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A Critical Reexamination of the Takings Jurisprudence

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A CRITICAL REEXAMINATION OF THE TAKINGS JURISPRUDENCE

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The U.S. Constitution forbids both the federal and state governments from taking private property for public use in the absence of just compensation.[1] In determining whether particular government actions require compensation, the members of the U.S. Supreme Court have agreed that the purpose of the constitutional compensation requirement is "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."[2] The members of the Court have also agreed that whether justice and fairness require compensation will turn upon a two-step inquiry. First, government action that involves either a permanent physical occupation or a denial of all economically viable use establishes a per se taking and will always require compensation. Second, for government action that does not involve a per se taking, the Court will resolve the compensation issue by an ad hoc balancing of five or six specific factors.[3] Despite agreement as to both the purpose of the compensation requirement and the correct approach to resolving the issue, the Court has had considerable trouble resolving the specific cases before it.

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1. In relevant part, the Fifth Amendment to the Constitution provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. While the Fifth Amendment does not apply directly to the states, *see* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 464, 466 (1833), the Court has held that the due process language of the Fourteenth Amendment prohibits state governments from taking private property in the absence of just compensation. *See* Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 241 (1897); Missouri Pac. Ry. v. Nebraska, 164 U.S. 403, 417 (1896).

2. Armstrong v. United States, 364 U.S. 40, 49 (1960); *see also* Hodel v. Irving, 481 U.S. 704, 714 (1987); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

3. Thus, even when Justices disagree as to the proper outcome of any given case, they nevertheless agree as to the nature of the inquiry. *Compare* Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 495 (1987) (Stevens, J., explaining that compensation issue is resolved by ad hoc consideration of specific factors) *with* 480 U.S. at 508 (Rehnquist, C.J., Scalia, O'Connor, and Powell, JJ., dissenting) ("Admittedly, questions arising under the Just Compensation Clause rest on ad hoc factual inquiries, and must be decided on the facts and circumstances in each case."). For a discussion of the factors considered by the Court in resolving this ad hoc issue, see *infra* text accompanying notes 137-46.

For example, of four recent compensation cases decided in the same year, two of the decisions evoked dissents by four Justices,[4] the third evoked a dissent by three Justices,[5] and the fourth, *Hodel v. Irving*,[6] while unanimous as to result, evoked four separate opinions.[7] These disagreements among the members of the Court, and the resulting confusion over the proper scope of the compensation requirement, ensure that the Court will face this issue again.[8] Whether the Court's next attempt will resolve these disagreements is unclear, but progress seems unlikely given the current state of the dialogue.

To provide some insight into the nature of these disagreements, and to suggest a possible solution to the compensation issue, this article undertakes a critical reexamination of the takings jurisprudence. It focuses on the two bases which the modern Court has articulated as

4. *See* Nollan v. California Coastal Commn., 483 U.S. 825 (1987) (five Justices holding that compensation was required, four dissenting); Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987) (five Justices holding that compensation was not required, four dissenting).

5. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) (six Justices holding that the constitutional compensation requirement provides a self-effecting remedy for government regulation of land use that goes too far, three Justices dissenting).

6. 481 U.S. 704 (1987).

7. Three of the Justices concurred specially, asserting that the Court's holding had "effectively limit[ed]" to its facts Andrus v. Allard, 444 U.S. 51 (1979), a compensation case decided eight years earlier. *Irving*, 481 U.S. at 719 (Rehnquist, C.J., Scalia, and Powell, JJ., concurring specially). Another three Justices asserted with equal vehemence that the Court's holding had not limited this earlier case to its facts. *See* 481 U.S. at 718 (Brennan, Marshall, and Blackmun, JJ., concurring specially).

8. In 1991, for example, the Court granted certiorari in three cases, any one of which it might have used to resolve some of the confusion and inconsistency surrounding the compensation issue. *See Lucas v. South Carolina Coastal Commission*, 404 S.E.2d 895 (S.C.), *cert. granted*, 112 S.Ct. 436 (1991) (preseting question whether due process requires just compensation to accompany a state ordinance that prohibits construction of residence on two beachfront parcels); *Yee v. City of Escondido*, 224 Cal. App. 3d 1349, 274 Cal. Rptr. 551 (Cal. Ct. App. 1990), *review den'd*, 1991 Cal. LEXIS 353 (Cal.), *cert. granted*, 112 S.Ct. 294 (1991) (presenting question whether due process requires just compensation to accompany city rent control ordinace); *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir.), *cert. granted*, 112 S.Ct. 414 (1991) (presenting question whether due process places a limit on the time the government may take in acting on an application for a building permit). Yet in none of the three cases did the Court provide effective guidance on the compensation issue. It dismissed the writ of certiorari in *PFZ Properties* as improvidently granted. *See PFZ Properties, Inc. v. Rodriguez*, 112 S.Ct. 1151 (1992). In *Yee*, the Court held that rent control ordinances, though they may permit a tenant to remain on another's land indefinitely, do not constitute such a permanent physical occupation as to establish a per se taking, but the Court refused to address the issue of whether due process otherwise required compensaiton for the City's acton. *See Yee v. City of Escondido*, 112 S.Ct. 1522, 1533-34 (1992). And in *Lucas*, while the Court did recognize a new category of per se takings (complete denial of all economically viable use), it failed to provide guidance on the central issue of the property interest for which the loss of value must be complete. *See Lucas v. South Carolina Coastal Council*, 60 U.S.L.W. 4842, 4845 n.7 (U.S. June 29, 1992) ("Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'proeprty interest' against whicn the loss of value is to be measured."); *see also* 60 U.S.L.W. at 4862 (statement of Justice Souter) (recommending that the writ of certiorari be dismissed as improvidently granted because the state of the record prevented the majority from adequately defining its "total taking" rule).

support for its resolution of the compensation issue: (1) the articulated purpose of using the just compensation requirement "to bar Government from forcing some people alone to bear public burdens"; and (2) the early case law. Beginning with the Court's first struggles with the compensation issue in the late nineteenth and early twentieth century, this article traces the historical path of the takings jurisprudence, reexamining the early cases and the policy reasons behind a constitutional requirement of compensation. This journey suggests that neither the early case law nor the articulated purpose of the Takings Clause will support the modern Court's resolution of the compensation issue.

First, a critical reexamination of the early case law reveals that the modern Court has not been faithful to the early Court's approach to the compensation issue but has instead rewritten that early history. Second, a critical reexamination of the modern Court's resolution of the compensation issue reveals that the Court has not interpreted the compensation requirement in a way that effectively "bar[s] Government from forcing some people alone to bear public burdens."[9]

Moreover, a critical reexamination of the just compensation requirement as a constitutional provision suggests that the modern Court's articulated purpose for the provision cannot explain the compensation requirement as a court-enforced constitutional right. If the sole issue is whether "fairness and justice" demand compensation, one should expect that the legislature is perfectly capable of resolving that issue and of providing just compensation when it is appropriate and desirable to do so. The compensation requirement makes sense as a constitutional right only if it was intended as a limit on the legislature's judgment about the need for compensation and a check on the legislature's authority over private property.

By its own terms, the compensation requirement necessarily divides government control of property into compensable and noncompensable categories. This division suggests that resolving the scope of the constitutional right to compensation requires a line between community and individual,[10] between the property that the legislature can control as the representative of the community and the property that falls within the control of the individual. A requirement of compensa-

9. Armstrong v. United States, 364 U.S. 40, 49 (1960).

10. *See generally* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). While the words *altruism* and *selfishness* are sometimes used to describe this division, this article prefers to describe the division in terms of *community* and *individual* or *public* and *private*. The question is whether the individual will decide what to do or another will tell the individual what to do. No reason exists to expect that altruism will more naturally be associated with the other rather than the individual.

tion reflects a decision that the individual, rather than the community, should have control of the property. The story of this community-individual line, as the early history of the Takings Clause tells it, reveals a gradual recognition of circumstances in which giving an individual control over particular property would lead to conflict with the property rights of others in the community. Such a conflict of rights was thought to justify community intervention and control over the property in question. The area in which community control was thought appropriate slowly grew through the early twentieth century until, in a series of cases in the mid-1930s, the Court seemingly ceded control over all property to the community, leaving nothing for the individual.

While the modern Court has occasionally enforced the compensation requirement, and has thereby returned some property to individual control, it seems to have lost sight of the underlying division between community and individual that a constitutional right to compensation necessarily creates. In resolving compensation cases, the Court does not expressly address the various concerns that community rather than individual control of the property implicates. Instead, it simply pretends that the early cases adequately settled the issue, and it proceeds to resolve the cases by mechanically applying a factor test that bears little resemblance to the early Court's approach, and little relation to the rationale for a Court-enforced right to compensation.

To dispel the lingering confusion and disagreements about the compensation requirement requires a renewed focus on the central division the compensation requirement creates and the reasons why we should prefer one decisionmaker to the other. The early cases told a story of identifying the circumstances under which we should not trust the individual with control of particular property. The modern portion of the story must consider the other side of the issue and identify the circumstances in which we should not trust the legislature, as the representative of the community, with control of particular property. Telling this story will entail examination of the legislative process and identification of the circumstances that indicate on a general level when mistakes can enter the process.

The story's essential theme is that the collective action advantage of a concentrated faction or interest group will give the group a distinct edge when it competes for property in the legislative process against a dispersed group. This edge provides sufficient reason to distrust the legislative process that the Court should assign authority over the property in the case of such a dispersed-concentrated conflict to the individual rather than to the community. In other words, the

Court should focus in resolving the compensation issue on whether the government has impaired the property rights of the very few in order to benefit the very many.

I. THE SCOPE OF COMPENSATION IN THE EARLY CASE LAW: PUBLIC RIGHTS VERSUS PRIVATE RIGHTS

To understand the modern Court's inability to resolve the compensation issue, we must begin by reexamining its interpretation of the late nineteenth- and early twentieth-century compensation cases. The modern Court's usual interpretation of the early cases follows two guides. First, it assumes that the cases understood *property* to mean physical property, rather than the set of legal entitlements that accompanies ownership of physical property.[11] In other words, the property the compensation requirement protected was the land, the car, and the house, rather than the right to transfer, the right to use, and the right to exclude others. Second, it assumes that each case reflected an ad hoc determination that compensation was necessary given the specific facts before the Court. Given these two guides, understanding the early cases becomes a matter of diligently identifying *the* particular fact that justified the requirement of compensation in each case.

For example, the modern Court tells us that a careful reading of *Pennsylvania Coal Co. v. Mahon*[12] reveals that compensation was required because the government action diminished the value of the physical property too much[13] and that a careful reading of *Pumpelly v. Green Bay Co.*[14] reveals that compensation was required because the government action caused a physical invasion of Pumpelly's land.[15] If the Court required compensation in an early case, but we cannot discover a convenient or understandable rationale, the Court's approach is either to ignore the case or to use name-calling — *Lochnerism!* — to justify a refusal to consider it.[16]

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11. Professor Bruce Ackerman has termed the former understanding of property the "ordinary observer's" view, and the latter the "scientific adjudicator's view." *See* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 26-29 (1977).

12. 260 U.S. 393 (1922).

13. *See* Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 493, 499 (1987); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978).

14. 80 U.S. (13 Wall.) 166 (1872).

15. *See* Yee v. City of Escondido, 112 S.Ct. 1522, 1528 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982).

16. In determining that a necessarily unequal distribution of benefits and burdens was not a takings factor, the *Penn Central* Court relied on an analogy to tax law and a trilogy of early cases: Miller v. Schoene, 276 U.S. 272 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); and Hadacheck v. Sebastian, 239 U.S. 394 (1915). *Penn Central*, 438 U.S. at 133-35. The *Penn Central* Court, though, ignored those early cases in which the Court limited the degree of inequality that the Constitution permits in the distribution of benefits and burdens. For exam-

Using the two guides and ignoring the early cases that proved inconvenient, the modern Court and commentators have almost uniformly derived three or four rules which supposedly governed the early Court's resolution of the compensation issue.[17] Professor Sax,

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ple, the early Court, in Martin v. District of Columbia, 205 U.S. 135 (1907), considered a statute which authorized the commissioners of the district to "condemn, open, widen, etc., alleys." 205 U.S. at 138. The cost of the improvement was to be apportioned among the owners of the land adjacent to the improved alley. In this case a jury assessed two landowners $558 and $475 of the cost of improving an adjacent alley. Before the improvement, the two lots were appraised at $368 and $300. While there was no evidence as to the value of the lots after the improvement, Justice Holmes, writing for the Court, thought it "most improbable that the widening of an alley could have nearly trebled the value of each lot." 205 U.S. at 140. The jury's original assessment, based on the plain reading of the relevant ordinance, divided the whole cost among the landowners. 205 U.S. at 141. The Court reversed the jury's findings and ordered that the jury redivide the cost and limit the assessment on any one property to the benefit received from the improvement. 205 U.S. at 140-41. While the Court recognized that the Fourteenth Amendment should not require "a system of delusive exactness" for the matching of cost and benefit, it explained that "when the chance of the cost exceeding the benefit grows large and the amount of the not improbable excess is great," due process may demand a limit. 205 U.S. at 139. Apparently Justice Stevens had not yet read this case when he wrote:

> The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of the benefits received.

Keystone Bituminous Coal Assn., 480 U.S. at 491 n.21; *see also infra* notes 152-76 and accompanying text. Most modern commentators have also overlooked inconvenient early cases. For example, Professors Blume and Rubinfeld assert that "[p]rior to the landmark decision in *Pennsylvania Coal Co. v. Mahon*, physical invasion was necessary for such a 'taking' to occur." Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 569 (1984) (footnotes omitted). The statement is simply not true. Well before the Court decided *Pennsylvania Coal* in 1922, it had struck down as takings a variety of measures that did not involve physical invasions. *See, e.g.*, Chicago, M. & S.P. R.R. v. Wisconsin, 238 U.S. 491 (1915) (striking ordinance prohibiting railroad from lowering upper berth, if lower berth occupied, in Pullman cars as a taking); Richards v. Washington Terminal Co., 233 U.S. 546 (1914) (ordering compensation for diminution in value of property caused by government action); Missouri Rate Cases, 230 U.S. 474 (1913) (holding rate regulations confiscatory as to certain complainants); Washington *ex rel.* Oregon R.R. & Navigation Co. v. Fairchild, 224 U.S. 510 (1912) (holding order requiring railroad to build and pay for eight additional track connections a taking); Curtin v. Benson, 222 U.S. 78 (1911) (striking order requiring landowner to give up right to graze sheep on his own property as a taking); Lake Shore & M.S. Ry. v. Smith, 173 U.S. 684 (1899) (striking order requiring railroad to sell "1000 mile" tickets at a wholesale price as a taking).

17. *See, e.g.*, ACKERMAN, *supra* note 11, at 66-67 (three rules: government action that effectively took title to the physical property always required compensation; government action that prohibited a noxious use never required compensation; otherwise, question was whether government action had diminished the value of the property too much); Lawrence Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165, 170-77 (1974) (three rules followed by early Court: government action that entailed a physical invasion always required compensation; government action that prevented a noxious or harmful use of property never required compensation; government action that caused a serious diminution in value of physical property affected by the action required compensation); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184-1201 (1967) (four rules followed by early Court: government action that entailed a physical invasion always required compensation; government action that caused a serious diminution in the value of the physical property required compensation; compensation was not required if the public gains from the action outweighed the private loss; compensation was not required if the action prevented a harm, but required if action extracted a benefit); Joseph L. Sax, *Takings and*

for example, has argued that the early Court followed three rules: (1) compensation was always required if the government action entailed a physical invasion of the physical property an individual owned; (2) compensation was never required if the government action prohibited a noxious use of an individual's property; and (3) if the government action neither caused a physical invasion nor prohibited a noxious use, compensation was required only if the government action seriously diminished the value of the physical property the government action affected.[18]

This orthodox interpretation of the early cases is fundamentally wrong. Instead of understanding the cases in a manner consistent with the reasoning and legal categories of the day, it tries to impose the modern perspective on the early cases.[19] First, the orthodox approach assumes that the early cases reflected the modern division between physical property, protected by the compensation requirement, and property rights, protected by substantive due process. Second, it assumes that the early Court resolved the compensation issue by identifying the special characteristics that justify compensation — the approach applied by the modern Court.

This insistence on imposing the modern perspective on the early cases creates a significant barrier to understanding the methodology behind the early cases. For example, consider an early takings decision that required compensation for government action that caused smoke, soot, and ashes from a railroad to intrude on a person's land. Under the orthodox approach, the modern Court would try to understand the early case by assuming that the early Court was focusing on particular characteristics of the action with respect to the physical property that would justify compensation, such as the nature of the intrusion or the diminution in value it caused. But neither these particular characteristics nor the general focus on particular characteristics actually captures the essence of the early Court's analysis.[20]

The modern Court's focus on the labels the early Court used, instead of the reasoning behind the labels, has further impeded our understanding of the early cases. Then as now, the label *a taking* referred to compensable government control of a right, and the label

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the Police Power, 74 YALE L.J. 36, 46-50 (1964) (same three rules as articulated by Berger: physical invasion, noxious use, and diminution in value).

18. *See* Sax, *supra* note 17, at 46-50.

19. *Cf.* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 98-100 (1984).

20. *See* Richards v. Washington Terminal Co., 233 U.S. 546 (1914) (the same government action was a taking with respect to the landowner's right to be protected from a private nuisance, but was not a taking with respect to the landowner's right to be protected from a public nuisance); *see also infra* notes 55-67 and accompanying text.

regulation[21] referred to noncompensable government control. Like other names, these labels have, at times, appeared to have life of their own, as if the name itself sufficed to answer the question of whether compensation should be paid.[22] To understand the early case law, we must look beyond the labels to the analysis behind them. To do otherwise, to force a modern perspective onto the early cases, means that we have learned nothing at all from the early Court's experience with the compensation issue. Instead of being useful tools for understanding the compensation issue, the early cases become a cloak, permitting the modern Court to advance an unarticulated substantive agenda behind the veil of stare decisis.[23] If we read the early cases with an eye toward what the Court understood itself to be saying, the early decisions reveal a consistent and coherent theory of the scope of private property rights and of government power.

First, the early case law consistently reflects a conception of *property* as the legal rights a private actor possesses by virtue of the actor's ownership of the physical property, and not as the physical property itself. Thus, the early Court considered the right to charge a negotiated rent for an apartment,[24] the right to exclude others from one's land,[25] the right to charge a negotiated premium for fire insurance,[26] and the right to grow red cypress trees on one's land[27] to be "property" for the purpose of resolving compensation issues.

Second, in determining whether government action that limited one of these rights required compensation, the early Court neither applied an ad hoc factual analysis nor sought to identify some special

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21. In the context of government limitations on property rights, the word *regulation* may carry two different meanings. First, *regulation* may refer generally to government efforts to control or limit certain conduct. Such usage is reflected in the title *Code of Federal Regulations*. Second, *regulation* may refer more precisely to government-imposed restrictions on property rights that do not justify compensation. In this article, only the second of the two meanings will be used.

22. In Andrus v. Allard, 444 U.S. 51 (1979), Justice Brennan wrote:

> Suffice it to say that government regulation — by definition — involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*.

444 U.S. at 65. The phrase *regulate by purchase* may be an effective rhetorical device, but it is not particularly helpful in deciding whether the label *regulation* or the label *taking* should be applied to particular government action.

23. The suggestion that stare decisis has been used to cloak substantive agendas has come from critics on both the left, *see, e.g.*, Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293, 321-29 (1984), and the right, *see* ROBERT H. BORK, THE TEMPTING OF AMERICA (1990).

24. *See* Block v. Hirsh, 256 U.S. 135 (1921); *see also* Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922); Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921).

25. *See, e.g.*, Delaware, L. & W. R.R. v. Town of Morristown, 276 U.S. 182 (1928).

26. *See* German Alliance Ins. Co. v. Lewis, 233 U.S. 389 (1914).

27. *See* Miller v. Schoene, 276 U.S. 272 (1928).

characteristic that would justify compensation. Rather, the cases reflect what Professor Duncan Kennedy has called "Classical legal thought."[28] In the classical conception, it was the Court's responsibility to separate authority over conduct into two spheres: one in which the government had absolute authority; and a second in which private actors had absolute authority. This perspective tied in well to the division between compensable and noncompensable government control of property established by the Fifth Amendment.

Consistent with the classical perspective, the early Court separated compensable government control of property from noncompensable control by determining whether the property in question fell within the sphere of public authority (community) or the sphere of private authority (individual). If the Court determined that a property right fell within the sphere of private authority (a "private right"), then the right was "private property," and the government could control or interfere with the right only by purchasing it through eminent domain.[29] On the other hand, if the Court determined that a right fell within the sphere of government authority (a "public right"), then the right was not "private property," and under its police power the government could control the right or even eliminate it entirely without paying compensation, provided the government action was reasonably necessary to achieve a legitimate end.

The following sections attempt to develop a historically faithful interpretation of the early cases. At times, this will require detailed consideration of the early cases, but this process of immersion should convey some sense of the classical perspective on the compensation issue and suggest an explanation for the current confusion in this area.[30]

A. *Property as a Legal Entitlement*

The term *property* in the Fifth Amendment could have three different meanings. First, it could refer to physical property[31] itself. Under this definition of property, the property that the just compensation requirement protects would include land, a house, or a boat. Second,

28. *See* Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940,* 3 RES. L. & SOC. 3, 3, 10-12 (1980).

29. *See, e.g.,* Munn v. Illinois, 94 U.S. 113, 124, 126 (1877).

30. *Cf.* Kennedy, *supra* note 28, at 10 (explaining use of immersion method to explicate substantive due process decisions of the *Lochner* era).

31. The phrase *physical property* refers to anything with respect to which legal relations between people exist. As the *Restatement (First) of Property* notes, physical property "may be an object having physical existence or it may be any kind of an intangible such as a patent right or a cho[ ]se in action." RESTATEMENT (FIRST) OF PROPERTY ch. 1, Introductory Note (1936).

the term could refer to the set of legal rules governing the relationship between various individuals and physical property. Under this definition, the property that the compensation requirement protects would include the rights to alienate, use, or exclude. Third, the term could refer to any relationship having an exchange value. Under this definition, the property that the compensation requirement protects would include, for example, the market value of an apartment complex given the current market for apartments in the area.[32] When the American Law Institute published its *Restatement (First) of Property* in 1936, the Introductory Note to Chapter One adopted the second definition of property.[33] This conception of property as a set of legal rights, or entitlements, was consistent with the early case law on the compensation issue.

For example, in a 1935 case, *Louisville Joint Stock Land Bank v. Radford*,[34] the Court considered a takings challenge to the Frazier-Lemke Act,[35] a bankruptcy statute that significantly limited the rights of a mortgage holder to force the sale of owner-occupied land that had been pledged as collateral. If the landowner defaulted on the mortgage, the Act would not permit the land to be sold at a judicial sale open to all bidders but required the land to be "sold" to the debtor at an appraised price with specified terms of payment.[36] In determining whether the statute took "property" from the holder of the mortgage

32. Note that the current market value of the property reflects a relationship having an exchange value, but the owner of the complex has no legally enforceable right to the exchange value (absent a binding contract for the sale of the building).

33. The word "property" is used sometimes to denote the thing with respect to which legal relations between persons exist and sometimes to denote the legal relations. The former of these two usages is illustrated in the expressions "the property abuts on the highway" and "the property was destroyed by fire." This usage does not occur in this Restatement. When it is desired to indicate the thing with regard to which legal relations exist, it will be referred to either specifically as "the land," "the automobile," "the share of stock," or, generically, as "the subject matter of property" or "the thing."

The word "property" is used in this Restatement to denote legal relations between persons with respect to a thing. . . . The broader meanings of the word "property," which include any relationship having an exchange value, are not used.

RESTATEMENT (FIRST) OF PROPERTY ch. 1, Introductory Note (1936).

34. 295 U.S. 555 (1935).

35. Ch. 869, 48 Stat. 1289 (1934) (repealed 1978).

36. Under the Frazier-Lemke Act, farm property that secured the defaulted mortgage of a bankrupt farmer could not be sold at a foreclosure sale. Instead, under paragraph 3 of the Act, the bankrupt may, if the mortgagee assents, purchase the property at its then appraised value, acquiring title thereto as well as immediate possession, by agreeing to make deferred payments as follows: 2 ½ per cent. within two years; 2 ½ per cent. within three years; 5 per cent. within 4 years; 5 per cent. within 5 years; the balance within six years. All deferred payments to bear interest at the rate of 1 per cent. per annum

295 U.S. at 575 (paraphrasing ¶ 3 of the Act). If the mortgagee did not consent to the bankrupt's "purchase" of the property under the deferred payment terms, then the bankrupt could "require the bankruptcy court to

stay all proceedings for a period of five years, during which five years the debtor shall retain possession of all or any part of his property, under the control of the court, provided he pays

within the meaning of the Fifth Amendment, Justice Brandeis, writing for a unanimous Court, specifically identified the relevant "property" as follows:

> 1. The right to retain the lien until the indebtedness secured thereby is paid.
>
> 2. The right to realize upon the security by a judicial public sale.
>
> 3. The right to determine when such sale shall be held, subject only to the discretion of the court.
>
> 4. The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.
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> 5. The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.[37]

In finding the Frazier-Lemke Act unconstitutional, the Court held that these rights constituted "private property," the taking of which was forbidden by the Fifth and Fourteenth Amendments absent just compensation.[38] By specifically listing the rights and identifying the rights as the relevant property, the Court made clear that the word *property* in the Fifth Amendment refered to property rights, rather than physical property.

Similarly, in *Pennsylvania Coal Co. v. Mahon,*[39] the Court considered a takings challenge to a Pennsylvania statute that prohibited coal mining that would cause subsidence of the surface and identified the relevant "property" as the right to mine the support coal.[40] Additionally, in three cases involving takings challenges to rent control statutes, the early Court identified the relevant "property" as the right to charge a negotiated rent.[41]

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a reasonable rental annually for that part of the property of which he retains possession . . . ."

295 U.S. at 575-76 (quoting ¶ 7 of the Act).

37. 295 U.S. at 594-95.

38. 295 U.S. at 601-02.

39. 260 U.S. 393 (1922).

40. The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without *the right of support,* we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much.

260 U.S. at 415 (emphasis added).

41. *See* Block v. Hirsh, 256 U.S. 135 (1921):

It may be assumed that the interpretation of "reasonable" [as defining the level at which the rents are to be set] will deprive him [the apartment owner] in part at least of the power of profiting by the sudden influx of people to Washington caused by the needs of Government and the war, and thus of a right usually incident to fortunately situated property . . . .

As a general proposition, then, the "property" protected by the Fifth and Fourteenth Amendments in the early case law included all legally enforceable rights.[42] Furthermore, the compensation requirement protected each of these legal rights individually.[43] Government action that effectively eliminated, modified, transferred, or restricted any enforceable legal right raised the issue whether compensation was required. To use the common metaphor, the early Court protected each "strand" in the bundle of ownership rights individually.[44]

The early cases also demonstrate that the Court protected neither the physical property itself nor all relationships having exchange value under the compensation requirement. So long as a government action that interfered with either the physical property or with an exchange value did not interfere with a *legal right,* the Court would label the action's effect on the physical property or the exchange value a "consequential injury" or *"damnum absque injuria"*[45] and would not require compensation. In making this distinction, the early Court focused neither on the nature of the government intrusion nor on the extent of the diminution in value, but on whether the government action effectively eliminated, or interfered with, the legal rights state law gave the landowner.[46]

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256 U.S. at 157; *see also* Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922); Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921).

42. *See also* cases cited *supra* notes 24-27.

43. *See, e.g.,* Richards v. Washington Terminal Co., 233 U.S. 546 (1914) (interference with the landowner's right to protection from private nuisances was a taking without regard to the value or nature of other rights the landowner retained); Curtin v. Benson, 222 U.S. 78 (1911) (interference with the right to use own land for sheep-grazing was a taking without regard to the value or nature of other rights the landowner retained); Muhlker v. New York & Harlem R.R., 197 U.S. 544 (1905) (interference with the landowner's rights to light, air, and access was a taking without regard to the value or nature of the other rights the landowner retained).

44. The modern Court has refused to provide similar strand-by-strand protection. *See* Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 498-99 (1987) (refusing to protect right to mine support coal individually); Andrus v. Allard, 444 U.S. 51, 65-66 (1979) ("[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' is not a taking, because the aggregate must be viewed in its entirety."); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978) (refusing to protect air rights individually).

45. *See, e.g.,* Union Bridge Co. v. United States, 204 U.S. 364, 390, 395 (1907); Chicago, B. & Q. Ry. v. Illinois *ex rel.* Drainage Commrs., 200 U.S. 561, 592 (1906); New Orleans Gas Light Co. v. Drainage Commn., 197 U.S. 453, 462 (1905) (Because "[t]he gas company, by its grant from the city, acquired no exclusive rights to the location of its pipes in the streets," requiring the gas company to move its pipes did not interfere with any legal entitlement it held.); L'Hote v. New Orleans, 177 U.S. 587, 599 (1900) (quoting 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 141 (4th ed. 1890)); Wabash R.R. Co. v. Defiance, 167 U.S. 88, 101 (1897); Eldridge v. Trezevant, 160 U.S. 452, 462, 464 (1896).

46. As Professor Ernst Freund explained in his treatise:

> Cases in which compensation has been denied will be found to go on the theory that there has been no invasion of any right, and hence no legal injury. Thus where property is subject to an easement or servitude in favor of the public, what would otherwise be an invasion or a taking, has been held to be the exercise of a public right, so that no compensation is due; so

For example, in a number of cases, the state authorized construction of a road, a canal, or an elevated railroad. The construction would cause noise, vibrations, and dust to intrude on adjacent land and would sometimes block access to it as well. While the government's action in each of these cases had similar effects on the physical property itself and on the exchange value associated with ownership of the land, the early Court would require compensation for the owners of the adjacent parcels of land only if the government action interfered with the landowner's legal rights under the relevant state law.[47] If the landowner held a legal entitlement to light or air, a so-called negative easement,[48] then this sort of government action would not only affect the physical property and its exchange value but would interfere with the landowner's rights as well, and the Court would require compensation.[49] On the other hand, if under the relevant state law the landowner did not hold an enforceable right to air or light, then the government action, while it might interfere both with the landowner's physical property and with the exchange value associated with her ownership, would not interfere with any enforceable right held by the individual and therefore would not require compensation.[50]

Limiting the compensation requirement so that it only protected against government action that interfered with a property right made sense for two reasons. First, if the term *property* in the Fifth and Fourteenth Amendments was understood to mean property rights, rather than physical property or any relationship having an exchange value, then government action that did not interfere with property rights

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in the case of improvements made on navigable waters in the interest of navigation, or under laws recognising a public servitude over riparian lands for the construction of public works.

The denial of any liability to compensation in the case of what are called consequential damages, likewise rests on the theory that there is no legal right taken or injured in the prosecution of the public work or enterprise.

ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS § 509 (1904) (citations omitted).

47. *Compare* Richards v. Washington Terminal Co., 233 U.S. 546 (1914) (requiring compensation for certain damages resulting from state-authorized operation of railroad adjacent to landowner's property) *and* Muhlker v. New York & Harlem R.R. Co., 197 U.S. 544 (1905) (requiring compensation for construction of an adjacent elevated railroad) *with* Sauer v. City of New York, 206 U.S. 536 (1907) (no compensation required for public use of ground-level streets), Meyer v. City of Richmond, 172 U.S. 82, 94-95 (1898) (no compensation required for consequential harm), Transportation Co. v. Chicago, 99 U.S. 635, 643-44 (1879) (same) *and* Smith v. Corporation of Washington, 61 U.S. (20 How.) 135, 146-49 (1858) (same).

48. *See, e.g.*, Russell R. Reno, *The Enforcement of Equitable Servitudes in Land: Part I*, 28 VA. L. REV. 951, 959 (1942).

49. *See, e.g., Muhlker*, 197 U.S. at 570-71.

50. *See, e.g., Sauer*, 206 U.S. at 547-48; Union Bridge Co. v. United States, 204 U.S. 364, 393-94 (1907); L'Hote v. New Orleans, 177 U.S. 587, 600 (1900); *Meyer*, 172 U.S. at 94-95 ("If under the constitution and laws of Virginia whatever detriment he suffered was *damnum absque injuria*, he cannot be said to have been deprived of any property." (citation omitted)); *Transportation Co.*, 99 U.S. at 642-44; *Smith*, 61 U.S. (20 How.) at 148-49.

held by an individual had, by definition, not taken property. Second, even at this time, the Court recognized that the government made thousands of decisions daily that affected the prices and values of a variety of rights held by individuals across the country. Requiring compensation every time prices changed in response to government action would have significantly limited government authority. As Justice Holmes remarked: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[51]

The early case law, however, strictly limited the reach of this notion of consequential injury by tying it to existing property rights. For example, if the government were to build low-income apartments in a community, the government action would likely reduce the rents that could be charged for existing apartments. By its actions, the government would diminish the exchange value associated with ownership of the preexisting apartments. Yet this action would not change the nature of the rights held by the apartment owners. Both before and after the government built the low-income apartments, the individual owners of the preexisting apartments would have the right to lease their physical property at a negotiated price. While the competition of the government's low-income apartments might diminish a "value[ ] incident to property," the government action would not have changed the nature of the property, *i.e.,* the rights, held by the apartment owners at all. The early Court would have treated such a diminution in exchange value as a "consequential injury" not requiring compensation.[52] In contrast, a rent control statute, one that limited the permissible rent that apartment owners could charge, would similarly reduce the exchange value associated with ownership. But the government action would also have changed the nature of the property held by the apartment owners, depriving the owners of the right to rent each apartment at a freely negotiated price. The government action would not only affect a "value[ ] incident to property" but would have changed the nature of the property itself.[53] This situation would have implicated the constitutional requirement of compensation, and the early Court would have proceeded to determine whether to require compensation.

51. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

52. *Cf.* Charles River Bridge Co. v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837) (holding that state-sponsored construction of a free public bridge adjacent to a preexisting private toll bridge need not violate Contracts Clause).

53. *See* Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922) (right to charge negotiated rent was "property" within the meaning of the Fifth Amendment); Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921) (same); Block v. Hirsh, 256 U.S. 135 (1921) (same).

B. *Public Versus Private Property*

Even though the early Court protected as property each of the legal rights possessed by virtue of ownership, it did not require compensation every time the government acted to limit or control one of these rights. Instead, consistent with the classical perspective, the Court defined a set of circumstances in which property would fall within the public sphere. If the Court determined that the property was public, then the state could permissibly regulate the property. Thus, the classical perspective adhered to the literal language of the Fifth Amendment in requiring compensation only for governmental control of "*private* property."

Because the proposed interpretation of the early cases differs greatly from the orthodox interpretation of these cases, the next two sections proceed, first, to establish that the line between public and private property was the basis for the early Court's resolution of the compensation issue, and second, to illustrate the early Court's method of drawing that line.

1. *The Existence of Separate Spheres*

The existence of two separate spheres of authority was the hallmark of classical legal thought. Consider the following passage written by Justice Harlan:

> The question in *Pumpelly v. Green Bay Company* arose under the State's power of eminent domain; while the question now before us arises under what are, strictly, the police powers of the State . . . .
>
> . . . [Such a police power regulation] cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.[54]

From a modern perspective, the passage appears to contain no reasoning at all. Justice Harlan appears simply to attach two different labels to the government's authority for its actions: the first case dealt with an issue arising under the state's power of eminent domain, while the second case dealt with an issue arising under the state's police powers. Yet, in the context of classical legal thought, the statement makes perfect sense.

The division of government power into two categories, eminent domain and the police power, reflected the classical division of authority in society into the two spheres of private and public authority. The government's power to control rights in the public sphere was called the police power, while the government's power to control rights in the private sphere was called eminent domain. Because the two

54. Mugler v. Kansas, 123 U.S. 623, 668-69 (1887).

spheres of authority were mutually exclusive, a right would fall either within the public or the private sphere. Furthermore, because the two categories of government power were coextensive with their respective spheres, the source of government authority to control a particular property right had to come either from the one type of authority or the other. From this perspective, Justice Harlan's statement that "[a police power regulation] cannot in any just sense be considered a taking"[55] is literally true.

The differing labels, *police power* and *regulation* on one side of the compensation issue and *eminent domain* and *taking* on the other, were not attached to particular government action in an ad hoc fashion. The label that the Court applied, and the corresponding power that the government used, turned on the Court's characterization of the right affected by the government action. A right was either a private right or a public right, and the Court resolved the compensation question by determining on which side of the public-private line the right fell.

The classical division between private rights and public rights was expressed, if not fully articulated, in all of the relevant opinions of the day. Consider Justice Holmes' description in *Hudson Water Co. v. McCarter:*

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. *The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. . . .*
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> *It sometimes is difficult to fix boundary stones between the private right of property and the police power* when, as in the case at bar, we know of few decisions that are very much in point.[56]

Justice Holmes' words suggest two separate spheres: "the police power" on the one hand, and "private property" on the other. The Court's task in resolving the compensation issue was to "fix boundary stones" between the two.

The Court went further in *Munn v. Illinois,*[57] setting out a distinction between "mere private contracts" over which "the legislature has

55. 123 U.S. at 669.

56. Hudson Water Co. v. McCarter, 209 U.S. 349, 355 (1908) (emphasis added).

57. Munn v. Illinois, 94 U.S. 113 (1877).

no control," and rights "clothed with a public interest."[58] According to the Court, only the latter type of rights could be regulated by the government under the police power.

These opinions reflect a view of legislative authority as limited. Only those rights that the early Court, for some reason, determined to be "public" fell within the sphere of public authority, and only those rights could be regulated under the police power. Furthermore, and as a necessary corollary, the legislature's authority to regulate did not extend to rights that the early Court determined to be "purely and exclusively private."

The public-private distinction was more than merely a factor that the Court considered in determining whether compensation should be required; it was the central issue in determining whether compensation should be paid. As the Court explained in *German Alliance Insurance Co. v. Lewis,* in determining whether rights concerning the negotiation of fire insurance contracts could be regulated:

> We may put aside, therefore, all merely adventitious considerations and come to the bare and essential one, *whether a contract of fire insurance is private and as such has constitutional immunity from regulation.* Or, to state it differently and to express an antithetical proposition, is the business of insurance so far affected with a public interest as to justify legislative regulation of its rates?[59]

This passage, as well as similar language in other cases[60] and the actual results in the cases in which the Court required compensation,[61] demonstrates that the public right-private right distinction was the basis for the early Court's resolution of the compensation issue.

Given their classical perspective, the early cases often discuss the scope of public authority in terms of power: was the right in question a public right that the legislature had the power to regulate under the

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58. 94 U.S. at 133-34.

59. German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 406 (1914) (emphasis added).

60. *See, e.g.,* cases cited *infra* notes 91-95 and accompanying text.

61. For example, in Richards v. Washington Terminal Co., 233 U.S. 546 (1914), government action caused smoke, soot, and ashes to invade a piece of rental property owned by Richards. The Court held that, to the extent the intrusion implicated the landowner's right against a private nuisance, it was a taking and required compensation. 233 U.S. at 551. On the other hand, to the extent that the same intrusion implicated the landowner's rights against a public nuisance, the intrusion was not a taking. 233 U.S. at 551. Given that the same government action was a taking with respect to the landowner's right to be protected from a private nuisance, but was not a taking with respect to the landowner's right to be protected from a public nuisance, the early Court's decision cannot have been guided by the nature of the government intrusion, the diminution in value, or any of the other factors suggested by the orthodox interpretation of the early cases. The actual basis for the decision was that the right to be protected from a public nuisance was, as its name suggests, a public right, while the right to be protected from a private nuisance was a private right. Government action that interfered with the private right required compensation; government action that interfered with the public right did not.

police power or a private right that the legislature had no power to regulate?[62] If, and only if, the Court found the right affected to be a public right, the Court characterized the government action as a police power regulation and required no compensation. If, on the other hand, the right fell within the sphere of private authority, the right carried a "constitutional immunity from regulation," and the government could control it only through the power of eminent domain.

2. *Defining the Scope of Each Sphere*

To understand the early cases in context, we must look to see where the early cases drew the line between public rights and private rights. The cases reflect one guiding theory in drawing the line: *sic utere tuo, ut alienum non lædas.*[63] Translated literally, the phrase means: use your own property as not to injure that of another person.[64] As Justice Pitney explained in 1917, though, the clause is more properly translated: "so as not to injure *the rights* of another . . . ."[65]

The premise behind the theory was that private rights became public, and government intervention was justified, when existing private rights came into conflict. Implicit in this theoretical framework is the conception that rights are generally private but may within certain defined circumstances become public. Given this conception, the Court, to resolve the compensation issue, needed only to define those circumstances in which a right would become public. So long as there was nothing special that would make a right "public," it remained private and beyond the government's regulatory power.

Applying the general principle of *sic utere tuo, ut alienum non lædas,* the early Court defined two circumstances in which rights would become public and therefore subject to the state's police power. The first, typified by *Miller v. Schoene*[66] and *Hadacheck v. Sebastian,*[67] involved a conflict between the private property rights held by adjacent landowners or neighbors. The second involved a conflict between

62. *See, e.g.,* Lake Shore & Mich. S. Ry. v. Smith, 173 U.S. 684, 690-91, 692-93 (1899) (referring repeatedly to the legislature's power in determining whether the ordinance in question was a taking), *overruled on other grounds by* Pennsylvania Ry. v. Towers, 245 U.S. 6 (1917); Munn v. Illinois, 94 U.S. 113, 134 (1877) ("The controlling fact is the power to regulate at all.").

63. *See, e.g.,* CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES 4 (1886) ("[T]he police power of the government, as understood in the constitutional law of the United States, is simply the power of the government to establish provisions for the enforcement of the common as well as civil-law maxim, *'Sic utere tuo, ut alienum non lædas.'* ").

64. *See* Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 492 n.22 (1987).

65. Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 254 (1917).

66. 276 U.S. 272 (1928).

67. 239 U.S. 394 (1915).

the property rights of an individual and a court-recognized right held by the public. Under this type of conflict in rights, the Court permitted government control of aspects of businesses that were, by their nature, "clothed with a public interest," the classic example being railroads. Only in these two circumstances would the early Court give the community, rather than the individual, control over a property right.

Conflict with another private right. In a variety of circumstances, the Court found a conflict between the existing property rights of neighbors that would permit regulation of those rights by the government. Using one's land in a manner that interfered with one's neighbor's right to use her land was the classic example. When one landowner exercised her right to use her land by operating a livery stable,[68] a garbage dump,[69] or a brickyard,[70] and thereby interfered with her neighbors' corresponding rights, the right to use became public and subject to regulation.

For example, the right to grow trees on one's own land would have been considered a private right. As such, the government could not limit the growing of trees on private land under the police power. However, this ordinarily private right could become a public right if, under a particular set of circumstances, exercising that right would have "injure[d] the rights of another."

This was the case in *Miller v. Schoene.*[71] In *Miller,* the State of Virginia enacted a measure that required cedar trees to be destroyed when they were found to be a host for cedar rust and were located within a certain distance of an apple orchard. While the cedar rust did not harm its host cedar tree, it would infect and destroy apple trees within a several mile radius.[72] By enacting the statute, the state removed the right to grow cedar trees from the bundle of rights landowners possessed in the situation the statute addressed. To determine whether this shift in legal rights required compensation, the early Court looked neither at whether the right to grow cedar trees was an essential part of our common conception of property ownership nor at the value of the right on its own or in relation to the value of the land as a whole.[73] Instead, the Court focused on whether the right had, under the circumstances, become a public right. In answering this

68. *See* Reinman v. City of Little Rock, 237 U.S. 171 (1915).

69. *See* Gardner v. Michigan, 199 U.S. 325 (1905); California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905).

70. *See* Hadacheck v. Sebastian, 239 U.S. 394, 408 (1915).

71. 276 U.S. 272 (1928).

72. 276 U.S. at 278-79.

73. *Cf. infra* notes 136-46 and accompanying text (discussing differences in the modern Court's approach).

question, the Court found that, in the situation the statute addressed, the exercise by one landowner of her right to use her land to grow cedar trees would conflict with her neighbors' rights to use their land to grow apple trees.[74] As a result of this conflict between existing legal rights, the rights became public, and the government could act to resolve the conflict, even if its action entailed the complete destruction of one of the rights.[75]

Later commentators have referred to these cases as the "noxious use" cases and the principle underlying them as the nuisance exception, stating the relevant principle as *the state may prohibit noxious uses without compensation.*[76] As the cases reflect, though, the government could regulate the right to use physical property given such a conflict even if the particular prohibited use would not have fallen within the common law definition of a private nuisance.[77] Thus, the so-called "noxious use" cases make more sense as one application of the general principle that ordinarily private rights become public, and therefore subject to regulation, when they come into conflict with other private rights.[78]

The state's authority under this strand of the public rights analysis

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74. The Court wrote:

> On the evidence we may accept the conclusion of the Supreme Court of Appeals that the state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. . . . When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public.

276 U.S. at 279.

75. As the Court explained: "And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." 276 U.S. at 279-80 (citations omitted).

76. *See, e.g.,* Berger, *supra* note 17, at 172-75; Sax, *supra* note 17, at 48-50.

77. *See* Hadacheck v. Sebastian, 239 U.S. 394, 410-11 (1915); Reinman v. City of Little Rock, 237 U.S. 171, 176 (1915); *see also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 133 n.30 (1978).

78. Justice McKenna expressed this general principle in Walls v. Midland Carbon Co., 254 U.S. 300 (1920):

> We there said in substance that, the power of regulation existing, the imposition of some limit to a right, when its exercise would impinge upon the equal right of another was the exercise of legislative power . . . .
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> The case *[Bacon v. Walker],* and those it cites, are authority for the position that a State may consider the relation of rights and accommodate their coexistence, and, in the interest of the community, limit one that others may be enjoyed.

254 U.S. at 315. As this passage reflects, the conflict in rights, rather than the noxious character of the use of the land, gave the government the authority under the police power to regulate the property in this situation. This general "conflict in existing rights" principle saw application in a number of other areas. *See* Champlin Ref. Co. v. Corporation Commn. of Oklahoma, 286 U.S. 210, 233-34 (1932) (allowing state to modify "Rule of Capture" to reconcile conflicting rights to hydrocarbon reservoir); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-88 (1926) (holding ordinance that segregated industrial and commercial uses of land from residential uses not a taking when the industrial and commercial uses would interfere with the rights of the

had limits, however. That the legislature reasonably thought the limitation on one individual's rights necessary to advance the public welfare or even to prevent the physical destruction of another's home and land was not enough. If a right was not in conflict with another existing *right,* then it remained private and beyond the reach of the police power. Two cases, *Lindsley v. Natural Carbonic Gas Co.*[79] and *Pennsylvania Coal Co. v. Mahon,*[80] illustrate this limitation.

In *Lindsley,* the State of New York enacted a statute entitled: "An act for the protection of the natural mineral springs of the State and to prevent waste and impairment of its natural mineral waters."[81] The Act provided:

> Pumping, or otherwise drawing by artificial appliance, from any well made by boring or drilling into the rock, that class of mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas, or pumping, or by any artificial contrivance whatsoever in any manner producing an unnatural flow of carbonic acid gas issuing from or contained in any well made by boring or drilling into the rock, for the purpose of extracting, collecting, compressing, liquefying or vending such gas as a commodity otherwise than in connection with the mineral water and the other mineral ingredients with which it was associated, is hereby declared to be unlawful.[82]

In its terms, the Act was absolute; it applied to all wells, whether drawing from a common source of supply or not. Despite the plain language of the statute, the Court of Appeals of New York added a qualifier "making [the statute] inapplicable where the waters [were] not drawn from a common source of supply, and also where, if they be drawn from such a source, no injury [was] done thereby to others having a like right to resort to it."[83]

The highest court of the state would, presumably, add such a qualifier only if the statute would otherwise face serious constitutional difficulty.[84] Chief Judge Cullen of the New York Court of Appeals explained that the court thought such a qualifier necessary because the

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residential landowners); Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900) (allowing state to modify "Rule of Capture" to reconcile conflicting rights to hydrocarbon reservoir).

79. 220 U.S. 61 (1911).

80. 260 U.S. 393 (1922).

81. N.Y. PUB. LANDS LAW § 90 (McKinney 1951); *see Lindsley,* 220 U.S. at 62.

82. 220 U.S. at 62-63 (quoting N.Y. PUB. LANDS LAW § 90 (McKinney 1951)).

83. 220 U.S. at 73.

84. The early U.S. Supreme Court used narrowing constructions in a number of cases, in addition to this one, to limit a statute's effect to the public aspect of the property affected. *See, e.g.,* Fort Smith & W. R.R. v. Mills, 253 U.S. 206, 207 (1920) (narrowing reach of wage regulation statute); Martin v. District of Columbia, 205 U.S. 135, 139-40 (1907) (construing street opening statute not to require that a given landowner contribute to the cost of the opening an amount in excess of his benefit from it). The modern Court has used narrowing construction cases as guides to the meaning of the relevant constitutional provisions. *See* Lehnert v. Ferris

right to produce the mineral waters, if not in conflict with the coequal right of others in the common pool, was a private right not subject to regulation under the police power. Only if one landowner's exercise of his rights to the common pool created a conflict with another landowner's rights to the common pool did the state have authority to act under the police power.[85]

Similar reasoning is reflected in *Pennsylvania Coal Co. v. Mahon.* In that case, the Mahons and others had purchased land from several coal companies. As part of each purchase agreement, the coal companies had specifically reserved the right to mine the coal from under the land. After many of the purchasers had built on the land, but before the coal companies had mined all of the coal from under it, the State of Pennsylvania enacted the Kohler Act,[86] which prohibited "the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a human habitation . . . ."[87] In considering whether the right to mine the support coal (where it had been reserved by the coal companies) was a public right that could be limited without compensation or a private right that could be limited only if accompanied by compensation, the Court focused on the existing distribution of rights:

> The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much.
>
> . . . .
>
> . . . So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.[88]

Faculty Assn., 111 S. Ct. 1950 (1991) (using cases that narrowly construed statutes to avoid First Amendment difficulties to determine the meaning of the First Amendment).

85. People v. New York Carbonic Acid Gas Co., 90 N.E. 441, 448 (N.Y. 1909) (Haight, Willard Bartlett, Edward T. Bartlett, Werner, and Hiscock, JJ., concurred with Chief Judge Cullen's reasoning). Judge Gray also wrote an opinion, justifying the qualifier with the following words: "The right of the people to demand that wasting of the product be restrained must rest upon the ground that it [the wasting of the product] is destructive of the rights of landowners to an equal appropriation and enjoyment of the natural product." 90 N.E. at 446; *see also* Hathorn v. Natural Carbonic Gas Co., 87 N.E. 504, 510 (N.Y. 1909) (opinion of Hiscock, J.) (arguing that statute may lawfully prohibit pumping only where the pumping would interfere with the rights of another person to the spring).

86. Act of May 27, 1921 Pa. Laws 445.

87. 260 U.S. at 413 (paraphrasing 1921 Pa. Laws 445).

88. 260 U.S. at 415-16. Professor Carol Rose has suggested that *Pennsylvania Coal Company* turned on an antiredistributive reading of the Fifth Amendment; in other words, she asserts that the early Court struck down the statute because it redistributed property from the coal compa-

As the passage reflects, the rights of the surface owners were subject to the coal companies' right to remove the coal from under the land. Because there was no conflict between the parties' rights, the right to mine the coal remained a private right and therefore could not be limited by the state through the police power even though exercising the right to mine would in some cases lead to the destruction of the surface owners' homes.

Thus, a conflict between existing private rights would justify community control of the rights in question. But as Justice Pitney's precise language suggests, injury to another was not enough; only "injury to another's *rights*" would render a right public and authorize government action under the police power.

Rights clothed with a public interest. Aside from the conflicts in private rights that arose under the first aspect of the definition of public rights, the Court during this period also considered whether the government had the authority to regulate wages, prices, hours of employment, and the like. Each of these measures would change the nature of the legal relations between the affected individuals; each therefore implicated a property right and the protections of the compensation requirement.

For example, before the enactment of a rent control statute, the owner of an apartment complex had the legally enforceable right to lease his apartments at whatever price he determined was appropriate. If another individual attempted to enter and reside in the apartment without paying a rent to which the owner of the apartment agreed, the owner had the legal right to have the person evicted as a trespasser. After the enactment of the rent control statute, the owner no longer had this right.[89] The government had taken one of the owner's legal rights, and, under the early case law, the apartment owner could raise a takings challenge.[90]

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nies to the surface owners. *See* Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle,* 57 S. CAL. L. REV. 561, 581-82 (1984). While some of the words may invite such a reading, the early Court's citation to the rent control cases, *see infra* note 90, suggests that the result does not reflect a prohibition of redistributive measures. The rent control statutes, which the early Court upheld, also entailed a redistribution of property. To understand the basis for *Pennsylvania Coal Co.* in the context of the early cases, we must discover why the redistributions in the rent control cases were valid while the redistribution in the coal mining case was invalid.

89. *See, e.g.,* Block v. Hirsh, 256 U.S. 135, 156-57 (1921).

90. Under the modern perspective, the right to charge a negotiated rent might be only an "economic interest," and as such entitled to protection only under the rational basis test of substantive due process. Nonetheless, Justice Holmes, writing for the Court in *Pennsylvania Coal Co.,* treats the early Court's decisions in the three rent control cases as the most relevant authority in resolving the takings challenge to the statute restricting the mining of support coal. *See* 260 U.S. at 416. Justice Holmes' reference to the rent control cases suggests that, in the view of the early Court, the right to charge a negotiated rent received the same protection as "property" under the Fifth and Fourteenth Amendments as did the right to mine the support coal.

In this type of case, the Court would resolve the compensation issue by determining whether the property right, under the circumstances, had become "clothed with a public interest." If so, then the right was a public right, subject to regulation under the police power.

Before 1934, the phrase *clothed with a public interest* had a defined and limited meaning. As Chief Justice Taft explained in 1923:

> In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well being of the people. The public may suffer from high prices or strikes in many trades, but the expression "clothed with a public interest," as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn v. Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public.[91]

Thus, in the early cases, the Court saw the phrase *clothed with a public interest* as bringing a limited class of businesses within the sphere of public authority.[92] Because of the "peculiarly close relation between the public" and the business, the Court would recognize the community's right to control those aspects of a business that were "clothed with a public interest." As Chief Justice White explained in *Wilson v. New:*

> [T]he business of common carriers by rail is in a sense a public business because of the interest of society in the continued operation and rightful conduct of such business and . . . the public interest begets a public right of regulation to the full extent necessary to secure and protect it . . . .[93]

While the Court used various phrases to describe the nature of the public interest in these businesses, the essence of the concept was that the nature of the business created certain rights in the public. As the Court wrote in *Tyson & Brother — United Theatre Ticket Offices, Inc. v. Banton,*[94] "[W]hile the [public interest] has not always been limited

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91. Charles Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522, 536 (1923); *see also* German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 406 (1914) ("In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence, which makes the public interest that justifies regulatory legislation.").

92. *See generally* Walton H. Hamilton, *Affectation with Public Interest,* 39 YALE L.J. 1089 (1930), *reprinted in* 2 SELECTED ESSAYS IN CONSTITUTIONAL LAW: LIMITATIONS ON GOVERNMENTAL POWER 494 (Association of American Law Schools ed., 1938) [hereinafter SELECTED ESSAYS]; Brook P. McAllister, *Lord Hale and Business Affected with a Public Interest,* 43 HARV. L. REV. 759 (1930), *reprinted in* SELECTED ESSAYS, *supra,* at 467.

93. 243 U.S. 332, 347 (1917); *see also* Northern Pac. Ry. Co. v. North Dakota, 236 U.S 585 (1915) (stating that states have broad discretion to regulate private property devoted to public use).

94. 273 U.S. 418, 430 (1927), *overruled by* Olsen v. Nebraska, 313 U.S. 236 (1941).

narrowly as strictly denoting 'a right,' that synonym more nearly than any other expresses the sense in which it is to be understood." By conceiving of the public interest in these businesses as a "right," the Court brought this line of cases within the precise interpretation of *sic utere tuo, ut alienum non lædas:* unreasonable exercise by this class of business of its rights injured not only another, but another's rights. The Court's attempt to distinguish businesses which were clothed with the public interest from those which were not generated results that would seem arbitrary today.[95] For example, the Court found that common carriers,[96] the production of liquor,[97] the storage of grain,[98] public utilities,[99] fire insurance,[100] and rental apartments[101] were businesses that were clothed with a public interest. On the other hand, theaters and entertainment facilities,[102] retail gasoline sales,[103] employment agencies,[104] the packing industry,[105] and the ice business[106] were not. Under the classical approach, the government could regulate the rights of only those businesses that had become clothed with a public interest.

Furthermore, even with respect to a business clothed with a public

95. The criteria for the determination were summarized in *Charles Wolff Packing Co.:*

> Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:
>
> (1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.
>
> (2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills.
>
> (3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation.

262 U.S. at 535 (citations omitted).

96. *See, e.g.,* Wilson v. New, 243 U.S. 332, 347 (1917).

97. *See, e.g.,* Mugler v. Kansas, 123 U.S. 623, 668-69 (1887).

98. *See, e.g.,* Brass v. North Dakota *ex rel.* Stoeser, 153 U.S. 391, 403 (1894); Munn v. Illinois, 94 U.S. 113, 124-26 (1877).

99. *See, e.g.,* Union Dry Goods Co. v. Georgia Pub. Serv. Corp., 248 U.S. 372, 374-75 (1919).

100. *See* German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 407-08 (1914).

101. *See* Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922); Marcus Brown Co. v. Feldman, 256 U.S. 170 (1921); Block v. Hirsh, 256 U.S. 135 (1921).

102. *See* Tyson & Brother — United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418 (1927), *overruled by* Olsen v. Nebraska, 313 U.S. 236 (1941).

103. *See* Williams v. Standard Oil Co., 278 U.S. 235 (1929), *overruled by* Olsen v. Nebraska, 313 U.S. 236 (1941).

104. *See* Ribnik v. McBride, 277 U.S. 350 (1928), *overruled by* Olsen v. Nebraska, 313 U.S. 236 (1941).

105. *See Charles Wolff Packing Co.,* 262 U.S. at 540.

106. New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

interest, the Court recognized the community's authority to regulate only certain rights of the business; other rights remained private and were "entitled to protection accordingly."[107] The early Court drew the line between these public and private rights by defining a set of rights that it considered the public to hold with respect to the business. If the property rights of the business came into conflict with one of these Court-defined rights, then the conflict would bring the business' rights within the public sphere and therefore subject to regulation. Absent such a conflict, the business' rights remained private and thus beyond the reach of the legislature without just compensation.

For example, with respect to the railroads, the early Court defined the set of rights held by the public to include the right to service at a reasonable rate, the right to adequate necessary facilities, and the right to nondiscriminatory service. When a railroad's attempt to exercise its rights conflicted with one of these three rights, the conflict would bring the railroad's rights within the public sphere and justify community intervention to reconcile the conflict. Absent such a conflict, however, the railroad's rights remained private, and the Court would strike down an attempt to control them unless compensation were paid.[108] The early Court's decision in *Northern Pacific Railway Co. v. North Dakota*[109] reflects this limit.

In order to subsidize a coal mining industry in the state, the State of North Dakota had set railroad rates for transporting coal below the carrier's costs. While the state attempted to justify the subsidy "as 'a declaration of public policy,' "[110] the Court struck down the rate regulation as a taking of private property.

> But, broad as is the power of regulation, the State does not enjoy the freedom of an owner. The fact that the property is devoted to a public

107. *Charles Wolff Packing Co.*, 262 U.S. at 535; *see also* Wilson v. New, 243 U.S. 332, 347 (1917) (White, C.J.) (noting that rail carrier's right to agree with employees on wages remained private despite public interest in regulating other aspects of railroad business).

108. *See, e.g.*, Washington *ex rel.* Oregon R.R. & Navigation Co. v. Fairchild, 224 U.S. 510 (1912) (holding administrative order requiring railroad to build and pay for eight additional connections a taking given that the connections were not reasonably necessary to fulfill the railroad's public duties); Louisville & Nash. R.R. v. Central Stock Yards Co., 212 U.S. 132 (1909) (holding, in the absence of a provision "securing due compensation for their use," that provision in the Kentucky Constitution requiring a railroad to permit other railroads to use its cars and switching facilities was a taking); Lake Shore & Mich. S. Ry. v. Smith, 173 U.S. 684 (1899) (holding ordinance requiring railroad to sell "1000 mile" tickets for travel on the railroad at a price below the rates fixed by general statute for travel on the railroad a taking because the duty to offer wholesale travel was not part of the railroad's public duties; once railroad expressly assumed duty of providing commuter service at a discount, state could require railroad to sell discounted commuter tickets); *see also* Missouri Pac. Ry. v. Nebraska, 217 U.S. 196 (1910), discussed *infra* text accompanying notes 112-14.

109. 236 U.S. 585 (1915).

110. 236 U.S. at 598.

> use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement.[111]

Because the railroad had not undertaken as a public duty carrying a class of goods at a loss, the Court refused to recognize a publicly held right to demand such carriage. As a result, no conflict existed between the rights held by the railroad and those held by the public in the situation the statute addressed. Absent such a conflict, the railroad's rights remained private, and the state had no power to require such carriage even if necessary to secure the public interest.

Further support for a careful distinction between public and private rights in the context of a business clothed with a public interest is found in *Missouri Pacific Railway Co. v. Nebraska.*[112] In that case, the State of Nebraska enacted an ordinance that required railroads operating in the state to build, upon demand, a sidetrack to serve private grain elevators. Justice Holmes, writing for the Court, reasoned first that the statute might be interpreted literally, to require the railroads to build the siding whenever demand was made, reasonable or not. Of that interpretation, Justice Holmes wrote: "Clearly, no such obligation is incident to their public duty, and to impose it goes beyond the limit of the police power."[113] He then reasoned that the statute might be interpreted to require the railroads to build the siding only if the demand were reasonable. Even under this limited interpretation, the statute "still . . . require[d] too much. Why should the railroads pay for what, after all, are private connections?" The statute was "unconstitutional . . . because it [did] not provide indemnity for what it require[d]."[114] Thus, the government had the power to regulate the

111. 236 U.S. at 595.

112. 217 U.S. 196 (1910).

113. 217 U.S. at 207.

114. 217 U.S. at 208. From a modern perspective, we might seize upon the phrase *private connections* and try to interpret the Court's action as based on the failure of the state's action to satisfy the requirement that private property be taken only for "public use." *See infra* notes 170-73 and accompanying text; *cf.* Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 484-90 (1987) (Justice Stevens giving such an interpretation to similar language in *Pennsylvania Coal Co. v. Mahon*); Sax, *supra* note 17, at 36 n.2 (giving such an interpretation). Contemporaneous interpretations of the language by the early Court, however, indicate that the use of *private*

rights of a business clothed with a public interest only to the extent that those rights had come into conflict with one of the Court-defined rights that the public held with respect to this type of business. If the government attempted to control a business' rights in the absence of such a conflict, the statute would be constitutional only if the government "provide[d] indemnity for what it require[d]."

Summary of the public rights-private rights distinction. The point of this extended foray into the early cases is not to identify precisely the point at which the early cases drew the line between public rights and private rights. Modern notions of the proper scope of regulation may justify drawing that line at an entirely different point than the Court thought appropriate at the turn of the twentieth century. The critical point is the early Court's approach to the issue of compensation.

In approaching the division between public and private rights, the Court began with the presumption that property rights were generally private, i.e., that the property was within the control of the individual rather than the community. Given this approach to the public-private issue, the Court never needed to explain why any particular property right was private. So long as a property right had not come into conflict with another right, it would remain private and under the control of the individual. Before this article discusses the implications of this perspective for the modern case law, the following section discusses briefly the limitations on government action within the sphere of public authority.

C. *Limits on Government Action in the Public Sphere*

If the Court determined that a right fell within the public sphere, then the government could regulate that right; in other words, it could change, modify, eliminate, or otherwise control the right without paying compensation. However, even within the public sphere, the legislature did not have unchecked authority to regulate rights as it saw fit. The early Court limited the legislature's authority in the public sphere, under what has come to be known as the doctrine of substantive due process, by requiring that a regulation: (1) have a legitimate end; and (2) demonstrate a sufficiently close relation between the means selected and the end desired.

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in this context was a reference to the public right-private right distinction, and not the public use requirement. *See, e.g.*, Northern Pac. Ry. v. North Dakota, 236 U.S. 585, 596 (1915). Justice Holmes' conclusion that the statute was "unconstitutional . . . because it [did] not provide indemnity for what it require[d]," *see* text *supra,* confirms that the failure to pay compensation and not a failure to satisfy the public use requirement led the Court to strike the statute.

If the government had authority to regulate a right under the police power (which it would have only if the right in question was a public right), it could exercise that authority for a broad range of legitimate ends. While parties would argue that the police power could only be exercised to ensure the public health and safety, the Court by the turn of the century had upheld police power regulations intended to "serve the public welfare."[115] The Court enforced a similar requirement under the eminent domain power, requiring the power to be exercised only for a "public use."[116] Under both tests, the Court gave the legislature considerable authority to determine what was in the public interest[117] or what was a public use.[118]

The Court also required a police power regulation to demonstrate a sufficiently close fit between the end the legislature desired and the means it chose.[119] For example, in *Nectow v. City of Cambridge,*[120] the Court struck down a zoning ordinance because the regulation bore no substantial relation to the legitimate end put forth by the City.[121]

Thus, the early Court protected property rights in two ways under the language of the Fifth and Fourteenth Amendments. First, the Court protected *private* property rights by requiring, consistent with the express language of the Fifth Amendment, government action that interfered with private property to be accompanied by just compensation. Second, the Court protected *public* property rights under the doctrine of substantive due process by requiring that government action limiting a public right be reasonably necessary to achieve a legitimate end.

D. *An Example of the Early Court's Analysis*

The 1907 case of *Bacon v. Walker*[122] illustrates the early Court's analysis well. The State of Idaho enacted a law that forbade the grazing of sheep on public commons within two miles of another's dwell-

115. "We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety." Chicago, B. & Q. Ry. v. Illinois *ex rel.* Drainage Commrs., 200 U.S. 561, 592 (1906) (citations omitted).

116. *See, e.g.,* Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906); Offield v. New York, N.H. & Hartford R.R., 203 U.S. 372 (1906); Clark v. Nash, 198 U.S. 361 (1905); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896); Sweet v. Rechel, 159 U.S. 380 (1895).

117. *See, e.g.,* New York *ex rel.* Silz v. Hesterberg, 211 U.S. 31, 40 (1908).

118. *See, e.g.,* Sweet v. Rechel, 159 U.S. at 393.

119. Most of the cases require that the regulation not be "arbitrary or unreasonable." *See, e.g.,* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

120. 277 U.S. 183 (1928).

121. 277 U.S. at 188-89; *see also* Dobbins v. Los Angeles, 195 U.S. 223 (1904).

122. 204 U.S. 311 (1907).

ing house. Before the state enacted the statute, the plaintiff in error had the right to graze his sheep on the public common within two miles of another's dwelling house. After the state enacted the statute, he no longer had this right. In deciding whether this shift in the legal relations required compensation or violated substantive due process, the Court first inquired whether the landowner's grazing rights were, under the circumstances the statute addressed, public or private. The Court wrote: "Defendants in error have an equal right with plaintiff in error [in using the public common], and the State has an interest in the accommodation of those rights."[123] This conflict between plaintiff's right to graze sheep on the common and defendants' property rights made plaintiff's right public and therefore subject to the state's regulatory power.

Given that the state had the power to regulate the rights under the circumstances, the Court proceeded to the substantive due process issue of whether the regulation was reasonably tailored to serve a legitimate end:

> [W]e [have] rejected the view that the police power cannot be exercised for the general well-being of the community. That power, we said, embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety.[124]

Applying this broad definition of legitimate ends, the Court found that preventing the overgrazing of public land was a legitimate end.

Finally, the Court concluded that the legislature had not acted arbitrarily or unreasonably in establishing a two-mile limit for the restriction. "Nor need we make extended comment on the two-mile limit. The selection of some limit is a legislative power, and it is only against the abuse of the power, if at all, that the courts may interpose."[125] Thus, because the government had the power to regulate the right and used that power to pursue a legitimate end in a reasonable manner, the statute did not "take the property of plaintiff in error without due process of law."[126]

E. *The Transition from a Limited Public Sphere to a Limited Private Sphere*

In 1934, the Court, in *Nebbia v. New York*,[127] considered a takings

123. 204 U.S. at 315.
124. 204 U.S. at 317.
125. 204 U.S. at 317.
126. 204 U.S. at 317.
127. 291 U.S. 502 (1934).

challenge to an administrative order of the New York Milk Control Board that "fixed nine cents as the price to be charged by a store for a quart of milk."[128] Under the classical conflicts-in-rights approach to the issue, the Court's inquiry would have focused on whether the public had a "peculiarly close relation" to the retail sale of milk — a relation sufficiently close to justify judicial recognition of the public's right to demand that milk be sold at a reasonable price. The *Nebbia* Court rejected such an approach, however, and in the course of upholding the statute redefined the category of rights that would be considered to be "clothed with a public interest."

> Under our form of government the use of property and the making of contracts *are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference.* But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. *Equally fundamental with the private right is that of the public to regulate it in the common interest. . . .*
>
> . . . .
>
> *It is clear that there is no closed class or category of businesses affected with a public interest,* and the function of the courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. *The phrase "affected with a public interest" can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good.*[129]

As this passage reflects, after *Nebbia* the category of rights "clothed with a public interest" would no longer be a limited one. A right would be considered to be "clothed with a public interest" so long as the legislature could reasonably conclude that limiting the right was reasonably related to the attainment of the public good.

While the modern perspective usually identifies the *Nebbia* decision as a substantive due process decision and not as a takings case, the decision had a profound impact on the Court's approach to the compensation issue. Before *Nebbia,* the Court separated compensable from noncompensable government actions by identifying two types of conflicts that would make property rights public and subject to government regulation: conflict between existing private rights; and conflict with a publicly held right. Because every right was either public or private, defining the circumstances in which a right would become public implied that in all other circumstances a right would remain

128. 291 U.S. at 515.

129. 291 U.S. at 523, 536 (emphasis added) (footnotes and citations omitted).

private. Accordingly, the early Court never needed to identify or discuss any special characteristics that were necessary to bring a right within the private sphere.

Furthermore, before *Nebbia,* the mere fact that the public was "warranted in having a feeling of concern" would not suffice to make a right public under the "clothed with a public interest" aspect of public rights.[130] "Something more special than this, something of more definite consequence"[131] was required. The pre-*Nebbia* Court had defined this something special by identifying a limited set of rights that the public held with respect to certain types of businesses. Only when there was a conflict between the rights of the business and one of these Court-defined rights would the rights of the business fall within the sphere of public authority. Absent such a conflict, even the strong demands of the public interest would not suffice to justify government action under the police power.[132]

The *Nebbia* Court, though, gave the public a *right* to pursue the common good. Thus, if we had continued to follow the early Court's conflict-in-rights approach to the compensation issue after *Nebbia,* compensation would never have been required.[133] So long as the legislature had acted to limit a property right in a manner that satisfied the requirements of substantive due process (in that the action was reasonably necessary to achieve a legitimate end), the property right in question would necessarily have conflicted with the public's right to pursue the common good. Because of the conflict, the property right would

130. *See, e.g.,* Tyson & Brother — United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418, 430 (1927), *overruled by* Olsen v. Nebraska, 313 U.S. 236 (1941).

131. German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 406 (1914).

132. As Justice Holmes wrote in *Pennsylvania Coal Co. v. Mahon,* "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." 260 U.S. 393, 416 (1922); *see also* Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935) (Brandeis, J.):

> For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of relief afforded in the public interest may be borne by the public.

295 U.S. at 602.

133. The *Nebbia* Court held that a right was clothed with a public interest so long as its control was necessary for the common good. *See Nebbia,* 291 U.S. at 536. Some might argue that the private sphere can still be defined as what is left: rights whose control the common good does not require. Such an interpretation of private rights would restrict the compensation remedy to government action that would be struck in any event as a violation of substantive due process (because the control of the rights was, by definition, not reasonably necessary for a legitimate end). *Cf.* James E. Krier, *The Regulation Machine,* 1982 SUP. CT. ECON. REV. 1, 7 ("*Any* exercise of the police power, to be valid, must bear some rational relationship to health, safety, and so on. It hardly follows that by passing the easy rational-basis test a measure then becomes immune from a taking challenge as well.").

have been considered public and would have fallen outside the scope of the constitutional requirement of compensation. If we accept the reasoning of *Nebbia* that property rights must give way to the "common interest," provided only that the government action is not arbitrary, no apparent reason exists to exclude any particular set of property rights from this general rule.

II. The Scope of Compensation in the Modern Case Law: Regulations Versus Takings

The Court has not accepted the furthest implications of *Nebbia*'s "right to preserve the common interest" reasoning for takings analysis. At the same time, of course, the Court also does not apply the classical takings doctrine which prevailed before *Nebbia.* Instead, the modern Court's takings jurisprudence begins with the presumption that the community has broad authority to regulate property[134] and interprets the Takings Clause as establishing certain limits to this regulatory power. Before *Nebbia,* the Court drew the community-individual line — or, in the language preferred by the modern Court, the regulation-takings line — by defining a limited set of circumstances that would justify community control of property. The modern Court has reversed this perspective, articulating a limited set of circumstances that justify individual control of property.[135]

The modern Court has defined this set of circumstances by identifying a set of special "takings factors." Under the modern test, when the government acts to restrict or shift property rights, an individual must demonstrate the presence of one or more of these takings factors in order to demonstrate that she, rather than the community, should have control of the property. If she cannot, then the control of the

134. *See* Hodel v. Irving, 481 U.S. 704, 713 (1987) ("[T]he Government has considerable latitude in regulating property rights in ways that may adversely affect the owners.").

135. Whereas the central concern of the early cases was the government's authority to act under the police power, the authority to act under the police power is undoubted in the modern cases. The question is instead whether "an otherwise valid regulation so frustrates property rights that compensation must be paid." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 425 (1982); *see also* Kaiser Aetna v. United States, 444 U.S. 164 (1979):

> In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a "taking," however, is an entirely separate question.

444 U.S. at 174 (footnote and citation omitted).

An early example of this reversed perspective is Bowles v. Willingham, 321 U.S. 503 (1944), which upheld a rent control statute. The issue of whether the statute took the apartment owner's private property — the central issue facing the Court with respect to such statutes only 20 years earlier, *see supra* notes 89-90 and accompanying text — was not even raised. Under the reversed perspective, a property right was presumed to be public, and accordingly, the *Bowles* Court was not required to justify bringing any particular right into the public sphere.

property will be given to the community, and she will be denied a right to compensation.

A. *Examples of the Court's Analysis in Modern Cases*

The Court's opinions in *Penn Central Transportation Co. v. New York City*[136] and *Hodel v. Irving*[137] typify the modern factor approach to the takings issue. In *Penn Central,* New York City enacted a landmark preservation ordinance that prevented Penn Central from reconstructing its Grand Central Terminal because an administrative committee found the proposed reconstruction to be inconsistent with the historic nature of the Terminal's architecture. When the administrative committee refused to permit the reconstruction, Penn Central sued, alleging that the landmark preservation ordinance violated due process unless it was accompanied by compensation.

In resolving Penn Central's request for compensation, the Court began by listing the set of factors that would make government interference with property a taking.[138] The Court recognized five of these "takings factors": (1) government action that deprived the owner of all economically viable use of his physical property; (2) government action that physically invaded an individual's physical property; (3) government action that was "not reasonably necessary to the effectuation of a substantial public purpose";[139] (4) government action that completely destroyed the bundle of rights in a physical thing; and (5) government action taken to acquire resources "to permit or facilitate uniquely public functions."[140]

The Court then determined whether the landmark preservation ordinance was a taking by seeing if it implicated any of the takings factors. The Court addressed arguments with respect to only two of the factors, diminution in value[141] and government acquisition of resources for a public function.[142] The Court held that the landmark preservation ordinance was sufficiently distinct from each factor that

136. 438 U.S. 104 (1978).

137. 481 U.S. 704 (1987).

138. "In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance." 438 U.S at 124.

139. 438 U.S. at 127 (citations omitted).

140. 438 U.S. at 128. The Court rejected Penn Central's argument that the Court should recognize as additional takings factors: (1) reverse or "spot" zoning; (2) subjective discretion in the hands of an administrative committee concerning the appropriate use of physical property; and (3) a necessarily unequal distribution of burdens and benefits. 438 U.S. at 132-35.

141. 438 U.S. at 135-37.

142. 438 U.S. at 135.

the ordinance did not fall within the takings sphere.[143] The measure was, therefore, labeled a regulation, and no compensation was required.

The Court's approach in *Hodel v. Irving* was virtually identical. The Court identified its inquiry as " 'essentially ad hoc, [and] factual' "[144]—a question of whether the facts in the case matched the identified takings factors. The Court considered the government action in terms of six identified factors: (1) the ordinance's economic impact on particular individuals; (2) its interference with reasonable investment backed expectations; (3) its distribution of benefits and burdens (an average reciprocity of advantage); (4) the importance of the right affected by the ordinance to our common conception of property ownership; (5) the degree of restriction on the right affected by the ordinance; and (6) the ends-means fit of the ordinance.[145] Finding that the government action *unnecessarily* (factor 6) *eliminated* (factor 5) a right *essential to our common conception of property ownership* (factor 4), the Court placed the right in question within the private sphere, labeled the ordinance a taking, and required compensation.[146]

The modern cases consistently follow this two-step approach in considering whether special circumstances have made a right private: (1) identify the takings factors; and (2) determine whether a sufficiently close match exists between the facts in the case and the identified takings factors.[147] The Court has identified a variety of factors that have particular significance in determining whether a government action falls within the takings sphere and has suggested that these factors are to be balanced in some unspecified way.[148] Yet since 1962, the

143. 438 U.S. at 135, 136-37.

144. 481 U.S. at 714 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)).

145. 481 U.S. at 713-18.

146. 481 U.S. at 718.

147. *See, e.g.*, Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 485 (1987) (focusing on two factors: (1) government action that "does not substantially advance legitimate state interests"; and (2) government action that "denies an owner economically viable use of his land"); Andrus v. Allard, 444 U.S. 51, 65-66 (1979) (recognizing three factors: (1) government action that requires surrender of the physical property; (2) government action that causes a physical invasion of the physical property; and (3) government action that causes a diminution in value to such a great extent that the owner is unable to derive any economic benefit from ownership of the physical property; rejecting as factor government action that destroys one "strand" in the bundle of ownership rights).

148. For competing points of view on whether the Court is engaged in some sort of balancing, or is following a set of bright-line rules, *compare* Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1622, 1629 (1988) (Court is moving towards a set of bright-line tests, but should be moving toward a more open-ended balancing) *with* Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1700 (1988) ("The recent cases represent a continuation of the trend towards ad hoc balancing, but what takings law needs is a good dose of formalization.").

Court has actually required compensation in only two types of fact situations: where government action affected the right of exclusive occupancy;[149] and where government action that was not necessary to achieve a substantial government purpose impinged on a right essential to our conception of real property ownership.[150]

B. *A Partial Critique of the Modern Approach*

The Court has repeatedly stated that the constitutional compensation requirement should be interpreted "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."[151] The Court has not, however, used this articulated purpose to identify the takings factors. Rather, the Court has determined the circumstances in which "fairness and justice" require compensation almost exclusively by a mechanical reinterpretation of the early cases — despite the inseparability of these cases from a classical legal doctrine which the Court has abandoned. By using this approach, the Court has avoided any need to explain how any given factor in its test comports with sensible notions of fairness and justice; it simply pretends that the early cases have already resolved the issue.

The modern Court's approach, defining the takings factors by reinterpreting the early cases, suffers from two serious flaws. First, the modern Court's reading of the early cases, from which it draws the takings factors, is incorrect. Second, the Court's resulting factor test fails to achieve the purported purpose of the constitutional compensation requirement because it does not prevent the government from unfairly "forcing some people alone to bear public burdens." Thus, neither stare decisis nor the supposed purpose behind the constitutional compensation requirement supports the modern test.

First, stare decisis provides no basis for the modern test. While the modern Court has used some of the early cases as a basis for its factors, the Court's interpretations of those early cases are plainly contradicted by other early cases. For example, a reading of *Portsmouth*

149. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011 (1984); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433-41 (1982); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); *see also* Nollan v. California Coastal Commn., 483 U.S. 825, 831-32 (1987). Sometimes the modern Court adopts an ordinary observer perspective and refers to this factor as the physical invasion factor. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

150. Hodel v. Irving, 481 U.S. 704 (1987).

151. Armstrong v. United States, 364 U.S. 40, 49 (1960); *see also* Pennell v. City of San Jose, 485 U.S. 1, 9 (1988); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318-19 (1987); *Hodel,* 481 U.S. at 714; *Kaiser Aetna,* 444 U.S. at 175; *Penn Central,* 438 U.S. at 124.

Harbor Land & Hotel v. United States and the consequential injury cases as turning on the absence or presence of physical invasion,[152] rather than on the absence or presence of a property right, is inconsistent with a number of the early cases. In *Richards v. Washington Terminal Co.*[153] and *Muhlker v. New York & Harlem Railroad Co.*,[154] the early Court held government action to be a taking and required compensation because the action interfered with one of the landowner's property rights, even though the action did not cause a physical invasion. On the other hand, in *Jackman v. Rosenbaum Co.*,[155] the early Court held that government action was not a taking even though it did involve a physical invasion because it did not interfere with the landowner's property rights.[156]

Interpreting *Pennsylvania Coal Co. v. Mahon*[157] as turning on a serious diminution in the value of the coal mines,[158] rather than on the private nature of the right to mine the support coal, creates similar conflicts. For example, in *Reinman v. City of Little Rock*[159] and *Hadacheck v. Sebastian*,[160] the early Court held that government action was not a taking, despite a serious diminution in the value of the property, because a conflict in existing rights had brought the rights at

152. *See Kaiser Aetna*, 444 U.S. at 180; United States v. Causby, 328 U.S. 256, 265 (1946).

153. 233 U.S. 546 (1914).

154. 197 U.S. 544 (1905).

155. 260 U.S. 22 (1922).

156. The Court in Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978), attributes the physical invasion factor to United States v. Causby, 328 U.S. 256 (1946). The *Causby* Court follows the orthodox interpretation of the distinction between consequential injury and takings: physical entry. 328 U.S. at 262-63. As previously discussed, *see supra* text accompanying notes 45-50, the term *consequential injury*, in the early cases, actually referred to government action that did not change the nature of any rights held by the owner of the property. The Court in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), relies on the navigational servitude cases: United States v. Kansas City Life Ins. Co., 339 U.S. 799, 809-10 (1950); Sanguinetti v. United States, 264 U.S. 146, 149 (1924); United States v. Cress, 243 U.S. 316, 327-28 (1917); Bedford v. United States, 192 U.S. 217, 225 (1904); and United States v. Lynah, 188 U.S. 445, 468-70 (1903). *See Loretto*, 458 U.S. at 428. Such a reliance is particularly troubling because these cases essentially define under federal law the scope of the legal entitlements held by owners of land adjacent to navigable waterways, whereas state law defines landowners' property rights outside the navigational servitude context. *See* United States v. Willow River Power Co., 324 U.S. 499 (1945):

> The law long has recognized that the right of ownership in land may carry with it a legal right to enjoy some benefits from adjacent waters. But that a closed catalogue of abstract and absolute "property rights" in water hovers over a given piece of shore land, good against all the world, is not in this day a permissible assumption. We cannot start the process of decision by calling such a claim as we have here a "property right"; whether it is a property right is really the question to be answered.

324 U.S. at 502-03.

157. 260 U.S. 393 (1922).

158. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).

159. 237 U.S. 171 (1915).

160. 239 U.S. 394 (1915).

issue into the public sphere. On the other hand, in *Richards v. Washington Terminal Co.*,[161] *Chicago, Milwaukee & St. Paul Railroad Co. v. Wisconsin*,[162] and *Missouri Pacific Railway Co. v. Nebraska*,[163] the early Court held government action to be a taking, even though the government action had minimal impact on the value of the physical property involved, because the property rights in question had not come into conflict with any other property rights, and had, as a result, remained private.

The modern Court's broad view of the reach of public authority creates the same sort of conflict. Interpreting conflict-in-rights cases, such as *Miller v. Schoene*,[164] *Hadacheck*, and *Reinman*, to stand for the proposition that the government can limit the rights of the few for the benefit of the many so long as the legislature has "reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by"[165] its action, squarely conflicts with essentially all of the cases in which the early Court required compensation. These cases stand only for the more limited proposition that, under the public-private line that the early Court followed, the legislature could regulate rights that *came into conflict with other rights*, subject only to the ends-means scrutiny of substantive due process. They do not stand for the modern Court's proposition that, *in the absence of such a conflict*, the government could permissibly regulate a right so long as the regulation was reasonably necessary to achieve the public interest.[166]

These difficulties in the modern Court's reinterpretation of the early cases demonstrate that stare decisis does not support the modern test or its factors. A more fundamental problem with the modern approach, though, is that it seeks to identify the factors that would make a right *private*, while relying on early cases that focused on the factors

161. 233 U.S. 546 (1914).

162. 238 U.S. 491 (1915).

163. 217 U.S. 196 (1910).

164. 276 U.S. 272 (1928).

165. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 125 (1978).

166. Numerous early cases demonstrate that, standing alone, the strong demands of the public interest were not enough to avoid the compensation requirement. *See supra* note 132 and accompanying text. As one example, recall the statute in Northern Pacific Railway Co. v. North Dakota, 236 U.S. 585 (1915), which required railroads in the state to carry coal at a price below actual costs. 236 U.S. at 590-91. The state argued that the statute served the public welfare by subsidizing a fledgling coal mining industry, which the legislature considered essential to the state's welfare, growth, and prosperity. Under the modern reinterpretation, the statute would presumably be valid, as the state could reasonably conclude that the subsidy was necessary for the common welfare. Yet the early Court struck down the statute as a taking of private property and, in response to the state's argument that the statute was a regulation necessary for the public good, replied: "The case [is] not . . . altered by the assertion that the public interest demanded such carriage." 236 U.S. at 595.

that would make a particular right *public.* The modern Court has ignored the "conflict-in-rights" and "clothed with a public interest" concepts that defined the compensation issue in the early cases in favor of interesting bits of dicta that provide a convenient explanation, given the modern perspective, for why a particular right should be held private.

For example, in *Keystone Bituminous Coal Assn. v. DeBenedictis,*[167] the modern Court faced a Pennsylvania statute materially identical to the one the early Court struck down in *Pennsylvania Coal Co.*[168] Rather than explicitly overrule *Pennsylvania Coal Co.,* Justice Stevens, writing for the Court, attempted to distinguish it by recharacterizing its reasoning.[169] First, Justice Stevens seized upon Justice Holmes' description of the dispute in the earlier case as essentially a private one.[170] Relying on this language, Justice Stevens argued that the real basis for the earlier decision was that the earlier statute prohibiting the mining of the support coal served no public purpose and therefore failed to satisfy the public use requirement.[171] The *Pennsylvania Coal Co.* opinion, read as a whole, does not support such an interpretation. Justice Holmes wrote:

> We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, *and we assume that an exigency exists that would warrant the exercise of eminent domain.* But the question at bottom is upon whom the loss of the changes desired should fall.[172]

This statement plainly demonstrates that the failure to pay compensation, not a failure to satisfy the public use requirement, led the early Court to strike the statute.[173]

In his second attempt to distinguish *Pennsylvania Coal Co.,* Justice Stevens asserted that the decision turned on an excessive diminution in the value of the coal mines as a whole. However, this reading of the earlier case faces similar difficulty[174] and, indeed, follows the reason-

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167. 480 U.S. 470 (1987).

168. Both statutes prohibited the mining of coal if the mining would lead to surface subsidence that would damage existing structures. 480 U.S. at 485-88.

169. *See* 480 U.S. at 506-07 (Rehnquist, C.J., dissenting).

170. 480 U.S. at 483-84.

171. 480 U.S. at 484-90.

172. *Pennsylvania Coal Co.,* 260 U.S. at 416 (emphasis added).

173. *See also supra* notes 112-14 and accompanying text.

174. Most importantly, such a reading is inconsistent with the contemporaneous decisions of the early Court. *Compare* Richards v. Washington Terminal Co., 233 U.S. 546, 550 (1914) (holding part of diminution in value from $5500 to $4000 a taking) *with* Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915) (holding diminution in value from $800,000 to $60,000 not a taking).

Professor Michelman has also disagreed with the idea that the diminution in value was the controlling factor in *Pennsylvania Coal Co. See* Michelman, *supra* note 17, at 1190 n.53. He

ing of the lone dissenter more closely than that of the majority.[175]

Justice Stevens misapplied *Pennsylvania Coal Co.* because he was looking for something that simply was not there: the special characteristics needed to make a right private. The opinion considered only the special characteristics that would make a right public. The actual basis for the early Court's resolution of the issue was its determination that, under the circumstances the statute addressed, there was no conflict in rights; the coal companies' exercise of the right to mine the support coal did not conflict with the existing rights of the surface landowners, nor did it conflict with any Court-defined publicly held right under the "clothed with a public interest" aspect of public rights.[176] Having explained why the right the ordinance eliminated was not a public right, Justice Holmes needed to say no more. In the absence of a conflict in rights, the right to mine the support coal remained private and subject to government control only through the power of eminent domain.

One must be skeptical of the modern Court's claim that stare decisis has dictated the modern test. As a whole, the modern factor test,

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offers only four tests to explain all of the early cases: physical invasion; diminution in value; balancing of social gains and private losses; and private fault versus public benefit. *Id.* at 1184-201. He makes no argument that one of his other tests will otherwise explain the result in *Pennsylvania Coal Co.;* indeed, none of the other tests appears to. If he is right that Justice Holmes did not intend to rest on the diminution in value factor, as appears certain, his other tests' inability to explain the result suggests that he has missed the real justification for the decision.

Equally troubling is Professor Sax's treatment of *Pennsylvania Coal Co.* Professor Sax writes: "The Holmesian approach has equal failings. Its central premise — that the right to compensation depends on the magnitude of loss suffered — is historically unsound, has never in fact been acceptable to the Court, and wasn't even followed by Holmes himself." Sax, *supra* note 17, at 37. But if diminution in value is inconsistent with other contemporaneous decisions, has never been followed by the Court, and was not even followed by the supposed author of the test, maybe it's because Sax is giving Holmes' words a meaning he never intended.

175. *Compare Keystone Bituminous Coal Assn.,* 480 U.S. at 498-99 (holding that government action that restricts the right to use will be a taking only if the restriction severely diminishes the value of the bundle of rights as a whole) *with* Justice Brandeis' position as the lone dissenter in *Pennsylvania Coal Co.:*

> If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property. . . . For aught that appears the value of the coal kept in place by the restriction may be negligible as compared with the value of the whole property, or even as compared with that part of it which is represented by the coal remaining in place and which may be extracted despite the statute.

260 U.S. at 419 (Brandeis, J., dissenting).

176. Justice Holmes considered and rejected arguments that the exercise of the right to mine the support coal would interfere with the public's right to be protected from unsafe conduct of a business, 260 U.S. at 414-15, and that the facts before the Court would make the right public under the rationale of Block v. Hirsh, 256 U.S. 135 (1921), and the other rent control cases. 260 U.S. at 416. Under the conflict in private rights aspect of public rights, the Court considered and rejected the State's argument that the statute adjusted conflicting private rights so as to obtain an average reciprocity of advantage. 260 U.S. at 415.

and the orthodox reinterpretation of the early cases that has created it, can explain the result in only a handful of the relevant early cases.

Aside from the question whether the modern Court has interpreted the early cases correctly, moreover, lies a second problem: the early cases rested not on notions of fairness and justice, as the modern perspective understands those concepts, but on a particular conception of the proper scope of public and private authority. Given that *Nebbia* decisively rejected this conception, it is not surprising that forcing the pre-*Nebbia* takings cases, by a process of revisionist interpretation, to yield the defining set of takings factors has not created a test that ensures a fair and just (or even predictable) result.

Under the modern test, the central and perhaps decisive factor is whether government action either has deprived an individual of the right of exclusive occupancy or has caused a physical invasion.[177] Every taking found by the modern Court save one[178] has involved this factor. The Court has advanced several reasons why its focus on exclusive occupancy provides a good answer to the question of when fairness and justice require compensation.

First, the Court has suggested that fairness and justice concerns are implicated when the government deals with the right of exclusive occupancy because the right has been around for a long time.[179] Yet if the importance of property lies in its monetary value, and not its pedigree, the value and not the pedigree should be the focus of our fairness concerns.[180] Given that the sole remedy offered by the just compensation requirement is money, it is simply unclear why anyone would believe that fairness and justice are of greater concern when the owners of several hundred buildings are required for the benefit of the community to give up the right of exclusive occupancy with respect to one and one-half cubic feet of their apartment building[181] than when one individual is singled out and required to close a profitable business at an estimated loss of $740,000.[182] Even assuming that pedigree is the appropriate focus, other rights with equally impressive pedigrees, such

177. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding permanent physical invasion a per se taking).

178. Hodel v. Irving, 481 U.S. 704 (1987) (holding that elimination of the rights of descent and devise constitutes a taking).

179. *See, e.g., Loretto,* 458 U.S. at 441.

180. *Cf.* Michelman, *supra* note 17, at 1227.

181. *Loretto,* 458 U.S. at 438 n.16.

182. Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) (upholding, as police power regulation, ordinance that prohibited brick manufacture on a piece of property when exercise of that right would conflict with the right of the neighbors to use their land; ordinance reduced the value of the land from $800,000 to $60,000).

as the right to sell and the right to use, have not received the same degree of protection as has the right of exclusive occupancy.[183]

Second, the modern Court has suggested that the focus on exclusive occupancy protects the reasonable expectations of property owners and that a greater reliance interest is bound up in the right of exclusive occupancy, for example, than in the right to run a business on a piece of land.[184] To the extent the Court is suggesting that people are, in terms of day-to-day life, less worried about losing their jobs than about a technical trespass on their physical property, the Court's emphasis on the right of exclusive occupancy is clearly misplaced.[185]

Alternatively, the Court might be suggesting that some expectations are more reasonable than others because the Court has historically provided more protection for those expectations.[186] Even so, the Court's analysis remains deficient. While this interpretation of "reasonable" expectations might justify an approach to the question of compensation that relied heavily on stare decisis to explain which rights the community should expect the Court to protect, the modern Court has not followed the early line between public and private rights.

Third, related to the protection of reasonable expectations, the Court has suggested that government control of property rights that can be characterized as protecting the public from harm will more likely be noncompensable, while government control of property rights that can be characterized as extracting a benefit will more likely be compensable.[187] Greater protection of the right of exclusive occupancy, as compared with the right to use, might be appropriate if government control of the right to use more often involved an attempt to prevent a harm, while government control of the right of exclusive occupancy more often involved an attempt to extract a benefit.

The harm-benefit distinction as applied by the modern Court, how-

183. *See, e.g.*, Andrus v. Allard, 444 U.S. 51 (1979) (holding elimination of the right to sell not a taking); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (holding very serious restriction on the right to use a parcel of land not a taking); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (same).

184. *See, e.g., Loretto,* 458 U.S. at 435-36.

185. *Cf.* Charles A. Reich, *The New Property,* 73 YALE L.J. 733, 778-86 (1964).

186. *See Loretto,* 458 U.S. at 441; *cf.* Nollan v. California Coastal Commn., 483 U.S. 825, 833 n.2 (1987); Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979).

187. See, for exmaple, Justice Scalia's argument in Pennell v. City of San Jose, 485 U.S. 1 (1988) that forcing an individual to bear the cost of government action is fair and just if

> there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly.

485 U.S. at 20 (Scalia, J., concurring in part and dissenting in part).

ever, is little more than word play. In the absence of some accepted standard of proper conduct, one may describe any government action equally well as extracting a benefit or preventing a harm. For example, in *Nollan v. California Coastal Commission,*[188] the State of California required a landowner to give up the right of exclusive occupancy in a corridor of land along the beach wall. The majority described the government's action as extracting a benefit: it required the landowner to dedicate the strip to public uses.[189] The dissent described the same action as preventing a harm: it barred the landowner from exercising the right of exclusive occupancy in a manner that the government had determined to be harmful to society.[190] The majority and dissenting opinions played similar word games with the ordinance at issue in *Penn Central Transportation Co. v. New York City.*[191] The dissent argued that the landmark preservation ordinance extracted a benefit because it required the owners of these historic buildings to dedicate their buildings to the public as a tourist attraction, while the majority claimed that the ordinance prevented an aesthetic harm to an historic district.[192]

The modern cases do not reveal any underlying objective basis for distinguishing government action that prevents a harm from government action that extracts a benefit. Lacking such an objective basis, the harm-benefit line in the modern cases[193] has become nothing more

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188. 483 U.S. 825 (1987).

189. *Cf. Nollan,* 483 U.S. at 831:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.

483 U.S. at 831.

190. *See* 483 U.S. at 843-44 (Brennan, J., dissenting) ("In this case, California has employed its police power in order to condition development upon preservation of public access to the ocean and tidelands.").

191. 438 U.S. 104 (1978).

192. *Compare* 438 U.S. at 133 n.30 ("Nor, correlatively, can it be asserted that the destruction or fundamental alteration of a historic landmark is not harmful.") *with* 438 U.S. at 140 (Rehnquist, Burger, and Stevens, JJ., dissenting) ("Under the historic-landmark preservation scheme adopted by New York, the property owner is under an affirmative duty to *preserve* his property *as a landmark* at his own expense.").

193. The early cases can also be seen as a reflection of the harm-benefit line. *See* Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse,* 88 COLUM. L. REV. 1630, 1635-36 (1988). If we define *preventing a harm* as government action controlling a right in a situation in which its exercise would otherwise come into conflict with another private right or with one of the "public rights" under the "clothed with a public interest" doctrine, and *extracting a benefit* as government action outside one of these two conflicts, then the harm-benefit line would follow precisely the public-private analysis discussed in Part I. Furthermore, tying the harm-benefit line to conflicts in existing rights, rather than preferred verbal formulations, could make the harm-benefit line into something more than simply a word game. Of course, this approach would not work after Nebbia v. New York, 291 U.S. 502 (1934), which

than a polling device to discover which verbal formulation a majority of the Justices prefers.[194]

Reading through the modern cases, one senses that the various justifications they offer for the focus on the right of exclusive occupancy are little more than post hoc rationalizations. The modern Court, for reasons it never explains, has decided to give the narrowest possible construction to the constitutional requirement of compensation and has taken refuge behind the veil of stare decisis instead of justifying its position.

This analysis suggests that neither stare decisis nor the articulated purpose behind compensation justifies the current resolution of the compensation issue. The current test makes sense neither as a device to ensure compensation when fairness and justice require it nor as the natural application of the early cases. Under the circumstances, the modern Court's considerable difficulty in resolving the compensation issue is not surprising.

In an attempt to suggest a workable solution to the compensation issue, the next Part compares the early and modern approaches, with the hope that a more thorough understanding of the early cases may provide insight into our current inability to resolve the compensation issue and suggest a workable and understandable role for the constitutional requirement of compensation.

III. A Comparison of the Two Approaches: What Can We Learn?

The constitutional requirement of compensation necessarily divides property rights into those that the government can control only if it pays just compensation and those that it can control without having to pay such compensation. Whichever set of labels we apply — community-individual, public-private, or takings-regulations — resolving the issue requires drawing a line between the two types of

essentially gave the public a right to anything reasonably necessary for its welfare. *See supra* notes 127-33 and accompanying text.

194. While Justice Scalia in *Nollan* chided the dissent for "missing" the harm-benefit line, *see Nollan*, 483 U.S. at 831 ("To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather (as Justice Brennan contends) 'a mere restriction on its use,' is to use words in a manner that deprives them of all their ordinary meaning." (citation omitted)), if Justice Brennan had found one more vote, his usage would have prevailed. As Justice Kennedy recognized in his concurrence in Lucas v. South Carolina Coastal Council, No. 60 U.S.L.W. 4842 (U.S. June 29, 1992), the definitions of both "reasonable" expectations and the harm-benefit baseline tend to be circular; "for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is." 60 U.S.L.W. at 4850 (Kennedy, J., concurring).

property. Both the early and the modern Court have faced this issue, but they have done so from opposite points of view. The early Court viewed individual control as the general rule and community control the exception; as a result of *Nebbia,* the modern Court has viewed community control as the general rule and individual control as the exception.

If this reversal in perspective had been the only difference between the early and modern cases, a shift in the line between community and individual might not have resulted. We could simply have defined the characteristics that would make a right private by reversing the conflict-in-rights tests used in the early cases: a right would be private if it were (1) not in conflict with another right and (2) not clothed with a public interest. So long as we retained a consistent interpretation of those tests, then the line between community and self would have remained in the same place.

However, *Nebbia* not only shifted our focus from what it takes to be public to what it takes to be private, but it also redefined the "clothed with a public interest" test for public rights. After *Nebbia,* any right that interfered with the public good was, under the classical conflict-in-rights approach, a public right. As a result, if after *Nebbia* we were to say that a right need only *not be* "clothed with a public interest" in order for it *to be* private, no rights would satisfy our test.[195]

Nebbia, therefore, not only reversed the perspective on the compensation issue but also vastly extended the reach of public authority. Because the material facts were identical in the two cases, this shift in favor of public authority can be seen most clearly in the differences between the modern Court's decision in *Keystone Bituminous Coal Assn.* and the early Court's decision in *Pennsylvania Coal Co.*[196]

However, other cases reflect the shift. For example, in a 1915 case, *Great Northern Railway Co. v. Minnesota ex rel. State Railroad & Warehouse Commission,*[197] the Court considered a takings challenge to a state administrative order that required a railroad to provide six-ton scales adjacent to all of its stockyards in the state. At the time, the railroad shipped stock from 259 of its stations in the state and had such scales at only 54 of the stations. The railroad did not use these scales as part of its business, but they were convenient for people who

195. *See supra* text accompanying notes 127-33.

196. *See supra* notes 167-76 and accompanying text.

197. 238 U.S. 340 (1915).

bought and sold cattle at its yards.[198] Businessmen from cities without such scales complained to the State Railroad Commission that the scales were attracting business to the cities where they were located and away from cities that lacked them. To remedy this discrimination in the railroad's service, the Minnesota Railroad Commission ordered the railroad to provide such scales at all of its stockyards. The railroad sued, arguing that the order was a taking. The Supreme Court agreed with the railroad and struck down the ordinance.[199] Even though the railroad could still have made an adequate return on its investment had it been forced to comply with the order, the duty to provide the scales was not a part of the railroad's public duties because the scales were a convenience not necessary to the railroad's business. The scales did create discrimination in the facilities and services the railroad provided, but to avoid a taking, due process required that the state permit the railroad to eliminate the discrimination by the less restrictive means of removing the existing scales.[200]

Because the railroad did not have a public duty to provide the scales, the state could not force the railroad to provide them under its police power.[201] After *Nebbia,* though, the railroad's public duties would include anything the legislature reasonably thought necessary to better the public welfare. Thus, under the modern test, the measure would not be labeled a taking but instead a regulation.

In *United States v. Carolene Products Co.,*[202] the Court justified abandoning its role as protector of such property rights by noting that for such rights, unlike rights that protect the integrity of the political process or the equality of insular minorities,[203] the political process itself provides adequate protection. As a result, the judiciary can and should defer to the judgment of the legislature with respect to the need for limitations on such rights, and there is no reason for the Court to substitute its own judgment for that of the legislature. Yet the Court appears unwilling to apply the same degree of deference to the legisla-

198. The railroad measured the weight of the cattle transported using a track scale after the cattle were loaded into the rail cars.

199. 238 U.S. at 346.

200. 238 U.S. at 346. Justice Holmes used a similar least-restrictive-means analysis in *Pennsylvania Coal Co. v. Mahon.* In that case, the Court rejected the State of Pennsylvania's argument that the ordinance prohibiting mining of the support coal was necessary to ensure the personal safety of the surface owners, stating "[t]hat could be provided for by notice." 260 U.S. 393, 414 (1922).

201. 238 U.S. at 346 ("The demands upon a carrier which lawfully may be made are limited by its duty, and the present record conclusively shows [the six-ton scales] had no direct relation thereto." (citation omitted)).

202. 304 U.S. 144 (1938).

203. 304 U.S. at 152 n.4.

ture when it acts to limit certain "preferred" property rights, such as the right of exclusive occupancy.[204]

If the Court plans to provide greater protection for these preferred property rights, it must face the same issue of institutional competence that led to the rejection of the "clothed with a public interest" analysis: why should the Court provide protection for a property right given the legislature's determination that control or elimination of the right is necessary for the common good? If the only justifications for such protection were the demands of "fairness and justice," one would expect that our elected representatives, to whom we entrust such delicate decisions, would be better suited than the Court to provide such protection.[205]

The early Court faced this issue of institutional competence and based the classical division between community and individual on its concerns about the nature of the legislative process. The early Court's decision to give greater authority to the individual, rather than the community, reflected not so much a desire to provide greater protection to those with property[206] as a distrust of the legislative process. The classical perspective saw the legislature as little more than a hotbed of contentious factions that were scrambling to benefit themselves at the expense of society.[207] The results of the legislative process were not in any sense the will of society; instead, they represented only the triumph of particular factions. Nor were these factions seen as benign messengers of the public interest. As James Madison explained in *Federalist No. 10,* a faction was "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, *adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.*"[208] With this conception of factions and the legisla-

204. *Cf.* Nollan v. California Coastal Commn., 483 U.S. 825, 834 n.3 (1987) ("Contrary to Justice Brennan's claim, our opinions do not establish that these standards [for a just compensation claim] are the same as those applied to due process or equal protection claims." (citation omitted)).

205. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 63-69 (1980).

206. This perceived role lies at perhaps the heart of the orthodox interpretation of the early cases. *Cf.* Kennedy, *supra* note 28, at 4-5.

207. In dissent in *Powell v. Pennsylvania,* Justice Field wrote:

> If the courts could not in such cases examine into the real character of the act [enacted ostensibly for the health and safety of the public], but must accept the declaration of the legislature as conclusive, the most valued rights of the citizen would be subject to the arbitrary control of a temporary majority of such bodies, instead of being protected by the guarantees of the Constitution.

127 U.S. 678, 696-97 (1888).

208. THE FEDERALIST No. 10, at 17 (James Madison) (Roy P. Fairfield ed., 1981) (emphasis added).

ture, the more limited authority given the community was thought to serve two purposes: (1) it ensured compensation for the "victims" of disproportionate government-imposed burdens *(the compensation rationale);* and (2) it provided a check on the potential misuse of legislative power *(the regulation rationale).*

The Court expressed the compensation rationale as early as 1893 in *Monongahela Navigation Co. v. United States:*[209]

> [The compensation requirement] in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it 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.[210]

The regulation rationale was discussed most explicitly in dissents, but it was inherent in the classical conception of distinct spheres of public and private authority, the boundary of which was controlled by the Court rather than the legislature. Justice McKenna's dissent in *Block v. Hirsh*[211] best expressed the concern and the questions it raises:

> [T]he Constitution['s] . . . words are a restraint upon power, intended as such in deliberate persuasion of its wisdom as against unrestrained freedom.
>
> And it is significant that it is not restraint upon a "Governing One" but restraint upon the people themselves, and in the persuasion, to use the words of one of the supporters of the Constitution, that "the natural order of things is for liberty to yield and for government to gain ground." Sinister interests, its conception is, may move government to exercise; one class may become dominant over another; and, against the tyranny and injustice that will result, the framers of the Constitution believed precautions were as necessary as against any other abuse of power. . . .
>
> Has it suddenly become weak — become, not a restraint upon evil government, but an impediment to good government?[212]

While the distinction between businesses "clothed with a public interest" and other businesses may be criticized as arbitrary,[213] some line was inevitable given a perspective intent upon controlling the "sinister interests" that might have come to dominate the legislature. Admittedly, the early Court addressed the potential for tyranny

209. 148 U.S. 312 (1893).

210. 148 U.S. at 325.

211. 256 U.S. 135 (1921).

212. 256 U.S. at 163 (McKenna, J., dissenting).

213. *See supra* notes 95-106.

indirectly, by limiting the scope in which the legislature could exert its control. But given the difficulties of distinguishing directly between good and bad government action, limiting the potential for abuse by limiting the scope of public authority seemed a viable and desirable alternative at the time. The line dividing the public and private spheres was necessarily arbitrary in that it could have been drawn a little to one side or the other, but once drawing such a line was seen as necessary, some degree of arbitrariness was, and is, inevitable.[214]

Accompanying the *Nebbia*-induced switch from a limited public sphere to a limited private sphere was a rejection of the belief that the Court should circumscribe the sphere of public authority[215] and a rejection of the classical perspective on the nature of the legislature. The post-*Nebbia* perspective no longer saw the legislature as a dangerous beast that needed to be confined but as an agent working for the public benefit.[216] The new perspective adopted a similarly optimistic view as to the role of factions. Factions provided a voice for the various and diverse interests in society and were redefined as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest," dropping from Madison's definition the final phrase *"adverse to the right of other citizens, or to the permanent and aggregate interests of the community."*[217] Further, competition among the various factions in the legislature was no longer seen as an evil but as a positive good.[218] So long as each faction had adequate access to present its perspective in the legislative arena, the competition among the factions

214. *See* Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting).

215. *See* United States v. Carolene Prods. Co., 304 U.S. 144 (1938). For a discussion of President Franklin Roosevelt's court-packing plan and its likely influence on the Court, see GERALD GUNTHER, CONSTITUTIONAL LAW 128-30 (11th ed. 1985); BENJAMIN F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 200-08 (Phoenix ed. 1967).

216. The labels for the two spheres, and the connotations associated with them, reflected this change. For the private sphere, the imagery of personal freedom and individual rights gave way to that of anarchy and oppression. For the public sphere, the imagery of tyranny gave way to that of a benign distribution of benefits and burdens that was a necessary part of civilized life. *Compare* Block v. Hirsh, 256 U.S. 135, 163 (1921) (McKenna, J., dissenting) (quoted *supra* note 211 and accompanying text) *with* Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987):

> Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. These restrictions are "properly treated as part of the burden of common citizenship."

480 U.S. at 491 (footnotes and citations omitted).

217. THE FEDERALIST, *supra* note 207, at 5; *see also* THEODORE J. LOWI, THE END OF LIBERALISM 53-55 (2d ed. 1979).

218. LOWI, *supra* note 216, at 53-55.

was thought to result in measures that appropriately balanced their various interests and thus necessarily reflected the desires of society as a whole.[219]

While the Court in *Carolene Products* identified a number of circumstances in which Court control of the legislature might be warranted even under this more optimistic view of the legislature, property interests as a general rule were not thought to warrant such protection. The premise of *Carolene Products* was that the political process would adequately protect these interests.[220] As a result, there was no need for the Court to constrain the legislature's authority with respect to property rights; in other words, because the legislature could be trusted, there was no need for a line between the authority of the community (represented by the legislature) and the individual in this area.

This rejection of a need to control the legislature created a seemingly direct conflict with the Fifth Amendment's express provision for Court protection of "private property," and this conflict has driven the modern resolution of the compensation issue. The modern factor test[221] makes most sense neither as an attempt to remain consistent with the early cases, nor as an attempt to ensure fairness and justice, but rather as the modern Court's attempt to walk the line between the "no protection is necessary for property and economic rights" premise of *Carolene Products* and the language of the Fifth Amendment. To distinguish regulations of the sort *Nebbia* and *Carolene Products* permitted from the "takings" the Constitution addresses, the modern Court has retreated to an interpretation of *private property* limited to physical property,[222] with the compensation rationale as the sole articulated purpose behind the compensation requirement.

This restrictive approach focuses on the "classic taking": the appropriation of a parcel of land for a post office. Virtually everyone seems to agree that compensation would always be required in this situation.[223] Certain members of the Court have tried to work out-

219. *Id.; see also* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31-33 (1985).

220. *Compare Carolene Prods. Co.*, 304 U.S. at 151-52 (justifying minimal court scrutiny of government action with respect to economic and property rights by arguing that political process should work adequately with respect to these rights) *with* 304 U.S. at 152 n.4 (stating that government action impacting noneconomic rights merit closer scrutiny to the extent that they may be caused by, or otherwise reflect, underlying flaws in the political process); *see also* Williamson v. Lee Optical, Inc., 348 U.S. 483, 487-88 (1955); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423-25 (1952).

221. *See supra* notes 137-47 and accompanying text.

222. *See supra* notes 177-86 and accompanying text.

223. *Cf.* Nollan v. California Coastal Commn., 483 U.S. 825, 831 (1987).

ward from this classic taking by analogy but have had difficulty identifying an aspect of the classic taking that can be used as a more general rule. What is it about the classic taking that justifies compensation? The government's appropriation of property for its own use? The government's destruction of all the former landowner's legal rights with respect to the parcel? The government action's effect on land? While the Court has suggested these and other possibilities,[224] it has failed to convince even its own members that any one factor captures the essence of why fairness and justice require compensation in the classic case. Called upon to make decisions based on a factor other than physical invasion (diminution in value, for example), the Court, despite its talk, has been unable to do so.[225] As a result, the constitutional compensation requirement, seemingly direct in its command, has been reduced to protecting only those whose physical property has been physically appropriated.

Commentators have offered a variety of suggestions to assist the Court in determining when "justice and fairness" require compensation. Professor Michelman has suggested that fairness and justice require compensation when the disaffection costs absent compensation would exceed the settlement costs of paying compensation.[226] Profes-

224. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) (stating that physical invasion "chops through the bundle [of property rights], taking a slice of every strand"); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 128 (1978) (involving appropriation by government).

225. *See, e.g.*, Lucas v. South Carolina Coastal Council, 60 U.S.L.W. 4842 (U.S. June 29, 1992) (holding that government action that denies all economic use of land constitutes a per se taking and remanding for reexamination of whether government action at issue denied owner all economic use of land); Consolidated Rock Prods. Co. v. City of Los Angeles, 370 P.2d 343 (Cal.), *appeal dismissed,* 371 U.S. 36 (1962) (state courts held that the ordinance deprived the owner of all economic use of a parcel of land; Supreme Court dismissed the appeal for failure to raise a substantial federal question); *see also* Sax, *supra* note 17, at 43-44 & n.48; *supra* notes 157-63, 174-75 and accompanying text. In addition, in deciding how much is too much, the Court has relied on the diminution in value in Hadacheck v. Sebastian, 239 U.S. 394 (1915) (diminution from $800,000 to $60,000), as establishing the extent of a permissible diminution in value. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. at 125-26; Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962). The Court never explained why it did not rely on the diminution in value in Richards v. Washington Terminal Co., 233 U.S. 546 (1914), to define the permissible amount of diminution. In that case, the early Court found government action that reduced the value of the parcel of land from $5500 to $4000 to be a taking. 233 U.S. at 550. One might respond that the diminution in value in *Richards* was not the reason for the early Court's decision, but that suggestion applies equally well to *Hadacheck.* As discussed, both cases turned on the private-public nature of the right with which the government interfered; in neither case was the diminution in value relevant to the early Court's resolution of the compensation issue. As long as we are merely pretending that the diminution in value was the decisive factor, no logical reason exists to use the extent of the diminution in *Hadacheck,* rather than that in *Richards,* as the appropriate number.

226. *See* Michelman, *supra* note 17, at 1215, 1223-24. Michelman justifies his rule as both a utility-maximizing interpretation of the constitutional compensation requirement and as a tool to ensure fairness. The only apparent difference between the two versions of the test is that the fairness analysis would require compensation if, *for a reasonable person,* disaffection costs would

sors Kratovil and Harrison have suggested that fairness and justice require compensation when the private losses outweigh the public gains.[227] Professor Radin has suggested that fairness and justice require compensation when the government takes a legal right that was part of a healthy relationship between person and physical property, but not when the legal right was part of an unhealthy relationship.[228]

All of these proposals focus on reasons why we might need or want *to compensate* the individual whose property interests have been impaired. But a need to compensate cannot by itself justify a constitutional compensation requirement. If the basis for compensation is simply a need to promote fairness and prevent social disorder, the legislature should be at least as able as the Court to recognize the situations in which compensation ought to be paid. For example, the legislature may decide that society would be better off by spending money on providing additional prenatal care, rather than compensating property interests disaffected by a given government action. Why should we permit the courts, in this era of strained budgets, to determine that the legislature was wrong in its decision? Are the courts better at balancing disaffection costs and settlement costs? Are the courts better at balancing social gains and private losses? Are the courts better at determining which relations between physical property and people are healthy?

No reason exists to expect that a court will be better at any of these determinations, unless, for some reason, we do not trust the legislature's judgment. As the early Court recognized when it articulated the regulation rationale, therefore, the constitutional requirement of compensation makes sense only if it is intended as a limit on the legislature's authority in this area. This analysis suggests that there is no path between *Carolene Products*' disavowal of protection for property and economic rights and the constitutional requirement of compensation. If property and economic rights need no protection, as *Carolene Products* suggests, we can presumably trust the legislature to provide compensation when appropriate and need not carve out a set of "special" rights that will remain beyond the reach of the legislature in the absence of compensation. However, the presence of the compensation

exceed settlement costs, while the utility analysis would require compensation if, *for the actual person involved,* disaffection costs would exceed settlement costs.

227. *See* Robert Kratovil & Frank J. Harrison, Jr., *Eminent Domain — Policy & Concept,* 42 CAL. L. REV. 596, 609 (1954).

228. *See* Margaret J. Radin, *Property & Personhood,* 34 STAN. L. REV. 957 (1982) (Giving no clear substantive content to the terms, but defining a healthy relationship between a person and her property as a relationship that promotes "desirable" characteristics in a person, while an unhealthy relationship is one that promotes "undesirable" characteristics.).

requirement in the Fifth Amendment, and of similar provisions in forty-seven of the states' constitutions,[229] suggests that we are not willing to trust our elected representatives this far. If the compensation requirement is to make any sense as a *court-enforced* right, the line between public rights and private rights, between community and individual, must be tied to the need for a check on the legislature's judgment in any given case.

The recent case law suggests that the Court recognizes this need. While the Court continues formally to reject any need for judicial control of the legislative process in the area of property and economic rights, much of the current disagreement and confusion over the scope of compensation reflects an underlying dispute over whether and how to limit the legislature's authority over these interests.[230]

Nearly a hundred years ago, Justice McKenna posed the basic question the modern Court must face in resolving the compensation issue: "Has [the constitutional compensation requirement] suddenly

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229. *See* ALA. CONST. art. I, § 24; ALASKA CONST. art. I, § 18; ARIZ. CONST. art. II, § 17; ARK. CONST. art. II, § 22; CAL. CONST. art. I, § 14; COLO. CONST. art. II, § 15; CONN. CONST. art. I, § 11; DEL. CONST. art. I, § 8; FLA. CONST. art. X, § 6; GA. CONST. art. I, § 3, ¶ 1; HAW. CONST. art. I, § 20; IDAHO CONST. art. I, § 14; ILL. CONST. art. I, § 15; IND. CONST. art. I, § 21; IOWA CONST. art. I, § 18; KY. CONST. Bill of Rights, § 13; LA. CONST. art. I, § 4; ME. CONST. art. I, § 21; MD. CONST. art. III, § 40; MASS. CONST. pt. I, art. X; MICH. CONST. art. X, § 2; MINN. CONST. art. I, § 13; MISS. CONST. art. 3, § 17; MO. CONST. art. I, § 26; MONT. CONST. art. II, § 29; NEB. CONST. art. I, § 21; NEV. CONST. art. I, § 8; N.J. CONST. art. I, ¶ 20; N.M. CONST. art. II, § 20; N.Y. CONST. art. I, § 7; N.D. CONST. art. I, § 16; OHIO CONST. art. I, § 19; OKLA. CONST. art. II, §§ 23-24; OR. CONST. art. I, § 18; PA. CONST. art. I., § 10; R.I. CONST. art I, § 16; S.C. CONST. art. I, § 13; S.D. CONST. art. VI, § 13; TENN. CONST. art. I, § 21; TEX. CONST. art. I, § 17; UTAH CONST. art. I, § 22; VT. CONST. ch. I, art. 2; VA. CONST. art. I, § 11; WASH. CONST. art. I, § 16; W. VA. CONST. art. III, § 9; WIS. CONST. art. I, § 13; WYO. CONST. art. I, §§ 32, 33. The Supreme Courts of two of the three states whose constitutions do not expressly provide compensation for the taking of private property have required such compensation as a component of due process under more general provisions of their constitutions. *See In re* Opinion of the Justices, 33 A. 1076 (N.H. 1891) (holding that New Hampshire legislature has no power under state constitution to take private property unless compensation is paid); Town of Morganton v. Hutton & Bourbonnais Co., 112 S.E.2d 111 (N.C. 1960) (holding that due process language contained in article I, § 19 of the North Carolina constitution incorporates the requirement of compensation in the event of a taking of private property). The Supreme Court of the third state, Kansas, has suggested that the state constitution may limit the state's authority to take private property absent compensation, *see* Robinson v. City of Winfield, 219 P. 273-74 (Kan. 1923); compensation is currently required by statute. *See* KAN. STAT. ANN. § 26-513 (1986).

230. As Professor Alexander has explained:

> "The Regulatory Takings Problem" is the title given to a story, or narrative, that has become prominent in the literature on just compensation issues. The story is one of power and fear. It is about a perceived imbalance of power between the two groups of actors involved in the process of public land-use regulation — private landowners and government regulators. . . .
>
> The dominant narrative describes local regulators as empowered, possessing enormous leverage over private landowners, who are depicted as unempowered. . . . Furthermore, this narrative sees these local agencies as motivated to behave opportunistically, abusing their discretion by strategically manipulating the situation of the vulnerable landowners.

Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752, 1752 (1988).

become weak — become, not a restraint upon evil government, but an impediment to good government?"[231] The narrow scope that the modern Court has given the compensation requirement reflects its uncertainty about how to construe this constitutional protection, consistently with the modern understanding of the appropriate role of factions and the legislature, to restrain evil government without overly impeding good government. Because the modern Court cannot resolve its uncertainty, it binds the compensation requirement to physical property and then covers its substantive decision under the cloak of early cases. For the same reason, while it has identified a number of factors relevant to the resolution of the compensation issue, the Court has, with only one exception, limited compensation to cases in which the government has effectively taken the right of exclusive occupancy.[232]

The modern Court, however, should not assume that it has successfully avoided the need to draw any line between public and private rights. Whenever the Court enforces the constitutional compensation requirement, it has necessarily drawn such a line. The problem is that the modern Court's line makes no sense as a check on the legislature. Nothing about the right of exclusive occupancy suggests that it will indicate whether the government is acting to serve the public interest.

This article does not suggest that we return to the "clothed with a public interest" test of the early cases in order to develop a more appropriate line between community and individual, between regulations and takings. The Court's new perspective on the nature of the legislature and the proper role of factions makes turning back the clock in that fashion unnecessary and undesirable. If we are concerned that the legislature may act inappropriately, and if we want to regulate its behavior through the mechanism of just compensation, we should try to define when inappropriate behavior is likely and when just compensation would correct the problem.[233]

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231. *Supra* note 211.

232. *See supra* notes 177-78 and accompanying text.

233. In his first article, *Takings and the Police Power,* Joseph Sax suggested that takings should be separated from regulations based on the nature of the government action: If the government was acting as an enterprise, then compensation should be required. If the government was acting as arbitrator, then compensation should not be required. Sax, *supra* note 17, at 62-63. While Sax's distinction suggests a regulatory basis for the compensation requirement, only compensation ultimately supports his approach, because he never demonstrated how the requirement of compensation would correct the mistakes in judgment that he saw as more likely when the government acts as enterprise. Thus, the enterprise-arbitrator distinction distinguishes the victims of government action who deserve compensation more than it corrects mistakes in the government decisionmaking process.

IV. REGULATING THE LEGISLATURE

As reflected in *Carolene Products,* the premise behind the formal rejection of the need to limit the legislature's authority in the property area is that the legislative process will adequately protect these interests. So long as opposing factions have equal access to present their desires to the legislature, inappropriate legislative action is unlikely and Court intervention unnecessary. To reintroduce the regulatory purpose behind the compensation requirement, we must identify those circumstances that predict on a general level when inappropriate legislative action is likely. To do this, we need to isolate the points at which mistakes can enter the legislative process.

A. *A New Approach to the Compensation Issue*

1. *The Modern Perspective on the Legislature*

With the industrial revolution, and the accompanying switch from a primarily agrarian society to a heavily urban population, no one view completely defined the "public interest." The growing diversity of the nation in the late nineteenth and early twentieth century rendered Madison's notion of a readily identified "permanent and aggregate" community interest anachronistic.[234] In this period, the modern model of the legislature, sometimes referred to as interest group pluralism, arose to redefine the public interest and to provide a normative justification for permitting any given legislative majority to impose its will on society.

The essence of the modern perspective is that the "public interest" is nothing more than the sum of the interests and desires of the particular factions or interest groups affected by a government action. Because the various and conflicting desires of these competing groups cannot always be reconciled, a measure is in society's interest so long as it benefits those who gain more than it costs those who lose.[235] The legislature plays the role of utility calculator, estimating the likely gains and losses resulting from a given measure and, based on that estimate, deciding whether to enact it.[236]

The legislature does not make these decisions in a vacuum. The modern model expects that those who would be adversely affected by a

234. *Cf.* FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 46-51 (2d ed. 1961); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 656-60 (2d ed. 1985).

235. *See, e.g.,* Kratovil & Harrison, *supra* note 226, at 609; Michelman, *supra* note 17, at 1168, 1172-83.

236. *See, e.g.,* ELY, *supra* note 204, at 79-84; James M. Buchanan, *Politics, Property, and the Law: An Alternative Interpretation of* Miller et al. v. Schoene, 15 J.L. & ECON. 439, 449 (1972).

proposed government action will oppose it, while those who would benefit from the action will support it. In the words of economist Albert Hirschman, those affected will exercise "voice"[237] in an attempt to persuade the legislature to their point of view. In the modern model, how much time, effort, and money an individual is willing to spend on a particular issue, and his corresponding voice strength, depend primarily on the action's "private value" to the individual.[238]

Comparing the strengths of the efforts undertaken by the individuals supporting and opposing a given measure, and their corresponding voice strengths, will reveal the public interest. In other words, if individuals opposed to the proposed measure spend more money than individuals in favor spend, the stronger voice of the first group accurately signals that society as a whole does not desire the measure's enactment. Under the pluralist model, the legislature not only does, but should, follow this signal in determining whether to enact the measure.

2. *Mistakes in the Legislature*

Within the modern model, systematic mistakes[239] can still result from either agency costs or information costs and uncertainty. Agency costs include all of those mistakes in the legislature's judgment that result from individual legislators' pursuit of their own self-interest at the expense of their constituents.[240] Agency cost mistakes can arise whenever the interests of constituents and their representative diverge, usually when the representative has the opportunity to obtain something for herself at the constituents' expense.[241] The classic example

237. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 16, 30 (1970).

238. Theory suggests that an individual will spend up to the private value of a proposed measure supporting or resisting its enactment. *See* Roger D. Congleton, *Committees and Rent-Seeking Effort, in* THE POLITICAL ECONOMY OF RENT-SEEKING 251, 254-55 (Charles K. Rowley et al. eds., 1988); *cf.* Richard A. Posner, *The Social Costs of Monopoly and Regulation,* 83 J. POL. ECON. 807, 807-08 (1975). The individual's perception of the likelihood of swaying the legislature's decision will guide how much she spends. *See, e.g.,* EDWARD C. BANFIELD, POLITICAL INFLUENCE 333 (1961).

239. A "mistake" occurs either when the legislature enacts a measure that, from the perspective of society as a whole, is not desirable, or when the legislature fails to enact a measure that, from society's perspective, would have been desirable.

240. Defined more broadly, agency costs include the costs of monitoring the agent and the bonding expenditures made by the agent, as well as the cost of the mistakes. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure,* 3 J. FIN. ECON. 305, 308 (1976).

241. Some commentators have been unwilling to extend the notion of agency costs beyond its traditional applications in agency and corporate law into the legislative arena, perhaps because they perceive legislators as more honorable than corporate directors. *See, e.g.,* Abner J. Mikva, *Foreword,* 74 VA. L. REV. 167, 168-69, 174-75 (1988). Others have gone further and argued that we should not even discuss the possibility that legislators might favor their own interests over the

of an agency cost in the legislative forum is a legislator's acceptance of a bribe to change her vote on an issue.[242] But agency costs also show up in junkets, paid speaking engagements, excessive pay raises, and laws of general application that do not apply to Congress.

The recent public choice literature has focused on the legislator's desire for reelection, and her need to accumulate a large campaign war chest to assure her reelection, as a substantial source of agency costs.[243] Because of her self-interest in reelection, a legislator may promise her support to particular contributors in return for large campaign contributions, even when her support adversely affects her constituents as a whole.

Information costs and uncertainty, on the other hand, cover those situations in which the legislature makes a mistake as a result of a lack of information or poor judgment. Given the complexity of our economy and the difficulty of predicting the future, even the best information may often be inadequate to predict exactly the consequences of a legislative action. Whether a proposed welfare reform or trade restriction will benefit or harm society in the long run is a difficult question about which reasonable persons can disagree, and we generally entrust our legislators to make these judgment calls.[244]

3. *Justifying Court Intervention to Remedy Legislative Mistakes*

Against the possibility of mistakes generally, the modern perspec-

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interests of their constituents. *Compare* Steven Kelman, *"Public Choice" and Public Spirit*, 87 PUB. INT. 80, 93-94 (1987) *with* Geoffrey Brennan & James M. Buchanan, *Is Public Choice Immoral? The Case for the "Nobel" Lie*, 74 VA. L. REV. 179 (1988).

Nonetheless, a growing body of literature suggests that a serious agency cost problem exists in the relationship between legislator and constituents. *See, e.g.*, RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES (1973); DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974); ROBERT E. MCCORMICK & ROBERT D. TOLLISON, POLITICIANS, LEGISLATION AND THE ECONOMY: AN INQUIRY INTO THE INTEREST GROUP THEORY OF GOVERNMENT (1981); PETER NAVARRO, THE POLICY GAME: HOW SPECIAL INTERESTS AND IDEALOGUES ARE STEALING AMERICA (1984); KAY L. SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY (1986); William N. Eskridge, Jr., *Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEXAS L. REV. 873 (1987); Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987).

242. *See generally* SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY (1978).

243. *See* MAYHEW, *supra* note 240, at 13; Eskridge, *supra* note 240, at 288; M. Bruce Johnson, *Planning without Prices: A Discussion of Land Use Regulations Without Compensation*, *in* PLANNING WITHOUT PRICES 63, 88 (Bernard H. Siegan ed., 1977); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 213 n.43, 218 (1988).

244. *See, e.g.*, Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) (the Court does not "sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare.").

tive posits the notion of countervailing power: if one faction attempts to bribe or mislead the legislature, an opposing faction will arise and counter with its own bribes and (mis-)information.[245] Though this process of conflict and compromise is not pretty to watch, the results are thought to be quite palatable.[246]

Court intervention is justified only in special circumstances that suggest that a basic premise of the modern model has failed. For example, if one interest group does not have equal access to the legislature to voice its perspective, a difference in the strength of the opposing groups' voice may reflect not the desires of society as a whole but simply one group's lack of access. While the legislature will not inevitably act inappropriately as a result of this failure of voice, we, as a community, have judged the likelihood of an information-cost mistake sufficient to justify a strict limitation on the legislature's authority to enact measures that burden, for example, insular minorities who have historically suffered from a lack of such access.[247]

Alternatively, the legislature may heed its own voice on an issue much more strongly than outside voices. For example, when the legislature considers limitations on speech, its own members' desire not to be criticized may skew the government action toward censorship and away from the true public interest. Again, the failure of voice will not inevitably cause the legislature to disregard the public interest, but we have judged the likelihood of an agency-cost mistake sufficient to justify a strict limitation on the legislature's authority in the area of political speech.[248]

If the constitutional requirement of compensation is to make any sense within the modern model, it too must be tied to such a failure of voice — a failure that warrants not an outright prohibition of government action, but the lesser requirement of compensation. As a general proposition, the modern model assumes that how much time, energy, and money those affected by a measure will be willing to spend on influencing the legislature depends primarily on the private value of a

245. *Cf.* LOWI, *supra* note 217, at 50-61.

246. The usual allusion compares laws to sausages. *See, e.g.*, Community Nutrition Inst. v. Block, 749 F.2d 50, 51 (D.C. Cir. 1984) ("This case . . . affords a rare opportunity to explore simultaneously both parts of Bismark's aphorism that 'No man should see how laws or sausages are made.' ").

247. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (While the Court upheld the government action in the case, this was the first time the Court described legal restrictions based on racial classification as being "suspect" and requiring a "most rigid scrutiny.").

248. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 & n.19, 771 n.24 (1976) (commercial speech not entitled to the same degree of protection as political speech).

measure to each individual.[249] Equally, and perhaps more, important, however, in determining the amounts of resources that individuals will spend, and their corresponding voice strength, are the number and homogeneity of similarly affected individuals.[250]

As the number of individuals who will be similarly affected by government action increases and grows more diverse,[251] each individual is likely to spend less time and effort to convey his views to his representative.[252] Because government action is a public good, each is more likely to rely on the efforts of the other similarly affected individuals (free ride), and less likely to find personal involvement worthwhile.[253] This is a *dispersed group.* On the other hand, as the number of individuals similarly affected grows smaller and more cohesive,[254] the individuals are more likely to combine their efforts and spend their resources in a concerted effort to convince the legislature of the merits of their point of view. This is a *concentrated group.*

The joint expenditure of resources gives the members of a concentrated group two significant advantages in the influencing process. First, the group can coordinate and control its members' efforts, achieving economies of scale. The group can avoid duplication of effort, obtain expert support for its position,[255] and even hire a full-time

249. Whether this assumption is accurate is not clear. Participation may be as much, or more, a function of personal predisposition as private value. If predisposition, rather than private value, dictates voice strength, and predisposition coincides with particular substantive political agendas, the bases underlying interest group pluralism collapse. In such a situation, the so-called "silent majority" might desire arbitrary limits on the scope of government authority, under a court-enforced constitution, simply because the silent majority would rather the government did nothing in a given area and would rather not exercise voice every legislative session to keep the government out of the area.

250. *See generally* RUSSELL HARDIN, COLLECTIVE ACTION 38-49 (1982); HIRSCHMAN, *supra* note 236, at 40-41; MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 22-36, 127-28 (1965).

251. As to the importance of diversity, see Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine,* 77 CAL. L. REV. 83, 98-101 (1989).

252. *See* HARDIN, *supra* note 249, at 38-49; OLSON, *supra* note 250, at 22-36, 127-28; George J. Stigler, *Free Riders and Collective Action: An Appendix to Theories of Economic Regulation,* 5 BELL J. ECON. & MGMT. SCI. 359, 360-62 (1974).

253. Other actors may decide not to oppose the measure because they are public-minded. These actors recognize that they will bear the cost of the measure but are willing to do so because they believe the measure will benefit society. *Cf.* Kelman, *supra* note 243, at 223 n.80. While this sort of conduct is morally preferable to other forms of free riding, it creates the same effect: some part of the private value to the interest group will be unavailable for lobbying against the measure.

254. *Cf.* Eskridge, *supra* note 241, at 286-87 (discussing the effects of size and cohesiveness on each group member's likely efforts).

255. Because an interest group cannot turn to a capital market to raise funds for lobbying based solely on a likely legislative outcome, it will probably have to raise the money from its own members; therefore, interest groups with relatively wealthy members are more likely to have the resources necessary to influence legislators. *Cf.* SCHLOZMAN & TIERNEY, *supra* note 240, at 66-

lobbyist to protect its interests. When the legislature requires information on costs or technology within the exclusive control of the members of an interest group, the concentrated group can more easily coordinate the release of the information, arranging the release in a manner designed to shape the legislature's perceptions of the merits of a proposed measure.[256] Some of this information may be unknown, or accessible only at great expense, outside the group.[257]

Second, because of their smaller effective[258] size, concentrated groups will have more resources available, for a given dollar amount at risk, than will dispersed groups. For a given dollar amount at risk, each member of a concentrated group faces a higher individual risk than would a member of a dispersed group. In addition, a concentrated group can more easily coerce each of its members to participate than can a dispersed group.[259] As a result, each member of a concentrated group is more likely to participate in the lobbying effort and less likely to free ride on the efforts of others.[260]

Because of these advantages, a concentrated group is likely to have disproportionately greater resources available, and to use the available resources more effectively, than a dispersed group. When a concentrated group and a dispersed group compete in the legislature, these

87, 107-19 (contending that interest groups generally represent the interests of the upper and middle classes); Bernard H. Siegan, *Editor's Introduction: The Anomaly of Regulation under the Takings Clause, in* PLANNING WITHOUT PRICES, *supra* note 242, at 28-29 (discussing same issue in takings context).

256. *Cf.* National Assn. of Greeting Card Publishers v. United States Postal Serv., 462 U.S. 810 (1983). The Court suggested that Congress delegated the task of setting postal rates to an administrative agency to "remove the rate setting from the political arena" and because the lack of expertise on the issue forced Congress "to place too much reliance on lobbyists."

257. The air pollution control bill exhibited this problem. The industry to be regulated had exclusive access to much of the information that Congress required to evaluate the various proposed measures. *Cf.* David Wessel, *Costs vs. Benefits: Analysis Gets Soft,* WALL ST. J., Apr. 4, 1990, at A15.

258. *Effective size* refers to the fact that corporations, unions, and other well-organized groups count as only one "effective person," even though the corporation may have thousands of employees and shareholders. In addition, *effective* recognizes that, while the total costs of a measure may be imposed on a very large group, the primary cost may fall on a select subgroup. For example, air pollution control might impose 95% of its cost on 50 corporations and the remaining 5% on five million individuals with woodburning fireplaces. Determining whether an industry is concentrated presents the same problem: five major corporations may control 95% of the business with 500 other corporations controlling the remaining 5 percent. To determine concentration in a market, a court can look to the market share of the top four to eight corporations, *see* Stigler, *supra* note 252, at 362, or use the Herfindahl-Hirschman Index. *See generally* Neil B. Cohen & Charles A. Sullivan, *The Herfindahl-Hirschman Index and the New Antitrust Merger Guidelines: Concentrating on Concentration,* 62 TEXAS L. REV. 453 (1983). A similar approach should be used in determining the effective size of an interest group.

259. *See, e.g.,* OLSON, *supra* note 250, at 22-36, 127-28; Eskridge, *supra* note 241, at 286-89; James D. Gwartney & Richard E. Wagner, *Public Choice and the Conduct of Representative Government, in* PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 19-23 (1988).

260. *See, e.g.,* Stigler, *supra* note 252, at 360-62.

differences in organizational costs will make the voice of the concentrated group stronger in comparison to the voice of the dispersed group than it would have been had the two groups been of the same size and homogeneity. As a result, when a concentrated and a dispersed group compete for property in the legislature, a difference in voice strength may not accurately reflect an underlying difference in private value and the resulting public interest, but simply a difference in organization costs.

The *Carolene Products* premise that competing factions in property disputes are equally capable of influencing the legislature ties in well to this analysis of competing interest groups. When the groups are equally sized, a group's inability to sway the legislature to its point of view suggests that the group's position would not serve the public interest, because its weaker voice reflects a lower underlying private value. While information- and agency-cost mistakes might still be made, presumably both groups can engage in bribing or other forms of influencing the legislature with equal effectiveness, making systematic mistakes unlikely. So long as the difference in lobbying resources available to the groups accurately reflects the substantive merits of the proposed measure, such a difference, in and of itself, does not justify court intervention in the legislative process. When the competing factions are of *significantly different size,*[261] however, a difference in their lobbying resources may not reflect the substantive merits of the proposed measure, but a difference in the two groups' organization costs.

The presence of such a failure of voice has justified a near absolute prohibition of legislative enactments in the areas of political speech and suspect classifications,[262] even though it is unclear that the failure

261. *Significantly different size* means a size sufficiently different to create a corresponding difference in organizational costs that would permit the smaller group, on average, to have enough resources to obtain enactment of a measure that transfers wealth from the larger group to the smaller if the measure has a neutral impact on overall social wealth. Professor Stigler has suggested that the amount of resources available per member decreases exponentially as the number of the members increases. Stigler, *supra* note 252, at 361. Accepting an exponential increase in the transaction costs of organizing, including free riders, as the size of the group increases, the significant ratio between the effective sizes of the two interest groups will increase as the groups increase in absolute size. Thus, if the smaller group consists of one individual, a significantly larger group might consist of 100 effective persons; whereas, if the smaller group consists of 10,000, a significantly larger group might be 5,000,000.

262. Some may disagree with the implicit assertion in the text that the constitutional rights to free speech and equal protection of the laws reflect process concerns, rather than a decision to protect the substantive values of the community. While it is beyond the scope of this article to resolve the question whether these rights are protected for their own sake or because they represent an underlying flaw in the democratic process, process concerns can better explain some of the recent developments in both areas. First, the Court has held that government restrictions on commercial speech will receive a lower level of scrutiny than government restrictions on political speech. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 & n.19, 771 n.24 (1976). While this might be explained in terms of substantive

of voice in those situations will necessarily lead the legislature to make an information- or agency-cost mistake. Intervention is justified, not because the Court is convinced that a substantive mistake in judging the public interest has been made, but because the strengths of the competing voices may not accurately signal the desires of society as a whole. Given such a failure of voice, there exists neither a reason to trust the legislature's judgment on the issue nor a normative basis for permitting any given majority to impose its will on others.

A similar failure occurs when two groups competing for property rights are of significantly different size. The concentrated group's organizational advantages will artificially amplify its voice. In this situation, when a difference in voice has failed to reflect accurately the value of the property to the individuals affected, we have not historically trusted, and should not now trust, the legislature's judgment.

An important factor distinguishes the failure of voice that occurs with respect to political speech or insular minorities from the failure that occurs when a dispersed group seeks the property of a concentrated group. In the first two categories, the failure of voice is likely to lead the legislature to make a mistake by *enacting an undesirable measure.* On the other hand, when the legislature considers a measure that would, if enacted, transfer property rights from a concentrated group to a dispersed group, the failure of voice is likely to lead the legislature to make a mistake by *not enacting a desirable measure.* To correct the political process in the first two cases, the Court should discourage such measures by using heightened scrutiny, for example, to strike down measures that limit political speech or burden insular minorities. Such heightened scrutiny would not address our process concerns in the property case, however. Instead of using heightened scrutiny, which would further discourage the enactment of these measures, we should use a different remedy, compensation, in order to

community values (political speech is more important than commercial), the distinction makes more sense if we focus on the greater possibility of an agency cost mistake when the legislature restricts political speech. *See* Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment,* 105 HARV. L. REV. 554, 563-67 (1991). Second, in the area of racial discrimination, the Court has provided a lower level of scrutiny for "benign" race-conscious measures. *See, e.g.,* Metro Broadcasting, Inc. v. Federal Communications Commn., 497 U.S. 547 (1990). While this too might be explained as a reflection of substantive values (we want to provide greater rights for the historically oppressed), the distinction is better explained by an analysis of the process concerns articulated in footnote 4 of *Carolene Products* as justification for heightened scrutiny of race-conscious measures. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (measures that burden insular minorities should be given more careful scrutiny because they may reflect prejudice and lack of access). Such benign race-conscious measures are not likely to reflect the minority group's lack of access. As a result, strict scrutiny of such measures is neither necessary nor appropriate.

placate the opposition of the concentrated group and thereby make the enactment of such measures more likely.

B. *A Public Choice Approach to the Takings Clause*

The constitutional compensation requirement can be seen as a tool to remedy the failure of voice that would otherwise occur when a concentrated and a dispersed group struggle over property. Simply put, the Takings Clause could guarantee that a victorious majority will compensate a losing minority. Such a guarantee would eliminate the incentive of a concentrated minority to oppose a measure which would, if enacted, impair its property rights. If the Court consistently focused on whether the rights of the very few have been burdened for the benefit of the very many in resolving the compensation issue, then the very few would not need to organize into a concentrated group and protect themselves in the legislature; they could be certain that they would be compensated.[263] Furthermore, if society as a whole, rather than the members of the concentrated group, will bear the expected cost of a given government action, then a dispersed group, taxpayers, will replace the concentrated group that would otherwise have opposed the proposed measure. As a result, the compensation requirement can convert a dispersed-concentrated conflict, with its accompanying failure of voice, into a dispersed-dispersed conflict in which the voices the legislature hears will accurately reflect the underlying private values and, as a result, the desire of society as a whole.

Thus, the failure of voice that occurs when a concentrated group and a dispersed group conflict over a particular property interest suggests that the taking-regulation line should depend primarily on differences in effective size between the group burdened and the group benefited when the government shifts or interferes with existing property rights. The presence of a dispersed-concentrated conflict gives us good reason to doubt that the community's decision with respect to the property will be the right one and justifies assigning control of the property to the individual.

By consistently assigning control over the property in the dispersed-concentrated situation to the individual, rather than the com-

263. This analysis indicates that the compensation requirement is appropriately restricted to property rights. The value of the right to exclude, the right to use, and other property rights is largely the market value. For that reason, the promise of compensation should make the concentrated group largely indifferent to the legislature's decision. Liberty rights, such as the freedom of speech and the freedom from illegitimate discrimination, on the other hand, resist monetary valuation, and prohibition will more efficiently remedy failures of voice that occur with respect to "liberty" rights. Money will not always be a perfect substitute to the concentrated group even for lost property rights, but the artificial strength of its voice will at least be much reduced.

munity, we can remedy the failure of voice that would otherwise occur and thereby increase the likelihood that the property will be used in a manner that more accurately reflects the values of the community as a whole.[264]

C. *Justifying the Proposed Interpretation*

The essential insight of the proposed interpretation is that what the legislature will decide in any particular situation is not set in stone. When the legislature considers a measure, its decision will, and under the modern perspective should, be affected by interest groups' support for, and opposition to, the proposal.[265] Absent the promise of compensation, a concentrated group will too often be able to block even those concentrated-dispersed measures that would benefit society as a whole. By promising compensation, and thereby replacing the concentrated group with a dispersed group, the Court would make enactment of these measures more likely. Moreover, whether successful at blocking a particular measure or not, concentrated groups will likely spend a considerable portion of the measure's private value opposing such a rights transfer. Because a dispersed group is likely to spend a far smaller fraction of the measure's private value on lobbying than would the concentrated group, promising compensation and replacing the concentrated group with a dispersed group would substantially reduce these enactment costs. On the other hand, the proposed interpretation involves costs as well. First, it would force all such measures to bear the transaction costs of identifying the members of the concentrated group, determining the appropriate amount of compensation, and collecting and distributing the compensation. Second, it might block the enactment of some concentrated-dispersed measures that

264. A failure of voice will also occur when the government acts to transfer property rights from a dispersed group to a concentrated group. Such a failure of voice in this case, as with insular minorities, is likely to lead the legislature to enact undesirable measures. To discourage enactment of such measures, the Court can either apply heightened scrutiny, as is done to discourage such measures with respect to political speech and insular minorities, or interpret the compensation clause to require the concentrated group to pay compensation to the government for the property the concentrated group has taken. Given " 'the self-executing character of the constitutional provision with respect to compensation,' " United States v. Clarke, 445 U.S. 253, 257 (1980) (quoting 6 PHILIP NICHOLS, EMINENT DOMAIN § 25.41 (3d rev. ed. 1972)), the government could enforce the right of compensation in a court action, or a private individual could do so through a *qui tam*-type action.

265. Commentators often fail to consider the interaction between the compensation requirement and the legislative process, except to worry that too broad an interpretation will bring government to a halt. *See, e.g.*, Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986) (efficiency analysis of the compensation requirement that fails to consider the possible efficiency gains in the legislative process that particular interpretations of the just compensation provision could achieve).

would have both benefited society and been enacted had compensation not been required.

From a utilitarian perspective, the proposed interpretation of the just compensation clause is desirable so long as its benefit outweighs its cost.[266] While analysis alone cannot resolve this empirical question, examination of the oft-expressed fear that giving excessive scope to the compensation requirement will prevent government from enacting desirable measures[267] suggests that the benefit of the proposal will substantially exceed its cost. To begin with, this fear is, in large measure, irrational. After all, no one argues that we would have more roads or post offices if the government could simply appropriate individuals' property for these purposes. Similarly, our roads would not likely be in better condition, nor our national defense more secure, if the government simply compelled the individuals in those industries to provide their services without compensation. On the contrary, more goods and services rather than fewer will almost certainly be forthcoming if the government pays for what it desires. Yet as soon as the Court begins to consider a requirement that compensation be paid in circumstances other than the direct appropriation of land or services, commentators blithely proclaim that, if there is any further expansion of the compensation requirement, "public governance as we know it today [will] cease forthwith."[268]

To attempt to address this fear rationally, we must first understand its exact nature. First, an increased scope to the compensation requirement may reduce the government's ability to act because a proposed government action is only popular so long as someone else appears to bear the cost. While broadening the scope of the compensation requirement may reduce the number of measures that government enacts if such fiscal illusion is behind most measures, the reduction in overall numbers does not establish that the government

266. *See, e.g.*, Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 513-14 (1980). The analysis employs the Kaldor-Hicks standard of efficiency (total benefit outweighs total cost), rather than the Pareto standard (no one made worse off, and at least one person made better off).

267. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) ("To [require compensation for the closing of the brickyard] would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community."); Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 423 (1837) ("We shall be thrown back to the improvements of the last century; and obliged to stand still, until the claims of the old turnpike corporations shall be satisfied . . . ."); John J. Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021, 1032 (1975).

268. Costonis, *supra* note 267, at 1032.

will enact fewer *desirable* measures.[269] Governments may just currently be enacting a large number of undesirable measures, which they would stop doing if the Court read the compensation requirement more broadly. To the extent that this is the type of public governance that "would cease forthwith," the fear would seem to encourage, rather than discourage, a broader reading of the compensation requirement.

A more reasonable basis for the fear focuses on transaction costs: the transaction costs of paying required compensation might consume any benefit the measure would otherwise generate. This version of the objection appears to have in mind the very high transaction costs documented in a variety of litigation contexts. For example, transaction costs in the average medical malpractice or products liability action will exceed the damages the plaintiff recovers.[270] If the transaction costs are similar in the compensation context, then a property right would have to be worth at least double to group *A* what it was worth to group *B*, just to cover the transaction costs of compensating group *B*. Because very few transfers will double the value of property, requiring compensation might prevent the government from taking any action with regard to compensable rights.

While the potential for such high transaction costs presents some reason for concern, three facts suggest that the fear is still more illusory than real. First, with respect to the level of transaction costs that can be expected, field evidence in the area of eminent domain suggests that the transaction costs of paying compensation are relatively low, in fact little more than the three to six percent routinely charged private purchasers of land by real estate agents.[271] The low transaction costs in this context suggest that once the Court provided a clear answer to the compensation issue, and so long as the property interest in question were amenable to monetary valuation, the transaction costs of compensation would be similarly low outside the land acquisition context. In any event, the proposed test calls for a simpler inquiry than that presented by the difficult issues of fault and causation in a negligence or products liability action.[272] In addition, the proposed inter-

269. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 51 (3d ed. 1986); Blume & Rubinfeld, *supra* note 16, at 620-22; Sax, *supra* note 17, at 62-67.

270. *See, e.g.*, John G. Fleming, *Is There a Future for Tort?*, 44 LA. L. REV. 1193, 1207 (1984); Thomas R. Tedcastle & Marvin A. Dewar, *Medical Malpractice: A New Treatment for an Old Illness*, 16 FLA. ST. U. L. REV. 535, 550 (1988).

271. *See* Curtis J. Berger & Patrick J. Rohan, *The Nassau County Study: An Empirical Look into the Practice of Condemnation*, 67 COLUM. L. REV. 430, 440-43 (1967).

272. This is the essential insight behind the switch to worker's compensation laws. Replacing the very uncertain outcome of a trial system with an administrative system saved substantial costs, primarily attorney's fees. *See, e.g.*, Lawrence M. Friedman & Jack Ladinsky, *Social*

pretation of the compensation requirement gives the government, and the politically powerful factions within it, every incentive to minimize the transaction costs associated with compensation. In contrast, under the current system, we let the government use our fear of high transaction costs to justify limiting the scope of the compensation requirement. This gives the majority faction that appropriates property an incentive to keep the transaction costs associated with the payment of compensation as high as possible, whereas requiring compensation would give the politically powerful factions the incentive to reduce transaction costs as much as possible.

Second, even to the extent that a broader scope to the compensation requirement would generate some added transaction costs, enactment of a measure over an interested faction's opposition involves transaction costs as well.[273] For example, if one individual places a higher value on a property right than does the current owner, legislative action to transfer the right from the current owner to the first individual would increase social value and would always, from a utilitarian perspective, be desirable in a world without enactment costs. In the real world, however, the current owner will, in the absence of a promise of compensation, oppose such a transfer. The possible beneficiary, on the other hand, will support the proposed measure. In the real world, legislative action to transfer the property right remains desirable only if the net increase in social value exceeds the value of the resources spent in support of and opposition to the measure.

With respect to those concentrated-dispersed measures for which the net increase in social value is so slight as not to cover the transaction costs of compensation (the only measures that would be rendered undesirable by the adoption of the proposed interpretation), the enactment costs associated with the measure would probably also have exceeded the social value that would be created upon the measure's enactment. After all, a concentrated group is likely to spend a significant fraction of the private value of a measure that affects it in an attempt to influence the legislature's decision.

Furthermore, if compensation were required, a dispersed group,

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Change and the Law of Industrial Accidents, 67 COLUM. L. REV. 50, 66-67, 71-72 (1967); *see also* Fleming, *supra* note 270, at 1207 (citing transaction costs under 10% for both the New Zealand no-fault compensation system and the Ontario worker's compensation plan).

273. In addressing the compensation issue, commentators often pretend that the enactment of a measure is costless by treating the compensation question as separate from, and unrelated to, the costs of enacting a measure. See Kaplow, *supra* note 265, for an example of an after-the-fact inquiry that simply ignores the interplay between the compensation rule and the costs of enacting a measure. These commentators may be assuming either that the costs of enactment are too trivial to consider or that the compensation rule will not affect the costs of enactment. Neither assumption is likely to be true.

taxpayers, would replace the concentrated group. While the dispersed group might still lobby, it would on average spend far fewer resources in the enactment process. The resulting savings in enactment costs might cover a significant fraction, if not all, of the added transaction costs associated with the payment of compensation.

Third, if compensation were not promised, the lobbying efforts of the concentrated group would send a convincing message to the legislature that the measure was not desirable. While the dispersed group would take steps to support the measure, organizational difficulties would probably weaken its ability to mount a convincing campaign. Again, with respect to those concentrated-dispersed measures for which the net increase in social value is so slight as not to cover the transaction costs of compensation, the much larger difference in the organization costs facing the two groups makes it probable that the concentrated group's voice will be louder than that of the dispersed group's. Given such a signal, the legislature will probably not enact such measures in any event.

This analysis suggests that a compensation requirement that focused on whether the government had taken the property of the very few to benefit the very many would not significantly impede desirable government action. Rather, this test would block government action that was either the result of fiscal illusion, inefficient absent compensation because the measure's high enactment costs would have exceeded the net benefit it created, or blocked by the concentrated group in any event. Thus, the proposed test is likely to impose small costs, while achieving the substantial benefit of making the legislature responsive to society's needs rather than to the needs of concentrated interest groups.

D. *Nonutilitarian Objections to the Proposal*

Several nonutilitarian objections can be leveled at the proposed interpretation of the compensation requirement. One critique might argue that the proposal converts the compensation requirement from a protection for certain specific property rights or shared community values into a device to improve the efficiency of the political process.

Consider a city with two hundred thousand residents that is considering a new freeway. The freeway, as it turns out, can either be placed on the west side or the east side of town. If it is placed on the west side, it will physically cross land owned by one half of the city's residents. If it is placed on the east side, it will physically cross land owned by the other half of the city's residents. If we somewhat artificially assume that only the city's residents will benefit from the new

freeway, the group benefited and the group burdened will be equally sized. If the Court, in resolving the compensation issue, focused solely on significant differences in size between the group benefited and the group burdened, no compensation would be required despite the physical appropriation of land.

The failure to require compensation given a physical appropriation must surely strike some as outrageous, a sure sign that the proposed test is seriously flawed. Such a critic might argue that because the new freeway has deprived either the eastern or western landowners of rights that are essential to our common conception of property ownership, compensation should be required despite the similar sizes of the two groups. Further, such a critic might argue against focusing solely on the efficiency of the legislative process, because such a focus will often fail to reflect the community's shared conception of property.[274]

Two difficulties mar this critique. First, the critique mistakenly assumes that some readily identifiable shared conception of property exists. Everyone agrees that private property rights must yield to the rights of others at some point, but the left and the right disagree radically about where that point lies. Thus, commentators on both the left and the right might argue that compensation should be awarded when the government acts to extract a benefit from the individual but not when it acts to prevent a harm. But what do we mean by *harm?*[275] Was the City of New York preventing a harm or extracting a benefit when it changed Penn Central's set of legal entitlements so that Penn Central could no longer reconstruct its terminal? Penn Central would obviously give a different answer concerning the community's values than would a lover of historic architecture. We might rely on the legislature as the authoritative voice of community values, but given the failure of voice that occurs, in the absence of compensation, when a concentrated and a dispersed group compete for property, no reason exists to believe that the legislature's voice will accurately reflect the desires of the community as a whole.[276] For this reason, the proposed

274. *See generally* Joseph L. Sax, *Takings, Private Property and Public Rights,* 81 YALE L.J. 149, 172 (1971).

275. *Compare* Sax, *supra* note 274, at 155-61 (defining harms very broadly) *with* Kmiec, *supra* note 193, at 1635-40 (defining harm very narrowly); *compare* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 130-31 (1985) (prohibiting sales of alcohol not within "preventing a harm" category) *with* Eberle v. Michigan, 232 U.S. 700 (1914) (public has a right to control businesses that endanger the public safety; because sales of alcohol endangered public safety, prohibiting alcohol sales prevented a harm) *and* Mugler v. Kansas, 123 U.S. 623 (1887) (same); *see also supra* notes 188-94 and accompanying text.

276. Conservative commentators often argue for a harm-benefit line tied to nuisance doctrine. *See* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls,* 40 U. CHI. L. REV. 681, 719-72 (1973); Kmiec, *supra* note 193, at 1638-40; *see also* Lucas v. South Carolina Coastal Council, 60 U.S.L.W. 4842, 4849-50 (U.S. June 29,

test rejects the notion that there is any material difference between the harm created by the coal companies' exercise of the right to mine the support coal in *Keystone* and the harm created by the Nollans' exercise of their right of exclusive occupancy to bar the public from crossing their land. The exercise of either right will frustrate society's desires. Furthermore, there is no material difference in the moral blame which should attach to the individuals in the two cases. Both are acting selfishly, perhaps, by putting their own interests ahead of the interests of the community, but one is not acting noticeably more so than the other.

Second, even to the extent that everyone considers certain rights, such as the right of exclusive occupancy, as essential to our common conception of property ownership today, times change. Rights that seem essential today may in the future seem inappropriate, even counterproductive, just as rights such as the heaven-to-hell theory of land ownership, considered essential at one point in time, became inappropriate with the advent of commercial air travel[277] or the discovery of large underground reservoirs of hydrocarbons.[278] Changes in the world and the way we perceive the world may demand a different set of legal relations to govern physical property than those we believe appropriate today.[279] A compensation inquiry that focuses on a static set of property rights that a particular Court, at a particular time, found to be an essential part of our common conception of property is not well-suited to this changing nature of property. This article's proposed interpretation of just compensation, on the other hand, requires compensation only when circumstances suggest that the artificially amplified voice of a concentrated group might otherwise mislead the legislature, thereby freeing the legislature to respond to changes in our vision of property in a manner that reflects society's needs. By focusing on the process, rather than on any one set of "ideal" property

1992). Such an approach suffers from the serious flaw that it inexplicably protects a particular subset of "private property," the right to use land, differently than other property rights. In other words, whether these commentators would limit the government's authority to adopt rent control ordinances because high rents would not have been considered a private nuisance under the common law is simply unclear.

277. *See* United States v. Causby, 328 U.S. 256, 260-61 (1946) ("It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe — *Cujus est solum ejus est usque ad coelum.* But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared." (footnote omitted)).

278. *See, e.g.*, Kemp Wilson, *Conservation Acts and Correlative Rights: Has the Public Pendulum Swung Too Far?*, 35 ROCKY MT. MIN. L. INST. 18-1 (1989) (tracing rejection of *ad coelum* doctrine of absolute ownership in favor of Rule of Capture, followed by return toward absolute ownership with creation of correlative rights).

279. *Cf.* Friedman & Ladinsky, *supra* note 272, at 64-66 (contending that changes in society led to switch from tort recovery for injured employees to worker's compensation).

rights, the proposed test permits the legislature to keep the property system in step with changes in our society.

Moreover, part of our difficulty with the freeway example is that our experience of the world may suggest no good reason for arbitrarily imposing the cost on one group rather than the other. If we change the facts just slightly, so that now instead of the construction of a freeway, we are considering imposition of a progressive income tax on half the population to support an entitlements program for the other half, our experience may suggest a number of good reasons why such an imposition should be valid. While it may be difficult for us to imagine a situation in which abrogation of the right of exclusive occupancy with respect to land would be justified, we should not use our inability to foresee future circumstances that might lead a legislature to abrogate such a "core" property right as an excuse for imposing unnecessary constraints on the legislature's authority.

A second critique might argue that whether or not the proposed interpretation is desirable as a matter of efficiency, it is nonetheless objectionable for distributional reasons because it requires us to "bribe" rich, concentrated groups. Even putting to one side the response that a failure to "bribe" can just as easily be labeled *theft,* this objection essentially returns us to the cost-benefit equation considered above and to questions of whether and how often the legislature would succeed in taking the property of a concentrated group without paying for it.[280] Both theory and experience suggest that a dispersed group will seldom be able to convince the legislature to take the property of a concentrated group.[281] Furthermore, allowing a dispersed group to take the property on those few occasions when it was able to would force concentrated groups to defend their property in the legislature in virtually every case. The constant opposition of concentrated groups means that, in the vast majority of cases, the concentrated group will succeed in blocking desirable concentrated-dispersed measures in the legislature.

Moreover, history suggests that on those few occasions when the

280. *See supra* text accompanying notes 265-73.

281. *See, e.g.,* MCCORMICK & TOLLISON, *supra* note 241, at 45-57; NAVARRO, *supra* note 241, at ix; SCHLOZMAN & TIERNEY, *supra* note 241, at 314-17; Martin Anderson, *Some Thoughts on the Political Economy of Land Use Regulation, in* PLANNING WITHOUT PRICES, *supra* note 243, at 113, 114-15; W. Mark Crain et al., *Voters as Investors: A Rent-Seeking Resolution of the Paradox of Voting, in* THE POLITICAL ECONOMY OF RENT SEEKING 241, 247-48 (Charles K. Rowley et al. eds., 1988); Otto A. Davis, *A Political Economist Views the Takings Issue, in* PLANNING WITHOUT PRICES, *supra* note 243, at 141, 142-45. As a specific example, consider the failure to pass meaningful gun control legislation in the face of the National Rifle Association. *See* Richard Lacayo, *Under Fire,* TIME, Jan. 29, 1990, at 16, 19 (cover story on the NRA).

dispersed group succeeds in taking a concentrated group's property, the concentrated group is almost always the little guy, rather than the prototypical special interest. Thus, the takings cases the Court has faced feature names, such as *Nollan, Lewis, Hadacheck,* and *Goldblatt,* that reflect one faction's success at convincing the government to close a family business or to limit the property rights of the small-time landowner. The names of the politically powerful are generally absent from this list[282] for the simple reason that the legislature jealously guards their interests.[283] In a sense, this article's proposed interpretation does not expand protection for the rich and powerful but merely extends the same sort of protection to the property rights of the not so rich and powerful.

V. CONCLUSION: FACTIONS, UNFAIR COMPETITION, AND THE CONSTITUTIONAL REQUIREMENT OF COMPENSATION

We have come a long way in our consideration of the compensation issue: from the limited public sphere of the early cases through the modern factor test and on to some suggestions for the future resolution of the issue. The essential insight of the journey is that in drawing a line between compensable and noncompensable government restrictions on property, we are essentially drawing a line between the authority of the community and the authority of the individual.

In the early cases, the Court justified a public sphere, and a limit to private property, by identifying a limited set of circumstances in which it was thought that community control of property was justified. While the Court presumed that property rights were private, a strict allocation of rights to individuals inevitably led to conflicts at the intersection of those rights, conflicts that the Court found justified the community's intervention. In the mid-1930s, however, the Court recognized that an individual's decision might harm another in a manner sufficient to justify community intervention, even though the first person's decision did not touch on the legal rights, as such, of the other person. The polluting factory, the unattractive gravel quarry, and the mining of the support coal were all seen as imposing costs on others in

282. There remains, of course, the possibility that any concentrated group will, on occasion, have its property rights taken. Thus, some of the compensation cases bear names such as *Keystone Bituminous Coal Assn.* or *Penn Central Transportation Co.* (to the extent we consider a bankrupt railroad a powerful special interest). The point remains, however, that even if these powerful special interests lose legislative battles on occasion, they will win far more often than they should.

283. *See, e.g., A Little Help for Some Friends,* TIME, Nov. 5, 1990, at 31 (highlighting efforts by members of Congress to protect their districts' industries); Tom Baden, *Agency Gives Power to the People,* NEW ORLEANS TIMES-PICAYUNE, Mar. 31, 1991, at A3 (discussing entrenchment of government agencies).

society. This redefinition of *harm,* from interference with another's rights to interference with another's desires or expectations, implicitly suggested that the community, rather than the individual, was the preferred decisionmaker with respect to essentially all property.

The modern Court has not gone that far, however. Instead, it continues to enforce on rare occasion the requirement that the community compensate the individual for a taking of the individual's property. Yet in making its decisions, the modern Court has not addressed the relative merits of placing the right within the control of the community or the individual but has resolved the compensation issue through a largely formal approach that deftly mixes and matches language from certain early cases to create a modern factor test with the narrowest possible scope for individual authority. While the Court has, on occasion, referred to a need "to bar Government from forcing some people alone to bear public burdens,"[284] the modern Court has neither used this supposed purpose to define the proper scope of compensation nor, on a more general level, provided a convincing explanation of how its factor test achieves this supposed purpose.

Moreover, from a critical perspective, the compensation rationale the modern Court has articulated cannot justify a court-enforced right to compensation. If we can trust the community to protect adequately the property rights of individuals, as *Nebbia* and *Carolene Products* suggest, we can presumably trust the legislature to provide compensation when appropriate. But we simply do not trust the legislature this far. Reconciling the premise of *Carolene Products* with the lack of trust articulated in the Fifth Amendment requires a recognition that the community's decision, like an individual's decision, may on occasion be flawed.

The story of the compensation issue is, therefore, a story of comparative competence: Under what circumstances do we trust the community rather than the individual to control the property? The early cases justified community control over property rights by focusing on the conflicts in rights that might otherwise arise. But the community is not perfect either. Circumstances may exist in which we do not and should not trust the legislature with exclusive control over property, a point that may underlie much of the current Court's disagreement as to the proper scope of the compensation requirement.

Under our current legislative model, interest group pluralism, we historically have not trusted the legislature when a difference in voice between competing factions has not accurately reflected a difference in

284. Armstrong v. United States, 364 U.S. 40, 49 (1960).

the underlying private values. In this situation, there is no reason to believe that the legislature's decision will reflect the public interest, rather than an agency- or information-cost mistake, and also no normative justification for permitting the winning faction to impose its will on the rest of us.

In the area of property, such a failure of voice occurs when a dispersed group and a concentrated group compete. The concentrated group's artificially amplified voice overstates the underlying private value of the measure to the concentrated group. A consistent judicial requirement of compensation whenever the property rights of the very few were taken to benefit the very many would eliminate the concentrated group's need to exercise its artificially amplified voice in the legislature. Further, such a requirement would shift the cost of the measure from the concentrated group to a dispersed group — taxpayers — and thereby replace the dispersed-concentrated conflict with a dispersed-dispersed conflict in which the competing voices would more accurately reflect the desires of society as a whole.