

Articles

Usings

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“[N]or shall private property be taken *for public use*, without just compensation.”¹

For a long time, there has been no Just Compensation Clause in constitutional law. Three words, “for public use,” have been cut away from it, treated as if they prescribed a distinct command of their own. Instead of the Just Compensation Clause as written, we have a *Takings Clause* engulfed in confusion² and a *Public Use Clause*³ of nearly complete insignificance.

1. U.S. CONST. amend. V (emphasis added).

2. For characteristic characterizations of takings doctrine over the last three decades, see BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 8 (1977) (“a chaos of confused argument”); Allison Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 63 (“crazy-quilt pattern”); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law*, 80 HARV. L. REV. 1165, 1170 (1967) (“liberally salted with paradox”); Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1524 (1991) (“chaos”); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles* (pt. 1), 77 CAL. L. REV. 1299, 1303-04 (1989) (“in far worse shape than has generally been recognized”); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984) (“muddle”); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964) (“a welter of confusing and apparently incompatible results”); and the unsurpassed John A. Humbach, *A Unifying Theory for the Just Compensation Cases*, 34 RUTGERS L. REV. 243, 244 (1982) (“a farrago of fumbings which have suffered too long from a surfeit of deficient theories”).

3. See, e.g., *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 231 (1984) (referring to and construing “the Public Use Clause”).

This strange breach is never remarked on. It is simply presupposed, most clearly by those who complain about the toothlessness of the “Public Use Clause” in modern doctrine. Their complaint is an old story: it has to do with the line of Supreme Court decisions in which the public-purpose requirement received its current, broad construction.⁴ The Court has held, for instance, that a state may (with proper compensation) take *A*’s estate and give it to his tenants *B*, *C*, and *D* on the ground that redistributing concentrated holdings of property can plausibly be deemed to further the public welfare.⁵ Construed this way, the so-called “public-use requirement” is simply duplicative of the legitimate-state-interest test that every deprivation of property must satisfy under the Due Process and Equal Protection Clauses.⁶ As a result, commentators—particularly those with an anti-redistributionist bent—have been proclaiming the demise of the public-use limitation⁷ or mocking it as “invisible”⁸ for more than forty years.

But the true disappearance of “for public use” from the Compensation Clause long antedates the cases that dealt so leniently with this limitation on the state’s power to take. The true disappearance took place the moment “for public use” was read *as* such a limitation—as stating merely a threshold test, a “‘public use’ requirement,”⁹ which, when violated, renders a taking unconstitutional *per se*. This is the reading of “for public use” established by *takings* jurisprudence,¹⁰ and on this point at least, the anti-redistributionists are in perfect agreement.¹¹

The moment “for public use” is so construed, the words lose their place in the constitutional text. They no longer specify—as their actual position in the clause suggests—which takings of property require compensation. Instead they somehow specify which takings of property are unconstitutional with or without compensation. This reading, whose strange grammar is never fully explained, effectively severs the three words from the whole of compensation jurisprudence.

Confined to its threshold role, “for public use” is a stranger to the mass of *takings* issues wrestled with in case after case, many of which hardly bother

4. See, e.g., *id.* at 231; *Berman v. Parker*, 348 U.S. 26, 31-32 (1954); *Bowles v. Willingham*, 321 U.S. 503, 519-21 (1944).

5. *Midkiff*, 467 U.S. at 241-42.

6. See *id.* at 242-43.

7. See, e.g., Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 *YALE L.J.* 599, 613-14 (1949).

8. See, e.g., RICHARD EPSTEIN, *TAKINGS* 161 (1985).

9. E.g., *Midkiff*, 467 U.S. at 239.

10. See, e.g., *id.* at 243; 2A JULIUS L. SACKMAN, NICHOLS’ *THE LAW OF EMINENT DOMAIN* § 7.01, at 7-7 (rev. 3d ed. 1990) [hereinafter NICHOLS]. This reading has been standard for at least a century. See JOHN LEWIS, *A TREATISE ON THE LAW OF EMINENT DOMAIN* § 163 (1st ed. 1888) (“By the provision in question, the people said to the legislature, in effect, You shall not exercise this power except for *public use*.”).

11. See, e.g., EPSTEIN, *supra* note 8, at 161-81.

to mention the three-word phrase any more.¹² The little phrase can contribute nothing, for example, toward explaining why there is no *taking* when government destroys blight-carrying trees, even though such state action manifestly deprives a person of private property without compensation.¹³ Nor could “for public use” possibly help digest the incoherent case law on so-called “regulatory takings.”¹⁴ Virtually every challenged regulation will have a colorable *public purpose*, and isn’t that the end of the matter so far as “for public use” is concerned? Isn’t that phrase only an appendix to takings jurisprudence, a vestigial, duplicative organ better off excised or at least relegated to its own private sphere of operation?

The Court’s recent struggle with *takings* law in *Lucas v. South Carolina Coastal Council*¹⁵ continues this approach, in which “for public use” plays no role. In *Lucas*, a decision purportedly establishing a new bright-line rule to resolve certain takings difficulties, the Court actually has added yet another tortuous knot to an already convoluted doctrine.¹⁶ For this reason alone, but also for others explained below, *Lucas* urges consideration of a far simpler, more natural, and more justifiable reading of the Just Compensation Clause.

Suppose we relocated “for public use” to its proper place, between “taken” and “without just compensation.” Suppose, in other words, that when a state orders the destruction of contaminated trees, it need pay no compensation not because the trees weren’t “taken,” nor even because they were threatening “harm,” but simply because the state did not put this property to *use*. And suppose “regulatory takings” occur not when regulations deprive property of its “economic viability,” but when their effect is, again, to put the property to a particular state *use*—when, to employ an analysis whose constitutional implications extend well beyond the Fifth Amendment, the state in effect has *conscripted* someone’s property through what seem on the surface to be merely *proscriptive* rules.

In this construction, “for public use” would no longer be merely duplicative. It would instead be dispositive in identifying which governmental takings, although otherwise constitutional, nonetheless require compensation. Such a construction would oblige us to read the Compensation Clause as written; it would also oblige us to read it as permitting many takings of property with no compensation whatsoever. (Could we bear either shock?) And its principle would be this: when government conscripts someone’s property for state use, then it must pay.

12. The words “for public use” appear only trivially in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), and *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992), the Court’s most recent forays into the takings thicket.

13. See *Miller v. Schoene*, 276 U.S. 272 (1928); *infra* Part I(B)(2).

14. See *infra* Part I(C).

15. 112 S. Ct. 2886 (1992).

16. See *infra* Part I(D).

Suppose, in short, that all this time what we needed was a jurisprudence of *usings*?

I. AN OUTLINE OF TAKINGS LAW

Throughout constitutional jurisprudence, only the right of privacy can compete seriously with takings law for the doctrine-in-most-desperate-need-of-a-principle prize. What Bruce Ackerman wrote in 1977 applies equally today: “Indeed, in many conversations on the [Compensation Clause], I have not encountered a single lawyer, judge, or scholar who views existing case-law as anything but a chaos of confused argument which ought to be set right if one only knew how.”¹⁷

Takings law is out of joint. Let’s rehearse its rise before we take our turn at setting it right.

A. *Eminent Domain*

The most historically settled application of the Just Compensation Clause—indeed perhaps the *only* historically settled application—is the requirement that government must pay for property it seizes through an exercise of eminent domain. The “eminent domain” power refers to the state’s prerogative to seize private property, dispossess its owner, and assume full legal right and title to it in the name of some ostensible public good.¹⁸ Although the great continental theorists of eminent domain asserted that compensation was a natural or necessary corollary of the power itself,¹⁹ early American practice was often to the contrary. Most of the original American state constitutions contained no compensation clause,²⁰ and uncompensated seizures of property for public roads and other uses were not unusual in eighteenth-century America.²¹ While the legislative history of the Compensation Clause is sparse,²² on one point there is no historical doubt: from the beginning of the republic to the present, the “*sacred principle of compensation*” has always been understood paradigmatically to express the

17. ACKERMAN, *supra* note 2, at 8.

18. See generally I NICHOLS, *supra* note 10, §§ 1.1-1.44. As to the amount owing, the long-established doctrine is that government must pay an owner of condemned property the fair market value of the property taken. See 4 *id.* § 12.02, at 12-50 & n.1.

19. See, e.g., 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS* 807 (Francis W. Kelsey trans., 1925) (1625).

20. Vermont and Massachusetts were the exceptions. See J.A.C. Grant, *The “Higher Law” Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 70 (1931).

21. See MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 63-65 (1977); William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 695-97 (1985). Uncompensated exercises of eminent domain by state governments continued into the early nineteenth century. See HORWITZ, *supra*, at 63-65.

22. For a good introduction, see Treanor, *supra* note 21. See also *infra* text accompanying notes 199-205.

state's obligation to indemnify owners of property taken through an assertion of eminent domain.²³

For about the first century of state and federal constitutional law,²⁴ outside of formal eminent-domain proceedings initiated by the government, the compensation guarantee was applied extremely restrictively. Occasionally courts would find for the plaintiff in inverse condemnation suits,²⁵ but even in such cases there was, for most of the nineteenth century, a "limitation of the term 'taking' to the actual physical appropriation of property or a divesting of title."²⁶

Although early compensation doctrine is often characterized as adhering to a strictly "physical" understanding of property (as opposed to an "abstract" or "legal" understanding of it),²⁷ the idea of physicalism is not adequate to

23. *Lindsay v. Commissioners*, 2 S.C.L. (2 Bay) 38, 59 (1796) (opinion of Waties, J.). In 1816, in a much-cited opinion, Kent described the Compensation Clause as follows:

Grotius, Pufendorf, and Bynkershoek, when speaking of the *eminent domain* of the sovereign, admit that private property may be taken for public uses, . . . but they all lay it down as a clear principle of natural equity, that the individual, whose property is thus sacrificed, must be indemnified. . . .

. . . But what is of higher authority, and is absolutely decisive of the sense of the people of this country, [the compensation principle] is made a part of the Constitution of the United States

Gardner v. Trustees of the Village of Newburgh, 2 Johns. Ch. 162, 166-67 (N.Y. Ch. 1816) (Kent, Ch.); see also, e.g., *Willyard v. Hamilton*, 7 Ohio 111, 114 (1836) (stating that Ohio's compensation clause—adopted in 1802—had been enacted to "sett[e] . . . doubts" as to whether compensation must be paid when government exercises power of eminent domain); THEODORE SEDGWICK, *A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW* 501 (New York, Voorhies 1857) (describing Compensation Clause as "only intended to operate . . . where property is taken for objects of general necessity or convenience, such as roads, canals, public buildings, [and] public works of all kinds"). In 1883, the Supreme Court defined "the right of eminent domain" as the "power to take private property for public use" and stated that the constitutional provision "for just compensation for the property taken, is merely a limitation upon the use of that power." *United States v. Jones*, 109 U.S. 513, 518 (1883).

24. The Compensation Clause did not become applicable to the states until the turn of this century. See *Chicago, B. & Q. Ry. v. Chicago*, 166 U.S. 226, 236-41 (1897). By the 1820's, however, a compensation guarantee had become an established part of state constitutional law. See 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 275 (1st ed. 1827) ("The right of eminent domain . . . gives to the legislature control of private property for public uses [But] the constitutions of the United States and of this state, and of most of the other states of the Union, have imposed a great and valuable check . . . by declaring, that private property should not be taken for public use without just compensation.").

25. Ordinary compensation proceedings are brought by the government following a formal exercise of eminent domain; the property taken is said to have been "condemned." In an *inverse* condemnation case, the plaintiff is a property owner alleging that the state has taken his property for public use without acknowledging it. See generally 2 NICHOLS, *supra* note 10, § 6.21, at 6-136 to 6-157.

26. SEDGWICK, *supra* note 23, at 524; see also WILLIAM B. STOEBUCK, *NONTRESPASSORY TAKINGS IN EMINENT DOMAIN* 16-20 (1977); Joseph M. Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221, 224-33 (1931); Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1, 76-81 (1986).

27. STOEBUCK, *supra* note 26, at 2, 16; Cormack, *supra* note 26, at 224. These authors are invoking Hohfeld's analysis of the word "property": "Sometimes it is employed to indicate the physical object to which various legal rights, privileges, etc., relate; then again—with far greater discrimination and accuracy—the word is used to denote the legal interest . . . appertaining to such physical object." WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER ESSAYS* 27 (1923), *quoted in* Cormack, *supra* note 26, at 222-23; see STOEBUCK, *supra* note 26, at 16.

account for a significant strand running through the case law during this period. Until about 1870, outside the limited area of eminent-domain seizures, courts repeatedly denied compensation for quite physical losses of property, sometimes involving actual trespassory invasions.²⁸ “[I]t cannot be said,” went the characteristic holding, “that the plaintiff’s [property] was taken.”²⁹ So long as the state did not formally appropriate the property or at the very least seize possession of it, the general rule was that no compensation had to be paid.³⁰

B. *Physical Invasion, Harm, and Economic Impact*

Between 1871 and 1922, the Supreme Court decided three cases that laid the foundations of modern takings doctrine. Each case presented facts outside the traditional eminent-domain context; each created a new paradigm for takings analysis that has survived in one form or another to the present day.

1. *Physical Invasion: Pumpelly*

In *Pumpelly v. Green Bay Co.*,³¹ the building of a dam in connection with a state canal project had caused the permanent flooding of the plaintiff’s land.³² Relying on the line of authority described above, the defendant answered Pumpelly’s compensation claim with the assertion that his “lands ha[d] not been *taken or appropriated*.”³³ The Supreme Court disagreed.

28. See, e.g., *Callender v. Marsh*, 18 Mass. (1 Pick.) 418 (1823) (removal of lateral support, threatening house with imminent collapse); *Monongahela Navigation Co. v. Coons*, 6 Watts & Serg. 101 (Pa. 1843) (elevation of river level, injuring plaintiff’s mill); *Alexander v. City of Milwaukee*, 16 Wis. 247 (1862) (flooding of land); cf. *Eaton v. Boston, C. & M. R.R.*, 51 N.H. 504, 511 (1872) (criticizing decisions for interpreting compensation clause of state constitutions “much as if it read,—‘No person shall be divested of the formal title to property without compensation’”).

29. *Monongahela Navigation*, 6 Watts & Serg. at 113. The idea that a purely “physical” understanding of property or even of the taking of property would rule out the sort of losses held uncompensable during this period is not persuasive. For example, the loss of a house due to the deliberate removal of its lateral support (which *Callender* suggested would not be compensable) is surely a deprivation of property in the most “physical” sense. Professor Cormack cited Shakespeare in this connection: “You take my house when you do take the prop / That doth sustain my house.” Cormack, *supra* note 26, at 224 (quoting WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1). Strangely, Cormack claims that Shylock’s protest was an (evidently prescient) illustration of the modern *legal* understanding of property, rather than the *physical* understanding. *Id.* On the contrary, it shows that a purely “physicalist” understanding would have been quite compatible with recognizing takings unrecognized by pre-1870 doctrine.

30. See Siegel, *supra* note 26, at 81 (saying that “confinement of the Constitution’s protection of property under the takings clause to a proscription of uncompensated seizures was a fundamental facet of nineteenth-century constitutional law”).

31. 80 U.S. (13 Wall.) 166 (1871).

32. *Id.* at 167 (statement of the case). Although *Pumpelly* arose under the Wisconsin Constitution’s compensation clause, *id.* at 177, the Court specifically noted that the state provision was “almost identical” to the federal one, *id.*, and the case quickly came to be relied on as precedent for construction of the federal guarantee. See, e.g., *Bridge Co. v. United States*, 105 U.S. 470, 502 (1881) (Field, J., dissenting); *Montana Co. v. St. Louis Mining and Milling Co.*, 152 U.S. 160, 169 (1894); see also, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982).

33. *Pumpelly*, 80 U.S. (13 Wall.) at 174 (argument of counsel).

In broad language, the Court rejected the argument that a “taking” could occur only upon the “absolute conversion” of property:

It would be a very curious and unsatisfactory result, if in construing [the Compensation Clause] . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use.³⁴

Although this passage seemed to open the door to compensation claims based purely on destruction of economic value, the *Pumpelly* Court went on to suggest that its ruling might be limited to cases “where real estate is actually invaded by superinduced additions of water, earth, sand, or other material.”³⁵ And within a few years, the Court had made this limitation explicit, holding that *Pumpelly* would be applied only where there had been “a physical invasion” of the owner’s property.³⁶

Thus *Pumpelly* established the *physical-invasion* rule in takings law, which has remained one of its dominant components ever since. For the next century, floodings of land continued to be the most common application of *Pumpelly* in Supreme Court decisions.³⁷ In 1982, however, the Court boldly extended the physical-invasion rule in *Loretto v. Teleprompter Manhattan CATV Corp.*³⁸

Loretto involved New York State legislation requiring landlords to permit cable-television companies to install their equipment in rental apartment buildings. In size, the intrusion onto Loretto’s property was quite minor, occupying “about one-eighth of a cubic foot of space on the roof.”³⁹ Nonetheless, the Supreme Court held that the statute effected an uncompensated taking.

Relying on *Pumpelly* and other physical-invasion precedents, the Court ruled that “a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court

34. *Id.* at 177-78.

35. *Id.* at 181.

36. *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1878). The case involved an owner whose access to his riparian property was blocked during construction of a tunnel; the Court denied compensation because “[n]o entry was made upon the plaintiff’s lot.” *Id.*

37. *See, e.g.*, *United States v. Dickinson*, 331 U.S. 745, 750-51 (1947); *Bothwell v. United States*, 254 U.S. 231 (1920); *United States v. Lynah*, 188 U.S. 445, 468-70 (1903); *see also* *Richards v. Washington Terminal Co.*, 233 U.S. 546, 557 (1914) (finding a “taking” where smoke and soot from railway tunnel caused “special and peculiar” damage to plaintiff’s property).

38. 458 U.S. 419 (1982).

39. *Id.* at 443 (Blackmun, J., dissenting). The majority opinion suggested that the “displaced volume” might in fact amount to about one-and-a-half cubic feet, but it went on to say that “these facts are not critical: whether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox.” *Id.* at 438 n.16.

might ordinarily examine.”⁴⁰ Temporary or intermittent physical invasions, the Court noted, “are subject to a more complex balancing process to determine whether they are a taking.”⁴¹ But a “permanent physical occupation of property is a taking” per se.⁴²

2. Harm: Mugler

Fifteen years after *Pumpelly*, in *Mugler v. Kansas*,⁴³ a brewery owner challenged a state prohibition law forbidding the manufacture or sale of alcohol. Among other claims, Mugler argued that Kansas had “taken” his factory under *Pumpelly*, on the ground that the law had entirely destroyed the beneficial use of it.⁴⁴

The Court rejected this claim, but *not* because Mugler’s property had suffered no physical invasion. Instead, in language of lasting importance to the subsequent development of takings doctrine, the Court held controlling the circumstance that Kansas had legislated solely to prevent individuals from acting in a manner deemed harmful:

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 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.⁴⁵

Private property, said the Court, is “held under an implied obligation that the owner’s use of it shall not be injurious to the community.”⁴⁶ Accordingly, a regulation preventing injurious use effected no taking.⁴⁷

40. *Id.* at 432.

41. *Id.* at 435 n.12.

42. *Id.* at 441. As to the amount of compensation due, the plaintiff contended that her loss should be measured as a percentage of the cable-television company’s revenues from her building, *see id.* at 443 (Blackmun, J., dissenting), whereas a state agency, measuring the injury that the equipment did to the market value of Loretto’s building, assessed her damages at \$1, *see id.* at 423-24. The Court did not resolve the valuation issue. *Id.* at 441. On remand, the New York courts upheld the administrative process that had yielded the \$1 award. *Loretto v. Teleprompter Manhattan CATV Corp.*, 446 N.E.2d 428 (N.Y. 1983).

43. 123 U.S. 623 (1887).

44. *See id.* at 648-49 (argument of counsel). The Court addressed the plaintiff’s takings claim without deciding whether the Fourteenth Amendment incorporated a compensation requirement. *Id.* at 666-68.

45. *Id.* at 669.

46. *Id.* at 665.

47. *Id.* at 667-69. A number of state court decisions had articulated this principle well in advance of *Mugler*. *See, e.g.*, *Coates v. City of New York*, 7 Cow. 585, 605 (N.Y. Sup. Ct. 1827) (denying compensation for ban on interment of dead within city limits) (“Every right, from an absolute ownership in property, down to a mere easement, is purchased and holden subject to the restriction, that it shall be so exercised as not to injure others.”); *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 58 (1851);

The Court adhered to this *harm* principle in case after case over the ensuing decades. On this basis, for example, the Court rejected compensation claims arising from a law preventing the manufacture of margarine,⁴⁸ ordinances prohibiting the operation of a brickyard and a livery stable in residential areas,⁴⁹ the state-ordered felling of infested cedar trees,⁵⁰ and a regulation closing a gravel pit.⁵¹

3. *Economic Impact: Pennsylvania Coal*

Finally, in *Pennsylvania Coal Co. v. Mahon*⁵²—the “Everest” of takings law, as Professor Ackerman calls it⁵³—the Court for the first time struck down a regulation as an uncompensated taking. The invalidated law was the Kohler Act, under which Pennsylvania had prohibited coal mining that would cause subsidence damage to surface structures, streets, utility lines, and so on.⁵⁴ The Pennsylvania Coal Company, like other mining concerns in the state, initially had owned the subject land in fee simple; as the Court read the relevant deeds, when the coal company conveyed the rest of its fee it reserved the right to mine the so-called “support estate” regardless of subsidence damage.⁵⁵

In his opinion for the Court, Justice Holmes was clear that the Kohler Act had crossed some critical line: “[W]e regard this as going beyond any of the cases decided by this Court.”⁵⁶ He was oblique, however, about exactly why this was so.⁵⁷ Why didn’t the *Mugler* harm paradigm easily dispose of the case (as Justice Brandeis thought it did⁵⁸)? At first glance one might think that the mining companies’ reservation of a right to damage exempted the case from the harm rule, but Holmes did not rely solely or even primarily on this circumstance.⁵⁹ Instead, the point most strongly emphasized in his terse

Commonwealth v. Tewksbury, 52 Mass. (11 Met.) 55 (1846); State v. Paul, 5 R.I. 185 (1858).

48. Powell v. Pennsylvania, 127 U.S. 678 (1888).

49. Hadacheck v. Sebastian, 239 U.S. 394 (1915) (brickyard); Reinman v. City of Little Rock, 237 U.S. 171 (1915) (stable).

50. Miller v. Schoene, 276 U.S. 272 (1928).

51. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962). More recent cases addressing the harm principle are discussed *infra* Parts I(C) and I(D).

52. 260 U.S. 393 (1922).

53. ACKERMAN, *supra* note 2, at 156. “Delphic Oracle” might suit still better.

54. *Pennsylvania Coal*, 260 U.S. at 393 n.1.

55. *Id.* at 412.

56. *Id.* at 416.

57. *See id.* (“[T]his is a question of degree—and therefore cannot be disposed of by general propositions.”).

58. *Id.* at 417-18 (Brandeis, J., dissenting).

59. Holmes stressed it at various points in his opinion, *see, e.g., id.* at 416, but he undoubtedly was aware that the Kohler Act could not have been sustained on the ground that all parties whom subsidence might harm had waived their rights. There were plenty of people not party to the deeds—for example, children—whom the state could have claimed to be protecting from injury. It should be recalled, moreover, that Holmes was writing in the middle of the *Lochner* era, a period marked by his emphatic refusal to hold unconstitutional laws that “merely” protected individuals from the harm they might come to as a result of

reasoning was the magnitude of the loss of value suffered by the owner of the mining rights:

[S]ome 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.*⁶⁰

In the most-quoted phrase of the opinion, Holmes wrote: “[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”⁶¹ As the Court observed, the Kohler Act left the mining companies with no economic value whatsoever in the support estate, for if the coal could not be mined, nothing productive could be done with it.⁶² Perhaps in this respect, then, the Act had gone too far. Such at least is the principle for which *Pennsylvania Coal* came to stand: diminution of value would be a decisive factor in determining the existence of a “taking,” and where the economic impact on the regulated property was too severe, a taking would likely be found.⁶³

As Holmes adumbrated, however, no degree of impermissible diminution of value was ever specified. Subsequent cases showed that very substantial percentage losses would be tolerated.⁶⁴ By the early 1980’s, the Court had arrived at an *economic-viability* formulation in which the requisite diminution of value approached total loss: “A statute regulating the uses that can be made of property effects a taking if it ‘denies an owner economically viable use of his land.’”⁶⁵

their own contracts. *See, e.g., Lochner v. New York*, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).

60. *Pennsylvania Coal*, 260 U.S. at 413 (emphasis added).

61. *Id.* at 415.

62. *Id.* at 414 (“What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect . . . as appropriating or destroying it.”).

63. *See, e.g., Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978); *Park Ave. Tower Assocs. v. City of New York*, 746 F.2d 135, 138 n.1 (2d Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985).

64. One of the most significant of these cases is *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), in which the Court denied a takings challenge to a city zoning ordinance that allegedly devalued the claimant’s property by 75%, *id.* at 384.

65. *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 295-96 (1981) (emphasis added) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)); *see also* Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1622 (1988) (describing movement from formulations of degree in Court’s economic-impact analysis to formulations of total deprivation).

C. *Modern Takings Law: Doctrinal Conflict, Ad Hoc Analysis*

Physical invasion, harm, and diminution of value have been the principal terms in which the Court has sought to conceptualize the “takings” question since 1922. Unfortunately, the three ideas are fraught with internal conflicts. By far the most important of these conflicts is that between the harm principle and the economic-impact test. More than anything else, the basic irreconcilability of *Mugler* and *Pennsylvania Coal* (or at least of the principles for which these two cases came to stand) has led to the doctrinal confusion so widely noted in the literature.⁶⁶

To put it bluntly, a diminution-of-value test cannot be squared with the harm principle as espoused in the *Mugler* line of cases. *Mugler* rested on the idea that owners have no right—and never had any right—to do harm with their property; hence they are not deprived of anything when laws enforcing this implied limitation are passed.⁶⁷ Cases adhering to *Mugler* have reiterated this thought: “[S]ince no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not ‘taken’ anything when it asserts its power to enjoin the nuisance-like activity.”⁶⁸

But if this is so, then the fact that a harm-preventing measure diminishes the value of the regulated property—no matter to what extent—ought not to convert the regulation into a taking. No property right that the owner ever possessed has been taken. For this reason, in its decisions following *Mugler*, the Court seemed singularly unconcerned with the extent of devaluation suffered. For example, in *Hadacheck v. Sebastian*⁶⁹—a case decided before *Pennsylvania Coal* under the *Mugler* rationale—the Court refused to find a taking even though an ordinance barring the plaintiff from using his property for a brick factory was said to have lowered the property’s value from \$800,000 to \$60,000.⁷⁰ And in *Miller v. Schoene*,⁷¹ in which the state had ordered the plaintiff’s blighted cedar trees to be felled to preserve nearby apple orchards, the Court did not hesitate to say that outright “destruction”⁷² of harm-creating property was permissible without compensation.

Thus the co-existence of *Mugler* and *Pennsylvania Coal* created a conceptual tangle around the question of when, if ever, the state’s exercise of its “police powers” could effect a “taking.” By the 1960’s this tangle had

66. See *supra* note 2.

67. See *Mugler*, 123 U.S. at 665; *id.* at 667 (emphasizing the “fundamental principle that every one shall so use his own as not to wrong and injure another”).

68. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 491 n.20 (1987).

69. 239 U.S. 394 (1915).

70. *Id.* at 405.

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

72. *Id.* at 280; see also, e.g., *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508 (1923) (saying that “destruction of, or injury to, property is frequently accomplished without a ‘taking’ in the constitutional sense”).

become quite apparent to the leading scholars of compensation law.⁷³ As Professor Sax put it, takings jurisprudence since 1922 had become a “welter of confusing and apparently incompatible results,”⁷⁴ in which courts could choose freely either to invoke an economic-impact rationale (and hence to find a taking) or to invoke a police-powers rationale (and hence to refuse to find a taking).⁷⁵ The Supreme Court itself had displayed both options in shifting from *Hadacheck* to *Pennsylvania Coal* to *Miller*—with the effect that no clear rules or principles governed the scene.

This confusion only worsened in 1978 with *Penn Central Transportation Co. v. New York City*,⁷⁶ in which the Court—acknowledging these criticisms—forswore the pursuit of general principles to resolve takings cases and held that judges must instead engage in “essentially ad hoc, factual inquiries.”⁷⁷ The Court’s results under this “ad hoc” approach easily earned the continuing admiration of commentators for the “disarray”⁷⁸ they produced. A law imposing a penalty on employers for withdrawing from a multi-employer pension fund did not “take” property,⁷⁹ while a law entitling a courthouse to keep the interest on deposited interpleader funds did,⁸⁰ prohibiting the *sale* of property was not a taking,⁸¹ but prohibiting the *bequest* of property was;⁸² and forcing a marina to let people “invade” its property for the purpose of crossing into navigable waters was a taking,⁸³ but forcing a shopping center to let people “invade” its property for the purpose of soliciting contributions was not.⁸⁴ During the same period the Court decided *Loretto*, whose per se requirement of compensation where the plaintiff’s damage may have amounted to all of one dollar⁸⁵ stood in stark contrast to cases like *Penn Central*, in which the Court found no taking despite losses in the millions.⁸⁶

73. See, e.g., Dunham, *supra* note 2, at 63; Michelman, *supra* note 2, at 1170; Sax, *supra* note 2, at 37.

74. Sax, *supra* note 2, at 37.

75. Compare, e.g., Dooley v. Town Plan & Zoning Comm’n, 197 A.2d 770 (Conn. 1964) (striking down as taking a wetlands regulation that denied owner all productive use of his property) with, e.g., Consolidated Rock Prods. Co. v. City of Los Angeles, 370 P.2d 342 (Cal.), *appeal dismissed*, 371 U.S. 36 (1962) (relying on nuisance-prevention rationale to uphold residential-use zoning ordinance that left claimant’s property—a rock and gravel pit—economically useless).

76. 438 U.S. 104 (1978).

77. *Id.* at 124.

78. Peterson, *supra* note 2, at 1304.

79. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986). It made no difference, the Court held, that claimant joined the plan long before the law was passed and that claimant had been contractually guaranteed the right to withdraw without penalty. *Id.* at 226-27.

80. *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

81. *Andrus v. Allard*, 444 U.S. 51 (1979).

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

83. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

84. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980).

85. See *supra* note 42 and accompanying text.

86. See *Penn Central*, 438 U.S. at 116. Meanwhile, the state courts have continued to switch at will from the harm principle to the economic-viability principle. Compare, e.g., *Department of Agric. v. Mid-Florida Growers*, 521 So. 2d 101 (Fla.), *cert. denied*, 488 U.S. 870 (1988) (awarding compensation to owners of healthy citrus trees destroyed to prevent spread of citrus canker) with, e.g., *First English*

One advantage of the ad hoc approach was to permit the Court to avoid the conceptual conflicts between the harm rule and economic-impact analysis, both of which remained factors in the *Penn Central* balancing test. The Court's movement toward a total-loss, economic-viability rule also helped suppress this conflict, because in most cases *some* residual value could be found in the regulated property. Nonetheless, the day of reckoning finally came, under the name of *Keystone Bituminous Coal Ass'n v. DeBenedictis*.⁸⁷

Keystone presented facts virtually identical to *Pennsylvania Coal*. Once again, Pennsylvania had enacted a law prohibiting coal mining that would cause subsidence damage to surface structures. Once again, mining companies had expressly reserved the right, when originally conveying the subject property, to extract the coal comprising the support estate. This time, however, the Court found no taking.

The Court, in an opinion written by Justice Stevens, insisted that it was distinguishing *Pennsylvania Coal*, not overruling it.⁸⁸ Yet the two principal arguments invoked to sustain the new law would have been quite as applicable in 1922 as they were in 1987. First, the Court reaffirmed the harm principle,⁸⁹ quoting liberally from *Mugler*⁹⁰ and declaring that the new law could be enforced without compensation because "Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare."⁹¹ Second, turning to the issue of diminution of value, the Court held that the law had not caused a total loss of economic viability, because the *entire package* of the claimants' mining rights—of which the right to mine the support estate was only a fraction—was the relevant "property" to consider, and this property had suffered only a partial devaluation as a result of the law.⁹²

Keystone was a disturbing opinion for a number of reasons. To begin with, it seemingly overturned the seminal case of regulatory-takings jurisprudence without confronting the implications of doing so. Moreover, it exposed a deep flaw in the economic-viability rule: a regulation of property use can be characterized as effecting *either* a total *or* a partial destruction of value depending upon how the property rights are parceled up. Although this

Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893, 904 (Cal. Ct. App. 1989), *cert. denied*, 493 U.S. 1056 (1990) (denying compensation for floodplain ordinance prohibiting any improvement of claimant's land on ground that regulation was aimed at "prevention of death and injury").

87. 480 U.S. 470 (1987).

88. *Id.* at 484.

89. *Id.* at 488-92.

90. For example, the passage from *Mugler* appearing above in block-quotation form, *see supra* text accompanying note 45, also appears in *Keystone*. *See id.* at 489 (quoting *Mugler*, 123 U.S. at 669).

91. *Keystone*, 480 U.S. at 485. To distinguish *Pennsylvania Coal* on this point, the Court stated that the true holding there had been that the Kohler Act failed the public-purpose requirement. *Id.* at 484. Justice Stevens therefore was obliged to characterize the bulk of Holmes's famous decision, including virtually all the passages on which subsequent cases rely, as an "advisory opinion." *Id.*

92. *Id.* at 496-502.

parceling problem had long been observed,⁹³ *Keystone* exacerbated it by treating as a package the same bundle of property rights that *Pennsylvania Coal* had treated as parceled. Finally, although *Keystone* began by indicating that harm-preventing laws could not be takings no matter how severe their economic impact,⁹⁴ it later went on (through its deployment of the parceling argument) to hold that Pennsylvania had not diminished too severely the value of the claimants' property, leaving the conflict between *Mugler* and *Pennsylvania Coal* utterly unresolved.

As a result, the clash between the economic-viability rule and the harm principle was destined to surface again, and it did last Term. The Court's extraordinary new rule to mediate this conflict deserves treatment in its own section.

D. Lucas

In *Lucas v. South Carolina Coastal Council*,⁹⁵ plaintiff Lucas, a land developer, had purchased two lots of unimproved beachfront property for \$975,000. Subsequently, South Carolina enacted the Beachfront Management Act, prohibiting Lucas from building any permanent structures on this property. The declared purpose of the Act was to prevent the erosion of the "beach/dune system," which assertedly served as an important barrier against dangerous storms and drew considerable tourist business to the state.⁹⁶ Unfortunately for Lucas, the Act had the effect, according to a factual finding entered by the lowest court of the state and accepted as conclusive by the Supreme Court, of rendering his property valueless.⁹⁷

The South Carolina Supreme Court denied compensation to Lucas on the authority of *Mugler* and *Keystone*.⁹⁸ The United States Supreme Court reversed and remanded.

Justice Scalia's opinion for the Court in *Lucas* reads like a mirror-image of Justice Stevens's opinion for the Court in *Keystone*. Just as *Keystone* opens

93. See, e.g., Michelman, *supra* note 2, at 1192-93; Rose, *supra* note 2, at 566-59. Justice Brandeis was the first to foresee the problem. See *Pennsylvania Coal*, 260 U.S. at 419 (Brandeis, J., dissenting) (arguing that under Court's approach, landowners would be entitled to compensation for restriction on building heights because such restriction would destroy air rights just as entirely as Kohler Act had destroyed mining rights).

94. See, e.g., *Keystone*, 480 U.S. at 488 & n.18 (saying that "the Court has repeatedly upheld regulations that destroy or adversely affect real property interests" when the regulations "abate activity akin to a public nuisance"); *id.* at 491 n.20 (saying that "since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity"); *id.* at 492 n.22 (approving cases holding that "a State need not provide compensation when it diminishes or destroys the value of property by . . . abating a public nuisance") (emphasis added).

95. 112 S. Ct. 2886 (1992).

96. S.C. CODE ANN. § 48-39-250(1) (Law. Co-op. Supp. 1991).

97. *Lucas*, 112 S. Ct. at 2889-90, 2894 n.7.

98. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 899 (S.C. 1991).

by finding in the precedent a categorical rule that harm-preventing regulations effect no taking (regardless of whether they totally destroy property value), so *Lucas* opens by finding in the precedent a categorical rule that regulations destroying economic viability do effect takings (regardless of whether they prevent harm).⁹⁹ Just as Stevens had to offer a strained account of *Pennsylvania Coal* to maintain the integrity of his categorical rule, so Scalia was obliged to offer a strained account of the *Mugler* line of cases to maintain the integrity of his.¹⁰⁰

Moreover, just as Stevens effectively exposed the manipulability of the economic-viability test, so Scalia ably criticized the manipulability of the harm principle:

[T]he distinction between “harm-preventing” and “benefit-conferring” regulation is often in the eye of the beholder. It is quite possible, for example, to describe in *either* fashion the ecological, economic, and aesthetic concerns that inspired the South Carolina legislature in the present case. One could say that imposing a servitude on Lucas’s land is necessary in order to prevent his use of it from “harming” South Carolina’s ecological resources; or, instead, in order to achieve the “benefits” of an ecological preserve.¹⁰¹

Accordingly, the *Lucas* Court said, “it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory ‘takings’—which require compensation—from regulatory deprivations that do not require compensation.”¹⁰²

And yet, precisely as Justice Stevens returned to the economic-viability test at the end of *Keystone* (despite his putatively categorical harm principle), so Justice Scalia returned to the nuisance paradigm at the end of *Lucas* (despite his categorical economic-viability rule). Even if the state “prohibit[s] all economically beneficial use of land,” wrote Scalia, it still does not “take” property if the state’s limitation on the owner’s rights already “inhere[d] in the [owner’s] title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”¹⁰³ No

99. *Lucas*, 112 S. Ct. at 2893 (“[W]e have found categorical treatment appropriate . . . where regulation denies all economically beneficial or productive use of land.”).

100. Justice Scalia wrote, “It is correct that many of our prior opinions have *suggested* that ‘harmful or noxious uses’ of property may be proscribed by government regulation without the requirement of compensation.” *Id.* at 2897 (emphasis added). “The ‘harmful or noxious uses’ principle,” however, was merely “the Court’s early attempt to describe in theoretical terms why government may . . . affect property values by regulation without incurring an obligation to compensate . . .” *Id.* “None of [our earlier cases] that employed the logic of ‘harmful use’ prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant’s land.” *Id.* at 2889. *But see id.* at 2911-12 & n.12 (Blackmun, J., dissenting) (quoting cases such as *Miller* in which Court approved “destruction” of property on harm grounds).

101. *Id.* at 2897-98.

102. *Id.* at 2899.

103. *Id.* at 2900.

“taking” will be found so long as the law “do[es] no more than duplicate the result that could have been achieved in the courts” under the common-law principles of the law of nuisance.¹⁰⁴ The Court expressed doubt that the Beachfront Management Act would pass this test, but held that the matter was one of state law to be decided on remand.¹⁰⁵

Thus what began as a ringing endorsement of a per se economic-viability rule—intended to clear away at least some of the takings confusion—ended with a direction to federal judges to decide takings claims by determining how the courts of the relevant state would have decided a hypothetical injunction action against the property owner under the state’s common-law nuisance precedents. This result is astonishing, not only because it makes takings analysis turn on the various common-law precedents of the fifty states, and not only because the “common-law principles” of nuisance that judges must now consult are themselves an “impenetrable jungle,”¹⁰⁶ but also because this appeal to nuisance law is nothing other than an appeal to the “noxious-use logic” that the *Lucas* Court began by condemning so effectively. If the harm principle is to be jettisoned because there is no “objective conception of ‘noxiousness’” that permits a “distinction between ‘harm-preventing’ and ‘benefit-conferring’ regulation,”¹⁰⁷ how then can judges be asked to evaluate “the degree of *harm* . . . posed by the claimant’s proposed activities” and “their *suitability* to the locality in question”?¹⁰⁸ These formulations, which the Court lifted almost wholesale from the Restatement of Torts,¹⁰⁹ are nothing other than efforts to define an “objective conception of ‘noxiousness’” in order to determine when a use of property does legally cognizable “harm” to others.¹¹⁰

104. *Id.* The Court rested this rule on the “understandings of our citizens regarding the content of, and the State’s power over, the ‘bundle of rights’ that they acquire when they obtain title to property.” *Id.* at 2899. “[T]he notion . . . that title [to land] is somehow held subject to the ‘implied limitation’ that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause . . .” *Id.* at 2900. But this historical understanding applies only to land. “[I]n the case of personal property, [an owner] ought to be aware of the possibility that new regulation might even render his property economically worthless . . .” *Id.* at 2899.

105. *Id.* at 2901.

106. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 616 (5th ed. 1984) [hereinafter PROSSER & KEETON] (“There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’”), quoted in *Lucas*, 112 S. Ct. at 2914 n.19 (Blackmun, J., dissenting). Private nuisance law may be more or less cabinable. But for over a century, the common law of public nuisance (expressly included in the body of “principles” that courts are to consult under *Lucas*, see *id.* at 2900) has allowed states to enjoin any conduct that “interferes” “with the public morals,” “with the public peace,” “with the public comfort,” “with the public convenience,” or “with a wide variety of other miscellaneous public rights of a similar kind.” RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (1977); accord PROSSER & KEETON, *supra*, § 90, at 643-45.

107. *Lucas*, 112 S. Ct. at 2897.

108. *Id.* at 2901 (emphasis added).

109. See RESTATEMENT (SECOND) OF TORTS §§ 826-28, cited in *Lucas*, 112 S. Ct. at 2901.

110. See RESTATEMENT (SECOND) OF TORTS § 826 cmt. c (“The unreasonableness of [the alleged nuisance] is determined from an objective point of view.”). Public-nuisance common law in particular rests on what the first half of *Lucas* seemingly repudiated: the harm principle articulated in *Mugler* and *Keystone*. For an example potentially applicable to *Lucas* on remand, see *State v. Turner*, 18 S.E.2d 372 (S.C. 1942),

Lucas begins by telling judges why traditional nuisance reasoning is unworkable in takings law, and it ends by telling them that they must apply *only* traditional nuisance reasoning when they decide total-loss takings cases. According to the first part of Justice Scalia's opinion, the Court had never once held that states may destroy *all* economic value in an individual's real property when acting "merely" to prohibit nuisances or other noxious uses; according to the last part, the true rule is that states may destroy all economic value in an individual's real property so long as they are "merely" prohibiting nuisances or other noxious uses.

The case is a fitting culmination of takings law. The best lesson we could derive from it would be that the time is ripe to reconsider the fundamentals of the Constitution's compensation guarantee.

II. THE FUNDAMENTAL PROBLEM IN TAKINGS LAW

A. "Fundamental Contradictions" in Takings Law

What is to be done when a body of law suffers so visibly from the kind of internal conflicts explored in the last Section? The three most common responses are as follows.

The first approach is *Penn Central's*: ignore the irreconcilable theoretical premises and instead try to "balance" the competing concerns in a series of "essentially ad hoc, factual inquiries."¹¹¹ To make this balancing more intelligible, certain ordering rules could be introduced, such as: (1) society's regulatory interests will almost always "outweigh" an individual's economic interests, (2) unless a total loss of value is inflicted on him, (3) in which case, at least as to real property, the individual's interests will "outweigh" society's, (4) except if the harm to the community prevented by the regulation could have been enjoined at common law. Putting aside acts of eminent domain and physical invasions, this set of formulations generally states the law of takings as it exists today.

Even if this "balancing test" were capable of generating a coherent and orderly takings law, it would remain deeply inadequate. Its premise is that the more socially valuable a property regulation is—the more the benefits to society outweigh the costs to the individual—the less reason there is to compensate. This is so even under *Lucas*, according to which a state inflicting

in which South Carolina's supreme court approved the following jury instruction: "Any use of property or thing which is of itself hurtful to the health, peace, happiness, safety or morals . . . of the community, would constitute a [public] nuisance." *Id.* at 376.

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

even a total loss on a landowner may still escape compensation if it can show a very favorable balance of social benefit over individual cost.¹¹²

Is it not peculiar that the more society gains, the less chance an individual has of being compensated for the use society makes of his property? If South Carolina can actually prove that the state or the surrounding community stands to gain millions of dollars if permitted to use Lucas's property as a storm barrier and tourist attraction—if the state makes so great a showing that it manages to satisfy the Restatement or other common-law test—is that a reason not to compensate Lucas? The “balancing” of public interest against private loss, which assumes that compensation is *less* warranted the *more* the state profits from using some of its citizens' property, misses the entire point of the compensation guarantee.¹¹³ This perhaps explains why takings law since *Penn Central* has continued to “muddle” along, awarding compensation here and there when the Justices think that some basic precept of fairness has been violated, even if the Court is unable to fit its holdings into the available balancing-test framework.¹¹⁴

A second response to the conflict between *Mugler* and *Pennsylvania Coal* would be simply to choose between them. Both Justice Stevens, writing for the *Keystone* Court, and Justice Scalia, writing in *Lucas*, seem to have set out on this course—the one opting for *Mugler*, the other for *Pennsylvania Coal*—only to return, in the latter portions of their opinions, to the road they sought not to travel.¹¹⁵ As these opinions reveal, simply choosing doesn't seem to be a real option for takings law. The reason is not only that both lines of authority are so deeply entrenched, but also that, despite their irreconcilability, they share a strange complementarity. Without the harm principle limiting its applicability, takings doctrine might cease to be economically viable; but without an economic-impact principle limiting its inapplicability, it might do too much harm. The inadequacy of each principle seems to make the other indispensable.

This strangely complementary opposition suggests the third response to the internal conflicts of takings doctrine. This response, a great favorite among academics, is to see the equivocality in takings law as irresolvable and perhaps

112. The Restatement test referred to in *Lucas*, 112 S. Ct. at 2901, is “essentially a weighing process” to decide whether the social utilities of enjoining certain conduct outweigh the utility of permitting it. RESTATEMENT (SECOND) OF TORTS § 826 cmt. c, at 121. Common-law courts have decided private nuisance suits in such terms since the days when judges could write, “Le utility del chose excusera le noisomeness del stink.” *Id.* § 826 cmt. a, at 120 (quoting JAMES F. STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 106 (1890) (quoting an early case on candlemaking)).

113. See Michelman, *supra* note 2, at 1196; see also ROBERT C. ELLICKSON & A. DAN TARLOCK, LAND USE CONTROLS 136 (1981) (saying that “if taken literally, the balancing approach underprotects landowners from unfair but efficient regulations”).

114. *Loretto* is one illustration; another is *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (finding that provision allowing local court to keep accumulated interest of about \$100,000 on interpleader funds deposited with clerk constituted taking). See also cases cited at notes 79-84 *supra*.

115. See *supra* text accompanying notes 87-110.

even necessary. On this view, the harm principle, the physical-invasion rule, and the economic-viability test each reflect an important truth about private property, but their truths collide. Takings law is caught, we are told, between the irreconcilable conceptual demands made on the idea of private property within our legal system.

Pursuing this thought, we might with Professor Ackerman interpret *Mugler* (as well as the physical-invasion rule) as expressive of a “layman’s” understanding of “social property,” while *Pennsylvania Coal* would be a first step toward a “scientific policymaker’s” recognition of “legal property.”¹¹⁶ Or, with Professor Rose, we might see the harm rule and the economic-impact test as reflecting a “fundamental tension” between a republican conception of property, with its emphasis on “civic virtue,” and a liberal conception of property, with its emphasis on individual “acquisitiveness.”¹¹⁷ Or finally, with Professor Michelman, we might try to organize all the tangles of takings law around the mutually exclusive demands of “classical property” and “popular sovereignty.”¹¹⁸

Such *fundamental-contradiction* approaches to takings doctrine—and there are others besides the three just mentioned¹¹⁹—provide powerful accounts of the general status of property in our law. They also have supplied the most enlightening commentary on takings doctrine over the last fifteen years. They run the risk, nonetheless, of taking takings thinking too seriously.

Must we regard the pile-up between *Keystone* and *Lucas* (or *Loretto* and *Lucas*) as a battle of titans, each expressing some deeply buried, divided truth about Private Property? What if, instead, all the main lines of takings analysis—the harm principle, the physical-invasion rule, and the economic-viability test—are conceptual blind alleys, reflecting only the banal truth that the Court’s methodology in takings analysis has failed? What if the irreconcilables in takings doctrine have arisen simply because that doctrine has for more than a century asked itself a question destined to tie the Court in knots?

Our *takings* jurisprudence reads the Just Compensation Clause as if it contained no modifying word or thought between “taken” and “without just compensation.” At least since *Bowditch v. Boston*,¹²⁰ however, takings law

116. See ACKERMAN, *supra* note 2, at 116-18.

117. See Rose, *supra* note 2, at 593-94.

118. See Michelman, *supra* note 65, at 1628; see also, e.g., Gary Minda, *The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Takings Problem*, 62 U. COLO. L. REV. 599 (1991) (describing “dialectical structure of takings law”).

119. The most common (and no doubt the earliest) is the effort to conceptualize takings law as evolving haltingly from a “physicalist” conception of property to an “abstract” conception. See *supra* note 27 and accompanying text. For a recent and more sophisticated elaboration of this theme, see Paul, *supra* note 2, at 1416-29. This approach concentrates less on the conflict between *Mugler* and *Pennsylvania Coal* than on that between physical-invasion analysis and economic-impact analysis, another important tension in the doctrine that we have mentioned only in passing.

120. 101 U.S. 16, 18-19 (1879) (denying compensation to people whose houses were destroyed to

has recognized that the state may effect some deprivations of property without compensation. In modern thinking, which recognizes every legal right as potentially protected property, the conclusion that government may take property without compensation is quite indispensable. The lower courts have learned to say so straight out: "It is . . . clear that not all takings of property are compensable."¹²¹

Thus the question for *takings* doctrine ineluctably must be: when is a taking of property not a taking of property? To which the Court's consistent answer has been: when the property taken isn't really property in some *fundamental* sense, or when the taking isn't really so *fundamental* a deprivation that it counts for constitutional purposes.

The logic that has structured takings analysis has not been the logic of fundamental contradiction, but that of *fundamental rights*. The harm principle, the *Loretto* rule, and the economic-viability test all are predictable outgrowths of an effort to define those incidents of ownership that are fundamental to property holding, either because they involve "treasured" freedoms of ownership or because they are somehow implicit in the very concept of an individual having property.

This fundamentalism is not unique to takings law; nor is it solely a result of the grammar through which the Compensation Clause has been read. On the contrary, in applying the logic of fundamental rights to takings doctrine, the Court simply has done with Fifth and Fourteenth Amendment "property" what it has been doing during the very same period—from the late nineteenth century to the present—with Fifth and Fourteenth Amendment "liberty." Indeed, as we shall see below, the developments in the Court's protection of property rights from *Mugler* to *Loretto* to *Lucas* display quite dramatic parallels to similar developments in the Court's protection of fundamental liberty rights from *Lochner* to *Roe*.

The fundamental problem with the harm principle, the *Loretto* rule, and the economic-viability test is not that they conflict with one another. It is that each is wholly undermined by the illogic of the fundamental-rights methodology.

B. *Fundamental Rights in Takings Law*

1. *Harm*

It is no coincidence that *Mugler*, the first case to announce the harm idea in takings doctrine, was also one of the harbingers of *Lochner v. New*

prevent the spread of a fire).

121. *Johnson v. United States*, 479 F.2d 1383, 1389 (Ct. Cl. 1973) (quoting *Finks v. United States*, 395 F.2d 999, 1004 (Ct. Cl.) (seven-judge panel), *cert. denied*, 393 U.S. 960 (1968)).

York.¹²² The entire ill-fated liberty-of-contract doctrine rested on an attempt to define the scope of constitutionally protected liberty in terms of harm. Individuals possessed a fundamental liberty of contract, according to the *Lochner*-era cases, limited only where their commercial arrangements were “affected with a public interest”¹²³—a right, in other words, to contract as they pleased so long as they threatened no harm to others.¹²⁴

This fundamentalist logic appears quite clearly in *Mugler*. Thus the Court addressed itself to the proposition

that while, according to the doctrines of the Commune [i.e., communism], the State may control the tastes, appetites, habits, dress, food, and drink of the people, our system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as to his conduct to others, leaving him the sole judge as to all that only affects himself.¹²⁵

The exception built into this proposition, however, meant that

the right to manufacture drink for one’s personal use is subject to the condition that such manufacture does not endanger or affect the rights of others. If such manufacture does prejudicially affect the rights and interests of the community, . . . society has the power to protect itself. . . . [W]hile power does not exist with the whole people to control rights that are purely and exclusively private, government may require “each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another.”¹²⁶

The takings holding in *Mugler* is simply the flip side of *Lochner*. Under *Mugler*, individuals threatening harm with their property can expect no constitutional protection; under *Lochner*, individuals threatening *no* harm with their contractual liberty *can* expect constitutional protection. By invoking the “fundamental principle that every one shall so use his own as not to wrong and

122. 198 U.S. 45 (1905). The *Lochner* Court cited *Mugler* for precedent, *id.* at 53, and for reasons about to be discussed, *Mugler* is often treated as one of *Lochner*’s progenitors. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804 (1992) (“[F]or at least 105 years, at least since *Mugler v. Kansas*, the [Due Process] Clause has been understood to contain a substantive component . . .”) (citation omitted).

123. E.g., *Tyson & Brother—United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 421 (1927); see also *Coppage v. Kansas*, 236 U.S. 1, 14 (1915); *Adair v. United States*, 208 U.S. 161, 174 (1908); *Lochner*, 198 U.S. at 52-53.

124. See, e.g., *Lochner*, 198 U.S. at 56-58. There were exceptions, of course: women, for example, could be restrained in their contractual liberty for their own protection. See, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding state law limiting women’s hours of employment). But that was the exception, not the rule, and even it did not last. See *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (invalidating fair-wage law for women).

125. *Mugler*, 123 U.S. at 660.

126. *Id.* (quoting *Munn v. Illinois*, 94 U.S. 113, 124 (1876)).

injure another,”¹²⁷ *Mugler* sought to constitutionalize common-law precepts of property, just as *Lochner* sought to constitutionalize common-law precepts of contractual liberty. In both cases, the pivotal criterion was the presence or absence of harm to third parties.¹²⁸

Unfortunately, all the hopes of this logic, when set up as the single axiom from which an entire political or constitutional theory is to follow, rest on the assumption that some substantial core of an individual’s conduct, embracing important liberties, “affects the interests of no persons besides himself.” As everyone knows, that assumption fails. What undermined *Lochner* in the aftermath of the Great Depression (which once and for all precluded the claim that “private” commercial arrangements have no effect on the nation as a whole) is the same point that makes the harm principle incoherent in takings doctrine: there is no such thing as a self-regarding act.¹²⁹ *Sic utere tuo*,¹³⁰ that benevolent maxim, by itself can place no coherent analytical limits on state power.

“But,” someone might say, “the Court has never held in takings law that owners have any kind of fundamental *sic utere tuo* rights. It has never held that regulations infringing on self-regarding uses are necessarily takings. All *Mugler* holds is that regulations preventing harm are *not* takings. And that holding, much more modest than its converse, does not depend on any assumption that there exists an identifiable category of protected, self-regarding conduct, does it?”

Yes, it does. Even if the harm principle in takings law stops short in this way of the full-blown *Lochnerian* doctrine—which is debatable¹³¹—still it demands at a minimum that judges distinguish, as the *Lucas* Court correctly pointed out, between regulations that prevent harms and those that confer or expropriate benefits.¹³² But this distinction is impossible to draw. Even if the state reached out and took money directly from my pocket, still we could not

127. *Id.* at 667.

128. The great intellectual source of this harm-based limitation on permissible state action is of course John Stuart Mill. In a passage with obvious influence on the Supreme Court’s words quoted above, Mill wrote: “As soon as any part of a person’s conduct affects prejudicially the interests of others, society has jurisdiction over it.” JOHN STUART MILL, ON LIBERTY 92 (Currin V. Shields ed., 1956). But where “a person’s conduct affects the interests of no persons besides himself . . . there should be perfect freedom, legal and social, to do the action and stand the consequences.” *Id.* *Mugler*’s lawyer quoted *On Liberty* in his argument. *Mugler*, 123 U.S. at 632 (argument of counsel).

129. For a more detailed discussion of this point in relation to fundamental liberty doctrine, see Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 756-61 (1989). For more general discussions, see C.L. TEN, MILL ON LIBERTY 10-41 (1980); J.C. Rees, *A Re-reading of Mill on Liberty*, 8 POL. STUD. 113 (1960).

130. *Sic utere tuo ut alienum non lædas*: so use your own as not to injure another.

131. The only way a court could plausibly determine whether a law was *not* legitimately harm-preventing would be to engage in precisely the same kind of super-legislative judgments that were the hallmark of *Lochner*-era cases. For an example, see *Nollan v. California Coastal Commission*, 483 U.S. 825 (1986). See also Michelman, *supra* note 65, at 1609 (observing parallels between *Nollan* and *Lochner*).

132. See *Lucas*, 112 S. Ct. at 2897-98 (quoted *supra* text accompanying note 101); Michelman, *supra* note 2, at 1197.

say that *here* the state has merely expropriated a benefit and not prevented harm. Perhaps the harm lay in my saving rather than consuming, perhaps in my plan to consume one thing rather than another, or perhaps simply in *my* having the money when others don't.¹³³

For this reason, pursued to its logical conclusion, the harm rule would countermand compensation even in cases of eminent domain. If a piece of land is needed to complete a railroad that would maximize the public interest, then any use of the land *other* than to complete the railroad is in fact harmful to the public. Or again: the very fact of one person's private ownership of a piece of property could be found to have harmful effects, warranting the state in its harm-preventing capacity to seize the property and convert it to some other form of ownership.¹³⁴

Taken seriously, then, the harm principle would render the Compensation Clause a nullity. Every state action that passes the legitimate-state-interest test aims at preventing anticipated harms, and hence no constitutional state action could ever effect a "taking." Because that result is obviously unacceptable, the fundamentalist harm idea announced in *Mugler* cannot be and never has been taken altogether seriously, and the consequence has been a century of doctrinal confusion.

Reflecting their intimate connection, the close of the *Lochner* era also marked the end of Supreme Court takings decisions resting foursquare on the harm principle. Yet the Court always kept the principle alive, dusting it off for special occasions, allowing lower courts to take advantage of its seeming simplicity, and now—in the form of *Lucas*—issuing yet another statement of simultaneous attraction toward and repulsion from it. The failure of the harm idea to distinguish coherently between compensable takings of property and exercises of the "police power" should come as no surprise; what should cause wonder is the persistence in just-compensation law of the very same harm idea whose flaws were recognized so long ago in the *Lochner* doctrine. The harm principle as such has failed—*Lucas* confirms that much—but takings law has never outgrown the fundamental-rights premises with which it began in *Mugler*.

133. To be sure, no common-law court ever held that a person's saving his own money qualified as a "nuisance," but the Court (prior to *Lucas*) never confined the harm principle to the common law of private nuisance. *See, e.g.,* Goldblatt v. Town of Hempstead, 369 U.S. 590, 593 (1962); Miller v. Schoene, 276 U.S. 272, 280 (1928); Hadacheck v. Sebastian, 239 U.S. 394, 411 (1915). Nor could the Court have done so, given that the whole point of the harm principle was to justify state action of the sort upheld in *Mugler*. Moreover, once the common law of *public* nuisance is allowed into the analysis, there is no reason as a matter of logic why a person's accumulating wealth could not be fit squarely within the traditionally articulated rules. *See supra* notes 106, 110.

134. *See Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984). The case is described *supra* text accompanying notes 4-6.

2. *Physical Occupation*

Loretto has tended to confound commentators. Frequently the *Loretto* rule is blamed for rendering takings law “paradoxical” because it compels compensation for regulations under which “the loss or inconvenience to the owner is minimal,” while in cases like *Penn Central* courts continue to deny compensation for regulations under which the owners’ losses are enormous.¹³⁵ *Loretto* is also seen as a throwback to simplistic “physicalist” attitudes about property.¹³⁶

Viewing *Loretto* as a reversion to earlier takings thinking has considerable appeal. The *Loretto* Court itself encouraged this view, supporting its holding with repeated references to the nineteenth-century physical-invasion rule established in *Pumpelly*.¹³⁷ But *Loretto* is quite different from *Pumpelly*, and the tendency to see *Loretto* as a paradoxical throwback misses the logic that makes it a perfectly consistent—indeed even predictable—development in post-*Lochner* takings doctrine.

Compare *Loretto* to *Pumpelly*. In the latter case, “physical invasion” referred to an inundation of the subject property so complete that it bordered on a “taking” of the property even in the ordinary sense of the term, because it “destroy[ed] its value entirely” and, “in effect, subject[ed] it to total destruction.”¹³⁸ The cases following *Pumpelly* restricted its holding to similar instances of complete, destructive invasions of property.¹³⁹

In *Loretto*, however, the Court broke decisively from the *Pumpelly* fact pattern and rationale. *Loretto*’s property did not face “total destruction”; the state had not “destroy[ed] its value entirely.” In fact, *Loretto*’s real estate was hardly interfered with at all. Far from returning to the “physicalist” view represented by *Pumpelly*, the *Loretto* Court discovered a sort of phlogiston of ownership—the right to remove someone else’s objects from your property—and insisted on constitutional protection for this essence even when little or no actual damage could be shown.

Loretto stands on the idea that particular incidents of property ownership have a special status that compels compensation for their abridgment. There is nothing paradoxical or atavistic in this proposition. On the contrary, it

135. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1672 n.30 (1988); see also, e.g., Michelman, *supra* note 2, at 1227 (“[The physical-invasion rule’s] capacity to distinguish, even crudely, between significant and insignificant losses is too puny to be taken seriously.”).

136. See, e.g., Paul, *supra* note 2, at 1467 (characterizing “the physical invasion test” as “a partial remnant” and “outgrowth of physicalist notions of property”); John J. Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465, 501-14 (1983).

137. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-28 (1982).

138. *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177-78 (1871); see *supra* text accompanying notes 31-35.

139. See, e.g., *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 809-10 (1950) (summarizing cases as standing for “the principle that the destruction of privately owned land by flooding is ‘a taking’”).

represents a perfectly logical outgrowth of post-*Lochner* fundamental-rights thinking, and it parallels a similar development in the domain of constitutionally protected liberty.

Harmlessness is a negative criterion: it refers not to any affirmatively valuable quality of the conduct at issue, but merely to a sort of jurisdictional limit on the state's reach. When the concept of harm begins to break down as a benchmark of permissible state action, the temptation for fundamental-rights thinking is to articulate a positive criterion to demarcate the implicit limits of state power. To shift away from the harm principle while remaining within a logic of fundamental rights, the trick is to begin identifying conduct immune from state regulation because of some special, positive value inherent in the conduct itself.

This shift is familiar in fundamental-liberty doctrine: it precisely marks the transition between *Lochner* and *Roe*. In making that transition, the Court abandoned the question of whether the proscribed conduct affected a public interest, instead asking whether the proscribed conduct is an element of one's own "personhood":¹⁴⁰ whether the conduct forbidden is too central to the ability to "define one's identity,"¹⁴¹ too "fundamentally affecting a person,"¹⁴² to be a legitimate object of state regulation. If so, then the law is invalid even if the state can credibly claim that its regulation furthers a legitimate governmental interest.

Loretto accomplishes the very same transition in takings doctrine. According to the *Loretto* Court, the "right to exclude" a third party's object from even a tiny portion of one's property is so fundamental, so "treasured"¹⁴³ a prerogative that a law violating this right demands constitutional redress "without regard to the public interests that [the law] may serve."¹⁴⁴ A violation of this freedom to remove objects from one's property "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice from every strand."¹⁴⁵ If English contained the word, we might say that *Loretto* introduced into takings doctrine

140. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807 (1992) (describing privacy cases as protecting freedom to "define the attributes of personhood"); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 15-1 to -3 (2d ed. 1988); J. Braxton Craven, Jr., *Personhood: The Right to Be Let Alone*, 1976 DUKE L.J. 699, 702 & n.15 ("The theme of personhood is . . . emerging. . . . Sometimes it is called privacy, inaptly it would seem to me But the idea is that of personhood in the sense of those attributes of an individual which are irreducible in his selfhood.") (quoting Professor Paul Freund, Address to American Law Institute (May 23, 1975)). See generally Rubinfeld, *supra* note 129, at 752-82 (discussing concept of personhood in privacy doctrine).

141. *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984); see also, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting) ("We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition . . .").

142. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); see also, e.g., *Roe v. Wade*, 410 U.S. 113, 152 (1973) (saying that privacy encompasses those "personal rights that can be deemed 'fundamental'").

143. *Loretto*, 458 U.S. at 435.

144. *Id.* at 426.

145. *Id.* at 435.

the idea of rights of “propertyhood”—the idea that some incidents of ownership are so central to a person’s ability to define property as his own that they cannot be eliminated without transgressing constitutional norms.¹⁴⁶

The *Loretto* shift to this fundamentalist “propertyhood” thinking is confirmed by *Hodel v. Irving*,¹⁴⁷ in which the Court, despite its rhetoric of ad hoc balancing,¹⁴⁸ announced a more or less per se rule of invalidity whenever “both descent and devise are completely abolished.”¹⁴⁹ Here not even a physical invasion took place; owners remained entirely unmolested in the use and enjoyment of their property throughout their lifetimes. The violation was to the owner’s “right to pass on property,”¹⁵⁰ and the violation of this right, raised to the same level of philosophical essence as the right to remove foreign objects had been in *Loretto*, had to be compensated. Thus the right to bequeath appears to be another right of propertyhood, and others may yet be found.¹⁵¹

And what is wrong with holding that the Compensation Clause affords protection to these “rights of propertyhood”? Nothing—except that the claim of fundamentality on which the protection is predicated is pure gossamer. The fragility of such fundamental rights always appears in two forms: in the absence of any plausible explanation of why one right—and not others—is fundamental, and in the presence of numerous embarrassing counterexamples to the putatively fundamental right itself.

These embarrassments are well known to privacy doctrine. If there is a fundamental right to “define the attributes of personhood” or to “define one’s own concept . . . of meaning,”¹⁵² what possible limits can it have? Why doesn’t it protect the rapist for whom rape is central to self-definition, or the architecture graduate student for whom smoking in restaurants plays an equally self-defining role? The response may be a retreat to the harm principle (conduct causing any harm to others is outside the ambit of the right), but then

146. *Loretto* had an antecedent in *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (characterizing right to exclude as “one of the most essential sticks in the bundle of rights that are commonly characterized as property”).

147. 481 U.S. 704 (1987). In *Hodel*, the Court found a taking in legislation that mandated tribal escheat for certain real-property interests belonging to American Indians; the existing testamentary scheme (under older legislation) had had the effect of so fractionating the Indian lands that economic use of them had become impossible. *See id.* at 717-18.

148. *See id.* at 712-14.

149. *Id.* at 717.

150. *Id.* at 716.

151. *Nollan*, for example, may suggest a standard of at least heightened scrutiny for laws impinging on “the right to build on one’s own property.” *See Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834 n.2 (1987). The Nollans owned land on the California coast and wanted to replace the house that stood on their lot with a larger one. The state refused to grant them the necessary building permit unless they agreed to let the public pass across their beach. The Supreme Court invalidated the state’s effort so to condition the permit, holding that the beach-easement requirement was too unrelated to the Nollans’ building plans to withstand scrutiny.

152. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807 (1992).

the entire effort, which is to specify the conduct immune from state action even if some legitimate state interests are thereby thwarted, will collapse.

If we said that the right of self-definition protects only “fundamental” decisions, what would “fundamental” mean here? How can anyone possibly answer the question of whether homosexual sex is “fundamental”?¹⁵³ Fundamental to what? The answer, “fundamental to those who claim the right to it,” would apply to every case in which anyone sought constitutional protection for activity important to his or her “concept of . . . meaning.” And even if we settled on some intuitive sense of matters fundamental to self-definition, still such analysis would end only in self-contradiction. For every time someone “defines himself” in a “fundamental” way that violates a law, we can be pretty sure that other individuals will be nearby to say that he is harming *their* right of fundamental self-definition—by preventing them, for example, from creating a community that has no people in it who do the unlawful act in question.

These are some of the questions that embarrass the fundamental-rights rationale offered in support of *Roe*. The other embarrassment concerns the question of whether *Roe* itself is defensible in terms of the asserted fundamental right. Is it believable that women who choose an abortion for a particular pregnancy necessarily and fundamentally define their identity in the process? How could this be, unless one accepts that abortion is the cataclysmic immoral or unwomanly act that only its opponents claim it to be? The fundamental-rights perspective seems to fail to capture even the very case it most wants to explain.¹⁵⁴

The same set of problems attends *Loretto*. Apart from the cable equipment whose installation was directly at issue, countless other “permanent physical occupations” of rental property—in the form of fire escapes, window guards, roof railings, smoke detectors, and so on—are ordered by the state with apparent impunity.¹⁵⁵ To be sure, the *Loretto* Court offered an explanation of this circumstance: landlords are allowed to “own” such items, whereas Teleprompter would have retained title to the cable equipment being installed.¹⁵⁶ But how can this “ownership” make a difference? The core holding of *Loretto* itself rests on the constitutional inadequacy of nominal “ownership” of property, when the owner can neither “possess, use [nor] dispose of it.”¹⁵⁷ In any event, the license plates that permanently occupy

153. This was essentially the question presented, as the majority opinion characterized it, in *Bowers v. Hardwick*, 478 U.S. 186 (1986). *See id.* at 190 (saying that issue to be decided is “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy”).

154. None of this argues against the actual right announced in *Roe*. The question is how to understand what the right of privacy stands for and why it demands constitutional protection. The issues raised here are treated at length in Rubinfeld, *supra* note 129. *See also infra* Part IV(D).

155. *See Loretto*, 458 U.S. at 449 & n.7 (Blackmun, J., dissenting) (citing numerous New York statutory requirements).

156. *Id.* at 440 & n.19.

157. *Id.* at 435 (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)).

your car are probably the nominal property of the state agency that issued them; does anyone suppose, however, that this legal formality renders the state's license-plate laws unconstitutional?

No one can believe that the cable-installation law fundamentally invaded Loretto's ownership rights *beyond* the deprivation and invasion already effected by laws fixing the amount of rent she could charge, granting her tenants perpetual rights of lease renewal, and minutely regulating her staircases, plumbing, roofing, flooring, and so on.¹⁵⁸ Only a philosopher's stone could make the right to remove Teleprompter's cable equipment fundamental, when Loretto's dominion of her property was manhandled so thoroughly by other laws of unchallenged constitutionality.

A car owner doesn't feel that his rights of "propertyhood" are threatened by the license plates permanently occupying his car because the right to exclude small objects from one's property just isn't very fundamental; or at least it needn't be in all sorts of cases. And again, what does "fundamental" (or "treasured" or "quintessential"¹⁵⁹) mean here? According to what criteria could the Court plausibly decide that the right to bequeath property is fundamental, but that the right to sell it is not?¹⁶⁰ Is it because "the right to pass on property . . . has been part of the Anglo-American legal system since feudal times"?¹⁶¹ Couldn't the same be said with equal validity of the right to alienate property? Couldn't it have been said as well of the right to brew ale on one's property—until the Court in *Mugler* upheld its prohibition?¹⁶² Living on one's own land might be the most "fundamental" use of real property imaginable, but routine zoning laws prohibit it in many places without compensation.

None of this states a conclusive argument against the outcome in *Loretto*, any more than the foregoing paragraphs stated one against *Roe*. On the contrary, in my view, a physical-occupation rule of some kind is an important piece of compensation law,¹⁶³ and the right of privacy is indispensable not only to women's freedom but to democracy itself.¹⁶⁴ The point is that the fundamental-rights logic through which the Court has tried to explain these

158. The importance to Loretto herself of the right to exclude the cable equipment was pretty clear: granted the right, she would have been able to bargain for a share of cable-television revenues. As noted earlier, the Court did *not* hold this monetary interest constitutionally protected. *See supra* note 42.

159. *Cf. Loretto*, 458 U.S. at 430 n.7 ("Early commentators viewed a physical occupation of real property as the quintessential deprivation of property.").

160. *Andrus v. Allard*, 444 U.S. 51, 64-67 (1979) (holding that law prohibiting sale of eagle feathers was not a taking).

161. *Hodel v. Irving*, 481 U.S. 704, 716 (1987).

162. *Cf. Tyson & Brother—United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting) ("Wine has been thought good for man from the time of the Apostles until recent years. But when public opinion changed it did not need the Eighteenth Amendment, notwithstanding the Fourteenth, to enable a State to say that the business should end.").

163. *See infra* Part V(B).

164. *See Rubenfeld, supra* note 129, at 789-91; *infra* Part IV(D).

decisions—and through which in general it has sought to define the scope of constitutionally protected property and liberty—cannot be sustained.

3. *Economic Viability*

Economic-efficiency analysis of almost any sort would tend to move takings law a considerable distance from the realm of fundamental-rights thinking. But the interpolation of economic analysis into takings law has been a wish consummated far more in the commentary¹⁶⁵ than in the case law. Ever since *Penn Central*, which employed a fairly open-ended and confessedly “ad hoc” economic analysis, the Court has moved steadily toward the relatively black-or-white economic-viability test, which operates without much regard for economic niceties.

Thus, if South Carolina’s Beachfront Management Act rendered Lucas’s property valueless, compensation will presumably have to be paid. This is so regardless of whether the price Lucas paid for his land reflected the risk of the new law’s passage and regardless of whether paying compensation to owners like Lucas will maximize society’s economic wealth. If, on the other hand, the Act had reduced his property’s value by “only” 80 percent, current case law still dictates that no taking occurred regardless of the costs of the Act or the benefits of compensation.

This is not economic analysis at all. It is rather another instance of fundamental-rights analysis. Even assuming (with the Court) that South Carolina’s law in fact reduced Lucas’s property to a market value of zero, he could still have swum from it, camped on it, and so on. These uses, under the Court’s economic-viability test, are constitutionally irrelevant. What really counts as owning property—indeed, what the land really consists of in some *fundamental* sense—is the right to make some money from it. Justice Scalia said so explicitly in defending the economic-viability rule: “[F]or what is the land but the profits thereof[?]”¹⁶⁶

The economic-viability principle is in fact just another star in the *Loretto* constellation of fundamental rights of propertyhood. If government violates an owner’s right to remove objects from his land, to bequeath it, or *to make some money from it* (absent a *Lucas* nuisance exception), it has impinged upon a fundamental incident of ownership for which compensation must be paid.

“And what is supposed to follow from that?,” a friend of the economic-viability test might respond. “No fundamental right is involved here; it’s just a matter of drawing a line to say when government has gone ‘too far.’ And when government has rendered someone’s property worthless, generally

165. See *infra* text accompanying notes 243-255.

166. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 (1992) (brackets in original) (quoting 1 EDWARD COKE, INSTITUTES ch. 1, § 1 (1st Amer. ed. 1812)).

speaking that's too far. True, *Loretto* requires compensation for puny injuries, so I take your point about the hollowness of the *Loretto* fundamental right. But not so *Lucas*. The last thing you can charge the economic-viability principle with is elevating to fundamental status a deprivation that somehow isn't worth constitutional protection."

On the contrary, it's the first charge one can make. Because of the parceling problem referred to earlier,¹⁶⁷ the *smaller* your parcel of rights, the better off you are under the "total taking" approach affirmed in *Lucas*.¹⁶⁸ If you are foolish enough to retain the air rights over your building, then the city's new height-restriction laws will not totally deprive your property of its economic viability, and you will have no compensation claim; but if you were clever enough to sell your air rights and to buy those over someone else's building, then the height restriction will effect a "total taking" of this parcel, and you will have a plausible claim under *Lucas*.

To take this regression to its conclusion, if *Loretto* deeds to *Lucas* the right to exclude cable-television equipment from her real estate, and New York then passes its mandatory-installation law, *Lucas* might well be entitled to compensation under *Lucas* even if *Loretto* loses *Loretto* (as she probably would, having sold her "most treasured"¹⁶⁹ right). Every regulation renders some right worthless,¹⁷⁰ and so the economic-viability test could indeed elevate the puniest deprivations into compensable takings.¹⁷¹

"You're making fundamentalist mountains out of speculative mole-hills," says the partisan of economic viability. "Whoever heard of deeding a right to exclude cable equipment from an apartment building? If clever speculators start parceling up property rights in unheard-of ways simply to reap rewards under the Takings Clause, a rule can be fashioned to deal with them. Protection could be limited, for example, to parcelings established by past practice and by accepted legal treatment in the relevant jurisdiction."

This was the Court's suggestion in *Lucas*: "The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land"¹⁷² This answer is quite puzzling. *Mugler's* interest in his brewery, for example, was probably an "interest in land" accorded full state-law

167. See *supra* note 93 and accompanying text.

168. As Professor Ackerman puts it, under an economic-viability principle, "less is more." ACKERMAN, *supra* note 2, at 158.

169. *Loretto*, 458 U.S. at 435.

170. See Michelman, *supra* note 65, at 1614 (observing that "any land-use regulation can be characterized as the 'total' deprivation of an aptly defined entitlement"), quoted in *Lucas*, 112 S. Ct. at 2913 (Blackmun, J., dissenting).

171. See *supra* note 135.

172. *Lucas*, 112 S. Ct. at 2894 n.7. The Court did not have to resolve the parceling problem, because the Beachfront Management Act allegedly had rendered *Lucas's* entire fee-simple interest valueless. *Id.*

“recognition and protection.” So, presumably, were Miller’s trees, Hadacheck’s brickyard, and so on. Thus *Mugler*, *Miller*, *Hadacheck*, and all the other cases that Justice Scalia strenuously sought to distinguish as involving only *partial* losses¹⁷³ would seemingly, on this very rule, have to be recognized as *total* takings.

Even apart, however, from the parceling problem, a fundamentalist definition of property is inevitable within the economic-viability test. Say that farmer *A* receives federal agricultural subsidies so long as he raises a particular crop, and that a federal statute explicitly entitles him to these payments. One day, a new law declares these subsidies terminated. Is there a taking?

“Certainly not,” the answer might be. “For one thing, the case wouldn’t meet the criterion of loss of economic viability. *A*’s land must remain of some value; terminating the subsidies has not destroyed all economically viable use of his property.”

But let’s say that it has. Perhaps *A*’s land is economically unfit for anything but raising the crop in question, and even then remains commercially viable only with the subsidies. Perhaps *A* is a renter and his rental estate cannot be sold at any price after the subsidies have been terminated.¹⁷⁴ Or perhaps the subsidies are themselves a separate “interest in land,” now wholly destroyed. In any event, if we grant that terminating the subsidies has rendered some relevant parcel of *A*’s property valueless, what prevents the state action from falling into the category of a compensable taking?

“I’ll tell you what prevents it,” says the partisan of economic viability. “The result would be absurd. If government had to compensate when it withdrew a subsidy, the subsidy wouldn’t have been withdrawn at all. That would mean government could never rescind the entitlement, once granted by statute. The Just Compensation Clause has no such ridiculous effect.”

No doubt. But this reply merely states the argument against the result that the economic-viability test seems to produce. An advocate of that test must either defend this result or explain why it does not follow from his analysis. Could it be argued that *A*’s subsidies somehow don’t count as the kind of property rights that the Compensation Clause protects?

“Yes, that’s quite right. Your example confused me by sailing off into the world of ‘governmental benefits,’” the champion of the economic-viability test might say, citing Justice Scalia’s reasoning for the Court in *Nollan v. California Coastal Commission*.¹⁷⁵ “Government handouts are always

173. See *supra* note 100.

174. Rental estates are of course compensable property under long-standing case law. See 2 NICHOLS, *supra* note 10, § 5.06, at 5-97 to -101.

175. 483 U.S. 825 (1987). The *Nollan* Court asserted that “the right to build on one’s own property . . . cannot remotely be described as a ‘governmental benefit.’” *Id.* at 834 n.2 (quoting and purportedly distinguishing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984) (upholding licensing permit that conditioned selling of pesticide on allowing government to use and disclose manufacturer’s trade secrets)).

conditioned on their possible future repeal. Such a repeal cannot constitute the taking of any genuine property rights, because the recipients had no property right in receiving the benefits in the future.”

This reply is virtually the only way to preserve the Court’s economic-impact analysis without converting the Compensation Clause into a greater engine of protection for the status quo than even Richard Epstein has dared to advocate. Thus it is not surprising that the Court should have adopted precisely this sort of reasoning in *Flemming v. Nestor*,¹⁷⁶ holding that rights to government benefits are not fully “accrued property rights” protected by ordinary takings analysis.¹⁷⁷ But even if we conclude that *Flemming* and its progeny¹⁷⁸ were correctly decided—as I do, below¹⁷⁹—the fundamentalist rationale for the result seems deficient. What can it possibly mean to say that rights to government benefits are not “accrued property”?

“Well, of course government-benefit rights are ‘accrued’ rights. That was just a little old-fashioned conceptualism on the Court’s part, perfectly forgivable in context. All the Court meant was that such rights would not be deemed ‘property’ for constitutional purposes, and that’s a perfectly coherent proposition.”

It may be coherent, but it is also indefensible. There is no doubt that benefit rights are “property” for purposes of procedural due-process protection.¹⁸⁰ And suppose a state seized the checks the federal government had sent to *A*, or passed a law directing the relevant banks to forward all such money to a state account. Putting aside any other issues raised by such state action, surely it will be conceded that the state has deprived *A* of property in every constitutional sense of that term.¹⁸¹

“Well, but you haven’t answered my argument that the recipients of statutory benefits have no right to their *continuation*.”

But why don’t they? Or rather, why aren’t *all* property rights equally held on condition of their possible future repeal?¹⁸² Is the answer supposed to lie in the right-holder’s reasonable expectations or reliance? As to expectations, the continuation of certain government “handouts”—social-security payments,

176. 363 U.S. 603 (1960).

177. *Id.* at 610-11.

178. *See, e.g.*, *Bowen v. Gilliard*, 483 U.S. 587, 604-05 (1987) (upholding change in welfare program’s eligibility requirements that reduced plaintiffs’ payments, because “incorporat[ing] a definitional element into an entitlement program” designed “to provide benefits to needy families” could not be “deemed to have taken some of those very family members’ property”).

179. *See infra* note 284 and accompanying text.

180. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970); *see also* ACKERMAN, *supra* note 2, at 165 (criticizing courts’ “fail[ure] to recognize the relevance of takings law in protecting the expectations of millions who have legal property in the Social Security and welfare programs”).

181. *See, e.g.*, *Swimming Turtle v. Board of County Comm’rs*, 441 F. Supp. 374 (N.D. Ind. 1977) (holding that state had “taken” an American Indian’s tax-exemption benefits within meaning of Compensation Clause).

182. After all, “no one has a vested right in any particular rule of the common law.” *Truax v. Corrigan*, 257 U.S. 312, 329 (1921).

for example—is a much better bet than the continuation of some of those rights that, according to Justice Scalia, “cannot remotely be described as a ‘governmental benefit.’”¹⁸³ Moreover, if reliance were the key, then a simple state proclamation that all property rights are henceforth subject to future repeal should permit government to rid itself of the vexatious Just Compensation Clause altogether.

Nor have we even mentioned the seemingly patent circularity of a court’s distinguishing among property rights on the basis of reasonable expectations about their continuation. Obviously, a judicial holding that rescission of a particular right is uncompensable would supply conclusive authority in any future case that an owner of that particular right had no legitimate expectation that the right existed at anything other than the state’s sufferance.¹⁸⁴

And what, finally, is the content of the claim that a particular property right, such as one governing land use, “cannot remotely be described as a ‘governmental benefit’”? This “not remotely” is not remotely clear. All nonconstitutional property rights are “governmental benefits” in the sense that they exist as rights only through positive legal grant and protection. At least that is so unless one believes that certain property rights somehow preexist the legal order, so that their enjoyment is not a matter of positive but of—what else?—natural law.¹⁸⁵

This is the position to which the economic-viability principle reduces. Invoking the expectations of the right-holders does not help one to exclude government benefits and parceled rights from the compensation guarantee’s coverage. The only way to reach that result is to carve the universe of property rights into those that, like Justice Scalia’s “right to build on one’s own property,”¹⁸⁶ somehow stand above or preexist the legislative order and cannot be abolished without a presumptive taking, and those that somehow are more fully the creatures of legislation, so that their abrogation does not count as a taking of property at all. This is fundamental-rights thinking all over again, here rendered particularly obtuse because an economic-impact test might have been supposed to provide the antidote to such nonsense.

* * * * *

When government prohibits some act, fundamental-rights thinking immediately concentrates on the conduct prohibited, inquiring whether it is

183. See *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834 n.2 (1987); *supra* note 175. In *Nollan* itself, the property right at issue was the right to build on beachfront property. Discontinuation of this right surely was foreseeable; the state’s decision to ban or at least strictly to condition it had been announced and enforced for years. See *Nollan*, 483 U.S. at 859-60 (Brennan, J., dissenting). And certainly Lucas, a land developer, could have been charged with foresight of South Carolina’s decision to adopt coastal-preservation laws.

184. See, e.g., Paul, *supra* note 2, at 1504-05.

185. Perhaps Justice Scalia, like Richard Epstein, believes that the Takings Clause enacts Mr. John Locke’s *Second Treatise*. See EPSTEIN, *supra* note 8, at 10-13.

186. See *supra* note 175.

“central” to or specially “treasured” by the individual affected, a part of his very definition as owner or person. This is the respect in which the harm principle, the *Loretto* physical-occupation rule, and the economic-viability test (as well as *Lochner* and even *Roe*, as the latter is usually understood) all overlap. If what has been taken away is a freedom deemed so essential according to some Justice’s conception of self- or property-ownership that it can somehow be cast as a pre-political or extra-political right—the sort of right that individuals supposedly created government to protect in the first place, as the old story goes—then the law effecting this fundamental deprivation will be struck down.

Thus has the Court sought to answer the question, “When is a taking of property not really a taking of property?” The problem is not that this question is itself incoherent: after all, the Court must adopt *some* construction of the word “taken” as it appears in the Compensation Clause, and there is no reason *a priori* why the Court is obliged to adopt the broadest possible construction. The problem has been in the Court’s attempt to answer this question through a fundamental-rights logic that has recapitulated in takings doctrine the same conceptual embarrassments that have attended fundamental liberty doctrine since *Lochner*.

The decisive break from this fundamental-rights thinking would consist of shifting the analysis away from the law’s prohibitory aspect, concentrating instead on the law’s affirmative consequences. The dispositive question in compensation doctrine should never have been, “Has the state taken something from an individual that qualifies as a fundamental deprivation?” It should have been, “Has the state taken something *for public use*?”

III. A JURISPRUDENCE OF USING

If it were possible, we would want to start at ground level, on clear terrain. But there is no clear terrain here; every inch has been occupied at some point along the way. The task in compensation law is not to build a brand new framework, but to locate a foundation already in place below the clutter. Let’s begin, therefore, below ground—with *Pennsylvania Coal Co. v. Mahon*.¹⁸⁷

A. *The Problem of Pennsylvania Coal*

In what sense exactly did the state go “too far” in *Pennsylvania Coal*? That has been the central question of takings law throughout most of this century. Not merely, “How far is too far?”, but “Too far in what direction?”

Subsequent takings case law has made Justice Holmes’s famous opinion the foundation of economic-impact analysis. In this reading, *Pennsylvania Coal*

187. 260 U.S. 393 (1922).

teaches that diminution of property value is the critical continuum—the path on which a law must not go “too far.” With certain new complications of its own, *Lucas* essentially has reaffirmed this framework as the basic structure of analysis for most regulatory-takings cases.

The difficulties with this understanding of *Pennsylvania Coal* are by now clear. First, how one measures economic impact depends entirely on how the relevant property rights are parceled up. Second, economic impact never offered a reason to depart from the harm paradigm established by *Mugler*. Once the “too far” of *Pennsylvania Coal* is understood in terms of diminution of value, there can only be an incessant tug-of-war between the harm principle and the economic-viability principle—a tug-of-war between two fundamental-rights concepts tying itself into further fundamentalist knots right up to the present day.

Holmes himself, laconic as ever, never quite said in *Pennsylvania Coal* what defined his “too far.” Perhaps he wasn’t sure. Put the problem as follows: was there in fact something exceptional about the Kohler Act—some circumstance that *did*, unlike the law’s economic impact, wrench it from the harm paradigm established by *Mugler*—so that the same Justice Holmes who saw a need for compensation in *Pennsylvania Coal* need not have seen one in *Miller*?

Surely if we look hard enough at the right to mine coal, its special nature—its fundamentality—will finally reveal itself: it must have been a historically “treasured” right; or maybe it held the key to the property’s “viability”; or perhaps it became “vested” when the mining companies reserved it in their conveyances.¹⁸⁸ Let’s try to avoid these fundamentalist traps. Instead of trying to measure the fundamentality of what the law proscribed, let’s consider instead what it prescribed.

The exceptional feature of the Kohler Act had nothing to do with what it took *from* the coal owners: nothing to do with the particular property rights that they lost, or the extent to which their property lost value. It had rather to do with the way in which the law took *over* property. In effect, the Kohler Act forced the subject coal into state service as a support foundation for other people’s buildings, city streets, and so on. It put the property to an affirmative public use.

No law the Court had previously upheld under *Mugler*’s harm principle had had a similar effect. *Mugler* lost the right to operate a brewery; indeed, he lost the brewery itself for all practical purposes. But while property was in that sense taken *from* him, it was not taken *over*; it was not affirmatively

188. The thought that the mining companies’ reservation of rights might provide the desired distinction may be superficially attractive, but must ultimately be rejected for the reasons stated *supra* note 59. Observe, however, that although this reservation of rights is *insufficient* to explain the result in *Pennsylvania Coal*, it may yet be *necessary*: without it, the Court might not have been willing to treat the Kohler Act as depriving the mining companies of any property rights at all.

conscripted into service for a state-dictated use. If there is a taking *for public use* only when government exploits some productive attribute or capacity of private property for state-mandated service, then compensation was not due in *Mugler* because—while there was certainly a taking—there was no using. Nor was compensation due for Reinman’s livery stable¹⁸⁹ or for Hadacheck’s brick factory,¹⁹⁰ each of which had been shut down but not impressed into any state service. Nor was it due for Miller’s cedar trees,¹⁹¹ felled but not conscripted into use.

In general, regulations directed at some perceived harm do not in this sense *use* the property they regulate; they merely proscribe a use to the owner or restrict him in exercising a use of his own choosing. That is the true appeal of the harm principle in compensation law. When, however, due to the extent of prohibitory regulation or the nature of the thing regulated, the law in effect appropriates property for a state-ordained use, proscription has crossed the line into conscription.

The conscriptive effect of state regulation may certainly be a matter of degree, subject to difficult borderline questions. But it may also be quite clear, as it was in *Pennsylvania Coal*: there the owners were left (as a practical matter) with *nothing* to do with their property *except* to suffer its use as a support foundation for others’ structures. The Kohler Act’s prohibition of mining was in effect analogous—indeed almost functionally equivalent—to a formal seizure of the coal for state-ordered use.

This was the sense in which the Kohler Act went too far; this was why the Act went “beyond any of the cases decided by this Court.”¹⁹² And this is why *Pennsylvania Coal*, although it appears at first glance to raise facts fitting squarely within the nuisance framework established by *Mugler*, in reality presented the Court with a hard and paradigm-shifting case. In effect, the regulated property had been appropriated for a particular, state-dictated *use*.

Holmes himself observed this: the Kohler Act, he stated, “had very nearly the same effect” on the support coal “as *appropriating*” it.¹⁹³ To be sure, he added, “or *destroying*” it.¹⁹⁴ The disjunction is critical: the Kohler Act can be analyzed either as a destruction of property *or* as an appropriation of property, and the choice between the two marks the difference between a jurisprudence of economic impact in compensation law and a jurisprudence of usings. With respect to the coal’s *value* to its owner, the Kohler Act effectively destroyed; with respect to the coal’s *use*, the law effectively appropriated. This

189. See *Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (upholding ordinance that barred operation of livery stable in residential area).

190. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

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

192. *Pennsylvania Coal*, 260 U.S. at 416.

193. *Id.* at 414 (emphasis added).

194. *Id.* (emphasis added).

disjunction is pivotal in explaining the problem with which we began: how to make sense of *Miller v. Schoene* in light of *Pennsylvania Coal*. Holmes proved willing to join an opinion countenancing the “destruction” of property when state interests justified it;¹⁹⁵ the line actually drawn by *Pennsylvania Coal* is at the point when the state has in effect “*appropriat[ed]*” property for use.

But suppose that government destroys property without any justification whatsoever. On our reading of *Pennsylvania Coal*, does it follow that a state may arbitrarily deprive a person of his home or car with constitutional impunity, so long as the property is not put to any use?

No: the Constitution offers a number of protections against the arbitrary destruction or taking *away* of property. The Due Process Clauses expressly address state action that “deprive[s]” persons of their property. The Fourth Amendment prohibits “unreasonable . . . seizures” of persons’ homes, effects, and “things.” And the Equal Protection Clause demands that a law depriving some (but not all) persons of property interests be at least rationally related to a legitimate state interest. But if *all* the state does is to take away property rights—if there has been no taking *for public use*—what, after all, does the Compensation Clause have to do with it?

B. *The Meaning of Use*

An objection. “After all you have said about fundamentalism in takings doctrine, you cannot possibly mean to advance an alternative so obviously fraught with the same flaws. Take *Miller*, for example. You say there is no using in the case. But nothing could be easier than to recharacterize *Miller* in your terminology of conscription and use. By felling *Miller*’s trees, the state *used* them to preserve the health of nearby apple orchards, just as a state may conscript, use, and permit soldiers to be killed to preserve national security. The only way you can deny this is to start in on the same fundamentalist manipulations you criticized so severely in takings analysis. In short, you’ll have to say that this use of *Miller*’s trees is not ‘really’ a using in some fundamental sense.”

This is an important objection. If the concept of use were hopelessly manipulable, if it extended to the very cases we have sought to distinguish, or if its application demanded the same fundamentalism we have been criticizing all along, then it would hardly be very useful. It is critical, therefore, to say precisely how we are construing the word “use.”¹⁹⁶

To reiterate: a taking for public use, as we are construing the phrase, can occur only when some productive attribute or capacity of private property is

195. *Miller*, 276 U.S. at 280.

196. It is also critical to say how a jurisprudence of usings would construe the word “taken,” for there is no a priori reason compelling the conclusion that every time the state uses property, it also takes. This subject is addressed in detail in Part V.

exploited for state-dictated service. If your car is impounded (because, say, the police suspect it is a stolen vehicle), your car is unquestionably taken from you. But so long as it is merely impounded—so long, that is, as the state does not start employing it for transportation (or other) purposes—it is not *used* in our construction. If the car merely sits in a government garage, none of its capacities or attributes is exploited in any way. And the same goes for Miller's cedar trees, so long as all the state has done is ordered that they be cut down.

"I don't think you've solved your problem at all. If trees carry a blight, or if a car has been stolen, these predicates are 'attributes' of the property. And by felling the trees or impounding the car, the state can equally be said to have 'exploited' these 'attributes' for a government-dictated purpose. You've simply replaced one set of manipulable words with another."

Words can always be redefined. But surely everyone can grasp and apply the difference between merely depriving someone of something and putting that thing to use by exploiting some productive capacity it possesses. We are not addressing here why this meaning of "use," which excludes mere deprivations, should be the construction put upon the constitutional language; we shall come to that shortly. The question at this point is solely whether there exists a concept of use that (1) requires a utilization of property going beyond mere deprivation or destruction and (2) is coherent, intelligible, and free from reliance on any mysterious fundamental essences. And the answer to that question, it seems to me, is yes.

"Well, I'm afraid I really don't see the distinction. Impounding a stolen car uses its attribute as stolen to deter others from stealing cars. Destroyed trees can't spread blight. As far as I can tell, your distinction is simply between a sort of active and passive use—between action and inaction, I suppose—and that distinction strikes me as defensible only on some fundamentalist grounds. You're simply insisting that a passive use isn't 'really' a use."

No active/passive or action/inaction distinction is in play here. The Kohler Act forced the Pennsylvania Coal Company to do nothing with its coal. Yet under our construction, the Act plainly took property for use. Property was not merely taken but used in the sense that the state exploited the coal's capacity to sustain weight for government-directed service. In the same sense, Miller's trees were merely felled (and the stolen car is merely impounded), not used. If the distinction still seems elusive, we can specify it even further.

Things are capable of producing effects in the world. Some of these effects are valuable to human beings. Let us define a use-value as any capacity of a thing to produce any effect in the world that some people might pay to have. Now, things can also produce effects in the world that humans will pay *to avoid*. That sort of capacity is not a use-value. We need another term to describe it; we might call it a disuse-value. We are construing "for public use" to require the state's exploitation of a use-value. If the state merely regulates a disuse-value, there is no using.

“Oh, please: this is just the old harm/benefit distinction dressed up in new clothing. You can’t mean to re-enter that morass.”

The line drawn is not the harm/benefit distinction whose infirmities were detailed above. A thing’s use-value may very well be its capacity to prevent harms. For example, the exploited use-value of the coal in *Pennsylvania Coal* was its capacity to sustain weight and thereby prevent subsidence damage. The government may *use* things (just as it may *take* them) to prevent harm; that is why the traditional harm/benefit distinction fails to provide a coherent logic for compensation law, and also why the traditional harm logic has nothing to do with a jurisprudence of usings.

“But subsidence damage is (in your own words) an effect in the world that people would pay to *avoid*. Quite plainly, then, the Kohler Act was regulating what you called a ‘disuse-value.’”

Quite plainly it was; but no one ever said that prohibiting disuses and exploiting use-values were mutually exclusive. (Saying so *would* be to fall into the harm/benefit trap once again.) The Kohler Act not only regulated a disuse-value, *but also* exploited a use-value—the capacity of the coal to sustain the weight of surface structures, an effect people would pay to obtain. By contrast, a law limiting toxic emissions from a factory merely regulates disuse. It eliminates an effect in the world that people would pay to avoid, but does not exploit any of the property’s numerous capacities to produce effects in the world that people would affirmatively pay to have.

“Doesn’t that formulation depend entirely on some baseline assumption that the property is not already (or ought not to be) producing harmful effects? If the factory is already polluting, then the factory’s production of fewer pollutants is an effect that people *would* pay to obtain.”

The only baseline at issue here is the state of affairs in the world with or without the property in question being in the world. Producing pollution—in whatever quantity—is the effect of the property under consideration, and whether we imagine the factory idle or spewing out black smoke, this pollution is an effect that people would pay to avoid, not an effect anyone would pay to have. (Or if someone would pay to have it, then the pollution has acquired a use-value.) Nothing in this argument turns on any assumptions about the “natural” condition of the property or the duties of act or omission the owner might owe society with respect to his property.

If uncertainty remains, here is a test for determining whether the state is merely regulating a disuse or is also exploiting a use-value. If the state’s interest in taking or regulating something would be equally well served by *destroying the thing altogether* (putting aside any independent considerations that might make such destruction undesirable to the state for other reasons), no use-value of the thing is being exploited. Would Pennsylvania’s purpose of supporting surface structures have been served as well by destroying the coal as it was by leaving the coal in place? Obviously not. The state wanted the

coal to sustain weight and sought to use it for that service. Would the purpose of eliminating pollution, deterring car theft, or preserving the health of apple orchards have been equally well served by destroying the property in question, rather than regulating its emissions, impounding it, or felling it? It would. When that test is satisfied, property is generally not being used in our construction of the word.¹⁹⁷

“All right, I grant that your definition of ‘use’ is coherent. But it’s still fundamentalist. I could just as easily say that the property in every one of those cases *was* being used. The pollution law uses the factory to achieve cleaner air, the impoundment law uses the stolen car to deter theft, and the tree-felling program uses the cedars to save the apples. You’re merely saying that these usings don’t ‘count’—that they’re not ‘really’ usings in some fundamental sense.”

This you’re-a-fundamentalist-too objection is sophomoric. It misunderstands everything said earlier about the flaws of fundamental-rights logic in a vain effort at internal critique. Of course the construction of “use” just set forth will exclude some states of affairs that could (within the confines of English) be described as usings. Does this demonstrate that our construction has fallen into the traps of fundamental-rights logic? Not at all.

Every act of construing words in legal texts involves selecting among the many possible constructions that may be put upon the words being construed. Hence every time a legal text is interpreted, someone could respond, “But I might just as easily say that the word ‘x’ means B rather than A, and thus all you are saying is that B simply doesn’t count as an ‘x’ in some fundamental sense.” Judges interpreting the Compensation Clause must adopt *some* construction of “use,” just as they must adopt some construction of “taken.” Accordingly, unless the construction chosen is “every state of affairs to which the word ‘use’ in any of its dozens of denotations and connotations in the English language could be applied” (which would be a very peculiar way to read a legal text, much less a constitutional one), some states of affairs that could be described as “usings” will not count as usings for constitutional purposes. If this circumstance were sufficient to charge a doctrine with fundamentalism, then fundamentalism would be present in every exercise of constitutional interpretation—indeed, in every exercise of *legal* interpretation.

What we denounced earlier as fundamentalism was not the mere fact that the Court had adopted a narrow construction of the word “taken,” but

197. Some uses of property destroy the property as they use it. Burning wood for heat is an example. Thus if Virginia had felled Miller’s cedar trees in order to use them as firewood, the state would of course have used the property in our sense (a use-value would have been exploited) even though it might be said that the state’s interest in producing heat *was* served by destroying the property in question. It should be understood, therefore, that the test offered in the text is not satisfied when some particular means of destroying a given type of property happens to exploit one of its use-values. To be more precise, the test should be: would the state’s interest in taking or regulating the property have been equally well served by the property’s *never having been in the world*?

something much more specific. As we saw, the Court since *Mugler* has sought to define takings by determining whether the conduct proscribed by the law at issue involved a fundamental right of property ownership—or propertyhood, as I termed it above. This deprivation-based, fundamental-rights logic suffers from a number of glaring inadequacies. It is a logic in constant embarrassment, grasping at essences whose essentiality remains entirely mysterious. It cannot successfully identify the exceptional feature of the rare cases in which laws have been struck down under the Compensation Clause, because what has made these cases exceptional is not the loss or deprivation inflicted on the owner. Most important, it is a logic that has no place in constitutional interpretation: the supposed fundamentality of its fundamental rights lies in their being imagined as somehow pre-political (not “governmental benefits”), when in fact there is no such thing as a pre-political constitutional right.

These are the flaws of fundamental-rights thinking, and I say that none of them would attend the jurisprudence of usings advocated here. Or if they would, their presence is certainly not demonstrated by the fact that a jurisprudence of usings requires judges to adopt one construction of “use” rather than another. Judges must always adopt one construction of legal language rather than another.

C. *Usings and Constitutional Interpretation*

But what argues in favor of the particular construction advocated here, other than its potential to resolve the riddle of *Pennsylvania Coal*? This question has two parts. First, why read a usings requirement into the Compensation Clause at all? And second, even granting such a requirement, why not construe “use” more broadly? If (for example) the police mistakenly believe your car to be stolen and impound it, why shouldn’t we say that it *is* being “used” to deter auto theft and hence that you *are* entitled to compensation for its period of detention? Wouldn’t that be an equitable result? Who cares whether the state’s interest in deterring auto theft would be equally well served by destroying stolen cars, rather than merely impounding them? Why, in short, adopt a construction of “use” specifically tailored to differentiate compensable usings from mere deprivations?

The proper methodology of constitutional interpretation is so deeply contested today that it is difficult even to begin answering questions of first principle with respect to a guarantee set forth in the Bill of Rights. Nevertheless, I will try to show that compelling reasons urge a doctrine of usings in compensation law. These reasons are to be found at the levels of constitutional text, history, precedent, and (ultimately) theory.

1. *Text and History*

There is, first of all, the small matter of the constitutional text. The Constitution provides that private property shall not “be taken for public use without just compensation,” and so a jurisprudence of usings would read it. “The phrase does not read ‘shall not be taken *except* for public use *and* not without just compensation.’”¹⁹⁸ Recall, moreover, what immediately precedes the Compensation Clause: a provision expressly dealing with *deprivations* of property—the Due Process Clause—demanding certain protections in the event that property is taken *away*. The Compensation Clause then follows, making special provision for a specific class of deprivations: cases in which private property is not merely taken, but taken *for public use*.

This is not to say that the text’s “plain meaning” requires a usings construction. Plain-meaning approaches to legal interpretation suppose that norms can be applied by consulting a dictionary, and no dictionary will supply answers to a judge applying the Compensation Clause. Even the current construction of this clause is not ruled out by the “plain meaning” of the words. If, instead of the Due Process Clause, the immediately preceding text had read, “Private property shall in no event be taken from one private person to be given to another,” it would be perfectly possible to read “nor shall private property be taken for public use without just compensation” as takings doctrine reads it. Yet even then “for public use” would remain at best an echo without significance of its own, and even then the distinctiveness of the little word “use” would be ignored.

The point is not that no reader of English could construe the Fifth Amendment as takings doctrine construes it, nor that a more natural reading of the Constitution’s grammar is necessarily dispositive. But surely there is value in reading our Constitution with, not against, its textual grain. Surely there is value in reading it so that phrases do not become mere surplusage—as “for public use” most certainly has become in current doctrine.

198. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 591 (1972). The author adds, “Nobody seems to have worried about that, . . . strangely.” *Id.* (He does not, however, propose that the clause be read otherwise. *See id.*) In fact, the text’s resistance to the conventional reading has long been observed. In 1888, in the preface to the first edition of his influential treatise on eminent domain, John Lewis felt obliged to express the following “doubt”:

The chapter on the meaning of the words “public use,” is written upon the assumption, which accords with all the authorities, that the words import a limitation upon the power of the legislature. . . . One doubt concerning the matter, however, remains, and that is, whether the words in question were originally intended to operate as a limitation at all. The language of the provision does not indicate it. . . . If the intent had been to make the words, *public use*, a limitation, the natural form of expression would have been: “Private property shall not be taken *except* for public use, nor without just compensation.” It is certainly questionable whether anything more was intended by the provision in question than as though it read, “Private property shall not be taken *under the power of eminent domain* without just compensation.”

LEWIS, *supra* note 10, at ii.

“But we all know what the framers were trying to get at through the words ‘for public use.’ Whatever you may say about the grammatical niceties, everyone knows that those words referred to the prohibition against taking from *A* to give to *B*.”

On the contrary, the limited textual sources from which the Compensation Clause was drawn indicate that “for public use” referred not (through some peculiar grammatical echo) to the category of takings that would be unconstitutional *per se*, but rather, precisely as the actual grammar of the clause suggests, to a specific category of constitutional takings—the category for which compensation would be required. Thus one of the original exemplars of the Compensation Clause, a provision in the Massachusetts Constitution of 1780, reads:

[N]o part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.¹⁹⁹

This language expressly draws the distinction between property merely “taken from” an owner and property “applied to public uses.” Both species of deprivation could constitutionally occur; both required (in the absence of the owner’s consent) some due process of law; but an owner whose property was merely “taken from” him did not have to be compensated. Payment was due only when property was “appropriated for public uses.”

Are we saying that those who framed and ratified the Constitution conceived of no prohibition against taking from *A* to give to *B*? Certainly not. But the founding generation believed that this prohibition obtained entirely apart from the Compensation Clause; it went, so to speak, without saying.²⁰⁰

199. MASS. CONST. of 1780, art. X, reprinted in 5 WILLIAM F. SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 92, 94 (1975). One commentator suggests that this provision was the first in which the phrase “public use” appeared in a constitutional compensation clause. See Stoebuck, *supra* note 198, at 591-93. It is worth noting, however, that Massachusetts’s colonial charter contained the following provision:

No mans Cattel or goods of what kinde soever shall be pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford. And if his Cattle or goods shall perish or suffer damage in such service, the owner shall be sufficiently recompenced.

MASS. BODY OF LIBERTIES § 8 (1641), reprinted in SOURCES OF OUR LIBERTIES 148, 149 (Richard L. Perry ed., 1959). The link between “public use” and situations in which the state has “pressed or taken” property into “service” emerges quite clearly in this early formulation.

200. In American constitutional jurisprudence of the late eighteenth century (and long afterward), takings from *A* to give to *B* were understood to be invalid without any reference to what is now called the “Public Use Clause.” One of the very first federal cases ever to articulate the principles of judicial review did so in the course of holding a private-transfer taking unconstitutional—*under a state constitution that had no compensation clause*. *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 312 (C.C.D. Pa. 1795);

The Compensation Clause provides nothing about what kinds of takings are unconstitutional *per se*; it dictates only what kinds of takings must be compensated.

If we were to judge by what the founding generation had in mind, the Compensation Clause would be concerned principally with two contexts, in both of which the distinctive feature of a government using is central. First, the founding generation almost certainly expected the clause to cover the exercise of the eminent-domain power. Without exception, from the time it was enacted until today, the Compensation Clause has been understood to require compensation in cases of eminent domain.²⁰¹ Takings by eminent domain almost invariably involve a state-planned *use* of the taken property in precisely the sense that we defined above; the property is not merely taken away, but used to lay a highway, build a dam, operate a post office, and so on.²⁰²

It is from this historically established paradigm case that a usings analysis derives the principle by which other claims for compensation are to be judged. One of the best ways to express the test that courts would have to apply were they to adopt the usings principle in compensation law would be: does the challenged state action in effect appropriate property for a state-dictated use? Is the state action functionally analogous in its affirmative effects to an exercise of eminent domain?

see also *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.) (stating that “a law that takes *property* from A. and gives it to B.” would be “contrary to the *great first principles* of the *social compact*” and “cannot be considered a *rightful exercise of legislative authority*”). Accordingly, nineteenth-century courts frequently observed that the source of the prohibition against private-transfer takings was *not* “the Public Use Clause.” *See, e.g., Baltimore & O.R.R. v. Van Ness*, 2 F. Cas. 574, 576 (C.C.D.C. 1835) (No. 830) (“The fifth amendment of the constitution of the United States says, that private property shall not be taken for public use without just compensation. But the objection [in this case] is that private property [has been] taken for private use, with just compensation; which is *not within the prohibition of the constitution*; although it would be an arbitrary proceeding.”) (emphasis added); *Concord R.R. v. Greely*, 17 N.H. 47, 55-56 (1845) (“[W]e have no doubt that a law providing merely that the property of A should be taken from and given to B [sic], either with or without consideration, would be repugnant to the constitution. Not indeed to the letter of any particular clause contained in it, but to its spirit and design”); *Coster v. Tide Water Co.*, 18 N.J. Eq. 54, 63 (N.J. Ch.), *aff’d*, 18 N.J. Eq. 518 (1866) (“There is no prohibition in the constitution of this state, or in any of the state constitutions, that I know of, against taking private property for private use. But the power is no where granted to the legislature.”). And several decades after enactment of the Fourteenth Amendment, while the Supreme Court continued to hold that the Compensation Clause had no application against state governments, the Court yet ruled that state-law private-transfer takings were prohibited by *due process*. *See, e.g., Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (1896).

201. *See supra* Part I(A).

202. Indeed, this was the very feature of eminent domain traditionally invoked to distinguish it from other governmental powers. Comparing taxation and eminent domain, one nineteenth-century treatise states: “By each power a forced contribution is exacted for the public good, but taxation exacts the money which is supposed to represent the contributor’s share of the public expense, while the eminent domain exacts *specific property for specific uses*.” CARMAN F. RANDOLPH, *THE LAW OF EMINENT DOMAIN IN THE UNITED STATES* 22-23 (1894) (emphasis added). Another, distinguishing the “police power” from eminent domain, asserts: “Under the one, the public welfare is promoted by regulating and restricting the use and enjoyment of property by the owner; under the other, the public welfare is promoted by taking the property from the owner and *appropriating it to some particular use*.” LEWIS, *supra* note 10, § 6, at 15-16 (emphasis added).

Now, I am far from being an intentionalist in constitutional interpretation, and paradigm holdings, even those established soon after passage of the constitutional provision at issue, must sometimes be abandoned.²⁰³ But in compensation law there is no question of abandoning the established holding; no one seriously advocates abolishing compensation in eminent-domain cases. And so long as there remains an accepted, historically settled paradigm case for a constitutional right, articulating a principle that captures it and reasoning from this principle will remain a powerful interpretive methodology.

This link to eminent domain supplies the usings principle with an analytical strength altogether lacking in the other rationales and tests that have dominated takings doctrine. The economic-viability test *can't explain the paradigm case*: many exercises of eminent domain (for an easement, say) cause only partial diminution of property value. Nor can the *Loretto* rule: again, an easement taken by eminent domain may not impose any permanent physical occupation upon the subject property. Even the harm principle, as we have seen, would undermine compensation for certain exercises of eminent domain, which may very well be designed to prevent harm. The usings principle, however, *can* explain the paradigm case; it is derived from that case. A jurisprudence of usings would tie the eminent-domain cases together with the regulatory and physical-occupation cases under a single unifying principle.

This principle also would draw strength from the second category of governmental conduct with which the founding generation was concerned in enacting the Compensation Clause: the appropriation of private property to supply the army during the Revolutionary War. The resentment against such conduct was articulated by John Jay in 1778:

I . . . take the Liberty of calling the Attention of my Countrymen to a Subject, which however important seems to have passed without due Notice; I mean *the Practice of impressing Horses, Teams, and Carriages by the military . . . without any Authority from the Law of the Land.*

. . . .
 . . . The Time may come when Law and Justice will again pervade the State, and many who now severely feel this kind of oppression, may then bring Actions and recover Damages. This is true Doctrine, however questionable the Policy of declaring it at this Time may be.²⁰⁴

Such feelings were sufficiently prevalent that St. George Tucker could write in 1803 that the Compensation Clause “was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other

203. A good example would be the holding in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

204. John Jay, *A Hint to the Legislature of the State of New York* (1778), reprinted in 5 THE FOUNDERS' CONSTITUTION 312, 312-13 (Philip B. Kurland & Ralph Lerner eds., 1987).

public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever.”²⁰⁵ In this paradigm case too—indeed, even more vividly here than in the case of traditional eminent domain—the defining feature is the *conscriptio* or “*impressment*” of property into governmental service. Thus the relevant constitutional history stands behind a construction of the Fifth Amendment according to which “for public use” signifies exactly what the grammar of the clause suggests.

Perhaps it will be said that the foregoing is only half an answer to the questions at hand. “All this might be sufficient to justify a usings analysis of some sort, but you still haven’t explained why a court’s construction of use should be strained in such a way that the destruction of Miller’s cedar trees or the impoundment of the suspected car is ruled out. Couldn’t we also say, with equal reliance on text and history, that property was ‘used’ in both those cases?”

The answer is no. First of all, it is not true that the proposed construction of use is “strained.” On the contrary, the definition elaborated earlier respects the word’s common usage, which generally differentiates using from merely taking away—as when we say that one is not allowed to *use* a word when defining it. Having temporarily impounded the word “use” in order to define it, what would you say if someone responded, “Ah, but you *are* using the word when defining it; by taking it away, you are using it to help clarify its definition”?

Pointing to a certain vehicle, we ask a state official, “What do you use that for?” He says, “That’s a patrol car: policemen drive in it.” Pointing to another vehicle, we ask the same question, and the answer is, “That’s a postal truck: it is used to deliver mail.” Finally, pointing to the impounded car, we repeat our question and receive this reply: “That car? That damned car is useless to us. We’ve taken it because we think it was stolen, but we’re not allowed to use it at all. If we do, we’ll have to compensate the owner.” Again, I do not claim to have isolated the only possible usage of “use.” The point is simply that, if meaning is to be derived from use, our construction is a perfectly natural one.²⁰⁶

205. 1 HENRY ST. GEORGE TUCKER, *BLACKSTONE’S COMMENTARIES* app. at 305-06 (Philadelphia, Birch & Small 1803). In this light, the Compensation Clause is also a descendant of Magna Carta, which provided that the King could not “take grain or other chattels of any one without immediate payment therefor in money.” *MAGNA CARTA* ch. 28, *reprinted in* 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 8, 11 (1971).

206. Natural enough, at least, to appear in one court’s opinion denying compensation to a car owner. *See Finks v. United States*, 395 F.2d 999, 1004 (Ct. Cl.) (seven-judge panel), *cert. denied*, 393 U.S. 960 (1968) (“The vehicles were impounded and plaintiffs were deprived of their possession. . . . [But] [t]here was no indication that the government would make any use of the vehicles, public or otherwise, at any time. . . . No ‘servitude’ of any kind was acquired.”). I am not suggesting, however, that ordinary-language analysis can ever be ultimately dispositive on a question of constitutional interpretation. The ordinary usage of “speech,” for example, does not include writing, but this fact ought to persuade no one that “the freedom of speech” does not protect written language.

More important, “for public use” once again would become utterly superfluous if, having accepted a usings requirement in compensation law, courts then adopted a definition of “use” so open-ended that it extended to mere deprivations—mere *takings*—of property. If by “use” courts were to understand any deprivation of property interests assisting in the furtherance of some state objective, then usings doctrine would have collapsed back into takings doctrine. Indeed, compensation would then be due in virtually every case of property regulation.

If “for public use” extended to mere takings away, it would mean nothing at all. Such a construction would obliterate the distinction between property “taken from” an owner and property “appropriated for public uses,” a distinction carefully drawn not only in the Massachusetts Constitution of 1780, but also in the Fifth Amendment’s own sequence from persons “deprived of . . . property” to property “taken for public use.” A construction of “use” that did not look to something beyond mere deprivation—to the conscription or impressment of property into state-directed service—would respect neither the text nor the history of the Compensation Clause.

2. *Precedent*

Grant, then, that as a matter of text and history, the compensation guarantee might have been sensibly read as a usings clause. But if in fact the Compensation Clause never has been so read, what difference does all this theorizing make? Apart from *Pennsylvania Coal*, will the rest of takings case law have to be ignored or distorted to make the principle fit the doctrine?

On the contrary: almost all the compensation claims ever upheld by the Supreme Court involved unquestionable instances of usings. To be sure, the primary reason is that most of these cases involved formal exercises of the eminent-domain power, and it probably will be objected that the presence of a using in such cases is trivial. It is trivial, however, only in the sense of being obvious. As we have seen, the ability of the usings principle to explain compensation in cases of eminent domain is a source of its analytical power.

But the applicability of the usings principle to compensation law is not limited to *Pennsylvania Coal* on the one hand and the set of eminent-domain decisions on the other. In case after case involving what has always been called the *takings* question—the question, that is, of whether state action other than a formal exercise of eminent domain must be accompanied by compensation—the Court has answered in the language of *usings*. Indeed, the strongest recommendation of a usings principle in compensation law may be that such a principle alone renders perspicuous the last century of compensation law, throughout which the Court repeatedly has based its decisions on the presence or absence of an appropriation of property, in substance if not in form, for a state-mandated use.

Let's begin with *Pumpelly* and *Mugler*. From our perspective, what made the inundation of *Pumpelly's* land compensable was not the violation of his right to exclude, nor the loss of value he suffered, but the fact that the state had performed the functional equivalent of an eminent-domain appropriation: his land had in effect been condemned and taken over for use as a floodplain. Did the Court ever offer this rationale for its *Pumpelly* holding in so many words? Yes: in *Mugler*. There, distinguishing *Pumpelly*, Justice Harlan said it in terms that could not have been clearer: "[*Pumpelly's*] property was, in effect, required to be devoted to the use of the public, and, consequently, he was entitled to compensation."²⁰⁷

Another early takings case in which a using was the decisive factor is *Portsmouth Harbor Land & Hotel Co. v. United States*.²⁰⁸ In *Portsmouth*, the plaintiff owned an oceanfront resort adjacent to land that the federal army appropriated to mount artillery guns, which were periodically test-fired. In an earlier case, the same plaintiff had alleged that the very presence of the army facility was destroying his once-lucrative business, but the Court denied compensation on the ground that the plaintiff's property had not been "actually appropriated."²⁰⁹ In *Portsmouth*, however, the plaintiff alleged that the army had fired artillery onto his property. Relying on this fact, the Court held that a compensation claim had been stated, because "a servitude has been imposed" on the plaintiff's land.²¹⁰ "Servitude" is of course a term of art in property law, but its legal and ordinary meaning overlap on at least one point: property is burdened with a servitude when a party other than its owner is allowed to make use of it—for example, as a firing range.

The usings principle was also expressed in *United States v. Causby*,²¹¹ in which a farmer had lost his livestock business as a result of aircraft flying low over his land in order to alight at a neighboring airport. The government contended that no compensation was due because *Causby's* land retained some value: his residential use, for example, was impaired but not totally destroyed. The Court disagreed. It expressly held that when aircraft fly too close to property, "the land is appropriated as directly and completely as if it were used for the runways themselves."²¹² The gravamen of *Causby's* compensation claim, the Court stated, was not that the government had "merely destroyed" some of the value of *Causby's* property, but that "[i]t is using a part of it for the flight of its planes."²¹³ "[T]he flight of airplanes, which

207. *Mugler v. Kansas*, 123 U.S. 623, 668 (1887) (emphasis added); see also *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924) (stating that under *Pumpelly* floodings would be compensated only when "amounting to an appropriation").

208. 260 U.S. 327 (1922).

209. *Peabody v. United States*, 231 U.S. 530, 540 (1913).

210. *Portsmouth*, 260 U.S. at 330.

211. 328 U.S. 256 (1946).

212. *Id.* at 262 (emphasis added).

213. *Id.* at 262 n.7 (emphasis added).

skim the surface but do not touch it, is as much *an appropriation of the use of the land* as a more conventional entry upon it."²¹⁴

The Court drew the identical distinction between destruction and use in *United States v. Caltex (Philippines), Inc.*,²¹⁵ a case in which an owner sought compensation for property deliberately destroyed by soldiers to prevent its falling into the hands of the opposing forces. Denying compensation, the Court was obliged to distinguish two earlier cases where wartime seizures of property had been held to be compensable takings. The crucial difference, the Court held, lay in the difference between mere destruction and appropriation for use:

Both [the earlier] cases involved equipment which had been *impressed by the Army for subsequent use* by the Army. In neither was the Army's purpose limited, as it was in this case, to the sole objective of destroying property of strategic value to prevent the enemy from using it to wage war the more successfully.²¹⁶

The claimant's property "was *destroyed, not appropriated for subsequent use.*"²¹⁷

Another illustration of the application of the usings principle can be found by comparing two cases sometimes said to be inconsistent, *United States v. Pewee Coal Co.*²¹⁸ and *United States v. Central Eureka Mining Co.*²¹⁹ In *Pewee*, the federal government, responding to threats of a wartime strike, issued an order declaring that the claimant's mines temporarily had become United States property, requiring that the claimant's mine officials act as government agents, and notifying the owner that the funds and assets pertaining to the mine temporarily belonged to the government.²²⁰ In these circumstances, the government having taken over possession and operation of the mine, the Court held with little discussion that a "taking" had occurred.²²¹

In *Eureka*, the claimant's gold mines were closed down, again by a wartime governmental order, this time to free up scarce labor.²²² No "taking" was found.²²³ Justice Harlan strenuously dissented, criticizing the majority

214. *Id.* at 264 (emphasis added).

215. 344 U.S. 149 (1952).

216. *Id.* at 153 (emphasis added).

217. *Id.* at 155 (emphasis added).

218. 341 U.S. 114 (1951).

219. 357 U.S. 155 (1958).

220. See *Pewee Coal Co. v. United States*, 88 F. Supp. 426, 427-29 (Ct. Cl. 1950). The Supreme Court adopted the findings of the lower tribunal. *Pewee*, 341 U.S. at 115.

221. *Pewee*, 341 U.S. at 115-17.

222. *Eureka*, 357 U.S. at 156-61.

223. *Id.* at 165-66.

because of the similarities between *Eureka* and *Pewee*.²²⁴ The *Eureka* owners “were totally deprived of the beneficial use of their property,” Harlan objected; “as a practical matter the Order led to consequences no different from those that would have followed the temporary acquisition of physical possession.”²²⁵

But if the consequences of the two orders were similar from the point of view of the *deprivations* that the two mining companies suffered, they were quite different from another point of view. Distinguishing *Pewee*, the *Eureka* Court observed that in the later case “the Government did not occupy, use, or in any manner take physical possession of the gold mines.”²²⁶ *Pewee* involved a taking of property rights equivalent to a temporary exercise of eminent domain; it was a taking *over*. By contrast, the taking of property rights in *Eureka*, pace Justice Harlan, was comparable to the shutting down of a polluting factory; it was merely a taking *from*. The *Eureka* mines were not taken *for public use*; the *Pewee* mines were.

Consider next Justice Brennan’s influential dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*.²²⁷ There, San Diego had passed a zoning ordinance that allegedly made it economically impossible for the plaintiff’s property to be developed at all.²²⁸ The Court declined to reach the merits of the takings claim, finding the case unripe for review.²²⁹ Justice Brennan, however, writing for four Justices,²³⁰ did reach the merits and stated that a taking should have been found. His opinion is a model for our purposes. While it propounds in emphatic terms the *deprivation*-based reasoning that has long confused takings analysis, it also states, just below the surface, the *usings* principle that might clear things up.

Attempting to synthesize the field of eminent domain with the Court’s muddled jurisprudence of regulatory takings, the same Justice Brennan who in 1978 had repudiated the attempt to lay down any “set formula” for compensation law²³¹ now wrote that the “essential similarity of regulatory

224. *Id.* at 181-82 (Harlan, J., dissenting). Commentators have also suggested that *Eureka* is inconsistent with *Pewee* or other decisions. See ACKERMAN, *supra* note 2, at 257 n.71; Dunham, *supra* note 2, at 80 (arguing that *Eureka* cannot “be reconciled with *United States v. Causby*”); Rose, *supra* note 2, at 567 n.35 (observing inconsistency between *Eureka* and cases holding that owners may not be deprived of all value of their property).

225. 357 U.S. at 181 (Harlan, J., dissenting).

226. *Id.* at 165-66 (emphasis added).

227. 450 U.S. 621 (1981). Numerous subsequent decisions, particularly in state courts, have relied on Justice Brennan’s opinion. See, e.g., *Bakken v. City of Council Bluffs*, 470 N.W.2d 34, 36 (Iowa 1991); *Loretto v. Teleprompter Manhattan CATV Corp.*, 446 N.E.2d 428, 433 n.3 (N.Y. 1983); see also, e.g., *McDougal v. County of Imperial*, 942 F.2d 668, 678 n.8 (9th Cir. 1991).

228. *San Diego Gas & Electric*, 450 U.S. at 626.

229. *Id.* at 632-33.

230. Justice Brennan’s opinion was joined by Justices Stewart, Marshall, and Powell. *Id.* at 636. In addition, Chief Justice Rehnquist, concurring separately on the ripeness issue, indicated agreement with Justice Brennan’s views on the merits. See *id.* at 633-34 (Rehnquist, J., concurring).

231. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. at 104, 124 (1978) (quoting *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962)).

'takings' and other 'takings'" is that "the effect in both cases is to *deprive [the owners] of all beneficial use*" of their property.²³² This proposition is certainly false: taking an easement by eminent domain need not deprive an owner of all beneficial use of his property, yet always has required compensation. Similarly, the overflying aircraft in *Causby* did not deprive the owner of all beneficial use, yet there too the Court ordered compensation.

The constitutional abuse consists not of taking every possible valuable use away from the owner of property. It consists of taking the property over for some particular use dictated by the state. A footnote in Justice Brennan's opinion (dropped from the very passage just referred to) demonstrated how such a using had taken place in *San Diego*. Quoting the state court of appeals, Justice Brennan observed that the effect and indeed the purpose of San Diego's ordinance "was 'to have the property remain . . . in its natural state so open space and scenic vistas may be preserved. *In this sense the property is being "used" by the public.*'"²³³

This usings principle, which does not require a total deprivation, explains how San Diego had gone too far. Indeed, if the city had *gone further*, not only converting the plaintiff's property into a nature preserve but requiring the plaintiff to permit the public for a fee to camp on it, the *total-deprivation* principle espoused in Justice Brennan's text would break down, but the *usings* principle of the footnote would apply even more strongly.

The same reasoning applies to *Lucas*. From a usings perspective, compensation was due in *Lucas* regardless of the true extent of property devaluation and regardless of South Carolina's common-law nuisance precedents. For just as San Diego sought to use property as a scenic preserve by ordering that land be kept in its natural state, so South Carolina sought to use Lucas's property as a tourist attraction by ordering that his land be kept in its natural state.²³⁴ In a jurisprudence of usings, if a state takes over someone's property for use in its tourism industry, it must pay compensation.

In fact, the Court's own reasoning supports this analysis of *Lucas*. Once again, if we look below the surface of the Court's economic-viability rule—if we look at the ground on which the total-takings rule was supposed to rest—we find the usings principle. Here is Justice Scalia's strongest argument for categorical treatment of total-loss cases:

232. *San Diego Gas & Electric*, 450 U.S. at 651-52 (Brennan, J., dissenting) (emphasis added).

233. *Id.* at 652 n.18 (Brennan, J., dissenting) (emphasis added) (quoting *San Diego Gas & Elec. Co. v. City of San Diego*, 146 Cal. Rptr. 103, 117 (1978)).

234. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2889-90 (1992). The state also claimed to need the "beach/dune system" in its natural condition to serve as a storm-protection buffer and as a wildlife habitat, *id.*, suggesting additional ways in which South Carolina sought to exploit use-values of Lucas's property. Other aspects of the applicability of usings analysis to *Lucas* are discussed *infra* Part V(D).

[R]egulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property *is being pressed into some form of public service* under the guise of mitigating serious public harm.²³⁵

To be sure, from a usings point of view, there are significant problems with this formulation. In the first place, committing the classic *Mugler* or *Keystone* error, Justice Scalia here has made it sound as if the category of compensable takings and the category of harm-preventing laws are mutually exclusive. The Beachfront Management Act (like the Kohler Act) conscripted property into public service not “under the guise” of preventing harm, but *genuinely* to prevent harm. As we know, even exercises of pure eminent domain may well “mitigat[e] serious public harm”; in doing so, they do not any the less take property for public use, and they do not any the less escape the Compensation Clause.

Moreover, the economic-viability rule catches in its net state action that by no means conscripts property into public service: for example, the shutting down of the Eureka mines, the destruction of property in *Caltex*, or a law extinguishing a highly abstract and parceled land interest like the right to sell refreshments on Lucas’s waterfront property. At the same time, the rule fails to catch laws that do take property for public use. As observed in discussing *San Diego Gas & Electric*, a using can occur even where the state *assures* the owner of a money-making use of his property. If South Carolina had *gone further*, ordering Lucas to open up his property five days a week as a public beach, but allowing him to collect an entrance fee that guaranteed him a positive market value for his property, a *using* would undoubtedly have taken place even if a *taking* (under current doctrine) had not.

But the most important feature of Justice Scalia’s formulation is its recognition that the impressment of property into state service is the true constitutional danger to avoid. Thus from *Mugler* to *Lucas*, the Justices have repeatedly invoked the language of usings to support the finding of a taking. And for good reason: judges always have known, beneath the vagaries of takings doctrine, that the strongest case for compensation is presented by facts closely analogous to exercises of eminent domain—facts indicating that the state has in effect taken over property and exploited it for some government-dictated use.

Even more important in demonstrating the power of the usings principle to make sense of the precedent are the cases in which the Court has *rejected* compensation claims. To render these cases coherent, it is especially crucial

235. *Id.* at 2894-95 (emphasis added).

to distinguish between the using of property and its mere destruction or deprivation in furtherance of a state interest. It is not just *Miller v. Schoene* to which this distinction is central; nor just *Caltex*, in which the Court expressly based its denial of compensation on the ground that property “was destroyed, not appropriated for subsequent use.”²³⁶ Nor need we accept this construction solely because Justice Brennan, writing for the Court in *Penn Central*, distinguished *Causby* on the same ground.²³⁷ Beyond all this, the distinction is necessary to sustain every case in the *Mugler* paradigm. *Mugler*’s brewery was more or less destroyed by the state,²³⁸ as was Reinman’s livery stable,²³⁹ Hadacheck’s brick factory,²⁴⁰ Goldblatt’s gravel pit²⁴¹—and, of course, Miller’s cedar grove.²⁴² At the very least, these owners were substantially deprived of their property. Yet the line drawn in the precedent, in case after case for more than a century, has been precisely here: between merely depriving someone of property and putting the property to use in the very sense that we have described.

Does a proposed reading of the Compensation Clause require more justification than the promise of bringing together text, history, and precedent into a single analysis that would both give order to the apparent chaos of takings law and supply a unifying principle for eminent-domain, physical-occupation, and regulatory-takings jurisprudence? Perhaps so: the unanswered question is *why*. What good does a usings principle do us? Shouldn’t we be concerned more about the efficiency of government regulations, or about the singling out of a few to bear disproportionate social burdens, than about whether the state has affirmatively put someone’s property to use?

An easy reply to this question would be: maybe we should, but unless we want to rewrite the Compensation Clause, use must remain the condition of its applicability. This answer, however, might suggest that nothing can be said on behalf of the usings principle as a matter of constitutional theory. It might suggest that apart from its textual and historical support, such a principle has no cognizable constitutional point, no intelligible position in a broader constitutional structure. So let’s forgo the easy answer and see if we can give a better one.

236. See *supra* text accompanying notes 215-217.

237. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 128 (1978) (observing that “*Causby* emphasized that Government had not ‘merely destroyed property [but was] using a part of it’”).

238. *Mugler v. Kansas*, 123 U.S. 623 (1887).

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

240. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

241. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

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

IV. COMPENSATION AS A MATTER OF CONSTITUTIONAL PRINCIPLE

How, then, as a matter of constitutional theory, are we to understand the compensation guarantee? Within what framework of values or purposes ought it to be interpreted? There is, of course, more than one possible approach to this question. Before advancing our own, let us first consider three others that have received support either in the takings commentary or in the case law.

A. *Takings Law and Economics*

Abroad in the takings literature is the idea that compensation doctrine should be governed by economic analysis.²⁴³ As observed earlier, serious economic analysis in compensation law would bear no resemblance to the economic-viability test affirmed in *Lucas* and little if any resemblance to the ad hoc balancing test typically pursued in the decisions following *Penn Central*. On the contrary, economic analysis would call for a “rather fundamental overhaul” of established practice.²⁴⁴ Despite its popularity in a certain scholarly marketplace, this overhaul of compensation law ought to remain an exclusively academic exercise.

Early invocations of economics in the takings context seemed to look forward to a much more active compensation doctrine, on the general assumption that “forcing the government to pay for the resources it gets promotes efficiency.”²⁴⁵ A strong compensation requirement was considered necessary to prevent underinvestment; it was assumed that the risk of uncompensated losses resulting from government regulation would stifle the efficient use of resources.²⁴⁶

243. For excellent introductions to law-and-economics in takings doctrine, see William A. Fischel, *Introduction: Utilitarian Balancing and Formalism in Takings*, 88 COLUM. L. REV. 1581 (1988); William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of “Just Compensation” Law*, 17 J. LEGAL STUD. 269 (1988); and Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697 (1988). For other important contributions in the last decade, see Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569 (1984); Lawrence Blume et al., *The Taking of Land: When Should Compensation Be Paid?*, 99 Q.J. ECON. 71 (1984); and Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986).

244. ACKERMAN, *supra* note 2, at 69; see *supra* Part II(B)(3).

245. Fischel & Shapiro, *supra* note 243, at 269. The formulation quoted is intended by the authors to state not their own view, but the assumption underlying the earlier work of others. Among other works, they cite William F. Baxter & Lillian R. Altree, *Legal Aspects of Airport Noise*, 15 J.L. & ECON. 1 (1972), and EPSTEIN, *supra* note 8, as examples. See Fischel & Shapiro, *supra* note 243, at 269 n.1.

246. See, e.g., ACKERMAN, *supra* note 2, at 44 (saying that “risk-averse citizens will respond [to the threat of uncompensated regulatory losses] by investing extra resources in adaptive behavior that would have otherwise been spent obtaining positive utilities”); Baxter & Altree, *supra* note 245, at 2-5; Lawrence Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165, 195-206 (1974); Michelman, *supra* note 2, at 1215-16.

Work by trained economists²⁴⁷ over the last decade, however, steadily has eroded this “conventional economic wisdom.”²⁴⁸ *Overinvestment* is now the focus;²⁴⁹ more sophisticated economic models have shown that “compensation allows landowners to ignore the opportunity cost of their land for efficient government projects.”²⁵⁰ In other words, much of the additional investment that would be spurred by the assurance of compensation for regulatory or other state-induced losses would be *undesirable* from the economic point of view.²⁵¹

Accordingly, the more recent economic work strongly suggests a compensation doctrine even less protective than current takings law. One author concludes that government compensation is generally *never* efficient; only private insurance could produce efficient results.²⁵² Others consider this conclusion too extreme²⁵³ but agree that compensation for fixed-capital investments, such as improvements of land, would have to be severely restricted because of the overinvestment problem.²⁵⁴ This result applies not only to regulatory cases, but to eminent-domain cases as well. Thus when government takes land to build a dam, economic analysis may well suggest that the owners should not be compensated for the loss of their improvements—for example, their houses—because such compensation could reward overinvestment.²⁵⁵

When economic analysis determines that owners should not be compensated if their homes are taken through eminent domain, it becomes tempting to conclude that the chasm between economic theory and established

247. Most of the earlier work was written by legal scholars, not economists.

248. Fischel & Shapiro, *supra* note 243, at 270.

249. Fischel, *supra* note 243, at 1595-96; Fischel & Shapiro, *supra* note 243, at 270-75; see Blume et al., *supra* note 243, at 72-73; Rose-Ackerman, *supra* note 243, at 1702-03.

250. Fischel & Shapiro, *supra* note 243, at 270.

251. For example, suppose that Hadacheck owns land in an area where there is a 60% probability that a populous suburban community will develop. He is considering building a brickyard. He knows that if the community does develop, the brickyard will depress surrounding property values by \$20 million and the city will pass an ordinance closing it down. Say that the positive value of the brickyard (over the next best use of Hadacheck's property) is \$1 million. It would be grossly inefficient for Hadacheck to build the brickyard (because \$20 million multiplied by 0.6 far exceeds \$1 million), but he will build it anyway if he can be sure of compensation. In this schematic illustration, the same conclusions hold as long as the probability of harm is greater than 5%.

252. See Kaplow, *supra* note 243, at 602-03.

253. See Fischel & Shapiro, *supra* note 243, at 271 (stating that Kaplow's conclusion provides “an economic rationale for reading the just compensation clause out of the Constitution”).

254. See *id.* at 273-74.

255. See, e.g., Blume et al., *supra* note 243, at 71, 90; Fischel & Shapiro, *supra* note 243, at 271-74; Rose-Ackerman, *supra* note 243, at 1702-03; see also Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279, 282-87, 291-94 (1992) (summarizing lack of fit between economic models and rule requiring compensation in eminent-domain cases). Professor Farber also points out some of the flaws in the conventional assumption (made in the early law-and-economics work on takings) that a broad compensation requirement would generally deter government officials from pursuing inefficient projects. See *id.* at 291-94. In particular, as Farber observes, the costs of compensation are characteristically spread through a politically dispersed and unorganized group; thus there is no reason to believe *a priori* that a broad compensation requirement would make government actors responsive to overall social efficiency. *Id.* at 292.

legal practice is simply too great here to make law-and-economics a serviceable mix. The economists don't pretend to be drawing their analyses from constitutional norms or practices,²⁵⁶ nor should they be expected to do so. There is, however, a limit of disconnectedness past which economic theory (like political theory or any other "law-and-" theory) will no longer have anything to say to the law.

Let us, however, waive any such objection here. Let's waive, in addition, any objections we might interpose concerning the difficulties of quantifying the "demoralization" costs usually conceded to be integral to a thorough efficiency calculus in takings cases.²⁵⁷ Imagine instead that the economists perfected their models, creating a workable analysis allowing judges to identify every case in which compensation would be inefficient and hence correctly denied. Even then, there is a clear reason why compensation law should not follow the economic analysis, a reason that explains why such analyses stray so far from established constitutional practice.

Put aside the Compensation Clause for a moment and consider every other familiar right guaranteed by our Constitution. The common feature of these rights is that they stand *against* any ordinary cost-benefit calculus of social welfare. They bind in the teeth of a perfectly plausible state determination that society would be more efficient, wealthy, or even happy were the guarantee violated.

This invulnerability to ordinary cost-benefit calculations is not fortuitous or incidental. It is part of what has always been understood in this country by a constitutional right. If, for example, your right to equal protection were to be overridden whenever it was cost-efficient to do so, you would in a significant sense no longer have a constitutional right to equal protection. For such a right is supposed to offer you protection precisely when a majority correctly determines that it could enrich itself, or make itself happier, at your expense.

We are not simply recapitulating, at the level of constitutional adjudication, the old argument between act- and rule-utilitarianism (or perhaps we should say, act- and rule-wealth-maximization). It *may* be that our constitutional rights each conduce in the long run to the wealthiest, happiest society in the best of all possible worlds. No one will ever know. But their binding force has

256. See, e.g., Blume & Rubinfeld, *supra* note 243, at 571 ("This Article discusses neither the history [nor] current state of takings jurisprudence Rather, we adopt the goal of economic efficiency"); Kaplow, *supra* note 243, at 565.

257. The term is Michelman's. See Michelman, *supra* note 2, at 1214-15. Included are, for example, the "dollar value" of the feeling of "emotional protest" suffered by the uncompensated owners, *id.* at 1214, 1228, as well as the price of the "disaffection" experienced by "good citizens who believe" that they or others have been the "victims of unprincipled behavior" by their government. ACKERMAN, *supra* note 2, at 46-47. Economists have acknowledged the importance of such "demoralization" costs, see, e.g., Fischel & Shapiro, *supra* note 243, at 286-87, but so far the economic models for assessing such costs are extremely primitive. See Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI-KENT L. REV. 23, 35-40 (1989) (criticizing law-and-economics models for failing to account for value of "psychologically vested rights").

nothing to do with the empirical fact of this matter (if there is one) and still less to do with a judge's poor effort to gauge whether the wealth-maximizing (or utility-maximizing) course is to adhere to the guarantee in every case, or only in some class of cases, or not at all. The nobility of the Constitution resides in the American people's commitment to principles that may afford the majority neither the most wealth nor the most pleasure.

To be sure, there is such a thing as a compelling state interest capable of overriding a constitutional right, and it may be correct in some cases to describe this eventuality in terms of a social cost too high to be borne. But that is the extreme exception, and in general our constitutional guarantees are deemed so invulnerable to cost-benefit calculations that even the circumstance of war is insufficient to suspend them.²⁵⁸

To economize the Compensation Clause—to hold that the right to just compensation should be suspended whenever society would produce more efficiently by dishonoring it—would misapprehend the central idea of our foundational law. It would turn the Constitution on its head. The constitutional right to compensation, to *be* a constitutional right, must stand precisely when the felicitic or economic calculus would count against it.

Of course, there would be nothing unintelligible or logically contradictory about a constitutional guarantee that called for its own suspension whenever economic efficiency weighed against it. Such a provision might even have a certain hortatory significance. It would, however, unmistakably declare its low esteem for the putative “right” even as it purported to announce it. Unless a constitutional provision makes such a limitation plain, to read it this way would be more evisceration than interpretation.

With respect to other rights secured by the Constitution, it would require little discussion to repudiate on principle a proposal that the right be adhered to whenever efficient, but dishonored whenever not so. Shall we discriminate against a race upon a finding that it would make society still richer? Condemn the innocent when it would be efficient to do so? Search a home on less than probable cause? If we balk at thinking of the Compensation Clause as a matter of principle, perhaps it is because we have been confused by those who would reduce its principle to a matter of money. More likely, however, it is because for so long we have read its principle right out of its text.

258. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952); *Frohwerk v. United States*, 249 U.S. 204, 208 (1919) (Holmes, J.) (“We do not lose our right to condemn either measures or men because the Country is at war.”).

B. *Redistribution*

A second overarching explanation of the Compensation Clause is that it stands for an anti-redistributive principle. Because most of the arguments here are familiar, the discussion will be brief.

There are two versions of this claim, one strong and one weak. The strong claim is addressed to the putative injustice of a majority's seizing for itself the wealth of a minority. On this view, whenever government redistributes wealth from one group to another (absent acts of force or fraud by the victimized class), the redistribution is either unconstitutional per se (as a taking from *A* to give to *B*) or at least unconstitutional without compensation. This view, or something quite close to it, appears to be Professor Epstein's.²⁵⁹

The problem with this strong anti-redistributive principle is twofold. First, taken seriously, it would seem to invalidate progressive taxation, minimum-wage and maximum-hour legislation, rent control, mandatory pension plans, social-security programs, and a host of other regulatory schemes that in principle redistribute wealth from the better off to the worse off and that have been utterly familiar in our legal system ever since the New Deal.²⁶⁰ Second, it is unreasonable to fulminate about the injustice of redistribution unless one can persuasively justify the existing distribution of wealth. The libertarian premises underlying Epstein's analysis are quite unable to do so.

The weaker claim grants the justifiability of *progressive* redistributions of wealth, insisting instead that *intra-class* redistributions are the proper target of Compensation Clause scrutiny. Professor Michelman advanced an argument to this effect twenty-five years ago. According to Michelman, the state action giving rise to compensation claims "will not usually have been taken with any view to the preexisting incomes or accumulations of the persons incurring special losses and gains as a result."²⁶¹ From this perspective, cases such as *Hadacheck v. Sebastian*²⁶² are "violently offensive":²⁶³ "no widely shared ethical precept . . . warrant[s] a redistribution from a member of the class of foundry owners to members of the class of residence owners."²⁶⁴

The trouble with this approach is that it can't account for paradigm Compensation Clause cases. If the state condemns a strip of your land for a highway, is compensation to be denied on proof that the "class of landowners"

259. See generally EPSTEIN, *supra* note 8.

260. See *id.* at 274-82, 306-29 (arguing that many of these programs are unconstitutional).

261. See Michelman, *supra* note 2, at 1183.

262. 239 U.S. 394 (1915).

263. Michelman, *supra* note 2, at 1237.

264. *Id.* at 1183. Michelman went on to argue, however, that as an ethical matter compensation still need not be awarded in such cases if not compensating would promote overall social efficiency. *E.g., id.* at 1195. If that concession is accepted, then the anti-redistributive principle reduces to the efficiency calculus already criticized in the previous section. (On the influential role of Michelman's article in the development of the law-and-economics approach to takings law, see Fischel & Shapiro, *supra* note 243, at 277-93.)

is generally better off than the “class of drivers”? Or if the state, explicitly invoking “the preexisting incomes [and] accumulations of the persons incurring special losses and gains as a result,” converts your house into a homeless shelter, is it defensible even then to read the Compensation Clause out of the Constitution?

The right to compensation is not concerned with the justice or injustice of redistribution in general or of intra-class redistribution in particular. Taking from the rich to give to the poor may be a species of thievery, but progressive taxation is not for that reason compensable; taking a wealthy man’s house to shelter the homeless may be eminently justifiable, but if the state does so, it must pay compensation notwithstanding. The justice or injustice of a particular redistribution of wealth is an issue simply orthogonal to Compensation Clause analysis.

C. *Public Payment for Public Goods*

The third and most familiar framework for explaining the purpose of the Compensation Clause concerns the extent to which some individuals can fairly be made to shoulder more social costs than others. Here, the Compensation Clause is said to address the unfairness not of the state’s redistributing wealth from one group to another, but of the state’s seizing the wealth of some for the benefit of all. In this view, as expressed on numerous occasions by the Supreme Court, a taking should be found whenever individuals are made to bear unequal or disproportionate costs of procuring public benefits: “It is axiomatic that the Fifth Amendment’s just compensation provision is ‘designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’”²⁶⁵

Even cursory reflection indicates that the Court’s formulation is untenable if interpreted strictly. The rock on which it breaks down is, once again, the modern legal system’s acceptance of redistributive legislation. Modern tax laws, for example, routinely allow the state to take money “from some people alone” to pay for public benefits. At the same time, landlords subject to rent-control laws are made to shoulder a disproportionate burden in providing

265. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1961)); *see also, e.g., Yee v. City of Escondido*, 112 S. Ct. 1522, 1526 (1992); *Pennell v. City of San Jose*, 485 U.S. 1, 9 (1988); *Costonis, supra* note 136, at 469. This idea goes far back. *See, e.g., Monongehela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (saying that Takings Clause “prevents the public from loading upon one individual more than his just share of the burdens of government”); ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* § 511 (1904). Three hundred years ago, Pufendorf wrote: “Natural equity is observed, if, when some contribution must be made to preserve a common thing by such as participate in its benefits, each of them contributes only his own share, and no one bears a greater burden than another.” 2 SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM*, LIBRI OCTO 1285 (C.H. & W.A. Oldfather trans., 1934) (1688).

cheaper housing to the renting public, and employers subject to pension laws are made to pay a disproportionate share of the costs of social security for older citizens.

But perhaps the Court's admonition should be interpreted more flexibly. What the Court means (it might be said) is not that *every* public burden, "in all fairness and justice, should be borne by the public as a whole." Instead, there is a *particular category* of public burdens to which this principle applies, and the task of compensation law is to identify this category. This more flexible view would allow judges to consider all sorts of criteria that might ethically redeem the imposition of economic injury on some (but not all) individuals. In the case of taxation, for example, it might be said that even progressive taxes still produce benefits for the taxpayer, creating a reciprocity that is lacking when an individual's house is condemned to build a park for his neighbors. Or that taxes do not single persons out, as do exercises of eminent domain, but rather spread the relevant burden throughout the entire class of persons satisfying designated criteria of wealth or income.

Considerations of this kind—particularly the themes of reciprocal benefits and singling out—have figured in numerous takings opinions.²⁶⁶ It is very difficult, however, to see how a coherent theory of compensation jurisprudence could be predicated upon them.

As to reciprocity, can anyone really believe that rent-control laws produce benefits for landlords sufficient to offset their effects on rent receipts? To be sure, a proponent of reciprocity could say that rent control is unconstitutional (without compensation) because it fails this test. But is he also prepared to say that every tax that does not produce equivalent-value benefits to a particular taxpayer is unconstitutional as applied to that taxpayer?²⁶⁷

If he replies that *some* reciprocity is sufficient to avoid a taking, he faces a still deeper problem. The reciprocal-benefits idea, understood as the claim that the presence of *some* reciprocal economic benefits can establish the absence of a "taking," confuses the two basic stages of compensation analysis: determining *whether* compensation is due and determining *how much* compensation is due. So long as the requisite amount of reciprocal value is less than what just compensation would otherwise require (for example, less than

266. As for reciprocity of benefits, see, for example, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 133-35 (1978), and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). On singling out, see, for example, *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2923-24 (1992) (Stevens, J., dissenting), and Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1356-58 (1991) (advocating version of singling-out thesis and discussing cases).

267. The Supreme Court once announced a rule to this effect. See *Norwood v. Baker*, 172 U.S. 269 (1898) (holding that special property assessment levied to pay for public improvements is a taking to the extent that it substantially exceeds value accruing to owner from those improvements). "When this holding flooded the federal courts with special assessment cases, the Supreme Court lost no time in undercutting the *Norwood* doctrine." Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 473 (1977); see, e.g., *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 344-45 (1901).

market value of the property taken), government could circumvent its just-compensation duty simply by providing for *some* reciprocal benefits in any law that would otherwise effect a taking.²⁶⁸ When state action adversely affecting someone's property also confers some economic benefits on the owner, that circumstance has a definite role to play in compensation analysis, but it ought to enter the analysis only in evaluating the amount of compensation due, and only *after* a court has determined that a taking for public use has in fact occurred.

By contrast, the fear of government unjustly singling out a few individuals for adverse treatment has no place in either stage of compensation analysis. Although the fear is undoubtedly valid, improper singling out is a danger present in all state action, not merely state action that deprives persons of their property. Thus while singling out might raise genuine issues under the Equal Protection Clause (or other constitutional provisions), it fails to offer much assistance in interpreting the Compensation Clause.

For example, say that South Carolina exercised eminent domain over its entire coastline, dispossessing thousands of owners and condemning the whole tract for use as one gigantic public beach. Should the compensation rights of these owners be nullified because the state has acted against a great many? Surely this generality does not negate the constitutional wrong, but rather compounds it.²⁶⁹ The situation is identical when the state condemns a strip of land through the property of a great many landowners: the generality of the injury does not excuse the violation of the constitutional right.

If, on the other hand, it is said that South Carolina has still "singled out" beachfront landowners in our hypothetical, then all sorts of routine regulations must fall as well. Certain pollution regulations, for example, would equally "single out" the owners of large factories; rent-control laws would "single out" owners of apartment buildings; pension laws would "single out" large employers. Indeed, if singling out is interpreted this way, then *Mugler* itself ought to fall as well. Prohibition laws inflicted enormously disproportionate economic injury on those few owners who had sunk fixed capital into breweries or distilleries, whereas the supposed benefits of prohibition were to accrue to the public as a whole. Ultimately the public-payment-for-public-benefits principle cannot stand because the law makes choices all the time in favor of certain public benefits at the expense of relatively small groups of individuals. No wonder, then, that the Court has conceded its inability "to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the

268. Cf. *Penn Central*, 438 U.S. at 147-49 (Rehnquist, J., dissenting).

269. On this point I'm obliged to say that I agree with Professor Epstein. See EPSTEIN, *supra* note 8, at 210-12.

government, rather than remain disproportionately concentrated on a few persons.”²⁷⁰

Something is missing when the first issue addressed in compensation cases is the extent of the owners’ “economic injuries.” Something is missing in the idea that compensation law must compare the amount of money lost by property owners to the amount that they gain from state regulation, the amount that others pay, the amount of their total wealth, the amount of harm they were doing with their property, or whatever other criterion of proportionality is advanced.

The owners of factories suffer enormous and disproportionate economic losses when the state takes away their property rights by enacting pollution statutes, but they are not for that reason entitled to compensation. By contrast, the owner of an acre of land taken for use as a public park *is* entitled to compensation, even if he receives benefits from the park, even if a thousand other landowners similarly situated also lose one acre to the park, and even if his acre happened to constitute so small a fraction of his personal wealth that his contributory share is perfectly just or fair from any number of points of view. The difference between the pollution regulation and the park condemnation is not in the taking; it is in the *use*.

D. *Instrumentalization*

A common feature of the three frameworks just rejected—efficiency analysis, anti-redistributionism, and public-payment-for-public-goods—is that each reduces compensation claims to a matter of money. How natural that seems: isn’t the constitutional harm at issue in every takings case a property owner’s economic injury? What is private property, after all, but the profit to be made from it, and why else (if not to redress a loss of wealth) would the Constitution specifically demand “compensation” as the remedy?

A usings principle begins from different premises. The constitutional significance of what the state does with private property is not always to be measured in terms of economic loss. Monetary compensation may be the mandated remedy, but what is being redressed need not for that reason be strictly or even primarily a monetary loss. Isn’t it just possible that our liberty might be at stake if government had unfettered power to dictate the use of private property?

What liberty? Why should a freedom from having one’s property instrumentalized by the state be of constitutional concern? The key to this question lies in the parallels observed earlier between takings doctrine and privacy doctrine.

270. *Penn Central*, 438 U.S. at 124 (quoting *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962)).

As we have seen, for over a century the Court has sought to define the scope of constitutionally protected property (under the Compensation Clause) within the logic of fundamental rights, attempting to identify those incidents of ownership so “treasured,” or so central to an owner’s ability to define property as his, that they fall somehow outside the state’s ordinary regulatory power. As we have also seen, in its privacy cases, the Court has sought to define the scope of constitutionally protected liberty within the identical logic of fundamental rights, attempting to identify conduct so “sacred,”²⁷¹ or so central to a person’s ability to “define the attributes of [his] personhood,”²⁷² that it is somehow necessarily prior to or outside the state’s jurisdiction. Previously we examined the logical flaws in which this fundamental-rights thinking is inevitably embroiled; let us now consider the status of these putative fundamental rights as a matter of constitutional theory.

What is the nature of the liberty that a personhood or propertyhood theory of constitutional rights purports to protect? It is liberty understood as individual autonomy. The mission that fundamental-rights thinking sets itself is to erect a barricade around those spheres of life in which the individual must be left to make his own law, to determine or define himself.²⁷³ Certain of these spheres (the autonomist will say) are already demarcated by the Constitution itself: for example, the freedoms of speech, of religion, and of security in the home. Others must be inferred. For some justices, the unenumerated core of self-determination will involve marriage or “the decision whether to bear or beget a child”;²⁷⁴ for others, it will involve the right to bequeath or “the right to build on one’s own property.”²⁷⁵ And why must individuals retain, at all costs, a core of personal autonomy? Because without it, the answer has always been, there would eventually be no individuality at

271. Cf. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (“We deal with a right of privacy older than the Bill of Rights . . . Marriage is a coming together for better or for worse, . . . intimate to the degree of being sacred.”).

272. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807 (1992).

273. The *Casey* Court gave eloquent expression to this notion:

Our precedents “have respected the private realm of family life which the state cannot enter.” *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Casey, 112 S. Ct. at 2807 (parallel citations omitted). The finest elaboration of this view is again to be found in Mill’s *On Liberty*. See MILL, *supra* note 128, at 67-113. The primacy of self-definition or self-determination as core constitutional value is (in a variety of forms) a fixture of modern liberal thought, running equally through, for example, BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980), ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974), and JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

274. Cf. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

275. Cf. *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834 n.2 (1987).

all; we would lose our capacity for moral action, and the pursuit of happiness—each after his own fashion—would come to an end.²⁷⁶

This entire conception of fundamental liberties, however appealing it may be, has no place in constitutional interpretation.

The reason is not simply that rights of self-determination produce perfectly indeterminate results, in that one person's self-determination (either of his personhood or propertyhood) invariably conflicts with that of others. Nor is the reason simply that theories of individual autonomy delude themselves, in that the usual spheres of activity in which the state is not supposed to intrude on individual decisionmaking (such as marriage or land ownership) are always already defined and produced by massive state intrusions on individual decisionmaking. There is yet another reason why we cannot understand our constitutional guarantees through the concept of individual autonomy: it makes the Constitution a hypocritical sham.

Most of us have no freedom to define the attributes of our personhood as we see fit, nor to build on our own property, nor for that matter to broadcast our political opinions. Lack of material resources alone is sufficient to turn such "fundamental rights" into mere empty promises.

"But you don't understand," it will be said; "by a 'fundamental constitutional right,' we certainly didn't mean that all persons were to be guaranteed the material ability to exercise the right. All we meant is the right not to be obstructed by the state should you ever be in a position to remove objects from your real estate, marry the person of your choice, publish your opinions, or what have you. Surely you've heard of the state-action doctrine?"

Surely I have, but this limitation on the scope of the right is just the problem. When constitutional rights are built around and derived from the idea that some conduct is essential to individuality itself, then the state-action doctrine will always have the apparent effect of rendering most of us less than full individuals. It will always arrive on the constitutional scene as the great sleight-of-hand, the device by which the fine-sounding fundamental rights trumpeted by a capitalist society become mere propaganda, mere formalities without the content they promised. Rich and poor alike are equally barred from sleeping under bridges, said Anatole France; and evidently the poor have the same constitutional right as the rich to broadcast their opinions, to build on their own land, and in general to pursue virtue and happiness after their own fashion.

276. See, e.g., MILL, *supra* note 128, at 68-72 (arguing that liberty should be more highly valued because of its indispensability to development of individuality); John Rawls, *The Basic Liberties and Their Priority*, in LIBERTY, EQUALITY, AND LAW 1, 22 (Sterling M. McMurrin ed., 1987) ("The basic liberties (freedom of thought and liberty of conscience, and so on) . . . are the background institutional conditions necessary for the development and the full and informed exercise of the two moral powers . . . [and] are also indispensable for the protection of a wide range of determinate conceptions of the good . . ."); Charles A. Reich, *The Individual Sector*, 100 YALE L.J. 1409, 1409-10 (1991).

There is another way to understand constitutional liberty. We must get used to the idea that enforcing the Constitution has little to do with assuring our individual autonomy. It will not make us complete individuals; it will not make anyone a happy or moral person. It may, however, make us a free and just people.

Our constitutional guarantees generally apply only against state action because their general point is to prevent specifically political abuses. Their indispensable point is to ensure political—not individual—autonomy.

Return to the right of privacy. When the fundamental-rights-of-individuality logic is cast aside, the privacy cases can be seen at once to stand for a principle of distinctively political liberty: the principle that government may not take over or dictate the course of individuals' lives.²⁷⁷ The liberty at issue in *Roe v. Wade*, for example, is not a freedom to decide when, whether, or with whom to bear a child. Who has such a freedom? How could a prohibition against certain abortion regulations, or any prohibition confined by the state-action doctrine, possibly be understood to guarantee such a freedom?

It is not the freedom *taken away* by anti-abortion laws that makes them unconstitutional; it is rather the degree to which, through them, the state has effectively *taken over* a woman's life. *Roe* protects against a specifically political danger: the danger of totalitarian state intervention into our lives. No single prohibition in our entire legal system has consequences that so thoroughly *take over, physically occupy, and put to use* an individual's entire existence as do those of a law prohibiting abortion. When the privacy right is understood this way, the state-action doctrine no longer figures as an embarrassing limitation on putatively fundamental rights of individual self-determination. Indeed it no longer figures as a limitation at all. Rather it appears as what it is: a necessary element of the offense—the specifically political offense—against which the Constitution protects.

What is the *political* evil in laws that take over individuals' lives? It has a twofold character, simultaneously deontological and consequential. Citizens are treated too totally as state instrumentalities—as political means. Thus the state both commits an injustice to the individual, who ought to be recognized and treated as a political end, and threatens the political liberty of the people, who are supposed to be the state's authors, not its tools. This twofold character is a common feature of many of our basic constitutional guarantees. It is apparent, for example, in the protections afforded by the First Amendment's freedom of speech, the Fourth Amendment's guarantee against unreasonable searches and seizures, and the Fifth and Sixth Amendments' fair-trial provisions, as well as the right of privacy. Occasionally commentators debate whether such rights should be understood as bearing intrinsic or merely

277. A much fuller discussion of this point may be found in Rubinfeld, *supra* note 129.

“purposive” value,²⁷⁸ but in fact the twin aspects of these rights are two sides of a single coin: in violating each of these rights, the state fails to respect its citizens as political *ends*.

These considerations provide a theoretical framework in which to interpret the Compensation Clause. We already know that the *methodological* shift outlined above—from an analysis of how much the state has taken *away* one’s property, to one of how much the state has taken it *over*—is applicable in the compensation context. This methodological shift was the first step we took to reinterpret *Pennsylvania Coal* and to articulate the usings principle in general.

More important, the *substantive* shift is applicable as well. The point of compensation law, from our perspective, is not to identify a core of individual autonomy defined through fundamental rights of property ownership (the right to exclude, to bequeath, and so on), but rather to protect against a fundamental political danger. Just as the right of privacy protects individuals from the conscription of their persons or futures, so the right of compensation guards them against state instrumentalization in the form of a conscription of their property.

Here too there is simultaneously a deontological and a consequentialist harm at issue. When the state puts a person’s things to use, the individual does not merely suffer economic injury. A servitude is forced upon him. He is made in a small or large way an instrumentality of the state. This instrumentalization differs from a mere restraint on liberty, and it differs from a tax. Through the great run of regulations that govern our lives and through the system of taxation, we all are required to conform and contribute to public ends. But we are not ordinarily obliged to see our persons, our lives, or our things taken over, occupied, conscripted into affirmative state service.

I am not suggesting that some peculiarly painful psychological shock accompanies such instrumentalization; and even if such a shock did exist, it would not be the constitutional touchstone. Once again the parallel to privacy is instructive. A law against singing in the streets may deprive some persons of a freedom they sincerely believe fundamental to their identities, and it might genuinely cause them a great deal of psychological pain. But the right of privacy, understood as an anti-totalitarian right, has nothing to do with their psychology; the question would be solely whether such a law affirmatively takes over and occupies individuals’ lives, to which the answer would be no. Similarly, the compensation guarantee, understood as an anti-instrumentalization right, has nothing to do with the degree of pain that might or might not be suffered by a particular owner as the result of the loss of his property.

278. See, e.g., TRIBE, *supra* note 140, § 12-1, at 785 (discussing this debate in context of First Amendment).

The wrong, rather, lies in the degree to which a citizen's things are made into the organs or instrumentalities of the state. Along with all the other functions that private property may serve, it stands as the material stratum in which independent citizens exercise their will. On this point Locke and Hegel agreed: private property is an embodiment of human will or subjectivity.²⁷⁹ This embodiment (for our purposes) is not to be understood along the lines of a thing imbued with some deep traits of the owner's labor or personhood, like an artistic work or a wedding ring.²⁸⁰ A person's property, precisely by being marked off legally and conventionally as *his*, stands as the repository, the emerging reflection, of what ought to be his politically independent will. When, therefore, the state takes a thing marked off as belonging to a private person and puts it to use, the state goes beyond mere deprivation. It compromises the independence of his will; it impresses this embodiment of his independent subjectivity into state service, and to that degree the owner is instrumentalized as well.

It might seem proper to object here that much property—particularly commercial property—is far more reflective of persons' dollars than of any sort of subjectivity. But the link between private property—especially commercial property—and an individual's political independence has shown itself too many times throughout history to be ignored. The same objection, moreover, would apply equally to the Fourth Amendment's search-and-seizure rights. These rights similarly rest (at least in part) on the sense of personal investment that individuals in our legal system often (perhaps characteristically) attach to things they consider theirs. Yet the fact that a piece of property is purely commercial—say, a warehouse—has never been held to nullify the operation of the constitutional guarantee. To make sense of such rights (under both the Fourth Amendment and the Compensation Clause), it is not necessary that the requisite relation between owner and property obtain in every case. It is sufficient, rather, if we acknowledge that this relation is possible and if we deem it worthy of protection against state abuse.

More important, the consequentialist aspect of the right against instrumentalization recommends a generalized guarantee (rather than one limited to certain classes of more personal property). If the state had unrestrained authority to direct the use of private property, its power to dictate the shape of

279. See G.W.F. HEGEL, *THE PHILOSOPHY OF RIGHT* 54-59 (T.M. Knox trans., 1967). For a good general account of Hegel on property, see JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 343-47 (1988). On Locke, see the excellent discussion in ANDRZEJ RAPACZYNSKI, *NATURE AND POLITICS* 177-217 (1987). As Professor Rapaczynski puts it, in the Lockean conception "[t]he 'something of his own' that a man 'annexes' to the object of nature by applying his labor to it" must, if man's appropriation of nature is to be distinguished from appropriation by animals, be understood as "nothing less than his own freedom In other words, labor appropriates nature . . . because . . . it embodies man's own subjectivity" *Id.* at 189. Cf. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897) ("A thing which you have enjoyed and used as your own for a long time . . . takes root in your being The law can ask no better justification than the deepest instincts of man.").

280. Cf. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982).

society and the course of individual lives would be almost limitless. One problem with state-run economies proved to be inefficiency. But another would have persisted even if machine-like efficiency had been achieved: the potential for totalitarian management and functionalization of the citizenry. We tend to think of the Compensation Clause as securing individual rights against the dictates of popular sovereignty.²⁸¹ But an unfettered state power to dictate the use of private property would undermine the material basis for popular sovereignty itself.

There is confirmation, moreover, beyond the Compensation Clause that the Constitution recognizes state instrumentalization of property as a distinct species of political abuse. The Quartering of Soldiers Clause provides a clear illustration: it too involves a ban (in peacetime) against conscripting private property into state service. Here indeed is a using of property that must have been felt so oppressive by the founding generation that it could not be borne even *with* compensation. As to lesser usings of property, the Constitution permits them, but it requires the state to make good.

“‘Make good’? What does making good mean, once you’ve turned the Compensation Clause into a protector of liberty, not property? The fact is that because you’re construing the compensation guarantee as some kind of liberty principle, you really can’t account for the remedy that it provides—a *monetary* remedy.”

The Compensation Clause protects liberty *and* property; like the Third and Fourth Amendments, the Fifth Amendment protects liberty *by* protecting property. And there are good reasons why compensation is an appropriate remedy for a using, even though economic injury is not the gravamen of the constitutional harm.

First, so long as the amount of compensation due is assessed by market value, the monetary remedy quite specifically addresses what I called the deontological injury of a using. The state’s payment of market value for the relevant property can be looked upon as effecting a sale that would allow a reasonable owner to regard the property taken as *no longer his*. By virtue of the compensation requirement, the government is obliged to make property its own—to make it no longer private property—as a condition of dictating its use. In this sense the compensation requirement actually does enjoin the state from using private property; what the state uses, it must buy.²⁸²

To be sure, this purchasing of the owner’s property is not a perfect remedy, if for no other reason than that the supposed “sale” and the “reasonable owner” are legal fictions. Nevertheless, although a forced sale is

281. See, e.g., Michelman, *supra* note 65, at 1628.

282. This rule would afford full protection to a homeowner whose land was taken for use in laying a highway. The government would have to compensate him for his house (even though the house itself was *not* used) because the value of the house would be reflected in the market value of the land, which the government would have to pay as a condition of its use.

obviously not a voluntary sale, it is not a sham either, so long as there exists a market for the good and market price is paid. There is at least *less* of a using of *your* property when the government is obliged to buy it from you at a fair price.

Second, from the consequentialist point of view, the crucial object is to restrain rather than to obliterate the state's power to appropriate private property. Accordingly, a monetary remedy is sensible for the simple reason that an absolute prohibition against eminent-domain takings would be too drastic. Perhaps government could manage if it always had to reach voluntary agreements with owners before appropriating property, but it makes good sense to foresee circumstances warranting appropriation without owner consent: time may be too pressing, the owner may hold out for too high a price, or the transaction costs may overwhelm the utility that the appropriation was to gain. If the founding generation recognized the injury in using someone's property against his will, but didn't want to enjoin it outright, what remedies *other* than a monetary one did eighteenth-century law make available?

Finally, the requirement of compensation prevents the state from treating the owner entirely as instrument—as means. It requires the state to take cognizance of the appropriation from the point of view of the individual whose property is used, with his own particular interests in the thing appropriated. It requires the state to take cognizance of him as one to whom government *ought* to be subservient, cloaked though it is with all the powers and authority of the polity. Because the engine of the state must stop, must see the using from the owner's point of view, and must make good his loss in some just if monetary fashion, it is obliged to treat him at least in part as *end*. At the same time, the state is obliged in the process to restore to those individuals whose property is used some degree of material independence.

"Be serious," someone may say. "Do you think this is the eighteenth century? Do you think that property consists of *things* capable of being *used* in your sense? In case you haven't noticed, our legal system is highly advanced in recognizing un-thingified property. People's wealth today consists of share rights in corporations, entitlement rights from government, pension rights, and so on. Sure, people don't want to *lose* their property any more than they ever did; they may feel just as much 'vesting' in these abstract rights as others may once have felt in their homesteads. But don't tell me that people can be *used* in your sense through this sort of property."

This point is extremely important. It is not, however, an objection.

I concede it: the more abstract the property, the less capable it is of being used in the constitutional sense. But this is one of the usings principle's strengths. It explains the marked tendency always displayed in compensation law to favor physical property (and to disfavor physical invasions of property), for which *takings* doctrine could never plausibly account. It also explains why the usings principle is not subject to the same degree of *parceling* problems

that plague economic-impact analysis. For while the infinite parcelability of property rights threatens to turn every regulation into a “total taking,” it cannot convert every regulation into a using. Thus if South Carolina forbade selling refreshments on coastal property, the right to sell such refreshments on Lucas’s beach would be wholly extinguished, raising a total-takings claim under *Lucas*.²⁸³ But the law would effect no using: no property is taken over or put to use.²⁸³

Additionally, the link between the usings principle and thing-like property may help explain the puzzle posed by taxation or the termination of government benefits. Why doesn’t such state action take property without compensation? The usings principle suggests an answer.

In a sense directly relevant to our analysis, monetary exactions are—and historically have been understood to be—a *substitute* for actual service, particularly *state* service. One pays taxes *rather* than serving the state with body or physical property; one can be made to pay money damages when the law will not countenance specific performance of a contract for personal services. Money is a highly abstract legal right masquerading as a thing. That fact doesn’t make money any the less *property*, but it does make money in a certain sense—despite appearances—*unusable*.

The conclusion that mere monetary loss alone is never sufficient to state a usings claim draws little support from ordinary language, which of course permits us to say that money is used in various ways. It does draw support, however, from the essential distinction we have drawn between mere deprivations and those appropriations that go beyond mere takings-from: for if a using occurred every time a law exacted economic value from an individual and the state applied the gains to other purposes, then once again a jurisprudence of usings would collapse into takings doctrine. If “for public use” is to be given content, it cannot extend to mere deprivations of money; otherwise every taking would be a using, and virtually every regulation would require compensation.

This treatment of monetary loss, moreover, is consistent with the analysis of the concept of use set forth earlier. For even though ordinary language permits us to say that we use money when we spend it, this using is different from that to which an object is put when we exploit one of its valuable or productive capacities. Money (as money) can in an important sense be said to have no use-value; what it has is exchange-value. As money (putting aside its attributes as paper, metal, or artifact), it is not itself capable of producing any effects in the world, but is rather a medium for the exchange of things,

283. When I speak of “thing-like” property for purposes of the Compensation Clause, it should be clear that I am not excluding so-called intangible property: copyrights, patents, and so on. A song or an invention fully qualifies as something that can be *used* just as much as any corporeal object can be. But if (say) your property right was the license to perform a certain song at a given time and place, this property would be so un-thing-like that it is hard to imagine a law that could effect a using of it. Parceling issues, however, would not be entirely eliminated in a jurisprudence of usings. See *infra* Part V(E).

services, and so on that do have use-values. Thus it is not unreasonable to conclude that money can rarely be *used* in the constitutional sense,²⁸⁴ but only (we might say) taxed and spent.

V. APPLICATIONS AND THE REQUIREMENT OF A TAKING

If all the foregoing were accepted, the remaining task would be one of application. In what follows, usings doctrine is applied in five broad contexts. The purpose is both to make more concrete our still-rather-abstract principles and to highlight certain features of a jurisprudence of usings: where it departs from takings doctrine, where it renders easy problems that takings doctrine finds difficult to answer, and where it confronts (like any other constitutional framework) borderline cases.

One last objection, however, must first be given voice, because it bears directly on the application of usings doctrine to concrete cases. "I'm prepared to grant you," someone might say, "that takings doctrine reads the use requirement out of compensation law. But your usings doctrine reads out the *taking* requirement. In *Pennsylvania Coal*, for example, your argument may show that coal was used, but it in no way shows that any coal was *taken*. Now, the requirement of a taking is what has forced judges (in regulatory cases) to look to such criteria as harm or economic devaluation, and I don't see why you think you can avoid these criteria. After all, given your own emphasis on reading the Compensation Clause as it is written, you surely will concede that property must not only be used, but *taken* for use, before compensation is owed."

I do concede it, but I deny having ignored the requirement of a taking. On the contrary, the account I have offered of a using has consistently demanded that there be a taking as a necessary condition of compensability—a taking, however, that cannot be reduced to criteria of harm, treasured property rights, total devaluation, or any other fundamental incident of propertyhood. How then does the jurisprudence of usings understand "taken"?

With no assistance from "for public use" in determining which state intrusions into property interests demand reimbursement, "taken" has had to carry the entire weight of analysis in compensation law—more weight than it can bear. Once "use" is restored to its proper place, a more natural reading of

284. An exception apparently exists when money is deposited to yield interest. See *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (requiring compensation where county courthouse had retained interest on interpleader funds deposited with clerk). Note that the Court in *Webb's Pharmacies* explained its holding in the language of usings: "The county's *appropriation of the beneficial use of the fund* is analogous to the appropriation of the *use* of private property . . ." *Id.* at 163-64 (emphasis added).

Doubtless at some point, or in some relations, the forced payment of money for a specific purpose might effect a using, but government would have to go extremely far before this line would be crossed. For example, even a law requiring support payments to an ex-spouse or children would effect no using because it so obviously serves as a lesser substitute for actual personal or physical service.

“taken” becomes possible. After all, one of the great peculiarities of takings doctrine, apart from the strange grammar it imposes on the Compensation Clause as a whole, is the equally strange grammar it imposes on “taken.” Property has been taken, we are currently obliged to say, when a small foreign object has been permanently installed on it; but property has not been taken (in circumstances such as *Miller*) when the state destroys a thing altogether. Recovering the grammar of the Compensation Clause ought to allow us to recover a more natural grammar for “taken” as well.

As always, however, the criterion of natural usage is desirable but not dispositive. There are several perfectly natural readings of “taken” available even when “for public use” is read in the way we have been suggesting. For example, given the enormous reach of the word “property,” we could understand virtually every regulation touching property interests to *take*. Every regulation takes a stick from some bundle, it might be said; hence every regulation is a taking of property. On this view, the only real question for compensation law would become whether property had been put to use. But it would also be perfectly natural to understand the taking of property much more narrowly: private property is taken, we might say, only when some more-or-less well-defined bundle of property interests is taken—either physically carted off or, if the owner is left in possession, subjected to near-total diminution of value. Only then, we might say, has something really been *taken* from the owner. Here too, the ultimate question would be whether the property taken had been put to use, but the class of regulations scrutinized for a using would be far smaller.

The requirement that the state exploit a use-value of property before compensation need be paid in no way chooses between these two alternatives. In theory, therefore, one could combine a usings principle even with a takings principle that recapitulated all the tangles of current doctrine. But there is something more to the concept of a using, as we have used the term throughout, than the bare requirement of state exploitation of a use-value. This something more concerns the requirement of a taking, and it points strongly toward rejecting *both* the broad and narrow constructions of “taken” just outlined.

Both these constructions share the following feature: for property to be taken, it must be taken *away*. This is, as I say, a perfectly natural way of taking “taken,” but there remains another way to take it. Consider again the paradigm case of eminent domain. When a mill or road is built on someone’s property, in what sense has the owner’s property been taken? It has not been physically taken away; the owner may not even have been dispossessed (he may retain numerous rights in the property, and in principle he could even be the “owner” of the mill or road in non-trivial respects). Nor need the property have been deprived of all economic value. So in the paradigm case, property may not have been taken in the narrow sense mentioned above. To be sure, the

owner has lost a number of sticks from his previous bundle, but to see the case this way—to understand the taking in such a case in terms of the broad construction of “taken” that would apply to virtually any property regulation—misses a much more specific and powerful species of taking not embraced by the idea of a taking-away.

The distinguishing feature of the paradigm cases of eminent domain is that property—to use a formulation we have insisted on throughout—has been taken *over* by the state for the mandated use. The property has been more or less totally forced into a particular, state-dictated use. A using, then, has two central components: the exploitation of a use-value, and the taking over of property for the state-exploited use. As repeatedly observed in Parts III and IV, this requirement of a taking-over of property—its conscription or appropriation for the state-mandated use—is an essential part of both the methodological and the substantive differences that would distinguish a jurisprudence of usings from the current jurisprudence of takings.

The considerations advanced in the last Section explain why this taking-over-for-use, rather than use *simpliciter*, ought to be a necessary condition of compensability. Again the right of privacy provides a helpful analogy. Concerns about the state dictating the course of individuals’ lives do not demand a rule of unconstitutionality whenever government imposes just any affirmative obligation on someone (say, filling out a tax form). The state must go much further in the direction of a total and particularized occupation of an individual’s life—requiring, for example, that a woman bear a child—before the right is violated. The question here too is how far the state has gone toward a taking-over—a taking over of individuals’ lives.

Similarly, concerns about government dictating the use of private property do not entail a *per se* rule of invalidity whenever government exploits a use-value of someone’s property. Instead, the concerns become relevant when, in exploiting property’s use-values, the state approaches a taking-over or conscription of the relevant property for the mandated use. Unlike the exploitation of a use-value, which is a yes-or-no matter, this taking-over is a matter of degree: if a law, even though it exploits a use-value of someone’s property, nevertheless leaves open to the owner substantially all the uses of the property that he previously could have chosen, no appropriation—no *taking* for use—of the property has occurred, and compensation ought not to be awarded. At the other extreme, if a law so constrains the owner’s field of use-options that only one specific use is now legally available for the property at issue, then the state (although the owner is still in possession and the property may yet have value) has effectively conscripted or taken over the property for state-dictated service, and compensation should be paid. The question in every case is the degree to which the property has been *occupied*—physically or otherwise—by the state-mandated use. In other words, the requirement of a

taking-over turns on the degree of liberty left to the owner to exercise his own choice about the use of the property.

Observe that this taking-over in no way excludes all cases of taking-away. Some takings-away certainly involve usings, as, for example, if a government official were to commandeer your car and use it to transport goods. Here, the government not only exploits a use-value of the property, but in doing so leaves the owner with no range of use-options. The property has been totally conscripted into state service.

On matters of degree, however, general principles do not decide concrete cases. Let us turn, therefore, to our applications. The cases considered will proceed in order of increasing difficulty.

A. *Contraband*

Consider first a statute outlawing cigarettes: their manufacture, distribution, or consumption would all be criminal offenses. This statute would wreak economic havoc on a few, singled-out parties; deprive others of a freedom they may (who knows?) consider fundamental to their individuality; and destroy perfectly reasonable, sharply crystallized, investment-backed expectations. These circumstances, which ought to argue strongly in favor of compensation under current doctrine, generally obtain whenever government enacts a contraband law, and yet the constitutionality of (uncompensated) contraband laws is taken for granted throughout our legal system.

The difficulties for takings doctrine raised by contraband laws are illustrated by the Supreme Court's decision in *Andrus v. Allard*²⁸⁵ and the subsequent treatment of that case. In *Andrus*, the Court held that a law prohibiting the sale of eagle feathers did not effect a taking, even if the property had been lawfully obtained. This result was troublesome for takings doctrine: not only did the law single out, it also deprived property of virtually all economic value and took away a property right—the right to alienate—that seems about as “treasured” or “central” as the right to remove small foreign objects or the testamentary rights of descent and devise. Indeed, in *Hodel v. Irving*,²⁸⁶ the decision holding that a law abolishing the right to bequeath one's land effected a taking, three Justices issued a separate concurring opinion to note their view that the decision effectively “limited *Andrus* to its facts.”²⁸⁷

The *Lucas* Court has rung another change on this theme. Although he was one of the Justices who in 1987 opined that *Andrus* had been limited to its facts, Justice Scalia now seems to have changed his view:

285. 444 U.S. 51 (1979).

286. 481 U.S. 704 (1987).

287. *Id.* at 719 (Scalia, J., concurring). Three other Justices disagreed. *Id.* at 718 (Brennan, J., concurring).

[I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [an owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale), see *Andrus v. Allard*.²⁸⁸

But why, we might want to know, does the category of "the State's traditionally high degree of control over commercial dealings" extend to modern species-preservation laws if it does not extend to modern beachfront-preservation laws? And exactly why should the hunter of (or dealer in) eagles have been aware of the possibility that new regulation might render his property worthless? Surely not because the state exercised a "traditionally high degree of control" over the spoils of hunting in 1789. Is it because every eagle hunter or dealer today ought to know of the threat to the species and the public concern over this threat? But then shouldn't every land speculator (like Lucas) know of the threat to the beachfront or wetlands and of the public concern over this threat?

Usings analysis avoids these difficulties. The reason contraband laws do not require compensation is straightforward: no one's property is put to use. No use-value of the regulated property is exploited in any way. Contraband laws are an example of the large category of regulations that plainly take away (under both a broad and a narrow construction of that term) but do not use. Thus if Congress passed tomorrow a law making cigarettes contraband, no property would be taken *for public use*, and no compensation would be owing. Such a law, which raises substantial difficulties for takings doctrine, would present an easy case in a jurisprudence of usings.

B. *Loretto and Rent Control*

Usings doctrine certainly would be sympathetic to claims of compensation based on physical invasions or occupations. Eminent-domain appropriations, the paradigmatic using, almost always involve a physical invasion or occupation of some kind. Nevertheless, the *per se* rule announced in *Loretto*²⁸⁹ would have to be rejected, as would the *Loretto* decision itself.

In a usings analysis, a great deal depends on the purpose for which, and the circumstances in which, the state orders a physical occupation of property. Consider the smoke detectors, window guards, and other items routinely imposed on landlords. The *Loretto* Court was obliged to distinguish these physical occupations on the ground that the landlord's nominal ownership of such objects (despite rigid legal controls on their placement and disposition)

288. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899-2900 (1992) (citation omitted).

289. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

somehow cures the physical occupation of its constitutional impropriety.²⁹⁰ No such distinction need be drawn in a usings analysis. All these items—as well as the cable-television equipment at issue in *Loretto*—would fall outside the compensation requirement for reasons wholly independent of where title to them lies.

Laws forcing landlords to install objects for the benefit of their tenants do not force owners to devote their property to the use of rental tenants. On the contrary, if the landlord ceases to use her property for rental purposes, the laws no longer apply.²⁹¹ Thus such laws are like workplace regulations: they do not put the owner's property to a state-dictated use, but simply regulate the way in which the owner must exercise a use of her own choosing.

“But don't these regulations exploit a use-value of the property in question? For example, doesn't a window-guard regulation at least use the weight-sustaining capacity of the walls to support the window guard? And doesn't a cable-television requirement use the landlord's property for the transmission of cable programming?”

Perhaps, but what makes such regulations easy cases on a usings analysis is their relation to the use chosen by the owner herself. These regulations may exploit a use-value, but they in no way *take over* the property for this use. On the contrary, they leave the owner just as free as she was previously to choose the use to which her property will be put. The laws do not dictate use, but merely regulate the exercise of one particular, owner-chosen use.²⁹²

It may be objected that this reasoning proves too much. “If that's right,” someone might say, “then even a law requisitioning governmental office space in every residential dwelling would escape compensation. After all, such a law wouldn't force the owner to use his property as a residence, would it? It applies only if he chooses to use his property in that fashion. Therefore, on your own reasoning, no compensation would be due.”

This argument is a familiar one. It appears in *Loretto* itself,²⁹³ and more generally it is but a special case of the problem of unconstitutional conditions,

290. See *supra* text accompanying note 156.

291. *Loretto*, 458 U.S. at 439 n.17.

292. A “physical invasion” takings case that a usings doctrine could sustain is *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the direct predecessor of *Loretto*. In *Kaiser Aetna*, the Court found that the federal government's attempt to force the plaintiffs (unconditionally) to give the public access to their marina, a formerly private pond that they had improved and connected to navigable waters, effected a taking. In the main body of its opinion, the Court emphasized that the government had deprived the plaintiffs of the “right to exclude,” which it labeled “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” *Id.* at 176. A jurisprudence of usings would have little to do with this essentialism. In the last paragraph of the decision, however, the Court stated another ground for its holding: “if the Government wishes to make what was formerly Kuapa Pond into a public aquatic park,” it must “invok[e] its eminent domain power and pay[] just compensation.” *Id.* at 180. In contrast to *Loretto*, the government in *Kaiser Aetna* was not regulating the owner's chosen use of the burdened property, but rather was dictating a use of its own, and for that reason it had to pay.

293. See *Loretto*, 458 U.S. at 439 n.17.

a problem that appears throughout constitutional law.²⁹⁴ For example, a federal employee may be prevented from managing a political campaign: the prohibition is merely a condition on governmental service, which the individual may take or leave.²⁹⁵ But a law prohibiting all government employees from criticizing government policy would certainly be unconstitutional²⁹⁶ despite its conditionality.

Perhaps the resolution of such cases lies in the nexus between the act conditioned and the condition itself.²⁹⁷ However that may be, a usings principle neither adds to nor reduces the complexities of this problem. A law demanding government office space in your house would clearly be an appropriation for public use, requiring compensation notwithstanding its putative conditionality. Such a hypothetical, however, proves only that laws conditioning an owner's chosen use of his property on a massive governmental occupation of it, wholly or largely unrelated to any externalities created by the particular use chosen, go too far. The hypothetical by no means proves that government appropriates property for state-dictated use when it orders the owner to take measures for the safety or benefit of people whose presence on the property is solely a function of the use the owner himself has chosen for the property.²⁹⁸

The same analysis applies to rent control. Current takings doctrine upholds rent-control laws,²⁹⁹ although (as we have seen) it has some trouble explaining why the costs of supplying cheaper housing to the renting public should be so disproportionately borne by landlords. A usings analysis would also support rent control—and would have no trouble explaining why—but with an exception not always recognized by current doctrine.

Rent-control laws inflict solely economic injury. Not only do they take away a property right—the right to set the prices for the goods one sells—that belongs in the category of property so un-thing-like that it could rarely be used in the sense we have described, but they also impose no state-dictated use. Like the cable-equipment law in *Loretto*, they merely regulate a particular use chosen by the owner himself. They do not force an owner to put his property into service as rental housing.

294. See generally Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185 (1990).

295. See *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973).

296. See, e.g., *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (holding that teacher could not be fired for criticizing Board of Education).

297. For a case apparently employing such an analysis to resolve an unconstitutional-conditions issue in the takings context, see *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); see *supra* note 151.

298. The same point explains and distinguishes *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914), which upheld a law requiring mine owners to leave a pillar of coal standing to safeguard mine-workers. The state effects no using when it orders the protection of those whom an owner hires to pursue the very use that he has chosen for his property.

299. See, e.g., *Pennell v. City of San Jose*, 485 U.S. 1, 12 n.6 (1988).

This analysis, however, indicates the line that rent-control laws could not constitutionally cross. If a rent-control regime effectively *takes over* the regulated property for rental use—if, for example, it gives tenants and then their children perpetual rights of lease renewal, rights that cannot be overridden by the owner's decision to change the property's use³⁰⁰—then an appropriation has taken place and compensation would be due.³⁰¹

C. Zoning

More difficult are certain issues presented by zoning laws, which received general constitutional approval in 1926.³⁰² Zoning too would generally be valid under a usings analysis, but in certain circumstances it would raise important questions that takings law does not confront.

First, consider a zoning ordinance declaring that certain pieces of urban property can be developed only as parking lots. Say that the law leaves the property with some value (less than its previous market value, but perhaps a substantial amount), so that it does not violate the *Lucas* test. Moreover, since no objects belonging to the state or to third parties would permanently occupy any part of the property, the law does not violate *Loretto*. Say even that the law upsets no “distinct investment-backed expectations,” so that it has a good chance of satisfying *Penn Central* as well.³⁰³ On these assumptions, it is by no means clear that current takings law would require compensation.

“Spot zoning” of this sort would clearly demand compensation in a jurisprudence of usings, because government is dictating the use of property to its owner. It is as if the state had condemned the property for this specific use in eminent domain, and then had compounded the problem by making the owner work as a government agent in order to receive the income stream that the state has substituted for just compensation.

This does *not* mean that a zoning ordinance mandating “commercial use” of property would also be unconstitutional. The critical factor in these cases is the degree to which the government constrains the owner's range of use-options. When laws effectively limit the owner to one legal use of his property, one generally can conclude that the state is improperly dictating a particular use. Even when the state has left the owner with two or three legal

300. *Cf. Loeterman v. Town of Brookline*, 524 F. Supp. 1325 (D. Mass. 1981) (upholding town by-law granting life tenancy to tenants who had occupied condominium unit continuously since time prior to recording of master condominium deed).

301. Of course, once a sufficient period has elapsed after imposition of such appropriative legislation, the proper disposition becomes clouded. Owners who bought rental property already subject to such a rent-control regime would presumably be estopped from making any compensation claims. At the same time, renters who have long enjoyed guaranteed tenancies might have to be deemed owners for constitutional purposes.

302. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

303. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

uses (say, as a parking lot, gas station, or body shop), this conclusion may still be clear. But “commercial use” embraces so broad a field of possible uses that the state cannot be said to be dictating any particular service for the property in question.

“Residential use” zoning is a closer case, but it seems to me that the result is the same. In addition to the breadth of the category, which might alone suffice to make residential-use laws uncompensable, there is also a difference between forcing an owner to use his property as a parking lot, in service to others, and forcing him to use it as a residence, where he himself could live. When a person remains free to make residential use of his property, occupying it himself in whatever fashion he chooses, the analogy to an eminent-domain appropriation of property or to state impressments of property for public service becomes so attenuated that the idea of a state instrumentalization of property no longer applies.

This is not to deny that the surrounding community receives benefits from restricting land to residential use. It is only to acknowledge that making one’s home on a piece of one’s own property is a far cry from the paradigmatic fact patterns of eminent domain, which almost invariably involve direct use of one’s property by or for others. Nor am I denying that residential-use zoning may deprive some owners of rights that they deem fundamental from their own subjective point of view. A person owning a great deal of property, or planning to move elsewhere, may have no desire to use a given piece of property for his own residence. To him, a residential-use zoning ordinance is purely a source of economic injury; making money from his land is far more “fundamental” than living on it. But these facts are problematic only within the deprivation-based, fundamental-rights logic of current takings doctrine.

The question in a jurisprudence of usings is whether the government has gone too far in the direction of instrumentalizing property. Residential-use zoning laws certainly constrain an owner’s range of use-options a great deal, but they would have to go still further—requiring, for example, that the owner devote his property to the residential use of rental tenants—before they required compensation.³⁰⁴

304. It is quite a different matter when a city zones for residential use a piece of land that is as a practical matter unfit for residential use. *San Diego Gas & Electric Co v. City of San Diego*, 450 U.S. 621 (1981), was such a case, yet takings doctrine found no compensation due. A usings doctrine certainly would. Here, the owner is left with no real use whatsoever to make of his property; instead, as we saw earlier, the law in effect condemns the land for use as a nature preserve. *See supra* text accompanying notes 227-233.

D. *Ecological Preservation*

For decades, laws preserving natural ecological systems have turned takings doctrine inside out. These cases present the most conspicuous clash between the harm principle and the economic-viability test.

Wetlands legislation has been particularly prominent in this controversy. As far back as the early 1960's, states began trying to preserve marine ecological systems by passing laws forbidding owners to fill in marshes.³⁰⁵ When such legislation effectively prevents all development of the land, the lower courts have had to struggle to apply the conflicting conceptual categories of takings law, holding sometimes that compensation must be paid because the law causes a near-total diminution of value³⁰⁶ and sometimes that no taking occurred because the law prevents harm.³⁰⁷ Under *Lucas*, the issue in such cases now is whether the harm-preventing aspect of these laws can be worked into the common-law nuisance precedents of the relevant jurisdiction.³⁰⁸

Usings analysis makes these cases easy as well. Wetlands laws prohibiting all development not only prevent harm, but also take over property in order to exploit some of its use-values for state-dictated service. As observed above, however, this taking-over is a matter of degree: the disposition of any particular case turns on the range of use-options left open to the owner by the law, and this determination will itself turn on the particular context and the particular uses reasonably to be made of the burdened property.

Lucas is an illustration. South Carolina sought to put Lucas's property to use as a tourist attraction, storm-protection barrier, and wildlife habitat. Nevertheless, the state left Lucas with a few uses still available to him—swimming, camping, and so on. In another time and place, having the natural usufruct of one's land might have been substantially all the use an owner desired. In twentieth-century America, however, and in the specific context of a small parcel of beachfront property, these natural uses were relatively trivial. If the Beachfront Management Act banned structures taller than five stories instead of banning all structures, its effect might still be a using, but the owners' range of use-options would be sufficiently untrammelled that a court could reasonably find no taking over for use. In its actual form, however, the Act foreclosed all but the narrowest range of possible uses of Lucas's land. The consequences for Lucas would have been functionally identical had the

305. See JON A. KUSLER, OUR NATIONAL WETLAND HERITAGE 6 (1983).

306. See, e.g., *Formanek v. United States*, 26 Cl. Ct. 332 (1992); *Bartlett v. Zoning Comm'n*, 282 A.2d 907 (Conn. 1971); *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 193 A.2d 232 (N.J. 1963); *Hamilton v. Diamond*, 349 N.Y.S.2d 146 (N.Y. App. Div. 1973).

307. See, e.g., *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971); *Candlestick Properties, Inc. v. San Francisco Bay Conservation & Dev. Comm.*, 89 Cal. Rptr. 897 (Cal. Ct. App. 1970); *Claridge v. New Hampshire Wetlands Bd.*, 485 A.2d 287 (N.H. 1984); *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972).

308. See *supra* text accompanying notes 103-110.

state formally condemned Lucas's property, and then given him a few minimal use-and-exclude rights as a substitute for compensation.³⁰⁹

E. *Parceling and Partial Usings*

As we have seen, usings doctrine eliminates the parceling problem created by economic-impact analysis in current takings law. Unfortunately, however, because of partial-usings cases, a jurisprudence of usings has a parceling problem of its own. Take South Carolina's Beachfront Management Act once again. Many owners of beachfront property had lots larger than Lucas's. On their property, back a certain number of feet from the water, existing houses remained unaffected by the Act and new houses could be built if the owners wished. Was South Carolina "using" the land of these owners?

There are two quite different answers to this question, both defensible under a usings principle. The first answer would be a straightforward yes. Under the Act, it might be said, portions of the property belonging to the large-lot owners were put to all the uses for which the state took Lucas's land. Accordingly, the large-lot owners too are entitled to compensation. The second answer would be that the Act leaves legally available to the owners of the larger lots so wide a range of possible uses of their property *as a whole* that it cannot be deemed a using. In other words, although the Act uses a portion of the large-lot owners' property, it does not take over their lots for the state-mandated use.

Although the second answer explicitly invokes the taking-over requirement, that requirement does not choose between the two alternative positions. The burdened strip of the large-lot owners' land *is* taken over (at least as much as Lucas's land was). At issue, therefore, is a partial using, and the question presented is whether the used strip ought to be deemed the relevant "private property" for purposes of the Compensation Clause or whether instead the entire lot is the relevant property.

309. It is also possible for the state to exploit a use-value of someone's property and thereby *increase* the range of uses open to the owner. One illustration might be a general regime of mutual lateral-support rules in land-use regulation. Each owner's land is used to support the land of others, but the law maintains or increases the range of possible uses to which each owner can put his property by ensuring that the property of each has support. In this kind of case, a principle of reciprocity has true appeal for compensation law—not as a matter of value returned to the owner, which confuses the question of *whether* compensation is due with that of *how much*, but rather as a matter of the range of uses made available to the owner. Nevertheless, if in a particular case such a law has the effect of (for example) preventing one owner from building anything on his property, while his land remained enlisted in lateral-support service for his neighbors, then the state would owe compensation for the simple reason that this owner's property would effectively have been appropriated for the support of others' structures. There is no reason, however, why a state could not discharge its just-compensation duties by making the advantaged owners liable for damages.

Both positions have advantages and disadvantages. The virtue of the first is its simplicity. The vice is its staggering costs.³¹⁰ Not only would every owner affected by coastal laws like the Beachfront Management Act have to be compensated, but typical set-back ordinances for street-side houses would also require compensation because they use part of a person's land for aesthetic purposes. Five-acre-zoning laws would probably demand compensation too. So would a landmark ordinance preventing alteration of a building's facade: even though the owner might still be able to use his building as he chooses, the law takes over his facade for use as an architectural attraction. Numerous other partial usings might be found as well. The price of simplicity would be extremely high.³¹¹

The second position avoids these costs, but it re-introduces parceling issues. Superficially, these parceling issues parallel those faced by current takings doctrine, in that the question under both doctrines is whether a burdened piece of property should be considered part of a larger unit. Nevertheless, the parceling problem of usings jurisprudence is far more modest than the one produced by economic-impact analysis. The latter is capable of turning *any* regulation into a taking, because every regulation totally destroys some property interest. By contrast, a partial-usings problem cannot appear unless the state is exploiting a use-value of some thing, and many regulations do not do so. As we have seen, for instance, the vendor whose sole interest in Lucas's beachfront land is the deeded right to sell hotdogs on it would have no *usings* claim when South Carolina forbids such sales, although he may have a good *takings* claim under *Lucas*. Under a usings principle, property rights (particularly abstract, un-thing-like property interests) obtain no greater protection when parceled than they enjoyed when they were merely sticks in a larger bundle.

Because of the high costs associated with a rule demanding compensation for all partial usings and because of the modesty of the parceling problems raised, the second position seems preferable to me. But how would the parceling problems posed by partial-using cases be addressed?

If we are to adhere to the interpretive method indicated by the entire analysis thus far, the proper place to look for guidance is the field of eminent domain. One paradigm case for compensation historically has been the

310. It would be appropriate for a judge to consider costs here because both possible positions are consistent with the normative constitutional imperative.

311. I am assuming here the rule entitling owners to compensation upon a finding of a regulatory taking, rather than simply invalidating the law. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). Even if invalidation alone were the remedy, throwing out set-back and landmark ordinances—as well as all other laws effecting partial usings of property—would demand a stunning overhaul of land-use regulation. One way to alleviate the compensation costs would be to abandon the rule of market-value compensation in partial-using cases. For example, courts could employ an upkeep rule: if the state wishes to keep your lawn, beach, or facade in its traditional state, it must pay for the maintenance. The discussion in the text assumes that the market-value rule is retained.

condemnation of a strip of someone's land for use as a highway—a partial using. Is there an identifiable feature of this fact pattern that might serve as a clear benchmark for determining when partial usings require compensation?

The usings perspective suggests that the answer lies in the range of uses to which the owner of the burdened property could put the property as a whole. Taking a strip of land for use in a highway effectively severs the burdened land from the rest of the owner's lot—where the concept of severance refers to the reasonable or likely uses to which the owner might put his property as a whole. Given the construction of the highway, as a practical matter the burdened strip of land can no longer be used together with the rest of the property. The owner has been obliged to use his property in pieces. This state-imposed severance is what entitles the owner to demand that courts treat the used strip of land as an independent unit.

In other words, in a jurisprudence of usings, the state must pay compensation for a partial using if its conduct renders the larger unit of property unusable *as a whole*. This “unusable as a whole” should not be confused with “wholly unusable.” The land remaining to an owner after a highway has been built through his property is by no means wholly unusable. But as a result of the state's partial appropriation, the entire lot can no longer be used as a whole. When the state has effectively forced the owner to parcel some piece of property that formerly could have been used as a whole, it is in no position to claim that the larger parcel remains the relevant unit of “private property” for purposes of the Compensation Clause.³¹²

To take an easy partial-usings case in which compensation would *not* be due, consider once again a law requiring license plates to be installed on cars. This law does not force an owner, for practical purposes, to use his property in pieces. On the contrary, the range of uses of his car *as a whole* is left almost entirely open to him. For this reason, even assuming that the law effects a using of the few square inches of fender occupied by the license plate, the owner is not entitled to have those inches treated as an independent parcel. Because the law leaves to the owner the almost unrestricted use of the burdened property *as a whole*, the state may plausibly demand that the larger thing should remain the relevant unit of “private property” within the meaning of the Compensation Clause.³¹³

312. I am certainly not saying that an owner has any sort of “fundamental right” to use a piece of property as a whole. The question is solely whether—given a state using of a part of someone's property—the used part should be considered an independent unit for purposes of the Compensation Clause, or whether instead the state should be allowed to insist that the relevant unit is some larger parcel that has not been taken over (as a whole) for use.

313. This analysis has the additional virtue of explaining what is necessarily a puzzle for the diminution-of-value prong of takings doctrine. The puzzle is why the owner's entire property holdings should not be taken into account in the denominator—or at least why the analysis should stop at the level of a particular thing. Why, for example, should courts say that the loss of a car is a total taking, rather than (say) a fifty-percent taking of a two-car owner's vehicular property? See ACKERMAN, *supra* note 2, at 123-29 (stating this problem). If compensation law looks to usings rather than takings, an answer appears:

The same result holds in the case of the landmark designation. Although the law takes over the facade of a building for public use, it does not prevent the owner from using the burdened building as a whole. Similarly, a five-acre-lot zoning ordinance may prevent owners from selling off their land in parcels, but it actually *forces* them to use their property as a whole. Such laws, therefore, would not require compensation as partial usings. Once again, however, if the effect of such a law in a particular case were to force one specific use on the property as a whole, then the result should be different.

A more difficult case is presented by the Beachfront Management Act as applied to large-lot owners. Here, some quite plausible uses of the property as a whole are clearly impeded: an owner cannot, for example, construct a building that occupies his entire lot. On the other hand, the principal use that the owner may all along have been making of his lot as a whole—its use as a large, residential piece of beachfront property, with a house at the landward end and a private beach at the seaward end—is not affected at all. In fact, with respect to the large-lot owners, the effect of the Act that is most likely to prompt compensation claims is its prevention of further *parceling* of their land into smaller residential lots. In this respect, the law is much more closely analogous to the five-acre-lot zoning rule than it is to the eminent-domain highway case. Like the five-acre-lot rule, it permits and indeed to a certain extent *requires* owners to use their property as a whole, rather than preventing them from doing so.³¹⁴

The case to bear in mind is that of an easement or servitude imposed by the state on a strip of property, in a way that almost physically severs the used strip from the rest of the property and sharply restricts the use of the burdened piece in conjunction with the whole. Where a partial using of property is accompanied by a substantial physical intrusion—such as opening the used portion to the public, running a highway over it, excluding the owner from it, or permanently occupying it in a fashion that prevents or substantially impedes use of the property as a whole—compensation must be paid. If, however, an owner asserts a partial-usings claim in the absence of such substantial physical intrusion, a judge could reasonably decide that the relevant property is the larger parcel and deny relief.

“But wait—*Pennsylvania Coal* was a ‘regulatory using’ case, without any physical invasion, and it involved only a part of a larger parcel of property

property is to be measured in use-packages. Cars are not frequently driven in tandem; even if they were, the fact that the state has commandeered one of an owner’s two cars would force the owner to use the other separately. As a result, the state would not be entitled to demand that the two-car “unit” be treated as the relevant “private property” whose public use is at issue.

314. A similar analysis applies to typical set-back rules, whose effect in turn closely resembles that of the Beachfront Management Act as applied to large-lot owners. Because (at least in our culture) pieces of land are commonly used as a whole in configurations with a structure fronted or surrounded by open property, set-back laws (considered apart from any use requirements that a city’s zoning rules might attach to them) leave available to owners a wide range of uses of their property as a whole.

rights, didn't it? According to your position now, *Pennsylvania Coal* was wrongly decided."

On the contrary, although takings doctrine has no answer to the question of whether the support estate in *Pennsylvania Coal* or *Keystone* should be deemed an independent piece of property, usings doctrine strongly favors Justice Holmes's decision. Underground minerals do not have much use *as a whole*. And to the extent they do, Pennsylvania's anti-subsidence law in both cases effectively severed the support coal—with respect to its potential uses—from the rest of the owner's property. For these reasons, under a jurisprudence of usings, the Court in *Keystone* should have adhered to *Pennsylvania Coal*.

VI. CONCLUSION

"[I]f the machine is to work," wrote Justice Holmes five years after *Pennsylvania Coal*, it is necessary "to conciliate the mind to something that needs explanation: the fact that the constitutional requirement of compensation when property is taken cannot be pressed to its grammatical extreme."³¹⁵

Takings law has always been afraid to take the Compensation Clause literally because it literally reads "for public use" into grammatical oblivion. There is no "constitutional requirement of compensation when property is taken." If the machine is to work, the Compensation Clause *must* be pressed to its grammatical extreme.

But isn't there a deep inconsistency in all this? Am I really insisting, simultaneously, that the Compensation Clause be read: (1) in accord with its text, *as written*; and (2) in accord with the right of privacy, the most untextual and unwritten right in all constitutional law?

Yes. But also in accord with numerous other enumerated constitutional guarantees: the First Amendment right *not* to speak, which prevents the state from "forc[ing] an individual, as part of his daily life[,] . . . to be an instrument for fostering public adherence to an ideological point of view";³¹⁶ the Quartering of Soldiers Clause, as we have seen; the right against forced self-incrimination, for there could hardly be a using more acute than to be made to turn state's evidence against oneself, as if the state had exercised a sort of eminent domain over one's own conscience; the prohibition of slavery and other involuntary servitude, a using so vicious that the Constitution bars

315. *Tyson & Brother—United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 445 (1927) (Holmes, J., dissenting).

316. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (emphasis added) (invalidating law requiring display of state motto on license plate); see *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); see also Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 207 (1992) (characterizing *Wooley* as presenting the question "whether turning a citizen into a billboard for the state's ideology is like using him as a mouthpiece") (emphasis added).

it even in private relations; and the Equal Protection Clause, which also rests ultimately on the demand that the state recognize each citizen as one of its ends. If the compensation guarantee were some day to be read as a usings clause, it would have recovered not only its text, but also its place in a far-reaching constitutional structure.

This structure is no accident. Political freedom consists of the citizens' ability to make of their state what they will; when the state instead seeks to instrumentalize the citizenry—to make of individuals what it will—the essential democratic relation is reversed. There are, to be sure, usings far worse than the exercise of eminent domain over a strip of someone's property. (That is why eminent domain merely requires compensation, whereas violations of the right to privacy or the Involuntary Servitude Clause are prohibited altogether.) But if the state had unfettered power to dictate the use of private property, it would be in a position to write a script for most of our lives.

Giving content to the principle that the state may not treat its citizens as mere means—distinguishing between proscription and conscription, assimilating the usings principle with the duties and virtues of public service—may well be difficult. It requires normative judgment to be exercised and lines to be drawn in borderline cases. But if we are to remain the authors of our own constitutional order, then the Constitution must be read as written, and compensation paid when the state takes private property for public use.

