which compensation was required from those in which losers should be left to tend their wounds without communal assistance"); *id.* at 7 n.13 ("No researcher has discovered either an English or an American case before 1789 that expressly required compensation in the absence of legislative authorization.").

[54] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1057-58 (1992) (Blackmun, J., dissenting).

Hearing of Potter's investment, they develop a plan to get back at him. They convince a majority of the council to enact a zoning ordinance that prohibits the conversion of low-income rental units of the sort Potter now owns. The Berkeley regulation is not an appropriation of Potter's property; it is merely a limitation on use, a limitation that may have dire consequences for Potter, that certainly frustrates his investment-backed expectations, and that may have similar effects on other owners of low-income housing in Berkeley.

If the Takings Clause offered the only legal protection of property, and the Court relied on the ordinary language meaning of its words, then property owners such as Potter would be out of luck. In such a situation, it might indeed be difficult to accept the narrow, ordinary language (and intuitively appealing) interpretation of the Takings Clause as prohibiting only physical appropriations or confiscations of property.

The Court has limited itself to the Takings Clause for constitutional authority to provide protection to property owners. It has accomplished this by asking when a regulation is like or in effect or similar to a taking.[55] Deciding when something is like or functionally equivalent to a taking shifts the Court's task from applying a relatively straightforward criterion clearly found in the Constitution's text to making judgments concerning the importance of property rights and the proper role of the state's police powers. It is therefore not surprising that takings adjudication has been rife with controversy and disagreement over issues such as how much value must be diminished by a regulation in order for it to be regarded as "like" a taking.[56]

But the Court need not resort to simile. Restricting its interpretation of the Takings Clause by using the plain meaning of "take" would not necessarily diminish property protections, because there are other provisions in the Constitution providing protection to property owners. In fact, the Due Process Clauses can be construed more naturally than can the Takings Clause to restrict unjustified government limitations on use. These include deprivations of property and not just uncompensated physical appropriations. In the hypothetical above, Potter could argue that the Berkeley ordinance de-

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[55] *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a 'taking.'"); Atlantic Coast Line R.R. Co. v. North Carolina Corp. Comm'n, 206 U.S. 1, 33 (1907) ("[A] court . . . is confined to ascertaining whether the particular assertion of the legislative power to regulate has been exercised to so unwarranted a degree as in substance and effect to exceed regulation, and be equivalent to a taking of property without due process of law.").

[56] Takings adjudication has been characterized repeatedly as in disarray and in need of reform. *See, e.g.*, David Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523, 523 (1999) (citing numerous commentaries addressing the "terrible state of takings jurisprudence"); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964) (noting that takings adjudication has yielded "a welter of confusing and apparently incompatible results").

prives him of his property without due process of law, and in making his case he could appeal to many of the considerations the Court presently weighs in its takings analysis. As I shall argue in the following Section, while several of the Court's considerations are irrelevant even to deciding whether a regulation is "like" a taking, they are in fact relevant to a due process analysis.

The purpose of the Takings Clause is not to protect citizens against bad laws—that is, laws that are overbroad, arbitrary, insufficiently justified, economically inefficient, or unfair.[57] Rather, the purpose of the Takings Clause is to prevent government from appropriating property for public purposes without paying compensation.[58] The idea that it is unfair to appropriate property without providing compensation is probably the strongest rationale for the clause. Nevertheless, the appropriate place to look in the Constitution for general protections against unfair laws is not to the Takings Clause, which is targeted at a specific type of government act, but rather to the Due Process Clauses. The Due Process Clauses provide protections against unfair laws, both those that take property as well as those that merely regulate it. The Due Process Clause, not the Takings Clause, protects citizens from state laws that are overbroad, arbitrary, insufficiently justified, or unfair.[59]

In the following section, I discuss the considerations that the Court uses to distinguish takings from regulations. I explain the confusion regarding several of these considerations—the economically viable use test, noxious use test, fairness (or reciprocity of advantage) test, balancing test, and nexus test—and argue that decoupling the Takings Clause from the Due Process Clause clears up some of this confusion and provides a principled method for deciding the scope of protection the Constitution affords to property owners.

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[57] *Cf.* First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 339 (1987) (Stevens, J., dissenting). Justice Stevens argued:

> There is, of course, a possibility that land-use planning, like other forms of regulation, will unfairly deprive a citizen of the right to develop his property at the time and in the manner that will best serve his economic interests. The "regulatory taking" doctrine announced in *Pennsylvania Coal* places a limit on the permissible scope of land-use restrictions. In my opinion, however, it is the Due Process Clause rather than that doctrine that protects the property owner from improperly motivated, unfairly conducted, or unnecessarily protracted governmental decisionmaking.

Id.

[58] *See supra* notes 10, 41 and accompanying text.

[59] Since the demise of *Lochner*, the Court has been reluctant to strike down economic legislation on due process grounds, *see* cases cited *supra* notes 14, 18, but recently several Justices have been willing to resurrect the Due Process Clause as a means of ensuring fairness, *see, e.g.*, E. Enter. v. Apfel, 524 U.S. 498, 550 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) ("Statutes may be invalidated on due process grounds only under the most egregious of circumstances. This case represents one of the rare instances in which even such a permissive standard has been violated."); *id.* at 556-57 (Breyer, J., dissenting) (observing that the Due Process Clause offers protection against a "law that is fundamentally unfair").

II. CONSIDERATIONS IN DISTINGUISHING TAKINGS FROM REGULATIONS

A. Physical Taking

Although the Court's Takings Clause jurisprudence rejects the ordinary language meaning of "take property," the Court nevertheless implicitly invokes this ordinary meaning—to grab, confiscate, make use of for oneself—in developing one of its tests for whether a regulation is a taking. Using this test, the Court holds that when the government physically appropriates property or transfers property rights, or does what is functionally equivalent, then the government has taken property.[60]

One important exception to the above rule is when the government confiscates property the possession of which is illegal. In these cases the Court does not require the government to compensate the owner, nor should it.[61] This can, for the most part, be explained by appealing to the "noxious use" principle discussed more fully below.[62] According to that principle, rights to private property do not extend to the right to use property to harm others. Thus the government is not violating any right when it prohibits possessing property the use of which is generally harmful.[63]

The Court has regarded this "physical taking" principle as a bright-line rule,[64] although the line is sometimes difficult to draw.[65] Distinguishing regulations from takings by appealing to the character of the government action draws on ordinary understandings of "take property" and therefore carries strong intuitive appeal. There is nothing intrinsic to physical appropriations of property, or to transfers of property rights, as against all other deprivations or denials of property, that would make such government actions violate the Due

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[60] *See* cases cited *infra* note 64.

[61] *See supra* note 47.

[62] *See infra* Part II.C.

[63] The principle that physical confiscations are takings unless they are of illegally possessed property is not equivalent to the principle that restrictions on harmful or noxious uses of property are regulations—and not takings—insofar as it is possible to possess property illegally without harming anyone.

[64] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014-15 (1992); Yee v. City of Escondido, 503 U.S. 519, 527 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427-28 (1982); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 125-26 (1978); United States v. Causby, 328 U.S. 256, 261-62 (1946).

[65] Justices disagree, for example, whether the government's decision to force an easement that permits the public to move across one's property counts as a physical taking of property. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 831-33 (1987). On the constitutionality of noncompensated easement extractions, see *Causby*, 328 U.S. at 265 (explaining that a landowner has a claim to the superadjacent airspace and that invasions of it are in the same category as invasions of the surface) and *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329 (1922) (stating that if the government installs a battery with the effect of subordinating the strip of land between the battery and the sea to the privilege of the government to fire projectiles across it, compensation must be paid).

Process Clauses. In other words, that a government physically appropriates property or transfers property rights does not, in itself, make the government action suspect on due process grounds. If in taking property the government acted arbitrarily or unfairly, a due process challenge might be appropriate; but this would equally be the case with unfair or arbitrary regulations that merely denied the use of, but did not appropriate, property.

B. Economically Viable Use

In addition to physical takings, the Court has held that land-use regulations that deny an owner "economically viable use of his land" may also effect a taking.[66] The viable-use test has created considerable confusion, because it leaves open the crucial question of when the uses left to the regulated property are "viable enough" to fall short of a taking. No clear answer can be given to this question unless we have a benchmark standard of viable property use. What is viable to someone who regards the right to property as consisting only in the right to possess may not be viable to the utilitarian or public choice theorist who regards the right to property as the right to exploit it for socially optimal use.[67] The Court uses the economic viability standard as one among many considerations in an ad hoc inquiry, without always clarifying why the Constitution makes it a relevant consideration.

The economic viability test can be understood in three ways. First, it can be seen as a surrogate for the "physical taking" test: a regulation may deny economically viable use of property to such an extent that the effect of the regulation is to physically take or transfer the rights to the property. The Court makes this connection between the two tests in *Lucas v. South Carolina Coastal Council*.[68] The *Lucas* Court notes that there are two sorts of regulations that require compensation without inquiry into case-specific considerations: where the state regulation amounts to a permanent physical invasion[69] and "where regulation denies all economically beneficial or productive use of land."[70] As authority for this latter rule, the Court cites *Agins v. Tiburon*,[71] *Nollan v. California Coastal Commission*,[72] *Keystone Bituminous Coal*

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[66] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (holding that the state effects a taking if it "denies an owner economically viable use of his land"); *Penn Cent. Transp.*, 438 U.S. at 138 n.36 (explaining that appellants may obtain relief if they can demonstrate that their property ceases to be "economically viable").

[67] For example, from an economist's perspective, regulations restricting use to control pollution would be considered socially optimal if they reduced pollution to the point where the marginal net private benefit of producing pollution is equal to the marginal external cost. *See generally* R. KERRY TURNER ET AL., ENVIRONMENTAL ECONOMICS (1993).

[68] 505 U.S. 1003, 1015 (1992).

[69] *Id.* (citing *Loretto*, 458 U.S. at 419).

[70] *Id.*

[71] 447 U.S. at 260 (concluding that zoning ordinances on their face do not violate the Tak-

Ass'n v. DeBenedictis,[73] and *Hodel v. Virginia Surface Mining & Reclamation Ass'n*.[74]

In *Agins*, the Court held that a regulation amounts to a taking if it denies an owner "economically viable use of his land," but not *all* viable use.[75] The *Nollan*, *Keystone*, and *Hodel* passages simply refer to this passage in *Agins*. Of course, Justice Scalia, writing for the *Lucas* majority, has not contradicted the precedents he cites; he did not hold that economically viable use is denied only when all economically beneficial use is denied. But while not contradicting prior rulings, he has in effect proffered a new rule holding that economically viable use is denied when all economically beneficial use is denied. Justice Scalia suggests that the justification for this new rule may be that regulations denying all economically viable use have the same effect as regulations that effect a physical taking.[76]

The economic viability test can also be seen as one factor of a balancing test. The economic viability factor measures the "private cost" side of the regulation, which must be weighed against the "public benefit" side.[77] When so used, the concern would be not with whether the property owner is left *any* productive or beneficial use of land, but whether the remaining uses are productive enough to justify an all-things-considered judgment supporting the regulation. This is the sense in which the Court invoked the viability test in *Agins*. There the Court explained the rule that government action constitutes a taking if it denies an owner economically viable use of his land by noting that "the question necessarily requires a weighing of private and public interests."[78] The *Agins* test is quite different from the test that Justice Scalia develops in *Lucas*, despite the fact that Justice Scalia says he is not inventing a new rule but only applying one already established.[79] Justice Scalia's rule is logically connected only to the Takings Clause, whereas the *Agins* rule is part of a balancing test that is logically connected only to the Due Process Clauses. Uncompensated denials of *all* viable uses of property are unconstitutional, on Justice Scalia's view, because such regulations are takings and the

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ings Clause).

[72] 483 U.S. 825, 834-36 (1987) (granting the state power to condition the issuance of a permit to owner on his providing the public an easement on his land only if the condition substantially advances the state's legitimate interest in otherwise denying the permit).

[73] 480 U.S. 470, 495 (1987) (authorizing revocation of a mining permit if the removal of coal causes damage to a protected structure).

[74] 452 U.S. 264, 295-96 (1981) (allowing the implementation of uniform minimum nationwide regulations for surface mining).

[75] *Agins*, 447 U.S. at 260.

[76] *Lucas*, 505 U.S. at 1017 ("We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation.").

[77] *See infra* Part II.E (discussing the balancing test in more detail).

[78] *Agins*, 447 U.S. at 261.

[79] *Lucas*, 505 U.S. at 1016 n.6.

Fifth Amendment demands that takings be compensated.[80] A regulation's uncompensated denials of economically viable uses of property, to the extent that the regulation's private detriment outweighs its public benefit, would be unconstitutional, *not* because the Takings Clause disallows uncompensated regulations that diminish social utility, but because in a substantive due process analysis using heightened or strict scrutiny, a law violating a fundamental right to private property that failed a balancing test could be regarded as a deprivation of property without due process of law.

Finally, the economic viability test can be used to evaluate the fairness of a regulation (a consideration also to be discussed below).[81] This test measures the burden a property owner is asked to bear, and whether this burden relative to the benefits the owner receives from the regulation is proportional to the burdens imposed on other citizens receiving similar benefits. Uncompensated and unfair denials of the economically viable use of property would be unconstitutional, not because the Takings Clause prohibits uncompensated unfair regulations of property, but because in a substantive due process analysis using heightened or strict scrutiny, a law violating a fundamental right to private property that was unfair could be regarded as a deprivation of property without due process of law.

The Court has not distinguished these three uses of the economic viability test, even though they have entirely different rationales, are linked to different provisions of the Constitution, and are actually different tests. The first test, where denial of (all) economically viable use is a surrogate for a physical taking, is appropriate only when applying the Takings Clause. The latter two tests are appropriate only in a due process analysis. By decoupling the Takings and Due Process Clauses we can not only see how these three tests are linked to different constitutional provisions, but can better answer the question of how the Court is to determine whether the uses left to regulated property are "viable enough." When using the economic viability consideration as part of a substantive due process analysis of a regula-

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[80] Justice Scalia's rule assumes that denying all viable uses of property is equivalent to taking property for public use. Of course this assumption can be challenged. If the government tells me I cannot drive, sell, look at, or otherwise use my car, it has denied me all viable uses of my property, yet we might think it has nevertheless not taken my property, because it has not actually taken possession of, seized, grasped, or appropriated my car for public use. This conclusion no doubt will displease advocates of property rights, who may point to this example as a reason for not relying on the ordinary language meaning of "take" as I advocate in this Article. But the example is not fatal even to those who would insist that such a regulation was not a taking, because government did not appropriate property. Assuming the implausible, that a government *were* ever to enact such a law, either it would have to be justified as a health and safety regulation and fall under the noxious-use exception to the no-takings rule, or, absent such a justification, the law could be overturned on substantive due process grounds.

[81] E. Enter. v. Apfel, 524 U.S. 498, 523-24 (1998) (noting that "the economic impact of the regulation" is one of the factors that are particularly significant in an inquiry into the justice and fairness of a regulation (citing Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979))).

tion and considering whether the regulation is sufficiently warranted on balance to justify a deprivation of property, or whether it is so unfair as to constitute a violation of due process of law, then it is irrelevant whether the regulation denies *all* economically viable uses of property. What matters is whether the uses that are denied create a detriment outweighing the regulation's benefit, or whether the burden is so excessively disproportionate as to fail to meet the requirements of fairness. When we are concerned with the fairness of saddling a property owner with a relatively greater burden than others who receive similar benefits are asked to bear or we are weighing the private cost of a regulation against its public benefit, nothing hinges on whether the burden or private cost is the denial of *all* economically beneficial use.

C. Noxious Use

Where government takes property to prevent harm or illegalities, as when it confiscates marijuana crops or orders the destruction of diseased trees, it does not have to pay just compensation for the resulting loss in value to the property owner. In these cases the government is not violating the plain meaning of the Takings Clause, because it is not appropriating property for its own (and thus for public) use or profiting from its confiscation.[82] The noxious use test serves as an exception-rule, selecting out among takings those that do not require payment of just compensation. The Court considers whether a noxious use of property is involved also when a government merely restricts the use of property but does not physically take or appropriate it.[83] This deployment of a noxious use test, like the Court's adoption of several other considerations, has not been adequately tied to the text of the Constitution. I shall argue in this Section that the noxious use test has a role in an analysis of the scope of constitutionally protected property rights, both for government takings of property and for regulations that merely restrict use, but the nature of and rationale for the tests are different in each case.

Before discussing how a decoupling of the Takings and Due Process Clauses leads to distinct uses of a noxious use test that are more securely moored to the Constitution's text, it will be helpful to see how the noxious use test currently is implemented by the Court. Under current law a government may regulate or take property without paying just compensation if in doing so it is preventing a noxious or

[82] While confiscation in these two examples is intended to promote the public good, the confiscated property is not being used by government for a public use, in contrast to compensable takings, the paradigmatic example of which is a state's taking land to build a railroad or freeway. *Cf.* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 126 (1978) (noting that in *Miller v. Schoene*, 276 U.S. 272 (1928), the government, while ordering cedar trees to be cut, permitted claimants to use the felled trees and did not appropriate them).

[83] *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

harmful use of that property.[84] The Court justifies this rule by arguing that private property rights do not include the right to use property to harm others. When the government prohibits the use of property in harmful ways or the possession of property that is intrinsically harmful, it is therefore not violating any rights. As Justice Blackmun notes, courts uphold bans on particular uses without paying compensation, "notwithstanding the economic impact, under the rationale that no one can obtain a vested right to injure or endanger the public."[85]

The noxious use standard has raised a problem of how the Court is to decide whether a restriction is prohibiting a harmful use or, instead, merely realizing a public benefit distinct from the cessation of a harmful or illegal use of property. I shall call such a benefit a "non-nuisance restraint benefit." The line between a restraint that mitigates harm and a non-nuisance restraint benefit is sometimes difficult to draw.[86] This is apparent in the landmark case of *Village of Euclid v. Ambler Realty Co.*,[87] in which the Court held that zoning laws that prohibit commercial uses of property in residential districts are valid regulations and not takings. The Euclid ordinance restricted commercial uses of property in order to promote "health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry," to facilitate "the extinguishment of fires, and the enforcement of street traffic regulations and other general welfare ordinances," and to make construction and repair of streets easier and less expensive "by confining the greater part of the heavy traffic to the streets where business is carried on."[88]

The goals of the Euclid ordinance can be construed either as providing a public benefit or as preventing harm. Unable conclusively to settle on either interpretation of the ordinance's purpose, the Court

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[84] *See supra* note 47; *see also* Consolidated Rock Products Co. v. Los Angeles, 370 P.2d 342 (Cal. 1962) (holding an ordinance constitutional on grounds that it protected the general public from uses of property that would be injurious to them); Turner v. County of Del Norte, 101 Cal. Rptr. 93 (Cal. Ct. App. 1972) (upholding zoning ordinance creating flood plain and restricting certain uses of property); Nassr v. Commonwealth, 477 N.E.2d 987 (Mass. 1985) (upholding the actions of the Commonwealth on the grounds that the public interest takes preference over individual private property rights); Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (Mass. 1851) (authorizing the Commonwealth to exercise its police power to seize or destroy property when necessary to prevent injuries to the rights of others, public health, and welfare); St. Louis Gunning Adver. Co. v. St. Louis, 137 S.W. 929, 942 (Mo. 1911) (granting the city the power to regulate billboards with ordinances if necessary to maintain peace and safety); Brick Presbyterian Church v. City of New York, 5 Cow. 538 (N.Y. 1827) (holding it unreasonable to allow plaintiffs to endanger the lives of others); Eno v. Burlington, 209 A.2d 499 (Vt. 1965) (upholding drastic fire regulations).

[85] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1058 (1992) (Blackmun, J., dissenting).

[86] *See, e.g., Lucas*, 505 U.S. at 1025 ("A given restraint will be seen as mitigating 'harm' to the adjacent parcels or securing a 'benefit' for them, depending upon the observer's evaluation of the relative importance of the use that the restraint favors."); *see also* Michelman, *supra* note 36; Sax, *supra* note 56.

[87] 272 U.S. 365 (1926).

[88] *Id.* at 391.

appeals to both. In parts of the opinion, the Court upholds the law by construing the ordinance as providing a non-nuisance restraint public benefit but holding that this in itself does not mean the state must pay compensation. To support this position, the Court cites one case that regards provision of a non-nuisance restraint benefit as within the scope of legitimate police powers:

> The exclusion of places of business from residential districts *is not a declaration that such places are nuisances* or that they are to be suppressed as such, but it is a part of the general plan by which the city's territory is allotted to different uses in order to prevent, or at least to reduce, the congestion, disorder and dangers which often inhere in unregulated municipal development.[89]

But the Court also cites another case that views such laws as preventing nuisances:

> Aside from considerations of economic administration, in the matter of police and fire protection, street paving, etc., *any business establishment is likely to be a genuine nuisance* in a neighborhood of residences. Places of business are noisy; they are apt to be disturbing at night; some of them are malodorous; some are unsightly; some are apt to breed rats, mice, roaches, flies, ants, etc. . . .[90]

The Court does not acknowledge that it invokes two distinct and competing arguments to defend the Euclid ordinance. Sometimes it regards the ordinance as preventing noxious uses of property; other times the Court treats the ordinance as providing a non-nuisance restraint public benefit and rejects the requirement that limits on property rights must be compensated unless they restrict noxious uses of property.

The fact that trucks enter an individual's property, thereby causing wear and tear to street pavement and potentially causing congestion that might hamper fire protection, does not in itself make that person's use of property for business purposes illegal. Under the rationale for the nuisance test laid out above, the state should not be able to prevent a person from using his property for business purposes, unless his use is a morally relevant cause of harm or is illegal. Of course, once a zoning law is enacted prohibiting commercial uses of property, his use becomes illegal, even if it is not a morally relevant cause of harm.

A further question then arises. The noxious use test laid out above regards a use as noxious if property rights do not extend to that use. Are there any limits on what legislators can decree regarding the uses to which property rights extend? We might think that the spirit of the noxious use exception is to allow government to pre-

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[89] *Id.* at 392-93 (citing City of Aurora v. Burns, 149 N.E. 784, 788 (Ill. 1925)) (emphasis added).

[90] *Id.* at 393 (citing State v. City of New Orleans, 97 So. 440, 444 (La. 1923)) (emphasis added).

vent only harmful uses, in which case we would want to prevent legislators from simply decreeing that a use is harmful and therefore illegal, unless the use is actually harmful. Whether a use is actually harmful requires us to be attentive to the meaning of "harm," as opposed to mere offense, and to what counts as "causing," as opposed to merely contributing to harm.[91]

Justice Scalia, writing for the Court in *Lucas*, addresses this question and, in doing so, modifies the noxious use test in two important ways. First, he holds that a special noxious use analysis should be invoked in cases where the state wholly eliminates the value of the land that it is regulating. "*A fortiori* the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated."[92] For Justice Scalia, what is decisive about previous cases in which the Court upheld a regulation on the grounds that the state was preventing a noxious use, was that in none of these cases had "the regulation wholly eliminated the value of the claimant's land."[93] Where all economically beneficial use of land is prohibited, he argues, a stricter standard must be used to determine whether the regulation passes the noxious use test.[94]

The second way in which Justice Scalia modifies the noxious use test is by developing this stricter standard. Rather than relying on the subjective judgments of Justices in deciding whether a given restraint is mitigating harm or securing a benefit in "total takings" situations, Justice Scalia appeals to what he regards as an objective standard: the common-law definition of noxious use in the relevant state. He explains, "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[95] He continues:

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[91] For a philosophical discussion of the concept of "causing harm," see JOEL FEINBERG, HARM TO OTHERS (1984) (developing the principle that the state may legitimately coerce only to prevent harm to others, through elaboration of the distinction between harm and offense and discussion of various senses of causation).

[92] Lucas v. S.C. Coastal Council, 505 U.S. 1006, 1026 (1992).

[93] *Id.* at 1026 & n.13 (citing Goldblatt v. Hempstead, 369 U.S. 590 (1962) (upholding town ordinance regulating dredging and pit excavating on property within its limits); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (finding that there is no taking when the government prohibits the operation of a brickyard within a residential area); Reinman v. Little Rock, 237 U.S. 171 (1915) (holding that though a livery stable is not a nuisance per se, the regulation of such stables lies within the state's police power); Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914) (upholding state statute requiring owners of adjoining coal properties to construct barrier pillars to safeguard employees); Mugler v. Kansas, 123 U.S. 623 (1887) (upholding state amendment prohibiting the manufacture and sale of intoxicating liquors except for medical, scientific, and mechanical purposes)).

[94] *Lucas*, 505 U.S. at 1026-27.

[95] *Id.* at 1027.

> [Such limitations by states must] inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.[96]

Justice Blackmun, dissenting in *Lucas*, rejects Justice Scalia's understanding of the noxious-use precedents:

> In none of the cases did the Court suggest that the right of a State to prohibit certain activities without paying compensation turned on the availability of some residual valuable use. Instead, the cases depended on whether the government interest was sufficient to prohibit the activity, given the significant private cost.[97]

And in the earlier case of *Nollan*, Justice Brennan takes issue with Justice Scalia's view that we are not bound to statutory (as opposed to common law) definitions of noxious use.[98]

The noxious use test as currently used by the Court raises several problems. Should different versions of the test be used depending on whether the state restriction leaves any economically beneficial use? Should the state's power to regulate be limited only to the prevention of harmful uses, or should it extend to the provision of nonnuisance restraint public benefits? If it should be limited to prevention of harmful uses, how do we decide what counts as a harmful use of property? In answering that question, what deference should be given to legislators—can they simply decree that a use is harmful and therefore illegal?

The Court raises all of these issues but has never adequately explained why they are constitutionally relevant. On the decoupling approach, the Court would rarely need to undertake a rigorous review of what it means to cause harm or of whether deciding what counts as a noxious use is better left to legislators. Answering these questions would be fruitful only in a Takings Clause analysis. On the decoupling approach, however, most regulations affecting property would be subject only to a due process analysis, for which deciding the difficult philosophical question of causation, and the problem of

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[96] *Id.* at 1029. *Cf.* Callies, *supra* note 56, at 562 (arguing that "background principles of state property law" should refer not to whatever regulations burdened the owner's title when he acquired the land, but to law that is "truly old, well-known, and of reasonably universal applicability in the state jurisdiction").

[97] *Lucas*, 505 U.S. at 1050-51 (Blackmun, J., dissenting).

[98] *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 857 (1986) (Brennan, J., dissenting). Justice Brennan argued, "It is axiomatic, of course, that state law is the source of those strands that constitute a property owner's bundle of property rights." Although he does not explicitly distinguish a state's statutory law from its common law, the thrust of the passage is that it is up to the state legislators, and not the courts, to decide the scope of property rights.

what deference is due legislators in resolving that question, are not central.

The Takings Clause requires that private property not be taken for public use without just compensation. We can infer from this fact that where government takes property to provide a non-nuisance restraint public benefit, it has taken for public use and must pay just compensation, but where government acts to prevent a noxious use of property, it need not pay just compensation. I call this the "strict noxious use test." But the Takings Clause does not apply to all regulations affecting property. On the decoupling approach, the consideration of whether a taking prevents a harm or provides a non-nuisance restraint public benefit has no logical bearing on the constitutionality of regulations that restrict property without physically appropriating it. Such regulations do not become unconstitutional takings merely because they cannot be shown to prevent harmful uses of property. In reviewing these non-taking deprivations of property we must turn to the Due Process Clauses. What role does a noxious use test have when applying these clauses?

The strict noxious use test would be appropriate in deciding whether a use-restriction amounted to a deprivation of property without due process, but only if in considering due process questions we accepted the doctrine of substantive due process and were committed to using strict scrutiny. The strict noxious use test is one potential surrogate for the familiar strict scrutiny due process test that demands that laws affecting fundamental rights be substantially related to the achievement of a compelling state purpose. For if we can say that the use restriction is preventing a use of property that is harmful, then we can say that the state's deprivation of "life, liberty, or property" is not without substantive due process, because such a restriction is substantially related to the realization of a compelling purpose, namely, the prevention of harm. Of course, the fact that a law does not pass the strict noxious use test does not mean the law cannot be sufficiently justified on other grounds to pass a strict scrutiny due process test.

There are less restrictive versions of a noxious use test. Those who see the police power as legitimately extending to the promotion of public welfare, even where the power is not used to prevent an action that is a morally relevant cause of identifiable harm, could employ a minimal noxious use test. This minimal test would ask whether limiting a use of property is rationally related to the promotion of the public welfare, regardless of whether the limitation prevents a nuisance or provides a non-nuisance restraint benefit. A heightened version of this test might also be employed. The heightened test would ask the additional question of whether the public benefit provided by the use restriction outweighs its private cost. The minimal and heightened versions of the noxious use test are appropriate only when undertaking a due process analysis, because they address the

considerations of whether a law is narrowly tailored or justified on balance—considerations that do not bear on whether the law takes property.[99]

Employing the strict noxious use test in takings situations still presents the problem of how we determine whether a use is wrongful, but this problem is not insurmountable. There are easy cases where we can clearly distinguish between preventing harm and providing non-nuisance restraint benefits. Resolving more difficult cases will require careful analysis of the concepts of harm and of causing harm. In *Lucas*, Justice Scalia gives up too easily when he asserts that such an analysis is "impossible."[100]

One necessary criterion for causing harm is setting back interests that are regarded as rights.[101] In *Lucas*, David Lucas challenged a regulation preventing him from building any permanent structures on land he had purchased for nearly $1 million. The purpose of the law was to prevent development that might contribute to soil erosion and tidal floods and might harm endangered species. Clearly, the citizens of South Carolina have interests in maintaining the integrity of their beaches and preserving endangered species, but it is not clear that setting back these interests violates rights. Moreover, building a house on the lot does not cause harm in the same way that a fungus on cedar trees would cause harm to neighboring apple orchards, or in the way that someone driving his car ninety miles per hour in a fifty-five mile per hour zone potentially causes foreseeable harm. Any harm resulting from tidal floods could not be attributed to the fact that Lucas built a house on his lot—there are too many intervening and concurrent causes of harm. The regulation Lucas challenged would likely fail a strict scrutiny noxious use test. But this fact would be relevant only if the South Carolina regulation effected a taking and it was necessary to determine whether this regulation met the noxious use exception to takings. There are reasons for holding that Lucas's land was not taken.[102] If we accept those reasons, then to

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[99] The minimal noxious use test is an instance of a nexus test. *See infra* Part II.F. In *Miller v. Schoene*, 276 U.S. 272 (1928), the Court ruled that requiring Miller to cut down his cedar trees because they were carrying a fungus destructive to neighboring apple orchards was a valid regulation and not a taking. The Court explained:

> We need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law; or whether they may be so declared by statute .... For where, as here, the choice is unavoidable, we cannot say that its exercise, controlled by considerations of social policy which are not unreasonable, involves any denial of due process.

Id. at 280. This passage in the *Miller* decision relies on the decoupling approach, which later Courts have failed to recognize.

[100] *Lucas*, 505 U.S. at 1026.

[101] *See, e.g.*, FEINBERG, *supra* note 91, at 36 (arguing that "no plausibly interpreted harm principle could support the prohibition of actions that cause harms without violating rights").

[102] For example, in his *Lucas* dissent, Justice Blackmun notes that there are other beneficial uses left to the property. *See Lucas*, 505 U.S. at 1065 n.3 ("Of course ... Lucas may put his land to 'other uses'—fishing or camping, for example—or may sell his land to his neighbors as a

fully resolve the issue of whether his constitutionally protected property rights have been violated requires further due process analysis.

The decoupling approach allows us to distinguish different applications of a noxious use test and shows that the problem of differentiating regulations that prevent harm and those that merely provide a benefit is not as serious as supposed. It also provides a reason to reject Justice Scalia's new noxious use rule in *Lucas*. Justice Scalia argues that in "total takings" situations the government is excused from paying compensation only if it is preventing a noxious use according to the common law definition of noxious use in the relevant state. He does not explain why this standard is required by the Constitution. On the decoupling approach, the standard should be rejected. The best reason for using common law definitions of noxious use to decide whether a taking need not be compensated is that the common law establishes reasonable expectations of what investors can and cannot do with their property, and it would be unfair to allow a legislature suddenly to enact statutory definitions of noxious use that undermine reasonable investor-backed expectations created by long-standing common law. But the fairness of a government's act is beside the point in deciding whether the government has taken property. Fairness enters into a takings analysis only once it has been established that a taking occurred and we then inquire into what compensation is just. But whether the government acted fairly is irrelevant in deciding whether it has appropriated property for public use—it either has or hasn't.[103] As will be discussed in the next Section, fairness is an appropriate standard only in a due process analysis, and in a due process analysis whether or not a government regulation of property amounts to a "total taking" is beside the point. There is no principled, textually grounded basis for using a common law standard of noxious use in "total takings" situations.

D. Fairness, or Reciprocity of Advantage

In an often cited passage from *Armstrong v. United States*, the Court held that the "Fifth Amendment's guarantee [against uncompensated takings of property is] designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[104] In an earlier case, Justice Holmes expressed this requirement of fairness as "an average reciprocity of advantage" that in some cases may be sufficient to

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buffer. In either event, his land is far from 'valueless.'"). Moreover, there was no transfer of property rights or physical occupation of the property, nor did the state make use of Lucas's property.

[103] *See infra* Part II.D.

[104] 364 U.S. 40, 49 (1960).

justify government actions affecting property.[105] But as the Court noted in a later opinion, it has "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[106]

Morality might require that all laws be fair, but is this requirement written into the Constitution? In its decision incorporating the Takings Clause into the Fourteenth Amendment, the Court suggests this requirement *is* implicit in the words of the Takings Clause. In defending the principle that a taking of property requires just compensation, which the Court observes is a principle "recognized by all temperate and civilized governments, from a deep and universal sense of its justice,"[107] it adds that this principle "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that, when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."[108]

The Court rightly points to a rationale for the Takings Clause: it is unfair for government to take without paying. But drawing a connection between fairness and takings is misleading if one implies that the fairness of a government act is relevant to whether it is a taking—in fact, it is relevant only in deciding whether the government act violates due process. There is nothing intrinsic to a regulation's being fair or unfair that bears on whether it comports with the ordinary understanding of "taking" property. Nor is fairness of this sort relevant to the legal understanding according to which taking property is taking some of the sticks in the bundle of property rights. When the state physically takes property, then it has taken property whether it does so arbitrarily, unfairly, or fairly. In some cases, if the state has taken property in return for benefits received, thereby satisfying the demands of fairness, as in the case of taxation, those benefits can be regarded as just compensation. But this does not mean that the fairness of a regulation is a criterion for whether it is a taking.[109] That the state physically takes one person's property but no one else's—even

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[105] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (noting that "average reciprocity of advantage . . . has been recognized as a justification for various laws").

[106] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).

[107] Chicago B. & Q. R. Co. v. Chicago, 166 U.S. 226, 238 (1897).

[108] *Id.*

[109] Justice Scalia draws exactly the opposite conclusion: he seems to think that if a regulation denies all productive uses and thereby amounts to a physical taking, this implies that the regulation is unfair. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017-18 (1992). Not only is this untrue (one need think only of noxious use exceptions), but the point of drawing this implication is elusive. Why use an explicit constitutional standard ("no takings") to infer a moral standard that is at best only implicit in the Takings Clause ("be fair")?

though the benefits of the taking are received by all equally—does not thereby make the taking unfair. On the contrary, while physical appropriations of property undertaken to prevent noxious uses of property may saddle a severe burden on a lone individual, the burden is not unfair precisely because there is a compelling reason to single out the individual. It would be unfair to make other citizens pay to remedy the wrong caused by the individual's noxious use of his property.

Under current takings adjudication, fairness is uncritically accepted as a consideration relevant in interpreting the Takings Clause.[110] While a primary motivation for including a Takings Clause in the Bill of Rights must have been the sentiment that it is unfair for government to take property *without paying for it*, this does not mean that a taking for public use becomes any less (more) of a taking if it is fair (unfair), or that a use-restriction regulation's unfairness makes the regulation a taking, that is, an appropriation or transfer of rights. The only textual provisions that logically support a declaration that an unfair regulation of property is unconstitutional are the Due Process Clauses.

Fairness is embedded in due process requirements in a number of ways. Laws enacted by a majority that single out a small class and impose an undue burden on them may violate the requirements of procedural due process if these laws resulted from the exclusion of that class from the political process.[111] Perhaps more relevant to regulations affecting property owners, laws which fail to provide an "average reciprocity of advantage," which single out a class of property owners to bear an unfair burden, or which are unfair in other ways (such as by frustrating reasonable, relied upon expectations), may violate the requirements of substantive due process.[112] The idea here is that fairness is a conceptual requirement of law. Enforcement of laws that arbitrarily or unfairly single out some people is, on this argument, not really to invoke the "law." To uphold "due process of law," government must comply with basic requirements of fairness and rationality.

How fair must laws be to satisfy the constitutional demands of due process of law? Answering that question requires exploring in more

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[110] *See* cases cited *supra* notes 104-07; *see also* E. Enter. v. Apfel, 524 U.S. 498, 523 (1998) (stating that in a takings analysis, "the process for evaluating a regulation's constitutionality involves an examination of the 'justice and fairness' of the governmental action" (citing Andrus v. Allard, 444 U.S. 51, 65 (1979))).

[111] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); Summers, *supra* note 15, at 880 (supporting stricter scrutiny for a substantial relation test of property regulations in order to protect discrete and insular minorities).

[112] The Court's consideration of whether a regulation frustrates reasonable investor-backed expectations, while relevant in a fairness analysis, is also relevant in a balancing test analysis, since a regulation's effect on future investments may figure greatly in a calculation of its net social utility. This consideration is therefore discussed in the next section on the "balancing test."

detail the idea of fairness. While the purpose of this Article is to show how considerations of fairness are properly tied to the Due Process Clauses rather than to the Takings Clause, and not to discuss precisely what level of fairness the Constitution requires of laws, it is appropriate to say something about the requirement of fairness so that we can see how a fairness analysis can be adapted to substantive due process reviews of regulations.

According to the argument from fairness invoked by moral philosophers discussing political obligations, the receipt of public goods from which we benefit entails an obligation, based on fairness, to contribute to the cooperative ventures that provide these goods so long as the benefits and burdens of such ventures are distributed fairly.[113] It is unfair for a person to benefit from the cooperative efforts of others without contributing to these efforts, and it follows that if others contribute, one has an obligation to reciprocate. Not to obey or contribute to cooperative schemes from which one benefits in society, such as national defense, is to place an unfair burden on those who do.[114] Applied to government regulations of property, this moral argument holds that it is unfair for the state to require an individual to make a greater contribution to a cooperative scheme relative to the benefit received from that scheme than is made by other citizens relative to the benefits they receive. If a cooperative scheme produces a total benefit B spread evenly among n citizens at a total cost C, it is unfair for the state to require an individual who receives a benefit of B/n to pay a cost greater than C/n.

This is a strict standard of fairness that is sometimes difficult to meet, and it may in some cases be unreasonable to expect anyone to satisfy it. For example, in the cooperative venture of a potluck dinner it is unreasonable to expect each participant to bring food of precisely the same quantity and quality as they consume. Moreover, ability to pay may be relevant in assessing the fairness of the distribution of contributions. However, we do typically regard it as unfair if someone partakes in the food and drink without having contributed *anything* or if someone is required to contribute though they do not intend to and do not partake in the food or drink. A minimal requirement of fairness requires only that a person not be unreasonably saddled with a burden. For example, no one can rightly be saddled with a burden if they receive no benefit from the cooperative

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[113] *See generally* GEORGE KLOSKO, THE PRINCIPLE OF FAIRNESS AND POLITICAL OBLIGATION (1992); H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 2, 175-91 (1955), *reprinted in* POLITICAL PHILOSOPHY 53 (Anthony Quinton ed., 1967); John Rawls, *Legal Obligation and the Duty of Fair Play*, *in* LAW AND PHILOSOPHY 9, 9-10 (Sidney Hook ed., 1964); Mark Tunick, *The Moral Obligation to Obey Law*, J. SOC. PHIL. (forthcoming).

[114] There is yet another sense of fairness relevant to the issue of property rights: it is unfair for the state suddenly to change the rules of property development upon which a person had relied in making her investments. *See infra* notes 120-21 and accompanying text (discussing the idea that fairness requires respecting reasonable investment-backed expectations).

scheme. Further, no one can rightly receive benefits from a scheme without contributing *something*. Some discretion remains in determining whether a burden is imposed unreasonably, and stricter and more lax standards can be used when interpreting this "minimal" requirement of fairness.

Whether a regulation of property violates due process on fairness grounds will depend on how scrupulously fair we require laws to be to satisfy the demands of due process, which in turn depends on what level of judicial review we believe is appropriate in a due process analysis. There is substantial case law on the question of appropriate standards in a due process analysis,[115] but this precedent has been virtually ignored in takings adjudication because of the Court's failure to decouple the Takings and Due Process Clauses.

E. Balancing Test

In deciding whether use restrictions amount to compensable takings, the Court also employs a balancing test that weighs the private costs of the restriction against its public benefits. The test was most famously used by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*.[116] There Justice Holmes held as an unconstitutional taking a statute that in the particular application at issue prohibited the defendant's mining of coal in such a way as to cause a subsidence of the surface beneath the plaintiff's house. In that case, the plaintiff had agreed to provide to the defendant the right to mine the land beneath the house and to waive claims for damages consequent to the mining. Justice Holmes argued that "the public interest" served by the statute is "limited," since ordinarily the surface of land is owned by the miner of the coal beneath. The statute could not be justified as a promotion of personal safety, since "[t]hat could be provided for by notice."[117] Against the statute's limited benefits must be weighed its great costs: "It purports to abolish what is recognized in Pennsylvania as an estate in land."[118] As applied to the facts in this case, Justice Holmes thinks 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."[119]

Despite references to balancing private costs against public benefits, the Court seldom conducts a genuine balancing test in property

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[115] Where a law impinges on a fundamental right, the Court uses strict scrutiny, but where a law does not, or is merely an economic regulation, the Court uses a minimal scrutiny rational-basis test. *See* cases cited *supra* note 14.

[116] 260 U.S. 393 (1922).

[117] *Id.* at 414.

[118] *Id.*

[119] *Id.* Justice Holmes proceeds to argue that the law is unconstitutional on its face and not merely as applied. In doing so, he places great weight on what he regards as the unfairness of the law, its failure to secure an "average reciprocity of advantage." *Id.* at 415.

rights cases. The Court rarely engages in serious economic analysis and rarely invokes the concept of economic efficiency in a rigorous manner or otherwise undertakes the sort of calculation required by economists or utilitarians in determining optimal social policy.

Some of the considerations that would be relevant to an economist's or utilitarian's rigorous balancing test are invoked by the Court, but for different purposes. For example, the Court has often regarded as relevant to deciding the takings issue whether a regulation has violated "reasonable investment-backed expectations."[120] This factor could be important in a rigorous balancing test, because of the consequences to social welfare of deterring investment in productive activities by making those investments uncertain. But the Court has never made an effort to quantify the potential impact on social wealth of lost future investments and actually weigh this impact against the public benefit of the regulation.[121]

The consideration of a regulation's effect on investment-backed expectations could also be relevant in considering its fairness. Take, for example, an individual who invested in property with the reasonable expectation that he could develop it, but who, if he had known that he would not be able to develop the property, would not have purchased it. When the state tells him after his purchase that he may

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[120] Connolly v. Pension Benefits Guar. Corp., 475 U.S. 211, 226 (1986) (identifying three factors of "particular significance" in considering whether a given regulation constitutes a "taking"); *see also* Concrete Pipe v. Laborers Pension Tr., 508 U.S. 602, 645 (1993) (holding Concrete Pipe did not display sufficient interference with reasonable investment-backed expectations where pension plans at issue had "long been subject to federal regulations"); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (distinguishing *Pennsylvania Coal* and finding no interference with investment-backed expectations); Bowen v. Gilliard, 483 U.S. 587, 606 (1987) (citing *Connolly*'s three factors, including reasonable investment-backed expectations, as important to any inquiry into whether a government regulation constitutes a taking); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 349 (1986) (noting that takings analysis involved "ad hoc factual inquiries that have identified several factors" and pointing to interference with reasonable investment-backed expectations as one factor to be considered); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 860, 865 (1986) (Brennan, J., dissenting) (noting "appellants can make no reasonable claim to any expectation of being able to exclude members of the public from crossing the edge of their property to gain access to ocean" where the state constitution explicitly prohibited them from excluding access to navigable waters "for any public purpose"); United States v. Locke, 471 U.S. 84, 107 (1985) (finding no taking because regulation of property rights does not "take" private property when an individual's reasonable investment-backed expectations can continue to be realized); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962) (noting that "a comparison of values before and after [government regulation] is relevant" to a consideration of whether a regulation constitutes a taking).

[121] There are occasionally references to there being an economic impact of interference with investment-backed expectations. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 n.8 (1992) ("[A]s we have acknowledged time and again, '[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally.") (citation omitted); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) ("The economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance.").

no longer do what he had intended with the property, then he and other investors would likely be deterred from developing property in useful ways in the future. By suddenly changing the rules of the game upon which the investor had relied, we might also say the state has treated him unfairly.[122] On a few occasions the Court has either implicitly or explicitly linked the consideration of a regulation's effect on investment-backed expectations to the principle of fairness.[123] More often, the Court simply asserts that a regulation's effect on investment-backed expectations is an important consideration, without explaining the principle upon which this consideration bears or precisely how the consideration is to be weighed.[124]

The "investment-backed expectation" consideration has also been put to use, albeit less convincingly, as the decisive factor for determining whether a special class of regulations, those that deny property of all value and thereby functionally effect a physical taking, are takings requiring just compensation. In his concurring opinion in *Lucas*, Justice Kennedy writes, "Where a taking is alleged from regulations which deprive the property of all value, the test [of whether property rights were violated] must be whether the deprivation is contrary to reasonable, investment-backed expectations."[125] Justice Kennedy gives no explanation for the requirement that a "finding of no value must be considered under the Takings Clause by reference to the owner's

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[122] *Cf.* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE, *in* TWO CLASSICS OF THE FRENCH REVOLUTION (Doubleday 1989). Burke observed:

> When men are encouraged to go into a certain mode of life by the existing laws, and protected in that mode as in a lawful occupation—when they have accommodated all their ideas, and all their habits to it—when the law had long made their adherence to its rules a ground of reputation, and their departure from them a ground of disgrace and even of penalty—I am sure it is unjust in legislature, by an arbitrary act, to offer a sudden violence to their minds and their feelings; forcibly to degrade them from their state and condition, and to stigmatize with shame and infamy that character and those customs which before had been made the measure of their happiness and honour.

Id. at 171. *See also* MARK TUNICK, PRACTICES AND PRINCIPLES: APPROACHES TO ETHICAL AND LEGAL JUDGMENT 157, 196-97, 204 (1998) (discussing the unfairness of undermining expectations upon which people reasonably rely).

[123] *See, e.g.*, Hodel v. Irving, 481 U.S. 704, 715 (1987) (finding that Indians whose decedents had received land from the government in exchange for ceding to the United States large parts of the original Great Sioux Reservation had no investment-backed expectations in the land); Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 14 (1984) (arguing that some "burdens consequent upon government action undertaken in the public interest . . . are so substantial and unforeseeable . . . that 'justice and fairness' require that they be borne by the public as a whole"); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1006-07 (1984) (holding that Monsanto was required to give up its property interest in health, safety, and efficiency data when the government concluded disclosure to the general public was necessary in exchange for the right to market pesticides).

[124] The Court, rather, characterizes the "investment-backed expectations" test as part of an ad hoc inquiry. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987); Connolly v. Pension Benefits Guar. Corp., 475 U.S. 211, 225 (1986); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 853 (1986); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); Prune Yard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

[125] 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring).

reasonable, investment-backed expectations,"[126] although he cites as authority a passage in *Penn Central Transportation* that mistakenly characterizes physical invasions of property as intrinsically unfair.[127] This use of the "investment-backed expectation" criterion is unconvincing, because the fact that such expectations have been violated is irrelevant in deciding whether property has been physically taken. The frustration of reasonable investment-backed expectations is relevant in deciding whether property rights have been violated, not because undermining expectations is intrinsic to the physical taking of property, but because frustrating such expectations is unfair, and in a substantive due process analysis the Court engaged in strict or heightened scrutiny might want to strike down a law that is grossly unfair. Such expectations are relevant also because violations of fairness would have economic implications that one might want to take into account in a substantive due process balancing test.

The decoupling approach permits analysis of the true constitutional moorings not only for the investment-backed expectation consideration, but for all applications of a balancing test. The Takings Clause requires only that government not take property without just compensation, not that it must enact economically efficient legislation or augment social utility. A regulation that diminishes the value of, but does not physically take or appropriate, property does not become a taking upon proof that the costs of the regulation greatly exceed its benefits. That proof is relevant in deciding whether the regulation violates property rights only as evidence that the law violates one of the Due Process Clauses. As we have seen, instead of engaging in a rigorous balancing test, the Court takes into account considerations that would be relevant to such a balancing test, but it sometimes uses those considerations for other purposes.[128] In principle the Court could apply public choice theory more rigorously to determine what outcomes are efficient and adopt a true balancing test. Doing so might be appropriate either in invoking the Takings Clause or upon using strict scrutiny in a due process analysis. Yet it is important to be clear about precisely what role balancing tests play for each sort of analysis.

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[126] *Id.*

[127] *See* Penn Cent. Transp. v. New York City, 438 U.S. 104, 124 (1978) ("A 'taking' may more readily be found when the interference with property can be characterized as a *physical invasion* by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.") (emphasis added) (citations omitted). The *Penn Central* Court was incorrect to imply that a regulation that can be characterized as a physical invasion is therefore presumptively unfair. A regulation of property is unfair if the regulation requires some property owners to bear a significantly greater burden relative to the benefits they receive than is borne by other citizens relative to the benefits they receive, or if the regulation violates reasonable, relied upon expectations. There is nothing intrinsically unfair about physical invasions of property.

[128] *See supra* note 120 and accompanying text.

In a Takings Clause analysis the Court sometimes needs to decide whether a physical taking is justified by the noxious use exception. This decision requires the Court to distinguish between takings that eliminate harmful uses and those that provide non-nuisance restraint benefits. While philosophical analysis of the concept of causing harm helps to decide this question in many cases, for some cases the problem may be insoluble unless we employ the tools of public choice theory and economics. This might be one occasion for employing a rigorous balancing test.[129]

The balancing test that would be used in a due process analysis would be less restrictive. That test would involve a general consideration of costs and benefits to decide, not whether a noxious use exception applies to a physical taking, but whether the law is sufficiently justified to withstand judicial scrutiny. Using this test in a due process analysis might require abandoning a long line of cases rejecting the use of strict scrutiny to decide whether economic regulations deprive liberty or property without due process of law, a line of cases that has a powerful justification: legislative bodies are more equipped to engage in economic and public policy analysis than are Supreme Court Justices.[130]

On the other hand, as the protection of property is explicitly required by the Due Process Clauses, the Court has a textual basis for scrutinizing more closely even "economic" regulations where they infringe on an explicit, fundamental right. Because the Court is ill equipped to engage in rigorous economic analysis, use of the balancing test is perhaps the easiest target for those troubled by the doctrine of substantive due process. A fairness test should be more readily accepted as one the Court is better equipped to implement.[131]

F. Nexus Test

The final test that the Court uses is a nexus test. The nexus test has been refined in recent cases but generally holds that for a government regulation not to exceed permissible bounds and become a taking, it must promote a legitimate or substantial public purpose through means that are reasonably or closely related to achieving that

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[129] *See supra* Part I.C.

[130] *See* Nebbia v. New York, 291 U.S. 502, 537-38 (1933); *see also* cases cited *supra* note 14.

[131] Steven J. Eagle argues that the "natural home" for deciding whether a regulation's failure to provide a reciprocity of advantage is the Takings Clause, not the Due Process Clause. *See* Eagle, *supra* note 15, at 1007-09 (arguing that "substantive due process has a role in property rights jurisprudence that is separate from that of the takings clause"). The analysis offered here reaches the opposite conclusion: considerations of fairness are appropriate only in a due process analysis. Eagle implies also that the natural home for considerations of whether a property use is a nuisance is not the Takings but the Due Process Clause, *id.* at 1007, whereas the analysis offered here reaches the opposite conclusion, *see supra* Part II.C.

purpose.[132] The level of scrutiny appropriate in applying this test has been a matter of dispute. If the test were applied using a minimal scrutiny rational basis test, then so long as the regulation was reasonably related to the effectuation of a legitimate purpose it would be valid, and most regulations can easily pass this test.[133] But if stricter scrutiny were used, requiring the regulation to be narrowly tailored to the effectuation of a compelling state interest, which is to say at the very least that the regulation adopted must be better than less restrictive alternatives, then many regulations would be declared compensable takings.

The Court addressed the question of precisely how strict the nexus test should be in *Dolan v. City of Tigard.*[134] The city of Tigard developed a code that required the petitioner, who had applied to the city for a permit to expand her hardware store, to dedicate part of her property for a green way adjoining and within a floodplain and to provide land for the construction of a pedestrian/bicycle pathway, in exchange for permit approval. The condition was intended to offset the effects of further development of her property. Ms. Dolan argued that this regulation effected a taking of her property. The Court applied a nexus test, asking whether the permit condition "substantially advances legitimate state interests."[135] Since the city had not proved that its demands satisfied this test, the judgment of the Supreme Court of Oregon upholding the act was reversed and the case remanded.

The importance of *Dolan* lies in its clarification of the nexus test, which is now labeled the "essential nexus" test,[136] apparently because it is regarded as a decisive factor rather than as just one among many considerations in an ad hoc inquiry. Chief Justice Rehnquist, writing for the Court, declared that a minimal scrutiny nexus test that falls back on "very generalized statements as to the necessary connection between the required dedication and the proposed development" is too "lax."[137] He also declared that a strict scrutiny nexus test that requires the local government to "demonstrate that its exaction is directly proportional to the specifically created need" is too "exact-

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[132] *See Penn Cent. Transp.*, 438 U.S. at 127 (arguing that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose"); *see also* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1986); Agins v. Tiburon, 447 U.S. 255, 260 (1980).

[133] For cases upholding economic regulations under minimal scrutiny, see *supra* note 14. In *Nollan*, the Court, over Justice Brennan's dissent, distinguished the rational basis test used in this line of cases and in equal protection cases from the test used in takings cases. 482 U.S. at 834 n.3 ("We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, not that 'the State could rationally have decided that the measure adopted might achieve the State's objective.'") (citations omitted).

[134] 512 U.S. 374 (1994).

[135] *Id.* at 385.

[136] *Id.* at 386.

[137] *Id.* at 389.

ing."[138] Thus he developed what he regards as a suitable standard: the rough proportionality test. It holds that "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[139]

The Chief Justice explicitly distinguishes this rough proportionality standard from the "rational basis" test used in Equal Protection Clause analysis,[140] just as Justice Scalia had done with the nexus test in its *Nollan* instantiation.[141] But he does not make clear what the textual basis for employing a nexus test is, if not a requirement of the Due Process Clause. This is a problem requiring further attention. Use of the nexus test is convincing only when our basis for using it can be found in the Constitution's text and its underlying principles. Otherwise the test is arbitrary, even if well-intentioned.

If the effect of a law is to physically take property or transfer property rights from the private owner to the public, the fact that the law is arbitrary or failed a minimal-scrutiny nexus test does not make the law any more or less of a taking. If a law regulates property uses without effecting a physical taking, the regulation would not become a "taking" merely on the basis of its being arbitrary. However, if the law is arbitrary, we can say it thereby deprives a person of property without substantive due process of law. Appealing to the Due Process Clause is, with one unimportant exception, the only intellectually coherent way to explain why a use-restriction failing either a minimal, heightened, or strict scrutiny nexus test violates the Constitution.[142]

There is one sense in which a nexus test would be appropriate in deciding whether a law effects a "taking." And there are two distinct ways in which a nexus test could be applied in a due process analysis. A nexus test can be employed as part of a general substantive due process analysis, as part of a special due process analysis applicable only to property cases and associated with the principle of fairness, and as part of a Takings Clause analysis, as a means of determining whether a use restricted by the state is a noxious use.

A nexus test might be applied to determine whether a law violates the requirements of substantive due process. Someone using this test

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[138] *Id.* at 390.

[139] *Id.* at 391.

[140] *Id.*

[141] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 n.3 (1987) ("[T]here 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 . . .").

[142] Glen E. Summers similarly argues that the substantial relations test, along with the balancing test, are appropriate only in a due process analysis. *See* Summers, *supra* note 15, at 838-39, 880, 885 (supporting a means-ends test using stricter scrutiny for regulatory takings under the rubric of due process only where necessary to protect discrete and insular minorities).

might argue that property is a fundamental right[143] and that the state may deprive an individual of her right to property only with compelling justification. Deprivations of property, on this reasoning, would be subject to strict scrutiny of the legislative means and ends. The law would have to be not merely rational or nonarbitrary but narrowly tailored to the effectuation of a compelling government interest, which is to say better than alternative, less restrictive laws the state might have enacted. Someone using the nexus test as part of a substantive due process analysis might also regard state regulations of property as essentially economic regulations, which, according to a long line of cases, are subject only to the minimal scrutiny rational basis test. Use restrictions on property, on this view, would violate substantive due process only if they were irrational or arbitrary.[144] In either case, the constitutional rationale for the nexus test is to determine whether the law deprives a person of property without due process of law.

There is another, conceptually distinct rationale for using a nexus test in a due process analysis. In the above section on fairness,[145] we observed that laws enacted by a majority that single out and impose an undue burden on some, or which fail to provide an "average reciprocity of advantage," may violate the requirements of substantive due process. Whether they do will depend in part on how scrupulously fair laws must be in order to satisfy the demands of due process. A nexus test can help to explain why a property owner is being singled out by a regulation and to evaluate the fairness of the regulation. In *Penn Central*[146] and *Miller v. Schoene*[147] government regulations passed even a strict scrutiny nexus test. In *Penn Central*, the Court held that New York City did not take Penn Central's property when it invoked its landmark preservation act to restrict Penn Central from constructing an office building atop its own Grand Central Terminal; the only way to address the legitimate interest of preserving Grand Central Terminal was to deny the construction permit.[148] The law passes the strictest nexus test, but it passes the noxious use test only on the most liberal understanding of noxious use. The law certainly fails a strict-scrutiny noxious use test. But the fact that the law passes the strict scrutiny nexus test is significant: it may justify singling out Penn Central and suggest why imposing a greater burden on it may not be unfair. In *Miller*, the Court ruled that requiring Miller to cut down his cedar trees because they were carrying a fungus destructive to neighboring apple orchards was a valid regulation and not a tak-

[143] Early court cases and documents of the Founders and those who influenced them suggest that property is regarded as a fundamental right. *See* Gold, *supra* note 10.

[144] *See* cases cited *supra* note 14.

[145] *See supra* Part II.D.

[146] 438 U.S. 104 (1978).

[147] 276 U.S. 272 (1927).

[148] *Penn Cent. Transp.*, 438 U.S. at 138.

ing.[149] In each case, the regulation was narrowly tailored and perhaps the only practical way to achieve the legitimate state interest. This fact provides a convincing reason for singling out the property owners. It was their present or proposed use of property that had to be prevented if the state was to meet its objective, be it the realization of a non-nuisance restraint public benefit (*Penn Central*) or the cessation of a harm (*Miller*). In the former case, though, this may *not* provide a convincing reason for making the owner bear the burden of the regulation. One can argue convincingly that when one causes harm, the price of ceasing the harm should be born only by the culprit, but where the state seeks not to prevent a harm but to provide a non-nuisance restraint benefit, the cost of obtaining this benefit should be spread evenly.

A third purpose for invoking a nexus test, conceptually distinct from the previous two, is to help determine whether a physical taking meets the requirements of the noxious use exception. The strict scrutiny noxious use test says that the state is justified in restricting property without paying just compensation only if it is doing so to prevent a noxious or harmful use of property. We have already discussed the underlying rationale for the test. We have also seen how it is sometimes difficult to decide whether a use of property is noxious and causes harm. If the state truly is justified in regulating property to prevent a noxious use, then we should be able to say that the regulation is substantially related, indeed *necessary*, for the effectuation of a compelling state interest. If a law cannot pass the nexus test, it cannot pass the noxious use test. If the Court is having difficulty deciding whether the law passes the noxious use test, it might turn to the nexus test to help decide this. For example, in *Miller* the only feasible way to save the apple orchards was to cut down Miller's trees; the regulation passes the nexus test, and this supports the judgment that the law is restricting a noxious use. On the other hand, in *Lucas* it would be difficult to say that the legitimate state interest in preserving the beaches and endangered species could only be achieved by preventing Lucas and those similarly situated from building permanent structures on their property. If the regulation would fail a nexus test, this would support the judgment that the law is not restricting a noxious use. This use of a nexus test will do little that can not already be done through a strict scrutiny noxious use test, and as a practical matter, on the decoupling approach the nexus test has no important role in applying the Takings Clause.

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[149] *Miller*, 276 U.S. at 279-81.

CONCLUSION

In current takings adjudication the Court relies on numerous considerations, often without linking them to a principled interpretation of the Constitution's text. The Court considers whether the local law in question denies a property owner economically viable use without recognizing that there are distinct reasons why denial of economically viable use would be relevant to the constitutional issue. The Court considers whether the law is preventing a "noxious use" of property without recognizing that there are distinct reasons why the fact that a law prevents a noxious use would be constitutionally relevant. The Court considers whether the property owner is being unfairly singled out, or whether the law secures an average reciprocity of advantage, without explaining the textual basis in the Constitution for a requirement that laws be fair, without acknowledging that there are different degrees of fairness, and without explaining which degree is required by the Constitution. The Court considers whether investment-backed expectations have been frustrated by the law without acknowledging that there are different reasons for why this consideration would be relevant to principled constitutional analysis. Finally, the Court considers whether the law passes a nexus test without recognizing that there are at least three different ways in which a nexus test can be linked to a constitutional requirement.

The Court has defended its approach, despite charges that the approach is "muddled," on the grounds that an ad hoc analysis is appropriate, because property rights issues are complicated and require attention to particular factual settings. But one can defend an analysis that takes into account the rich and complex details of a factual setting while also criticizing the unprincipled use of textually ungrounded considerations in approaching this factual setting.

There are two practical implications of decoupling the Takings and Due Process Clauses. First, for a regulation that does not physically take property but which nevertheless deprives a person of property without due process, the Court, on the decoupling approach, would have to find that the regulation violates not the Takings Clause but the relevant Due Process Clause (for a federal regulation, the Fifth Amendment's Due Process Clause; for a state or local regulation, the Fourteenth Amendment's Due Process Clause). The constitutional remedy for such a violation would not necessarily be just compensation, unless the Court were to decide that by providing just compensation a regulation could thereby overcome due process objections. Since there is little reason for holding that just compensation provides an adequate remedy for the enactment of arbitrary, unfair, or unwise laws restricting the use or value of private property, then on the decoupling approach proposed here governments may simply be prohibited from enacting some of the laws that they are permitted to enact under current takings adjudication so long as they

provide compensation to the affected property owners. Second, the decoupling approach should force Justices who defend property rights by regarding restrictions on use as compensable takings but who also oppose the doctrine of substantive due process to reconcile what, on the view espoused here, is an incoherent constitutional jurisprudence.