Administrative Takings: A Realist Perspective on the Practice and Theory of Regulatory Takings Cases

David A. Westbrook

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ADMINISTRATIVE TAKINGS: A REALIST PERSPECTIVE ON THE PRACTICE AND THEORY OF REGULATORY TAKINGS CASES

David A. Westbrook*

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* Associate Professor of Law, State University of New York at Buffalo School of Law. This Article was sparked years ago by conversations with Judge S. Jay Plager of the United States Court of Appeals for the Federal Circuit, for whom I clerked and who graciously entertained my ideas about a subject which is dear to his heart and to which he has made substantial contributions. I want to thank Bill Butler and Kara Stein, with whom I worked on takings cases at Wilmer, Cutler & Pickering, and Professors Jim Chen, Sherman Clark, and Marc Miller, who commented on a draft version of this Article. I am again indebted to my teacher Frank Michelman, this time for providing scholarly (in all the best senses) advice on a number of questions, usually at short notice. Special thanks are due to Eric J. Kuhn, Natalie Butler, and Barbara Rutland for their able research and to Donna Sisson, Karen Johnson, Jeanne Fletcher and Darlene Miller for their secretarial assistance. Any mistakes are, as ever, my own.
Introduction

The law of regulatory takings—the constraint of the government’s regulatory powers by the command of the Fifth Amendment that “nor shall private property be taken without just compensation”\(^1\)—has been a major preoccupation of the legal community for several decades.\(^2\) Judges, practitioners, and academics agree that the rationales offered by courts to support their judgments in takings cases are inconsistent.\(^3\) And yet, although takings law is doctrinally vexed, actual takings cases are not particularly difficult. Hard cases exist, as in any area of the law, but the vast majority of takings cases

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1. U.S. Const. amend. V. Unless otherwise indicated, “government” refers to either state or federal government. Lore has it the Fifth Amendment was made applicable to the states through the due process clause of the Fourteenth Amendment in Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 239 (1897). See Dolan v. City of Tigard, 512 U.S. 374, 383 n.5 (1994). But see id. at 410–11 (Stevens, J., dissenting); discussion infra nn. 128–33 and accompanying text. Neither Stevens nor anyone else appears to question the general proposition that the takings clause applies to the states. In addition, most state constitutions contain a clause providing that takings be compensated.


3. See Nollan v. California Coastal Comm’n, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting) (acknowledging “great uncertainty” about the Supreme Court’s takings decisions); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–24 (1978) (noting the Court’s difficulty in determining what constitutes a taking); Bruce A. Ackerman, Private Property and the Constitution (1977) (“Indeed, in many conversations on the subject, 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.”); Richard A. Epstein, Takings, Exclusivity and Speech: The Legacy of PruneYard v. Robins, 64 U. Chi. L. Rev. 21, 21 (1997) (“The law of takings, with its ever expanding subject matter, is a sprawling affair with very little intellectual coherence.”); Jeremy Paul, The Hidden Structure of Takings Law, 64 S. Cal. L. Rev. 1393, 1524 (1991) (“[T]he Court’s inability to move beyond ad hoc inquiry and the undeniable difficulty of reconciling the Court’s takings cases have provided an irresistible challenge to scholars, who seek to impose order upon this chaos”); Andrea L. Peterson, The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Taking Clause Doctrine, 77 Cal. L. Rev. 1299, 1304 (1989) (“[I]t is difficult to imagine a body of case law in greater doctrinal and conceptual disarray.”); Susan Rose-Ackerman, Against Ad Hocry: A Comment on Michelman, 88 Colum. L. Rev. 1697, 1698 (1988) (“[T]he future direction of takings law is very much in doubt.”). This critique is not new. See Dunham, supra note 2, at 63 (noting the “crazy-quilt pattern of Supreme Court doctrine”).
are resolved in rather straightforward fashion. This combination of doctrinal confusion and relatively settled law presents, to those so inclined, a very seductive jurisprudential puzzle: how to express the abstract doctrine, to restate the law, in a way that explains all of the cases and does not flatly contradict a Supreme Court pronouncement?

In 1964, Joseph Sax published *Takings and the Police Power,* one of the first rivulets in the modern stream of academic writings on the Takings Clause. Sax's article is significant in part because it set the pattern for adopting what would come to be called a "Comprehensive View" of takings law. With considerable labor, it would be possible to make the case that every effort to take a Comprehensive View of the case law has been unsuccessful. That labor would be the stuff of an-

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4 This too has been noted by academic commentators. See Peterson, *supra* note 3, at 1304 ("[O]ne can often predict how the Court will rule in a takings case . . . ."); see also Ackerman, *supra* note 3, Chs. 5, 6 (arguing that takings law, for all its logical incoherence, can be understood by reference to the socially formed understandings of the "Ordinary Observer").


6 See Ackerman, *supra* note 3, at 11.

7 See, e.g., *id.* at 4 ("Not for the first time in our constitutional law, it will be impossible to resolve the legal issues without confronting, and resolving as best we can, our philosophical perplexities."); *id.* at 5 ("Philosophy decides cases; and hard philosophy at that."). Ackerman admits, however, that his view "accords a role to theory far greater than that granted generally by the profession." *Id.* See also Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II—Takings as Intentional Deprivations of Property Without Moral Justification,* 78 CAL. L. REV. 53, 58 (1990) ("This predictability suggests that an unarticulated pattern underlies the Supreme Court's takings jurisprudence. In this Article, I attempt to identify a set of principles that account for and explicate that underlying pattern."). Peterson calls the underlying pattern "unified," and "a single coherent set of principles," *id.*, and sets forth her intention "to provide a complete descriptive theory of when the Court will find that a compensable taking of property has occurred." *Id.* at 61. She explicitly disclaims the possibility that case law might be understood in terms of principles that were not unified. *Id.* at n.21. Should the reader be dissatisfied with her theory, Peterson welcomes competing theories, see *id.* at 61, tacitly assuming that the only response to theory is more/better theory. The present Article implicitly argues against such ambitions to theory. Similarly, Richard Epstein has claimed that his book, *Takings,* provides a complete takings theory, and that this is a good thing. See Richard Epstein, *A Last Word on Eminent Domain,* 41 U. MIAMI L. REV. 253, 275 (1986). But still again, more than a decade later, he said: "Theory comes first; case law interpretation and practical politics only after the conceptual underbrush is cleared away." Richard A. Epstein, Pennsylvania Coal Co. v. Mahon: *The Erratic Takings Jurisprudence of Justice Holmes,* 86 GEO. L.J. 875, 876 (1998). Regrettably, according to Epstein, Holmes' "insights are not disciplined by any overriding theoretical approach." *Id.* at 891.
other article. Suffice it to say that theorists themselves are not satisfied with the results, and continue to find it necessary to produce theoretical accounts of the takings cases.

I doubt there is a vantage point from which a Comprehensive View can be taken, a Pisgah from which one can see the cases logically arrayed down upon the plain. Suits brought under the Takings Clause concern not one but many aspects of government power, and the various ways in which government should go about its business cannot be unified within a single normative theory. This Article suggests a more pragmatic approach to takings law, and highlights some of the insights that this approach affords.

A pragmatic approach to takings cases requires examination of the practice of deciding such cases. Regulatory takings claims—as opposed to theories—are from the beginning demands for judicial review of government action. Takings cases may raise great questions,
such as the nature of private property\textsuperscript{13} or the tensions within a society that aspires to both democratic government and a respect for property rights.\textsuperscript{14} But even in such cases, courts must decide whether, and if so how, they are to review the actions of coordinate branches of government. Many substantive doctrinal difficulties noted by commentators on regulatory takings are not so difficult when analyzed within this institutional context, that is, as legally sufficient decisions rather than as inadequate philosophy. I begin this Article by examining takings cases \textit{in situ}, as claims brought against an organ of the government and reviewed by a court.

This Article has two theses. First, as the title suggests, regulatory takings tend to be claims against the administrative actions of government. Part I describes how both the institutional context and the internal structure of takings suits incline courts to fact-specific review of particular agency actions, rather than theoretically satisfying pronouncements on general legislation. Because takings cases tend, for deeply embedded reasons, to be decided on the particularities of each case rather than grand principle, takings law tends to be pragmatic at the expense of internal consistency.\textsuperscript{15} The general lesson here is an old one: legal process does much to define the substance of legal discourse.

To say that takings law is pragmatically sensible rather than internally consistent, however, is not to say that the law is unprincipled. The second thesis of this Article, to which Part II is devoted, is that the judicial review of administrative action under the Takings Clause resembles the judicial review (often of legislative action) conducted under the rubrics of the Due Process Clause, the Equal Protection Clause, and the great administrative law statutes. Takings cases turn on familiar concerns, as opposed to some constitutional interest specific to the Takings Clause. I conclude by suggesting that the Takings Clause is a constitutional device through which bureaucracy—the regulatory state—is held accountable.

\textsuperscript{13} See, e.g., Peterson, \textit{supra} note 7, at 61–76 (defining property); Sax, \textit{supra} note 2, at 61 ("Since the question being asked is what sort of protection is to be given to property, the initial task must be to develop a workable concept of what we mean when we talk about property.").


\textsuperscript{15} See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) ("As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions.").
The present account of takings law is realist in its focus on institutional context, specifically the process of judicial review. Takings law makes considerable sense if one remembers that cases are litigations before they become the raw material for articles, and that judicial opinions are written under the constraints that litigation imposes. Takings claims are not made in a vacuum, and the opinions that decide them are not written on a blank screen. Perhaps because the conflict between the property owner and the government is so dramatic, academic takings literature on the whole seems little concerned with the problems of judicial review central to every claim that property has been taken without just compensation. To understand takings cases, attention should be paid to the political and institutional roles of courts that sit in judgment on the activities of other organs of government. Takings jurisprudence is more successful, and more satisfying, when considered as the collective practice of the judiciary reviewing government action rather than as an internally consistent doctrinal edifice.

I. THE FOCUS ON AGENCY ACTION IN REGULATORY TAKINGS CASES

A. The Claim

The Fifth Amendment—not just the Takings Clause—regulates the way in which the government applies its power to the individual. The clauses proceed in descending order of gravity for the individual affected by the government action—from a requirement for how the

16 Attention to judicial decision, as opposed to academic doctrine, is certainly a hallmark of realism. Efforts to define realism more completely have been around as long as realism itself. See, e.g., Karl Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 Harv. L. Rev. 1222, 1226–28 & n.18 (1931). Judging by the number of contemporary efforts to define realism, a satisfactory solution to this problem has yet to be found. Discussing or mentioning the work of a number of contemporary scholars, including herself, Professor Kalman states that “I concede that none of us have come up with a satisfactory definition of realism, but I contend that it is still a useful category for historical analysis.” Laura Kalman, Bleak House, 84 Geo. L.J. 2245, 2551 (1996) (reviewing John Henry Schlegel, American Legal Realism and Empirical Social Science (1995)). See also Laura Kalman, Legal Realism at Yale, 1927-1960 (1986); American Legal Realism, supra note 12 (collecting edited primary sources with commentary); Joseph William Singer, Legal Realism Now, 76 Cal. L. Rev. 465, 476 n.40 (1988) (reviewing Kalman, supra) (defining realism through a bibliography of works he finds significant).

17 In his classic treatise, Louis Jaffe similarly used the practice of review as a way to understand administrative law. Louis Jaffe, Judicial Control of Administrative Action (1965). A danger of this approach, of course, is that the unwary reader may unselfconsciously, but still wrongly, understand appellate court pronouncement to be the whole of the law.
government may prosecute felonies (i.e., very serious crimes) to a purely civil matter, the taking of property. The Fifth Amendment thus sets forth, if only in broad outline, a hierarchy of restraints on how the power of the state is exercised, from irremediable capital punishment to the exercise of imminent domain, easily to be remedied by a money payment.

Courts have long held that government regulation may take property, in the constitutional sense, even though the government does not actually acquire title to or physical possession of the land or chattels at issue. Such claims have come to be called "regulatory takings." In Pennsylvania Coal v. Mahon, decided in 1922, the Supreme Court held that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." While Pennsylvania Coal has generated a great deal of commentary, it is generally considered to stand for the proposition that the Constitution may require compensation for government regulation of the uses to which property may be put, even if such regulation is proper in every respect. At least since Pennsylvania Coal, therefore, a regulation can be within the police power of the government, and nonetheless necessi-

18 The complete text of the Fifth Amendment is:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.


20 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). Interestingly, a cold reading of the case would not yield this holding. See discussion infra note 32 and accompanying text; Brauneis, supra note 19. This is, however, the significance of Pennsylvania Coal in U.S. legal culture.
tate compensation for an individual whose property rights are adversely affected.21

In fact, courts usually do not find that a regulation that adversely affects the value of property works a taking. Thus, the problem before the courts in regulatory takings cases is to distinguish regulations that "go too far" and so require compensation, from regulations that do not. One solution to this problem, necessarily somewhat vague if the question is considered in the abstract, is that judicial review under the Takings Clause, as under the Fifth Amendment as a whole, is concerned both with how the government regulates and with what the government regulates. In judging takings claims, "the way of government matters."22 Courts decide whether regulatory activity preserves or disturbs the proper relation between the government, representing the collectivity of citizens, and individual members of a civil society. Takings jurisprudence entails a right relationship between government and governed, in which both have their normal (i.e., both normative and usual) roles. When government acts outside its normal role, in a manner that destroys private property rights, the Takings Clause may require compensation for the owner.

A court may determine that government has acted outside its normal role and must compensate the affected property owner, even if the government action is fully permissible. Indeed, the opinions in takings cases often presume that the government action is not only permissible, but well-intentioned.23 In building a road, or regulating the use of land, the government is presumably realizing worthy policy objectives. The worthiness of the underlying policy, however, does not relieve the government of its obligation to compensate.

On the other hand, the mere fact that the government deprives a private individual of property does not suffice to create a taking. Neither fines nor taxes are takings.24 Maintenance of the criminal

21 The dominant late 19th and early 20th century understandings of the constitutional protection of private property appear to have been very different. The Takings Clause (along with the Contract, Privilege and Immunities, and Due Process Clauses) protected private property, and the police power governed the public realm, under which neither property nor a takings claim was possible. There was, therefore, no situation in which government both had authority to act under the police power, and owed compensation under the takings clause. See Brauneis, supra note 19. But see Lynch v. United States, 292 U.S. 571 (1934).

22 Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994).

23 See, e.g., Dolan v. City of Tigard, 512 U.S. 374, 396 (1994) (noting that although the city's goals were well-intentioned, just compensation was still required); see also Michelman, supra note 14, at 1626.

24 "Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the differ-
justice system and the tax regime are normal activities of government, that is, they are intended to be expressions of an appropriate relationship between the state and criminals, in the first instance, and between the state and its citizens, in the second. In contrast, the exercise of imminent domain (either directly through the government's condemnation procedure, or indirectly through a property owner's takings claim\(^{25}\)), is in some sense extraordinary.

The line between "normal" taxation and "extraordinary" taking is necessarily normative.\(^{26}\) It is logically consistent to assert that virtually all exactions are transgressions of the appropriate relationship between the state and its subjects, i.e., most taxation should be compensable.\(^{27}\) It is equally logical to maintain the precise opposite, that government regulation inheres in civilized life, and it is merely whimsical to designate some exactions as requiring compensation.\(^{28}\) Although both are logical, neither extreme is particularly sensible, and it has been left to the courts to distinguish between ordinary and extraordinary, fair and unfair, exercises of government power.\(^{29}\)

### B. The Ripeness of the Claim

It is frequently difficult for either the parties or the courts to determine when a course of bureaucratic action reorders property rights, and is hence justifiable as a takings claim. The judicial review of how another government organ exercises power is therefore often

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25 Regulatory takings claims brought by landowners arguing that regulations are confiscatory in effect have sometimes been called "inverse condemnation" actions. See, e.g., Suitum v. Tahoe Reg'l Planning Agency, 117 S. Ct. 1659 (1997).

26 See Frank Michelman, The Common Law Baseline and Restitution for the Lost Commons: A Reply to Professor Epstein, 64 U. Chi. L. Rev. 57, 67 (1997) (The right to compensation "falls out of a judgment of political fairness: if, in the general context of American constitutionalism, it is unfair for politics to impose on property in the challenged way without compensation, then property has been taken, and vice-versa."); Sax, supra note 2, at 57 ("What seemed to concern the early writers was not the fact of loss but imposition of loss by unjust means. It was the exercise of arbitrary or tyrannical powers that were sought to be controlled.").

27 See Epstein, supra note 9.

28 See Kaplow, supra note 9.

29 Advocacy may play an important role in such characterizations. The claimant's case in Pennsylvania Coal was argued before the Supreme Court by former Solicitor General Davis, whose name still adorns the Wall Street firm of Davis, Polk & Wardwell. Justice Holmes said of Davis, "[o]f all the persons who appeared before the Court in my time, there was never anybody more eloquent, more clear, more concise, or more logical than John W. Davis." Mary Ann Glendon, A Nation Under Lawyers 34 (1994).
deferred. In such cases, the issue litigated is not whether the government acted in its normal role with regard to property interests, but whether the relationship between the claimant and the government is sufficiently well-defined to permit such analysis. The cause of the uncertainty lies in the structure of the takings challenge to government regulation of the use of property. A takings suit claims that "private property" has been taken "without just compensation." Therefore, no takings claim can be stated until the government has (i) taken property, and (ii) denied the owner compensation for the taking.

In practice, these determinations are often difficult to make. Government regulation rarely takes property in obvious fashion and administrative agencies rarely concede that property was taken. Agencies therefore have no need to refuse to pay compensation. As a result, claimants must argue both that property has in fact been taken, and that the government's silence is a tacit refusal to pay compensation. For their part, judges seldom rush to answer constitutional questions. As a fundamental matter of constitutional jurisprudence, courts are to avoid resolution of controversies on constitutional grounds whenever another just ground for decision presents itself.

The Court rejected a preenforcement takings challenge to the Surface Mining and Control and Reclamation Act of 1977 in Hodel v. Virginia Surface Mining & Reclamation Ass'n, in part because the property owners had not sought administrative relief from the terms of the statute, relief which was provided for by the same statute. The Court noted that if the property owners "were to seek administrative relief under these procedures, a mutually acceptable solution might well be

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30 U.S. Const. amend. V. Professor Rubenfeld has argued that courts should pay more attention to "public use" as a criterion for distinguishing compensable government actions, takings, from mere diminutions. See Rubenfeld, supra note 9.


32 In his famous concurrence in Ashwander v. Tennessee Valley Authority, Justice Brandeis wrote:

The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. ... Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.


reached . . . thereby obviating any need to address the constitutional questions.\textsuperscript{34}

To be literal-minded, regulation of how the property owner may use the property almost never takes the property, because the owner retains title.\textsuperscript{35} As Holmes said, "if regulation goes too far, it will be recognized as a taking."\textsuperscript{36} Holmes did not say, "if a regulation goes too far, it will transfer title to the government." In the regulatory takings context, the superficially simple question—did the government take property—thus becomes the more difficult and open-ended question—when should the court hold that government actions constitute a \textit{de facto} destruction of the bundle of rights that comprise ownership?\textsuperscript{37} In order to evaluate the actual effects of the government's regulation on the claimant's property, the government needs to have acted, not merely threatened to act. There is thus a profound tendency to review only government actions that have in fact been applied to specific parcels or chattels, and to dismiss as unripe facial challenges to statutes or regulations.

This hesitancy over whether a regulation should be characterized as though it worked a taking of property is expressed both jurisdictionally and prudentially. Jurisdictionally, the Constitution requires courts to review cases and controversies, not to speculate on prospective government action.\textsuperscript{38} Prudence generally requires courts to proceed on as fully developed a record as possible.\textsuperscript{39} Controversy over

\textsuperscript{34} \textit{Id.} at 297 (footnote omitted). In some cases, claimants may be able to show that application for a variance would have been futile. \textit{See}, e.g., Herrington v. County of Sonoma, 834 F.2d 1488 (9th Cir. 1987), \textit{as amended} \& \textit{reh'g denied}, 857 F.2d 567 (9th Cir. 1988), \textit{cert. denied}, 489 U.S. 1090 (1989).

\textsuperscript{35} \textit{Dolan v. City of Tigard}, 512 U.S. 374 (1994), involved an exaction of title to an easement in exchange for a variance to a zoning ordinance. Thus, not the regulation, but relief from the regulation, took title to property.

\textsuperscript{36} Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (emphasis added).

\textsuperscript{37} \textit{Pennsylvania Coal}, however, reached the statute prior to its application. \textit{See id. at} 394.


\textsuperscript{39} The ripeness doctrine is generally viewed as being both constitutionally required and judicially prudent. The constitutional mandate results from Article III's requirement that federal courts hear only cases or controversies. The prudential restrictions result from the fact that most courts would rather avoid speculative cases, defer to finders of fact with greater subject matter expertise, decide cases with fully-developed records, and avoid overly broad opinions, even if these courts might constitutionally hear a dispute. \textit{See Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 n.18
whether claimant’s loss is sufficiently certain to support a takings claim may extend to the Supreme Court. In *Pennell v. City of San Jose*, the Supreme Court affirmed the dismissal of a claim that a rent control ordinance, on its face, worked a taking because “there simply is no evidence that the ‘tenant hardship clause’ has in fact ever been relied upon . . . to reduce a rent . . . .”

It is nonetheless possible to conceive of a statute that would, without actually being applied, present a conflict ripe for adjudication. *Hodel v. Virginia Surface Mining & Reclamation Association* seemed to be such a case. The Surface Mining Act regulates only one activity, mining. The Court explained:

> Because appellees’ taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land. Thus, the only issue properly before the District Court and, in turn, this Court, is whether the “mere enactment” of the Surface Mining Act constitutes a taking.

Thus, while it is legally possible to bring a takings claim against a regulatory statute prior to its application in a concrete situation, the nature of the claim makes it difficult to succeed. As the Court summarized in *Suitum v. Tahoe Regional Planning Agency*:


> 40 *See*, e.g., *Lucas v. South Carolina Coastal Council*, 506 U.S. 1003 (1992) (particularly the dissenting opinions and the separate statement of Justice Souter); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986) (requiring “a final and authoritative determination of the type and intensity of development legally permitted on the subject property”); *Williamson County Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172 (1985) (holding that respondent’s claim was not ripe because he had not yet received a decision concerning his ordinance application nor used the available state procedures for receiving just compensation); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 630 (1981) (holding that in the absence of a final state court judgment, there is no appellate jurisdiction under 28 U.S.C. § 1257); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (unanimous decision) (“[B]ecause the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions.”); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 137 (1978). In *Penn Central*, the court dismissed a claim of categorical takings: “Since appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal.” *Id.*


> 43 *Id.* at 295.

> 44 *But see* *Babbitt v. Youpee*, 117 S. Ct. 727 (1997).
Such “facial” challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed, but face an “uphill battle,” since it is difficult to demonstrate that “mere enactment” of a piece of legislation “deprived [the owner] of economically viable use of [his] property.”

In claims founded on land use regulation, the Supreme Court has not been satisfied with application of the law, but has required the claimant to show that the effects of the regulation on the parcel could not be avoided or ameliorated. For example, in United States v. Riverside Bayview Homes, Inc., claimants challenged § 404 of the Clean Water Act, which gives the Army Corps of Engineers the authority to issue permits for building in wetlands. The Court denied the proposition that the “mere assertion of regulatory jurisdiction” worked a taking:

A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself “take” the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired.

This ruling highlights a basic theme of this Article: regulatory takings cases are judicial reviews of administrative agency action. Therefore, the ripeness of a case is determined by the finality of the agency’s action. The agency needs to have committed itself to a final decision; agency discretion over the matter must be at an end. Ripeness doctrine ensures that the conflict between the property owner and the agency is sufficiently well-defined for the judiciary to review the agency decision. The Supreme Court made this explicit in Suitum v. Tahoe Regional Planning Agency. Suitum owned a parcel near Lake Tahoe. The parcel was within a planning district controlled by the Tahoe Regional Planning Agency, which had authority for land use planning in the area. In 1989, Suitum applied for a permit to build a residence on the property. The Agency determined that her land was in a “Stream Environment Zone” and therefore could not be built upon. Suitum was entitled, however, to Transferrable Development Rights (TDRs) which, at least in theory, could be sold to a third party.

48 Riverside, 474 U.S. at 126.
49 Id. at 127. See also MacDonald, Somer & Frates v. County of Yolo, 477 U.S. 340, 348 (1986).
In addition, Suitum was eligible for a lottery in which she was assured of receiving further TDRs. The Agency argued that Suitum's takings claim was not ripe because she had not attempted to sell her TDRs. Therefore, the Agency argued, the magnitude of Suitum's loss could not be known and the fact of whether there had been a taking could not be ascertained. Until such a determination was possible, the Agency argued, the case would remain unripe.

The Supreme Court disagreed. In its discussion of the "finality requirement" (i.e., that agency action be final in order for a takings claim to be ripe), the Court noted two points. First, the requirement "applies to decisions about how a taking plaintiff's own land may be used," and second, the requirement "responds to the high degree of discretion characteristically possessed by land use boards in softening the strictures of the general regulations they administer." In Suitum's case, both points had been met. First, there was a final decision regarding her land—nothing could be built on it. Second, there was no further decision to be made by the Agency regarding Suitum's land. The conflict between Suitum and the Agency was therefore ripe for review. The Court dismissed the Agency's argument that Suitum needed to sell her TDRs and to have the purchaser's use of such TDRs approved by the Agency, in order to determine the magnitude of Suitum's loss, and hence decide whether or not such a loss constituted a taking. The Court found the question of the value of the TDRs to be factual and for the jury. For the purposes of the Takings Clause—i.e., judicial review of government action—the crucial question was not the magnitude of the claimant's loss, but how the government agency had in fact acted.

In sum, due to judicial concern for the ripeness of takings claims, courts that reach the merits tend to review the agency that administers the statutory scheme, not the legislature that authors the statute. As I next discuss, the administrative emphasis of takings jurisprudence is

52 See Suitum, 117 S. Ct. at 1667.
53 Id.
54 See id.
55 See id. In the event that Suitum sold a TDR to a third party, that third party would still have to seek the Agency's authority to use the TDR. Permission might or might not be granted, depending on the circumstances. The Court found that this did not constitute a decision regarding Suitum's land. At most, the risk that the Agency would deny permission to use the TDR discounted the value of the TDR. See id. at 1668–69.
56 See id.
further reinforced by constraints on the remedial powers of courts that hear takings cases.

C. Remedies and Ramifications

At least in theory, successful takings claims may have two distinct logical structures. Both sorts of claims begin with the propositions that (a) "nor shall private property be taken, without just compensation," and (b) property has been taken. The first sort of claim concludes therefrom that compensation is due, and prays for monetary relief. The second sort of claim adds another premise: no compensation has been or will be paid. The second sort of claim concludes therefrom that the government has acted unconstitutionally and prays for equitable relief.

Procedurally, the difference between monetary and equitable relief may be the difference between federal courts. Takings claims for compensation, if for more than $10,000 and against the federal government, are brought in the Court of Federal Claims and appealed to the Court of Appeals for the Federal Circuit. Takings claims for invalidation, if against the federal government, are generally brought in federal district court and appealed up through the regional courts of appeals.

From the court's perspective, there is a somewhat subjective but nonetheless substantial difference in character between grants of monetary and of equitable relief. A grant of monetary relief means that a particular claimant, but for the relief, would be forced to bear a cost that should be shouldered by the public fisc. The validity of the government's action is not in question. In contrast, an order based upon a finding of constitutional infirmity challenges the validity of a government action, and implies that a coordinate organ of the federal government has acted outside of its powers.

Invalidation is always available. Since *Marbury v. Madison*, courts have had the right to declare government actions unconstitutional. The real question is whether a takings claimant may instead pray for compensation. Until relatively recently, in constitutional

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57 U.S. Const. amend. V.
58 For these purposes there is no difference between injunctive and declaratory relief.
60 There are exceptions. The Tahoe Regional Planning Agency, the defendant in *Suitum*, is an interstate agency, approved by Congress. *Suitum* sued for monetary compensation, in federal district court, under 42 U.S.C. § 1983. See *Suitum*, 117 S. Ct. at 1663.
61 5 U.S. (1 Cranch) 137 (1803).
terms, it has been unclear whether the Fifth Amendment itself entails a right to monetary relief.62 The Constitution prohibits the payment of money from the federal fisc without the express consent of Congress.63 One might think, therefore, that if Congress did not authorize the payment of compensation for property deemed to be taken by government action, then the courts would be unable to grant monetary relief, and takings claimants would be forced to challenge the validity of the government action in question.

The Supreme Court has provided two reasons why this is not the case. First, the Tucker Act establishes that "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution . . . ."64 Regardless of the particular government action that gives rise to the claim, takings claims are based upon the Fifth Amendment, and hence "founded upon the Constitution"65 (i.e., within the terms of the Tucker Act).66 The Supreme Court has held that, in passing specific legislation, Congress need not indicate an intention to make Tucker

62 In 1975 a leading commentator maintained that the proper remedy for excessive limitation on the use of property was invalidation under what appears to be a substantive due process analysis, rather than compensation:

[If] regulative legislation is so unreasonable or arbitrary as virtually to deprive a person of the complete use and enjoyment of his property, it comes within the purview of the law of eminent domain. Such legislation is an invalid exercise of the police power since it is clearly unreasonable and arbitrary. It is invalid as an exercise of the power of eminent domain since no provision is made for compensation.

1 NICHOLS, EMINENT DOMAIN §1.42(1) (3d rev. ed. 1975) (quoted in Agins v. City of Tiburon, 598 P.2d 25, 28 (Cal. 1979) (emphasis omitted)). Stripping away the verbiage, it is worth noting that government actions that take all use of property are not necessarily "clearly unreasonable and arbitrary." For example, First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), involved a prohibition on reconstruction of buildings on a floodplain, enacted after a fatal flood. Lucas involved building restrictions enacted by the State of South Carolina in the wake of Hurricane Hugo and its 29 fatalities and six billion dollars worth of damages in South Carolina. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1037 n.1 (1992) (Blackmun, J., dissenting); id. at 1075 & n.13 and accompanying text.

63 See U.S. CONST. Art. I, § 9, cl. 7.
66 As a general matter, takings judgments are not paid from moneys appropriated by the act authorizing the governmental action subsequently deemed a taking. Instead, Congress has established a judgment fund, out of which judgments adverse to the government are paid. So, the requirement of Article I, § 9, that expenditures be authorized by the legislature, has been met.
Act remedies available to those whose property is taken by action of the legislation. Absent explicit language to the contrary, Congress is presumed to have intended Tucker Act compensation to be available. The Tucker Act thus provides the judiciary with the authority to grant monetary relief for takings claims against actions of the federal government.

The second source of judicial authority to grant compensation in takings cases appears to be the Constitution itself. The Tucker Act does not apply to the states. In *Agins v. City of Tiburon*, the Supreme Court of California, sitting en banc, was "persuaded by various policy considerations to the view that inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged." The court therefore held that "mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances." On appeal, the U.S. Supreme Court held that the zoning law at issue in *Agins* did not work a taking. The Supreme Court therefore did not reach the issue of whether the Fifth Amendment required the State of California to provide monetary relief for takings claims.

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67 "The proper inquiry is not whether the statute 'expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy,' but rather 'whether Congress has in the [statute] withdrawn the Tucker Act grant of jurisdiction to the [Claims Court] to hear a suit involving the [statute] 'founded . . . upon the Constitution.'" *Preseault*, 494 U.S. at 12 (quoting Regional Rail Reorganization Act Cases, 419 U.S. 102, 126 (1974)). See also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) (relying on Regional Rail Reorganization Act Cases).

68 In the context of *Bivens* actions, the Supreme Court has expressly rejected an invitation to issue money judgments against agencies without an explicit expression of congressional intent to grant such damages. *See FDIC v. Meyer*, 510 U.S. 471, 486 (1994). ("If we were to recognize a direct action for damages against federal agencies, we would be creating a potentially enormous financial burden for the Federal Government.")


70 Id. at 29.

71 Id. at 31. It could be argued that, because the California Supreme Court held that the regulation did not work a taking, the discussion of remedies was dictum. Subsequent decisions, however, have treated this discussion as a holding. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 312 n.5 (citing cases).

72 See *Agins*, 447 U.S. at 259.

73 See id. at 263.
The Agins rule was repeatedly challenged. In First English Evangelical Lutheran Church v. County of Los Angeles, the Church owned a summer camp, Lutherglen, that was built in a floodplain. In the aftermath of a major flood, the county adopted Interim Ordinance No. 11.855, which prevented the Church from rebuilding its camp. Litigation ensued. Claimants alleged that the Ordinance deprived them of all use of the property, and that therefore they were due compensation. The California trial court sustained a demurrer to the effect that, under Agins, claimants had to allege that the Ordinance was unconstitutional and pray for equitable relief. The court of appeals affirmed on that basis.

The U.S. Supreme Court understood the question presented by this case to be whether "the California Supreme Court erred in Agins v. Tiburon in determining that the Fifth Amendment, as made applicable to the States through the Fourteenth Amendment, does not require compensation as a remedy for 'temporary' regulatory takings—those regulatory takings which are ultimately invalidated by the courts." This was a stretch. Neither the California Court of Appeals in First English nor the California Supreme Court in Agins mentioned temporary takings. On the contrary, in Agins the California Supreme Court was concerned with long-range land-use planning. Nor does it make any sense to condition compensation for a temporary regulatory taking on a judicial finding of invalidity; presumably a regulatory taking that was valid but only temporary also would be compensable.

Recourse must be had to the facts. The California Court of Appeals in effect held that the Church made a mistake in pleading. Under Agins, the Church had to complain that the Ordinance was unconstitutional, and it had not done so. The case had dragged on for almost eight years. Even assuming that the Church was allowed to amend its complaint, it would take more years to receive a final deci-

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74 See First English, 482 U.S. at 310.

Four times this decade, we have considered similar claims and have found ourselves for one reason or another unable to consider the merits of the Agins rule. See McDonald, Sommer & Frates v. Yolo County, 477 U.S. 340; Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172; San Diego Gas & Electric Co., supra; Agins v. Tiburon, supra.

Id.

75 See First English, 482 U.S. 304; see Michelman, supra note 14, at 1616 ("A little work is required to produce a clear statement of the precise question decided by the Court in this case.").

76 See First English, 482 U.S. at 309.

77 See id. The California Supreme Court denied the petition for review.

78 See id. at 310.

sion. Suppose that the Ordinance worked a taking, and that if the Church persevered, it ultimately would be successful.\(^8\) Then "compensation is not required until the challenged regulation or ordinance has been held excessive in an action for declaratory relief or a writ of mandamus and the government has nevertheless decided to continue the regulation in effect\(^8\) (i.e., the government decides to exercise its power of eminent domain). If instead of exercising its power of eminent domain, the State of California decided to rescind the regulation, then the Church would receive nothing, even though it had been deprived of the use of the land for years. This result is what galled the Court: "Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause."\(^8\) \(^2\) The State of California had to pay compensation for the period of time—which might be years—between the government action and judicial determination that such action worked a taking. Therefore, equitable relief could not be the sole form of relief for takings claims. The U.S. Supreme Court held "that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."\(^8\)

In holding that the Fifth Amendment required post hoc compensation for the loss of property during the pendency of legal proceedings, the Supreme Court necessarily held that the Fifth Amendment itself required a specific remedy—compensation—rather than equitable relief. No federal law was at issue. The State of California had no provision for payment of regulatory takings claims, and indeed in this case had determined that it was going to strike down its law rather than enforce it and pay compensation. Therefore, the requirement

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\(^8\) The Court explicitly reserved the questions of whether the ordinance in fact took all use of the property away from the Church, and of whether the ordinance might nonetheless be insulated from Fifth Amendment obligations to pay compensation as an exercise of the state's police power to ensure public safety. \textit{See First English}, 482 U.S. at 321.

\(^8\) \textit{Id.} at 308–09. As the U.S. Supreme Court's opinion later makes clear, the government may respond to a determination that a regulation works a taking by exercising its power of eminent domain, paying compensation, and pursuing the policy that occasioned the regulation. \textit{See id.} at 321.

\(^8\) \textit{Id.} at 319.

\(^8\) \textit{Id.} at 321. In light of the fact that nothing in the case below indicated that the Church would not be able to receive compensation for the loss of property during the pendency of the legal proceedings, it is difficult to see how this could be the holding. \textit{See id.} at 322 (Stevens, J., dissenting).
that courts provide monetary relief in situations such as the one presented in *First English* could only come directly from the Constitution. This was a substantial extension of the traditional idea that the Fifth Amendment is "self-executing."\(^8^4\) The Supreme Court quoted:

The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. *That right [is] guaranteed by the Constitution.* . . . Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. *The suits were thus founded upon the Constitution of the United States.*\(^8^5\)

But such language, like the Fifth Amendment itself, could be understood to impose a limitation on the extent of government power, rather than to specify a judicial remedy. The United States, as *amicus curiae*, took just this position in *First English*.\(^8^6\) The Supreme Court disagreed: "[I]t is the Constitution that dictates the remedy for interference with property rights."\(^8^7\) This "basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."\(^8^8\)

There are problems. First, if the Fifth Amendment so clearly requires compensation rather than equitable relief, why do so many cases, notably *Pennsylvania Coal*, grant equitable relief? Second, if the Fifth Amendment is self-executing and requires the compensation remedy, does it matter whether Congress has consented, in the Tucker Act or elsewhere, to allow courts to enter money judgments against the government? Would not a congressional effort to avoid responsibility for paying compensation, as required by the Constitution, be unconstitutional on its face? And yet congressional consent does appear to matter. A few years after *First English* was decided, the Supreme Court in *Preseault v. ICC* noted that the Fifth Amendment

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\(^8^4\) *Id.* at 315 (citing United States v. Clarke, 445 U.S. 253, 257 (1980)). See also United States v. Dickinson, 331 U.S. 745, 748 (1947) ("The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action'—when they are born, whether they proliferate, and when they die."); Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630, 1659 (1988).

\(^8^5\) Jacobs v. United States, 290 U.S. 13, 16 (1933), *quoted with approval* in *First English*, 482 U.S. at 315 (emphasis added).

\(^8^6\) *See First English*, 482 U.S. at 316 n.9.

\(^8^7\) *Id.*

\(^8^8\) *Id.* at 315.
was self-executing, and cited *First English*. But the Court then went on to discuss, at length, whether Congress, in passing the Rails to Trails Act, had withdrawn Tucker Act authorization to grant money judgments against the federal government. Third, nowhere in *First English* does the Supreme Court flatly say that states cannot satisfy the Fifth Amendment through the provision of equitable relief. And yet that would seem to be the necessary result of the Court's language.\textsuperscript{89}

What is the relationship between the two sorts of remedies: monetary compensation on the one hand, and equitable relief on the other? In some situations, the government, not the court, may choose the form of the relief granted by the court. A court may simply declare that a given action works a taking, and leave it up to the government to choose between either restoring the status quo ante or using its powers of eminent domain to take title to the property.\textsuperscript{90} But as a practical matter in cases involving the physical occupation of land, paradigmatically the building of roads, the government may be forced to pay compensation for the fee because the land has been rendered unusable by the government action. Moreover, even in situations in which the land could be returned, the government has paid compensation for taking the right of exclusive possession for a limited period of time—i.e., the government has been held to take a leasehold interest rather than a fee.\textsuperscript{91}

The Court has also expressed the common law preference for monetary over equitable relief. In *Ruckelhaus* the Court said that "Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking."\textsuperscript{92} In light of the fact that, as discussed above, a suit for compensation can generally be brought against the federal government, the *Ruckelhaus* rule amounts to a requirement that claimants pray for money in their first suit and challenge the validity of a federal

\textsuperscript{89} Justice Stevens, dissenting in *First English*, maintained that "[t]he Court recognizes that the California courts have the right to adopt invalidation of an excessive regulation as the appropriate remedy for the permanent effects of overburdensome regulations, rather than allowing the regulation to stand and ordering the government to afford compensation for the permanent taking." Id. at 335.


\textsuperscript{91} See *First English*, 482 U.S. at 320; see also United States v. Dow, 357 U.S. 17, 26 (1958) ("In such cases compensation would be measured by the principles normally governing the taking of a right to use property temporarily."); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945).

governmental action in a second suit (or under a different clause). The Court made this clear in *Preseault v. Interstate Commerce Commission,*\(^\text{93}\) in which the claimants challenged the Rails to Trails Act as violative of the Takings Clause.\(^\text{94}\) As discussed above, the Supreme Court held that the Tucker Act provided a general authorization for the treasury to pay judgments brought under the Fifth Amendment. Therefore, the Preseaультs' taking claim, if any, was for compensation against the government in the court of claims,\(^\text{95}\) and the challenge to the validity of the Act was premature.\(^\text{96}\)

Taken together, the cases exhibit a clear trend towards compensation, and away from invalidation, as the appropriate relief for takings claims. Under current case law, the Constitution requires both state and the federal governments to pay compensation for most takings. At least in the federal context, moreover, claims for monetary compensation must be brought before claims for injunctive relief.

Monetary relief may foster the incremental virtues of the common law better than injunctive relief. Monetary relief allows courts to make highly particularized judgments. In contrast, declaring a regulation valid or invalid is likely to decide a wide range of subsequent cases brought under the same regulation. It would be difficult to imagine facts on which counsel could now responsibly challenge the texts of the Surface Mining Control and Reclamation Act of 1977,\(^\text{97}\) the dredge and fill provisions of the Clean Water Act,\(^\text{98}\) or the Rails to Trails Act,\(^\text{99}\) on their face. In contrast, many applications of a statute are sufficiently new to support adjudication.\(^\text{100}\) For example, in *Dolan v. Tigard,* the Supreme Court recognized that "the authority of state and local governments to engage in land use planning [without compensation] has been sustained against constitutional challenge as long ago our decision in *Village of Euclid v. Ambler Realty Co.***\(^\text{101}\) The Court

94 The Preseaультs also claimed that the Rails to Trails Act represented an exercise of Congressional power in excess of that ceded to the legislature under the Commerce Clause. That claim was dismissed.  See id. at 17.
96 The Preseaультs ultimately prevailed on their claim for compensation.  See Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996).
99 See *Preseault,* 494 U.S. 1.
100 See *Preseault,* 100 F.3d 1525 (Rails to Trails Act).
then carefully reviewed the "adjudicatory decision" made by the City Planning Commission in exacting conditions in exchange for the Dolan’s building permit and decided that compensation was required. In Dolan, the issue was not general legislative authority, but a particular administrative decision.

At least for most claimants, money provides not merely an adequate remedy, but a highly appropriate one. Property ownership affords the individual a range of possibilities, opportunities to exercise the rights in the bundle. While government taking deprives the owner of property, the payment of compensation preserves the owner’s range of possibilities, the freedom, that was secured by property ownership. Moreover, the fact that a takings claim is generally not ripe until the taking actually occurs often makes injunctive relief inappropriate for the claimant. Once the law has actually been applied—i.e., the claimant has in fact been deprived of property—the claimant may be uninterested in challenging the validity of the legislative action. The land is flooded; the farm is lost; the turkeys are dead. After losing her property, however, the claimant may still be very interested in compensation for her loss. Indeed, having suffered an actual deprivation, even if the claimant maintained her facial challenge to the validity of the regulation, she would be virtually obligated to bring a claim for compensation against the regulation as applied, as well.

The cases leading up to and including Preseault have laid the groundwork for the generalization that contemporary takings challenges are requests that the court review the administration of government, awarding compensation if necessary, rather than review constitutional validity of government action.

102 This is not to gainsay a central theme of this Article that the takings clause must be understood as a constitutional constraint on government, not a guarantee of individual welfare. See Rubenfeld, supra note 9 at 1142-44 (arguing that the Constitution’s protection of the institution of private property is valuable because it restrains government, not because it guarantees autonomy).


104 E.g., United States v. Causby, 328 U.S. 256 (1946); Miller v. Schoene, 276 U.S. 272 (1928).

105 E.g., Yancey v. United States, 915 F.2d 1534 (Fed. Cir. 1990); see also Raynor v. Maryland Dep’t of Health & Mental Hygiene, 676 A.2d 978 (Md. Ct. Spec. App. 1995) (holding that killing of pet ferret for rabies testing was a valid exercise of police power to prevent nuisance and therefore not compensable), cert. denied, 684 A.2d 454 (Md. 1996), cert. denied, 117 S. Ct. 1428 (1997).

106 See discussion of First English, supra note 80, and accompanying text.
D. Larger Concerns in Ad Hoc Adjudication

*Pennsylvania Coal* and subsequent decisions have recognized that the question of when a regulation goes too far cannot be answered in the abstract, but instead requires case-by-case adjudication of government action, the patient calling of balls and strikes. To say that takings judgments are ad hoc is not to say that no lesson can be drawn from them. Taken together, ad hoc judgments form a body of prudential wisdom; such wisdom has traditionally been the virtue of the common law.

Yet the ad hoc quality of takings jurisprudence has distressed the scholarly community, and to a lesser extent, the judiciary. Judicial insistence that each case be considered on its own merits sounds like no more than a reminder of a fundamental principle of adjudicatory justice, and does nothing to define the standards by which some claims are judged meritorious and others are not. How are agents of the government or private parties to know what distinguishes a regulation that requires compensation—a taking—from one that causes only a mere diminution in the owner’s fortunes, and requires no compensation?

The question is best approached by examining the Takings Clause as one of several ways for the judiciary to review government action. In fact, a number of cases generally referred to in the takings literature make little or no mention of the Takings Clause. If one considers takings law from the perspective of the judiciary rather than that of the academy—i.e., actual cases rather than grand principles—it is quickly apparent that claimants often state other constitutional

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108 See, e.g., *Rose-Ackerman*, *supra* note 3, at 1700 (“ad hoc balancing is impossible to reconcile... Takings law should be predictable”) (footnotes omitted); *Pennell*, 485 U.S. at 16 (Scalia, J., dissenting) (arguing that an ad hoc analysis should be limited to regulatory takings cases).

claims on the same facts as the takings claim. For example, the petitioner in *Pennell v. City of San Jose* claimed that a rent control ordinance was compensable under the Takings Clause of the Fifth Amendment, and violated both the Due Process and the Equal Protection Clauses of the Fourteenth Amendment.

A number of circuits have attempted to classify different approaches to takings claims. In *Eide v. Sarasota County*, Eide challenged the zoning of his land in Sarasota, Florida, in federal district court. The Eleventh Circuit found that cases like Eide's could support four challenges to a zoning ordinance: (a) "just compensation," i.e., takings claims for money; (b) "due process takings," i.e., takings claims seeking injunctive relief; (c) "arbitrary and capricious due process," sometimes called substantive due process claims; and (d) "equal protection claims." The Sixth Circuit, relying in part on *Eide*, characterized a similarly situated claimant's legal options somewhat differently in *Pearson v. City of Grand Blanc*. The Sixth Circuit found six categories of federal zoning claims: (a) "just compensation takings;" (b) "due process takings;" (c) "arbitrary and capricious substantive due process;" (d) "equal protection;" (e) "procedural due process;" (f) "First Amendment." Instead of curing ad hocery, considering the Takings Clause among other constitutional clauses animated by related concerns only seems to obscure the substantive law in a welter of causes of action.

The English legal historian Frederick Maitland famously said that "[t]he forms of action we have buried, but they still rule us from their graves," meaning that the writ system informed the way English lawyers think. A similar process is at work in constitutional law. Although there is but one cause of action in federal civil cases, common law lawyers necessarily think in terms of cases. Cases, in turn, are founded upon claims, which are derived from the language of the Constitution as interpreted in earlier cases. This creates a bewildering thicket of possible constitutional claims, and a case law in which, as the Eleventh Circuit pointed out, "often one cannot tell which claim has been brought or which standard is being applied."

111 Eide v. Sarasota County, 908 F.2d 716 (11th Cir. 1990). See also Executive 100, Inc. v. Martin County, 922 F.2d 1536, 1540 (11th Cir. 1991) (relying on *Eide*).
112 961 F.2d 1211 (6th Cir. 1992).
113 Id. at 1215–16.
115 *Eide*, 908 F.2d at 722.
Navigating this thicket is not always easy. Choosing the appropriate claim to bring—in the loose sense of argument rather than the technical sense of writ—is a considerable part of the advocate’s job.\textsuperscript{116} From the perspective of the judiciary, deciding takings cases “calls as much for the exercise of judgment as for the application of logic.”\textsuperscript{117} Nonetheless, it should be reassuring, rather than disturbing, that the different parts of the Constitution are so harmonious that their roles overlap. It is in part this complexity that has provided nuance and flexibility to constitutional discourse.

Moreover, as discussed above, the very particularity of takings cases stems from underlying similarities. First, takings claims are petitions for judicial review of government action. Second, due to both the serious character of judicial review and the nature of the claims, courts tend to review administrative actions taken rather than legislative pronouncements. Third, this emphasis on particular administrative action is further reinforced by the remedies available to courts. In sum, the ad hoc quality of most takings decisions is inherent rather than accidental.

To say that takings cases are particular by nature is not meant to imply—as is too often suggested—that takings jurisprudence is unprincipled. Administrative takings jurisprudence can be fruitfully understood as judicial review of bureaucracy in the name of three concerns: that government act in a manner befitting the situation at hand (“due process”); that the law be applied fairly (“equal protection”); and that the administration of the law be publicly accountable.

\textsuperscript{116} Under a formal writ system, choosing the right claim might well be dispositive.

II. **Judicial Review of Agency Action Under the Takings Clause**

A. *"Due Process" Concerns for the Conduct of Government*

1. The Duet of Due Process and Just Compensation

As discussed above, the Fifth Amendment contains both the Takings Clause and the Due Process Clause. It is therefore natural to understand the clauses as in some sense complementary constraints upon the government's power to act. But determining how the clauses complement each other is difficult. The meaning of each clause has shifted over the decades, and so the relationship between the clauses has changed.

By its terms, the Fifth Amendment applies only to the federal government. Until well into the twentieth century, the sorts of social and economic regulation that might today be challenged as a taking were largely the purview of the states.118 Thus, until the ratification of the Fourteenth Amendment, the question of the relationship between the clauses did not exist with regard to state law, and was largely irrelevant with regard to federal law.119

The situation changed after the ratification of the Fourteenth Amendment, which contains the Due Process Clause but does not contain the Takings Clause. By its terms, however, the Fourteenth Amendment applies only to the states. For years after ratification of the Fourteenth Amendment in 1868, the Supreme Court explicitly understood the Takings Clause to be a limitation on federal, but not state, power. State power was limited by the Due Process Clause of the Fourteenth Amendment, which pointedly omitted the Takings Clause, and by the state constitutions.120 In *Mugler v. Kansas*, long cited as a takings case, Justice Harlan stated that:

118 There is some debate over the extent to which one can speak of takings claims in the eighteenth and nineteenth centuries. "Even after the establishment of a compensation requirement, it applied only to interference with physical ownership, and government routinely acted in ways that diminished the value of private property without providing compensation." Treanor, *Original Understanding*, supra note 19, at 785. *But see* Brauneis, *supra* note 19 at 686 (arguing that "regulatory takings" claims were reviewable under other clauses).

119 *See* Sax, *supra* note 2, at 38 ("Because most of the takings cases have come to the Supreme Court by way of state regulation, the bulk of 'early' authority in this field is found subsequent to the adoption of the fourteenth amendment.").

120 The district court for *Kansas ex rel. Tafts v. Ziebold*, responding to an application to remove the case to U.S. circuit court, was explicit. Its opinion is reprinted in *Mugler v. Kansas*, 8 S. Ct. 273, 277 (1887).

But the statesmen who framed the early amendments were at least as wise and had as accurate an understanding of the import of the words in a fundamental law as any who have succeeded them. They were not given to a waste
The general question in each case is whether the foregoing statutes of Kansas are in conflict with that clause of the Fourteenth Amend-
ment, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law."121

While the Due Process Clause of the Fourteenth Amendment clearly imposed a constitutional limitation, reviewable in federal court, on state government action, the scope of that limitation, and hence of the jurisdiction of the federal courts, was not clear. These questions were urgent. In the years before the Civil War, neither the federal Due Process Clause nor the Takings Clause had attracted much attention.122 After the Civil War, however, the Supreme Court docket was "crowded"123 with cases seeking judicial review under the new Due Process Clause of state government actions. As one of the trial courts below Mugler v. Kansas said:

But while [the Due Process Clause] has been a part of the Constitution as a restraint upon the powers of the states only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, and property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of the provision as found in the fourteenth amendment. In fact, it would seem, from the character

of words, nor the useless and perplexing repetition of the same proposition in different forms. They recognized the fact that private property might be taken for public use under regular process without just compensation, and also that a man might be deprived of his property without due process of law, and yet obtain compensation therefor to the full measure of its value; and the federal government was inhibited from both of these forms of injustice, while the states were left free to establish such rules on the subject as they deemed proper.

Id.
122 See Davidson v. New Orleans, 96 U.S. 97 (1877). The Court noted:

It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion.

Id. at 103–04 (quoted with approval in Kansas ex rel. Tufts v. Ziebold, reprinted in Mugler, 8 S. Ct. at 277).
123 Id. at 104.
of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.\textsuperscript{124}

The Supreme Court was thus confronted with the question—what was the scope of judicial review under the Fourteenth Amendment Due Process Clause?—and more specifically—did the Fourteenth Amendment’s Due Process Clause entail the rights against the state governments secured against the federal government by the Takings Clause? The Court assumed, without much difficulty, that taking property for a \textit{nonpublic} purpose violated the Due Process Clause.\textsuperscript{125} Litigation centered on whether or not various schemes intended to achieve a collective good that benefited some far more than others, such as the creation of an irrigation district\textsuperscript{126} or the drainage of a swamp,\textsuperscript{127} were in fact for a public purpose. This left undecided, however, the question of whether state government takings for concededly public purposes were reviewable in federal court under the Due Process Clause of the Fourteenth Amendment.

In 1897, the Supreme Court, in \textit{Chicago, Burlington \& Quincy R.R. v. Chicago},\textsuperscript{128} concluded that the Fourteenth Amendment Due Process Clause entailed the notion that a state government’s takings of property without compensation gave rise to a federal cause of action:

\begin{quote}
In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment
\end{quote}

\textsuperscript{124} \textit{Id.} at 104.

\textsuperscript{125} \textit{See} Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158 (1896).

It is claimed, however, that the citizen is deprived of his property without due process of law, if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the State, instead of the Federal, government.

\textit{Id.}

\textsuperscript{126} \textit{See} id.

\textsuperscript{127} \textit{See} Wurts v. Hoagland, 114 U.S. 606 (1885).

\textsuperscript{128} 166 U.S. 226 (1897).
by the highest court of the State is a denial by that State of a right secured to the owner by that instrument.\textsuperscript{129}

The Court discussed at length its abhorrence of uncompensated takings, and in effect concluded that if "due process" meant anything "substantive,"\textsuperscript{130} it meant that state government could not take property without just compensation. Although the Supreme Court cited \textit{Mugler v. Kansas} for another proposition, the Court did not discuss the question that preoccupied the trial court in \textit{Mugler} (but on which the first Justice Harlan, for the Supreme Court in \textit{Mugler}, was silent), \textit{viz.}, why the Fifth Amendment included a Takings Clause but the Fourteenth Amendment did not. In fact, \textit{Chicago, Burlington & Quincy R.R.} does not mention the Fifth Amendment at all, and for many years after that case was decided, the Supreme Court was careful to distinguish cases brought against states under the Due Process Clause of the Fourteenth Amendment from those brought against the federal government under the Takings Clause of the Fifth Amendment. Many early cases that are currently regarded as takings cases, most notably \textit{Pennsylvania Coal Co. v. Mahon},\textsuperscript{131} were in fact decided under the rubric of other clauses.\textsuperscript{132} Over time, however, \textit{Chicago, Burlington & Quincy R.R.} has come to stand for the proposition that the Fifth Amendment Takings Clause jurisprudence is incorporated by the Fourteenth Amendment and conditions both state and federal government action.\textsuperscript{133} Thus, both the Takings and the Due Process Clauses apply to state and federal government, and the question of the relationship between judicial review under the two clauses, once hardly worth asking, has become pressing.

The language of judicial review is a bit misleading. First, judicial review is not a single process applicable to all claims. Courts subject different sorts of cases to different levels of scrutiny. Thus, it would be

\textsuperscript{129} \textit{Id.} at 241.
\textsuperscript{130} See \textit{id.} at 235 ("In determining what is due process of law regard must be had to substance, not to form.").
\textsuperscript{131} 260 U.S. 393 (1922).
\textsuperscript{132} \textit{Pennsylvania Coal} was decided under the Contract and Due Process Clauses. The Fifth Amendment was mentioned once. See also \textit{Block v. Hirsh}, 256 U.S. 135, 153 (1921) ("[T]he question is whether the statute is constitutional, or, as held by the Court of Appeals, an attempt to authorize the taking of property not for public use and without due process of law, and for this and other reasons void."); \textit{Monongahela Navigation Co. v. United States}, 148 U.S. 312, 325 (1893); \textit{Mugler v. Kansas}, 123 U.S. 623, 653 (1887) (Privileges and Immunities and Due Process Clauses of the Fourteenth Amendment); \textit{Pumpelly v. Green Bay Co.}, 80 U.S. (13 Wall.) 166 (1871).
more accurate to speak of judicial reviews in the plural. Second, and even more importantly, scrutiny is not a process of inquiry, but rather one of decision. Government actions receive a level of scrutiny commensurate with the likelihood that the action is constitutionally impermissible. Race-based classifications receive strict scrutiny because they are rarely permissible; ordinary economic regulations receive little scrutiny because they are usually permissible.

Because all government actions must be taken with whatever legal process is due, suits brought under the Due Process Clause span the spectrum of levels of scrutiny. The Due Process Clause requires that the government's proceeding be appropriate to the individual interests affected by the government action. So, for example, suits which may result in incarceration—a deprivation of physical liberty—require a panoply of procedural safeguards. Deprivations of lesser interests require fewer procedural safeguards, and regulations that merely cost money require only that the state “could rationally have decided” that the action in question might achieve the state's purpose in order to pass judicial review. Due process challenges thus involve a whole range of standards of review—i.e., challenged government actions are more or less likely to be permitted by courts—depending on the constitutional interests at stake.

The standard of judicial review appropriate under the Takings Clause is unclear and has only in the last few years received much attention. In Agins v. City of Tiburon, the appellants challenged a city zoning ordinance that restricted their previously purchased tract of land to construction of single-family homes on relatively large lots. The Supreme Court established that a taking occurs if the regulation precludes all use of the land or does not “substantially advance legiti-


mate state interests."138 Emphasizing the importance of protecting open-space land, the Court upheld the ordinance because "the zoning ordinances substantially advance legitimate governmental goals."139

In Nollan v. California Coastal Commission,140 the California Coastal Commission conditioned a development permit for a beachfront house on the landowner's grant to the public of an easement along the beach. The Coastal Commission maintained that this condition was necessary in order to preserve visual access to the beach, i.e., so that from the street in front of the Nollans' house, people might look across the beach and see the ocean. The Supreme Court held that the condition was a taking because no "essential nexus"141 existed between the government's express purpose, to provide a view across the Nollans' property to the ocean, and the requirement of allowing third parties to walk alongside the ocean on the Nollans' beachfront property.142 The court required the government action to be aligned with a permissible government purpose. "In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'"143

In Dolan v. City of Tigard,144 the Supreme Court required a "rough proportionality"145 between administrative means, i.e., the exaction demanded and the burden on legislative ends imposed by the proposed development. The City Planning Commission of Tigard, Oregon, imposed several requirements on the granting of the Dolans' permit to expand their store and adjacent parking lot, including the deed of an easement from the Dolans to the city for the construction of a bicycle pathway.146 The city argued that these requirements were necessary to control flooding and reduce traffic congestion. The Court acknowledged the importance of such purposes,147 but held that "on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's

138 Id. at 260. See also Penn Central, 438 U.S. at 127 (holding that a restriction on use may be a taking "if not reasonably necessary to the effectuation of a substantial public purpose").
139 Agins, 447 U.S. at 261.
141 Id. at 837.
142 See id.
143 Id. (citation omitted).
145 Id. at 391.
146 See id. at 379.
147 See id. at 396 (acknowledging "the commendable task of land use planning").
requirement for a dedication of the pedestrian/bicycle pathway easement."^{148}

With some reference to the practices of the various states,^{149} the Court described the fit between regulatory means and policy ends expected of land use planning commissions:

We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.^{150}

This heightened scrutiny raises at least three problems. First, it may be argued that the Court has resurrected "a species of substantive due process analysis that it firmly rejected decades ago."^{151} Land use regulations are exercises of the state's police powers. In reviewing particular exercises of such power, the Supreme Court has generally required only that the state "could rationally have decided"^{152} that the action under review would bring about a legitimate government end. The analyses in Agins, Nollan, and Dolan are clearly far more substantive. In each of these cases, the Court asked, in effect, if the agency's action made sense. In other circumstances, however, the Supreme Court has expressly declined to "sit as a super-legislature to weigh the wisdom of legislation [or] to decide whether the policy which it expresses offends the public welfare . . . ."^{153} Why is substantive due process review defensible in the context of takings cases, and indefensible elsewhere?

Second, why is the quality of agency decisionmaking relevant to a finding that a given government action constitutes a taking? After all,
the Takings Clause requires compensation regardless of the propriety of the government action. Land seized to build a badly needed road is no less requiring of compensation because the agency judiciously decided that the road was needed. Either property is taken by government action, or it is not. If it is taken, compensation is owed, if not, not.

Third, what is the relationship between review under the Takings Clause and the minimal due process review that courts use to assess the propriety of economic regulations passed under the police power?

These objections are not fatal; some degree of heightened scrutiny seems justifiable. "Substantive due process," as that term is currently understood, requires courts to subject government action to only minimal scrutiny, so-called rational basis review. Under this standard of review, courts will uphold government action if there is any rational basis for believing that the action will further a permissible public purpose. The Takings Clause applies to property taken for public use. The Supreme Court has equated the Takings Clause requirement that property be taken for public use with the Due Process Clause requirement that the government act with public purpose. Therefore, any regulation that has been passed with due process of law—i.e., that survives rational basis review—has a sufficiently public use to satisfy the Takings Clause. The Takings Clause does not impose a higher standard of public-mindedness on government action than is required by the Due Process Clause. A regulation passed in the public interest, and therefore valid under the Due Process Clause, may nonetheless require compensation under the Takings Clause, because it takes private property for public use. The paradigmatic taking, the condemnation of land to build a road, generally serves a public use—survives rational basis review—and nonetheless requires compensation. Rational basis review is thus inadequate to determine which regulations work takings and which do not. Therefore, deciding takings claims must require scrutiny more exacting than substantive due process (rational basis) review.

Judicial review of bureaucratic action under the Takings Clause is also different from the great due process cases of the "Due Process Revolution." Administrative takings cases differ from due process cases in the claim of right and in the remedy sought. If an administrative action takes rights that constitute private property, and claimants

154 See Nollan, 483 U.S. at 841–42 (noting that action aimed at benefiting public interests does not necessarily affect government's requirement to pay).

seek monetary relief or invalidation of the action, courts may review the action under the Takings Clause. If, on the other hand, government action takes rights without providing a hearing or other legally required process, then a procedural due process challenge is appropriate. For example, in the landmark procedural due process case *Goldberg v. Kelly*, the plaintiff claimed to have been wrongly denied his welfare benefit. The Supreme Court held that the Due Process Clause required the administrative agency to provide the claimant with a hearing. *Goldberg v. Kelly* thus involved the right to process, specifically a hearing, and only indirectly, if ultimately, the claimant’s financial interest in the entitlement itself. In contrast, once a claimant has made out a prima facie case in an administrative takings review, the court is the forum for the claim that a property right has, in fact, been taken. The claimant seeks money damages, not an injunction that the administrative agency improve the procedures with which it governs the claimant.

The Takings Clause thus imposes requirements on government action over and above the basic constitutional requirements of public purpose and due procedure. The substance of those requirements—and the level of scrutiny to which government actions will be subjected—is unclear, and has to date been discussed in contrast to standards of review in more settled areas of the law. The Supreme Court in *Nollan* said that:

157 The *Goldberg* Court understood Kelly’s welfare benefit as property. Subsequent procedural due process cases tended to regard the interest as a liberty—rather than a property, interest—thereby making less obvious the connection between Due Process and Takings Clause review of agency action.
158 *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993) (en banc), was decided on the basis of the precedent in *Thornton v. Hay*, 462 P.2d 671 (Or. 1969). In *Thornton*, the Supreme Court of Oregon held that the general public had a right of access to the dry sand area and beachfront lots throughout Oregon. Claimants in *Stevens*, who were not parties to *Thornton*, alleged that application of the *Thornton* understanding of real property in Oregon to them constituted a denial of due process. Justices Scalia and O’Connor agreed. See *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (dissent by Justice Scalia, joined by Justice O’Connor, from a denial of a petition for a writ of certiorari); see also *Harris v. City of Akron*, 20 F.3d 1396 (6th Cir. 1994).
159 In *Patel v. Penman*, the Ninth Circuit held that “[b]ecause the Takings Clause ‘provides an explicit textual source of constitutional protection’ against the type of conduct challenged by the Patels, that clause preempts the Patels’ substantive due process claim.” Patel v. Penman, 103 F.3d 868, 875 (9th Cir. 1996) (citation omitted), cert. denied, 117 S. Ct. 1845 (1997); see also *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1997) (en banc).
[O]ur opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State 'could rationally have decided' that the measure adopted might achieve the State's objective."\(^{160}\)

The Court went on to discuss Justice Brennan's dissent, which relied on an equal protection case and two substantive due process cases:

But there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical.\(^{161}\)

In sum, the same regulation may affect a number of constitutional interests, and it is the interests affected that determine the level of scrutiny to which the regulation is subjected by courts. Economic regulations which would otherwise receive only rational basis review may be subjected to stricter scrutiny because they disturb one of these interests. Property rights are constitutionally protected interests. As the Supreme Court said in Dolan:

But simply denominating a governmental measure as a "business regulation" does not immunize it from constitutional challenge on the ground that it violates a provision of the Bill of Rights. . . . We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.\(^{162}\)

Consequently, if a claimant can make out a prima facie case that a government action has taken a property interest, then the claimant may have the government action reviewed. The claimant's allegation that a property interest was taken triggers heightened judicial scrutiny of the government action. Heightened judicial scrutiny, and hence any practical chance of recovery, thus appears to be logically depen-


\(^{161}\) Id.

dent on a colorable claim that government regulation, restriction of the use of property, amounts to a taking of property. The big question that haunts takings jurisprudence—what is property?—seems both unavoidable and unanswerable. The following section suggests how the question is elided.

2. Defining Property in Takings Cases

Administrative takings claimants often claim that their "reasonable expectations" regarding their property rights have been frustrated by government action. But property rights—and conversely, the government's obligation to pay—are based upon more than owners' expectations. A property owner cannot expect to use property to create a nuisance, and government action taken to prevent the nuisance cannot be characterized as taking. Activities are deemed to be nuisances depending on their circumstances. What constitutes a nuisance, then, changes over time, as the circumstances of the activity change. Therefore, regulation to prevent nuisances sometimes prohibits activity that had been permissible. A transfer of land that once might have been considered within the realm of acceptable contractual negotiation—a surface owner's sale, to the owner of the mineral rights, of the right to support the surface of the earth—may come to be considered a public nuisance, and hence not open to private negotiation. A building that once might have been torn down with impunity may come to be considered a landmark, and its future uses may be limited. As products of politics, property rights are creatures of history, and so subject to change.

In markets that are constructed around ongoing government regulation, private undertakings whose expectations are disappointed by regulatory changes are unlikely to have cause for complaint under the

163 See Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); see also Preseault v. United States, 100 F.3d 1525, 1540 (Fed. Cir. 1996) (plurality opinion by Plager, J., joined by three judges, and two judges concurring separately) (noting that the subjective expectations of the property owner are irrelevant).

164 See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1031-32 (1992) ("Only on [a showing of public nuisance] can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing."); see also Miller v. Schoene, 276 U.S. 272 (1928); Mugler v. Kansas, 123 U.S. 623 (1887); Sax, supra note 2, at 48-50.

165 See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). One might argue, however, that the nuisance alleged in Pennsylvania Coal was not real. See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

166 See Keystone, 480 U.S. at 491-93; M & J Coal Co. v. United States, 47 F.3d 1148 (Fed. Cir. 1995).

167 See Penn Central, 438 U.S. 104.
Takings Clause. For example, the Supreme Court has repeatedly held that employers must expect changes, even expensive ones, with regard to their pension obligations. Chemical companies have limited expectations in the secrecy of their formulae. Mining companies who file claims on federal land have no property interest beyond the scope of the law setting forth the metes and bounds of their patents to mine. Banks cannot assume that their right to exclude others includes the Federal Deposit Insurance Corporation. A central issue in each of these cases is whether or not the regulation interfered with expectations sufficiently concrete to be understood as property: if not, no taking can have occurred.

As these cases also illustrate, however, expectations are not attached solely to the physical objects of property rights, the land, houses, and other items that are affected by regulation. There are also important expectations of government. Government is expected to regulate the negative externalities of land use (to prohibit nuisances); government is expected to protect the cultural heritage of the nation; government is expected to regulate industries like banking. In short, the expectation of government action may preclude the formation of the publicly settled expectations of stable relations that constitute property rights.

Yet our government is also expected to be limited in scope, to leave substantial compass for private action. It is the responsibility of government to maintain the stability of the general order relative to


169 See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005–06 (1984). Note that intellectual property in chemical formulae is also protected by the patent system. The acquisition of a patent requires disclosure of that which is to be protected; patents are public documents.

170 See United States v. Locke, 471 U.S. 84, 105 (1985) (“Claimants thus must take their mineral interests with the knowledge that the Government retains substantial regulatory power over those interests.”).


174 See California Housing Securities, 959 F.2d 955.

175 For discussion of the literature dealing with the relationship between rational expectations and appropriate property entitlement, see Kaplow, supra note 9; Michelman, supra note 2.

176 “Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern.” Nebbia v. New
the designs of private interests, so that individuals may pursue what they desire secure in the knowledge that the government will not act capriciously towards them.\(^\text{177}\) The settled expectancies that constitute property change, if at all, in arboreal fashion, incrementally. The Takings Clause requires that government action that disrupts rather than conserves the stability of this general order must be viewed with suspicion. Should government disturb these expectations too abruptly, compensation is owed.\(^\text{178}\)

At few points in the American legal tradition is stability more expected than it is with regard to regulation of land. It could be argued that, in the wake of both the environmental movement and Hurricane Hugo, people in South Carolina no longer thought of owning a piece of beachfront as they thought of owning real property elsewhere.\(^\text{179}\) Consequently, the restrictions imposed on Lucas's beachfront lot by the state's regulation did not compromise his property interests. The U.S. Supreme Court in *Lucas*, however, viewed property as essentially static. The Supreme Court held that state legislatures cannot change an institution of property (without paying for the change), but can only articulate the common law. The only question was whether doctrines of nuisance already restricted building on beachfront land in the manner intended by the statute. The Supreme Court therefore remanded *Lucas* in order to find out whether or not the statute reflected the established understanding of ownership of beachfront land in South Carolina. On remand, the state Supreme Court held that the understanding in South Carolina, before passage of the stat-

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\(^{177}\) York, 291 U.S. 502, 523 (1934) (holding regulation of contracts appropriate in the circumstances of the case).

\(^{178}\) See Michelman, *supra* note 2, at 1214–18 (understanding individual anxiety over possible appropriation as a disutility cost).

\(^{179}\) Widespread consensus exists that abrupt changes wrought by the government to property rights are compensable. Robert Brauneis argues that Holmes, in *Pennsylvania Coal*, was solely concerned that the courts be able to restrain the government from abrupt redefinition of property rights:

> [C]ourts should presume that certain basic principles embedded in standing positive law reflect the settled will of those dominant forces. Although gradual legal change is inevitable, sudden changes that drastically undermine basic principles, unaccompanied by compensation to disadvantaged parties, should be struck down as inconsistent with the settled will of the community.

Brauneis, *supra* note 19, at 642. The proposition that even slow changes to property rights are compensable is more controversial; resolution of this controversy requires a jurisprudentially satisfying account of the genesis of property entitlements, an account beyond the scope of this article.

ute, of fee simple title to beachfront property did not restrict the owner's liberty to build single family dwellings.180

The law is different in Oregon. The Supreme Court of Oregon held in Stevens v. City of Cannon Beach181 that public access to the dry-sand areas of the Pacific shore inheres in the title of shorefront property in Oregon. The Supreme Court of Oregon expressly referred to the so-called “nuisance exception” set forth in Lucas, i.e., that otherwise compensable regulatory constraints on the use of property were not compensable if the regulation merely restated the common law of nuisance, or, more generally, reflected preexisting “background principles”—i.e., property doctrines—that determined the scope of the property rights possessed by the landowner. In Oregon, the state Supreme Court said, landowners of oceanfront property did not have, and never had, the right to exclude others from access to the dry-sand areas of the beach. Therefore, a denial of a permit to build a wall which would so exclude the public was not a taking.182

In Agins v. City of Tiburon, the Supreme Court spoke of the “weighing of private and public interests” required to decide takings cases.183 This formulation is misleading, because public and private interests are not necessarily opposed. Someone whose house is taken to build a road may well use that road. More fundamentally, a court’s weighing of public and private interests should always indicate that the government action should be taken. First, takings are compensable even if the public interest in taking the action is overwhelming. Second, determining the public interest is the primary job of the political branches, not the courts. Third, if the action were not in the public interest, it would be illegal under the Due Process Clause, not the Takings Clause. The fundamental tension confronted in Agins and other takings cases is actually between settled expectations and gov-

181 854 P.2d 449 (Or. 1993) (en banc). See also McDonald v. Halvorson, 780 P.2d 714 (Or. 1989) (en banc).
182 The claimants petitioned the U.S. Supreme Court for a writ of certiorari and were denied. Justice Scalia (the author of Lucas), joined by Justice O'Connor, dissented from the denial of the petition. Justice Scalia questioned the Oregon Supreme Court’s use and understanding of Oregon cases, and strongly suggested that the Oregon Supreme Court was “invoking nonexistent rules of state substantive law.” Stevens v. City of Cannon Beach, 510 U.S. 1207, 1211 (1994) (Scalia & O’Connor, JJ., dissenting). Justice Scalia’s willingness to judge the Oregon court’s understanding of Oregon property law is difficult to square with traditional understandings of federalism, under which states define property law. See Frank I. Michelman, Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism, 35 WM. & MARY L. REV. 801 (1993); Sax, supra note 179.
ernment actions to improve the status quo. Because settled expectations regarding particular property rights are held most dearly by their owners and government actions are taken presumably at the behest of the electorate, however, the Agins formulation is not too wide of the mark. Takings cases do exhibit a tension between private and public interests, even if the "balancing" that courts must undertake is more accurately described to be between conflicting expectations of stability and change.

In the famous 1798 case Calder v. Bull, the Supreme Court was asked whether another constitutional mediation between continuity and change, the prohibition on the passage of ex post facto laws, was general, or was restricted to criminal law. In deciding that it applied only to criminal law, Justice Chase noted:

The restraint against making any ex post facto laws was not considered by the framers of the constitution, as extending to prohibit the depriving a citizen even of a vested right to property; or the provision, "that private property should not be taken for PUBLIC use, without just compensation," was unnecessary.

By constitutionally providing for just compensation, Justice Chase argued, the founders made clear their understanding that the federal government would, on occasion, have to take property, and so upset settled expectations.

The question of whether private property is at issue would seem to be logically antecedent to any takings decision. But from a realist perspective, property ultimately is defined as a bundle of enforceable rights, that is, in terms of how an organ of government, a court, will act. Thus, in reviewing the actions of coordinate branches of government, courts may, to the frustration of academics, jump the metaphysical question: what is property? Instead, courts may review government action directly: should the government compensate the claimant? If the answer is yes, then it must be said, in the course of granting relief under the Takings Clause, that the government took a

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184 See Sax, supra note 2, at 48 ("[T]he taking provision is undoubtedly an attempt to find some fair balance between the forces of change and the security of established interests . . . .").

185 3 U.S. (3 Dall.) 386 (1798).

186 This appears to have been a matter of some dispute at the Constitutional convention. See Douglas W. Kmiec, The Coherence of the Natural Law of Property, 26 VAL. U. L. REV. 367, 374–75 (1991).

187 Calder, 3 U.S. (3 Dall.) at 394.

188 Justice Iredell agreed with this much of Chase's position. See id. at 400.
property interest. Successful takings claims define property rights as much as the other way around. The circularity is complete.\footnote{See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring) ("There is an inherent tendency towards circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is.").}

3. Considerations in Determining the Process Due

The Takings Clause mandates judicial oversight of the prudence with which government agencies help weave the social fabric. In assessing the prudence of an agency action, the question for the court is whether the agency acted with the deliberation required by the circumstances. Review of the somewhat inchoate process of deliberation is notoriously difficult. It is also, of course, what courts do all the time, and the burden of what courts of appeals do. An exhaustive list of the considerations, much less a theoretically satisfying schema, of what courts should consider when they review administrative actions challenged under the Takings Clause is probably impossible. Nonetheless, a few aspects of the administrative process are dispositive of takings claims often enough to warrant mention.

a. What is the Nature of the Property Right in Question?

Both courts and commentators have noted judicial solicitude for the right to exclude others from land.\footnote{See, e.g., Michelman, supra note 14, at 1612 (discussing Nollan).} Regulations that abrogate that right have been described as "categorical" takings.\footnote{Lucas, 505 U.S. at 1015.} "In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation."\footnote{Id. See also Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Although perhaps often compensable, the right to exclude others from land is not absolute. In the exercise of its police powers, government may "invade" land in a variety of circumstances, for example, to fight fires, to pursue suspected criminals, and to give succor in medical emergencies, without compensating the landowners. Moreover, owners of businesses retain considerably less than plenary rights to exclude others from the premises. For example, the owner of the mall in PruneYard Shopping Center v. Robbins invited "the public" onto the premises, and could not thereafter exclude well-mannered members of the public who wished to exercise their First Amendment rights. See PruneYard Shopping Center v. Robbins, 447 U.S. 74 (1980); see also Katzenbach v. McClung, 379 U.S. 294 (1964) (holding that under the commerce clause, Congress could require restaurants to accept customers of all races); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (holding that under the commerce clause, Congress could require hotels to accept guests of all races).} The Supreme Court has been
similarly solicitous of the rights of owners to profit financially from their property. The Court said in *Lucas* that "[t]he second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land."\textsuperscript{193}

The *Lucas* Court defined "categorical treatment" as "compensible without case-specific inquiries into the public interest advanced in support of the restraint." *Lucas* contrasts this categorical approach with over seventy years of "ad hoc, factual inquiries" undertaken to resolve takings claims in other areas.\textsuperscript{194} This bifurcation between ad hoc balancing cases, necessarily messy, and principled "categorical" cases, is profoundly misleading. First, as discussed above, the public interest, strictly speaking, has nothing to do with whether or not a takings claim is compensible. Few, if any, takings decisions turn on judicial evaluation of the "public interest advanced in support of the restraint."\textsuperscript{195} Such a decision would raise serious separation of powers concerns. Second, all successful claims are "categorical." The courts have seldom, if ever, awarded compensation in a land case that could not be characterized as a taking of all of a right, usually to exclude or to profit. Litigation therefore centers around the struggle to define the adverse effect of the challenged government action as a deprivation of such a right. If the claimant is successful in doing so, then the government-action taking represents a complete destruction of the right, and courts will award compensation in full view of the fact that the action was in the public interest, i.e., categorically. Third, it is wrong to suggest, as *Lucas* does, that the Court's review is less fact-specific when the right to profit or to exclude is at stake. The treatment of state government action in *Nollan, Dolan,* and *Lucas* was hardly categorical. In each of these cases, the Court subjected state government actions to reviews sufficiently exacting to be characterized by responsible observers as revivals of substantive due process.

Courts have shown less solicitude for the rights of owners to profit in any specific way. In *Florida Rock,* a mining company claimed

\textsuperscript{193} *Lucas,* 505 U.S. at 1015. See Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). The rights to descent and devise have also been zealously protected under the takings clause. See Babbitt v. Youpee, 117 S. Ct. 727 (1997); Hodel v. Irving, 481 U.S. 704 (1987). Both Babbitt and Hodel invalidated escheat provisions of the Indian Lands Consolidation Act under the takings clause. See also Andrus v. Allard, 444 U.S. 51, 66 (1979) (holding a regulation that destroyed all economic value of certain personal property was not a taking in part because the rights of descent and devise were undisturbed).

\textsuperscript{194} *Lucas,* 505 U.S. at 1015.

\textsuperscript{195} Id.
that denial of its right to mine destroyed all value in the property, even though evidence was presented that the land was worth a considerable amount of money on the speculative real estate market. The mining company also argued that a speculative real estate market could not provide compensation. The Court of Appeals for the Federal Circuit responded: "Dollars are fungible; a speculative market provides a landowner with monetary compensation which is just as satisfactory as that provided by any other market. Should a landowner wish to pick and choose her buyers, that luxury is not chargeable to the federal fisc." The Federal Circuit remanded for consideration of whether or not the mining company would suffer any loss if the land were sold as real estate. In effect, the mining company had no claim to the preservation of its activity, mining.

b. What is the Character of the Government Organ in Question?

The "sovereignty of the courts" implicit in the process of judicial review is problematic for a nation that conceives of itself as a republican democracy. Majoritarian objections to judicial review of government action are somewhat attenuated by the bureaucratic character of administrative takings cases. In hearing administrative takings claims, courts review the exercise of powers twice delegated, first by the people to their representatives, and second by the political branches to the bureaucracies that actually do much of the work of government. In Dolan, the Supreme Court distinguished general zoning laws, created by legislative bodies, from the administration of the zoning laws by city zoning boards:

[In evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city.]

Here again is the distinction between legislation and administration, between the creation of law and the application of the law. At least since Euclid, the Supreme Court has held that localities could zone—

196 Florida Rock Indus. v. United States, 18 F.3d 1560, 1567 (Fed. Cir. 1994).
i.e., restrict the uses to which property could be put—without paying landowners for resulting diminutions of property value. The Dolan Court distinguished Euclid and like cases by saying that such cases "involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel." The Dolan Court thus announced that courts are to scrutinize the application of zoning laws more carefully than they examine the creation of such laws.

Legislatures, executives, and their agents make different kinds of decisions, and they do so with different levels of political accountability. There is no reason for courts to review all institutions with the same level of scrutiny. Dolan strongly suggests that judicial scrutiny bears an inverse relationship to the political accountability of the governmental organ in question. If the governmental organ is directly responsible to the electorate, then judicial oversight is usually unnecessary, and its exercise raises questions about the separation of powers. For this reason, judicial invalidation of legislation is a rare and grave event, and the burden of production is squarely on the claimant. Conversely, judicial oversight is necessary, indeed required, insofar as the governmental organ is insulated from political processes. In such cases, the burden of production may shift to the bureaucracy that has impaired the property rights.

200 Id. at 385.
201 Not even all legislatures are the same. "[T]akings jurisprudence should not assume that all governments are identical in takings questions and should therefore look more closely at the governmental entity doing the taking. Citizens may be protected against federal legislative takings by the Madisonian safeguards accompanying a large and diverse legislature; there may be other types of protections against takings available at the local level. A sensible jurisprudence should not assume that what constitutes a taking of property at the federal level is necessarily a taking at the local level, or vice versa."

203 See Nollan v. California Coastal Comm'n, 483 U.S. 825, 836 (1987); Dolan, 512 U.S. at 391 n.8. For discussion of the standard of review set forth in the Dolan opinion, see Freilich & Bushek, supra note 149.
c. Did the Governmental Organ Give Private Parties Reason to Assume That It Would Take a Particular Course of Action?

The administration of law is often thought of as the rule of a distant authority, a judge, who lays down the law among strangers. However apt this description may or may not be of trial courts, this imagery is often unsuited to the administrative context. Much administrative action is negotiated between regulators and members of a regulated community who must work together for extended periods of time. In such a context, fair dealing is absolutely necessary to both the efficacy and the efficiency of the regulatory process.

The Supreme Court has on occasion discussed the relationship between the right to compensation and the government's obligation to deal fairly in terms of vested property rights, and at other times has used more explicitly contractual language. In *Lynch v. United States*, Congress had established life and disability insurance programs for veterans under the War Risk Insurance Act. Thereafter, in order to save money, Congress passed the so-called "Economy Act," which statutorily repudiated congressional obligations to pay claims on yearly renewable term insurance. The Supreme Court held that the veterans' expectations of benefits were property, and that congressional repudiation of its decision was therefore a taking. The Supreme Court found that "War Risk policies, being contracts, are property and create vested rights." "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment."

The Supreme Court has also found takings in situations which, while not precisely contractual, have strong elements of contract. The claimants in *Kaiser Aetna v. United States* were told that they could dredge their lagoon and build a marina that opened out onto navigable waters. Only after the work was done were the claimants told that

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206 *See* id. (citing § 17 of the Economy Act, 38 U.S.C. § 717).

207 *Id.* at 577.

208 *Id.* at 579.

they had to allow the public to use the marina. The Supreme Court said that:

While the consent of individual officials representing the United States cannot "estop" the United States, it can lead to the fruition of a number of expectancies embodied in the concept of "property"—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property.\footnote{Id. at 179 (citations omitted).}

Similarly, in \textit{United States v. Sioux Nation of Indians},\footnote{448 U.S. 371 (1980).} the Supreme Court held that treaty obligations between the federal government and the tribe created property interests. Those interests were subsequently taken by the federal government in its abrogation of its treaty obligations, and the tribe was consequently owed compensation.\footnote{See id. at 424. In \textit{United States v. Mitchell}, 463 U.S. 206 (1983), the Supreme Court held that the constellation of statutes and regulations establishing federal responsibility for Indian lands created a fiduciary relationship between the federal government and the Indians. Breach of the fiduciary duty owed by the government to the Indians gave rise to a cause of action for damages. For discussion of \textit{Lynch, Sioux Nation}, and \textit{Ruckleshaus}, see Peterson, \textit{supra} note 7, at 123–29.}

The labeling scheme for the marketing of pesticides in the United States established by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) required manufacturers of pesticides to disclose trade secrets to the Environmental Protection Agency (EPA). Under certain circumstances set forth in the statute, the trade secrets might be disclosed to the public, destroying their value. Monsanto, a pesticide manufacturer, challenged FIFRA as a taking. In \textit{Ruckleshaus v. Monsanto},\footnote{467 U.S. 986 (1984).} the Supreme Court acknowledged that trade secrets were property under state law, and hence protected by the Takings Clause. But Monsanto knew that disclosure of trade secrets to the EPA would, in some circumstances, involve disclosure of the secrets, and therefore their loss. Monsanto voluntarily disclosed its trade secrets in order to participate in the labeling scheme and to be able to market its products in the United States. In years for which the EPA provided an "explicit guarantee" of secrecy, however, disclosure of the trade secrets constituted a taking.\footnote{See id. at 1010–14. Monsanto further argued that conditioning its ability to participate in the U.S. market or surrender its property rights was an unconstitutional condition. The Supreme Court observed:

\begin{quote}
Monsanto has not challenged the ability of the Federal Government to regulate the marketing and use of pesticides. Nor could Monsanto successfully
\end{quote}
These aspects of regulation that in fact receive judicial scrutiny in takings cases should not be considered—either jointly or in conjunction with one another—to be "tests" as the word is too often used in the legal profession; that is, as algorithms for deciding cases. Instead, the considerations discussed above should be considered "tests" as the word is used in the medical profession: as methods for inquiry into the exercise of bureaucratic power, and so into the health of the body politic.

B. Equal Protection Concerns

1. Introduction

Takings jurisprudence contains echoes of equal protection rhetoric, talk of not requiring a few people to bear burdens which, "in all fairness and justice, should be borne by the public as a whole." It seems intuitively obvious that the Takings Clause requires that individuals bear no more than their fair shares of the cost of governance. But while individuals should not have to shoulder the full cost of public action, it seems unarguable that the costs of such action will not fall evenly across the population. And even if—miraculously—the cost of each government action were evenly apportioned and distributed among the population, would that be fair in a world where the ability of individuals to bear a cost varies widely? Fair distribution of the costs of government action thus seems to be both important and inadequate to inform our understanding of takings cases.

Another set of problems with constitutional efforts to constrain the government's powers to take—i.e., to redistribute outcomes generated by the market—is that at a certain level the government and

make such a challenge, for such restrictions are the burdens we all must bear in exchange for "the advantage of living and doing business in a civilized community."

Id. at 1007 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting)).

the market are difficult to tell apart. The market is suffused with government activity. Most obviously, taxes and subsidies constantly redistribute outcomes generated by the market. More importantly, as the realists made clear, the economy cannot be understood without reference both to current legal entitlement, which is the product of past politics, and to private expectations about future government activity. Conversely, markets suffuse politics: the operation of the economy transforms standards of acceptable use. Of particular importance in the takings context, urbanization and heightened public solicitude for dwindling wild spaces may render inappropriate uses that were once perfectly acceptable.216 Gravel pits become suburban developments;217 land that was once thought to be good for limestone mines is bought by real estate speculators.218 These changes bring considerable profits, as well as costs, to the property owners in the area. The law must recognize, and formalize, the social changes wrought by economic activity. Political and market activity, manifested by law and price, thus interpenetrate each other. The simplistic but common notion that the Takings Clause prohibits political redistribution of marketplace decisions is to some extent true, but suffers from the inadequacies of a description of society as a polar opposition between the “state” and the “market.”

These objections, however, are far removed from the bump and grind of takings litigation. Courts are quite capable of discussing whether a particular outcome is fair, even if they may not be able to generalize such judgments and produce a compelling theory of justice. Similarly, distinguishing government action (the taking) from marketplace outcome (the private property) is not difficult in an actual case. In practice, the Takings Clause is, in some important sense, about the judicial review of the allocations that society makes through its political institutions, as opposed to its market institutions. Takings jurisprudence requires, as a logical antecedent, that the concepts of “law,” “politics,” and “market” can be meaningfully distinguished from one another. Otherwise, legal standards could not be applied to government actions that take property, thereby changing the situation established by the action of the market. But only by looking at how administrative takings claims actually challenge government action can we discern the standards by which government action is judged.

216 See Sax, supra note 2, at 49.
2. Discrimination and Reciprocity

Regulations with relatively narrow application are more apt to be held takings than similar regulations with broader application. The Supreme Court in *Dolan* noted that a land use regulation that “involved essentially legislative determinations classifying *entire areas* of the city” were more likely not to require compensation than more narrowly applicable regulations.\(^{219}\) A regulation that applies to many people more closely approaches “the public as a whole.”\(^{220}\) Conversely, a regulation that applies only to a few people, particularly if others benefit from the regulation, is likely to be deemed an abuse of political power, discrimination against some in favor of others.\(^{221}\) It is fair to say that the Takings Clause serves as a constraint upon discriminatory regulation, if we pay special attention to what is meant by “discrimination” in the context of the governance of competitive markets—that is, markets in which actors generally occupy unequal positions.

The Supreme Court has often considered the local effects of regulation under the rubric of “reciprocal advantage” in order to deny takings claims, most famously in upholding a generalized scheme of zoning.\(^{222}\) If a regulation is likely to provide considerable benefits to

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\(^{219}\) *Dolan*, 512 U.S. at 385 (emphasis added).

\(^{220}\) *Armstrong*, 364 U.S. at 49.

\(^{221}\) Discrimination here means unfairness or inequality which is created by government action in a morally defensible effort to realize a policy, not “invidious discrimination,” a putatively legal expression of prejudices which have traditionally been appealed under the Equal Protection Clause of the Fourteenth Amendment. Professor Treanor would reconfigure takings law to accommodate currently noncompensable claims discussed under the rubric of environmental justice. A showing of political process failure should occasion judicial review under the takings clause of decisions to locate environmentally undesirable facilities in minority neighborhoods. Members of “discrete and insular minorities,” United States v. Carolene Products, 304 U.S. 144, 152–53 n.4 (1938), should receive compensation because they cannot organize themselves and protect their interests in the political arena. See Treanor, *Original Understanding*, supra note 19, at 872–78. To my knowledge, no court has attempted to mate the takings and equal protection clauses so forcibly. I strongly suspect, however, that any effort to mitigate racism by providing an equivalent—compensation—would itself be a violation of equal protection. See Brown v. Board of Educ., 347 U.S. 483 (1954). The extent to which decisions to locate an environmentally undesirable facility are influenced by political prejudice is very difficult to determine. See, e.g., Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 Ecology L.Q. 1 (1997); Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 Yale L.J. 1383 (1994).

\(^{222}\) See Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); see also Keystone Bituminous Coal Ass’n v. DeBenedicts, 480 U.S. 470, 491 (1987); Agins v. City of
the affected property owner, then the property owner has been, in
effect, compensated in kind, and has no claim for monetary compen-
sation. Writing for the Court in Pennsylvania Coal, Justice Holmes
distinguished Plymouth Coal Co. v. Pennsylvania, a case in which the
Supreme Court upheld a regulation that required coal companies
whose mines abutted one another to leave pillars of coal between the
mines untouched, in order to form a "sufficient barrier for the safety
of the employés of either mine in case the other should be abandoned
and allowed to fill with water." Such a requirement "secured an
average reciprocity of advantage that has been recognized as a justifi-
cation of various laws."

But mere inequality without reciprocity of advantage does not
give rise to a successful takings claim. Even a statute that defines and
economically disadvantages a minority, for example, opthamologists
and optometrists, may be without constitutional remedy. The right
to compensation in administrative takings claims tends to arise from
the differential application of the law to parties similarly situated
under the law. Imagine the paradigmatic taking: a state needs land
for a road. A variety of routes are possible; one is chosen. The people
whose land is taken simply happen to be in the way of a road that the
political authorities deem necessary. In some sense, such landowners
are discriminated against vis-a-vis their neighbors. While that discrими-
nation is valid, it requires compensation. Suppose, for example, the
public has decided, through statute, that the draining of wetlands
needs to be controlled, even at considerable economic expense. This
legislative tradeoff between wetlands and other goods tends to be
rather general. Particular tradeoffs—can this wetland be drained or
will this limestone operation be prohibited?—are usually made by a
bureaucracy. The public justifiably expects that such particular de-
cisions will be made in a manner that reflects the statutory mandate of
the agency. Obviously, more ecologically significant wetlands ought
to be privileged over less ecologically significant ones; more economi-
cally sensible development should be favored over less. The policy

Tiburon, 447 U.S. 255, 262 (1980); Andrus v. Allard, 444 U.S. 51, 67 (1979); Penn
224 232 U.S. 531 (1914).
225 Id. at 533.
226 Pennsylvania Coal, 260 U.S. at 415.
229 See 33 U.S.C. §§ 301, 502 (1988) (making the Army Corps of Engineers respon-
sible for the permitting process).
thus impels discrimination against lesser wetlands and mining operations. In some situations, relatively unprincipled discrimination may be necessary. To carry the foregoing example forward, imagine that a city decides that it needs to limit the number of limestone mining operations in the area in order to protect the municipal aquifer. There are twelve local mining operations; the city decides that the water supply can sustain the operation of six. The city also needs limestone for building. None of the limestone mining operations are either disproportionately harmful to the aquifer, or economically beneficial to the community. It would be environmentally disastrous to allow all the operations to continue, economically disastrous to shut them all down, and unfair to deny some permit applications and grant others. Yet six operations must be shut down. In short, enforcement of the law may require an agency to discriminate among parties who have equally worthy claims. In such situations, the Takings Clause may require compensation, i.e. may force buy-outs, in effect culling the herd of competitors without unjust discrimination.

C. Administrative Law Concerns

As a practical matter, the mediation between conflicting expectations of stability and change at issue in regulatory takings cases is done mostly by agencies. Statutes often grant agencies the authority to administer legislative policy over time. Elected officials in the executive branch necessarily trust bureaucracies to do the daily business of governing. As discussed above, courts tend to consider the effects of agency decisions already taken: whatever mediation between legal right and political imperative courts may undertake tends to be occasional and after the fact. Although judicial decisions may have prospective effect, those effects are relatively limited by the ad hoc character of administrative takings decisions. So, on a daily basis, it is agencies themselves which decide whether their exercise of power is so abrupt as to upset property rights.

Administrative takings law is thus largely the compilation of judicial reviews of the way agencies exercise their power to mediate between past rights and future policy. The discussion so far has examined judicial review animated by concerns more familiarly expressed under other clauses of the Constitution, and has argued that takings jurisprudence is uniquely situated to express such concerns in the administrative context. Despite these similarities of purpose, however, judicial review of bureaucracies under the Takings Clause operates in a fundamentally different way from review of legislative action under the Due Process and Equal Protection Clauses.
The Equal Protection Clause and the Due Process Clause impose constitutive restraints on government. Claims brought under those clauses challenge whether the government may act in such a manner at all. The question is absolute, and the remedy sought—an order forbidding the action, or a declaration that the action is illegal—is consequently absolute. The idea that compensation, standing alone, could remedy violations of due process or equal protection is repugnant. With regard to these questions, once a court decides what the Constitution demands, the court must so decree.

In contrast, an administrative takings claim presumes that the governmental interest is legitimate, that the action taken to achieve that interest is valid, and that the agency should continue to take similar actions, as required by its mandate. The question posed by an administrative takings claim is whether a government action nonetheless takes a claimant's property right and so requires compensation. This is an ad hoc judgment rather than a decision on general principle. Each pitch must be called a ball or a strike; each case must be judged anew. This occasional quality, rather than an inability to reach doctrinal consensus, is the reason that courts have insisted on case-by-case adjudication in takings claims. The “rule” announced in Pennsylvania Coal, that “if regulation goes too far, it will be recognized as a taking,” no more decides cases than the rule that a ball thrown through the strike zone will be counted a strike. Holmes himself noted that “this is a question of degree—and therefore cannot be disposed of by general propositions.” The occasional nature of administrative takings claims precludes the grand adjudication—and the absolute remedies—associated with the other constitutional clauses. Administrative takings claims do not prohibit classes of agency action, but instead scrutinize particular agency actions in a public light.

Public scrutiny is a good thing for administrative agencies, because bureaucratic activity tends to be unaccountable. Many bureaucrats toil in relative obscurity and are unknown to the public they serve. Professional bureaucrats are unelected and the amount of control that elected officials in practice exercise over bureaucrats varies widely. Civil service jobs are secure, and therefore bureaucracy is relatively immune from the constraints of the market. This combination

230 Pennsylvania Coal, 260 U.S. at 415.
231 Id. at 416. See also Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (“General propositions do not decide concrete cases.”).
232 Holmes may well have believed that necessary deduction was impossible in legal reasoning, which operated on the basis of analogy. See Brauneis, supra note 19, at 637.
that obscurity and security creates has its dangers. Administrative agencies are susceptible to lobbying, which need not be nefarious but is usually the influence of groups with interests different from the policies the agency exists to further. Special interest groups can be condoned more easily in the legislative context, because the excesses of special interest groups should be checked by the accountability of the legislature to the voters, or by the countervailing efforts of opposing factions. But bureaucracies, in contrast, have no voters, and because their processes are not necessarily open, factions may have difficulty opposing and so neutralizing one another. Because administration is insulated, in contrast to the legislative process, the administration of law may be more susceptible to abuse by particular interests, and the abuse may be harder to cure, than is the drafting of law. Consequently, administrative agencies should be subjected to heightened review.

Administrative takings claims remedy failures of day-to-day governance, rather than failures of democratic authority. In Dolan, the Supreme Court distinguished "legislative determinations classifying entire areas of the city" from "an adjudicative decision" regarding a single parcel, between the plan devised by the city's elected officials and a specific application of that plan by the City Planning Commission. The general zoning plan was democratically approved; the exaction in the Dolan case was not. Injunctive relief—judicially mandated violation of the zoning plan—thus more directly contravenes the will of the electorate than the requirement of compensation.

Administrative takings claims subject bureaucracy to three sorts of scrutiny. First, the prosecution of a takings claim requires the agency to defend its actions in open court. An administrative takings claim thus subjects an agency to public scrutiny of particular decisions. Because the court's decisions may be published, the scrutiny of the agency policy is not only public, it may be durable. Second, if an agency is required to pay compensation for a taking, the agency places a demand upon the public fisc. If money is spent, elected officials and ultimately taxpayers will pay attention. In an age of deficit anxiety, agencies cannot afford to take property—i.e., spend money—without being sure that they are realizing a policy for which a political demand

233 See The Federalist No. 10 (James Madison).
235 One might respond that judges are even more insulated from both political and economic controls than other civil servants, and therefore should not be given power over political decisions. But judges are held accountable largely by the fact that they are constantly subjected to public scrutiny, and that their most important work product, opinions, are read daily by other lawyers.
exists. Takings law thus subjects an agency to democratic scrutiny. Third, and more subtly, administrative takings claims may signal the agency, either through public or fiscal embarrassment, that it needs to devote more care to its decisions.\(^{236}\) Judicial review under the Takings Clause, requiring compensation instead of invalidation, “is a way of opening a dialogue between branches of government on constitutional principle of a sort whose importance to restrained judicial theory was properly emphasized by the late Alexander Bickel. To put the point in Bickelian terms, compensation law may serve as a passive virtue—albeit of a relatively active sort.”\(^{237}\) Without some mechanism such as that provided by takings law, bad agency decisions cost the agency nothing but goodwill, and the agency decisionmaking process is easily compromised. Rephrased, the risk of successful takings claims provides agencies with incentives to make defensible decisions.

In requiring agencies to provide the public with information in order to ensure good government, takings cases serve the same ends as the statutes that regulate the government bureaucracy by requiring agencies to provide information, such as the Administrative Procedure Act,\(^{238}\) the Freedom of Information Act,\(^{239}\) and the National Environmental Policy Act.\(^{240}\) Takings law has even incorporated a key administrative law device, the requirement that agencies assess the impact of proposed action on policies. In a 1988 Executive Order, President Reagan required federal agencies to take “due regard for the constitutional protections provided by the Fifth Amendment and to reduce the risk of undue or inadvertent burdens on the public fisc resulting from lawful government action.”\(^{241}\) The Order requires that federal agencies assess, in light of recent takings cases, whether or not proposed regulation is likely to work a taking. As the Order makes clear, failure to consider the local effects of regulation on the regulated community powerfully suggests that the administrative agency is derelict in its duties. Like the administrative law statutes, the Takings Clause acts to ensure that the agency action is scrutable, either through agency payment of compensation or through judicial review of agency failure to pay compensation.

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236 This does not apply to cases of necessary discrimination, discussed in Part II.B, *supra*.


239 Id. at § 552.


CONCLUSION

The adjudication of takings claims in the regulatory state presents problems that already existed when the activities of government could be thought to run in just three courses—in the legislative, executive, and judicial branches. And yet the constitutional task of compelling government to exercise its power over individual lives in deliberate, fair, and open fashion is the same, regardless of the aspect of government under review.

In general, government must be able to show that its actions do not upset the settled expectations that constitute property too abruptly, or else a presumption arises that the action requires compensation. Due to its remedial flexibility, the Takings Clause is well-suited to judicial review of particular bureaucratic actions. Considerations relevant to judgment include the nature of the private interest affected, the political accountability of the agency, and the commitments made by the government.

In a world of competition for scarce resources, government will often be forced to limit the size of markets. In order to do that, discrimination among existing participants in the market will be necessary. Frequently, there will be no rational basis on which to choose among competitors. A limited number of permits—permissions to carry on the activity—can be distributed, and there are many applicants whose claims are worthy and who have much invested in the matter. If the law requires administrative choices among such competitors, compensation is due.

Finally, the Takings Clause is not addressed solely, or even primarily, to courts. Instead, it imposes an obligation, across the many organs of government, to mediate between settled commitments—property—and society’s efforts to improve itself—policy. That obligation, in an open society, must be publicly perceived to be fulfilled.

Administrative takings law can thus be understood as a reprise of the three “constitutional moments” that inform our political self-understanding.242 The Fifth Amendment, with its concern for how the

power of government is applied to the individual, was ratified along with the Constitution itself. The Fourteenth Amendment, with its concern that government treat citizens fairly, was ratified in the wake of the war over equality, the Civil War. The great administrative statutes, passed in response to the emergence of modern government's assumption of vast social responsibilities, have endeavored to ensure that government not become too distant, too obscure, too alien to those it is meant to serve. By forcing bureaucratic action to be defensible, fair, and open, administrative takings law furthers each of these constitutional efforts.

A coda: it has been suggested that a number of contemporary political events, such as the Supreme Court decisions in United States v. Lopez and Printz v. United States, the congressional elections of 1994, the promulgation of the Contract with America, and even the Reagan Presidency, together might comprise a fourth "constitutional moment," the reconfiguration of the federal government by "We the People." I doubt this. But if we have begun the fourth age of American political history, and if this age is characterized by the People's desire to constrain the power of bureaucracy—presumably in an effort to unshackle themselves from their own government, grown alien—then it seems inevitable that the Takings Clause will be understood as the constitutional expression of that desire.

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