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Jam for Justice Holmes: Reassessing the Significance of *Mahon*


William Michael Treanor

Georgetown University Law Center, wtreanor@law.georgetown.edu

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ARTICLES

Jam for Justice Holmes: Reassessing the Significance of *Mahon*

WILLIAM MICHAEL TREANOR*

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* Associate Professor of Law, Fordham University School of Law. J.D., Yale, 1985; A.M. (history), Harvard, 1981; B.A., Yale, 1979. I am grateful to Greg Alexander, Vicki Been, Bob Ellickson, Martin Flaherty, Abner Greene, Tracy Higgins, Jim Kainen, Jim Krier, Glynn Lunney, John Nagle, Carol Rose, Paul Schwartz, Tony Sebok, Howard Shapiro, Steve Siegel, and Ben Zipursky for their comments on earlier drafts, to John Goldberg for his insights about Holmes, and to John Echeverria for his discussions about Takings Clause litigation. Prior versions were presented at faculty colloquium at Cardozo Law School and Seton Hall Law School, and I benefitted greatly from the comments of the participants at those colloquia. Lindsay Feinberg and Yvette LeRoy provided expert research assistance.

INTRODUCTION

When courts and commentators discuss *Pennsylvania Coal Co. v. Mahon*,¹ they use the same word with remarkable regularity: famous.² *Mahon* has achieved this fame in part because it was the occasion for conflict between judicial giants, and because the result seems ironic. Justice Oliver Wendell Holmes, Jr.—the great *Lochner* dissenter³ and a jurist generally considered a champion of judicial deference to legislatures in the sphere of economic decision-making—wrote the opinion striking down a Pennsylvania statute barring coal mining that could cause the surface to cave-in. Sharply dissenting from Holmes's opinion was his consistent ally on the Court, Justice Louis Brandeis.⁴

The *Mahon* decision is also famous because it has become a virtual surrogate for the original understanding of the Takings Clause.⁵ Even though it is generally accepted that the Takings Clause was originally understood to apply only to physical seizures of property, the case law has now firmly established that it applies to government regulations as well.⁶ *Mahon* has satisfied the need

1. 260 U.S. 393 (1922).

2. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1063 (1992) (Stevens, J., dissenting) ("famous observation"); FRED BOSSELMAN ET AL., *THE TAKING ISSUE* 238 (1973) ("famous case"); WILLIAM FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 14 (1995) ("*Pennsylvania Coal* is famous"); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 595 (2d ed. 1988) ("famous epigram"); Gregory S. Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 COLUM. L. REV. 1545, 1588 (1982) ("perhaps the most famous land-use case under the takings clause"); Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1475 n. 210 (1991) ("famous opinion"); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles, Part II*, 78 CAL. L. REV. 53, 152 (1990) ("Justice Holmes' famous statement"); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1677 (1988) ("famous *Pennsylvania Coal* case"); Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1124 n.23 (1996) (book review) ("one of the most famous cases in the regulatory takings pantheon"); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1111 (1993) ("famous opinion"); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 43 (1964) (same); Bernard Schwartz, *Takings Clause—"Poor Relation" No More?*, 47 OKLA. L. REV. 417, 422 (1994) ("famous epigram"); Stewart E. Sterk, *Governmental Liability for Unconstitutional Land Use Regulation*, 60 IND. L.J. 113, 119 (1984) ("famous 'taking' language"). A search of the Lexis law review database using the search phrase "*Pennsylvania Coal* w/50 famous" produced 42 law review articles, 36 of which describe the case or some aspect of it as "famous." Search of LEXIS, Lawrev Library, Allrev File (Dec. 1, 1997).

3. See *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting) (arguing that statute limiting the bakery employees' hours, which the majority struck down as outside state's police powers, should be upheld because of state's inherent regulatory power).

4. See *Mahon*, 260 U.S. at 416 (Brandeis, J., dissenting).

5. U.S. CONST. amend. V ("[N]or shall private property be taken for public use without just compensation.").

6. Even Justice Scalia acknowledges that the Takings Clause did not originally extend to regulations. See *Lucas*, 505 U.S. at 1014 ("Prior to Justice Holmes's exposition in *Pennsylvania Coal v. Mahon*, it was generally thought that the Takings Clause reached only a 'direction appropriation' of property or the functional equivalent of a 'practical ouster of [the owner's] possession.' " (alteration in original) (citations omitted)). For discussion of the evidence that the original understanding was so limited, see BOSSELMAN, ET AL. *supra* note 2, at 105-14; William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 831-54 (1995) [hereinafter *The Original Understanding*]; William Michael Treanor, Note, *The Origins and Original Significance of the*

original understanding typically satisfies: *Mahon* serves as a touchstone from the past that can be used to resolve current controversies. Politicians and activists routinely appeal to Holmes and his decision.⁷ The Court does the same, and the opinion has become, to quote Chief Justice Rehnquist, “the foundation of our ‘regulatory takings’ jurisprudence.”⁸ That jurisprudence has gained in importance in recent years as the Court, often invoking *Mahon*,⁹ has used the Takings Clause¹⁰ to strike down economic legislation with a frequency not seen since the New Deal constitutional revolution.¹¹ As the significance of this area

Just Compensation Clause of the Fifth Amendment, 94 YALE L.J. 694, 706-14 (1985). The Framers’ limitation of the Takings Clause to physical dispossession was not the product of a lack of experience with regulations that diminished the value of property. Regulation in colonial America was often intensive. See FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 87-96 (1985); John F. Hart, *Colonial Land Use and its Significance to Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996); Treanor, *The Original Understanding*, *supra*, at 787-91. I have argued previously that the Framers protected only against physical dispossession because they thought physical property was the form of property peculiarly unlikely to be fairly treated by majoritarian decisionmakers. See *id.* at 825-55.

7. See, e.g., H.R. REP. NO. 104-46, at 4 (1995) (“In *Pennsylvania Coal Co. v. Mahon*, the Supreme Court recognized that regulation of property could be considered a taking if it ‘goes too far.’” (citation omitted)); 143 CONG. REC. S5005 (daily ed. May 22, 1997) (statement of Sen. Hatch) (“This key problem to the regulatory takings dilemma was recognized by Justice Oliver Wendell Holmes in *Pennsylvania Coal Co. v. Mahon*.”); Nancy G. Marzulla, *Testimony Concerning the Endangered Species Act Before the House Committee on Resources* (Sept. 17, 1996), FED. DOC. CLEARING HOUSE CONG. TESTIMONY, available in LEXIS, Legis Library, Cngtst File (“Since 1922, the government has known that if its regulations go ‘too far,’ then it must pay for the taking. *Pennsylvania Coal v. Mahon*.”)

8. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 508 (1987) (Rehnquist, C.J., dissenting). Similar statements are numerous and come from those who favor narrow constructions of the Takings Clause, such as Bruce Ackerman, see BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 156 (1977) (“both the most important and most mysterious writing in takings law”), and those who favor broad readings of the clause, such as Richard Epstein, see Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 12 (“*Pennsylvania Coal* has long been regarded as perhaps the single most important decision in the takings literature . . .”).

9. For discussion of recent judicial treatment of the case, see *infra* Part II and text accompanying notes 314-41.

10. U.S. CONST. amend. V (“[N]or shall private property be taken for public use without just compensation.”).

11. Although commentators disagree about precisely which cases are regulatory takings cases, there are at least eight such cases since 1979 in which the Court has invalidated state or federal economic regulations, five of these decisions having been handed down since 1987. See *Youpee v. Babbitt*, 117 S. Ct. 727, 729 (1997) (invalidating escheat-to-tribe provision of amended Indian Land Consolidation Act); *Dolan v. City of Tigard*, 512 U.S. 374, 395 (1994) (invalidating property dedication requirement as an uncompensated taking of property); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026 (1992) (invalidating state regulation that deprives land of all economically beneficial use without just compensation or a finding that land owner’s intended use is an improper nuisance); *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 841 (1987) (holding that conditioning permit to build on grant of public use easement would be appropriate only if public purpose related to permit requirement); *Hodel v. Irving*, 481 U.S. 704, 718 (1987) (invalidating escheat-to-tribe provision of Indian Land Conservation Act of 1983); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982) (invalidating a New York statute that required landlord to allow cable television company to install facilities on her property without just compensation); *Webb’s Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 (1980) (invalidating a county practice of retaining interest earned on interpleader

of the law has grown, so has the amount of attention paid to this always-prominent case.¹²

Despite disagreement about precisely how to read Justice Holmes's opinion in *Mahon*, courts and commentators have concurred about his basic intent: *Mahon* is uniformly held to stand for the proposition that the judiciary should closely scrutinize economic legislation for potential unconstitutionality. Thus, Justice Scalia, arguing for a broad reading of the Takings Clause, has invoked *Mahon* as the decision that best supports the expansive view that compensation is owed the landowner whenever a regulation destroys a property interest to which "the State's law has accorded legal recognition and protection."¹³ Although favoring a narrow reading of the Takings Clause, Justice Stevens nonetheless offers a similar (if less sympathetic) reading of the decision, finding in it a "potentially open-ended source[] of judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair."¹⁴

By reading *Mahon* against the background of relevant Supreme Court precedent, Holmes's substantive due process decisions, and other historical evidence—such as Holmes's scholarly writings and his correspondence about the case—this article shows that, despite the attention *Mahon* has received, the conventional understanding of it is dramatically wrong. Holmes's constitutional property decisions reflect both a high degree of deference to majoritarian decision-making and a rejection of the Court's various formalist, categorical rules for a balancing test weighted in favor of the government. *Mahon* was fully consistent with both these aspects of Holmes's thought. It has been misunderstood largely

funds held for private parties as a taking of property); *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979) (holding that government's attempt to create a public right of access to an improved pond goes far beyond ordinary regulation and therefore amounts to a taking); see also *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659 (1997) (ruling in favor of property owner that regulatory takings claim was ripe for adjudication and remanding case). In contrast, in the years between 1935 and 1979, there was only one such case. See *Armstrong v. United States*, 364 U.S. 40 (1960). For a discussion of *Armstrong*, see William Michael Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151, 1153-54 (1997). The point that recent decisions mark a heightened judicial scrutiny of economic legislation unseen since the 1930s is a standard one. See, e.g., Robert Brauneis, "The Foundation of Our 'Regulatory Takings' Jurisprudence": *The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon*, 106 YALE L.J. 613, 615 (1996); Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and its Impact on Economic Legislation*, 76 B.U. L. REV. 605, 605 (1996); *The Supreme Court, 1993 Term—Leading Cases*, 108 HARV. L. REV. 139, 298 (1994).

12. For recent analyses of the case, see ACKERMAN, *supra* note 8, at 156-67; FISCHER, *supra* note 2, at 14-47; Brauneis, *supra* note 11; Joseph F. DiMento, *Mining the Archives of Pennsylvania Coal: Heaps of Constitutional Mischief*, 11 J. LEGAL HIST. 396 (1990); Lawrence M. Friedman, *A Search for Seizure: Pennsylvania Coal v. Mahon in Context*, 4 LAW & HIST. REV. 1 (1986); E.F. Roberts, *Mining with Mr. Justice Holmes*, 39 VAND. L. REV. 287, 304 (1986); Carol M. Rose, *Mahon Reconstructed: Why the Takings Clause Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Frank R. Strong, *On Placing Property Due Process Center Stage in Takings Jurisprudence*, 49 OHIO ST. L.J. 591 (1988).

13. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992).

14. *Dolan v. City of Tigard*, 512 U.S. 374, 407 (1994) (Stevens, J., dissenting). For similar statements by academic commentators, see *infra* text accompanying notes 91-94.

because previous writers have myopically focused on the result, thus failing to grasp how the decision fit into the larger structure of Holmes's thought.

The project of this article is important from the vantage point of legal history. Part of its contribution is doctrinal. The Supreme Court's early police power cases, the background to *Mahon*, have never before been accurately synthesized, leading to widespread scholarly misunderstanding of one of the most critical topics in constitutional history. Part of its contribution is biographical, as it reveals Holmes's constitutional jurisprudence, although this project has symbolic significance as well because of the importance attached to the Holmesian mantle in our legal culture. Scholars have contended that *Mahon* shows, despite Holmes's dissents from the Court's substantive due process decisions, that he had a more activist conception of the role of the judiciary in reviewing economic legislation than Brandeis and other progressives. This article argues, in contrast, that the split between Holmes and Brandeis in *Mahon* reflected not a differing level of commitment to judicial deference, but rather different analytic approaches. Whereas Brandeis's dissent is consistent with a traditional approach to the police power, Holmes in *Mahon* and in his other opinions brilliantly reconceived the entire area of constitutional property law. His employment of a balancing test—notwithstanding the result in *Mahon*—effectively increased the scope of permissible government actions.

The reading of *Mahon* advanced in this article also has important consequences for takings law. Though in its decisions the Supreme Court repeatedly asserts reliance on *Mahon*, if the Supreme Court read *Mahon* correctly and applied Holmes's constitutional property jurisprudence in its Takings Clause cases, the Court would narrow the protections provided property owners in the great majority of situations (although in the area of common law nuisances it would expand them). At the same time, Holmes's view not only deviates from current takings law, but it is more coherent than that case law and, although flawed, has substantial normative appeal.

Part I of this article briefly presents the opinions in *Mahon*. Part II summarizes the competing schools of thought on the case's place in takings history and the test Holmes employed, and discusses the general consensus that *Mahon* is a case protective of property rights. Part III presents the groundwork for an alternative account by reviewing the pre-*Mahon* case law (other than Holmes's decisions), highlighting the generally overlooked cases involving regulation of businesses affected with a public interest. Part IV analyzes Holmes's decisions prior to *Mahon* and argues that those decisions reflect a constitutional property jurisprudence that was both internally coherent and at odds with the era's Supreme Court case law. Part V then shows how *Mahon* reflects Holmes's unique and deeply innovative acceptance of deferential balancing. Finally, Part VI discusses why *Mahon* has become so central to our takings jurisprudence and examines how a proper understanding of Holmes's views would sharply alter current case law.

I. *PENNSYLVANIA COAL CO. v. MAHON*

Mahon involved a challenge to the constitutionality of Pennsylvania's Kohler Act.¹⁵ The Kohler Act, a 1921 Pennsylvania statute, barred coal mining if it would cause the land at the surface to subside. (The Act only applied if the coal company did not own the surface rights. If it owned the surface rights, it was free to mine.)¹⁶ In 1878, Margaret Mahon's father had purchased from the Pennsylvania Coal Company the surface rights to a lot. The company, however, retained under the deed the lot's mineral rights and support rights, the latter an estate at land under Pennsylvania law.¹⁷ Under Pennsylvania case law pre-dating the passage of the Kohler Act, a coal company that owned support rights (as well as mineral rights) had no responsibility to the surface owner when mining caused subsidence.¹⁸ In 1921, Mahon and her husband, H.J., now living on the lot,¹⁹ received notice from the coal company of its intent to mine.²⁰ Suing under the Act, the Mahons sought an injunction barring mining in such a way as to cause subsidence.²¹ After the trial court found for the company by invalidating the statute on constitutional grounds, the Pennsylvania Supreme Court reversed, upholding the statute as a valid exercise of the police power.²²

Ruling for the company, the U.S. Supreme Court overturned the Pennsylvania Court's decision, and struck down the statute as unconstitutional. Justice Holmes's opinion for the Court is short and requires some unpacking. After stating the facts, he framed the case as one in which "[t]he question is whether the police power can be stretched so far."²³ Holmes next presented the large, competing concerns—individual constitutional protection versus government power—implicated by the case:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the

15. 1921 Pa. Laws 1198.

16. *See id.*

17. *See Mahon*, 260 U.S. at 412 (setting forth terms of 1878 deed); *id.* at 414 (recognizing that support rights were an estate under Pennsylvania law); Rose, *supra* note 12, at 564 (noting that original purchaser had been Mahon's father).

18. *See Penman v. Jones*, 256 Pa. 416, 422 (1917) (surface owner's right of support can be waived if waiver express or "the intention to waive clearly appears").

19. *Mahon*, 260 U.S. at 412.

20. *Id.* at 414.

21. *Id.* at 412.

22. *Mahon v. Pennsylvania Coal Co.*, 274 Pa. 489, 500-01 (1922).

23. *Mahon*, 260 U.S. at 413.

judgment of the legislature but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.²⁴

Obviously, Holmes acknowledged in the sentences just quoted that the Constitution provides protection to the property owner. When “[diminution in value] reaches a certain magnitude,” compensation will be due “in most if not all cases.” But he provided an equally striking acknowledgement of government power. Government can legitimately diminish the value of property—“[S]ome values are enjoyed under an implied limitation and must yield to the police power”—and, indeed, government could not operate without affecting property value—“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” Despite limitations on the legislative power, courts should overturn legislative acts with great hesitancy: “The greatest weight is given to the judgment of the legislature”²⁵

The next paragraph in the opinion, however, makes plain that the Mahons will lose. It begins: “This is the case of a single private house.”²⁶ Holmes thus highlighted at the outset the limited nature of the interests protected by the state statute. But even here he indicated the broad scope of public power over property, for in the next two sentences he declared: “No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case.”²⁷ Therefore, even a relatively trivial—and essentially private—interest can justify the exercise of the police power, although that is not the general rule—“[U]sually in ordinary private affairs the public interest does not warrant much of this kind of interference.”²⁸ Holmes then explained why public interference to protect the Mahons was not warranted in this case: The potential damage “is not a public nuisance”;²⁹ the “extent of the public interest is shown by the statute to be limited”³⁰ because it does not apply to land when the coal company owns the surface rights, and notice to surface owners of an intent to mine would adequately protect their safety.³¹ In contrast, he wrote, the competing interests of the coal company, as property owner of the support rights, were compelling: “[T]he extent of the taking is great. [The statute] purports to abolish [these support rights,] recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below

24. *Id.*

25. *Id.*

26. *Id.*

27. In support of this proposition, Holmes cited only one of his own decisions, *Rideout v. Knox*, 148 Mass. 368 (1889), a Massachusetts Supreme Judicial Court case. See *Mahon*, 260 U.S. at 413. For discussion of *Rideout*, see *infra* text accompanying notes 158-62.

28. *Mahon*, 260 U.S. at 413.

29. *Id.*

30. *Id.* at 413-14.

31. *Id.* at 414.

to be a contract hitherto binding the plaintiffs."³² Holmes then applied an implicit balancing test that set public against private interest and found that the balance tipped in the company's favor: "If we were called upon to deal with the plaintiffs' position alone we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the [company's] constitutionally protected rights."³³

Holmes initially intended to end the opinion at this point, having addressed the constitutionality of the statute as applied to the Mahons.³⁴ But Chief Justice Taft, after reviewing Holmes's first draft, convinced him to address the overall constitutionality of the statute as well.³⁵ In the final version, therefore, Holmes wrote an additional section, which began: "But the case has been treated as one in which the general validity of the act should be discussed."³⁶ He resolved this claim by concluding that the statute "cannot be sustained as an exercise of the police power," and was therefore unconstitutional as a whole.³⁷ While recognizing that the state did not own support rights under roads and that this situation posed a "danger,"³⁸ he found that this problem could be addressed through use of the power of eminent domain. Here he specifically invoked the Takings Clause of the Fifth Amendment and, as if it were to the same effect, the Fourteenth Amendment, highlighting the constitutional limitations on the police power:

If in any case [the state's] representatives have been so short sighted as to acquire only surface rights without the right of support we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.³⁹

Holmes distinguished *Plymouth Coal v. Pennsylvania*,⁴⁰ a case in which the Court upheld as a valid exercise of the police power a Pennsylvania statute

32. *Id.*

33. *Id.*

34. For the text of the first draft, see DiMento, *supra* note 12, at 433-34 (reprinting draft).

35. *See id.* at 406-08.

36. *Mahon*, 260 U.S. at 414.

37. *Id.*

38. *Id.* at 416.

39. *Id.* at 415 (citation omitted).

40. 232 U.S. 531 (1914).

requiring owners to leave a pillar of coal in the ground along their property lines to prevent water from their mine from running into their neighbor's mines. Because that statute imposed a parallel obligation on other property owners and thereby protected the workers of one mine from the flooding of others' mines, it created "an average reciprocity of advantage that has been recognized as a justification of various laws,"⁴¹ a proposition for which Holmes offered no support. He also distinguished the three cases in which the Court had recently upheld rent control legislation.⁴² "They went to the verge of the law but fell far short of the present act."⁴³ Again invoking the Takings Clause, he wrote: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."⁴⁴ Holmes conceded that even this proposition failed to provide full guidance. There were "exceptional cases, like the blowing up of a house to stop a conflagration, [which might] go beyond the general rule."⁴⁵ He concluded that the resolution of police power questions required courts to be sensitive to the facts of the individual case: "As we already have said this is a question of degree—and therefore cannot be disposed of by general propositions."⁴⁶

Brandeis's dissent, while longer than Holmes's majority opinion,⁴⁷ is nevertheless simple and straightforward. He treated the statute as a clearly constitutional exercise of the police power. "[A] restriction imposed to protect the public health, safety or morals from danger threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use."⁴⁸ He cited a string of cases in which the court had upheld regulations in which "the police power [was] exercised . . . to protect the public from detriment and danger."⁴⁹ Were the situation to change, however, the statute would no longer be constitutional: "Whenever the use prohibited ceases to be noxious—as it may because of further change in local or social conditions—the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore."⁵⁰

The scholarly literature on these opinions, and on Holmes's majority opinion, in particular, is enormous. The U.S. Supreme Court has also repeatedly invoked the case. The next Part analyzes how courts and commentators have understood the decision.

41. *Mahon*, 260 U.S. at 415.

42. *Id.* at 414. The cases distinguished were *Block v. Hirsh*, 256 U.S. 135 (1921); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921); *Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1921).

43. *Mahon*, 260 U.S. at 415.

44. *Id.* at 415.

45. *Id.* He suggested that this result might "stand as much upon tradition as upon principle." *Id.* at 416.

46. *Id.* at 416.

47. Holmes's opinion runs from page 412 to page 416 of volume 260 of the *United States Reports*; Brandeis's dissent runs from page 416 to page 422.

48. *Id.* at 417 (Brandeis, J., dissenting).

49. *Id.* at 422 (Brandeis, J., dissenting).

50. *Id.* at 417 (Brandeis, J., dissenting).

II. CONCEPTIONS OF *MAHON*

Supreme Court decisions and scholarly writings offer a variety of starkly different visions of the relationship between *Mahon* and the case law that preceded it, as well as of what tests the case embodied. Nonetheless, these different readings all incorporate the view that *Mahon* supports judicial activism in economic matters, and this view has strongly shaped the case law and academic debate.

A. FIRST REGULATORY TAKINGS CASE

One standard conception of *Mahon's* place in history is that it was the first case in which the Court interpreted the Takings Clause to bar the uncompensated taking of property through government regulation (as opposed to through some form of physical seizure, such as through eminent domain). In the 1992 case of *Lucas v. South Carolina Coastal Council*,⁵¹ Justice Scalia wrote for the Court:

Prior to Justice Holmes' exposition in *Pennsylvania Coal Co. v. Mahon*, it was generally thought that the Takings Clause reached only a "direct appropriation" of property, or the functional equivalent of a "practical ouster of [the owner's] possession." Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits.⁵²

Chief Justice Rehnquist has also advanced this position,⁵³ and Justice Blackmun suggested that he took this view of the case.⁵⁴ Additionally, the great majority of scholars have so understood *Mahon's* relationship to precedent; for example,

51. 505 U.S. 1003 (1992).

52. *Id.* at 1014 (alteration in original) (citations omitted). The Federal Circuit Court similarly interpreted *Mahon* in *Florida Rock Industries v. United States*, 791 F.2d 893, 901 (Fed. Cir. 1986) ("[The old rule was that] a valid 'police power' regulation could not also be an exercise of eminent domain. The case generally considered to have broken with this analysis [was]: *Pennsylvania Coal Co. v. Mahon*." (citations omitted)). Some scholars have recognized that before *Mahon* the Court reviewed regulations for constitutionality and considered relevant to the resolution of that issue the effect the regulations had on the value of the property. See, e.g., MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 160-64; Brauneis, *supra* note 11, at 680; Glynn S. Lunney, *A Critical Reexamination of Takings Jurisprudence*, 90 MICH. L. REV. 1892, 1896 n.16, 1902-04, 1912-14 (1992); Stephen Siegel, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Regulations*, 70 VA. L. REV. 187, 216-218 (1984). This scholarship, however, typically treats the early cases, including *Mahon*, as substantive due process decisions. For discussion of the work treating *Mahon* as a substantive due process case, see *infra* Part II.B.

53. *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 508 (1987) (Rehnquist, C.J., dissenting) (describing *Mahon* as "the foundation of our regulatory takings jurisprudence").

54. *Williamson City Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 196 (1985) ("The notion that excessive regulation can constitute a 'taking' under the Just Compensation Clause stems from language in *Pennsylvania Coal Co. v. Mahon*.").

Professor Jed Rubenfeld recently observed: “[I]n *Pennsylvania Coal Co. v. Mahon* . . . the Court for the first time struck down a regulation as an uncompensated taking.”⁵⁵ Under this view, *Mahon* supplied courts with a new tool for invalidating economic legislation—the Takings Clause. There are, in turn, two views about how Holmes thought that tool should be applied.

1. Diminution in Value Test

According to one view, *Mahon* sets forth a diminution in value test under which, if the property owner’s loss crosses some unspecified line, compensation is owed. This is both the dominant reading of *Mahon* among commentators, and the principal way in which the Court has read *Mahon*.⁵⁶ Moreover, although the Court has been inconsistent in its takings jurisprudence and applied a range of different tests in resolving takings challenges, the diminution in value test is the one that the Court applies most commonly when the challenged regulation targets something other than a nuisance.⁵⁷

Supporting this view of *Mahon* is language in the opinion indicating that courts should focus on the economic loss suffered by the property owner and that compensation is the remedy if the loss is too great. In particular, Holmes observed: “One fact for consideration in determining such limits [to the police power] is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act.”⁵⁸ He also observed: “The general rule at least is that

55. Rubenfeld, *supra* note 2, at 1086. For similar statements, see BOSSELMAN ET AL., *supra* note 2, at 124 (“*Pennsylvania Coal Co. v. Mahon*: Holmes rewrites the Constitution.”); DAVID L. CALLIES ET AL., CASES AND MATERIAL ON LAND USE 245 (2d ed. 1994) (“In [*Mahon*], the regulatory takings doctrine was born.”); Lawrence Blume & Daniel L. Rubenfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 569 (1984) (“Prior to the landmark decision in *Pennsylvania Coal Co. v. Mahon*, physical invasion was necessary for such a ‘taking’ to occur.”); Eric Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. REV. 77, 84 (1995) (“The Supreme Court first applied the takings provision to a regulatory measure in 1922.”); Paul, *supra* note 2, at 1459 n.165 (“*Pennsylvania Coal* marks the first occasion on which the Supreme Court holds that an exercise of the police power might so restrict property rights as to constitute a taking.”).

56. For Supreme Court decisions reading *Mahon* as embodying a diminution in value test, see *Suitum v. Tahoe Reg’l Planning Agency*, 117 S. Ct. 1665, 1659 (1997) (invoking *Mahon* as support for proposition that “a regulation that ‘goes too far,’ ” results in a taking under the Fifth Amendment); *Lucas*, 505 U.S. at 1014 (citing *Mahon* as support for holding that compensation is owed when all value in property is lost); *Yee v. City of Escondido*, 503 U.S. 519, 529 (1992) (“In the words of Justice Holmes, ‘while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.’ ”); *First English Evangelical Lutheran Church v. City of Los Angeles*, 482 U.S. 304, 316 (1987) (invoking *Mahon* as support for the proposition that regulation that “goes too far” is a taking); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978) (“[*Mahon* is] the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a ‘taking.’ ”). For leading academic commentary adopting this reading of *Mahon* as setting forth a diminution in value test, see Paul, *supra* note 2, at 1492-1503; Rose, *supra* note 12, at 562-63; Rubenfeld, *supra* note 2, at 1086-87, 1111-12; Sax, *supra* note 2, at 41; Glen E. Summers, Note, *Private Property Without Lochner: Toward a Takings Jurisprudence Uncorrupted by Substantive Due Process*, 142 U. PA. L. REV. 837, 854 (1993).

57. See Paul, *supra* note 2, at 1492-1503.

58. *Mahon*, 260 U.S. at 413.

while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."⁵⁹

Thus stated, however, the diminution in value test is incomplete because it raises the question of how far is "too far?" While proponents of the diminution in value test do not claim that *Mahon* answers this question, some have contended that, because Holmes focuses on how the Kohler Act affects the coal company's support rights, *Mahon* suggests that, at least where the property interest affected by a regulation had in some way been recognized by the law, the question of whether a regulation went "too far" should be determined by focusing on the percentage loss in the value of the affected property interest, not the percentage loss in the value of the fee simple as a whole. Professor Margaret Radin has dubbed this approach of focusing on the property interest, not the whole property, "conceptual severance."⁶⁰ In the two most important victories for the liberal wing of the Court in recent takings jurisprudence—the 1978 decision *Penn Central Transportation Co. v. New York City*⁶¹ and the 1987 decision *Keystone Bituminous Coal Ass'n v. DeBenedictis*⁶²—the Supreme Court read *Mahon* as embracing conceptual severance, although it also treated that aspect of the opinion as non-controlling.⁶³ On the other hand, in the 1992 *Lucas* decision, Justice Scalia suggested in dicta that the Court should begin applying the diminution in value test as it was applied in *Mahon*.⁶⁴ Thus, courts would determine whether to focus on an affected property interest, as opposed to the fee simple, by examining "whether and to what degree the State's law has accorded legal protection and interest to the particular interest in land"⁶⁵

59. *Id.* at 415.

60. Radin, *supra* note 2, at 1676.

61. 438 U.S. 104 (1978) (holding that denial of permission to use air rights over landmarked building not a taking).

62. 480 U.S. 470 (1987) (upholding statutory prescription of mining techniques which may cause surface cave-in). For discussion of *Keystone*, see *infra* note 71.

63. In *Penn Central*, Justice Brennan concluded that *Mahon* was not controlling because in subsequent decisions the Court had used the fee simple, rather than the affected property right, in determining whether the regulation had gone "too far." See *Penn Central*, 438 U.S. at 130-31 & n.27. In *Keystone*, Justice Stevens treated *Penn Central* as controlling. See *Keystone*, 480 U.S. at 497. He also found that the part of *Mahon* which concerned the general applicability of the statute was simply an "advisory opinion," because, according to Justice Stevens, Holmes resolved the case as an applied challenge brought by the Mahons. *Id.* at 484. Other than Justice Stevens's dissent in *Dolan*, see *Dolan v. City of Tigard*, 512 U.S. 374, 407 (1994), no other Supreme Court opinion suggests that the section of *Mahon* addressing the facial challenge to the Kohler Act was dicta. From across the spectrum, academic criticism of this contention has been unsparing. See FISCHER, *supra* note 2, at 18 ("remarkable"); Epstein, *supra* note 8, at 19 ("incredible"); Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1600 (1988) ("amazing"). For a response to Justice Stevens's argument, see *Keystone*, 480 U.S. at 508 (Rehnquist, C.J., dissenting).

It should be added that, in *Keystone*, Justice Stevens read *Mahon* as setting forth a balancing test, under which diminution in value was a factor, but not the only consideration. See *id.* at 484-85. For further discussion, see *infra* note 71.

64. *Lucas*, 505 U.S. at 1016 n.7. Fittingly, this footnote has also been dubbed famous in its own right. *Stupak-Thrall v. United States*, 89 F.3d 1269, 1295 (6th Cir. 1996) (Moore, J., dissenting).

65. *Lucas*, 505 U.S. at 1016 n.7.

affected by a regulation. Were this approach followed in future cases, the range of land use regulations that would violate the Takings Clause would increase enormously because a regulation can make a particular interest valueless even though the effect on the value of the property as a whole is relatively small. For example, regulations that bar use of water or mineral rights or that prevent an owner from developing some part of her property might give rise to compensable takings, even if the overall value of the fee simple did not substantially decline.⁶⁶ Though the Supreme Court has not yet ruled on the matter, the Court of Appeals for the Federal Circuit,⁶⁷ and the Court of Appeals for the Ninth Circuit⁶⁸ have both explicitly followed Justice Scalia's suggestion, indicating that in some circumstances conceptual severance is appropriate. Justice Scalia's reading of *Mahon* thus potentially expands the influence of this already central case, transforming takings law by broadening property owners' protections.

2. Balancing Test

Less commonly, commentators and, on one occasion, the Court have read *Mahon* as employing a balancing test, rather than a diminution in value test.⁶⁹ While Holmes did not explicitly employ a balancing test, those who find this test in the opinion argue that Holmes's analysis reflects consideration of both the public interest and harm to the property owner.

To say that *Mahon* involved a balancing test is not, however, to say how Holmes intended the balance be struck. The consensus among those who read *Mahon* as embodying a balancing test is that Holmes believed that a large

66. See William W. Fisher, III, *The Trouble with Lucas*, 45 STAN. L. REV. 1393, 1403 (1993). While the conceptual severance approach could as a theoretical matter be extended to any property interest, the Supreme Court has rejected such an extension beyond the context of real property. See *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 643-44 (1993) (holding that the conceptual severance approach in *Lucas* applicable only to "cases dealing with permanent physical occupation or destruction of economically beneficial use of real property").

67. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994) (finding taking by examining effect of regulation on 12.5 acres of 50 acre parcel (where original 150 acre parcel reduced to 50 acres by partial sale)).

68. *Del Monte Dunes v. Monterey*, 95 F.3d 1422, 1434 (9th Cir. 1996) (finding taking because property had been zoned for multi-family residential use and could no longer be used for that purpose). Dissenting from an affirmance by an equally divided court, four judges of the United States Court of Appeals for the Sixth Circuit have also suggested that they would follow the approach outlined by Justice Scalia in footnote seven of *Lucas*. See *Stupak-Thrall*, 89 F.3d at 1295 (Moore, J., dissenting) (writing for four judges).

69. In *Keystone*, Justice Stevens, writing for the Court, stated that under *Mahon* the "factors" relevant to constitutionality were the public interest and the diminution in value, implicitly suggesting that the decision embodied a balancing test. *Keystone*, 480 U.S. at 484, 492. In his concurrence in *Lucas*, Justice Kennedy cited *Mahon* for the proposition that various factors "must be measured in the balance." *Lucas*, 505 U.S. at 1036 (Kennedy, J., concurring). For academic commentators reading *Mahon* as setting forth a balancing test, see BOSSELMAN ET AL., *supra* note 2, at 238; HORWITZ, *supra* note 52, at 131 & n.167 (1992); Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1190 n.53 (1967); Donald H. Zeigler, *The New Activist Court*, 45 AM. U. L. REV. 1367, 1372 (1996).

thumb should be placed on the property owner's side of the scale. As Fred Bosselman, the leading proponent of reading *Mahon* as employing balancing, put it, "[T]he primary focus [in *Mahon*] was upon the regulation's effect upon a certain individual's property rights. The public purpose and rationality of the statute were peripheral concerns."⁷⁰ Bosselman concluded, "[I]n the balancing of public and private interests . . . [Holmes gave] property rights a preferred position."⁷¹ Thus, read as a balancing test, *Mahon* is still seen as a decision deeply protective of property rights.

B. SUBSTANTIVE DUE PROCESS CASE

While *Mahon* is most commonly described as the first regulatory takings case, others have argued that it is not a regulatory takings case at all, but a substantive due process case "different only in degree" from *Lochner*.⁷²

Most prominently, in his recent dissent in *Dolan v. City of Tigard*,⁷³ Justice Stevens suggested that *Mahon* is just such a substantive due process case. He wrote: "The so-called 'regulatory takings' doctrine that the Holmes dictum [in *Mahon*] kindled has an obvious kinship with the line of substantive due process cases that *Lochner* exemplified."⁷⁴ Justice Stevens observed that *Mahon* and

70. BOSSELMAN ET AL., *supra* note 2, at 243.

71. *Id.* A close reading of Justice Stevens's opinion for the Court in *Keystone* suggests a view of *Mahon* similar to Bosselman's. Justice Stevens treats the part of *Mahon* addressing the general validity of the statute as an "advisory opinion," *Keystone*, 480 U.S. at 484, a determination which allowed him to treat it as non-controlling. For discussion, see *supra* note 63. The Pennsylvania statute at issue in *Keystone*, like the Kohler Act, barred coal companies from mining in such a way as to cause cave-ins, the principal difference being that, unlike the Kohler Act, it applied even when the coal company owned the surface rights. See *Keystone*, 480 U.S. at 476. In upholding the more recent statute, Justice Stevens explicitly weighed the relevant factors differently than they had been weighed in *Mahon*. For example, in evaluating the private interest, he considered the relevant factor the diminution in value of the property as a whole, rather than the diminution in value of the support rights. See *id.* at 493-501. Thus, Stevens's opinion implies that in *Mahon* (unlike in *Keystone*), the balancing test was weighted in favor of the property owner.

72. Brauneis, *supra* note 11, at 676.

73. 512 U.S. 374 (1994).

74. *Id.* at 407 (Stevens, J., dissenting) (footnote omitted). Justice Stevens took the position that the cases that are generally treated as the Supreme Court's early takings cases—a category into which he put *Mahon*—were actually substantive due process cases. He wrote:

The Court begins its constitutional analysis by citing *Chicago, B. & Q.R. Co. v. Chicago* (1897), for the proposition that the Takings Clause of the Fifth Amendment is "applicable to the States through the Fourteenth Amendment." That opinion, however, contains no mention of either the Takings Clause or the Fifth Amendment; it held that the protection afforded by the Due Process Clause of the Fourteenth Amendment extends to matters of substance as well as procedure, and that the substance of "the due process of law enjoined by the Fourteenth Amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a State." It applied the same kind of substantive due process analysis more frequently identified with a better known case that accorded similar substantive protection to a baker's liberty interest in working 60 hours a week and 10 hours a day. See *Lochner v. New York* (1905).

Id. (citations & footnotes omitted). In his majority opinion in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), Justice Stevens interpreted Holmes's decision in *Mahon* as holding

Lochner have “similar ancestr[ies],”⁷⁵ and that both cases involve “potentially open-ended sources of judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair.”⁷⁶ Both the California Supreme Court⁷⁷ and the New York Court of Appeals⁷⁸ have taken this position, and leading land use and constitutional law scholars have also reached this result.⁷⁹ Proponents of this view argue that the late-nineteenth and early-twentieth-century “takings” cases in which the Supreme Court considered the constitutionality of state regulations or eminent domain seizures were actually decided under the Due Process Clause of the Fourteenth Amendment, not the incorporated Takings Clause. As a technical matter, these proponents note that Holmes invoked the Fourteenth Amendment, not the Fifth Amendment’s Takings Clause.⁸⁰

Robert Brauneis recently gave this approach its fullest treatment. “The story

that the Kohler Act was not justified by the police power. *See id.* at 484. As a result, that opinion has also been interpreted as indicating that Justice Stevens views *Mahon* as a substantive due process case. *See Douglas Kmiec, The Original Understanding Was Neither Obtuse nor Obscure*, 88 COLUM. L. REV. 1632, 1647 (1988). I think, however, that the best reading of *Keystone* is that it treats *Mahon* as a regulatory takings case. *See supra* notes 63, 71.

75. *Dolan*, 512 U.S. at 407 (Stevens, J., dissenting).

76. *Id.* (Stevens, J., dissenting)

77. *Agins v. Tiburon*, 598 P.2d 25, 29 (Cal. 1979) (“It is clear both from context and from the disposition in *Mahon*, however, that the term ‘taking’ was used solely to indicate the limit by which the acknowledged social goal of land control could be achieved by regulation rather than by eminent domain.”), *aff’d*, 447 U.S. 255 (1980).

78. *Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381, 385 (N.Y. 1976) (stating *Mahon* was “a police power and not an eminent domain case”).

79. *See Brauneis, supra* note 11, at 680; *Sterk, supra* note 2, at 118; *Strong, supra* note 12, at 593; Phillip J. Tierney, *Bold Promises but Baby Steps*, 23 U. BALT. L. REV. 461, 503 (1994); Charles Wise, *The Changing Doctrine of Regulatory Takings and the Executive Branch*, 44 ADMIN. L. REV. 403, 409-13 (1992). Glynn Lunney has offered a similar approach, although his connection between *Mahon* and *Lochner* is largely implicit. Lunney argues that *Mahon* should be understood as consistent with the Court’s early-twentieth-century takings jurisprudence. Lunney, *supra* note 52, at 1912-14. A group of prominent land use scholars has also advanced what is in effect a substantive due process reading of *Mahon*. They contend that “Holmes used the word ‘taking’ not to describe an event requiring payment of just compensation, but as a shorthand description of a regulation that was invalid, and therefore void *ab initio*.” Norman Williams, Jr., et al., *The White River Junction Manifesto*, 9 VT. L. REV. 193, 208 (1984). Under this view, *Mahon* was in approach a due process case, although Holmes’s dissent in *Lochner* forced him to use the Takings Clause as the nominal basis of decision. *See id.* at 209. As stated in the text, *see* text accompanying note 81, Professor Brauneis’s recent article most fully develops the view that *Mahon* is a substantive due process case. *See Brauneis, supra* note 11, at 616-17, 670-71. That article, however, does not build on the earlier literature, citing only the Williams article, which treats *Mahon* as technically a Takings Clause case. *See id.* at 686 n.351.

80. Thus, Holmes stated:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone.

Mahon, 260 U.S. at 413. Relying on such language, Stewart Sterk has observed: “Justice Holmes never characterized the challenged ordinance as an exercise of the eminent domain power. In fact, he indicated that the legislature’s use of its police power in *Pennsylvania Coal* offended the due process clause, not the just compensation clause.” Sterk, *supra* note 2, at 118.

of *Mahon's* reputation and interpretation," he has argued, "is a case study in legal evolution, selective borrowing, and amnesia."⁸¹ *Mahon* was a "minor substantive due process case."⁸² The inquiry is essentially the same under *Mahon* and under *Lochner*. Neither involved a balancing test.⁸³ Both involved "inquiries into traditional legal categories and legislative purposes."⁸⁴ When the Supreme Court "rejected the Due Process Clause as a textual home for substantive economic rights,"⁸⁵ the case was essentially forgotten: "After 1935, *Mahon* appeared to be destined for oblivion . . ."⁸⁶ Only later was it eventually "rediscovered—and to some extent reinvented—as the 'foundation of regulatory jurisprudence.'"⁸⁷ "*Mahon* is now widely understood, by Supreme Court Justices and academic commentators alike, to be a landmark: the first 'regulatory takings' case."⁸⁸ It has thus been "stripped of its original meaning"⁸⁹ as a substantive due process decision.

C. MAHON AND PROPERTY RIGHTS

The disagreements about *Mahon* are important. They have symbolic significance. When Justice Stevens equated *Mahon* and *Lochner* in his *Dolan* dissent, he clearly was motivated by a desire to delegitimize *Mahon*. In contrast, when Justice Scalia treated *Mahon* as the first regulatory takings case, he likely sought

81. Brauneis, *supra* note 11, at 702.

82. *Id.* at 680.

83. *See id.* at 701 ("Holmes had worked out a theory of constitutional property that was far more sophisticated than a . . . 'balancing' test.").

84. *Id.* at 680.

85. *Id.*

86. *Id.*

87. *Id.* at 702 (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 508 (1987) (Rehnquist, C.J., dissenting)).

88. *Id.* at 670-71. In addition to the various tests discussed in the text, two deserve mention. The case has been read to set forth a reciprocity of advantage test, *see, e.g., Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1985); *Nollan v. California Coastal Commission*, 483 U.S. 825, 853 (1987) (Brennan, J., dissenting); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 195-97* (1985); *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1492-93 (1978), because Holmes favorably refers to the "average reciprocity of advantage that has been recognized as a justification of various laws." *Mahon*, 260 U.S. at 415. This is not, however, treated as a stand-alone test by those who discuss it, but as involving a factor relevant to one of the three tests discussed in the text. It is, therefore, not separately analyzed in this article. Professor Brauneis has also suggested that one of the grounds for the decision was that the Kohler Act violated the Contract Clause. *See Brauneis, supra* note 11, at 666. Textually, this is not a well-grounded view. In *Mahon*, Holmes principally refers to the Contract Clause as a general statement about the tension between the Contract Clause and the police power, rather than as a statement that the Contract Clause forms the basis of the decision. *See Mahon*, 260 U.S. at 413 ("As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone."). Moreover, Holmes was firmly committed to the position that individuals could not enter into contracts that would limit the state's police power. *See Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908) ("One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them."). This was not only Holmes's position—it was Supreme Court orthodoxy. *See Manigault v. Springs*, 199 U.S. 473, 480 (1905).

89. Brauneis, *supra* note 11, at 684.

to legitimate regulatory takings doctrine by making it a creation of Holmes. The varying understandings of the case also affect what it means as binding precedent. A diminution in value test will sometimes lead to a different result than a balancing test. When the highest courts in New York and California found that *Mahon* was a substantive due process case rather than a takings case, they concluded that the appropriate remedy when a land use regulation was determined to be unconstitutional was simply invalidation, rather than invalidation and compensation.⁹⁰ But the major point to recognize is that, notwithstanding these different readings, there is fundamental agreement about the case. Whether it merely follows the legendarily conservative *Lochner* line of cases or whether it arms the judiciary with a new weapon, *Mahon* nonetheless supports a strong judicial power to invalidate economic legislation. Scholars are unanimous about this basic point. Bruce Ackerman refers to Holmes's "aggressive holding."⁹¹ Carol Rose has called the opinion "antiredistributive."⁹² Lawrence Friedman has described it as departing from precedent in a way that indicated that judicial "attitudes towards state intervention had changed."⁹³ Robert Brauneis has suggested that Holmes may have been a "more ardent defender of property rights" than Justice Scalia.⁹⁴

There is a blatant tension between such readings of *Mahon* and the conception of Holmes, based on his dissents in the Court's substantive economic due process cases, as a champion of judicial deference to majoritarian decisionmaking in the economic sphere.⁹⁵ Some scholars acknowledge the inconsistency between *Mahon* and, for example, Holmes's *Lochner* dissent and conclude that Holmes did not have a consistent approach in his constitutional property cases.⁹⁶ More commonly, however, scholars who have examined *Mahon* argue that *Mahon* clarifies Holmes's goal in his substantive economic due process

90. *Agins v. Tiburon*, 598 P.2d 25, 29 (Cal. 1979); *Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381, 385 (N.Y. 1976).

91. ACKERMAN, *supra* note 8, at 165.

92. Rose, *supra* note 12, at 581.

93. Friedman, *supra* note 12, at 22.

94. Brauneis, *supra* note 11, at 701 n.438. For other examples of statements about *Mahon*'s protective attitude toward property rights, see, e.g., G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 280 (1993) (stating *Mahon* is inconsistent with the view of Holmes as a judge who "distinguished between judicial review of legislation affecting economic issues, where he advocated a deferential stance for judges, and judicial review of legislation affecting First Amendment rights, where he insisted on a more searching judicial scrutiny"); Roberts, *supra* note 12, at 293 ("[In *Mahon*, Holmes] was concerned with the institution of private property in the then emerging world of the regulatory state. . . . [*Mahon* embodied the view that p]roperty is safe from the masses only insofar as the restraint upon the exercise of the police power is a legal one, nay, a constitutional one.").

95. For discussions of Holmes's reputation that highlight his reputation as the champion of judicial deference in economic matters, see Walton H. Hamilton, *On Dating Mr. Justice Holmes*, 9 U. CHI. L. REV. 1 (1941); Jan Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CAL. L. REV. 343 (1984); G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576 (1995); and G. Edward White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51 (1971).

96. See BOSSELMAN ET AL., *supra* note 2, at 243.

cases. It shows that he was not as deferential to legislatures as those cases, read without the gloss of *Mahon*, might suggest. Thus, Professor Brauneis writes, "Deference to legislative judgment in *Mahon* is one of the key points of contention between Holmes and Brandeis"⁹⁷ and that Holmes's intermediate position on deference is a consistent part of "his method of analyzing constitutional property issues."⁹⁸ Other commentators to reach a similar conclusion include such leading scholars as Alexander Bickel, William Fischel, and G. Edward White.⁹⁹

While the remainder of this article will show why the various views of *Mahon* outlined here are wrong, they are understandable. Even Holmes's friends and allies acknowledged the opaqueness of his decisions. Felix Frankfurter declared, "Mr. Justice Holmes spoke for the Court, in most instances tersely and often cryptically,"¹⁰⁰ and Brandeis said of him: "[H]e doesn't sufficiently consider the need of others to understand . . ." ¹⁰¹ Holmes's decision in *Mahon* itself has been variously described as "cryptic,"¹⁰² "delphic,"¹⁰³

97. Brauneis, *supra* note 11, at 676.

98. *Id.* at 677.

99. See ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* 227 (1957); FISCHEL, *supra* note 2, at 14; WHITE, *supra* note 94, at 403. Some who have sought to protect Holmes's liberal credentials have ignored the case. See Felix Frankfurter, *Twenty Years of Mr. Justice Holmes's Constitutional Opinions*, 36 HARV. L. REV. 909 (1923) (illustrating this strategy). Frankfurter paid elaborate tribute to Holmes and his decisions—"He is philosopher become king," *id.* at 919—but slyly omitted *Mahon*: the text of the article covers Holmes's decisions issued before December 8, 1922. See *id.* at 919 n.31 (stating that cut-off date was December 8, 1922 because Holmes's tenure on Court started December 8, 1902). *Mahon* was decided on December 11, 1922. The omission of *Mahon* from the period covered in the body of the article was obscured by the fact that Frankfurter listed it in the appendix, which covered Holmes's decision through the exact date *Mahon* was decided. See *id.* at 937. The first full-scale biography of Holmes, Sheldon Novick's *Honorable Justice*, fails to mention *Mahon* at all. See SHELDON M. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* (1989). The same is true of Catherine Drinker Bowen's worshipful biography of Holmes. See CATHERINE DRINKER BOWEN, *YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY* (1944). The latter omission is particularly striking, because Bowen's brother, Howard Drinker, was one of Pennsylvania Coal's lawyers. See FISCHEL, *supra* note 2, at 14.

100. *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 523 (1958) (Frankfurter, J., dissenting). In commenting that Holmes's opinions were often cryptic, Frankfurter was in good company. For a collection of observations on the opacity of Holmes's opinions (including Justice Frankfurter's statement), see WHITE, *supra* note 94, at 312-13. The lack of clarity may reflect the speed with which Holmes drafted opinions. For a contrast of the rapidity with which Holmes wrote the opinion in *Mahon* and Brandeis's numerous, careful revisions, see DiMento, *supra* note 12, at 405-13.

101. See BICKEL, *supra* note 99, at 226-27 (quoting the Brandeis-Frankfurter Conversations). Perhaps most tellingly, Harvard Professor John Chipman Gray, a long-time friend of Holmes who, as the author of the definitive treatise on the rule against perpetuities, was not one to shun the murky, privately conceded that "Holmes's opinions seem to lack lucidity." WHITE, *supra* note 94, at 313 (quoting letter from John Chipman Gray to William Howard Taft, Nov. 9, 1912). On the friendship between Gray and Holmes, see *id.* For Gray's classic study, see JOHN CHIPMAN GRAY, *RULE AGAINST PERPETUITIES* (1886).

102. Maureen Straub Kordesh, "I Will Build my House with Sticks": *The Splintering of Property Interests Under the Fifth Amendment May Be Hazardous to Private Property*, 20 HARV. ENVTL. L. REV. 397, 418 (1996).

103. Richard A. Epstein, *Why Is This Man a Moderate?*, 94 MICH. L. REV. 1758, 1759 (1996) (reviewing WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* (1995)).

“terse,”¹⁰⁴ and “laconic.”¹⁰⁵

Equally important, legal scholars have lost touch with the police powers cases that serve as the background to *Mahon* and to which Holmes reacted. Strikingly, there is no adequate history of these late-nineteenth and early-twentieth-century cases on which *Mahon* scholars could draw.¹⁰⁶ As a result, scholars have repeatedly erred in their description of constitutional property law as it existed prior to *Mahon* and, erring in that description, have misinterpreted Holmes’s project.

III. THE COURT’S CONSTITUTIONAL PROPERTY CASE LAW BEFORE *MAHON*

This Part surveys the pre-*Mahon* case law concerning the police power and the eminent domain power with the exception of one category of opinions—those written by Holmes. The discussion here and in the following sections reveals that *Mahon* resembles Holmes’s earlier decisions more than any other part of the case law preceding it.

At a technical level, proponents of the substantive due process reading of *Mahon* are correct that the early “takings” cases were substantive due process cases. *Chicago, Burlington and Quincy Railroad Co. v. Chicago*,¹⁰⁷ in which the Court held that a compensation requirement for the taking of property was mandated by the Due Process Clause of the Fourteenth Amendment, derived that requirement from first principles:

The requirement that the property shall not be taken for public use without just compensation is but an affirmation of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.¹⁰⁸

104. Rubenfeld, *supra* note 2, at 1086.

105. *Id.* at 1112. In addition, Holmes’s classic scholarly writings provide little of value in understanding *Mahon*. Finally, there was no individual with whom the Justice shared his thinking in any systematic fashion. See WHITE, *supra* note 94, at 410-11. Although a prolific and remarkable correspondent, he had no confidant to whom he divulged his ideas in a sustained way. For example, his letters to Frederick Pollock may be his most illuminating, but the illumination is limited. When they were published, Walton Hamilton observed: “[Holmes] affords only passing glimpses [into his opinions], hardly ever enough for his English friend to know what the cause [was] about.” Hamilton, *supra* note 95, at 24. Holmes’s clerks “were primarily household staff members and intellectual and social companions” and played no part in the drafting of opinions except “to find him citations, preferably to his previous opinions.” WHITE, *supra* note 94, at 313.

106. The only sustained attempt to examine the history of the police power in the period after ratification of the Constitution is William Novak’s superb study *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996). Despite its title, however, this work is concerned almost exclusively with the period before *Mugler v. Kansas*, 123 U.S. 623 (1887), and thus it does not analyze the case law to which Holmes was responding.

107. 166 U.S. 226 (1897).

108. *Id.* at 236 (internal quotations omitted).

This is not the “mechanical incorporation” favored by Justice Hugo Black under which the provisions of the Bill of Rights protecting individual rights are incorporated into the Fourteenth Amendment because that is held to be the original understanding.¹⁰⁹ Rather, it reflects the view that, to quote Akhil Amar, “[t]he Fourteenth [Amendment] requires only that states honor basic principles of fundamental fairness and ordered liberty—principles that might indeed happen to overlap wholly or in part with some of the rules of the Bill of Rights, but that bear no logical relationship to those rules.”¹¹⁰ The compensation principle is, according to the Court, “founded in natural equity.”¹¹¹ Having endorsed the compensation principle, the *Chicago, Burlington and Quincy Railroad Co.* Court then used the Due Process Clause as the technical anchor by which this obligation is imposed on the states: “Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public.”¹¹²

It is, however, an error to move from the accurate point that *Mahon* is, like *Lochner*, a substantive due process decision to the conclusion that *Mahon* is precisely the same type of case as *Lochner*. Before *Mahon*, the Supreme Court protected property under substantive due process analysis using distinct rationales that produced three lines of cases: classic police power cases, cases of businesses “affected with a public interest,” and eminent domain cases. Examination of the lines of cases that follow the different rationales shows that *Lochner* was representative of only one of these categories. Scholars who analyze *Mahon* have uniformly missed this point (regardless of whether they treat it as a substantive due process case or as the first regulatory takings case).

A. CLASSIC POLICE POWER: PUBLIC HEALTH, SAFETY, OR MORALS

The classic police power cases exemplify the principle that a regulation that barred activity that endangered public health, safety, or morals would withstand constitutional scrutiny. The questions for the Court were whether the legislature’s goal was the protection of public health, safety, or morals and whether the means chosen were suited to achieve that goal. If these questions could be answered in the affirmative, the regulation was a valid exercise of the police power.¹¹³ The cases in which the Court upheld statutes that barred property

109. For Justice Black’s most important statements of his theory of incorporation, see *Duncan v. Louisiana*, 391 U.S. 145, 162-71 (1968) (Black, J., concurring); *Adamson v. California*, 332 U.S. 46, 68-92 (1947) (Black, J., dissenting); HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH 34-42 (1968).

110. Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1192, 1196 (1992).

111. *Chicago, Burlington and Quincy R.R. Co.*, 166 U.S. at 235.

112. *Id.* at 236-37.

113. For treatise discussion of the police power to regulate to safeguard health, safety, and morals, see 2 THOMAS B. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 1223-32 (Walter Carrington ed., 1927); ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 546-51 (1904); JOHN

owners from engaging in nuisances are of this type. *Mugler v. Kansas*,¹¹⁴ an 1887 decision in which the Court upheld a Kansas statute barring the manufacture and sale of alcoholic beverages, is the leading decision in this category. Writing for the Court, the first Justice Harlan distinguished police power regulations from takings:

A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.¹¹⁵

Although the statute rendered *Mugler's* brewery worthless, he had no remedy; the police power might validly be exercised to destroy "property which is itself a public nuisance,"¹¹⁶ or to "prohibit[] . . . its use in a particular way, whereby its value becomes depreciated."¹¹⁷ The Court underscored the contrast between valid regulation and the prohibition on taking property without compensation, noting "[i]n the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner."¹¹⁸ If the state is exercising its police power, it has no obligation to provide compensation. Justice Harlan wrote:

The power which the States have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized

LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 467-86 (1909); PHILIP NICHOLS, 1 THE LAW OF EMINENT DOMAIN: A TREATISE ON THE PRINCIPLES WHICH AFFECT THE TAKING OF PROPERTY FOR THE PUBLIC USE 261-83 (2d ed. 1917); CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES 358-442 (1886).

114. 123 U.S. 623 (1887).

115. *Id.* at 668-69.

116. *Id.* at 669.

117. *Id.*

118. *Id.* at 669. *Mugler* preceded the Court's determination in *Chicago, Burlington, and Quincy R.R. Co.* that the right to compensation for the taking of property was part of due process, but "incorporation" did not alter the police power doctrine. *See, e.g., Reinman v. City of Little Rock*, 237 U.S. 171, 176 (1915) (upholding a city ordinance that barred livery stables from a part of the city in which Reinman was operating a livery stable;

Granting that it is not a nuisance *per se*, it is clearly within the police power of the State to regulate the business and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law, provided this power is not exerted arbitrarily, or with unjust discrimination, so as to infringe upon rights guaranteed by the Fourteenth Amendment.);

Hadacheck v. Sebastian, 239 U.S. 394, 411 (1915) (rejecting claim to compensation when Los Angeles barred brick yards from the part of the city in which a brick yard was already located; "effect upon the health and comfort of the community" justify restriction).

society, cannot be burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.¹¹⁹

Although it involved interference with liberty of contract without due process rather than deprivation of property without due process, *Lochner* was analytically the same type of case as *Mugler*, as each turned on whether a regulation fell within the police power. Indeed, Justice Peckham's majority opinion invoked *Mugler* as defining the proper scope of the police powers,¹²⁰ and the two cases were subsequently frequently paired as illustrating the nature of the police power and its limits.¹²¹

According to Justice Peckham, the question for the *Lochner* Court as it reviewed New York's maximum hour statute was simply: "Is [the statute] within the police power of the State?"¹²² The Court invalidated the statute because it determined that this type of statute was not a health and safety measure:

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the

119. *Mugler*, 123 U.S. at 669. For examples of other decisions in which the Court upheld regulations as valid exercises of the police power when challenged as takings of property without due process, see, e.g., *Thomas Cusack Co. v. Chicago*, 242 U.S. 526 (1917) (prohibiting billboards); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (requiring brickyard to close); *Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (requiring livery stable to close); *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914) (requiring pillar of coal remain in ground to protect mine workers); *Murphy v. California*, 225 U.S. 623 (1912) (requiring billiard hall to close); *Welch v. Swasey*, 214 U.S. 91 (1909) (restricting heights of buildings); *L'Hote v. City of New Orleans*, 177 U.S. 587 (1900) (rejecting hotel owner's challenge to municipal ordinance barring "lewd woman" from living outside specified areas of city); *Powell v. Pennsylvania*, 127 U.S. 678 (1888) (prohibiting sale of margarine).

120. Justice Peckham wrote:

There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere. *Mugler v. Kansas*.

Lochner, 198 U.S. at 52 (citations omitted).

121. See, e.g., *Welch v. Swasey*, 214 U.S. 91, 104-05 (1909) (upholding statute that limits building height); *Adair v. United States*, 208 U.S. 161, 173 (1908) (invalidating statute that barred employers from discriminating against members of labor unions); *Heath & Milligan Mfg. Co. v. Worst*, 207 U.S. 338 (1907) (upholding statute that requires proper labeling of products). Some saw interference with liberty of contract as a form of deprivation of property, a view that completely merged the *Mugler* and *Lochner* lines of cases. See *Ritchie v. People*, 40 N.E. 454, 455 (Ill. 1895) (invalidating statute that limits hours of employment of females); *State v. Goodwill*, 10 S.E. 285, 287 (W. Va. 1889) (invalidating statute that regulated labor of mine workers). Thus, treatise writer John Lewis declared: "Many laws prohibiting or restricting the right to contract, or labor, or carry on business, have been held void, because they deprived the citizen of his property without due process of law." LEWIS, *supra* note 113, at 477.

122. *Lochner*, 198 U.S. at 57.

purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, *Sui juris*), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees.¹²³

Strikingly, in dissent, Harlan, the author of *Mugler*, followed the same approach as Peckham, though with different results. Again, the question was whether this statute was a valid health measure. He wrote: "All the cases agree that this power [the police power] extends at least to the protection of the lives, the health and the safety of the public against the injurious exercise by any citizen of his own rights."¹²⁴ Citing a variety of types of evidence, he concluded that the statute was a health measure, declaring:

There are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours' steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the state and to provide for those dependent upon them.¹²⁵

These police power cases thus turned on the use of a formalist, categorical rule: if the end were to promote health, safety, or morality and if the means were suited to the end, the statute was valid. Even when the claim was for deprivation of property, the loss of value, rather than being a concern to be balanced against the state interest, was simply irrelevant—and this was something on which both the right and left of the Court agreed. As David Brewer, the leader of the Court's conservative wing, observed in 1901: "The truth is, that the exercise of the police power often works pecuniary injury, but the settled rule of this court is that the mere fact of pecuniary injury does not warrant the overthrow of legislation of a police character."¹²⁶

The method of analysis presented in these opinions precisely tracks what Duncan Kennedy has identified as the defining trait of classical legal thought: its concern with spheres of power.¹²⁷ According to Kennedy, "In the Classical systematization, the concept that was most significant . . . was that of a constitu-

123. *Id.* at 64.

124. *Id.* at 65 (Harlan, J., dissenting).

125. *Id.* at 72 (Harlan, J., dissenting).

126. *L'Hote v. City of New Orleans*, 177 U.S. 587, 597 (1900).

127. Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 *RES. L. & SOC.* 3, 6-8 (1980).

tionally delegated power absolute within its sphere."¹²⁸ The process of decision-making was presented as mechanical—"objective, quasi-scientific."¹²⁹ Kennedy's description accords with how judges reasoned in the traditional police power cases: a regulation was, in view of its end and the aptness of its means for that end, either inside or outside the police power sphere and, therefore, as a matter of definition either constitutional or unconstitutional. Courts did not independently evaluate the legitimacy of ends—only regulations aimed at promoting health, safety, or morals were permissible—and they did not analyze whether the regulation's benefits justified the harm to the individual.¹³⁰

B. BUSINESSES "AFFECTED WITH A PUBLIC INTEREST"

If traditional police power cases—or at least *Lochner*—are well remembered, the second category of substantive due process cases, those involving businesses "affected with a public interest,"¹³¹ has been almost totally forgotten. Indeed, though they form an essential part of the background of *Mahon*, none of the articles on the case gives them more than passing reference. In these cases, unlike the police power cases described above, the takings principle came into play.

As the last section showed, traditional police power cases repeatedly took the position that compensation was never owed if the regulation was a valid exercise of the police power. This view accorded with the original understanding of the Takings Clause; under the original understanding, the clause did not apply to regulations.¹³² This approach became problematic after the Supreme Court adopted a broad view of the permissible scope of the police power in its 1877 decision *Munn v. Illinois*.¹³³

In *Munn*, the Court upheld as valid exercises of the police power the regulation of rates charged by grain elevators on the grounds that grain eleva-

128. *Id.* at 6-8.

129. *Id.* at 7.

130. Kennedy uses Peckham's and Harlan's opinions in *Lochner* as illustrations of classical legal thought. *See id.* at 11-14. Subsequent to Kennedy's work, others have developed the view of *Lochner* as involving categorical legal rules. Alexander T. Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 951-52 (1987); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1198 (1985); Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 23-24 (1991). At the same time, this view of *Lochner* has not achieved universal acceptance. *See* WHITE, *supra* note 94, at 325-26 (arguing that *Lochner* involved balancing). Glynn Lunney has argued that early police power cases reflected the line-drawing characteristic of classical legal thought. *see* Lunney, *supra* note 52, at 1907-14, although his argument differs from the analysis here in that it does not treat the cases involving businesses affected with a public interest as analytically distinct from traditional police power cases.

131. Chief Justice Waite credited Matthew Hale with coining the phrase "affected with a public interest." *See id.* at 126. ("This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78."). For the origins of the doctrine, *see* Harry N. Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 PERSP. AM. HIST. 329 (1971).

132. *See supra* note 6 and accompanying text.

133. 94 U.S. 113 (1877).

tors were businesses “affected with a public interest.”¹³⁴ The traditional police power approach would suggest that, because under *Munn* a state could regulate rates charged by businesses “affected with a public interest,” it could set them as low as it wanted, without concern for diminution of the value of the enterprise. To avoid this problem, Justice David Brewer took the position that eminent domain concepts should be extended to rate regulation. In the 1894 case *Reagan v. Farmers’ Loan & Trust Co.*,¹³⁵ Brewer’s position became the Court’s, as he wrote: “[T]he forms of law . . . must, in their actual workings, stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held.”¹³⁶ Thus, compensation was owed if a business affected with a public interest were regulated in such a way that the rates generated an inadequate rate of return.¹³⁷

Reagan was not a due process case. The technical basis for the decision is somewhat unclear, but it appears to be an equal protection case.¹³⁸ In 1898, however, in *Smyth v. Ames*,¹³⁹ the Court found that the state deprived a railroad of its property without compensation, in violation of the Due Process Clause, when it fixed rates at an “unreasonably low” level:

While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the [C]onstitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry.¹⁴⁰

Compensation critically separates permissible from impermissible regulation. In other words, in traditional police power cases, the underlying activity was presumptively permissible; the state could stop it only if it were harmful. Compensation had no bearing on the inquiry. With respect to businesses affected with a public interest, it was the regulation that was presumptively permissible. The limit to state power was that the regulation could not deny a reasonable rate of return. If it did, however, compensation was the remedy, and

134. *Id.* at 129.

135. 154 U.S. 362 (1894).

136. *Id.* at 399.

137. For development of this doctrine, see *id.* at 399, 410; *Ames v. Union Pac. Ry.*, 64 F. 165, 176-78 (C.C.D. Neb. 1894); *Chicago & N.W. Ry. v. Dey*, 35 F. 866, 879 (C.C.S.D. Iowa 1888). For discussion, see Siegel, *supra* note 130, at 216-17; Treanor, *The Original Understanding*, *supra* note 6, at 800-01.

138. See *Reagan*, 154 U.S. at 399 (“[I]t is within the scope of judicial power, and a part of judicial duty, to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property.”).

139. 169 U.S. 466 (1898).

140. *Id.* at 526.

it would make the property owner whole.¹⁴¹

The precise content of the category “affected with a public interest” was a matter of dispute. Apart from the post–World War I rent control cases cited in *Mahon*, the broadest reading of the concept occurred in *German Alliance Insurance Co. v. Lewis*,¹⁴² a 1914 opinion by Justice McKenna. In *German Alliance*, the Court upheld a Kansas statute regulating fire insurance rates. The Court found that insurance was a business “affected with a public interest” because it was a matter of “public concern.”¹⁴³ More typical, however, was the view of Chief Justice Taft, who limited the category primarily to public utilities and other monopolies offering “indispensable . . . service[s].”¹⁴⁴

Yet, while there were narrower and broader views of how it should be constructed, this was a category definitionally narrower than the traditional police power category—only businesses affected with the public interest could fall into it. In this area, the showing needed to justify regulation was not so elevated—regulation was allowed without a showing that high utility rates, for example, threatened public health, safety, or morality. At the same time, regulation was limited, because value could not be destroyed.¹⁴⁵

At the most fundamental level, these cases resembled the traditional police

141. The takings principle was sometimes invoked in the cases in the traditional police power category, but the use of the principle was very different than in the businesses affected with a public interest category. In the former category, regulation without compensation was sometimes described as a second and related constitutional violation. In other words, a regulation was invalid both because it fell outside of the police power and because it, as a result, took property without compensation. Treatise writer John Lewis wrote: “[W]hatever deprives a citizen of his property without due process of law necessarily takes his property, either for public use or private use, without compensation, and such laws are, therefore also obnoxious to the eminent domain provision of the constitution.” LEWIS, *supra* note 113, at 477. Any loss in value caused by a regulation that fell outside the police power was therefore a taking without compensation, regardless of the extent of the diminution. For traditional police power cases that reflect this approach to the compensation principle, see *Hadacheck v. Sebastian*, 239 U.S. 394, 407 (1915); *Welch v. Swasey*, 214 U.S. 91, 107 (1909).

142. 233 U.S. 389 (1914).

143. *Id.* at 408. On *German Alliance* as an atypical case, see Walton Hamilton, *Affectation with Public Interest*, 39 YALE L.J. 1089, 1098 (1930). Hamilton offers a defense of a broad reading of “affectation with a public interest.” See *id.* at 1106-12.

144. *Wolff Packing Co. v. Court of Industrial Relations of Kansas*, 262 U.S. 522, 537 (1923). Though decided the year after *Mahon*, *Wolff* reflected the approach at the time of *Mahon*. See Hamilton, *supra* note 143, at 1100-01. The theoretical justification for rate regulation of businesses affected with a public interest was that they were natural monopolies and therefore no competitors would limit profits. As leading economist Henry Carter Adams wrote: “[I]t is easier for an established business [in these fields] to extend its facilities for satisfactorily meeting a new demand than for a new industry to spring into competitive existence.” HENRY CARTER ADAMS, *Relation of the State to Industrial Action*, in *TWO ESSAYS* 57, 110 (Joseph Dorfman ed., 1969). Under this view, as Professor Carol Rose has noted, “any values above opportunity costs were due to the increasing scale return of public use, and belonged to the public that created them.” Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 771 (1986); see also Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 439-46 (1988) (discussing tensions in Supreme Court “affected with a public interest” jurisprudence and examining correlation between dominant strand in that jurisprudence and classical economics).

145. See Siegel, *supra* note 130, at 207 (contrasting regulation of businesses affected with a public interest with health and safety regulations).

power cases in that they turned on the use of categorical rules.¹⁴⁶ Here, the primary rule was that rate regulation was permissible only if the affected business fell into the category of businesses affected with a public interest. Moreover, there was a concerted effort to eliminate judicial discretion by finding a mechanical rule to determine adequate rate of return, and the Court ultimately adopted as its solution the rule that rates had to cover replacement costs.¹⁴⁷

C. EMINENT DOMAIN

The final substantive due process category involves exercises of the eminent domain power. The original rule had required a physical seizure before compensation would be owed. As treatise writer Theodore Sedgwick wrote in 1857: "It seems to be settled that, to entitle the owner to protection under [the Takings C]lause, the property must be actually taken in the physical sense of the word" ¹⁴⁸ Thus, the Court stated in *Transportation Co. v. Chicago*,¹⁴⁹ "[A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision."¹⁵⁰ By the time of *Mahon*, however, a competing line of cases had taken root in which an obligation to compensate arose when the government took physical actions that, had they been done by a private citizen, would have violated an enforceable property right. The critical case was *Pumpelly v. Green Bay Co.*,¹⁵¹ in which the Court found the property owner was entitled to compensation "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness."¹⁵² *Pumpelly* was limited in its significance in that the governmental action of flooding property was a de facto physical taking; the case was also limited in terms of its legal consequence as the Court was interpreting the Wisconsin Takings Clause.¹⁵³ But in 1905, in a case adjudicated under the Fourteenth Amendment's Due Process Clause, the Court required compensation when an elevated railroad was constructed that deprived the property owner of his easements of light and

146. For illuminating development of the position that the cases involving businesses affected with a public interest relied on a categorical rule, see Lunney, *supra* note 52, at 1913-20.

147. The test was adopted in *Smyth v. Ames*, 169 U.S. 466 (1898). For analysis of the test, see Siegel, *supra* note 130, at 224-32.

148. THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 519-20 (1857).

149. 99 U.S. 635 (1879).

150. *Id.* at 642.

151. 80 U.S. (13 Wall.) 166 (1871).

152. *Id.* at 181.

153. *Id.* at 166-67 ("The property of no person shall be taken for public use without just compensation therefor.").

air.¹⁵⁴ Similarly, in 1914, it required compensation when smoke from a state-authorized railroad damaged private property.¹⁵⁵ Thus, a new categorical rule had begun to emerge: the government owed compensation for physical seizures or physical acts affecting property rights in the same instances in which private citizens would have owed such compensation.

IV. HOLMES'S DECISIONS BEFORE *MAHON*

In a variety of significant ways, this body of precedent was deeply at odds with Holmes's thought as revealed in his decisions on the Massachusetts Supreme Judicial Court and in pre-*Mahon* decisions while on the U.S. Supreme Court. In particular, Holmes departed from traditional jurisprudence by engaging in balancing. Moreover, Holmes weighted his balancing approach in favor of the government and sanctioned a broader range of permissible ends than were previously sanctioned (even as he more closely examined traditional police power regulations). Examination of Holmes's early opinions both highlights the differences between his views and the then-existing case law and helps clarify his aims in *Mahon*.

A. MASSACHUSETTS SUPREME JUDICIAL COURT

From early in his career, Holmes rejected the categorical approach, under which there was a sharp line separating legitimate uses of the police power from impermissible state regulations, and favored balancing. Reviewing Thomas Cooley's treatise in 1872, he wrote of the term "police power": "We suppose this phrase was invented to cover certain acts of the legislature which are seen to be unconstitutional, but which are believed to be necessary."¹⁵⁶ As one Holmes scholar has observed, the future Justice was thus rejecting the view that the "police power . . . [was] qualitatively different from the power to take property."¹⁵⁷

154. *Muhlker v. New York & Harlem R.R. Co.*, 197 U.S. 544, 570-71 (1905).

155. *Richards v. Washington Terminal Co.*, 233 U.S. 546, 557 (1914). On *Richards* as a case involving practical ouster, see NICHOLS, *supra* note 113, at 316 & n.56.

156. Book Review, 6 AM. L. REV. 140, 141-42 (1871-72) (reviewing THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (2d ed., Boston, Little Brown & Co. 1872)). Though unsigned, the review was penned by Holmes, according to his biographer Mark DeWolfe Howe. See MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 57 (1963).

157. Patrick J. Kelley, *Holmes's Early Constitutional Law Theory and its Application in Takings Cases on the Massachusetts Supreme Judicial Court*, 18 S. ILL. L.J. 357, 377 (1994). Kelley's excellent study concludes that Holmes's state takings jurisprudence involved balancing, *see id.* at 389, 412, a conclusion similarly reached here. Kelley also highlights the deferential stance adopted by Holmes in his actual decisions. *See id.* at 402-12. Kelley, however, contends that Holmes had a "wildly overbroad interpretation of the scope of the takings clause," *id.* at 413-14, based on Holmes's belief in a "formal coherence . . . between the common law and the [T]akings [C]ause." *Id.* at 413. Given this reading of the clause, to avoid invalidating a significant number of regulations, Holmes offered "strained if not downright fanciful interpretations of statutes." *Id.* at 414. Moreover, according to Kelley, Holmes's reading of the Takings Clause led to limits to his deference. *See id.* at 415. The reading of Holmes that I offer, in contrast, contends that his takings jurisprudence reflected a rejection of the common law approaches.

In *Rideout v. Knox*,¹⁵⁸ an opinion that he wrote in 1889 while on the Massachusetts Supreme Judicial Court, Holmes more fully articulated the view that the difference between legitimate exercises of the police power and uncompensated takings was a “difference of degree,” not of kind.¹⁵⁹ The court in that case upheld a Massachusetts statute barring property owners from constructing fences greater than six feet in height, but indicated that a greater restriction might have been invalid. Holmes wrote:

It may be said that the difference is only one of degree. Most differences are, when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise the police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; large ones could not be, except by the exercise of the right of eminent domain.¹⁶⁰

In upholding the statute, Holmes relied on a balancing test:

On the whole, having regard to the smallness of the injury, the nature of the evil to be avoided, the quasi accidental character of the defendant’s [previous common law right] to put up a fence for malevolent purposes, and also to the fact that police regulations may limit the use of property in ways which greatly diminish its value, we are of opinion that the act is constitutional to the full extent of its provisions.¹⁶¹

In essence, the evil that the regulation addresses is set against the harm to the owner, and the statute is pronounced valid because the former interests outweigh the latter. Significantly, by using a balancing approach, Holmes was implicitly rejecting the categorical approach employed by the U.S. Supreme Court only two years earlier in *Mugler*,¹⁶² a police power decision upholding Kansas’s ban on the manufacture and sale of liquor.

In his 1898 opinion for the Massachusetts Supreme Judicial Court in *Bent v. Emery*,¹⁶³ Holmes again analyzed the case in a way that departed strikingly from U.S. Supreme Court precedent in its use of a balancing test, rather than a categorical rule. The plaintiff owned mud flats and other lands on a river that emptied into Boston’s South Bay. To improve sanitation and navigation, the Board of Harbor and Land Commissioners intended to dredge plaintiff’s property. One consequence of this dredging would be that mud flats on Bent’s property would be permanently submerged, and he claimed that this would constitute a taking. Under the interpretation of the takings principle advanced

158. 148 Mass. 368 (1889).

159. *Id.* at 372.

160. *Id.* at 372-73.

161. *Id.* at 374.

162. See *Mugler v. Kansas*, 123 U.S. 623 (1887); see also *supra* text accompanying notes 114-19 for discussion of *Mugler*.

163. 173 Mass. 495 (1899).

by the U.S. Supreme Court in *Pumpelly v. Green Bay Co.*, this was an easy case because the fact patterns of the cases were virtually identical.¹⁶⁴ *Pumpelly*, however, was not binding because it was an interpretation of the Wisconsin Takings Clause,¹⁶⁵ and Holmes did not even cite the decision. Though he found for Bent, Holmes did not treat the permanent physical invasion as dispositive. Instead, he employed a balancing test. On one hand, he set the harm to Bent—the removal of soil from his property and the permanent submersion of his mud flats. Although building restrictions barred construction on the flats, Holmes anticipated that, with growth in the region, those restrictions would be removed. On the other hand was the state interest, which was not compelling. In particular, because the land in question was separated from the bay by seven bridges, navigation was already impeded and therefore the flooding of Bent's property served little useful public purpose. Holmes concluded: “[I]n view of the probable future of the region, already referred to, and of the fact that the place of the dredging is above seven bridges, we do not feel called upon to strain the police power in aid of public needs.”¹⁶⁶

In *Rideout* and *Bent*, Holmes's use of balancing led to an approach more favorable to government than the traditional rules (although the property owner prevailed in *Bent*). In contrast, *Miller v. Horton*¹⁶⁷ shows how Holmes's balancing could also lead to a result more favorable to the property owner than traditional rules. Local government officials, seeking to halt the spread of a contagion, destroyed a horse, which was later determined to have been healthy. The horse's owner sought compensation under the takings clause of the state constitution. Three members of the seven member court would have denied compensation on the grounds that the board's order was a valid exercise of the police power to abate a nuisance. Writing for the majority, however, Holmes construed the statute under which the officials had acted to provide for payment when the state takings clause mandated it, and he ordered payment to the plaintiff. In other words, he stretched the text of the statute to avoid holding it unconstitutional. The question whether the state takings clause required compensation turned, Holmes characteristically wrote, on a matter of degree: “[T]here is a pretty important difference of degree . . . between regulating the precautions to be taken in keeping property . . . and ordering its destruction.”¹⁶⁸ The state could not constitutionally require the destruction of a healthy horse without providing compensation:

[E]ven if we assume that [the state] could authorize some trifling amount of innocent property to be destroyed as a necessary means to the abatement of a nuisance, still, if [the statute] had added in terms that such healthy animals as

164. For discussion, see *supra* text accompanying notes 151-53.

165. See *supra* text accompanying note 153.

166. *Bent*, 173 Mass. at 497.

167. 152 Mass. 540 (1891).

168. *Id.* at 547.

should be killed by mistake for diseased ones should not be paid for, we should deem it a serious question whether such a provision could be upheld.¹⁶⁹

In doing so, Holmes rejected the rule that regulations intended to abate nuisances were necessarily valid, and that rejection reflected his view that the category of nuisances was hollow. As he wrote in his 1894 article, *Privilege, Malice, and Intent*, the core nuisance doctrine “sic utere tuo ut alienum non laedas”—“Use your own property in such a manner as not to injure that of another”¹⁷⁰—was an “empty general proposition[] . . . which teaches nothing but a benevolent yearning.”¹⁷¹

The key to Holmes’s requiring compensation in *Miller* was his conclusion that no public interest was served by destruction of a healthy horse. A similar finding that a statute served no public purpose accounts for the result in *Woodward v. Central Vermont Railway Co.*¹⁷² At issue in that case was a Vermont statute that imposed on Central Vermont Railway the liabilities for assets acquired from a bankrupt railroad. Ruling that the railroad company did not have to pay the creditor, Holmes declared that the statute did not advance the public interest in any way: “We are unable to see how the public good can be said to require that the defendant should be compelled to pay another person’s debt.”¹⁷³ The statute “is an attempt to require private property to be applied to a private use,”¹⁷⁴ and therefore violated the public use requirement of the takings clause of the Vermont Constitution.¹⁷⁵

Perhaps the most interesting of Holmes’s state court opinions was *Parker v. Commonwealth*.¹⁷⁶ A state statute imposed a height limitation of seventy feet on buildings on the block west of the state capitol. It provided no compensation except “if and in so far as the act . . . may deprive [any persons] of rights existing under the constitution.”¹⁷⁷ Holmes treated the justification for the statute as purely aesthetic: the purpose to be served by this exercise of the “police power” was “love of beauty.”¹⁷⁸ This was plainly an inadequate justification under U.S. Supreme Court case law because it was not concerned with health, safety, or morality. Treatise writer Philip Nichols stated at the time:

169. *Id.* at 547-48.

170. BLACK’S LAW DICTIONARY 1551 (4th ed. 1968).

171. Oliver Wendell Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 3 (1894). For discussion of Holmes’s rejection in this article of the principle of *sic utere*, see Louise A. Halper, Christopher G. Tiedeman, “Laissez-Faire Constitutionalism” and the Dilemmas of Small Scale Property in the Gilded Age, 51 OHIO ST. L.J. 1349, 1381 (1990); see also HORWITZ, *supra* note 52, at 130-33 (discussing *Privilege, Malice, and Intent* as Holmes’s first use of balancing).

172. 180 Mass. 599 (1902).

173. *Id.* at 604.

174. *Id.* at 603.

175. *Id.*

176. 178 Mass. 199 (1901).

177. *Id.* at 200.

178. *Id.* at 203-04.

“[A] restriction upon the height of buildings established only for aesthetic reasons, and to preserve an artistic skyline, though imposing no severer burden, is unconstitutional unless compensation is provided.”¹⁷⁹ Significantly, however, Holmes did not ground his decision on this basis. Rather, he focused on the absence of legislative justification for the restriction: compensation was owed in the absence of “a legislative adjudication that the public welfare requires [these height restrictions] without compensation.”¹⁸⁰ That he did not invalidate the statute on the grounds that its ends were aesthetic suggests a willingness to consider the possibility that regulations aimed at promoting this non-traditional end were permissible.

Holmes’s Massachusetts takings cases illustrate several points about his takings jurisprudence before his appointment to the U.S. Supreme Court. While he had already enunciated the position that courts generally should defer to legislative economic acts,¹⁸¹ such deference had its limits, and in *Bent* and *Woodward* he found that government actions were unconstitutional on takings grounds. Moreover, in *Miller* he ordered payment where an orthodox judge, using the nuisance abatement rule, likely would have ruled for the state. But to suggest that this made Holmes a judicial activist would be to miss his larger project—his substitution of a balancing test for the traditional categorical rules. While Holmes’s rejection of the traditional rules meant that there were some situations when the property owner might be better off than if precedent had been honored—common law nuisance cases—there were other cases in which Holmes’s approach was more favorable to the government. In particular, his approach was more favorable to the government when, as in *Parker*, the government was regulating to advance ends outside of the classic police power justifications of promoting health, safety, and morals. Because in the late-nineteenth-century state governments were increasingly engaging in such regulation—with respect to, in particular, land use and labor law¹⁸²—this shift concerning permissible ends was of critical significance. Equally significant, in reviewing the actions of government as regulator, Holmes was deferential. The two situations involving regulations in which he considered compensation necessary were ones in which the regulation, in his eyes, served no public purpose. In one case, *Miller*, property was being destroyed needlessly. In the other, *Woodward*, property was simply being transferred from one party to another. Thus, even before his appointment to the U.S. Supreme Court, Holmes’s takings jurisprudence was marked by balancing and deference, and he looked favorably on government regulation that advanced non-traditional ends.

179. NICHOLS, *supra* note 113, at 277. When the Supreme Court ultimately upheld height restrictions, it did so purely on safety grounds. See *Welch v. Swasey*, 214 U.S. 91, 108 (1909).

180. *Parker*, 178 Mass. at 205.

181. Most notably, in *Commonwealth v. Perry*, 155 Mass. 117 (1891), Holmes’s dissent strongly foreshadowed his *Lochner* dissent. See *id.* at 124 (Holmes, J., dissenting); WHITE, *supra* note 94, at 282-84.

182. See OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910*, at 107-221 (1993); THOMAS K. McCRAW, *PROPHETS OF REGULATION 57-79* (1984).

B. U.S. SUPREME COURT

In the years before *Mahon*, Holmes's U.S. Supreme Court takings jurisprudence reflected the same basic themes as his takings jurisprudence while on the Massachusetts Supreme Judicial Court. In particular, he continued to use balancing tests weighted in favor of the government rather than following established categorical rules.

The balancing tests are particularly striking from the vantage point of Supreme Court history. As Professor T. Alexander Aleinikoff has pointed out in his article *Constitutional Law in the Age of Balancing*,¹⁸³ explicit references to balancing tests did not appear in Supreme Court majority opinions until the late 1930s.¹⁸⁴ Before Holmes's arrival on the Court, even implicit balancing was anomalous.¹⁸⁵ Aleinikoff (who does not separately treat Holmes's takings jurisprudence) calls Holmes the "patron saint" of the balancing test.¹⁸⁶

The case that Aleinikoff identifies as exemplifying Holmes's use of balancing tests is one in which the Justice held for the Court that a challenged regulation fell within the police power.¹⁸⁷ In *Hudson County Water Co. v. McCarter*,¹⁸⁸ the Court upheld a New Jersey statute barring a water company from diverting water from a New Jersey river into New York state. Holmes wrote for the Court:

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is

183. See generally Aleinikoff, *supra* note 130.

184. *Id.* at 948.

185. *Id.*

186. *Id.* at 955. Aleinikoff finds Holmes implicitly embracing the notion of balancing in *The Path of the Law*: "[J]udges . . . have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious . . ." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897); see Aleinikoff, *supra* note 130, at 958. Similarly, Morton Horwitz has argued that Holmes's 1894 article *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894), represented "the first time . . . that a fully articulated balancing test has entered American legal theory." HORWITZ, *supra* note 52, at 131. Although Horwitz highlights *Privilege, Malice, and Intent* as Holmes's first scholarly justification of balancing, Holmes had employed balancing previously in the takings context. See *Rideout v. Knox*, 148 Mass. 368 (1889); see also *supra* text accompanying notes 158-61 (discussing *Rideout*). Horwitz argues that Holmes's use of balancing in the 1894 article represented a departure from his search for an "organic customary principle" in *The Common Law*. See HORWITZ, *supra* note 52, at 130-31. The conclusions reached in this article do not turn on whether Horwitz correctly identified the precise timing of a change in Holmes's position on balancing. The critical point for my purposes is that Holmes had embraced balancing in the takings context well before *Mahon*, and, indeed, well before he was appointed to the Supreme Court.

187. See Aleinikoff, *supra* note 130, at 948 n.33, 958 n.92 (discussing *Hudson County Water Co. v. McCarter*).

188. 209 U.S. 349 (1909).

called the police power of the State.¹⁸⁹

As in his Massachusetts cases, the difference between exercises of the police power and exercises of the eminent domain power is one of degree not kind. Balancing of competing interests determines constitutionality. On one side of the balance is the “public interest.” These interests “become strong enough to hold their own when a certain point is reached,” and the regulation is then constitutional. On the other side of the balance is private property. At some point, “the rights of property would prevail over the other public interest, and the police power would fail.”¹⁹⁰ Precedent over time increasingly establishes how the balance should be struck: “The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side.”¹⁹¹ Significantly, with balancing, the presence or absence of compensation becomes relevant to the constitutional calculus.

For instance, the police power may limit the height of buildings in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.¹⁹²

At some point, compensation is required if the state’s act is to be found constitutional.

Holmes’s opinion in *McCarter* thus dramatically differs from the non-Holmesian police power cases. He imported into a case that did not involve a business affected with a public interest the central concept from the business affected with a public interest case law—the question of whether the regulation went too far. More broadly, he changed the structure of analysis. For a tradition-minded Harlan or a Peckham, the question to be answered was simply whether a statute advanced traditional police power ends. Holmes, in contrast, weighed the interests at stake—balancing the state’s goals against the private loss. The touchstone of that analysis was whether the statute was reasonable, which Holmes deemed it to be in this case: “[W]e . . . think it quite beyond any rational view of riparian rights, that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the state in which it flows.”¹⁹³ Moreover, the burden of proving

189. *Id.* at 355. Aleinikoff identifies this as one of the first uses of an implicit balancing test by the Court. See Aleinikoff, *supra* note 130, at 949 n.33, 958 n.92.

190. *Hudson County Water Co.*, 209 U.S. at 355.

191. *Id.*

192. *Id.* at 355.

193. *Id.* at 356.

rationality was not a heavy one: "We are of opinion, further, that the constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs."¹⁹⁴

Allied with this notion of minimal rationality in Holmes's Supreme Court opinions is an expansion of permissible ends of regulation, which his state court opinions had foreshadowed. In *St. Louis Poster Advertising Co. v. St. Louis*,¹⁹⁵ he upheld a municipal regulation of billboards. The Supreme Court's previous decision concerning billboard regulation had upheld the regulation on the ground that billboards could be prohibited "in residence districts of a city in the interest of the safety, morality, health, and decency of the community."¹⁹⁶ In contrast, Holmes went beyond traditional police power justifications and upheld regulatory requirements (such as a rule that the billboards had to be constructed in conformity with the building line) even though he acknowledged that they "have aesthetic considerations in view more obviously than anything else."¹⁹⁷

The limited burden of the rationality requirement was even more dramatically evidenced by Holmes's decision in *Laurel Hill v. San Francisco*.¹⁹⁸ Writing for the Court, Holmes upheld a city ordinance barring burials, rejecting a challenge brought by a cemetery. The city claimed that cemeteries were a health hazard, and the cemetery had presented strong evidence that they were not. Holmes wrote that, even if all members of the Court thought the health benefits of the statute were illusory, "it would not dispose of the case."¹⁹⁹ He added:

Tradition and the habits of the community count for more than logic. Since, as before the making of constitutions, regulation of burial and prohibition of it in certain spots, especially in crowded cities, have been familiar to the Western world. . . . The plaintiff must wait until there is a change of practice, or at least an established consensus of civilized opinion, before it can expect this court to overthrow the rules that the lawmakers and the court of his own state uphold.²⁰⁰

Thus, even in the face of strong evidence that it is unjustified, an established belief proved sufficient to justify a regulation. *Laurel Hill* thus provides striking evidence of the extent to which Holmes deferred to legislative judgments.

Although it is generally not fleshed out, this same scrutiny into minimal rationality runs through Holmes's opinions addressing challenges to regulations on the grounds that they interfered with liberty of contract. In *Otis v. Parker*,²⁰¹

194. *Id.* at 356-57.

195. 249 U.S. 269 (1919).

196. *Cusack Co. v. Chicago*, 242 U.S. 526, 529-30 (1917). For a discussion of the point that aesthetic concerns were not considered a valid police power justification, see *supra* text accompanying note 180.

197. *St. Louis Poster Adver. Co.*, 249 U.S. at 274.

198. 216 U.S. 365 (1910).

199. *Id.* at 365.

200. *Id.* at 366.

201. 187 U.S. 606 (1903).

his first opinion on the Court,²⁰² he upheld the validity of a California constitutional provision barring sale of stock on margin, stating, “[N]either a state legislature nor a state constitution can interfere arbitrarily with private business or transactions”²⁰³ The inquiry into arbitrariness was nevertheless deferential:

While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this court can know but imperfectly, if at all.²⁰⁴

Holmes’s more celebrated dissent in *Lochner* echoes *Otis*’s deference.²⁰⁵ Freedom of contract was not absolute: “It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which . . . interfere with the liberty to contract.”²⁰⁶ Judges were not to use their own views as a trump to majoritarian decisionmaking: “[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*.”²⁰⁷ The most striking point about the opinion is that, while Harlan and Peckham required a close analysis of the question whether New York’s statute limiting bakers’ hours fell within the police power, Holmes would have sanctioned the statute because “[a] reasonable man might think it a proper measure on the score of health.”²⁰⁸ Holmes later employed this same inquiry into minimal rationality in his dissents in *Adair v. United States*,²⁰⁹ *Adkins v. Children’s Hospital*,²¹⁰ and *Truax v. Corrigan*.²¹¹

Precisely the same themes present in his police power jurisprudence emerge in Holmes’s decisions involving businesses affected with a public interest. One example is his opinion in *Interstate Consolidated Street Railway Co. v. Massa-*

202. WHITE, *supra* note 94, at 323.

203. *Otis*, 187 U.S. at 608.

204. *Id.* at 608-09.

205. On the similarities between Holmes’s opinions in *Lochner* and *Otis*, see WHITE, *supra* note 94, at 326-27.

206. *Lochner*, 198 U.S. at 75.

207. *Id.*

208. *Id.* Professor Kennedy states that Holmes’s *Lochner* dissent reflects a rejection of Classical legal thought, although the point is not developed. See Kennedy, *supra* note 127, at 9. For a discussion linking Holmes’s dissent and rationality review, see FISS, *supra* note 182, at 179-84.

209. 208 U.S. 161, 192 (1908) (Holmes, J., dissenting) (“I quite agree that the question what and how much good labor unions do, is one on which intelligent people may differ . . . but I could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of the railroads and the country at large.”).

210. 261 U.S. 525, 569 (1923) (Holmes, J., dissenting) (expressing skepticism about effectiveness of statute fixing minimum wage for women, but concluding that it should have been upheld because the belief “reasonably may be held” that it serves the public good).

211. 257 U.S. 312, 342 (1921) (Holmes, J., dissenting) (“If, as many intelligent people believe, there is more danger that the injunction will be abused in labor cases than elsewhere I can feel no doubt of the power of the Legislature to deny it in such cases.”).

chusetts,²¹² a 1907 challenge to the constitutionality of a Massachusetts statute that required railways to transport school children at half fare. Holmes, writing for the Court, noted that a majority of the Court ruled in the state's favor for the reason that the statute was already in place when the plaintiff had taken his charter; on notice of the requirement, the company had implicitly consented to it.²¹³ But Holmes—"[s]peaking for myself alone"²¹⁴—analyzed whether the statute was a taking. He wrote:

[C]onstitutional rights, like others, are matters of degree, and . . . great constitutional provisions for the protection of property are not to be pushed to a logical extreme, but must be taken to permit the infliction of some fractional and relatively small losses without compensation, for some, at least, of the purposes of wholesome legislation.²¹⁵

On one side is the degree of loss. On the other, the nature of the public interest—"some . . . of the purpose of wholesome legislation"²¹⁶ warranting losses of property interests. In this case, the balance weighed in favor of the legislation. Equally significant, in specifying the state interest that justified inflicting a loss on the railways, Holmes again revealed his expansive conception of the police power: "Education is one of the purposes for which what is called the police power may be exercised."²¹⁷ Thus, the statute was constitutional, even though its purpose was to require railways to subsidize school children's transportation.

Holmes also applied a balancing approach to a takings challenge in the 1915 case, *Noble State Bank v. Haskell*.²¹⁸ The bank contested a special assessment of one percent of the money in its checking accounts to create a guaranty fund to compensate depositors in the event of bank failure. The bank contended "the assessment takes private property for private use without compensation."²¹⁹ In upholding the statute, Holmes made clear that he understood that the statute operated to diminish the bank's property, but the statute was nonetheless constitutional because the considerations on the other side were sufficient. "[T]here is," he candidly acknowledged, "no denying that by this law a portion of [the bank's] property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side."²²⁰ A simple showing of diminution in value was inadequate to justify a finding of unconstitutionality:

212. 207 U.S. 79 (1907).

213. *Id.* at 84.

214. *Id.* at 85.

215. *Id.* at 86-87.

216. *Id.* at 87.

217. *Id.*

218. 219 U.S. 104 (1911).

219. *Id.* at 110.

220. *Id.*

Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of . . . the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent.²²¹

Resolution was on a case-by-case basis:

It is asked whether the State could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. It will serve as a datum on this side, that, in our opinion, the statute before us is well within the State's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line.²²²

The last sentence makes clear once again that it is not only the effect on the property owner that is of constitutional relevance, but the public interest as well. The state can assess a one percent fee to preserve the integrity of its banking system, but "help[ing] individuals in business"²²³ is an inadequate justification for a regulation that diminishes individual property. Notably, as in *Laurel Hill*, Holmes indicated that majority sentiment fixed the scope of the police power: "[I]n a general way . . . the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."²²⁴

Holmes's balancing test was, however, strongly weighted in favor of the state, as demonstrated in *Erie Railroad Co. v. Board of Public Utility Commissioners*.²²⁵ There, the railroad company argued that the state's requirement that it change the grades at various crossings unconstitutionally took its property. Holmes dismissed the challenge with a balancing test under which the property owner literally could not prevail: "Grade crossings call for a necessary adjustment of two conflicting interests—that of the public using the streets and that of the railroads and the public using them. Generically the streets represent the more important interest of the two."²²⁶ Holmes accepted the railroad's argument that, if the state had the power to demand changes in crossing, it could bankrupt the railroad, but dismissed it as constitutionally irrelevant: "That the States might be so foolish as to kill a goose that lays golden eggs for them, has

221. *Id.* at 110.

222. *Id.* at 112 (citation omitted).

223. *Id.*

224. *Id.* at 111.

225. 254 U.S. 394 (1921).

226. *Id.* at 410.

no bearing on their constitutional rights.”²²⁷

At the same time, for Holmes the police power was not limitless. Writing for the Court in *Missouri Pacific Railway Co. v. Nebraska*,²²⁸ he invalidated a Nebraska statute that required railroad companies to build tracks that would link privately owned grain elevators to the main railroad lines. This transfer of property from one private party to another could not be rationally justified. “Why should the railroads pay for what, after all, are private connections? We see no reason.”²²⁹ Thus, the rationality requirement was not meaningless. Invoking only his own state court decision in *Woodward v. Central Vermont Railway Co.* as support, Holmes declared the statute a taking.²³⁰

A final, and more celebrated, case involving a business affected with a public interest, *Block v. Hirsh*,²³¹ considered the constitutionality of Washington D.C.’s rent control statute. The federal government claimed the statute was justified by the housing shortage following the First World War. Justice McKenna, the dissenter, applied the same type of analysis that he had used in *Lochner* to argue that the regulation was unconstitutional because it was outside of the police power. He asked, “Of what concern is it to the public health or the operations of the federal government as to who shall occupy a cellar, and a room above it, for business purposes in the city of Washington?”²³² Holmes, for the majority, classified the rental of apartments in a market confronting a post-war housing shortage as a business affected with a public interest, although he added that under other circumstances apartments would not fall into this category:

The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern.²³³

Given the short-term housing shortage, public need warranted regulation, but had the rent control been more onerous, it would not have passed constitutional muster: “For just as there comes a point at which the police power ceases and

227. *Id.*

228. 217 U.S. 196 (1910).

229. *Id.* at 207.

230. *Id.* at 205-06. For discussion of *Woodward*, see *supra* text accompanying notes 172-75. Holmes reached a similar result in *Louisville & Nashville R.R. Co. v. Central Stockyards Co.*, 212 U.S. 132 (1909). There he found a statute that required the railroad to allow other carriers to use its terminal “simply paying for the service of carriage,” 212 U.S. at 145, to be a taking. He wrote: “The duty of a carrier to accept goods tendered at its station does not extend to the acceptance of cars offered to it at an arbitrary point near its terminus by a competing road, for the purpose of reaching and using its terminal station.” *Id.* As in *Missouri Pacific Railway*, the transfer of a property right from one private party to another without public benefit was considered arbitrary and hence unconstitutional.

231. 256 U.S. 135 (1921).

232. *Id.* at 160-61 (McKenna, J., dissenting).

233. *Id.* at 155.

leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law."²³⁴

What is most significant about *Block* is not Holmes's balancing, but his treatment of the category of property "clothed . . . with a public interest."²³⁵ As noted, previous Supreme Court case law had treated the category as one with a very constrained ambit. It was generally limited to monopolies, to railroads, and to businesses that operated pursuant to a charter or franchise.²³⁶ As Yale Law Professor Walton Hamilton pointed out in his 1930 article *Affectation with Public Interest*, *Block* represented the broadest reading of the doctrine, reflecting the very different view that "the legislature [could] extend price control where public concern demands it."²³⁷ In other words, Holmes had dramatically reshaped the traditional categorical rule, effectively depriving it of its content.

One of his later opinions suggests that underlying Holmes's re-working of the concept was a belief that the category was incoherent. In *Tyson & Brother v. Banton*,²³⁸ the Court, by a vote of 5-4, invalidated a New York state statute barring ticket scalping on the grounds that a theater was not a business affected with a public interest.²³⁹ Dissenting, Holmes wrote:

the notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers. The truth seems to me to be that, subject to compensation when compensation is due, the [l]egislature may forbid or restrict any business when it has a sufficient force of public opinion behind it.²⁴⁰

Holmes here plainly rejects the concept of a separate category of businesses affected with a public interest.

While Holmes was quite deferential in the cases thus far discussed, all of which involved government as regulator, he was not deferential when the government was acting, not as regulator, but as property owner seeking to benefit itself. *Portsmouth Harbor Land & Hotel Co. v. United States*²⁴¹ best exemplifies this point. The plaintiff—a company that owned a resort adjoining a government fort—argued that the government had taken its property by repeat-

234. *Id.* at 156.

235. *Id.* at 155.

236. See *supra* text accompanying notes 142-45. For further discussion, see Hamilton, *supra* note 143, at 1098-99.

237. Hamilton, *supra* note 143, at 1099. Hamilton indicated that the 1914 decision *German Alliance* was the only decision that even came close to *Block*. See *id.* at 1099; *supra* text accompanying notes 143-145 (discussing *German Alliance*).

238. 273 U.S. 418 (1927).

239. See *id.* at 439-40.

240. *Id.* at 446. Holmes indicated that he had previously "intimated" this view in *Adkins v. Children's Hospital*, 261 U.S. 525, 569 (1923). See *Tyson & Brother*, 273 U.S. at 446. For discussion, see WHITE, *supra* note 94, at 399-401.

241. 260 U.S. 327 (1922).

edly firing cannons over it. Justice Holmes overruled the Court of Claims, reinstating the dismissed complaint. He stated that a taking would have occurred if the government had, as plaintiffs charged, acted “with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the [g]overnment to fire projectiles directly across it . . . with the result of depriving the owner of its profitable use”²⁴² Justice Brandeis, in dissent, would have ruled for the government on the grounds that the only possible category of taking implicated by the case was a “taking [which] was made under such circumstances as to give rise to a contract express or implied in fact to pay compensation”²⁴³ and the facts did not support the existence of a contract.²⁴⁴ *Portsmouth Harbor* should be highlighted for several reasons. First, other than *Mahon*, it was the only case involving a constitutional property issue in which Holmes and Brandeis wrote opposing opinions.²⁴⁵ Second, the Court was not split along political lines: joining the liberal Justice Brandeis was the leader of the Court’s conservative wing, Justice George Sutherland.²⁴⁶ Rather, the split seems to have been along analytic lines. Brandeis (and Sutherland) found that there was no taking because the government’s action did not fit into one of traditional rules specifying what constituted a taking. In contrast, Holmes, writing for the majority, found that the action was a taking because what the government had done was the functional equivalent of something normally done through an exercise of the eminent domain power, acquiring an easement over adjacent property.

More generally, *Portsmouth Harbor* illustrates the larger point that, when Holmes concluded that government was either exercising its eminent domain power or acquiring property in a way that was functionally equivalent to the exercise of the eminent domain power, compensation was owed if the act was to be constitutional.²⁴⁷ Here, in contrast to his treatment of government regulations, Holmes’s jurisprudence approximated the dominant approach on the Court.²⁴⁸ At the same time, Holmes’s approach had an unorthodox element, because, as *Portsmouth Harbor* indicates, his analysis of whether the government had acquired the property interest was functionalist, rather than formalist.²⁴⁹

242. *Id.* at 329.

243. *Id.* at 331 (Brandeis, J., dissenting).

244. *See id.* at 332.

245. I have reached this conclusion by running a Lexis search to locate all cases in which Justices Holmes and Brandeis both wrote opinions and examining the 22 cases yielded by the search. Search of LEXIS, Genfed Library, US File (Dec. 2, 1997) (search term “written by (holmes) and written by (brandeis)”).

246. For a recent, sympathetic treatment of Sutherland’s jurisprudence, see HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS* (1994).

247. *See also* *International Paper Co. v. United States*, 282 U.S. 399 (1931) (water rights); *A.W. Duckett & Co., Inc. v. United States*, 266 U.S. 149 (1924) (possession of terminal).

248. *See supra* Part III.C.

249. For the formalist rules used by the Court in the eminent domain area, see *id.* In this regard, it should be added that Holmes also departed from the categorical rule, represented by a decision like

A number of themes, then, emerge from Holmes's pre-*Mahon* Supreme Court opinions. He implicitly—and then, in *Tyson*, explicitly—rejected the orthodox view that there was a coherent distinction between traditional police power regulations and regulation of businesses affected with a public interest. In place of the two types of formalist rules developed by the Court to govern these two areas, Holmes uniformly applied a deferential minimal rationality standard that reflected a government-favoring balancing test. As part of that test, he expanded the realm of permissible government ends. Moreover, in *McCarter*, he borrowed an approach that precedent had previously limited to cases involving businesses affected with a public interest—whether the regulation went too far—and applied it in a traditional police power context.

Though generally deferential, Holmes's approach did not allow all statutes to pass muster. Specifically, Holmes found a constitutional violation in cases in which a regulation transferred property from one party to another without advancing a public interest. *Missouri Pacific Railway* falls into this category (as does his opinion in *Woodward*, the Massachusetts Supreme Judicial Court case invalidating a statute requiring a railroad to assume the obligations of its predecessor-in-interest). Moreover, the deferential standard only applied when government acted as regulator—not when it acted to benefit its own property, as in *Portsmouth Harbor*.

Holmes's Supreme Court opinions in the constitutional property area accord with his state court decisions in their use of balancing tests and deferential approach. They accord as well with the larger themes in Holmes's jurisprudence. His rejection of the formalist categories that dominated constitutional property law was consistent with his intellectual rejection of Langdellian formalism and its conception that one could reason deductively and certainly from a general concept to a specific application.²⁵⁰ Indeed, in his 1897 article, *Path of the Law*, Holmes attacked legal conceptualization that improperly focused on the "dramatic incidents" of cases; he chose scholars who wrote on "Railroads or Telegraphs" to exemplify his point.²⁵¹ The notion that certain types of

Muhlker v. New York & Harlem R.R. Co., 197 U.S. 544 (1905), that the government owed compensation for physical seizures of property acts affecting property rights if private property owners in the same circumstance would owe compensation. For discussion of *Muhlker*, see *supra* text accompanying notes 154-55. In dissent, Holmes rejected the Court's conclusion that construction of an elevated railroad that blocked Muhlker's light and air was a compensable taking. That decision, he wrote, transformed into a property right "the practical commercial advantage of the expectation that a street would remain open." *Id.* at 573 (Holmes, J., dissenting). Instead, he would have applied, not surprisingly in light of his overall constitutional property jurisprudence, a balancing test. *Id.* at 576 (Holmes, J., dissenting) ("Suppose that the plaintiff has an easement, and that it has been impaired, bearing in mind that his damage is in respect of light and air, not access, and is inflicted for the benefit of public travel, I should hesitate to say that in inflicting it the legislature went beyond the constitutional exercise of the police power.").

250. For further discussion of Holmes and Langdellian formalism, see Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 816-26 (1989).

251. Holmes, *The Path of the Law*, *supra* note 186, at 475.

businesses merited separate treatment simply because of the nature of those businesses—the idea behind the category of businesses affected with a public interest²⁵²—was thus for Holmes a paradigmatic example of the approach to law he was rejecting. Moreover, his embrace of balancing tests in the constitutional property area is consistent with Morton Horwitz's argument that, by the time he wrote the *Path of the Law* in 1897, Holmes had lost faith in the determinacy of legal reasoning and had turned to ad hoc balancing because "he had finally abandoned any conviction that common law categories were capable of providing neutral constraints on judicial decision making."²⁵³

Holmes's deference to majoritarian decisionmakers, even in instances when he suggested (as he often did) uncertainty about the wisdom of that legislation, was the product of the same larger themes in his thinking. As Horwitz writes, Holmes's philosophy of judicial self-restraint was based on his belief that "[i]f law is merely politics, then the legislature should in fact decide."²⁵⁴ Holmes believed there to be two limiting principles to his philosophy of judicial self-restraint. First, the government should not be allowed to act arbitrarily—as it did when it transferred property from one person to another with trivial public benefit. Second, the government should not be allowed to violate a core principle of the Takings Clause when, without compensation, it used private property for its own benefit. The next Part will show how these themes are consistent with, and illuminate, *Mahon*.

252. See *supra* text accompanying notes 142-44.

253. HORWITZ, *supra* note 52, at 139. For accounts that, at least in part, accord with Horwitz's, see Aleinikoff, *supra* note 130, at 955, 958 (Holmes as balancer); Mark Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 VA. L. REV. 975, 1044-51 (1977) (stating Holmes abandoned conceptualist project). It should be added that Horwitz's account is controversial. In marked contrast, Thomas Grey has contended that Holmes was a pragmatist who was also a conceptualist and formalist, although of a different type from Langdell. Grey, *supra* note 250, at 816-26; see also RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 220-44 (1990); Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 WM. & MARY L. REV. 19 *passim* (1995); Catherine Wells Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541 *passim* (1988); Richard A. Posner, *Introduction to OLIVER WENDELL HOLMES, JR., THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.*, at ix, xi-xii (Richard A. Posner ed., 1992).

This debate does not need to be resolved for purposes of this article. As Grey has acknowledged, his analysis does not extend to Holmes's judicial opinions concerning the constitutionality of economic legislation, because Holmes had relatively little concern for adhering to precedent in this area. See Grey, *supra* note 250, at 849; Grey, *supra*, at 37-39. In addition, the views of Holmes as formalist and as balancer are ultimately reconcilable, as the work of Professor Brauneis suggests. See Brauneis, *supra* note 11, at 660-64 (discussing Holmes's use of balancing to further project of specification).

254. HORWITZ, *supra* note 52, at 142. Although his account of Holmes's thought generally conflicts with Horwitz's, Thomas Grey offers a similar explanation for Holmes's deference, noting that Holmes "did not think anyone could come close to proving which of the contending social ideas of his time would advance human welfare in the long run." Grey, *supra* note 250, at 39. White attributes this trait in Holmes's thought to his fatalism: "Holmes' 'tolerance' of legislative regulation was . . . the product of a conviction that in the long run neither he nor any single individual could resist the force of public opinion." WHITE, *supra* note 94, at 401.

V. RECONCEPTUALIZING *MAHON*

Mahon grows out of Holmes's previous constitutional property decisions and his rejection of the traditional approaches embodied in the case law. The competing schools of thought about the case have failed to understand Holmes's larger project and the case law to which he was responding. As a result, although each approach contains at least a partial truth about the case, the partial truths ultimately serve to obscure rather than reveal. Misunderstanding and disregarding *Mahon*'s background has led to the erroneous conclusion that the case reflects a fairly high degree of judicial oversight of economic regulation. This Part builds on the article's discussion of Holmes's constitutional property jurisprudence to show what he was actually doing in *Mahon*.

Mahon is a substantive due process case. It preceded the Supreme Court's acceptance of incorporation. And so, for example, Professor Brauneis correctly observes:

Holmes's remarks in *Mahon* about the relationship between the Fifth Amendment Takings Clause and the Fourteenth Amendment are not sloppy, but quite precise. Holmes refers to the protection afforded by the Takings Clause against the federal government and then states that "[a] similar assumption is made in the decisions upon the 14th Amendment."²⁵⁵

Although *Mahon* is technically a substantive due process case, it is not, however, like *Lochner*, and proponents of the substantive due process view of *Mahon* have repeatedly missed this critical point. The last Part showed how Holmes's other decisions reworked and restructured the basic concepts of substantive due process and rejected its formalist approach. *Mahon* evidences the same activity in that Holmes merged the traditional police power analysis with that of businesses affected by a public interest.

The language that those who read *Mahon* as a diminution in value case have focused on—such as Holmes's assertion that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"²⁵⁶—is critical here. This is not language that another Supreme Court Justice would have included in the opinion. Because this language treats loss in value as central to the question of whether there has been a constitutional violation, it belongs to the cases concerning businesses affected with a public interest, and *Mahon* was not such a case. Under a traditional balancing approach, *Mahon* was a case in which the issue to be resolved was simply whether the regulation fell within the police power, and this is exactly how Brandeis analyzed it. Holmes's merging in *Mahon* of the two lines of cases is also evidenced by his treating as relevant the post-World War I rent control cases, such as *Block v. Hirsh*.²⁵⁷ Thus, as he had done previously in

255. Brauneis, *supra* note 11, at 669 (quoting *Mahon*, 260 U.S. at 415).

256. *Mahon*, 260 U.S. at 415.

257. *See id.* at 415-16.

Hudson County Water Co. v. McCarter, Holmes disregarded the distinction between two substantive due process categories and imposed a unified analysis in which loss of value was a relevant concern.

In the context of ratemaking in regulated industries, the diminution in value test that the Court developed before *Mahon* constrained judicial discretion and could yield relatively determinate answers.²⁵⁸ Once one removes the test from the context of regulated industries, however, the question of what diminution is too great becomes problematic. Indeed, as the Court—nominally following *Mahon*—has applied a diminution in value test, this is the major problem with which the Court has wrestled. *Mahon* has been read to resolve this problem in part through conceptual severance.²⁵⁹ Under the conceptual severance approach, the analysis focuses on the affected property right (at least if it is a property right, like support rights, that has received separate legal recognition) rather than the fee simple. If the right loses all value, it logically follows that compensation must be owed. This formalist approach, however, conflicts with the antiformalist balancing approach repeatedly demonstrated in Holmes's constitutional property decisions. More specifically, the formalist approach also conflicts with his decision in *Erie Railroad Co. v. Board of Public Utility Commissioner*, in which he wrote that state regulations could force the railroad into bankruptcy without giving rise to a requirement of compensation.

Holmes's other decisions further suggest that he would have been unlikely to have embraced in *Mahon* a pure diminution in value test. They suggest that he would instead have been likely to adopt a balancing test. A look at the structure of *Mahon* indicates that that is precisely what he did. Balancing language is central to *Mahon*. In the paragraph in which Holmes presented the interests in the case, he stated: "When [the diminution in value] reaches a certain magnitude, in most if not in all cases there must be an exercise of [the power of] eminent domain and compensation to sustain the act."²⁶⁰ Similarly, as he closed the section dealing with the Mahons' claim, he wrote: "If we were called upon to deal with the plaintiffs' position alone, we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights."²⁶¹

Understanding *Mahon* as involving a balancing test is, however, only a partial guide to reading the case. Previous work contending that *Mahon* set forth such a test has read the opinion as one in which the test was weighted in favor of the private property owner. But if one reconsiders the text of *Mahon* in light of Holmes's other decisions, the deferential quality of the opinion becomes apparent. He treats the loss to the property owner as significant: "[T]he extent of the taking is great. [The statute] purports to abolish what is recognized in

258. See *supra* text accompanying notes 145-47.

259. For discussion, see *supra* text accompanying notes 60-66.

260. *Mahon*, 260 U.S. at 413.

261. *Id.* at 414.

Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs.”²⁶² This loss alone, however, would not justify a finding of a taking because it is also necessary that the public interest be slight: “This is the case of a single private house.”²⁶³ Harm to the public as a whole is similarly described in underwhelming terms—the problem is that those negotiating on behalf of the state were “short-sighted,”²⁶⁴ hardly a term suggesting tragic misjudgment. The opinion makes clear, however, that there are circumstances in which private property claims can be extinguished: “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”²⁶⁵ Even as he invalidates a regulation, then, Holmes does so in a way that is consistent with his *Lochner* dissent and his other constitutional property decisions.

With respect to the balancing, it is important to recognize that on the government side Holmes was placing interests that would not, under the Supreme Court’s prior case law, have justified regulation. Previous case law (except for Holmes’s decisions) had limited permissible regulation either to matters of health, safety, or morality, on one hand, or businesses affected with a public interest. But in cases such as *Otis v. Parker, St. Louis Poster Advertising Co. v. St. Louis*, and *Laurel Hill v. San Francisco*, Holmes had sanctioned regulations on non-traditional grounds, and he did the same thing in *Mahon*. The most telling passage in this regard is the one just alluded to—“This is the case of a single private house”²⁶⁶—which continues: “No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case.”²⁶⁷ Not surprisingly, there is only one source of precedent to which Holmes could turn to support the proposition that regulation is legitimate even when the end advanced pertains to “a single private house”: his own previous decisions. Thus, as support for this passage, he cited his state court decision in *Rideout v. Knox*.

To recognize the powerful elements of judicial self-restraint present in *Mahon*, however, only raises the next question. Why was the statute found unconstitutional? Why is it that the balance weighed in favor of the property owner? The answer is that the fact pattern of *Mahon* fits precisely into the limited category of instances in which, under Holmes’s prior decisions, regulation was impermissible. Admittedly, Holmes in his opinion did not clarify how the weighing was to be done. But the way in which *Mahon* accords with Holmes’s prior decisions shows that *Mahon* was consistent with his very constrained view of the judicial role.

262. *Id.* at 413.

263. *Id.*

264. *Id.* at 415.

265. *Id.*

266. *Id.* at 413.

267. *Id.* (citing *Rideout v. Knox*, 148 Mass. 368 (1889)).

As applied to the Mahons, the Kohler Act failed to pass constitutional muster because it involved the simple transfer of property from one party to another *without advancing any public interest*. Though Margaret Mahon's father had not purchased support rights, the Kohler Act operated to provide such rights free of charge to his successors-in-interest: "[The statute] purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs."²⁶⁸ Holmes found no offsetting public benefit—he specifically noted that safety is not implicated because the coal company must provide notice of its intent to remove pillars of coal.²⁶⁹ Thus, the case is precisely like *Woodward v. Central Vermont Railway Co.* and *Missouri Pacific Railway Co. v. Nebraska*, other cases in which Holmes found a taking. The government action is arbitrary.

There was, however, greater evidence of real harm with respect to public lands. The record in the case shows that, while homeowners might have avoided danger, the same was not true of people travelling on public roads and children going to school.²⁷⁰ Had Holmes applied an arbitrariness standard here, he presumably would have ruled in favor of the statute's constitutionality. The opinion, however, gives this claim short shrift, dismissing it with the observation:

If in any case [the state's] representatives have been so short sighted as to acquire only the surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much.²⁷¹

That the statute was invalidated despite such harm would seem to reinforce the conventional view that *Mahon* supports close judicial scrutiny of economic regulation. Holmes, however, made clear his reasoning to Frankfurter in a February 14, 1923 letter, which has been overlooked by other *Mahon* scholars.²⁷²

This letter was not the first one from Holmes to Frankfurter that referred to *Mahon*. While Holmes was drafting his opinion, he mentioned in passing to the then-Harvard Law School professor that he was working on a decision "which I

268. *Id.* at 414.

269. *Id.*

270. See Rose, *supra* note 12, at 578 n.96 ("The Brief on Behalf of City of Scranton at 2-5 also included a sheaf of photographs of surface damage caused by cave-ins. The first photograph depicts an exposed coffin in a collapsed grave; others show the collapse of streets, houses, a public school, and a factory.").

271. *Mahon*, 260 U.S. at 415.

272. The Holmes papers (including his correspondence with Frankfurter) were not available for scholarly research until 1985, see Robert M. Mennell & Christine L. Compston, *Introduction to HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912-1934*, at xi, xl (Robert M. Mennell & Christine L. Compston eds., 1996), nor were they published until 1996. None of the accounts of the case cites this correspondence.

think has God's truth about the police power."²⁷³ Frankfurter apparently did not agree as, following *Mahon's* release, he did not send Holmes his normal letter of effusive approval.²⁷⁴ Responding to the silence, Holmes wrote Frankfurter on February 14, 1923:

... I have not seen the slightest reason to doubt the decision [in *Mahon*], but only to regret that I didn't bring out more clearly the distinction between the rights of the public generally and their rights in respect of being in a particular place where they have no right to be at all except so far as they have paid for it.²⁷⁵

This statement shows that Holmes did not see the state's claim that the mining endangered those using state property as implicating the government as regulator. It was not about "the rights of the public generally." Rather, the case concerned the state's acquisition of property. The state could not pay for surface rights alone and then acquire support rights for free. Thus, for Holmes, the case was precisely like *Portsmouth Harbor Land & Hotel Co. v. United States*.²⁷⁶ In each instance, the state was seeking to benefit its own property. In each instance, Holmes held that it could not do so without compensation.

And the same was true for Brandeis, who again applied traditional categories. Just as he had argued in *Portsmouth Harbor* that the government's action did not fall into a category in which compensation was owed, so he argued in *Mahon*. Clearly, the two Justices had dissimilar approaches in the area of constitutional property law. But two cases in a sixteen-year period of joint tenure on the bench hardly suggest that Holmes was recognizably less deferential than Brandeis. More to the point, Holmes's approach was simply different—he was a balancer, not a formalist—and in *Mahon* that orientation produced a different result. The key to *Mahon* is that Holmes did not accept the traditional police power categories that, for Brandeis, justified the statute. That *Mahon* would be misinterpreted is certainly understandable. A statute was invalidated

273. Letter from Oliver Wendell Holmes to Felix Frankfurter (Nov. 27, 1922), in HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912-1934, *supra* note 272, at 148, 148.

274. See WHITE, *supra* note 94, at 403.

275. Letter from Oliver Wendell Holmes to Felix Frankfurter (Feb. 14, 1923), in HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912-1934, *supra* note 272, at 150, 150. Holmes made a similar point in a letter to Pollock, although he did not distinguish (as he did in his letter to Frankfurter) between the government as regulator and the government as property owner. He wrote: "My ground is that the public only got on to this land by paying for it and that if they saw fit to pay only for a surface right they can't enlarge it because they need it now any more than they could have taken the right of being there in the first place." Letter from Oliver Wendell Holmes to Frederick Pollock (Dec. 31, 1922), in 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932, at 108, 109 (Mark D. Howe ed., 1941). Holmes's distinction in the Frankfurter letter between "the rights of the public generally and their rights in respect of being in a particular place" is significant because the explicit contrast highlights Holmes's view that the case was not primarily about government as regulator; moreover, the letter shows that Holmes realized that he had not drawn the distinction "clearly" in the actual opinion.

276. See *supra* text accompanying notes 241-49.

despite the fact that, as Brandeis's dissent shows, the case law provided sufficient support for a judge sympathetic to legislation or deferential to legislatures to conclude that the statute was constitutional. Moreover, Holmes was using diminution in value in a novel way—and this is why commentators have so often seen *Mahon* as the first regulatory takings case. But that perception of *Mahon* changes when the case is placed in context. The shift from formalist, categorical rules to balancing almost inevitably means that some statutes that might have been upheld under the old approach would be invalidated under the new approach—even if the new approach is deferential. *Mahon* is the case in point.

VI. MAHON AND THE TAKINGS REVIVAL

We now return to the question of how *Mahon* became central to takings law. As noted, Robert Brauneis has offered the most complete explanation. According to his account, *Mahon* was a “minor substantive due process case.”²⁷⁷ After 1935, when the Court abandoned economic substantive due process, “*Mahon* appeared to be destined for oblivion . . .”²⁷⁸ Frankfurter and other leading academics helped facilitate this process of repressing the memory of *Mahon*: “For the Progressives, Holmes’s decision in *Mahon* was a lapse to be explained away privately and ignored publicly.”²⁷⁹ When the Supreme Court started to use the Takings Clause in the late 1950s, however, the case was “rediscovered—and to some extent reinvented—as the ‘foundation of regulatory jurisprudence.’”²⁸⁰ This portrayal of the history of *Mahon*’s influence makes a number of significant interpretive mistakes—besides the already discussed claim that *Mahon* was a substantive due process case—but it also helps illuminate how *Mahon* came to dominate contemporary takings jurisprudence.

Brauneis offers as evidence of *Mahon*’s status as a minor case that it was rarely cited by the Court and never cited for embodying either a diminution in value test or a balancing test.²⁸¹ *Mahon*, however, was clearly not viewed as a minor case. Dean Acheson denounced it in an (anonymous) editorial in *The New Republic*.²⁸² Thomas Reed Powell, the leading constitutional law scholar of the day, wrote an article defending it.²⁸³ A series of student notes reported

277. Brauneis, *supra* note 11, at 680.

278. *Id.*

279. *Id.* at 683.

280. *Id.* at 702 (quoting *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 508 (1987) (Rehnquist, C.J., dissenting)).

281. Brauneis, *supra* note 11, at 678-80.

282. See Dean Acheson, Editorial, *NEW REPUBLIC*, Jan. 3, 1923, at 136. On the authorship of the unsigned editorial, see Letter from Oliver Wendell Holmes to Harold Laski (Jan. 23, 1923), in 1 *HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1932*, at 346, 346 (Alger Hiss ed., 1963) (“I was not greatly impressed by Acheson’s [sic] support of his former boss [Justice Brandeis] in the *New Republic* . . .”).

283. Thomas Reed Powell, *Reasoning, Reasonableness and the Pennsylvania Surface Subsidence Case*, 1 *N.Y. L. REV.* 242 (1923).

it.²⁸⁴ Holmes's own reaction to the commentators' response to *Mahon* indicates that the case was not minor; he smarted under the criticism he received. "I fear," he wrote Harold Laski, "that I am out of accord for the moment with my public-minded friends"²⁸⁵

But despite this prominence, it was, at first, an unimportant case, in the sense of affecting Supreme Court decisions. Holmes's decision in *Mahon* reflected his idiosyncratic approach to constitutional property law. In accordance with his earlier opinions, he rejected the various categorical rules that had guided previous decisions and that were broadly shared. Harlan and Peckham may have disagreed about the result in *Lochner*, but they at least had shared a common frame of analysis: police power regulations were legitimate if they advanced public health, morality, or safety, and if they were legitimate, the effect on property value was irrelevant. Brandeis's dissent in *Mahon* equally reflects the existing categorical rules: The Kohler Act was constitutional because it was a safety regulation. In contrast, Holmes's balancing and his disregard of established categories were unique.

Moreover, Holmes's approach in *Mahon* had relatively little initial impact because it was not clearly developed—either in *Mahon* or elsewhere. This article has pieced together Holmes's project in his constitutional property decisions, but Holmes never attempted to synthesize his decisions or to explain his full constitutional property jurisprudence. (If he had, this article would not have been necessary.) Thus, the approach present in *Mahon* did not win converts because Holmes never satisfactorily articulated his approach. Ironically, Holmes's jurisprudence is easier to discern now than it was in the 1920s. Balancing tests today are commonplace. As previously observed, explicit balancing tests did not figure in Supreme Court majority opinions until the late 1930s.²⁸⁶ That Holmes used an implicit balancing test may appear clear in retrospect. Given the novelty of his approach and the opaqueness of his presentation, it is easy to see why his contemporaries failed to see what he was doing and failed to follow him.

As a result, Holmes's approach remained one that he alone held. And that is why the two principal zoning cases from the 1920s—the only cases handed down by the Court before it retreated from the area—do not mention *Mahon*,

284. *Comment on Cases, Constitutional Law: Police Power v. Eminent Domain*, 11 CAL. L. REV. 188 (1923); *Current Decisions, Constitutional Law-Police Power-Unjustifiable Extension*, 32 YALE L.J. 511 (1923); *Note and Comment, Constitutional Law-Police Power, Regulation, and Confiscation*, 21 MICH. L. REV. 581 (1923); *Recent Cases, Constitutional Law-Legislative Powers: Impairment of the Obligation of Contracts-Pennsylvania "Cave-In" Statute*, 36 HARV. L. REV. 753 (1923); *Recent Cases, Constitutional Law-Police Power-Due Process-Mining-Surface Subsidence*, 7 MINN. L. REV. 242 (1923); *Recent Cases, Constitutional Law-Police Power-Kohler Act Held Unconstitutional*, 71 U. PA. L. REV. 277 (1923); *Recent Decision, Constitutional Law-Police Power-Taking Property and Impairing Contractual Obligations by Exercise of State Police Power*, 9 VA. L. REV. 457 (1923).

285. Letter from Oliver Wendell Holmes to Harold Laski (Jan. 23, 1923), in 1 HOLMES-LASKI LETTERS, *supra* note 282, at 346, 346.

286. See *supra* text accompanying notes 183-86.

even though its applicability seems obvious today. In *Village of Euclid v. Ambler Realty Co.*,²⁸⁷ despite his political conservatism,²⁸⁸ Justice Sutherland upheld the constitutionality of zoning by invoking a classic police power rationale:

[T]he coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing . . . the disturbing noises incident to increased traffic and business . . . detracting from [the streets'] safety and depriving children of the privilege of quiet and open spaces for play . . . until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.²⁸⁹

This statement echoes the harm rationale that Justice Harlan advanced in *Mugler v. Kansas* to uphold a state regulation banning the manufacture and sale of alcohol.²⁹⁰ Zoning is constitutional because apartment houses in residential neighborhoods are “very near to being nuisances.” Similarly in *Nectow v. City of Cambridge*,²⁹¹ Justice Sutherland invalidated a specific application of Cambridge’s zoning laws on the grounds that “it does not bear a substantial relation to the public health, safety, morals, or general welfare.”²⁹² Sutherland does not cite *Mahon* not because *Mahon* is too trivial a case to mention. Rather, *Mahon* is not cited because Holmes and Sutherland live in different analytic universes.

The next step in Brauneis’s explanation is also erroneous, though it reflects an important point. The idea that *Mahon* would be forgotten is, even at a surface level, implausible. During a period when commentators compared Holmes with Hitler,²⁹³ it is not likely that his one-time invalidation of a piece of economic legislation was considered a truth too terrible to be widely spoken. And nothing

287. 272 U.S. 365 (1926).

288. See *supra* text accompanying note 246.

289. *Village of Euclid*, 272 U.S. at 394-95.

290. See *supra* text accompanying notes 114-19.

291. 277 U.S. 183 (1928).

292. *Id.* at 188. Sutherland’s addition of “general welfare” to “health, safety, morals” merits comment. The case law recognized welfare-promoting regulations under two conditions: where the regulation targeted a business affected with a public interest; alternately, where the regulation did not affect the value of property. See NICHOLS, *supra* note 113, at 276-79 (discussing “police regulations not affecting the public health, morals or safety”).

293. The most vitriolic entry in this debate is probably Ben W. Palmer, *Hobbes, Holmes and Hitler*, 31 A.B.A. J. 569 (1945). For other examples to similar effect, see John C. Ford, *The Fundamentals of Holmes’ Juristic Philosophy*, 11 FORDHAM L. REV. 255 (1942); Francis E. Lucey, *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 GEO. L.J. 493 (1942); Ben W. Palmer, *Defense Against Leviathan*, 32 A.B.A. J. 328 (1946); Ben W. Palmer, *The Totalitarianism of Mr. Justice Holmes: Another Chapter in the Controversy*, 37 A.B.A. J. 809 (1951). For discussion, see EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY* 159-78 (1973).

about Holmes is ever forgotten. For example, during the period when *Mahon* was supposedly relegated to oblivion, Yale Law School Professor Walton Hamilton thought it worth sharing with the readers of the *University of Chicago Law Review* the information that “when Holmes was a small boy his father rewarded every bright saying with a spoonful of jam.”²⁹⁴ Again, it is unlikely that Holmes’s father’s jam-based incentive structure would be remembered at a time in which people forgot that Holmes and Brandeis had disagreed over whether a state statute was unconstitutional.

And, of course, *Mahon* was never forgotten. It is a case that was always in the Holmes canon. In 1931, when the Justice retired from the Court, Alfred Lief compiled a one volume work, *Representative Opinions of Mr. Justice Holmes*;²⁹⁵ *Mahon* was included in that collection.²⁹⁶ When Max Lerner published a selection of Holmes’s writings in 1943 (and then reprinted his selections with some editorial revision in 1953), *Mahon* was again included.²⁹⁷ *Mahon* was regularly cited in state and lower federal court cases,²⁹⁸ and it regularly appeared as a principal case in constitutional law casebooks.²⁹⁹ Scholarly discussions of the Holmes-Brandeis relationship inevitably focused on the case. Thus, in 1957, the year before *Mahon*’s first significant post-1935 appearance in a Supreme Court decision, Alexander Bickel featured it in the chapter “Holmes” in *The Unpublished Opinions of Mr. Justice Brandeis*.³⁰⁰

Nevertheless, it is correct that *Mahon* was essentially uncited—appearing in no majority opinion—by the Court between 1935 and 1958. That disappearance, however, did not reflect *Mahon*’s eclipse so much as it did the Supreme Court’s substantial abandonment of use of the regulatory takings doctrine. In particular, from 1928, when it decided *Nectow*, until 1962, the Supreme Court did not resolve a zoning case.³⁰¹

294. Hamilton, *supra* note 95, at 22 n.30.

295. OLIVER WENDELL HOLMES, REPRESENTATIVE OPINIONS OF MR. JUSTICE HOLMES (Alfred Lief ed., 1931).

296. *Id.* at 62-66.

297. OLIVER WENDELL HOLMES, THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS, AND JUDICIAL OPINIONS 185-90 (Max Lerner ed., 2d ed. 1953) (reprinting case); Max Lerner, *Introduction to id.* at x (noting case selection unchanged from first edition).

298. A Lexis search reveals 89 citations in opinions handed down between 1936 and 1958. Search of LEXIS, Mega Library, Mega File (Jan. 9, 1998) (search term: (Pennsylvania Coal) pre/3 mahon and date 1935 and date 1959). To put this number in context, it is helpful to observe that, in the same database search for the same period, there were 100 citations to *Plessy v. Ferguson*, 163 U.S. 537 (1896). Search of LEXIS, Mega Library, Mega File (Jan. 9, 1998) (search term: Plessy pre/3 Ferguson and date 1935 and date 1959). Presumably, *Plessy* was not forgotten during the heyday of Jim Crow and the years immediately following *Brown v. Board of Education*, 347 U.S. 483 (1954).

299. *See, e.g.*, 2 PAUL A. FREUND ET AL., CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS 1202-08 (1954); PAUL G. KAUPER, CONSTITUTIONAL LAW 836-41 (1954).

300. *See* BICKEL, *supra* note 99, at 227-31.

301. Williams et al., *supra* note 79, at 200. In his comprehensive study of Supreme Court takings cases between 1933 and 1962, Allison Dunham mentions only seven cases decided between 1936 and 1958 that implicated any aspect of the regulatory takings doctrine. *See* Allison Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 SUP. CT. REV. 63, 73-81.

When the Court resumed resolution of regulatory takings issues, *Mahon* became the centerpiece of its jurisprudence, not because it had always been the central case in the regulatory takings area—it hadn't—but because it alone accorded with late-twentieth-century approaches to property and constitutional law. In contrast, the previously dominant categorical approaches were inconsistent with social and political changes and with fundamental changes in constitutional law.

The traditional economic substantive due process line of cases—including both *Mugler* and *Lochner*—had long been subjected to unrelenting attack from the legal academy, broad segments of the bar, and political actors, all of whom had denounced it as embodying unconstrained judicial decisionmaking.³⁰² After the New Deal Revolution, this critique became constitutional orthodoxy. Beginning in *United States v. Carolene Products*,³⁰³ the Court adopted a stance of deferential review under the Due Process Clause of economic and social legislation.³⁰⁴ In the years that followed, it retreated from even the limited scrutiny suggested by *Carolene Products*, ultimately adopting the position that it could uphold legislation on purely hypothetical facts and reasons.³⁰⁵ Perhaps equally significant, when the Court returned to the regulatory area in the 1960s, “*Lochnerizing*” had become an “epithet,”³⁰⁶ a reputation that made economic substantive due process an unattractive basis for an assertion of judicial authority. Moreover, the analytic appeal of the harm principle enunciated in *Mugler* was undermined as economic criticism of that principle became widely accepted. According to that critique, an apparently harmful activity, such as a brickyard in a residential neighborhood, was not truly harmful; it was simply inconsistent with other land uses. Preference of one use over another was simply “arbitrary.”³⁰⁷

Although the line of cases involving businesses affected with a public interest

302. See HORWITZ, *supra* note 52, at 3-7.

303. 304 U.S. 144 (1938).

304. See *id.* at 152 n.4.

305. See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (upholding statute requiring prescriptions for eyeglasses based on hypothetical health reasons). For an even more extreme example, see *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (Black, J.) (upholding state law restricting debt adjusting to licensed attorneys; legislature “free to decide for itself” so long as it does not violate particular federal statute or textually-clear constitutional mandate); see also *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 535-36 (1949) (explicitly rejecting the “*Alleyger-Lochner-Adair-Coppage* constitutional doctrine”).

306. TRIBE, *supra* note 2, at 567 (discussing Supreme Court jurisprudence from the turn of the century until the mid-1930s and observing that “‘*Lochnerizing*’ has become . . . an epithet”).

307. Michelman, *supra* note 69, at 1198. The argument summarized here was first presented by Michelman. See *id.* at 1196-1201; see also Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (critiquing harm/benefit distinction). Justice Scalia embraced it in his opinion in *Lucas v. South Carolina Coastal Council*. See *Lucas*, 505 U.S. 1003, 1023 (1992). The argument has not, however, gained universal acceptance. Robert Ellickson and William Fischel have offered sophisticated defenses of the harm/benefit distinction, arguing that one can define harm and benefit in terms of a normal-behavior standard. See FISCHEL, *supra* note 2, at 353-61; Robert Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 419-21 (1977).

is hardly as well remembered as the classic police power line of cases—as the fact that takings scholars have almost completely overlooked them illustrates—this line of cases suffered a similar fate. Progressive legal scholars and legal realists declared that *all* businesses were affected with a public interest and that there was no coherent distinction between businesses that the courts had proclaimed to be affected with a public interest and other businesses. As Columbia Law School Professor Robert Hale asserted: “There is scarcely a single advantage possessed by a business affected with a public use which cannot be matched in the case of some unregulated concern.”³⁰⁸ In 1934, the Supreme Court effectively embraced this viewpoint in *Nebbia v. New York*.³⁰⁹ In upholding the New York Milk Control Board’s power to fix the price of milk, the Court stated: “The phrase ‘affected with a public interest’ can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good.”³¹⁰ In effect, if the legislature had rational basis for a regulation, any business could now be a business affected with a public interest.³¹¹

Most important, by the 1960s, the character of government action had fundamentally changed—it had unquestionably transcended the bounds of regulating health, safety, and morals and regulating businesses traditionally deemed to be affected with a public interest, and there was a general consensus that this broader range of governmental interests was permissible. Thus, today, even Justice Scalia acknowledges that government may “affect property values by regulation[.]”³¹² even to promote “ecological, economic[, or] aesthetic concerns.”³¹³ The two traditional lines of cases could provide little guidance as to when such non-traditional activities were unconstitutional because, under the traditional view, all such activities were unconstitutional.

Thus, Holmes’s approach seemed to provide the only attractive basis for a reassertion of judicial authority in the economic realm. Not only did *Mahon* provide precedential support for such a reassertion of authority, it offered a superb defense against the charge of *Lochnerizing*: it was written by the great *Lochner* dissenter.

In other words, the fact that Holmes authored *Mahon* is central to the reliance

308. Robert L. Hale, *Rate Making and the Revision of the Property Concept*, 22 COLUM. L. REV. 209, 212 (1922). In another leading critique, Yale Law School Professor Walton Hamilton attacked the case law for embodying “a simple categorical approach to a complicated industrial problem.” Hamilton, *supra* note 143, at 1111.

309. 291 U.S. 502 (1934).

310. *Id.* at 536.

311. For further discussion, see Lunney, *supra* note 52, at 1921-24.

312. *Lucas*, 505 U.S. at 1023.

313. *Id.* at 1024. For similar statements by the Court, see *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834-35 (1987) (“Our cases have not elaborated on the standards for determining what constitutes a ‘legitimate state interest’ . . . [but t]hey have made clear . . . that a broad range of governmental purposes and regulations satisfies these requirements.”); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 133-34, n.30 (1978) (government can sacrifice economic interests to promote “historic preservation”).

placed on it. The importance of the Holmesian imprimatur also lies at the heart of the specific way the case is cited and invoked. In defending their positions on the Takings Clause, members of the Court do not simply cite *Mahon* as precedent. Rather, they invoke *Holmes's* intent in writing *Mahon*, and sometimes bolster their reading of that intent by arguing that their interpretation correctly accords with other opinions Holmes joined.³¹⁴

Yet while Holmes's intent has become central to our regulatory takings jurisprudence, that intent has been misunderstood. A proper understanding of *Mahon* and, more generally, of Holmes's constitutional property philosophy would have led to a different result in the cases at the heart of the Court's takings revival. The balancing favored by Holmes and the limited inquiry into arbitrariness when government acted as regulator conflict with the mixture of formalism and close scrutiny reflected in recent decisions.

At its most concrete level, a proper understanding of *Mahon* is inconsistent with the diminution in value test (the most commonly applied test in the takings realm), with conceptual severance, and with the continued (if limited) use of the categorical nuisance test exemplified by *Mugler*.³¹⁵ *Lucas v. South Carolina Coastal Council*³¹⁶ best illustrates the shift and its consequences.

David Lucas owned two beachfront lots for which he had paid almost \$1,000,000. Thereafter, the South Carolina Beach Management Act was passed and, acting pursuant to that act, the state coastal commission prohibited Lucas from building on the lots, a prohibition that, according to the state trial court, rendered the properties worthless.³¹⁷ Ruling for Lucas, the Court held that, when a government regulation takes all economic value from land, compensation is owed unless the regulation bars a common law nuisance or accords with background principles of property law.³¹⁸ The elements of the holding reflect Justice Scalia's understanding of, and reliance on, *Mahon*. Justice Scalia traces the diminution in value test back to *Mahon*.³¹⁹ The core idea of *Lucas*—that a

314. *Lucas* illustrates the appeals to Holmes. Justice Scalia, writing for the Court, observes that “[p]rior to Justice Holmes’ exposition in *Pennsylvania Coal v. Mahon*” the Takings Clause did not apply to government regulations. *Lucas*, 505 U.S. at 1014. He continues: “Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government’s power to redefine the range of the interests included in the ownership of property was necessarily constrained by constitutional limits.” *Id.* Justice Stevens writes that in *Mahon* “Justice Holmes recognized that such absolute rules ill fit the inquiry into ‘regulatory takings.’” 505 U.S. at 1063 (Stevens, J., dissenting). Stevens further writes of the decision in *Mahon* that “Justice Holmes regarded economic injury to be merely one factor to be weighed.” *Id.* Justice Blackmun notes that Holmes, “the author of *Pennsylvania Coal*, joined *Miller v. Schoene*,” *id.* at 1053, n.17. (In *Miller*, 276 U.S. 272 (1928), one of the traditional police power cases, the Court found no taking when Virginia destroyed infected cedar trees to prevent infection from spreading to apple trees.) Justice Blackmun adds: “Justice Holmes apparently believed that such an approach [the approach in *Miller*] did not repudiate his earlier opinion [*Mahon*].” *Id.*

315. See *supra* text accompanying notes 114-19.

316. 505 U.S. 1003 (1992).

317. For the facts of the case, see *Lucas*, 505 U.S. at 1006-10.

318. *Id.* at 1027.

319. See *id.* at 1015 (analyzing when a regulation goes “too far” (quoting *Mahon*, 260 U.S. at 415)).

regulation that takes away *all* value from land is presumptively a taking—then follows logically from the diminution in value test: that is, if *Mahon's* concept of “too far” is to have any meaning, loss of “all economically beneficial or productive use of land” must be too far.³²⁰ The nuisance exception reflects Scalia’s implicit view that *Mahon* supplemented, rather than displaced, the earlier classic police power case law. This point merits emphasis because it reflects a view at odds with this article’s thesis that *Mahon* was fundamentally inconsistent with the case law that preceded it. Scalia and, in dissent, Blackmun offer differing ways to read (and distinguish) the *Mugler* categorical nuisance line of cases. Scalia interprets them narrowly as applying only to common law nuisances;³²¹ Blackmun reads them as authorizing the government to bar “harmful” activities.³²² No one, however, suggests that there is any tension between *Mugler* and *Mahon*.

As previously observed,³²³ Justice Scalia read *Mahon* as adopting a conceptual severance approach and suggested that the Court should apply that approach in future decisions. Thus, when a regulation eliminates a property interest that “has [been] accorded legal recognition and protection”³²⁴—like the support rights in *Mahon*—compensation would be owed. None of the dissenters challenged Justice Scalia’s reading and, in previous decisions, liberal members of the Court have adopted precisely this reading of *Mahon*, although they did not treat it as controlling.³²⁵

Every point of this analysis conflicts with the contextualized reading of *Mahon* presented here. *Mahon* reflects a balancing test, not a diminution of value test. Thus, government interest comes into play and, because there is something on the other side of the scale, a total loss of value would not necessarily be a taking. Moreover, when the balancing test in *Mahon* is understood in the context of Holmes’s other decisions, it becomes clear that the balance is weighted in favor of the government. The state interests advanced—that preserving the beachfront through a development ban would promote the economy through tourism and protect endangered species³²⁶—are sufficiently substantial to make the statute constitutional; Holmes invalidated regulations only when the public benefit was trivial or nonexistent. At the same time, it should be noted that, were the state seeking to stop a common law nuisance, Holmes’s approach would be more favorable to the property owner than Scalia’s: while Scalia would automatically uphold the statute, Holmes would still use balancing.

Finally, Holmes’s approach is not one of conceptual severance. While in

320. *Id.* at 1015 (noting that while *Mahon* provides little guidance as to what is “too far,” it nonetheless gives rise to the categorical rule that all loss of value is “too far”).

321. *Id.* at 1023-24.

322. *Id.* at 1050-51 (Blackmun, J., dissenting).

323. See *supra* text accompanying notes 64-66.

324. See *Lucas*, 505 U.S. at 1016 n.7.

325. See *supra* text accompanying notes 60-62.

326. *Lucas*, 505 U.S. at 1025 n.11.

Mahon there was a total diminution of a legally recognized property right, that factor did not determine the outcome. Holmes's approach was not categorical; accordingly, to read *Mahon* as embodying a categorical rule is to misread *Mahon*.

Lucas highlights the very concrete doctrinal ways in which *Mahon* conflicts with current case law. More broadly, however, *Mahon* conflicts with the takings revival, even though its spirit is invoked repeatedly in support of that revival. The Court invokes *Mahon* in support of the proposition that under the Takings Clause economic regulations are subject to a high level of scrutiny (as opposed to the scrutiny that they receive under the Equal Protection Clause or the Due Process Clause).³²⁷ In last term's *Suitum v. Tahoe Regional Planning Agency*,³²⁸ the Supreme Court adopted ripeness rules favorable to landowners pressing takings claims; in so doing, it began its analysis with *Mahon*'s proposition that "a regulation that 'goes too far' results in a taking under the Fifth Amendment."³²⁹ Similarly, in *First English Evangelical Lutheran Church v. Los Angeles*,³³⁰ when the Supreme Court held that a temporary regulation could give rise to a requirement of compensation, the Court reached that conclusion from the premise that: "It has also been established doctrine at least since Justice Holmes' opinion for the Court in *Pennsylvania Coal Co. v. Mahon*, that '[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'"³³¹ When in *Hodel v. Irving*,³³² the Court invalidated a federal statute that, for administrative reasons, barred the inheritance of property interests in Native American lands that generated an income of less than one hundred dollars a year, the opinion closed by invoking *Mahon*.³³³

The most significant cases in the takings revival, however, apart from *Lucas*, are the two "unconstitutional conditions" cases, *Nollan v. California Coastal Commission*,³³⁴ and *Dolan v. City of Tigard*.³³⁵ The unconstitutional conditions doctrine, as applied to the Takings Clause, restricts the conditions that a government can impose on a property owner in exchange for removal of a valid restriction on land use. The doctrine is an important one because it limits a tool

327. On the general proposition that, under Supreme Court case law, the Takings Clause involves a significantly higher level of scrutiny than the Due Process or Equal Protection Clauses, see *Lucas*, 505 U.S. at 1027 n.14; *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 n.3 (1987).

328. 117 S. Ct. 1659 (1997).

329. *Id.* at 1665 (quoting *Mahon*, 260 U.S. at 415).

330. 482 U.S. 304 (1987).

331. *Id.* at 316 (alteration in original) (citations omitted); see also *id.* at 321-22 ("As Justice Holmes aptly noted more than 50 years ago, 'a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.'" (quoting *Mahon*, 260 U.S. at 416)).

332. 481 U.S. 704 (1987).

333. *Id.* at 718 ("Accordingly, we find that this regulation, in the words of Justice Holmes, 'goes too far.'" (quoting *Mahon*, 260 U.S. at 415)).

334. 483 U.S. 825 (1987).

335. 512 U.S. 374 (1994).

that local governments have increasingly used in recent years.³³⁶

The unconstitutional conditions doctrine received its fullest expression in *Dolan*. There, the Court held that there must be both an “essential nexus” between the reason justifying the power to ban and the condition imposed in exchange for lifting the ban and “rough proportionality” between the “nature and extent” of the harm occasioned by lifting a development ban and the condition imposed in exchange for lifting the ban.³³⁷ When Tigard, Oregon, granted Florence Dolan permission to expand her hardware store and create a parking lot on the condition that she dedicate land for a bikepath, the Court found that the “essential nexus” requirement was satisfied, but not the “rough proportionality” requirement, and therefore the town’s action was unconstitutional.³³⁸ Chief Justice Rehnquist concluded his opinion by invoking *Mahon*:

The city’s goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this may be done. “A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” *Pennsylvania Coal*, 260 U.S. at 416.³³⁹

Yet, while the Court enlists *Mahon* to support the holding, the low level review that *Mahon* embodies is inconsistent with the heightened scrutiny that *Dolan*’s result requires. Indeed, Holmes cannot fairly be enlisted as support for the unconstitutional conditions doctrine because it is inconsistent with his general position on sovereignty. Holmes believed that, if the state had the power to forbid a certain activity, it could also authorize that activity subject to limitations.³⁴⁰ He specifically applied this position in the takings area, noting, for example, in *Noble State Bank v. Haskell*:

There are many things that a man might do at common law that the states may forbid. He might embezzle until a statute cut down his liberty. We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the state in taking the whole business of banking under its control. On the contrary, we are of opinion that it may go on from regulation to prohibition except

336. See McUsic, *supra* note 11, at 660-64 (arguing that local environmental laws, development exactions, and capital mobility restrictions may be jeopardized by current Takings Clause jurisprudence).

337. *Dolan*, 512 U.S. at 386, 391.

338. *Id.* at 394-96.

339. *Id.* at 396 (alteration in original).

340. On this point and on the inconsistency between Holmes’s jurisprudence and the unconstitutional conditions doctrine that the Court later adopted in a variety of areas, see WHITE, *supra* note 94, at 317; Stephen Diamond, *Citizenship, Civilization, and Coercion: Justice Holmes on the Tax Power*, in THE LEGACY OF OLIVER WENDELL HOLMES, JR. 115, 124 (Robert W. Gordon ed., 1992). As Professor Richard Epstein put it: “Justice Holmes dismissed the entire doctrine of unconstitutional conditions as a logical and conceptual error.” Richard A. Epstein, *The Supreme Court, 1987 Term-Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 8 n.10 (1988).

upon such conditions as [the state] may prescribe.³⁴¹

The point here is not that *Mahon* itself is inconsistent with the unconstitutional conditions doctrine—it does not discuss that issue—but rather that, in a variety of contexts, the takings revival enlists the spirit of *Mahon*, but *Mahon*, properly understood, fundamentally conflicts with that revival.

If *Mahon* were read as part of Holmes's project of establishing a minimal level of scrutiny for economic regulations, then consistency with Holmes's project would lead to a different approach to these cases. All of these decisions begin from the premise that courts, in reviewing regulatory takings claims, should be significantly more vigilant than when reviewing challenges to regulations brought under the Equal Protection Clause or the Due Process Clause. In contrast, Holmes, in his takings cases, used the same rationality review that he generally used in cases involving substantive due process challenges to economic regulations.

CONCLUSION: JAM FOR JUSTICE HOLMES

To recover Holmes's perspective is not to say that it should be followed. From a precedential point of view, the cryptic conception of one Justice is hardly binding, particularly given that the other Justices who signed onto the opinion clearly did not share that conception, and that the Court, in its subsequent takings decisions, has repeatedly failed to read the original opinion as the author would have. Because the reading of *Mahon* offered here is not binding as precedent, the real question is whether Holmes's conception of constitutional property and the Takings Clause merits revival because of its inherent appeal.

Part of the strength of Holmes's approach lies in the fact that it is more coherent than current case law. That case law incorporates a series of approaches that, as has been often pointed out, conflict with each other, and that make takings law a "mess."³⁴² In particular, there is an obvious tension between the doctrine that regulation of a common law nuisance can constitutionally destroy all value in a property and the doctrine that all other regulations are reviewed to determine if they diminish value too greatly.³⁴³ Holmes's unified approach does away with this intellectually problematic distinction.

341. 219 U.S. 104, 113 (1911); see also *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908) ("The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.").

342. Indeed, this may be the one point in the takings literature about which there is a consensus. For recent articles that have called takings law a "mess," see Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279, 279 (1992); William W. Fisher III, *The Significance of Public Perceptions of the Takings Doctrine*, 88 COLUM. L. REV. 1774, 1791 (1988); Oliver A. Houck, *The Secret Opinions of the United States Supreme Court on Leading Cases in Environmental Law, Never Before Published!*, 65 U. COLO. L. REV. 459, 512 (1994); Jay Plager, *Takings Law and Appellate Decisionmaking*, 25 ENVTL. L. 161, 163 (1995).

343. Both doctrines are present in *Lucas*. See *Lucas*, 505 U.S. at 1022-25.

Moreover, his approach allows for greater regulatory freedom to confront new problems and to respond to new conceptions of harm. The *Lucas v. South Carolina Coastal Council* test would prevent a legislature from outlawing an activity that was not a common law nuisance, regardless of its harm, if the regulated property were rendered valueless. It would seem, for example, to require compensation if Congress were to outlaw tobacco planting and property were thereby made worthless.³⁴⁴ Holmes's approach, in contrast, would uphold such a statute; in using his government-favoring balancing test, a court would find that the state's interest in avoiding the harms associated with smoking would outweigh the property loss caused by the tobacco ban.

Although Holmes never mounted a defense of his position, it can be justified on utilitarian grounds. His balancing reflects a utilitarian calculus: government action is permissible only if its benefits (to society) outweigh its harm (to the individual).³⁴⁵ A regulation that is clearly unjustified on utilitarian grounds would be held unconstitutional as arbitrary.

Because the balancing test Holmes implicitly adopted favored the government, admittedly, a court applying the test would uphold some government actions that it might feel were problematic. Two reasons, however, justify this weighting. First, it ensures predictability. The Holmesian approach is more constrained than open-ended balancing; regulations will be upheld unless they essentially transfer property between citizens with little public benefit or unless government acts to benefit its own property. This leads in turn to greater certainty in the average case that the court will not intervene. Second, the weighting is justified on the grounds of majoritarian theory. To quote Horwitz's explanation of Holmes's deference once again: "If law is merely politics, then the legislature should in fact decide."³⁴⁶ Courts should trump legislatures only when it is unquestionable that the legislature erred.

344. The example is suggested by a point raised by Justice Stevens in his *Lucas* dissent. *See id.* at 1068 ("Under the Court's opinion today, however, if a state should decide to prohibit the manufacture of asbestos, cigarettes, or concealable firearms, for example, it must be prepared to pay for the adverse economic consequences of its decision.").

345. Holmes's jurisprudence has been conceptualized as reflecting utilitarianism. *See* H.L. POHLMAN, JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE (1984); Patrick Kelley, *Oliver Wendell Holmes, Utilitarian Jurisprudence, and the Positivism of John Stuart Mill*, 30 AM. J. JURIS. 189 (1985). The utilitarian argument presented in this paragraph draws on Professor Michelman's defense of his own balancing view of the Takings Clause in his article, *Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*. *See* Michelman, *supra* note 69. That article is almost certainly the most influential piece ever written on the clause. To sum up a complicated and sophisticated argument in part of a sentence: Michelman's balancing test calls for compensation when the demoralization caused by a failure to compensate would outweigh the cost of compensation. *See id.* at 1214-15. To the extent that a court sought to apply Michelman's test (as opposed to leaving it to legislatures to apply the test), the approach would entail far greater judicial oversight than Holmes's approach and thus would be less consistent with the view that courts should presumptively defer to majoritarian decisionmaking. At the same time (and essentially for the same reason), Michelman's approach is more sensitive to individual rights and more closely scrutinizes whether the government's act is in fact justified by a utilitarian calculus.

346. HORWITZ, *supra* note 52, at 142.

These are strong arguments. At the same time, there are fundamental problems with Holmes's view. The Takings Clause is, among the clauses in the Bill of Rights, perhaps the one for which balancing is *least* appropriate. Other constitutional rights necessarily involve a choice between the state and the individual. The Takings Clause uniquely involves something that is quantifiable and fungible. The individual can be made whole when her property is taken in a way that she cannot be when, for example, her speech is curtailed. Therefore, balancing in the takings context merely begs the question. Balancing may tell us that a certain regulation is efficient. It does not tell us who should bear the burden of that regulation—the property owner or society at large.³⁴⁷

Similarly, the fact that the balancing test is weighted in favor of the government also ultimately involves a kind of question begging. In other words, if Holmes believed that decisionmaking were inherently political and thus best left to the legislature, that would suggest—not that courts should intervene rarely—but that they should never intervene. The response to this might be that the arbitrariness of the result suggests that the legislative process in fact failed, making any deference to such process inappropriate. Arbitrariness, in other words, suggests corruption (to some extent) of the legislative process and, when the process has been corrupted, courts are under no obligation to defer to it because the decision has no meaningful majoritarian sanction.³⁴⁸ The problem with this argument is that a focus on results in a specific instance is not necessarily a good test of whether the political process has failed.

Ironically, one could not ask for a better illustration of this point than the facts in *Mahon*. If one focuses on the Kohler Act, one could certainly argue that the statute was arbitrary and that it involved a very narrow transfer of property interests from one class of private citizens to another and from that same class of private citizens to the state as owner. But, although none of the *Mahon* opinions note the fact, the Kohler Act had a companion statute, the Fowler Act.³⁴⁹ Both statutes were written by the same individual and passed on the same day.³⁵⁰ The Fowler Act provided that coal companies could be exempted from the provisions of the Kohler Act if they paid a two percent sales tax, the funds from the tax to be used to compensate surface owners whose land was damaged by mining. The Fowler Act was thus a virtual carbon copy of the

347. I thank Jim Krier for this point.

348. Professor Terrance Sandalow has ascribed a position similar to Chief Justice Stone and suggests that it was embodied in footnote four of *Carolene Products*. See Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1179 (1977) (“Courts may safely defer to the judgments underlying legislation that touches upon constitutionally protected interests if the burden of the legislation is broadly distributed through the population.”).

349. 1921 Pa. Laws 1192.

350. See FISCHER, *supra* note 2, at 33-34. The Fowler Act is discussed in the dissenting opinion in the state supreme court. See *Mahon v. Pennsylvania Coal Co.*, 118 A. 491, 498 (Pa. 1922). The first *Mahon* scholar to discuss the case was Lawrence Friedman. See Friedman, *supra* note 12, at 21-22. I am grateful to Professor Vicki Been for the insight that the Fowler Act makes the situation in *Mahon* similar to that in *Noble State Bank v. Haskell*.

banking statute upheld by Holmes in *Noble State Bank v. Haskell*, in that it involved a tax on revenues to be paid into a general fund to compensate those injured by members of the industry. In other words, viewed in the larger statutory context, the Kohler Act did not involve arbitrary actions against identifiable classes of property owners. Indeed, coal companies in Pennsylvania had been better served by the political process than banks in Oklahoma, as the latter were required to pay into a common fund, whereas the former had the choice of paying into a common fund or opting out of the fund and paying damages if they harmed surface property owners. If Holmes had evaluated the Kohler Act in the context of the Fowler Act, he should have upheld it, just as he upheld the statute in *Noble Bank*.

The *Mahon* Court's failure to consider the Fowler Act is not surprising. The judicial focus is narrow—typically on the case and the statute before it. But this focus can, in turn, cause a misvaluation of the political process. Because the judicial focus is on one specific government decision, rather than on the series of trades and deals that make up the legislative process, what appears arbitrary may not be. This, in turn, suggests that the type of concerns that motivated Holmes would lead best to a political process theory of the Takings Clause, rather than to a low-level rationality test. Courts should substitute their judgment for legislative judgments not when the result embodied in a statute suggests substantive unfairness, but when there is reason to suspect process failure. Evidence of process failure would be, in particular, that a statute or regulation singles out an individual, or that it disproportionately affects people who live outside the jurisdiction or, as in environmental racism cases, that it burdens discrete and insular minorities. When the losers in the political process are those who, for one reason or another, are not equal players in that process, there is less reason for a court to defer to the majority's conclusions.³⁵¹

The fact that Holmes's theory has flaws, however, should not obscure either its appeal or the fact that it was an intellectual tour de force. Holmes's constitutional property jurisprudence is of historic significance. It reflected a reconceptualization of the appropriate role of the state and of the scope of the police power. Even more remarkably, it represented a break from the classical legal thought that had dominated Supreme Court jurisprudence and the adoption of a new approach—balancing. Justice Holmes may not have been right, but what he said was clever. And for that he deserves one last, posthumous, spoonful of jam.

351. I develop my political process theory of the Takings Clause along the lines outlined here in Treanor, *The Original Understanding*, *supra* note 6, at 866-80. Among the others to have advanced process theories of the clause in recent years are FISCHEL, *supra* note 2, at 325-68; Farber, *supra* note 342; Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285 (1990)). The differences between the various process theories of the clause are discussed in James E. Krier, *Takings from Freund to Fischel*, 84 GEO. L.J. 1895, 1909-11 (1996) (reviewing WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* (1995)).