California Western School of Law
CWSL Scholarly Commons

Faculty Scholarship

Spring 2021

SCOTUS in the Strait of Messina: Steering the Course between Private Rights and Public Powers

Donald J. Smythe

Follow this and additional works at: https://scholarlycommons.law.cwsl.edu/fs

 Part of the Constitutional Law Commons, and the Property Law and Real Estate Commons

HEINONLINE

DATE DOWNLOADED: Thu Oct 7 14:39:16 2021
SOURCE: Content Downloaded from HeinOnline

Citations:

Bluebook 21st ed.
Donald J. Smythe, SCOTUS in the Strait of Messina: Steering the Course between Private Rights and Public Powers, 25 TEX. REV. L. & POL. 437 (2021).

ALWD 6th ed.
Smythe, D. J., Scotus in the strait of messina: Steering the course between private rights and public powers, 25(2) Tex. Rev. L. & Pol. 437 (2021).

APA 7th ed.
Smythe, D. J. (2021). Scotus in the strait of messina: Steering the course between private rights and public powers. Texas Review of Law and Politics, 25(2), 437-472.

Chicago 17th ed.
Donald J. Smythe, "SCOTUS in the Strait of Messina: Steering the Course between Private Rights and Public Powers," Texas Review of Law and Politics 25, no. 2 (Spring 2021): 437-472

McGill Guide 9th ed.
Donald J Smythe, "SCOTUS in the Strait of Messina: Steering the Course between Private Rights and Public Powers" (2021) 25:2 Tex Rev L & Pol 437.

AGLC 4th ed.
Donald J Smythe, 'SCOTUS in the Strait of Messina: Steering the Course between Private Rights and Public Powers' (2021) 25(2) Texas Review of Law and Politics 437.

MLA 8th ed.
Smythe, Donald J. "SCOTUS in the Strait of Messina: Steering the Course between Private Rights and Public Powers." Texas Review of Law and Politics, vol. 25, no. 2, Spring 2021, p. 437-472. HeinOnline.

OSCOLA 4th ed.
Donald J Smythe, 'SCOTUS in the Strait of Messina: Steering the Course between Private Rights and Public Powers' (2021) 25 Tex Rev L & Pol 437

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at https://heinonline.org/HOL/License
-- The search text of this PDF is generated from uncorrected OCR text.
-- To obtain permission to use this article beyond the scope of your license, please use: Copyright Information

SCOTUS IN THE STRAIT OF MESSINA: STEERING THE COURSE BETWEEN PRIVATE RIGHTS AND PUBLIC POWERS

DONALD J. SMYTHE*

ABSTRACT

The greatest challenge for any civilized society is to find the appropriate balance of rights and responsibilities between the individual and society. In the United States, the Supreme Court is the ultimate arbiter of the line between individual rights and governmental powers. The prerogatives and protections for private property rights help to define that line. The Supreme Court has developed two distinct bodies of constitutional jurisprudence bearing on the protections for private property, one under the doctrine of substantive due process and the other under the Takings Clause. But the appropriate balance has been difficult to achieve, and the Supreme Court's jurisprudence has been prone to slippage. Thus, substantive due process has lost its teeth. Unless fundamental rights are implicated, modern substantive due process claims are so unlikely to succeed they are rarely worth making. Modern takings jurisprudence has not lost its teeth, but it has become incoherent and dysfunctional. The Supreme Court does not apply its takings jurisprudence consistently across different types of claims, and its expansive interpretation of public uses has allowed government takings powers to be exploited by powerful political interests. Takings jurisprudence could be made more coherent and less dysfunctional by clarifying the nuisance rule, extending the public use requirement to all takings, and narrowing the interpretation of public uses. These refinements of takings law would empower governments to resolve nuisance conflicts, improve the coherence of the Court's jurisprudence across different types of takings, constrain governments from using their regulatory and takings powers on behalf of special interests, and reduce the burden of government on private property.

* Chief Justice Roger J. Traynor Professor of Law, California Western School of Law, San Diego, CA 92101.

I. INTRODUCTION

The greatest challenge for any civilized society is to find the appropriate balance of rights and responsibilities between the individual and society. Because the United States is a constitutional democracy, the most difficult questions about how to strike that balance are often answered by the Supreme Court of the United States. The Supreme Court's answers help to define the boundary between the individual rights and liberties of American citizens and the powers of the federal, state, and local governments. This is no small task, which is why the title of this Article analogizes it to charting a course through hazardous waters.[1] It is inevitable that there will be disagreement and controversy about the Court's answers; they have important political implications, and political opinions in any free society can differ widely. But, at the very least, we should hope for some coherence in the Supreme Court's decisions that demarcate the constitutional line between individual rights and liberties and governmental powers. Sadly, such coherence is lacking in some of the Court's most important jurisprudence.

The role of the government has significantly expanded in all developed countries during the last one hundred fifty years. The second industrial revolution that began around 1870 gave rise to new modes of transportation, new technologies, a national economy, and a plethora of modern corporations formed under general corporation laws. It also raised questions about whether and how the government should manage or control the proliferation of new market activities and new business practices in the emerging modern economy. The questions were often manifested in legal challenges against government actions that sought to intervene in the economy and regulate the use of private property. The legal challenges often asserted limitations on government powers to regulate economic activities under the Due Process Clauses of the Fifth and Fourteenth Amendments or on government powers to take private property under the Takings Clause of the Fifth Amendment. The Supreme Court's modern substantive due process and takings jurisprudence evolved out of those cases.

1. In Greek mythology, the Strait of Messina between Sicily and Calabria is the home of two great sea monsters, Scylla and Charybdis. The difficulty of navigating through such a narrow body of water with Scylla on the Calabrian side and Charybdis on the Sicilian side posed an unavoidable hazard to passing sailors.

The doctrine of substantive due process originally rested on the notion that the liberty of contract under the Due Process Clause placed certain individual property rights and economic rights beyond the reach of government regulation.[2] As the doctrine evolved in the twentieth century, however, it lost its teeth except in cases where fundamental rights are implicated.[3] Today, for the most part, the doctrine of substantive due process does little, if anything, to limit the scope of government regulatory powers. Unless fundamental rights are implicated, modern substantive due process claims are so unlikely to succeed they are rarely worth making. Substantive due process, therefore, is almost a dead letter. At this point, there is little hope that it will play any further role in defining the appropriate balance between government powers, individual property rights, and economic liberties.

Modern takings jurisprudence has not lost its teeth, but it is incoherent and dysfunctional. The incoherence arises because the Court does not apply the Takings Clause uniformly across all takings cases.[4] The dysfunctionality arises because the Court has defined the public use requirement so broadly that the government's takings powers can be commandeered by powerful political influences.[5] Nonetheless, recent Supreme Court decisions have made it clear that the Court is willing to restrain the government's takings powers in conventional and other takings cases. Because takings law has been applied so broadly, it now has more potential to restrain government powers than substantive due process, especially if the Supreme Court is willing to make its takings jurisprudence more coherent and less dysfunctional.

This Article suggests how takings jurisprudence could be made more coherent and less dysfunctional and how it could thus improve the panoply of social benefits we derive from private property rights while still clothing government with essential regulatory authorities. These suggestions can be summarized in three basic rules: (1) nuisance regulations are never takings; (2) the public use requirement should apply to all takings, including regulatory takings and takings through

2. *See infra* subpart III(A).
3. *See infra* subpart III(A).
4. *See infra* subpart III(B).
5. *See infra* subpart III(B).

exactions;[6] and (3) public uses should be limited to (i) the transfer of private property to public ownership, (ii) the transfer of private property to public carriers, utilities, or throughways, and (iii) the transfer of private property to private owners for uses that will be open to the public. The adoption of these rules would empower governments to resolve nuisance conflicts, improve the coherence of the jurisprudence across different types of takings, constrain governments from using their regulatory and takings powers on behalf of special interests, and reduce the burden of government on private property.

The next Part of this Article discusses the relationship between government powers and private property and explains how the government's regulatory and takings powers burden private property, even when those powers have not been exercised. The third Part describes and distinguishes the substantive due process and takings doctrines. It also clarifies why nuisance regulations cannot cause takings, and it critiques the incoherent way in which the Supreme Court has applied the public use requirement to different types of takings claims. The fourth Part addresses the need to clarify the scope of the public use requirement and to apply it coherently in all types of takings cases; the Part argues that applying the public use requirement to regulatory takings and exactions takings could help to limit government regulatory excesses in ways the substantive due process doctrine no longer can. The fifth Part concludes.

II. PRIVATE PROPERTY AND GOVERNMENT POWERS

A. Property Theory

The dominant theoretical conception of property rights draws on an analogy of a bundle of sticks.[7] Under the bundle-of-sticks analogy, a person's property rights in a thing are defined by all of the legal rights and obligations the person has in regard to the thing.[8] Specific legal rights and obligations in regard to the thing

6. An exaction is something of value a landowner must provide in return for a development permit. *See infra* subpart III(F).

7. *See, e.g.*, JESSE DUKEMINIER ET AL., PROPERTY 102–03 (8th ed. 2014) (analogizing property rights to a "bundle of rights").

8. To be more precise, a well-defined system of property law defines the hierarchy of persons' rights regarding land or chattels. *See id.* at 51 n.33 (explaining that lawyers consider property rights to be relationships among people with respect to things, rather than relationships between people and things).

are thought of as sticks, and the collection of them all is thought of as a bundle of sticks. Because modern American property law evolved out of common law rules governing rights in land, it is easiest to focus the discussion on land, even though the concepts, in theory, can extend to rights in anything.[9]

Regarding a person's property rights in land, the bundle of sticks defines the duration and geographical scope of the person's rights, as well as the uses that may be made, the actions that can be taken, the rights that may be exercised against others, and the transactions that can be undertaken to convey rights.[10] Further, the bundle of sticks also defines a person's duty to pay taxes on the land, the affirmative duties associated with any affirmative private land use servitudes, and any other affirmative duties under public laws or regulations on the land.[11] In theory, any of the rights and obligations in the bundle can also be made contingent, allowing modification or termination in various circumstances.

For example, someone could own a life estate in the surface and air space, but not the subsurface, of a one acre parcel of land subject to a right-of-way easement of one neighbor.[12] The life estate would define the duration of the rights,[13] the rights would be limited geographically to the surface and air space, and the life estate owner would have all of the usual rights and obligations of an owner except for the right to exclude the one neighbor from the use of the right-of-way. Given the many ways in which the duration, geographic scope, rights, and obligations in a bundle of rights could vary, especially considering all the possible ways they might be made contingent, property rights can in theory be almost infinitely complex. In fact, people may have property rights that we cannot even imagine—most people do not have any reason to think about many of their property rights in all their complexity until they have a property dispute with someone about them.

---

9. For well-known treatments of estates in land, see generally RICHARD R. POWELL, POWELL ON REAL PROPERTY: MICHAEL ALLAN WOLF DESK EDITION (Michael Allan Wolf ed., 2009), LexisNexis; SHELDON F. KURTZ & HERBERT HOVENKAMP, CASES AND MATERIALS ON AMERICAN PROPERTY LAW 246–347 (4th ed. 2003).

10. *See* Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. CIN. L. REV. 57, 68 (2013) (noting the multiplicity of substantive rights the bundle-of-rights metaphor may implicate).

11. *See id.* (same).

12. *See* POWELL, *supra* note 9, § 15.01 (noting special limitations of life estates).

13. *Id.*

B. Government Powers and the Limits of Private Property

Government laws and regulations obviously play an important role in defining an owner's bundle of rights. For example, a zoning ordinance that limits uses to single-family residences eliminates all other uses from the bundle. Similarly, a local ordinance requiring an annual payment of property taxes places an important obligation in the bundle.[14] Federal and state laws and regulations might create other restrictions and obligations.[15] The restrictions and affirmative duties created by public laws are analogous to the servitudes that are often created through private land use restrictions.[16] The difference, of course, is that private land use servitudes are created privately and usually with the owner's explicit or implicit assent; in contrast, public land use servitudes are created through the political process, not only without the owner's assent but often against the owner's wishes.[17]

The mere fact that the government has the power to eliminate or diminish rights in a portion of the owner's bundle or create additional obligations for the owner has important implications for an owner's property rights. Even if the government has not yet asserted its powers to do so, the fact that it might do so makes the owner's property rights subject to a contingency.[18] The government's power to establish new restrictions or add new obligations on a parcel of land means that the government has something like a right of entry or power of termination that it can assert against specific sticks in the owner's bundle of rights.[19] Of course, a right of entry is a contingent future interest.[20] The government's right of entry is thus analogous to a contingent future interest against the owner's bundle of rights. The mere possibility that the government has the power to regulate the owner's uses or subject the owner to obligations itself impinges on the owner's property rights.[21] Generally speaking, therefore,

14. Donald J. Smythe, *The Power to Exclude and the Power to Expel*, 66 CLEV. ST. L. REV. 367, 370 (2018) (describing regulatory authority to eliminate property rights or add affirmative duties).

15. *See id.* (same).

16. *Id.*

17. *See* Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 536–37 (2009) (arguing that governmental decision-making, even when exercising the power of eminent domain, is often driven by concerns of reelection and future opportunity).

18. Smythe, *supra* note 14, at 370–71.

19. *Id.*

20. 23 AM. JUR. 2D *Descent and Distribution* § 32, Westlaw (Nov. 2020 update).

21. Smythe, *supra* note 14, at 371.

the government's regulatory powers impinge on private property even if they have not been exercised. The broader the government's regulatory powers, the greater the burden on private property.

The government also has the power of eminent domain, which gives it the power to take an owner's property rights, subject to a "just compensation" requirement.[22] In property terms, the exercise of the government's takings powers against an owner implies that the government not only has a right of entry that it can exercise against individual sticks in the owner's bundle of rights through laws and regulations, but also has a right of entry that it can exercise against the entire bundle of rights (subject to the just compensation requirement).[23] The power of eminent domain thus subjects all of the owner's property rights to a separate contingency.[24] The government's takings powers confer upon the government a right of entry (or power of termination) that it may exercise against any property through condemnation, as long as the constitutional requirements for its exercise are met.[25] The only significant difference between a governmental taking and a grantor's exercise of a right of entry is that when a private grantor exercises a right of entry against her grantee, she typically has no obligation to provide the grantee with any compensation;[26] when the government exercises eminent domain by taking private property, the private property owner is, of course, entitled to just compensation.[27]

There is some overlap between the government's regulatory powers and its takings powers. The Supreme Court has recognized that regulations can go "too far" and amount to takings, even though not all of the rights in the owner's bundle are taken.[28] A separate category of takings—"exactions takings"—has also been recognized when regulatory authorities demand

22. U.S. CONST. amend. V.

23. *See* Smythe, *supra* note 14, at 372 (noting that a conventional taking involves the termination of the entire bundle of rights and obligations in a piece of property).

24. *See id.* (describing eminent domain's ability to eliminate all sticks in the bundle of property rights).

25. *Id.* at 372–73.

26. *See, e.g., id.* at 372 (arguing that the government's takings power is similar to a contingent future interest); Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 249 (2007) (arguing that corrective justice requires the government to compensate takings).

27. Wyman, *supra* note 26, at 252–53.

28. *See infra* subpart III(E).

too much from a landowner or make demands that are not closely enough related to the purpose of the regulatory scheme as a condition for granting the landowner a permit.[29] By recognizing that regulations or exactions may go too far and amount to takings, the Supreme Court has opened up the possibility that the government's regulatory powers could be subject to limits under doctrines that constrain government regulatory and takings powers.

III. CONSTITUTIONAL PROTECTIONS FOR PRIVATE PROPERTY

There are two ostensibly important constitutional limitations on the government's powers to limit private property rights. One limitation arises under the substantive due process doctrine of the Fifth and Fourteenth Amendments, and the other arises under the Takings Clause of the Fifth Amendment. The substantive due process doctrine defines the scope of the government's authority to enact laws and make regulations.[30] The Takings Clause acknowledges that the government has the power to take private property, but limits that power to takings for a public use and requires that just compensation be provided to the owner.[31] As the Supreme Court developed the doctrines

29. *See infra* subpart III(F).

30. The substantive due process doctrine essentially defines the scope of the government's inherent powers. The United States Supreme Court applied the doctrine strictly in the early decades of the twentieth century and thus struck down governmental regulations in a number of important cases. BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT 4 (1998). The matter nearly resulted in a constitutional crisis when President Franklin D. Roosevelt was impeded from implementing his New Deal legislation. The Court then began to apply the substantive due process doctrine less strictly before President Roosevelt followed through on his Court-packing plan. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 43 (1991) (endorsing the "switch in time" interpretation of *West Coast Hotel Co. v. Parrish*). The scope of the government's regulatory powers was defined more broadly thereafter, and private property rights were circumscribed more severely. *See* CUSHMAN, *supra*, at 3 (mentioning the impacts of the shift in Supreme Court jurisprudence after 1937). *See generally* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000) (discussing the Court's ideological shift across the 1930s).

31. In a conventional taking, the state's power is used to take possession of land away from the individual owner. The individual owner could be a natural person or a corporate person. *See generally, e.g.*, Kelo v. City of New London, 545 U.S. 469 (2005) (applying the Takings Clause to individuals); Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931) (applying the Takings Clause to a corporation). Because all of the sticks in the owner's bundle are taken, the intrusion is much greater than that caused by a government regulation, unless the regulation amounts to a regulatory taking. *See* Coniston Corp. v. Hoffman Estates, 844 F.2d 461, 466 (7th Cir. 1988) ("[I]n cases under the takings clause the courts distinguish between taking away all of the owner's rights to a small part of his land and taking away (through regulation) a few of his rights to all of his land . . . ."). Regulatory takings and takings through exactions do not involve the

through the nineteenth and twentieth centuries, however, the constitutional limitations they impose on the exercise of government powers have become more theoretical than practical.[32]

Until well into the twentieth century, there was some confusion surrounding the distinction between substantive due process and regulatory takings claims.[33] The confusion was no doubt a consequence of the cognate roots of the claims in the Fifth Amendment; it sometimes confounded whether the basis of a legal challenge was that the government lacked the power to enact the law or whether the law caused an unconstitutional taking of private property.[34] The incipient and evolving nature of the Supreme Court's substantive due process and takings jurisprudence probably contributed to the confusion.[35] As the Supreme Court's jurisprudence developed and clarified the doctrines in the twentieth century, they came to rest on distinctly different elements and require different tests.

A. Substantive Due Process

The test for a breach of substantive due process depends on whether the government's law or action impinges on fundamental rights. If a government law or action impinges on fundamental rights, then a "strict scrutiny" test applies, and the question is whether the law is narrowly tailored to further a compelling government interest. If a fundamental right is not impinged, then the courts apply a "rational basis" test, and the question is whether the law bears a rational relationship to a

government taking possessory rights, and as such, the Takings Clause is not applied to them in the same way. That is a principal topic of discussion in this Article.

32. This is especially true of substantive due process. The Supreme Court has also diminished the constraint provided by takings law in cases that have defined public uses too expansively. At the same time, it has increased the reach of takings law by applying the Takings Clause to government regulations and exactions. *See infra* subparts III(E)–(F).

33. *See* Smythe, *supra* note 14, at 391 (noting how litigants and courts often confound the two doctrines). Kenneth Salzberg has argued that the Supreme Court continues to confound substantive due process and takings cases, and now more commonly uses the Takings Clause to strike laws that should be stricken under the substantive due process doctrine. *See* Kenneth Salzberg, *"Takings" as Due Process, or Due Process as "Takings"?*, 36 VAL. U.L. REV. 413, 414–16 (2002) (exploring the confused state of these doctrines and the resulting consequences).

34. *See* Smythe, *supra* note 14, at 391 (noting this doctrinal confusion).

35. *See* Salzberg, *supra* note 33, at 414–16 (discussing the Court's lack of constancy and its jurisprudential drift regarding takings doctrine).

legitimate governmental interest.[36] Because laws and regulations affecting property rarely impinge on fundamental rights, the rational basis test normally applies to laws and regulations that affect property.[37] Moreover, because the scope of legitimate government interests has been construed so broadly in recent decades, and because the rationality requirement is so loose, government laws or regulations that impinge on property rarely, if ever, now breach the substantive due process doctrine.[38] Substantive due process has therefore become almost a dead letter, and takings jurisprudence is now the primary constitutional constraint on general government regulatory powers that do not impinge on fundamental rights or raise equal protection issues.[39]

B. Takings

Takings jurisprudence is much more complicated. In cases where the government takes permanent physical possession of an owner's property, there is no question that the government has taken the property, and so just compensation will be required if the taking is allowed;[40] there may, however, be a question about whether the taking is within the scope of the government's takings powers.[41] The government may only take permanent physical possession of property for a public use.[42] The definition of "public use," however, is controversial.[43] Scholars have argued that the original intent of the drafters was

36. David N. Mayer, *Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract*, 60 MERCER L. REV. 563, 626 n.290 (2009).

37. *See id.* at 572 (noting that the Court's preference for rational basis review offers minimal protection to private property rights).

38. Smythe, *supra* note 14, at 401.

39. There are obviously other constraints on specific governments through the division and separation of powers. The focus in this Article is on economic regulations and the regulation of property rather than the equal protection issues. It is relevant to observe, however, that government takings have sometimes disproportionately burdened members of suspect categories. *See infra* Part IV.

40. *See* Donald J. Smythe, *Liberty at the Borders of Private Law*, 49 AKRON L. REV. 1, 26–27 (2016) (explaining that private property rights are limited by the government's power to take land in exchange for just compensation).

41. *Id.* at 27–28. The Fifth Amendment of the Constitution contains the express limitation of the government's power. U.S. CONST. amend. V.

42. U.S. CONST. amend. V.

43. *See generally* Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993) (tracing the history of the term); Buckner F. Melton, Jr., *Eminent Domain, "Public Use," and the Conundrum of Original Intent*, 36 NAT. RESOURCES J. 59 (1996) (analyzing the historical practice of courts construing the term's meaning).

not to interpret the term narrowly.[44] When the Supreme Court began to hear takings cases in the nineteenth century, however, the term was interpreted to confine the government's takings powers to cases in which land was taken for uses that would leave it open to the public or for uses by public carriers.[45] During the twentieth century, public pressures for government interventions to control and manage the economy increased significantly, and in the last half of the twentieth century, the scope of public uses was broadened to allow takings to spur economic development, including some takings in which private property was conveyed from its initial owners to new private owners for private uses as part of "integrated [economic] development plan[s]."[46]

In cases where not all of an owner's rights are taken, but it is claimed that a government law, regulation, or action has caused a taking, the Supreme Court's jurisprudence is more complicated. These are often called regulatory takings cases. Here, the Supreme Court's jurisprudence rests on an ad hoc, multi-factored inquiry into the nature of the regulation, the public benefits, and any other relevant factors.[47] It is notable that there is no inquiry into whether a regulatory taking is for a public use.[48] There is also—or, at least, there was until recently[49]—a per se rule that a nuisance regulation is not a

44. *See, e.g.*, Rubenfeld, *supra* note 43, at 1119–24 (arguing that the historical context of the Compensation Clause suggests that "public use" denotes an entire category of takings that cannot occur without just compensation, as opposed to takings not for the public use, which would require only due process); Melton, *supra* note 43, at 59–80 (presenting an originalist interpretation of "public use").

45. *See* Melton, *supra* note 43, at 83 (demonstrating that New York lawmakers in the 1830s understood the term "public use" to mean use for "public possession" and "public utility"). For a detailed discussion of the historical developments, see *id.* at 65–83. For a concise explication of the conventional perspective on the historical development of the public use requirement, see Justice O'Connor's dissenting opinion in *Kelo v. City of New London*, 545 U.S. 469, 494–504 (2005) (O'Connor, J., dissenting).

46. *See, e.g.*, *Kelo*, 545 U.S. at 486–87 (majority opinion) (upholding a governmental transfer of land between private owners as part of an integrated economic development plan); Berman v. Parker, 348 U.S. 26, 34 (1954) ("We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.").

47. *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (stating that the Court engages in "essentially ad hoc, factual inquiries").

48. *See id.* (making no mention of an inquiry into whether a regulatory taking is for public use).

49. *See infra* subpart III(D).

taking.[50] This has created its own confusions about when a regulation is a nuisance regulation.[51]

Setting nuisance regulations aside for the present, if the ad hoc, multi-factored test results in a decision that the regulation is a taking, then just compensation must be provided.[52] Since a public use requirement is not applied, there is a presumption that the taking is within the scope of the government's takings powers. The substantive due process doctrine in theory provides a separate test to determine whether the government has the power to implement the regulation, but unless the regulation breaches substantive due process, it is presumed to be for a public use.[53] This may, in part, reflect the fact that takings law developed to regulate complete takings of property rights in land long prior to the advent of the modern regulatory state.[54]

In more recent years, the Supreme Court has developed a unique category of takings jurisprudence to address claims that exactions demanded in return for a permit required under a regulatory scheme amount to takings.[55] The Court's theory rests on the doctrine of "unconstitutional conditions," which in this context implies that the government cannot use the permitting process to "pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation."[56] The Supreme Court has developed a two-prong

50. The nuisance rule derives from an early case challenging a land-use ordinance in Los Angeles. *See* Hadacheck v. Sebastian, 239 U.S. 394, 411 (1915) (holding that the regulation of nuisances falls within the police power of the state).

51. *See infra* subpart III(D).

52. *See, e.g.*, Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 678 (2005) (arguing that a central issue in takings analyses should be deciding how much the government must pay when compensation is due).

53. Kenneth Salzberg has argued that a regulation that "does not result in the government actually using [the] property cannot be a taking." Salzberg, *supra* note 33, at 435. Professor Salzberg's argument and the one here are, in some ways, the mirror images of one another. His reasoning is that if a taking is for a public use, then a regulation that is not for a public use cannot be a taking. *Id.* at 418–19. The reasoning here is that if a taking must be for a public use, and if a regulation amounts to a taking and is not for a public use, then the taking must be unconstitutional. Professor Salzberg argues there should be no regulatory takings; instead, substantive due process should discipline the use of government regulatory powers. *Id.* at 434. The argument here recognizes that the Supreme Court has gutted the substantive due process doctrine but has also deemed that regulations can go too far and amount to takings; thus, if the takings are not for a public use, the regulations are unconstitutional.

54. *See id.* at 431–32 (noting that the Takings Clause was interpreted as being limited to "real takings" for approximately 175 years after it was written and did not originally extend to regulations).

55. *See infra* subpart III(F).

56. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 605 (2013).

test for determining whether exactions amount to takings, but the public use requirement is conspicuously absent from its analysis.[57] As with regulatory takings, there is also a presumption that takings through exactions are for a public use.[58] The Court's exactions takings jurisprudence is, therefore, as disconnected from its conventional takings jurisprudence as its regulatory takings jurisprudence, and it is every bit as dysfunctional.

The Supreme Court itself has acknowledged that it has been unable to develop any set formula for determining whether a regulatory action is a taking, and it has described its regulatory takings jurisprudence as "essentially ad hoc."[59] While from one perspective that may seem like a refreshingly honest and frank admission, from another it is a gross understatement. There is only one Takings Clause, and it does not distinguish between conventional, permanent physical takings of land and regulatory takings or takings through exactions. The larger truth is that the Supreme Court's takings jurisprudence as a whole is ad hoc, incoherent, and dysfunctional. This Article suggests ways in which the Court can develop its takings jurisprudence more coherently and constructively.

C. Public Uses v. Public Purposes

The government's takings powers can be exercised only for a public use.[60] Unfortunately, there is no clear guide as to what constitutes a public use except for the courts' use of the term, and the courts have not always used the term consistently and coherently.[61] The Supreme Court's majority opinion in *Berman v. Parker*[62] included dicta that suggested public uses should be interpreted broadly—ostensibly broadly enough to extend to any

57. *See infra* subpart III(F).

58. *See infra* subpart III(F).

59. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

60. Smythe, *supra* note 40, at 27–28. The Fifth Amendment of the Constitution contains the language that has been interpreted to create this limitation on the government's power. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). Scholars have cast significant doubt on whether the public use requirement was originally intended to provide a serious constraint on the government's takings powers. For analyses of the original meaning of the language, see generally Rubenfeld, *supra* note 43; Melton, *supra* note 43.

61. For a useful overview of the historical development of the public use requirement, see Justice O'Connor's dissenting opinion in Kelo v. City of New London, 545 U.S. 469, 494–504 (2005) (O'Connor, J., dissenting). For more penetrating analyses of the drafters' original intent, see Rubenfeld, *supra* note 43, at 1118–24; Melton, *supra* note 43, at 59–80.

62. 348 U.S. 26 (1954).

public purpose in pursuit of a legitimate government interest.[63] The Supreme Court, however, most recently addressed a question about the public use requirement in *Kelo v. City of New London*,[64] and its opinion shed a different light on the matter.[65] Ironically, in *Kelo* the Court stated that it had embraced the interpretation of "public use" as "public purpose" since the close of the nineteenth century, but its decision in the case made it perfectly clear that there is an important constitutional difference between public purposes and public uses.[66]

The question in *Kelo* was whether the New London Development Corporation (NLDC) could take private properties (with the payment of just compensation) to implement an urban redevelopment plan in a non-blighted neighborhood.[67] The redevelopment plan entailed the transfer of the private properties to new private owners who would redevelop them for commercial and residential uses.[68] Writing for the majority, Justice Stevens stated that the question about whether the takings would be a public use turned on whether the urban redevelopment plan served a "public purpose."[69] To that end, Justice Stevens invoked the Court's precedent in *Berman*, in which the Court had upheld takings necessary to implement an urban redevelopment plan in a blighted neighborhood in Washington, D.C.[70]

In *Berman*, the Supreme Court equated public uses with anything that promotes the "public welfare."[71] Moreover, the Court interpreted the public welfare broadly to include values that extended to spiritual as well as physical matters and to aesthetic values as well as monetary ones.[72] *Berman*, therefore,

63. *See id.* at 33 ("It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.").

64. 545 U.S. 469 (2005).

65. *See id.* at 487 (noting courts' power to review a governmental taking is to ensure the taking was not for "private purpose").

66. *See id.* at 503–04 (O'Connor, J., dissenting) (arguing against the Court's holding on the grounds that it describes a rule against taking for private purpose but fails to provide a meaningful limit that would enforce the rule).

67. *Id.* at 474–75 (majority opinion).

68. *See id.* at 483 (noting the City's coordination of private and public land use).

69. *Id.* at 480.

70. *Id.* at 480–81 (citing Berman v. Parker, 348 U.S. 26, 33–35 (1954)).

71. *See Berman*, 348 U.S. at 33 (explaining that a taking did not violate Fifth Amendment requirements because "[t]he concept of the public welfare is broad and inclusive").

72. *Id.*

appeared to interpret the scope of public uses to extend to the full police powers of the state. Under that interpretation, a taking for the sake of pursuing any legitimate government interest would satisfy the public use requirement. This seemed to imply that the public use requirement was more of a dead letter than the doctrine of substantive due process.[73] Although the Court's dicta in *Berman* generated much discussion about the public use requirement's apparent demise, in light of the Supreme Court's more recent opinion in *Kelo*, the reports of its death were greatly exaggerated.

This is not to say that *Kelo* lifted the clouds and cleared the skies. Justice Stevens's majority opinion is hardly a paragon of judicial reasoning. In fact, no doubt because of the dicta in *Berman*, Justice Stevens used the terms public use and public purpose interchangeably.[74] He concluded that the NLDC's economic development plan "unquestionably serve[d] a public purpose" and thus satisfied the public use requirement.[75] But Justice Stevens also made it perfectly clear the Court was not holding that the government could transfer a property from one private owner to another outside the scope of a carefully considered, integrated economic development plan—even though such a transfer could easily serve some public purpose in the broader sense of the word.[76] Ultimately, therefore, Justice Stevens's opinion distinguishes public uses from public purposes even though he at times uses the terms interchangeably. As Justice O'Connor observed in a dissenting opinion (joined by Chief Justice Rehnquist and Justices Scalia and Thomas), Justice Stevens confounded the question about the scope of public uses under the Takings Clause with the question about the government's inherent powers under its police powers.[77] In hindsight, *Berman*'s true legacy may be confusion.

---

73. Substantive due process would at least remain relevant when governments' laws or regulations implicated fundamental rights. *See supra* subpart III(A).

74. *See Kelo*, 545 U.S. at 480 (arguing that the Court had "embraced the broader and more natural interpretation of public use as 'public purpose'").

75. *Id.* at 484.

76. *See id.* at 486–87 (arguing that the question of a one-to-one private transfer of property, outside the confines of an integrated economic development plan, was not presented in the case).

77. *See id.* at 501–02 (O'Connor, J., dissenting) ("The case before us now demonstrates why, when deciding if a taking's purpose is constitutional, the police power and 'public use' cannot always be equated."). In fact, Justice Stevens subsequently acknowledged that his opinion confounded principles of substantive due process with

The consequence is that *Kelo* has made it clear there is an important and meaningful public use requirement for a taking. The government only has the power to take private property if it is for a public use, and the scope of public uses is significantly narrower than the scope of legitimate government interests.[78] As the discussion below will elaborate, however, the public use requirement is not always applied,[79] which contributes to the incoherence of the Supreme Court's takings jurisprudence. Moreover, the public use requirement is still interpreted too broadly, which contributes to the dysfunctionality of the Supreme Court's takings jurisprudence.

D. Nuisance Regulations

Until recently, the conventional wisdom was that one of the per se rules under the United States Supreme Court's takings jurisprudence was that a nuisance regulation is not a taking. This changed with Justice Scalia's majority opinion in *Lucas v. South Carolina Coastal Council*.[80] Justice Scalia's opinion cast doubt on the courts' competence to distinguish when a regulation is a nuisance one; in fact, it seemed to challenge whether a nuisance regulation is always conceptually distinguishable from other regulations.[81] It also stated a new per se rule that appeared to overturn the conventional wisdom about nuisance regulations.[82] It thus added another layer to the fog that pervades the Supreme Court's regulatory takings jurisprudence.

The Court's struggle with the nuisance concept in *Lucas* is understandable because there have often been disagreements about when a regulation is a nuisance regulation. In *Pennsylvania Coal Co. v. Mahon*,[83] two of the twentieth century's great legal minds, Justices Holmes and Brandeis, famously disagreed about whether the law in question constituted a nuisance regulation.

---

those of the public use requirement. ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN 8 (2015).

78. *See* Smythe, *supra* note 14, at 401–02 (arguing that Supreme Court precedents that expand the scope of public use to include any legitimate governmental interest extended beyond the historical understanding of the Takings Clause).

79. *See infra* subparts III(D)–(E).

80. 505 U.S. 1003 (1992).

81. *See id.* at 1023–24 (arguing that nuisance analysis is the "progenitor" of land-use regulation).

82. *See id.* at 1027 (holding that where regulation deprives land of all economically beneficial use, compensation may be resisted only if the "proscribed use interests" were not part of the title).

83. 260 U.S. 393 (1922).

For the majority, Justice Holmes wrote that a Pennsylvania law, which forbade subsurface mining that might cause a subsidence of structures on the surface used for human habitation, was not a nuisance regulation.[84] In a dissenting opinion, Justice Brandeis wrote that the law was a public nuisance regulation.[85] Neither Justice Holmes nor Justice Brandeis provided much explanation for their characterizations of the law. The case illustrates how slippery nuisances can be and how even great minds who normally think much alike may disagree about them.

The confusion about nuisances and takings is a consequence of the disconnection between property theory and takings jurisprudence. Under the common law, a nuisance is an unreasonable interference with other owners' use and enjoyment of their properties or with other people's rights.[86] Courts have traditionally distinguished between private nuisances and public nuisances. A private nuisance is one that affects only a single other owner or a small number of other owners;[87] a public nuisance is one that affects the rights of a larger number of people, often regardless of whether they own property.[88] Traditionally, courts have allowed private actions by individual property owners against other property owners for private nuisances;[89] they have not, however, allowed private actions for public nuisances.[90] Public nuisances have

84. *Id.* at 412–13.

85. *Id.* at 418–19 (Brandeis, J., dissenting).

86. *See, e.g.*, 58 AM. JUR. 2D *Nuisances* § 1, Westlaw (Feb. 2021 update) ("The law of nuisance recognizes two conflicting rights: property owners have a right to control their land and use it to benefit their best interests, and the public and neighboring landowners have a right to prevent unreasonable use that substantially impairs the peaceful use and enjoyment of other land.").

87. *See, e.g., id.* § 33 ("A private nuisance springs from the general principle that it is the duty of every person to make a reasonable use of his or her property so as to occasion no unnecessary damage or annoyance to his or her neighbor. The concept of private nuisance involves an interference with or invasion of an individual's interest in the use and enjoyment of land or property, which interference or invasion must, according to some courts, be unreasonable and substantial.").

88. *See, e.g., id.* § 26 ("A public nuisance is an unreasonable interference with a right common to the general public or all members of the community, such as by directly encroaching on public property or by causing common injury. A 'public nuisance' has also been defined as a condition or activity that substantially or unduly interferes with the use of a public place or with the activities of an entire community.").

89. *See, e.g., id.* § 214 ("A private nuisance is redressed by a private action because a private nuisance claim is inherently a private right of action.").

90. *See, e.g., id.* § 206 ("Generally, a public nuisance gives no right of action to an individual either for equitable relief or generally."). Some nuisances, however, are said to be "mixed" because they are both private nuisances and public nuisances. *Id.* § 25. In such cases, of course, private actions would be allowed. The public aspect of the nuisance, however, would still best be addressed through public action, such as a statute.

traditionally, therefore, been redressed through statutes and regulations.[91] Common examples of public nuisances include emissions from factories, loud noise from bars and nightclubs, and agricultural water runoff from farms. These are typically regulated either by federal and state laws and regulations or by local government ordinances.

When a private nuisance action is brought in court, the court is asked to decide whether the defendant's actions or behavior amount to an unreasonable interference with the plaintiff's use and enjoyment of her property. The court's decision does not entail any taking of private property rights by the government; instead, it clarifies how private property rights are assigned between the two parties.[92] If a court holds that the defendant's use of his property did cause a nuisance to the plaintiff, the court's decision assigns the right to be free from the nuisance to the plaintiff's property.[93] The defendant's property rights in his land thus do not include the right to use it in a way that causes the nuisance. Alternatively, if a court declines to hold that the defendant's use of his property caused a nuisance, the court's decision assigns to the defendant the right to use his property in a way that causes the claimed nuisance, and the court declines to assign to the plaintiff's property the right to be free from the claimed nuisance.[94]

Under the law of private nuisance, therefore, a property owner's bundle of rights includes the right to use and enjoy her land up to the point where the uses cause an actionable nuisance to her neighbor. Her neighbor's rights to use and enjoy his land include the right to be free from her nuisances beyond the point where they would become actionable. In theory, a court does not realign property rights when it decides a nuisance case; it merely clarifies where the line between the plaintiff's property rights and the defendant's property rights lies. And a court, therefore, neither takes nor conveys private property rights when it makes

91. *See id.* § 39 ("The legislature has broad discretion to designate a particular activity to be a public nuisance.").

92. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 79–80 (8th ed. 2011) (discussing examples of nuisance decisions altering the rights of two opposing private landowners).

93. *See id.* at 80 (describing how courts may resolve cases by ordering a defendant to cease the nuisance).

94. *See id.* (describing how courts may resolve cases if the defendant's conduct has not been found to be a nuisance).

that decision. Thus, in theory, a court's holding that a private nuisance has occurred can never amount to a taking.

A statute, regulation, or ordinance that controls a public nuisance serves essentially the same purpose as the case law controlling private nuisances except that it defines the boundary between an owner's property rights and the rights of others to be free from the nuisance. Courts have traditionally declined to hear public nuisance claims because a private individual does not generally have standing to assert a cause of action on behalf of the public, not because there are any other differences in the purposes of public nuisance law.[95] A regulation that controls public nuisances, therefore, does not take private property rights away from any property owner; instead, it defines the boundary between the rights of the private property owner and the rights of the public. In other words, a public nuisance law cannot amount to a taking.

Given the purposes and effects of nuisance law, some of the Supreme Court's reasoning in *Lucas* seems tortured. Before the case reached the Supreme Court, the Supreme Court of South Carolina held that the Beachfront Management Act, which prevented Mr. Lucas from developing his coastal properties, was intended to prevent harmful and noxious uses and was therefore a nuisance regulation.[96] Justice Scalia's majority opinion rejected this holding.[97] Instead of construing the South Carolina court's opinion as a mistaken application of traditional nuisance concepts, the Supreme Court reframed the matter using concepts from substantive due process doctrine,[98] which would clearly be inadequate to address a nuisance question. Justice Scalia then undertook an inapposite analysis of the equivalence of harm-preventing and benefit-conferring regulations.[99] Of course, public nuisance law strikes a balance between the rights of property owners to use their properties in particular ways and

95. *See* 58 AM. JUR. 2D *Nuisances* § 206, Westlaw (Feb. 2021 update) ("[A] public nuisance normally must be abated by a proceeding instituted in the name of the state or at the suit of some proper officer or body . . . .").

96. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1022–23 (1992); Lucas v. S.C. Coastal Council, 404 S.E.2d 895, 900–02 (S.C. 1991).

97. *Lucas*, 505 U.S. at 1022–23.

98. *See id.* ("The 'harmful or noxious uses' principle was the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power.").

99. *Id.* at 1023–24.

the rights of others to be free from such uses by the owners. Therefore, the distinguishing characteristic of a nuisance regulation is that it balances the harm of property owners' nuisance-causing behavior against the benefits to others of being free from nuisances. In other words, nuisance laws always both prevent harm and confer benefits. To characterize a nuisance regulation as only preventing harm is to confound the basic principles of nuisance law.

Instead of subjecting the South Carolina statute to a nuisance analysis, Justice Scalia suggested that the appropriate test is whether the Act's proscribed land uses would already have been proscribed under South Carolina law when it was enacted.[100] The logic is clear: a statute that merely codifies an existing regulation cannot cause a taking because it cannot take property rights that have already been taken and do not exist. But to confine the scope of nuisance regulations that are exempt from takings claims to laws that merely codify existing proscriptions is to cast nuisance law in stone and to interfere with the power of state governments and state courts to develop their nuisance laws in accordance with their constitutionally assigned powers. Justice Scalia, therefore, conceded the nuisance concept in favor of principles of substantive due process much too quickly.

Justice Sutherland famously observed that a nuisance is "a pig in the parlor instead of the barnyard."[101] As he explained, whether a land use law is a nuisance law is not something that can be ascertained in the abstract; rather, it requires serious consideration of the circumstances and context.[102] Moreover, the circumstances and context in which land uses occur can and do change over time, and a land use that was once the right thing in the right place can become the wrong thing in the wrong place.[103] State legislatures thus need the freedom to enact new statutes that identify new nuisances arising under new

100. *See id.* at 1029–30 ("The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and . . . it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.").

101. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

102. *See id.* at 387 ("A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities.").

103. *Id.*

circumstances and in a new context.[104] By limiting the scope of nuisance regulations that are exempt from takings claims to nuisance regulations that merely codify existing legal proscriptions, courts would impinge on state legislatures' legitimate powers. In theory, this could make nuisance laws static and ill-fitted to social circumstances.

Lucas created further mischief by stating a per se rule that it is always a taking when a regulation denies an owner all economically viable uses of her property.[105] This seems to suggest that even a nuisance regulation could be a taking if it denied the owner all economically viable uses. It is difficult to conceive of a nuisance regulation that could do that, but given that a nuisance regulation merely assigns private rights between private individuals, it would be illogical to characterize a nuisance regulation as a taking. Beyond that, the new per se rule creates its own confusion.

As Justice Stevens asked in a dissenting opinion, when, exactly, does a regulation deprive an owner of all economically viable uses of her property?[106] The Court held that the South Carolina Beachfront Management Act deprived Mr. Lucas of all economically viable uses of his land.[107] To be sure, Mr. Lucas was prohibited by the Act from developing his properties for lucrative residential sales, but it is debatable whether the Act deprived him of *all* economically viable uses.[108] More importantly, given the significance of the economic impact of the Act on the value of Mr. Lucas's properties, the Court could have held that the Act caused a taking without laying down the new per se rule.

On remand, the Supreme Court of South Carolina determined that no existing South Carolina laws or caselaw precedents would have prohibited Mr. Lucas from building

104. *See Lucas*, 505 U.S. at 1027 (noting that American jurisprudence has historically recognized police powers to include the ability to impose new limits on the use of private property as needs arise).

105. *See id.* (explaining that the Court's takings jurisprudence requires compensation for a regulation that deprives land of all economically viable uses in all situations unless the proscribed use interests were not part of the landowner's title anyway).

106. *See id.* at 1064–65 (Stevens, J., dissenting) (arguing that the Court's rule for regulatory takings is "arbitrary" as there is not a meaningful difference between losing ninety-five percent of a property's economic value and losing all its economic value).

107. *Id.* at 1020 & n.9, 1027 (majority opinion).

108. *See id.* at 1065 n.3 (Stevens, J., dissenting) (contending that Mr. Lucas could have used his land for recreational activity or sold it to neighbors).

houses on his lots as he had planned.[109] That is not surprising. In fact, if a nuisance law simply prohibits an owner from using her property in a way that impinges on the rights of others, it is difficult to conceive how the Beachfront Management Act could have been construed as a nuisance regulation. The outcome, however, did nothing to clarify the nuisance rule. The Supreme Court of South Carolina had precipitated the entire controversy by holding that when a law prevents serious public harm, no takings compensation is required.[110] The Supreme Court of the United States would have done better, however, to clarify the nuisance rule and remand the matter back to the South Carolina Supreme Court for an appropriate application of nuisance law. Unfortunately, *Lucas* has left confusion and incoherence in its wake. Thankfully, there is little evidence that it has played much role in takings litigation.[111]

E. Regulatory Takings

What is most conspicuously missing from the Supreme Court's analysis in *Lucas*, and what is always missing from regulatory takings cases, is any consideration of whether the taking is for a public use.[112] As it has been interpreted by the Supreme Court, the United States Constitution states that a taking may occur only for a public use; if the purpose of a taking is not to serve a public use, then the taking is prohibited no matter how much compensation is provided to the owner.[113] The Constitution does not distinguish between conventional takings and regulatory or exactions takings, so there is no constitutional basis for ignoring

109. Lucas v. S.C. Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992).

110. *Lucas*, 505 U.S. at 1020–22.

111. *See* James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 60, 61–62 (2016) ("The nuisance exception spelled out in *Lucas* does not figure prominently in the post-1992 cases.").

112. The Supreme Court has acknowledged that its regulatory takings jurisprudence has long ignored the public use requirement. *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326 (2002) ("After *Mahon*, neither a physical appropriation *nor a public use* has ever been a necessary component of a 'regulatory taking.'" (emphasis added)). For one scholar who has argued for the application of a public use requirement in copyright cases, see Kenneth J. Sanney, *Balancing the Friction: How a Constitutional Challenge to Copyright Law Could Realign the Takings Clause of the Fifth Amendment*, 15 COLUM. SCI. & TECH. L. REV. 323 (2014). For another scholar who has argued for the application of the public use requirement to regulatory takings from an originalist perspective, see John Greil, Note, *Second-Best Originalism and Regulatory Takings*, 41 HARV. J.L. & PUB. POL'Y 373 (2018). For the most part, however, the Court's failure to apply the public use requirement has been acknowledged without challenge.

113. *Kelo* reaffirmed this principle. Kelo v. City of New London, 545 U.S. 469, 477 (2005) (citing Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984)).

the public use requirement.[114] If the public use requirement was simply equivalent to a public purpose requirement and the government could engage in a taking to advance any legitimate government interest, then the matter would normally be of little interest because the public use requirement would have almost no impact.[115] But if a public use is different from a public purpose and is not simply defined by the scope of the government's police powers, the public use requirement becomes more important.[116] In this respect, *Kelo* not only reinvigorated the public use doctrine in conventional, physical takings cases, but it also created the potential for the public use doctrine to matter in other takings cases.

There is no rational justification for the Supreme Court to ignore the public use requirement in regulatory takings cases. Because the Court does ignore it, the only constitutional limit on the government's power to take private property through regulations arises from the doctrine of substantive due process, which limits the government's takings power less than the public use requirement in conventional takings. As a practical matter, therefore, the Supreme Court now provides less protection for private property against regulatory takings than against conventional takings. This undermines the coherence of takings jurisprudence and has the potential to create some absurd incentives.

For example, suppose the government wished to take a parcel of land from one private owner to transfer it to another private owner to encourage investment in the local economy—e.g., an investment in an auto parts plant—and foster economic development. According to the Supreme Court's opinion in *Kelo*,

---

114. *See* U.S. CONST. amend. V (making no mention of different categories of "takings"). Of course, the drafters probably did not anticipate that the Fifth Amendment would be applied to regulations and exactions. *See, e.g.*, Melton, *supra* note 43, at 75–76, 80 (explaining that at the time of the framing, Americans were concerned about the government's power to confiscate property); *cf.* Rubenfeld, *supra* note 43, at 1085–86 (noting that the U.S. Supreme Court first examined the potential of regulatory takings in 1887 and did not hold that a regulation constituted an uncompensated taking until 1922).

115. The public use requirement would be as toothless as substantive due process when no fundamental rights are implicated. *See* Smythe, *supra* note 14, at 401 (noting that due to the broadly defined scope of legitimate state interests, the substantive due process doctrine "places few limits on government powers" when applied to non-fundamental rights).

116. In theory, regulations that are allowed under the rational basis test for a breach of substantive due process might be deemed unconstitutional because they amount to takings and the public use requirement is not met.

such a taking would be unconstitutional, even with just compensation, because the transfer would not be part of an integrated economic development plan.[117] It would seem, however, that the government could enact a land use ordinance that limited the use of the land to the purpose for which the new investor would put it—the auto parts plant—and thus, virtually compel the owner to sell or lease the land to that investor (or some similar investor). Of course, if the courts deemed the regulation to amount to a taking, as one would hope, just compensation would have to be provided. But if there was no public use requirement, the taking would be constitutional, compelling the owner to sell or lease the land. A regulatory taking would thus accomplish something the government could not do through a conventional, physical taking.

The example may sound contrived, but it is wise to remember how the *Lucas* case turned out. In the end, the trial court ordered the government of South Carolina to pay Mr. Lucas just compensation.[118] The parties negotiated a settlement under which the state purchased the land from Mr. Lucas for a price less than the price he had initially paid for it himself (the state also agreed, however, to pay his legal costs).[119] The state ultimately sold the land to a private developer,[120] and beachfront residences now line the shore of the Isle of Palms, South Carolina. For practical purposes, what happened in *Lucas* was a transfer of property from one private owner to another outside the context of an integrated economic development plan. In *Kelo*, the Supreme Court stated that such a transfer would not satisfy the public use requirement and would not be allowed, even with just compensation.[121] If the courts had applied the public use requirement and invalidated the application of the South Carolina statute to Mr. Lucas's properties, he probably would have been the one to earn a profit from developing them rather than some other developer.

---

117. *See Kelo*, 545 U.S. at 477, 486–87 (acknowledging that using eminent domain to transfer property between two private owners to maximize productive land use raises constitutional "suspicion").

118. Lucas v. S.C. Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992).

119. *See* DUKEMINIER ET AL., *supra* note 7, at 1179, 1197 (noting that the state paid Mr. Lucas $850,000 for the two lots that he had originally purchased for $975,000).

120. *See id.* at 1197 (explaining that the state resold the lots purchased from Mr. Lucas to a private construction company).

121. *See Kelo*, 545 U.S. at 477 (discussing the public use requirement without defining it precisely).

As a more general matter, it does not make sense to constrain governments from abusing their powers of eminent domain through conventional takings but to give them unbridled powers to engage in regulatory takings. The Supreme Court has clarified that there is a meaningful difference between the public use requirement and legitimate government purposes in conventional takings cases. To be sure, the Court should clarify and limit the scope of permissible public uses further,[122] but its revitalization of the public use requirement has the potential to limit political abuses of governments' takings powers. Applying the public use requirement to regulatory takings and exactions takings would lessen the likelihood that governments misuse the expansive police powers they have been given under the modern substantive due process doctrine. It would also lend more coherence to the Supreme Court's takings jurisprudence.

F. Takings by Exactions

The proliferation of government regulations in the modern era has given government significant leverage over property owners who wish to use their properties in ways that are subject to regulations.[123] It has also arguably given governments incentives to subject private properties to their regulations, in part, to increase their leverage over property owners.[124] Land use regulations and local ordinances often require property owners to obtain permits to develop or use their properties in particular ways.[125] In return for granting the permits, the government departments or agencies that administer the regulations often require exactions, which are something of value the landowner must provide in return for the permit.[126] These exactions typically consist of the transfer of particular property rights or

122. *See infra* Part IV.

123. *See, e.g.*, WILLIAM A. FISCHEL, REGULATORY TAKINGS 341–51 (1995) (describing how the "dramatic expansion of land use regulations" has enabled governments to force private builders to pay for community benefits).

124. *See id.* at 342 (observing that local governments would have "no leverage" without exactions).

125. *See, e.g.*, 83 AM. JUR. 2D *Zoning and Planning* § 813, Westlaw (Feb. 2021 update) (explaining that a "special permit" is issued to describe an enumerated use allowed by an ordinance and can allow the affected property to be "an exception to underlying zoning regulations").

126. *See* FISCHEL, *supra* note 123, at 341 (noting that developers must typically pay fees or provide goods before they are granted a permit).

money.[127] Landowners from whom such exactions have been demanded have challenged the demands as takings, and the United States Supreme Court has developed a body of takings jurisprudence to address such claims.

The Supreme Court has not applied the public use requirement in exactions cases, either. However, the Court has developed a two-pronged inquiry.[128] The first prong applies a nexus test. This asks whether the exaction is rationally related to the purpose of the regulation under which the permit is required.[129] The second prong is a rough-proportionality test. This asks whether the exaction is roughly proportional to the adverse impact that granting the permit and allowing the land use will have on the purpose of the regulation.[130] If the exaction fails either of the tests, it is deemed to be a taking, and just compensation is required.

What is missing from the exactions jurisprudence, of course, is a public use requirement. This means that takings law provides less protection for private property rights when they are subject to exactions than when they are subject to conventional takings. Some exactions that bear no relationship to the purpose for which a permit is required may still be demanded—subject to the government's provision of just compensation—even though they do not meet any public use requirement. The regulation under which the permit is required thus grants the government considerable discretion about how it may use its leverage in the permitting process to pursue objectives unrelated to the regulatory scheme under which the permit is required and unconstrained by a public use requirement. That may encourage governments to establish permit requirements to pursue objectives that are unrelated to the permits and could not be pursued through a conventional taking, where a public use requirement would apply.

To make matters worse, an exaction that fails the rough-proportionality test may also still be demanded—subject to the government's provision of just compensation—without meeting any public use requirement. This confers upon the government

127. *See, e.g., id.* at 341, 344 (discussing examples of exactions consisting of money, such as paying a fee, and exactions consisting of a transfer of property rights, such as giving an easement).

128. DUKEMINIER ET AL., *supra* note 7, at 1248–49.

129. *Id.* at 1248.

130. *Id.* at 1249.

the power to take more property rights than is necessary to offset the adverse effects to the public of granting the permit even though the taking does not meet a public use requirement. Although just compensation will be required, it may seem less than just to the property owner. Of course, it is possible that exactions might fail both the nexus and rough-proportionality tests and also not satisfy a public use requirement. In that case, a government actor could demand exactions in return for granting a permit under a regulatory scheme when the exactions bear no relationship to the purpose of the scheme, exceed any adverse impact of granting the permit, and do not satisfy a public use requirement.

Adding a public use test to the Supreme Court's exactions takings analysis thus would not only bring greater coherence to its taking jurisprudence, but it would also mitigate, if not eliminate, the perverse incentives for governments to overregulate and abuse their takings powers. Because an exaction could only amount to a taking if it passed both the nexus and rough-proportionality tests, the public use requirement would only apply if the exaction failed at least one of those tests. It would, therefore, be most appropriate for courts to apply the nexus and rough-proportionality tests first and then to apply a public use test if the government's demand for the exaction were deemed to be tantamount to a taking. If the exaction were deemed not to be for a public use, then the taking would not be constitutional even with just compensation, and the exaction would have to be voided.

The question then would be whether the government would be obliged to grant the permit. To discourage governments from abusing the permitting process, the answer, arguably, should be "yes." The permit would then be issued unconditionally. If the government could withhold the permit, some landowners who had particularly strong interests in developing their properties might be loath to challenge the exactions for fear their permits would not be granted. If the government were compelled to issue the permit unconditionally, on the other hand, there would be a disincentive for the government to abuse the regulatory process by demanding exactions that violated both at least one prong of the two-pronged nexus and rough-proportionality test and the public use requirement. Of course, governments could avoid such problems by ensuring their exactions complied with

the two-pronged nexus and rough-proportionality test. The public use requirement, however, would still mitigate some abuses of the regulatory process.

In some cases, an exaction that failed the nexus or rough-proportionality tests—or both—might pass the public use test. In such a case, the taking would be allowed, but just compensation would be required. For example, in *Nollan v. California Coastal Commission*,[131] the Coastal Commission's demand for an easement across the Nollans' property to grant the public access to the beach would probably pass the public use test, even if it were applied in the narrow way advocated here.[132] In such a case, therefore, the public use requirement would make no difference to the outcome. In other cases, however, an exaction might fail the nexus or rough-proportionality test and also fail the public use test.

In *Koontz v. St. Johns River Water Management District*,[133] for example, the St. Johns River Water Management District wanted Mr. Koontz to pay for improvements on wetlands several miles away from his property in return for the permit he needed to develop his own property.[134] When Mr. Koontz challenged the district, the trial court determined that the money exaction failed both the nexus and rough-proportionality tests.[135] The district appealed, arguing in part that money exactions should not be subjected to those tests.[136] The Supreme Court of the United States ultimately held that a money exaction should be subjected to both the nexus and rough-proportionality tests,[137] that the exaction amounted to a taking, and that the trial court's award of just compensation should stand.[138] It is very likely, however, that a money exaction like the one in *Koontz* would fail a public use test, especially if it were applied in the narrow way advocated here.[139] Under the approach advocated here, therefore, the money exaction would be voided, and the permit would be granted.

---

131. 483 U.S. 825 (1987).

132. *See infra* Part IV. An easement like the one demanded in *Nollan* would be open for use by members of the public. It would be analogous to a turnpike or public carrier.

133. 570 U.S. 595 (2013).

134. *Id.* at 601–02.

135. *Id.* at 603.

136. *Id.* at 611–12.

137. *Id.*

138. *Id.* at 619.

139. *See infra* Part IV.

If a meaningful public use requirement were applied in exactions takings cases, government regulators might be wary of demanding exactions that risked failing either the nexus or rough-proportionality tests, and government regulatory excesses might be curbed.

IV. CLARIFYING PUBLIC USES AND REVITALIZING PRIVATE PROPERTY

If the public use requirement were applied to all takings, whether they were conventional, regulatory, or by exactions, much more would turn on the Supreme Court's interpretation of the public use requirement. As it stands, the Court currently defines a public use for a conventional taking on an ad hoc basis.[140] Thus, takings of land for uses by the government, or for uses that would make the land open to the public, are public uses.[141] Takings of land for transfer to other private owners as part of an integrated economic development plan are public uses.[142] Other takings might or might not be for public uses. If there is any guidance in the Court's recent cases, they suggest that takings are more likely to be considered public uses if they would provide benefits more broadly to the public.[143] Unfortunately, that guidance, if it is such, is too nebulous to provide much help. The Supreme Court needs to articulate a more precise interpretation of the public use requirement if it wants to forestall government abuses of takings powers and alleviate the uncertainties that government powers place on private property.

Perhaps even more importantly, the Supreme Court needs to narrow the scope of the uses that meet the public use requirement. Although *Kelo* provided an important reminder that the public use requirement is still very real, the majority in *Kelo* defined public uses too expansively. In fact, the Supreme Court had already opened the Pandora's Box in *Berman*, which conflated the public use requirement with the government's

140. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

141. *See* Kelo v. City of New London, 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting) (arguing that the Fifth Amendment forbids takings that transfer private property to another private owner and criticizing the majority's reasoning as "wash[ing] out any distinction between private and public use of property").

142. *See id.* (noting that the Court's definition of "public use" turns on the presence of an integrated economic development plan).

143. Smythe, *supra* note 14, at 412.

police powers. *Kelo* and *Berman* upheld challenges against takings under urban redevelopment plans[144] and thus facilitated takings under urban redevelopment plans over the last several decades all across the country.[145] The impact of urban redevelopment has no doubt varied across communities, but in many cases, it appears that the poor (or middle class) and powerless (or politically uninfluential) have been the victims of government-sponsored urban gentrification in the service of the rich and powerful.[146] Interpreting the public use requirement too expansively exacerbates the potential for political abuses of government takings powers. As Justice O'Connor warned in her dissenting opinion in *Kelo*:

> [T]he fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more.[147]

It is important to emphasize that there are potential political abuses of eminent domain in all economic development takings and not just in cases, such as *Kelo*, where the properties are well maintained and not blighted as in *Berman*. In fact, the potential political abuses are probably much greater in cases like *Berman* because the residents who will be most adversely affected by the takings will not have the political influence to resist them.[148] In this regard, it is relevant to observe that, even though the Supreme Court upheld the takings (with just compensation) in *Kelo*, where the takings occurred in a relatively affluent and certainly unblighted neighborhood, the City of New London's

144. Amy Lavine, *Urban Renewal and the Story of* Berman v. Parker, 42 URB. LAW. 423, 424 (2010).

145. *See id.* at 472–73 (observing that the deferential standard used to uphold the taking in *Berman* led to Congress enacting broad reforms and the courts permitting broader takings challenges in an attempt to undo the consequences of urban renewal projects).

146. *See, e.g.*, SOMIN, *supra* note 77, 15–17 (observing that Pfizer Inc. not only strongly influenced the City of New London's economic redevelopment plan but that it also lobbied the city's redevelopment agency extensively to encourage it to exercise its takings powers); *see also* Smythe, *supra* note 40, at 28 (observing that allowing takings for economic development plans "opens the door to an abuse of the State's powers by those who are the most wealthy and influential against those who are the least wealthy and influential").

147. *Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting).

148. Smythe, *supra* note 14, at 408.

economic development plan was, in the end, stymied by political opposition.[149] In contrast, in *Berman*, where the takings occurred in a poor, blighted neighborhood in Washington, D.C., the economic development plan was implemented, and over five thousand mostly poor African-American residents in the neighborhood were displaced.[150] Sadly, Justice O'Connor's dire warning in *Kelo* had already proved true.

The takings in *Kelo* were a terrible mistake and an injustice to the owners of the properties that were targeted. If any good can result from such a fiasco, it will be from the scrutiny that it placed on economic development takings and the public use requirement generally. It is unfortunate that the lesson had not already been learned from *Berman*. The sad consequences of the takings in *Kelo* and *Berman* have made it clear that overly expansive conceptions of the public use requirement invite political abuses of the government's takings powers. The public use requirement should be construed narrowly to prevent further abuses of the democratic process by constraining government powers that can be so easily abused.

One of the overarching principles of constitutional democracy is the idea that certain government powers should be constrained to protect citizens' rights and liberties from political abuses.[151] Given the obvious political abuses of the government's power of eminent domain, the Supreme Court should overrule *Kelo* and *Berman* and define public uses much more narrowly. To respect the historical interpretation of the term, public uses

149. There were several plaintiffs in *Kelo*, and there was considerable media coverage of the case. Local politicians faced so much criticism that the mayor of New London issued an apology to the displaced property owners in 2012. SOMIN, *supra* note 77, at 235. Somin observed that ten years after the case, the condemned properties remained undeveloped and unused. *Id.*

150. Smythe, *supra* note 14, at 408. Amy Lavine has recounted the long-neglected story behind *Berman*. *See generally* Lavine, *supra* note 144. *Berman* was largely neglected by the media and, in Lavine's view, "will likely remain esoteric to much of the public" for years to come. *Id.* at 474.

151. As James Madison wrote:

> Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *cheifly* [sic] to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.

Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-11-02-0218 [https://perma.cc/3VYU-CTLU] (last updated Jan. 5, 2021).

should include the transfer of private property to (1) public ownership, (2) public carriers or utilities, or (3) private owners for uses that will be open to the public. The Court should be wary of including anything beyond that. The Court would have to overrule some precedents, such as *Berman* and *Kelo,* but a narrow interpretation of the public use requirement such as this would be consistent with most of the Supreme Court's takings jurisprudence, and it would help to prevent the kind of political abuses of government power against which the courts in a constitutional democracy have always been the last safeguard.

The Supreme Court should also apply its public use requirement consistently across all takings, whether they are conventional ones where permanent physical possession of land is taken, regulatory takings, or takings by exactions. Under the *Penn Central* multi-factor test for regulatory takings, there is some weight given to the character of the government action; that could allow some consideration for whether the action is for a public use. However, that consideration is only given in determining whether the government's action was a taking and thus whether just compensation is required. It does not constrain the government from engaging in any regulatory takings; it merely influences the likelihood that just compensation will be required. This still leaves open the possibility that the government's regulatory powers will be subject to political abuses. The public use requirement needs to be applied separately from whatever multi-factor test the Court uses to determine whether a regulation amounts to a taking. The potential for political abuses in the regulatory process implies the same need for a public use test in exactions takings cases. And because the nexus and rough-proportionality tests are used merely to determine whether exactions amount to takings and just compensation is required, the public use requirement should be applied independently of them.

There is some urgency to the matter because the courts have not yet applied a public use requirement at all in regulatory takings cases or exactions takings cases; thus, the scope of such potential abuses through regulatory takings and exactions takings is even greater than it is through conventional takings. Applying the public use requirement to all takings cases would make takings jurisprudence more coherent, and it would provide safeguards against political abuses of government powers and

regulatory processes. In fact, the public use requirement would allow the courts to constrain some government and regulatory excesses in ways that they can no longer do through the doctrine of substantive due process.

The idea of using takings jurisprudence to accomplish what substantive due process can no longer do might seem like a sleight of hand. But that would misconstrue the Constitution. Some critics of the substantive due process doctrine argue that it has no textual basis in the Constitution. The Takings Clause clearly does have a textual basis in the Constitution, and its obvious purpose is to constrain governments from abusing private property rights. The just compensation requirement ensures that politically motivated expropriations at least come at some costs. But many regulatory takings might be worth the costs to the political interests that lobby for them, especially since the costs might be borne in part by others. And the just compensation paid to those whose property rights are taken might seem less just to them than it does to the political interests that motivate the takings. Applying a meaningful public use filter to regulations and exactions would provide a stronger check against the political abuses of governments' legislative powers and their regulatory processes.

It would also relieve the burden of government regulatory powers on private property generally. To the extent that government powers create the potential for takings, regulations, and exactions, they also burden all private property rights with a contingency that exists merely because of the possibility that the government might exercise its powers.[152] Constraining the government's takings powers by defining the public use requirement narrowly and applying it to all takings, including regulatory and exactions takings, would reduce the contingencies government powers place on private property, reduce the risks to investors in developing properties, diminish the uncertainty associated with the ownership of private property, and increase the market value of private property. In other words, it would reverse the adverse consequences of construing government powers too expansively.

Of course, it would be a mistake to hamstring the government and lose the social benefits of constructive and salutary

152. *See supra* Part II.

regulations. To ensure that government retains adequate regulatory powers, therefore, it is essential for courts to apply the nuisance rule appropriately. Properly interpreted, a nuisance regulation does not take private property rights; it merely aligns them appropriately in relation to the rights of others. It is true that the nuisance rule creates the potential for political abuses because politically powerful parties might try to alter the alignment of private rights in their own interests, but as long as there is a legal standard that courts can apply to distinguish nuisance regulations from others, they can rebuff those efforts, and the abuses can be minimized. Courts will, no doubt, make mistakes in the application of the laws, but there would be an even greater danger to liberty and justice if they applied the wrong laws.

V. CONCLUSION

In the years to come, the future of the country will turn on the direction of the Supreme Court, and the direction of the Supreme Court will turn on the outcomes of national elections. Regrettable though it may be, the direction of takings jurisprudence may turn on politics. It is discomfiting to have to rely on the political process to check political abuses of government powers. Ultimately, however, the Supreme Court is the last line of defense for liberty and justice against the encroachments of influential political interests. However the political process shapes the direction of the Supreme Court, one can only hope that the Justices will have the reason, character, and judgement to turn takings law in a more constructive direction, make it more coherent and less dysfunctional, empower governments to resolve legitimate nuisance problems, and also provide more meaningful protections for private property.