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# Does the Compensation Clause Burden the Government or Benefit the Owner? The Compensation Clause as Process

Joshua Ulan Galperin
*Yale Law School, Yale Center for Environmental Law and Policy*

# DOES THE COMPENSATION CLAUSE BURDEN THE GOVERNMENT OR BENEFIT THE OWNER? THE COMPENSATION CLAUSE AS PROCESS

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## INTRODUCTION

One of many ideas indelibly drawn in the legal vernacular is that "if a regulation goes too far it will be recognized as a taking."[1] This workhorse of a phrase has shouldered the bulk of the regulatory takings doctrine since the first half of the last century.[2] So much ink has been spilled in an attempt to parse the meaning of "too far," and yet the academic and judicial communities have made little progress towards a better understanding.[3] This article, therefore, seeks to divert some attention away from the meaning of "taking", and put a little more focus on the function of "compensation" by looking to the language of the Constitution and the fundamental purpose of the Takings Clause.[4]

Trying to divine the fundamental purpose of any constitutional language is a difficult task— where do we even start? One thing we can say with some certainty is that much of the practical debate about the Takings Clause surrounds compensation[5]—when must the government pay a property owner for a loss or devaluation of property? Thus, at the center of any practical analysis of the Takings Clause should be the real purpose and meaning of "compensation."[6] Not only *how much* compensation is "just," but also *when* (under what circumstances) is compensation due at all.[7] This article proposes that

1. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
2. William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813 (1998).
3. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326 (2002) (noting that after eight decades following that decision "we still resist the temptation to adopt per se rules in our cases involving partial regulatory takings, preferring to examine a 'number of factors' rather than a simple 'mathematically precise' formula.").
4. *See generally* Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993) [hereinafter *Usings*] (referring to the text and history of the Takings Clause to divine a suggested purpose of the Clause and proposing a new interpretation thereof).
5. *See* Glynn S. Lunney, Jr., *Compensation for Takings: How Much is Just?*, 42 CATH U. L. REV. 721, 722-24 (1993) [hereinafter Lunney).
6. *See id.* at 724-25.
7. *See id.* at 723.

simply because property has been "taken," whatever that means, compensation is not necessarily due.

The general thesis of this article is that the Compensation Clause of the Fifth Amendment[8] is a procedural requirement, not a substantive one, that is intended to burden the government and not benefit the property owner. Hopefully, the continual focus on what regulations amount to takings may be relegated to an academic question and the question that both governments and landowners care about—whether compensation is due—is given more importance.

Section I of this article will review two important authorities related to regulatory takings and the analysis of the Compensation Clause: *Lingle v. Chevron*[9] and *Penn Coal.*[10] Section II will introduce and explain a new approach to the intent and meaning of the Compensation Clause. Section III of this article will address the implications of this new interpretation proposed in the preceding section, including its scope and exceptions.

## I. THE FOUNDATIONS

In this section, I hope to provide foundations for my own thesis based on more credible sources than myself. I will look to the United States Supreme Court and try to demonstrate why contemporary case law supports my argument.

Take note, however, that this section may not be of interest to you. I hope to show that by separating substantive due process from takings, *Lingle*[11] took a step towards correcting the regulatory takings framework and also may have demonstrated that *Penn Coal*[12] was decided on invalid grounds. I wish to show this in order to blaze a clearer trail for the arguments that I will make in the next section. However, I do sincerely believe that those arguments will stand even in the face of *Penn Coal.* Therefore, read this subsection if it interests you, pass it by if you are willing to accept a change in takings doctrine without the extra ornamentation.

### *A.* Lingle*: Regulatory Takings and Substantive Due Process*

*Lingle v. Chevron* dealt with the respective roles of substantive due process and regulatory takings.[13] To combat high gasoline prices on

8. U.S. CONST. amend. V ("[N]or shall private property be taken for public use without just compensation.").
9. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).
10. Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).
11. Robert Dreher, *Lingle's Legacy: Untangling Substantive Due Process from Takings Doctrine*, 30 HARV. L. REV. 371, 372 (2006).
12. *See id.*
13. *Lingle*, 544 U.S. at 531 ("This case requires us to decide whether the 'substantially advances' formula announced in *Agins* is an appropriate test for determining whether a regulation effects a Fifth Amendment taking.").

the Hawaiian Islands, the state enacted legislation prohibiting oil companies from consolidating control over their retail service stations.[14] One affected oil company, Chevron, sued the state following the enactment of the new prohibitions.[15] Chevron claimed that one measure, a rent cap provision, would reduce its income by over $200,000 per year and, therefore, amounted to a taking of its property.[16]

In mounting its challenge, Chevron argued that the State's purpose in prohibiting consolidation of gas stations was to prevent high prices for consumers.[17] Chevron did not question the validity of this purpose, but it did insist that the rent cap would not advance it.[18] Chevron's argument concluded that because the regulation would not "substantially advance" a legitimate use of the police power, i.e., reducing retail prices of gasoline, it amounted to a taking of their property.[19] The District Court for the District of Hawaii agreed with this argument and found that there was a taking of Chevron's property vis-à-vis its reduced profits.[20]

When this issue reached the Supreme Court, the Court was not faced with the factual question of whether the law actually did substantially advance a legitimate purpose.[21] Rather, it took up a broader question—whether the "substantially advances" test has any role in determining if a law affects a taking.[22] Looking only to Supreme Court precedent, it was perfectly clear that the test had become an important part of the doctrine.[23] However, the circumstances in *Lingle* forced the Court to take a critical look at the logic of its precedent and at the basic language of the Constitution in order to decide exactly what the roles of substantive due process and regulatory takings were.[24]

Justice O'Connor, writing for a unanimous Court, approached the question by looking first at the meaning and purpose of regulatory takings,[25] and then, separately, by looking at the origin of the "substantially advances" test.[26] By approaching the question this way, the Court discovered two incompatible ideas. First, the idea that "property shall not be taken for public use without just compensation"[27] does

14. *Id.* at 533 (citing HAW. REV. STAT. § 486H-10.4 (1998)).
15. *Lingle*, 544 U.S. at 533.
16. *Id.* at 534.
17. *Id.*
18. *Id.*
19. *Id.*
20. Chevron U.S.A. Inc. v. Cayetano, 57 F. Supp. 2d 1003, 1014 (D. Haw. 1998).
21. *Lingle*, 544 U.S. at 532.
22. *Id.*
23. *See id.* at 540; *see also* Pa. Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) (discussing the limited public interest of the law in that case).
24. *Lingle*, 544 U.S. 528.
25. *Id.* at 536.
26. *Id.* at 540.
27. U.S. CONST. amend.V.

not mean that taking property for public use is unconstitutional; it merely means that the government must compensate if there is a taking.[28] Second, with respect to the "substantially advances a legitimate state interest" test, the Court stated that it is:

> a means-ends test: It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause.[29]

When a law affects a taking, compensation is due.[30] When a law "runs afoul" of the Constitution, it is invalid and cannot be enforced.[31] Thus, if a law does not pass the "substantially advances" test, it cannot be a taking because it is not valid law.[32] This is the logic behind the holding in *Lingle*, but the holding is simply that the "substantially advances" test is a substantive due process test, not a valid takings test.[33]

### *B.* Penn Coal: *What Was Really Behind the Birth of Regulatory Takings?*

If substantially advancing a legitimate state interest "is not a valid method of discerning whether private property has been 'taken' for the purposes of the Fifth Amendment,"[34] then what was the basis of *Penn Coal*? This storied and revered case is the foundation of regulatory takings, yet all we take from it is two short words: "too far." In this subsection, I hope to dust off this soot-covered case and suggest that, in the wake of *Lingle*, this case has barely a pillar of coal on which to stand.

Pennsylvania Coal Company ("Penn Coal") owned surface and mineral rights to a parcel of land.[35] In 1878, Penn Coal sold the surface rights of that parcel but expressly retained the right to mine all the coal under the surface.[36] The buyer also took the parcel "with the risk, and waive[d] all claim[s] for damages that may arise from mining out the coal" beneath the land.[37]

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28. *Lingle*, 544 U.S. at 536.
29. *Id.* at 542.
30. *Id.* at 538.
31. *See id.* at 543 (stating that when a law is impermissible, "[n]o amount of compensation can authorize such action. . .").
32. *See Lingle*, 544 U.S. at 543.
33. *Id.* at 548.
34. *Id.* at 542.
35. Pa. Coal Co. v. Mahon, 260 U.S. 393, 412 (1922).
36. *Id.*
37. *Id.*

In 1921, the state of Pennsylvania passed the Kohler Act, which prohibited any coal company from mining under property in any way that would remove all coal and cause a home to collapse.[38] Since, after the 1878 sale, Penn Coal owned only mineral rights in the parcel in question and a house on the surface was still owned by a private individual, the Act would not allow Penn Coal to fully exploit its mineral rights because doing so would cause damage to the home.[39] This prohibition limited Penn Coal's ability to extract the full value from its mineral property, and so it sued the State.[40]

When this case reached the United States Supreme Court, the Court first noted that "the statute is admitted to destroy previously existing rights of property and contract."[41] The Court thus stated the question as "whether the police power can be stretched so far."[42] This is the first indication that the Court was not setting up a strong foundation for regulatory takings. As we now understand it, the general test for regulatory takings is whether a regulation is "so onerous that its effect is tantamount to a direct appropriation or ouster."[43] By starting with a question of police power, the *Penn Coal* Court was not giving paramount importance to "the magnitude or character of the burden" or even how the "burden is distributed."[44] Rather, the Court was beginning with a question of the Act's basic permissibility. But as *Lingle* made quite clear, "[t]he Takings Clause presupposes that the government has acted in pursuit of a valid public purpose."[45] And so, looking merely at the question presented, *Penn Coal* does not begin with a strong basis in what has become known as regulatory takings doctrine.[46]

It is not only the question presented, however, that demonstrates the problems of *Penn Coal*'s reasoning. What a further reading of *Penn Coal* demonstrates is that the Court was undertaking a balancing test; it was balancing the public purpose against the extent of the harm done to the property interest. The Court states: "The extent of the public interest is shown by the statute to be limited . . . . On the other hand the extent of the taking is great."[47]

38. *See id.* at 412-13 (citing Kohler Act, 1921 Pa. Laws 1198 (1921)).
39. *Mahon,* 260 U.S. at 412-13.
40. *See id.* at 413.
41. *Id.*
42. *Id.*
43. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005).
44. *Id.* at 542.
45. *Id.* at 543.
46. *See Mahon,* 260 U.S. at 413.
47. *Id.* at 413-14. Further, it is worth quickly discussing what I imagine to be the etymology of the phrase "on the other hand." Though this is probably not a surprise, the physical act of placing pros and cons in one hand or the other is a substitute (or perhaps a metaphor) for a weight scale (picture the scales of justice if you will). The fundamental purpose (since I have already used that phrase *ad nauseam*) of a scale is to balance one thing against an-

The *Penn Coal* Court dedicated quite a bit of energy towards demonstrating that the Kohler Act did not serve a legitimate state interest.[48] For instance, the Court found that "damage to such a house is not a public nuisance," and, therefore, the protection of such a house is not a legitimate state interest.[49] Continuing this line of argument, the Court also found that the Act "is not justified as a protection of personal safety.[50] That could be provided for by notice."[51] Finally, and perhaps most tellingly, the Court found that "[t]he extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal."[52]

It is important to keep in mind that *Lingle*'s condemnation of the "substantially advances" test is not only a denunciation of the test as it applies to the *effectiveness* of the law. The "substantially advances" test is merely a shortened name for the substantive due process test, that is, it "substantially advances *a legitimate state interest.*"[53] The first half, "substantially advances," is a question of effectiveness, while the second half, "a legitimate state interest," is a question of police power.[54] *Lingle* strikes the entire test from the takings analysis.[55] Thus, when the Court in *Penn Coal* looks at how far the police power can be stretched, it is undertaking a substantive due process analysis, not a takings analysis.

The *Penn Coal* Court's focus on the public interest, police power, or state interest, however it is phrased, is a focus on substantive due process, and on an area of reasoning that *Lingle* has since ruled to be separate and apart from regulatory takings.[56] In fact, it is somewhat of a surprise that *Penn Coal* has been viewed as such a strong underpinning for regulatory takings when even that Court emphasized that "the act cannot be sustained as an exercise of the police power."[57] If

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other. And so, when the Court considers one fact and then a second fact "on the other hand" it is *necessarily* applying a balancing test. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 302-03 (2002) ("Although this Court's physical takings jurisprudence, for the most part, involves the straightforward application of per se rules, its regulatory takings jurisprudence is characterized by 'essentially ad hoc, factual inquiries,' (citation omitted) designed to allow 'careful examination and weighing of all the relevant circumstances'. . . ."). On the other hand, if "necessarily" is too strong a word, you might only call this a "rule of thumb".

48. *Mahon*, 260 U.S. at 413-14.
49. *Id.* at 413.
50. *Id.* at 414.
51. *Id.*
52. *Id.* at 413-14.
53. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 528, 540-41, 548 (2005).
54. *Id.* at 540-42.
55. *Id.* at 548.
56. *Id.* at 540-42.
57. *Mahon*, 260 U.S. at 414.

the act was not a valid exercise of police power, then the act should have been overturned. Recall that *Lingle* stated,"[t]he Takings Clause presupposes that the government has acted in pursuit of a valid public purpose."[58] Therefore, if the act were overturned, Penn Coal would be permitted to mine all of its coal.[59] If Penn Coal could mine its coal, its property rights were not limited.[60] If its property rights were not limited, then no question of takings would arise because no property was taken.[61]

With all this in mind, it certainly seems that *Lingle* implicitly overrules *Penn Coal*. *Lingle* explicitly holds that substantive due process and takings are two distinctly different areas of law with different consequences.[62] And since *Penn Coal*'s reasoning is weakened, if not destroyed, it might now be easier to accept that the current understanding of regulatory takings, which stems from this uncertain decision, is not well grounded in the case law or in the Constitution.

Before I proceed, I will try to state exactly what I hope you have taken from this section: the takings doctrine is very confusing. *Lingle v. Chevron* should have been an important step towards clarity, therefore it should not be overlooked. The value and precision of *Lingle* comes from the Court's review of the logic behind the Takings Clause. Moreover, *Lingle*'s holding seems to draw into question the reasoning behind *Penn Coal*, the case on which the doctrine of regulatory takings is based. If I have made a convincing argument that even *Penn Coal* does not stand on valid Constitutional footing, then perhaps there is good reason to reassess the common understanding of regulatory takings.

## II. COMPENSATION AS PROCEDURAL DUE PROCESS

The Compensation Clause of the Fifth Amendment has been read as a command to compensate any owner whose private property is taken for public use.[63] However, I will argue in this part that the Compensation Clause is not a substantive command, but is rather intended to be one aspect of procedural due process. The Clause is intended to act as a procedural safeguard that will be a barrier for government. It slows the act of condemnation, allows more consideration by the government actors, and functions as a computing device through which government can calculate its action not only based on its desire for property but on financial grounds.[64]

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58. *Lingle*, 544 U.S. at 543.
59. *See Mahon*, 260 U.S. 393.
60. *See id.*
61. *See id.*
62. *Lingle*, 544 U.S. at 536.
63. *Id.* at 536-38.
64. Mark Fenster, *The Takings Clause, Version 2005: The Legal Process of Constitutional Property Rights*, 9 U. PA. J. CONST. L. 667, 709 (2007) ("Judicial en-

In other words, compensation helps protect property because of the cost and the burden it imposes on government, not because of the benefit it provides to an individual whose property the government has taken.[65]

In this Section, I will lay out three arguments for this view of the Compensation Clause. In Subsection A, I will demonstrate that the context of the Clause within the Fifth Amendment establishes a procedural, rather than substantive, command. In Subsection B, I will lay out the historical arguments for viewing the Clause in this manner. Finally, in Subsection C, I will lay out the logical arguments that help to pull this thesis together.

### *A. The Constitutional Basis*

A simple reading of the Fifth Amendment is the first indication that the Compensation Clause is about procedure.[66] The Fifth Amendment protects individual liberties through its five major clauses, which are safeguards in the form of outright prohibitions or protective procedures.[67] These safeguards are: (1) the grand jury indictment; (2) the prohibition of double jeopardy; (3) the prohibition on self-incrimination; (4) the Due Process Clause; and (5) the Takings Clause.[68]

In reading these safeguards it is easy to distinguish between those that are complete prohibitions and those that are mere procedural safeguards. The two outright prohibitions, placed next to one another, each contain a single command: "nor shall any person be subject for the same offence to be twice put in double jeopardy of life and limb, nor shall be compelled in any criminal case to be a witness against himself."[69] The rest of the amendment deals with procedural safeguards, which are written in an almost mathematical formula: *A* shall not happen without *P*, where "*A*" is the government action that deprives an individual of liberty or property and "*P*" is the procedural safeguard.[70] Thus, "[n]o person shall be held to answer for a capital,

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forcement of the 'public use' and 'just compensation' clauses can serve as external checks that force such takings to be productive and wealth-enhancing.").

65. *See* Jones Truck Lines, Inc. v. Price Rubber Corp., 182 B.R. 901, 909 (M.D. Ala. 1995).
66. *See* U.S. CONST. amend. V; *see also* BLACK'S LAW DICTIONARY 1896 (9th ed. 2009) (Procedural Law is defined as "[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves.").
67. U.S. CONST. amend. V.
68. *Id.*
69. *Id.*
70. *See* Mathews v. Eldridge, 424 U.S. 319 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."); *see generally* U.S. CONST. amend. V.

or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[71] The "held to answer" is the government action, and the indictment is the procedural safeguard. Likewise, "nor shall be deprived of life, liberty, or property" encompasses a number of government actions that shall not happen "without due process of law."[72] Finally, for our purposes, "nor private property be taken for public use," is the government action, "without just compensation," is the procedural safeguard.[73]

Each of the procedures noted in the Fifth Amendment are designed as safeguards against a deprivation of property or liberty.[74] This is an important point because these safeguards are not individual ideas existing because they are somehow intrinsically important. Rather, they were crafted by the Framers of the Constitution in order to protect individuals from arbitrary or thoughtless deeds by unaccountable government agents.[75] The Compensation Clause is not exempt. The Clause is an intentional procedure designed to protect against arbitrary or thoughtless condemnation of property.[76]

This might not be a drastically different view of the Clause than you previously held. Still, as will be discussed in Section III, understanding that the compensation requirement is a constitutional *procedure* has consequences that do not receive much attention in takings doctrine.

### *B. The Historical Basis*

In order to better support the assertion that the compensation is a procedural requirement, I will also draw your attention to the historical context of the Fifth Amendment's Compensation Clause. Richard Epstein has said he "fear[s] that history offers us too much information, without a means of sorting it out. The best evidence of those historical views that won out are those found in the Constitution itself."[77] In order to narrow our focus, I started with the triumphant

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71. U.S. CONST. amend. V.
72. *Id.*
73. *Id.*
74. *See* United States v. Chi., Milwaukee, St. Paul & Pac. R.R. Co., 282 U.S. 311, 327 (1931) ("[P]rivate property shall not be taken for public use without just compensation and that no person shall be deprived of life, liberty or property without due process of law.").
75. *See* Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot., 130 S.Ct. 2592, 2602 (2010) ("[T]he Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking.").
76. *See* Jones Truck Lines, Inc. v. Price Rubber Corp., 182 B.R. 901, 909 (M.D. Ala. 1995).
77. Richard A. Epstein, *History Lean: The Reconciliation of Private Property and Representative Government*, 95 COLUM. L. REV. 591, 592 (1995) [hereinafter Epstein].

text, but now I now turn to history to support, rather than prove, my thesis.

James Madison authored the Compensation Clause.[78] During the drafting of the entire Constitution, and later the Bill of Rights, a ubiquitous tension between liberalism (focused on individual rights) and republicanism (focused on the common good through strong government) shaped the drafters' ideas.[79] With the Compensation Clause, Madison reached a compromise between the two philosophies.[80] The Compensation Clause does not prohibit the taking of private property as the liberal philosophy may have preferred.[81] Nor does it allow unencumbered or uninhibited taking of property as the republican philosophy may have preferred.[82] Rather, the Clause protects private property without prohibiting condemnation.[83] But how, exactly, did Madison intend for the Clause to protect property?

The Takings Clause was designed to protect private property by allowing its condemnation only for public use and by requiring compensation.[84] According to Madison, the purpose of compensation was not limiting in the way that public use is limiting.[85] Rather, compensation, as a mandatory procedure, serves some less direct purposes. Chiefly, Madison wrote that "[p]aper barriers have a tendency to impress some degree of respect."[86] According to Madison, "paper barriers" were less than prohibitions but sufficient to limit government action.[87] One can see that a paper barrier and a procedural safeguard are, therefore, one and the same.

The Compensation Clause is a paper barrier because it is not a prohibition of or even a limitation on takings. Rather, the Compensation Clause is a paper barrier that serves at least three purposes enumerated by Madison.[88] Madison wrote that the Clause is: (1) a basis for judicial review—the courts may, for example, review compensation to assure that it is just; (2) a shaper of public opinion—the cost of condemnation will temper the desire of a state to take property; and (3) a tool for education—the process of calculating and negotiating costs

78. *E.g.*, William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L. J. 694, 694 (1985) [hereinafter Treanor].
79. *Id.*
80. Epstein, *supra* note 77, at 594.
81. *See* Treanor, *supra* note 78.
82. *See* U.S. CONST. amend. V; *see also* Treanor, *supra* note 78.
83. Treanor, *supra* note 78, at 712.
84. *E.g.*, Epstein, *supra* note 77, at 593.
85. Treanor, *supra* note 78, at 712-13.
86. James Madison, Speech Proposing the Bill of Rights (June 8, 1789), *in* THE PAPERS OF JAMES MADISON 197, 207 (Charles F. Hobson & Robert A. Rutland eds., vol. 12 1979) [hereinafter PAPERS OF JAMES MADISON].
87. *Id.* at 204-05.
88. Treanor, *supra* note 78, at 711-13.

can alert the public, and the condemning authority, to the true value of taking private property.[89]

By designing a mechanism that would protect property through procedure, rather than prohibition, Madison pleased both liberals and republicans.[90] However, the compromise is not one that is much respected today. The Compensation Clause, when viewed as merely a payment for the sake of payment, is often considered weak and insufficient.[91] If the historical understanding of the Clause is better understood, it may diminish some contempt for the Clause. It will also better resolve an important conflict in the Compensation Clause. That conflict, discussed in the next Subsection, is between the purpose of the Clause and the value of compensation.

### *C. The Logical Basis*

The conflict that I hope to resolve in this Subsection is this: compensation for property, when viewed as a substantive command rather than a procedural safeguard, is not the same as protection of property. This is not a matter of pure textual interpretation or historical understanding. It is a matter of reason and logic. Therefore, the reason and logic analysis has waited until the end of this Subsection, even though, to my mind, it is the most compelling reason for a new view of the Compensation Clause.

Without intending any disrespect to the Framers, the Constitution is not primarily a logical document. The clear meaning and historical context of language in the Constitution must be a more authoritative basis for legal argument than logic. If logic alone demonstrates a failing in the Constitution, then the result should probably be an amendment, but not a construction that does violence to the language and history of the document. Nevertheless, when logic comports with language and history, it should be viewed as an additional source of support for the proffered construction. In this case, text and history provide the basis for an argument, but logic bestows the most powerful substantiation.

Money is, of course, a form of property, but from an economic and a practical perspective, money is merely a store of value that simplifies the process of exchanging property. Presumably, when one speaks of protecting property, one does not mean to protect just the value of property, one means to protect the nature of property or a specific

89. PAPERS OF JAMES MADISON, *supra* note 86, at 207; *see also* Treanor, *supra* note 78, at 710-13.

90. *See* Treanor, *supra* note 78.

91. Gideon Kanner, *"[Un]equal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065, 1088-89 (2007) [hereinafter Kanner].

piece of personal or real property.[92] When I speak of the nature of property, I mean the so-called fundamental rights in property that are often recognized.[93] Physical possession of property, for example, has been called "the most cherished prerogative, and the most dramatic index, of ownership of tangible things."[94] Likewise, Professor Michelman captures the general understanding that it is "self evident" that property is more than just value.[95] It is, rather, the ownership of "several discrete 'things' whose destiny [the owner] controls."[96] Finally, though this is not an exclusive list of the several natures of property, Professor Michelman also writes that the right to use property for the generation of income in an "economically beneficial or productive way " is fundamental.[97]

To fully follow the remainder of this Subsection, there is one simple premise on which we must agree: that the purpose, or at least *a* purpose, of the Compensation Clause is to protect private property.[98] This premise does not seem to me to be a very controversial point, but I want to be explicit that I am working from within this assumption.

Now consider the word "protect." If we look at property, as courts and commentators have, through the lens of fundamental rights, we must realize that compensation is not protection; compensation is

92. This economic view of property is certainly valid. However, it does not agree with any interpretation of the Compensation Clause. *See generally* Lunney, *supra* note 5, at 721-22. Consider this: from a purely economic standpoint, compensation, if complete, is more than just a protection of property, it is the property itself, transformed, into a new store of value, the dollar. Property, whether liquid, real, or personal is still property. *See generally* Phillips v. Wash. Legal Found., 524 U.S. 156 (1998). Thus, from the pure economic standpoint, the Compensation Clause is more than a protector of property; it is a transformer of property. Under this view, property cannot be taken, and this Clause is really not a Takings Clause, but a Transformation Clause. That, alone, would be an imaginable interpretation of the Constitution, the Compensation Clause exists to assure that property is never taken, that it is merely transformed. However, two additional factors demonstrate that this view is untenable. First, to many people, and historically, property, land in particular, is more than its worth in dollars, it is the source of all their wealth and independence. Kanner, *supra* note 91. It is also a set of fundamental rights that go beyond mere value. (More on this in the text). Phillips v. Wash. Legal Found., 524 U.S. 156, 170 (1998). Second, there would be no need for the limitation of the Public Use Clause if property were merely being transformed. If the Framers saw the Compensation Clause as forcing a mere transformation of property then there would have been no need for the limitation that the government only take property for public use because there would be no harm done to a person whose property is not taken, but merely transformed.

93. *Usings*, *supra* note 4, at 1097.

94. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1228 (1967).

95. *Id.* at 1234.

96. *Id.*

97. *See id.* at 1167-68; *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015-16 (1992).

98. *E.g.*, Treanor, *supra* note 78, at 694.

merely consolation.[99] Compensation only pays an owner for the destruction of his rights to exclude, control his property's destiny, or earn money through his property.[100] Put in terms of first year property courses, the owner is paid when one of the sticks in his bundle is taken, but the stick, in fact, is still taken.[101] Compensation does not protect that property in the way that a militia, for example, may actually help an owner maintain fundamental control over his property, or in the way that a Constitutional prohibition would fully prevent the state from taking over property.[102] Compensation is not a protection in itself. By way of an analogy, if you purchase a china doll, the original owner, through the purchase price, has, of course, been compensated. However, you may then take a hammer or an angry bull to the doll and the compensation has done nothing to protect that actual piece of property even though the previous owner was fully compensated. In a transaction of real property, the land will probably still exist after the government takes possession, but the "private" aspect of "private property" has been destroyed, and compensation alone has failed to protect that private interest.[103]

Realizing that compensation is only a consolation for taking away property rights, it becomes clear that compensation, as we currently recognize it, does not protect private property.[104] This is where the conflict between purpose and perception arises. However, compensation does protect private property when it is viewed as a procedure to help stop or slow condemnation. That is, when it is viewed as a paper barrier that serves any or all of the purposes Madison intended.[105] When this view is accepted, the seeming conflict is rectified: government is slowed and possibly dissuaded from taking the property and

99. *E.g.*, Epstein, *supra* note 77, at 594 ("[T]he state's ability to force the surrender of property, but by purchase and not by expropriation, negates the holdout power of the individual.").
100. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
101. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-36 (1982).
102. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536 (2005) ("[T]he Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.").
103. *See* Gideon Kanner, *"Fairness and Equity" or Judicial Bait-and-Switch? It's Time to Reform the Law of "Just" Compensation*, 4 ALB. GOV'T L. REV. 38, 39 (2011) ("[T]he time is at hand to refocus on the long-festering problem of inadequacy of 'just compensation' payable when private property is taken for public use.").
104. Of course, property rights advocates have realized this, and so, they have sought changes in the law that would make it more difficult to take property even with compensation. *See* David King, *Eminent Domain Changes Seek to Limit State's Power to Seize Property* GOTHAM GAZETTE (Feb. 04, 2010), http://www.gothamgazette.com/article/albany/20100204/204/3170; *see also* Benjamin Spillman, *Bid to change eminent domain law gains traction*, LAS VEGAS REV. J. (Feb. 17, 2011, 11:44 AM), http://www.lvrj.com/news/push-to-change-eminent-domain-law-gains-traction-116418024.html.
105. *See* Treanor, *supra* note 78, at 710.

the property is therefore protected.[106] As a matter of fact, this conflict is not the only thing that is rectified, so too is the entire riddle of regulatory takings.

## III. THE IMPLICATIONS: WHY SOME REGULATORY TAKINGS DO NOT REQUIRE COMPENSATION

If I have convinced you that the Compensation Clause of the Fifth Amendment is a matter of procedural due process, then the next question to ask is what difference it will make to the law generally. It is not merely a change of understanding; on the contrary, it will change the doctrine of takings. It is well established that legislatures are not beholden to the due process standards in the same way as executive and judicial actors.[107] "When the legislature passes a law which affects a general class of persons, those persons have all received procedural due process—the legislative process."[108] With respect to takings law, this means that the Compensation Clause, as a matter of due process, does not apply to legislative acts, which are considered regulatory takings.[109] The legislative process serves as due process, meaning that due process simply does not apply to legislatures; therefore, the Compensation Clause does not apply to legislative activity.[110] With that in mind, so-called "regulatory takings" have a limited basis in the Takings Clause.

Even though it is well settled law that legislatures are not obligated by due process,[111] in the next Section I will still seek to further support this fact in order to drive home the conclusion that compensation for many regulatory takings is not constitutionally mandated.

### A. *Legislative Due Process*

Lord Coke explained that the words "due process of law" are meant to "guarantee[ ] the rights of the subjects against the oppression of the crown."[112] Reference to "crown" is exceedingly important, because it highlights a distinction between the decrees of a royal executive on the one hand and the "customary laws of the English people, or laws enacted by the Parliament" of which the English people "were

106. *See* Jones Truck Lines, Inc. v. Price Rubber Corp., 182 B.R. 901, 909 (M.D. Ala. 1995).

107. Ronald D. Rotunda & Jone E. Nowak, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §17.8(c) (4th ed. 2011) [hereinafter Rotunda].

108. *Id.*

109. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 323-24 (2002).

110. *See id.*; *see also* Rotunda, *supra* note 107.

111. *See* Davidson v. New Orleans, 96 U.S. 97 (1877); *see also* Rotunda, *supra* note 107.

112. Davidson, 96 U.S. at 101.

a controlling element," on the other hand.[113] Protection against the rather undemocratic crown was seen as a necessary protection, whereas protection against the Parliament or protection from customary laws of the land was not so imperative because both of the latter were laws that the people, either directly or through representatives, shaped themselves.[114]

> It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concessions that neither their lives nor their property should be disposed of by the crown expect as provided by the law of the land. . . . It was not in their mind[ ] to protect themselves against the enactment of laws by the Parliament of England.[115]

In other words, having no need for protection from themselves, there was no intention of having procedural safeguards apply to the laws of the land.[116]

Turning to a more modern history of the Unites States, there is an abundance of evidence that due process, particularly with respect to takings, does not apply to legislative actions.[117] Dean Treanor notes, for instance, that in all the early state constitutions that addressed takings, consent was required before property could be condemned.[118] However, that consent could come from the property owner or the legislature.[119] Whether true or not, the legislature was, and is, assumed to be a protector of the people it represents and, through elections, it is accountable to those same people.[120] Because legislatures were representative and highly accountable, special procedural protections were only needed to defend against encroachments by the less representative and less accountable executives.[121]

Case law is also rife with recognition that procedural due process does not apply to legislatures, at least when the legislative act in ques-

113. *Id.* at 102. This sentence, you will now certainly understand, is a balancing between the executive and the legislature because it uses the phrase "on the other hand." If you do not understand, see note 36.
114. Davidson, 96 U.S. at 102.
115. *Id.*
116. *See id.* In fact the Barons had already established for themselves sufficient control over the law making process that they had no need for procedural safeguards. The early feudal courts, a precursor to English Parliament, was entirely composed of chamber of the very Barons who opposed King John's distraint. WILLIAM STUBBS, LECTURES ON EARLY ENGLISH HISTORY 346-47 (Arthur Hassall, 1906).
117. *See* Treanor, *supra* note 78, at 698.
118. *See* Treanor, *supra* note 78, at 698.
119. *See* Treanor, *supra* note 78, at 698.
120. *See* Treanor, *supra* note 78, at 700.
121. *See* Treanor, *supra* note 78, at 700.

tion is generally applicable.[122] This distinction begins with *Londoner*[123] and *Bi-Metallic.*[124]

In *Londoner v. Denver,* Plaintiffs were homeowners who had been assessed a tax to raise funds for improving the street in front of their homes.[125] The Board of Public Works undertook the assessment, which applied only to a set of specific landowners who would benefit from the improved roadway.[126] The Plaintiffs complained that the tax was invalid because they were not notified of either the assessment or a hearing to contest the results.[127] The Plaintiffs argued that the failure to grant notice and a hearing was a denial of their due process.[128] The Court agreed.[129] Justice Moody, for the Court, wrote:

> where the legislature of the State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it should be levied, and of making its assessment and apportionment, due process of law requires that . . . the taxpayer shall have an opportunity to be heard.[130]

Under this holding, there are two problems with the tax in question. First, it was set by a "subordinate" body, that is, a body that is not sitting as a representative of the people, but rather, as a representative of the executive responsible for tax collection.[131] The first problem, succinctly, was that a non-legislative body set the tax.[132] Second, the decision applied only to a limited number of individuals, not because of the narrow scope of the act, but because the body specifically selected the very individuals to whom it would apply.[133] The first *Londoner* principal is the basic and important idea on which this article is based: legislative process is due process while executive action requires additional limits.[134] The second principal, dealing with the generality of a law, however, adds a complication to the very idea that legislatures are immune from due process requirements.[135] I will deal with this second principal in more detail in Part B.

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122. Londoner v. City and County of Denver, 210 U.S. 373 (1908); Bi-Metallic Inv. Co. v. Bd. of Equalization of Colo., 239 U.S. 441 (1915).
123. *Londoner,* 210 U.S. at 373.
124. *Bi-Metallic Inv. Co.,* 239 U.S. at 441.
125. *Londoner,* 210 U.S. at 374.
126. *Id.* at 375.
127. *Id.* at 385.
128. *Id.*
129. *Id.* at 386.
130. *Id.* at 385.
131. *Londoner,* 210 U.S. at 385-86.
132. *Id.*
133. *Id.* at 385.
134. *Id.* at 385-86.
135. *See id.* at 375, 384.

*Bi-Metallic Inv. Co. v. Bd. of Equalization of Colorado* validates the *Londoner* line of reasoning.[136] In that case, the State Board of Equalization for the state of Colorado raised their valuation of every single property in Denver.[137] Relying on *Londoner*, the Plaintiff objected that sufficient procedural safeguards were not in place.[138] The Court framed the question in this way: do "all individuals have a constitutional right to be heard before a matter can be decided in which all are equally concerned?"[139] Thus, the Court recognized that this case was not exactly the same as *Londoner* because the assessment affected the entire city equally; there was no individual selection of properties to be burdened.[140] The Court then held:

> Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. . . . Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.[141]

Through this holding the Court recognized both principles stated in *Londoner*. First, specific selection can lead to injustice,[142] and due process is designed to assure that when specific selection takes place, there are reasonable safeguards.[143] In *Bi-Metallic*, the act applied to everybody, so there was no need for the additional safeguard of a hearing.[144] The Court also recognized that the people have power over elected officials insofar as elected officials can be voted out.[145] However, in *Bi-Metallic*, as in *Londoner*, it was not a legislative body that imposed the tax.[146] Thus, *Bi-Metallic* stands for the idea that a general act may be spared from due process requirements, whether or not it is legislatively enacted.[147] We may also understand that legislatures, as accountable bodies, are generally immune.[148]

If an individual claims that a government action is a taking, or if a government body is asking themselves whether an action will be a taking, the practical analysis should hinge not on whether the action is a taking, but whether compensation will be due. There is no reason to proceed through a treacherous taking analysis if we can determine at

136. Bi-Metallic Inv. Co. v. Bd. of Equalization of Colo., 239 U.S. 441 (1915).
137. *Id.*
138. *See id.* at 444 (complaining, as the plaintiffs in *Londoner* did, that there was no opportunity to be heard before the assessment of their land).
139. *Id.* at 445.
140. *Id.* at 445-46.
141. *Id.*
142. *Bi-Metallic Inv. Co.*, 239 U.S. at 445-46.
143. *See id.*
144. *Id.* at 446.
145. *Id.* at 445.
146. *Id.* at 443. Londoner v. City and County of Denver, 210 U.S. 373, 375 (1908).
147. *Bi-Metallic Inv. Co.*, 239 U.S. at 445.
148. *Id.*

the outset that compensation will not be due even if there has been a taking. Thus, the following elements must be answered to determine whether compensation is due: (1) is the actor un-elected; (2) is the act individually selective; and (3) is the act a taking under current takings standards? Only if all three of these elements are answered affirmatively is takings compensation due. Thus, if the first and second elements are answered in the negative, the final and most complicated element need not be answered at all. If the actor is elected and the act is broadly applied, not individually selective, then there is no need to worry about whether the act "goes too far" and amounts to a taking because, even if it is a taking, the due process of compensation is not due. Of course, it would be too easy to say that the first two elements are completely black and white. They are only relative to the difficulty of deciding whether something is a taking under current doctrine. We can easily answer whether an actor is elected or not, but there is some ambiguity as to when legislative acts involve specific selection.

### *B. Scope and Exceptions*

Recall from the last Subsection this quotation: "[w]hen the legislature passes a law which affects a general class of persons, those persons have all received procedural due process—the legislative process."[149] This is not new. It is well understood that the "Supreme Court long ago established that when the legislature extinguishes a property interest via legislation that affects a general class of people, the legislative process provides all the process that is due."[150] I am making no new arguments about due process in the legislative realm, but I am making a new argument about what should be considered part of due process. So, if my thesis about the Compensation Clause is accepted, and this rule of legislative due process is understood, one must recognize that legislation depriving individuals of property, in most cases, does not require the procedural safeguard of compensation. However, in some cases a legislature may pass a law that does not affect a general class of people and there are cases when non-legislative or non-elected bodies are responsible for depriving the owner of that property. When either of these possibilities occurs, process—specifically compensation—is due.

Ultimately, this caveat does not change the fundamental argument that I have presented in this article. This general issue deserves brief comment, however, since the distinction between general and specific legislation is not crystal clear. Likewise, the legislative process at a local level, where many takings conflicts originate, is rarely as straightforward as it is at the state and federal level. Thus, a comment about

149. Rotunda, *supra* note 107.
150. McMurtray v. Holladay, 11 F.3d 499, 504 (5th Cir. 1993).

the local land use process and a review of several historic takings cases to assess the specificity of the government act are useful.

When legislation applies to a large group of individuals, the compensation safeguard is irrelevant.[151] When legislation applies very narrowly, to one or only a few specific individuals, compensation might be due.[152] With respect to the local governing process, the rub is that the boards and commissions responsible for making decisions about private property are often intertwined and sometimes unelected.[153] Councils, boards of aldermen or selectmen, zoning commissions, zoning boards of appeals, planning boards, wetland boards, and coastal commissions are just a few of the possible local bodies that may be responsible for making significant decisions about use of private property. In any given jurisdiction, any combination of these bodies may be elected or appointed. It should go without saying that the primary safeguard of the legislative process is the electoral process.

For example, consider a decision by an unelected park commission that the east side of town should become a park. That decision might amount to a taking, no matter how legislative the decision, no matter how broad and prospective, compensation might be due because the opportunity to vote out the decision makers does not exist. Do not, however, assume that actions of an unelected body will automatically require compensation. If the decision maker is not insulated from due process, than we must move to the standard takings analysis. That is, compensation is still only due if there has actually been a regulatory taking.[154] Turning an entire side of town into a park probably will amount to a taking, and as the decision maker is not elected, compensation would most likely be due. On the other hand, if the decision turns one municipally-owned lot into a landfill, despite the unelected actor, the neighbors probably do not have a legitimate takings claim based on the landfill-related diminution in property value.[155]

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151. *Londoner*, 210 U.S. at 385-86. *Bi-Metallic Inv. Co.*, 239 U.S. at 445-46.

152. *Londoner*, 210 U.S. at 385-86. *Bi-Metallic Inv. Co.*, 239 U.S. at 445-46. This situation assumes that the elected body even has the authority to pass highly specific or selective legislation. For instance, at the federal level, bills of attainder, and bills of pains and penalties are constitutionally prohibited. U.S. CONST. Art. I, § 9. United States v. Brown, 381 U.S. 437, 441 (1965).

153. Rotunda, *supra* note 107 at §17.8(c) ("[A]n administrative agency may make decisions that are of a legislative or general rulemaking character. . . [h]owever when the agency makes rules that might be termed adjudicative in that they affect a very defined group of interests, then persons representing those interests should be granted some fair procedure to safeguard their life, liberty or property. . .").

154. U.S. CONST. amend. V.

155. *See, e.g.*, Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 330 (2002) (quoting *Lucas v. South Carolina*, 505 U.S. 1003, 1019 (2002) ("The categorical rule that we applied in *Lucas* states that compensation is required when a regulation deprives an owner of "all economically beneficial uses" of his land. Under that rule, a statute that "wholly eliminated the value" of Lucas' fee simple title clearly qualified as a

Conversely, an elected body, the zoning board of appeals, may make a very specific decision to deny a variance. If this amounts to a taking, compensation will be due, not because of the nature of the board, which in this example is elected, but because the decision, as with any variance, is a narrow one, applying to one parcel of land and one landowner. When this is the case, there is insufficient public interest to arouse the democratic process, and hence, that legislative safeguard is not effective; compensation is due.

Now moving back to the federal government, there are a number of historic cases that provide good illustrations of the actor-scope paradigm. Because the history of takings analysis is so muddled, it is often difficult, if not impossible, to ascertain what factors are determinative parts of a court's analysis. Thus, we cannot say that the following cases were necessarily decided because of the nature of the actor or the scope of the action, but we can at least regard these cases as useful examples for parsing out, in particular, which government acts are individually selective and which are not.

*Mugler v. Kansas* is a classic case of prohibition.[156] When the Kansas legislature passed a law prohibiting the manufacture and sale of all intoxicating beverages, Mr. Mugler was forced to close the doors of his brewery.[157] This is a very simple case of a general law passed by an elected actor.[158] The offending regulation came directly out the Kansas legislature and was directed very broadly at "anyone, directly or indirectly" who would "sell spirituous, vinous, fermented, or other intoxicating liquors. . ."[159] Mugler was not specifically selected as a target for this prohibition.[160] The Court in *Mugler* found that there was not a taking of his property, and that decision was based in part on the fact that the people of the state deemed an "absolute prohibition" through their "chosen representatives."[161] There is no telling what the outcome might have been had this case revolved around a partial prohibition (perhaps only against beer manufacturers who sold unpalatable mass-produced light lagers) and if that prohibition were promulgated by an unelected executive body (the elite "Better Beer Task Force"). As it happens, this case involves a very general act

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taking. But our holding was limited to "the extraordinary circumstance when no productive or economically beneficial use of land is permitted." The emphasis on the word "no" in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%. Anything less than a "complete elimination of value," or a "total loss," the Court acknowledged, would require the kind of analysis applied in *Penn Central. Lucas,* 505 U.S. at 1019-1020, n. 8").

156. Mugler v. Kansas, 123 U.S. 623 (1887).
157. *Id.* at 656.
158. *Id.*
159. *Id.* at 656-57 *citing* Gen. Stat. Kansas, 1868, c 35 § 5.
160. *Mugler,* 123 U.S at 623.
161. *Id.* at 662.

passed by an elective body and in the end, no taking was found and no compensation was due.[162]

*Hadacheck v. Sebastian*, in which all brick manufacturing was legislatively prohibited,[163] *Miller v. Schoen*, in which the Virginia legislature ordered the destruction of all red cedar trees, in proximity to apple trees, and infected with a certain rust,[164] and *Goldblatt v. Hempstead*, in which dredging and pit excavation were prohibited within town limits[165] are all examples of the simplest type of legislation, where the legislature passes a broadly applicable law and is therefore insulated from the requirement of compensation.[166] In each of these cases, no compensation was due.[167]

*Chicago, Burlington and Quincy Railroad Co. v. Chicago*, presents another arrangement, in which there was an elected actor, but the regulation was specific.[168] In this case, the City Council of Chicago, by ordinance, approved the widening of a city street and the taking of the Railroad's property for that endeavor.[169] That is, an elected body specifically selected the road that they would enlarge and the property that they would take in order to enlarge that property.[170] This case is not a challenge of that specific regulation because the court understood that where specific selection of this type occurs, compensation is due.[171] This is nothing more than a process of eminent domain condemnation initiated by the legislature, as opposed to regulatory takings, or inverse condemnations which have been the focus of this article. This case rose to the Supreme Court because there was a question of how much compensation was due.[172] There was some amount due for the condemnation of land, but the Railroad also argued that by expanding the road, and by moving their rail yard closer to a public road, they would be subject to other regulations that address rail operations in proximity to public areas.[173] Because the condemnation resulted in a new swath of regulations becoming applicable, there was a cost to the Railroad above and beyond the cost of the actual property that was taken, and the Railroad argued that compensation was due for this cost as well.[174]

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162. *Id.* at 664.
163. Hadacheck v. Sebastian, 239 U.S. 394 (1915).
164. Miller v. Schoene, 276 U.S. 272 (1927).
165. Goldblatt v. Hempstead, 369 U.S. 590 (1961).
166. *Hadacheck*, 239 U.S. at 413; *Miller*, 276 U.S. at 280; *Goldblatt*, 369 U.S. at 591.
167. *Hadacheck*, 239 U.S. at 413; *Miller*, 276 U.S. at 280; *Goldblatt*, 369 U.S. at 591.
168. Chi., Burlington and Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1896).
169. *Id.* at 230.
170. *Id.*
171. *Id.*
172. *Id.* at 228.
173. *Id.* at 251-52.
174. *See Chi., Burlington and Quincy R.R. Co.*, 166 U.S. at 251-52.

The Court reasoned through quite a bit of case law, almost all of which holds that due process of law requires compensation.[175] In the Court's words, " the *legislature* [cannot] take private property for public use without just compensation. . ."[176] It certainly appears through this quote that the court is challenging my thesis that if a legislative act amounts to a regulatory taking, compensation is not due.[177] In fact, the Court cites a number of cases that seem to make the same point:[178] a legislature can no more take property without compensation than a transportation secretary or school superintendent. However, the point that I believe the Court is really making in this case is the truism that affirmative condemnation, eminent domain, which by rule requires specific selection of each piece of property to be taken, requires compensation.[179] In making this point, *Chicago, Burlington* actually reinforces the idea that specific selection requires compensation, but that general legislative activity does not;[180] "[t]he requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the State by reasonable regulation to protect the lives and secure the safety of the people."[181] In other words, the state owed compensation in this case because it specifically selected the Railroad's property for use.[182] Thus, specific selection trumped the otherwise broad power of the legislature.[183]

We have now covered cases in which elected officials make generally applicable decisions, and cases in which elected actors make specific decisions. The case of *Andrus v. Allard* is one in which an unelected actor makes a generally applicable rule.[184] The conflict in this case arises from a generally applicable prohibition on the sale of eagle feathers that was established by the unelected Department of the Interior.[185] Ultimately, compensation was not due in this case because the court determined that no taking had occurred, not because of any reasoning related to the general applicability of the rule or the nature of the actor.[186] Nonetheless, this case does demonstrate a situation in which an unelected actor can promulgate a generally applicable rule.[187] Even though the rule is legislative in nature, the

175. *See, e.g., id.* at 235-36.
176. *Id.* at 238 (emphasis added) (quoting Sinnickson v. Johnson, 17 N.J.L. 129, 146 (N.J. Super. Ct. App. Div. 1839).
177. *See id.* at 241.
178. *See, e.g., id.* at 237-39.
179. *Id.* at 235-36, 256.
180. *See Chi. Burlington and Quincy R.R. Co.*, 166 U.S. at 252, 255-56.
181. *Id.* at 252.
182. *See id.* at 255-56.
183. *See id.* at 236.
184. Andrus v. Allard, 444 U.S. 51 (1979).
185. *Id.* at 54.
186. *Id.* at 51-52.
187. *See generally* Andrus v. Allard, 444 U.S. 51 (1979).

government would owe compensation if the rule effected a taking, which in this case it did not.[188]

The remaining type of action is one in which an unelected actor specifically selects a property owner, and the case of *United States v. Causby* demonstrates this situation.[189] The Causbys owned a home and a small farm in North Carolina.[190] At some point, a military airport began operations very near the farm, and the frequency and proximity of landing aircraft made living on the property and operating the farm impossible.[191] Here, the actor that made decisions not only about the location of the airfield, but the frequency, altitude, path, and other flight related information were unelected military personnel.[192] Likewise, the decision to fly over the Causby's farm amounts to specific selection because it was not merely an implementation or application of objective standards or broadly applicable rules.[193] Rather, the decision to land aircraft in a certain way must specifically consider the landing path and height that would affect the Causby farm, just as selecting the route of a new road must specifically consider the individual homes in its path.[194]

The lesson here is that specific selection need not be malicious.[195] Perhaps a good way to define specific selection is to refer again to eminent domain, where an identifiable individual is selected, not for broad policy reasons, but for strategic reasons such as cost or engineering where the actor has prior knowledge that each option will affect different property owners.[196] The military had a number of flight paths it might have chosen. Any of those paths would have burdened some property owners, and in choosing a path, whether based on wind, the built environment, available airspace, or some other factors, the military knew that different landowners would be burdened differently.[197] The Causby property was not chosen for any broad policy reason, only for the specific benefits that flying in that path would provide.[198]

*Miller v. Schoene* is a good jumping-off point for some more nuanced discussion. The facts of *Miller* are this: cedar rust was spreading through Virginia, severely damaging the population of apple trees.[199]

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188. *Id.* at 64-65.
189. United States v. Causby, 328 U.S. 256 (1945).
190. *Id.* at 258.
191. *Id.* at 256.
192. *Id.* at 260.
193. *See id.* at 258-59.
194. *See id.* at 265.
195. *See generally Causby*, 328 U.S. at 259 (explaining that flight paths are determined based on prevailing wind patterns and therefore did not target the Plaintiffs land specifically).
196. *Id.* at 259.
197. *Id.*
198. *Id.*
199. Miller v. Schoene, 276 U.S. 272, 277 (1928).

This disease was hosted by red cedars, but affected commercial apple trees, hence a law that called for the destruction of all contaminated red cedars within a set radius of an apple orchard was passed.[200] The state entomologist was charged with carrying out the identification of such offending cedars.[201] This case is useful because it demonstrates two important principals of general versus specific selection.

First, it can be difficult to judge when an act is sufficiently general, and I cannot offer a method for drawing a bright line between general and specific selection. In this case, comparable to *Mugler* or *Hadacheck*, for example, the regulation applied only to a small group of red cedar owners who owned infected trees and were within a certain radius of apple orchards.[202] It is impossible to know exactly how many property owners this affected.[203] Mr. Miller may have had the only such population, or he may have been one of hundreds of red cedar growers. In order to judge whether a legislative act is sufficiently broad, I can offer only one important thought. As a statute becomes more specific — from "all red cedars" to "all infected red cedars" to "all infected red cedars within one mile of an apple orchard" to "all infected red cedars one mile from an apple orchard on land bordered by a lake" to "all infected red cedars one mile from an apple orchard on land bordered by a lake which is larger than 5 square miles" — determining whether the regulation is too selective should probably be based on the logic of the increasingly specific qualifications. Where the qualifications force application of the regulation onto a very narrow group, the law might be challenged and defeated as a matter of substantive due process.[204] Regulating infected red cedars that are close enough to infect apple trees seems to advance a legitimate government interest.[205] Regulating the same trees that are on a large lake probably would not have any rational relation to the stated goal of the legislation.[206] If there is not a substantive due process challenge, the same logical analysis can be conducted to determine if the legislation is so specific that it does not offer normal protections of the legislative process.[207] That is, if legislation is limited in scope to a point of not furthering its stated goals, then the law should be regarded as specifically selective, and

200. *Id.*
201. *Id.* at 277-78.
202. *Id.*
203. *See id.* at 277-80.
204. Bi-Metallic Inv. Co. v. Bd. of Equalization of Colo., 239 U.S. 441, 445 (1915). Londoner v. City and County of Denver, 210 U.S. 373, 375 (1908).
205. *Miller*, 276 U.S. at 278-79 ("[the disease] is communicated by spores from one to the other over a radius of at least two miles. . .[t]he only practicable method of controlling the disease. . .is the destruction of all red cedar trees, subject to the infection, located within two miles of apple orchards. . .").
206. *Id.*
207. *Bi-Metallic Inv. Co.*, 239 U.S. at 445. *Londoner*, 210 U.S. at 375.

some process other than the legislative process is due to the regulated parties.

The second principle of general versus specific selection highlighted by *Miller* is how a law is applied.[208] In *Miller*, the state entomologist did, in fact, specifically select Mr. Miller and demand the destruction of his cedars.[209] This gives the impression that a non-elected actor was responsible for selecting whose property should be regulated. This is not the case, however, because the entomologist was not given any independent discretion.[210] The entomologist was simply charged with determining whether the specific conditions of the legislation were met, and if they were, with assuring the destruction of the infected trees.[211] The point here is that the actor on the ground is not the same as the actor who makes the policy decisions with which the Takings Clause is concerned. When one is assessing whether there has been specific selection, it is also important to determine the amount of discretion given to each decision maker.

To further illustrate the point about discretion, we can turn to a familiar example. Imagine this scenario: a city on the East Coast of the United States has a great deal of history in its landscape. Residents of that city have clearly indicated that preserving this history is a top priority and they believe that safeguarding historic buildings is one practical way of so doing. Thus, the city council, an elected body, passes an ordinance creating a historic landmark commission, which is made up of appointed experts on law, history, architecture, real estate, city planning, and other pertinent disciplines. This board is tasked with selecting properties that they feel are of notable historical importance. Board members are guided by the intent of the city ordinance, but they do not make objective decisions in which they merely select all the buildings that meet legislatively defined criteria. That is, unlike the state entomologist in *Miller*, they may select some buildings and not others, even if the buildings have similar significance. This is more a matter of taste than of science.

Of course, when a specific building is selected for preservation, the owner of that building is at a disadvantage. The city might direct money to the building owner, in order that they can maintain the building in its historic character, but that does not cover the devaluation of the building that will result from the burdensome restrictions. These restrictions are part and parcel of maintaining the building essentially as it is and has been throughout history.

If this regulation does amount to a taking, is compensation due? Yes. We are dealing here with a situation where a body is both unelected and very clearly taking part in specific selection that entails

208. *Miller*, 276 U.S. at 281.
209. *Id.* at 277.
210. *See id.* at 277-78.
211. *Id.*

almost endless discretion. Perhaps the fact pattern here is familiar to you, even though the outcome is not? That's right, *Penn Central*; an opinion that, if fairly judged a taking, would have been compensable under this new framework.[212]

## CONCLUSION

I do not mean to imply that *Penn Central* was wrong. The Court looked at several factors, of which "character of government action" was only one, and the Court decided that no taking occurred.[213] This character element, one could argue, is similar to the framework I have proffered in this article. However, this framework is only applicable when something is already deemed a taking. The question that this article poses is: if a regulation amounts to a taking, is compensation due? In *Penn Central*, the Court found that the regulation was not a taking in the first place, and so, the question of compensation did not arise.[214] But what is the point of all my long-winded investigation if the entire takings analysis must proceed before the question of compensation arises? What does this tome provide in the way of simplification? If simplification is the goal, we simply reverse the question. The only reason any landowner or government cares whether an action is a taking is because they want, or want to avoid, compensation. So, simply ask first: if this *were* a taking, would compensation be due? If the answer is "no," then there is no need to continue with the inquiry, because the terminal question—compensation—is already settled. If the answer is that compensation would be due, then the unwieldy, unpleasant, and uncertain inquiry into how far is too far can continue.

Part of the motivation for this article focusing on compensation is because compensation is the public and the government's real concern in a takings conflict. Because of this focus, I would be amiss if I did not give at least brief attention to another very practical and popular issue in takings law: fairness. One will undoubtedly see that this article suggests that government can regulate property, even to the point of fully devaluing that property, but the landowner may not be compensated. Is this fair? The simple and practical answer is that this is a question for legislatures to answer. What I hope to have demonstrated is that the Constitution does not require compensation in situations where we might now expect it, but the Constitution also does not prevent a legislature from enacting policies that they believe will inject more fairness into takings law.[215]

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212. Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).
213. *Id.* at 124.
214. *Id.*
215. *See, e.g.*, Joshua Ulan Galperin, Note, *A Warning to States—Accepting This Invitation May be Hazardous to Your Health (Safety, and Public Welfare): An Analysis of Post-Kelo Legislative Activity*, 31 VT. L. REV 663 (2007).