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Tort Reform & the Takings Clause

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The United States tort reform movement has capped noneconomic damage awards in many jurisdictions, thereby preventing the most injured plaintiffs from being fully compensated for their suffering. While litigants have asserted numerous state constitutional challenges to these tort recovery limits, with varying degrees of success, aggrieved plaintiffs have underutilized the Fifth Amendment's Takings Clause. This Article advocates that judicial reduction of a jury's noneconomic damage calculation after the court has informed the successful plaintiff of the full verdict is a regulatory taking in violation of the federal Takings Clause, as incorporated against the states through the Fourteenth Amendment.

A Takings Clause violation requires a government taking of private property for public use without just compensation. A noneconomic damage award of which an injured plaintiff has been informed is a vested property interest; a trial judge

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reduces that award based on a statute; this is a regulatory, rather than a physical, taking under the Penn Central ad-hoc, three-factor standard; the taking is uncompensated because the plaintiff does not receive an equivalent of the full noneconomic damage verdict; and the taking is for public use because it is intended to reduce liability insurance premiums for the general public and encourage business investment. Finding enforcement of noneconomic damage caps to be an impermissible regulatory taking is supported by the Fifth Amendment's historical roots and the Supreme Court's Takings cases since the Founding. Moreover, ensuring that the most injured members of society, who are damaged because of a tortfeasor's actions, are adequately compensated and are not required by states to carry the burden of lower insurance costs and business investment for a whole jurisdiction is sound public policy.

INTRODUCTION

Since the mid-twentieth century, tort reform advocates have called for changes to the United States civil justice system.[1] The most vocal advocates have been individuals on the defense side of civil litigation.[2] These lobbyists have

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1. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 672–73 (4th ed. 2019) ("The liability explosion is real and powerful. It has led to a major backlash . . . [t]he American Tort Reform Association (ATRA), founded in 1986, and backed by business interests, helped spread the message that the [tort] system had run amuck."); Patricia Born et al., *The Effects of Tort Reform on Medical Malpractice Insurers' Ultimate Losses*, 76 J. RISK & INS. 197, 197 (2009) ("There have been three distinct 'rounds' of tort reform—the mid-1970s, the mid-1980s, and the late 1990s."); F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 438 (2006) ("For over thirty years, repeat players on the defense side of tort litigation have undertaken to "reform" tort doctrine in their favor."). Indeed, as some scholars have noted, tort reform has been a movement that has existed in some form or another since at least 1910. *See* G. Edward White, *Tort Reform in the Twentieth Century: An Historical Perspective*, 32 VILL. L. REV. 1265, 1265 (1987) ("Beginning about 1910, four reforms of the tort system have taken place, each of which represented a break with the status quo and a major reorientation of principals thought to fundamentally embedded in tort law."). Torts as a legal doctrine exists as a way for wronged individuals to achieve civil redress, often in the form of monetary damages, for the ills that the defendant has caused to befall the plaintiff. *See* Benjamin C. Zipursky & John C.P. Goldberg, *Thoroughly Modern Tort Theory*, 134 HARV. L. REV. F. 184, 185 (2021) (surveying the many theories and purposes of tort law).

2. Hubbard, *supra* note 1, at 438. For more on the tort reform debate, see Roland Christiansen, Comment, *Behind the Curtain of Tort Reform*, 2016 BYU L. REV. 261, 264 (2016) (identifying corporations as "some of the main proponents of tort reform" and expressing that corporations "often paint themselves as victims, and plaintiffs and their attorneys as the unreasonable aggressors."); Scott DeVito & Andrew W. Jurs, *"Doubling-Down" for Defendants: The Pernicious Effects of Tort Reform*, 118 PENN ST. L. REV. 543, 550 (2014) (noting that lobbyists for doctors in medical malpractice defense cases were the chief drivers of medical malpractice damage limit legislation); Paul R. Sugarman & Valerie A. Yarashus, *If You Like Enron, You'll Love Tort Reform*, 46 BOS. BAR J. 26 (2002).

helped pass statutes in numerous states that limit the noneconomic damages a plaintiff can recover in the stated hopes of reducing liability insurance premiums for automobile drivers, product manufacturers and sellers, and medical providers.[3] Consequently, injured people do not receive monetary awards adequate to compensate them for their anguish while insurance companies and corporate America profit.[4]

Along with political debates, noneconomic damage caps have been the subject of numerous constitutional challenges.[5] These cases have questioned whether tort caps

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3. Hubbard, *supra* note 1, at 468–69; *see* FRIEDMAN, *supra* note 1, at 673 ("States capped recoveries in tort law, limited amounts for pain and suffering, or punitive damages, and enacted other 'reforms.' The tort system is, indeed, imperfect. But in an imperfect welfare system, a fabric of rags and tatters, it plays a definite (and necessary?) role in the system of justice.").

4. CONG. BUDGET OFF., CONG. THE U.S., THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES vii (2004) ("[S]tate-level tort reforms have decreased the number of lawsuits filed, lowered the value of insurance claims and damage awards, and increased insurers' profitability as measured by payouts relative to premiums in the short run."). There is a constant struggle between people and profits in the tort reform discussion, whereby advocates for tort reform assert that reducing damage awards will encourage economic development within a state, while those opposed to reform argue that limiting damages harms seriously injured people as caps on damages target large verdicts for presumably the most egregious injuries. *See, e.g.*, Kenneth D. Kranz, *Tort Reform 1997–98: Profits vs. People?*, 25 FLA. STATE UNIV. L. REV. 161, 182 (1998). Kranz has noted of this debate, which was raging in Florida at the time of his article's publication:

> On one side, business is contending that it needs tort reform in the form of liability reduction to bolster Florida's economy. On the other side, citizens, consumers, and trial lawyers are contending that there is no evidence, economic or otherwise, supporting a need for these types of proposals, and that big business is opportunistically trying to shield itself from liability for its wrongful acts at the expense of the safety of Florida's citizens.

Id.

5. Though not an exhaustive account, the following cases were

violate the rights to a jury, open courts, and due process

litigants' attempts, with varying results, to invalidate tort reform legislation mostly on state constitutional grounds. Evans *ex rel.* Kutch v. State, 56 P.3d 1046, 1070 (Alaska 2002) (holding that a noneconomic and punitive damage cap did not violate Alaska's constitutional provisions regarding the right to a jury or the separation of powers); C.J. v. Dep't of Corr., 151 P.3d 373, 375 (Alaska 2006) (declaring a noneconomic damage cap did not violate Alaska's equal protection clause); Gourley *ex rel.* Gourley v. Nebraska Methodist Health Sys., Inc., 663 N.W.2d 43, 78 (Neb. 2003) (finding noneconomic damage caps did not violate Nebraska's separation of powers doctrine or the state's constitutional right to a civil jury); Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C., 95 P.3d 571, 579 (Colo. 2004) (ruling that damage caps did not violate Colorado's constitutional right to a jury nor separation of powers doctrine); Arbino v. Johnson & Jonson, 880 N.E.2d 420, 449 (Ohio 2007) (deciding that Ohio's limit on noneconomic damage caps was constitutional); Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895, 914 (Ill. 2010) (articulating that tort caps violate the Illinois separation of powers doctrine by the legislature infringing on the judiciary's role); Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218. 225 (Ga. 2010) (holding that maximum tort recovery laws violated the Georgia right to a civil jury because damages are a finding of fact); Estate of McCall v. United States, 134 So. 3d 894, 897 (Fla. 2014) (declaring tort reform measures are not equal justice under law in violation of the Florida Constitution); North Broward Hosp. Dist. v. Kalitan, 219 So. 3d 49, 50 (Fla. 2017) (affirming Florida's constitutional prohibition on tort caps based on equal protection); Mayo v. Wisconsin Injured Patients and Fams. Comp. Fund, 901 N.W.2d 782, 785 (Wis. 2017) (finding that Wisconsin's equal protection clause barred noneconomic damage caps that harmed the most injured plaintiffs); Beason v. I. E. Miller Servs., Inc., 441 P.3d 1107, 1109 (Okla. 2019) (declaring that noneconomic damage limits amounted to a special law that favored some while harming others under Oklahoma's Constitution); McClay v. Airport Mgmt. Servs., L.L.C., 596 S.W.3d 686, 696 (Tenn. 2020) (ruling that Tennessee's noneconomic damage caps did not violate the state's protections regarding the right to a jury, separation of powers, or equal protection). For more on Tennessee's contentious noneconomic damage cap litigation, see Bailey D. Barnes, *Violating the Inviolate?: Divided Tennessee Supreme Court Upholds Constitutionality of Noneconomic Damage Caps, Focuses on Right to Jury Trial*, 56 TENN. BAR J. 12 (2020) (discussing the Tennessee Supreme Court's decision in *McClay*); Bailey D. Barnes, *A State-Circuit Split: Reconciling Tennessee Damage Caps after* Lindenberg *and* McClay, 2 CTS. & JUST. L.J. 201, 202 (2020) (noting the incongruity of Tennessee Supreme Court and Sixth Circuit Court of Appeals rulings on Tennessee tort reform).

guaranteed by many state constitutions.[6] This battle has largely occurred in state courts because the United States Supreme Court has not incorporated the Seventh Amendment, which provides the right to a jury in civil cases, to the states.[7] Moreover, the United States Constitution contains no open courts provision.[8]

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6. *See supra* note 5.

7. *See* U.S. CONST. amend. VII; Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211, 219–20 (1916) (finding that the Seventh Amendment does not apply to the states); Suja A. Thomas, *Nonincorporation: The Bill of Rights After* McDonald v. Chicago, 88 NOTRE DAME L. REV. 159, 159 (2012). *Id.* at 172–75 (2012) (discussing the arguments surrounding selective incorporation of the Seventh Amendment); Paul B. Weiss, Comment, *Reforming Tort Reform: Is There Substance to the Seventh Amendment?*, 38 CATH. U. L. REV. 737, 737–38 (1989) (outlining the contours of the Seventh Amendment as applied to damage cap legislation); James L. "Larry" Wright & M. Matthew Williams, *Remember the Alamo: The Seventh Amendment of the United States Constitution, the Doctrine of Incorporation, and State Caps on Jury Awards*, 45 S. TEX. L. REV. 449, 518 (2004) (concluding that the Seventh Amendment's right to a jury is so fundamental to the United States system of civil justice and ordered liberty as to require selective incorporation). Notably, at least one litigant has argued that tort caps violate the Fourteenth Amendment's Equal Protection Clause; however, that argument has not prevailed because the litigant could not demonstrate a discriminatory intent that paralleled a disparate impact. *See McClay*, 596 S.W.3d at 695–96 (citing Washington v. Davis, 426 U.S. 229, 242 (1976)).

8. *See* U.S. CONST.; William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 MEMPHIS L. REV. 333, 374–75 (1997) (noting the absence of an open courts provision in the Bill of Rights); Patrick John McGinley, *Results from the Laboratories of Democracy: Evaluating the Substantive Open Courts Clause as Found in State Constitutions*, 82 ALBANY L. REV. 1449, 1453–54 (2019) (acknowledging the lack of an open courts provision in the United States Constitution); Robert F. Williams, *State Constitutional Protection of Civil Litigation*, 70 RUTGERS UNIV. L. REV. 905, 911 (2018) (recognizing the failure of the Framers to include an open courts provision in the federal Bill of Rights). The Founding Fathers apparently considered including an open courts provision in the Bill of Rights, but such a proposal was never sent for state ratification. *See* David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197,

However, one underutilized federal constitutional provision in tort cap litigation has been the Fifth Amendment's Takings Clause, which provides, "[N]or shall private property be taken for public use, without just compensation."[9] This Article asserts that judicial reduction of damage awards that have already been lawfully rendered by the jury and read to the parties is the taking of private property for public use without just compensation.[10] This prohibition applies to the states because the Supreme Court has incorporated the Takings Clause against the states.[11]

1199–1200 (1992) (citing BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 967–68 (1971)).

9. U.S. CONST. amend. V.

10. Few scholars have published works discussing a Takings Clause challenge to noneconomic damage caps. In fact, to the best of the author's knowledge, only two authors have offered more than a cursory mention of this idea. *See* Carey D. Collingham, Comment, *The Damages of Caps in Nebraska*, 99 NEB. L. REV. 209, 239–42 (2020) (surveying the reasoning and arguments presented in Gourley *ex rel.* Gourley v. Neb. Methodist Health Sys., Inc., 663 N.W.2d 43 (Neb. 2003)); Robert S. Peck & Hartley Hampton, *A Challenge Too Early: The Lawsuit to Invalidate Texas Damages Caps Ten Years Ago and Its Likely Future Vindication*, 51 TEX. TECH L. REV. 667, 685–87 (2019) (discussing the Takings Clause challenge presented and decided in Watson v. Hortman, 844 F. Supp. 2d 795 (E.D. Tex. 2012)). This Article intervenes in the scholarship by analyzing the efficacy of a Takings Clause challenge to noneconomic damage caps imposed after a successful litigant learns of a jury's verdict of more than the limits. This Article, to the author's knowledge, is the first to undertake this examination and propose this litigation strategy.

11. Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 236, 241 (1897) (incorporating the Takings Clause against the states); Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 279 (1982) (dissecting the Court's selective incorporation holding in *Chicago B. & Q.R. Co.*); Francis J. Swayze, *Judicial Construction of the Fourteenth Amendment*, 26 HARV. L. REV. 1, 21–22 (1912) (noting the Supreme Court's selective incorporation of the Takings Clause); Neal S. Manne, Note, *Reexamining the Supreme Court's View of the Taking Clause*, 58 TEX. L. REV. 1447, 1461–62 n.87 (1980) (asserting that the Takings Clause applies to the states because of *Chicago B. & Q.R. Co.*). *But see* Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 140, 152 (1949) (questioning whether

To make this argument, this Article proceeds in four parts. Part I briefly discusses the mechanics of noneconomic damage caps. Part II surveys the history of the Takings Clause's and its development. Part III analyzes previous attempts to employ the Fifth Amendment against tort limits. The fourth and final part uses this historical and jurisprudential context to argue that noneconomic damage caps are unconstitutional takings.

I. MECHANICS OF NONECONOMIC DAMAGE CAPS

A frequent target of tort reform has been noneconomic compensatory damages.[12] These include pain, suffering, loss of consortium, embarrassment, inconvenience, humiliation, reduced quality of life, loss of reputation, and emotional distress, among other injuries.[13] Tort reform legislation that caps noneconomic damages typically allows the jury to return a noneconomic damages verdict above the caps, and the judge then reads the verdict to the litigants.[14] After the

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the Court had incorporated the Takings Clause or merely relied on the Due Process Clause).

12. *See, e.g.*, Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1263 (2004) ("Caps on noneconomic loss damages are the most prevalent feature of tort reform legislation pending in Congress and proposed or enacted in many states."); Nancy L. Zisk, *The Limitations of Legislatively Imposed Damages Caps: Proposing a Better Way to Control the Costs of Medical Malpractice*, 30 SEATTLE UNIV L. REV. 119, 120 n.7 (2006) ("Most states with damages caps limit 'noneconomic' damages, although some states limit both economic and noneconomic damages."); Katherine Hubbard, Note, *Breaking the Myths: Pain and Suffering Damage Caps*, 64 ST. LOUIS UNIV L. REV. 289, 289 (2020) ("With injury or death due to a party's negligence comes expensive and lengthy litigation. In an effort to lower costs, many states have introduced sweeping tort reform . . . [that] frequently include[s] caps on plaintiffs' noneconomic damages.").

13. Finley, *supra* note 12, at 1264; Hubbard, *supra* note 12, at 290.

14. *Cf.* Hubbard, *supra* note 12, at 291 ("The jury, as the finder of fact, is given discretion to determine how much a plaintiff should be awarded depending on the circumstances of an individual case.").

judge discharges the jury, the trial court reduces the damages consistent with the caps.[15] To illustrate, if a jury awarded $5,000,000 in noneconomic damages in a state that caps noneconomic damages at $750,000, the judge would read the verdict, discharge the jury, and then reduce the award by $4,250,000. This Article contends that a property interest in the full noneconomic damage award vests with the plaintiff upon the reading of the jury's full verdict, and reduction of damages to accord with the caps is an uncompensated taking for public use.

II. HISTORY & DEVELOPMENT OF THE TAKINGS CLAUSE

A. *English & Colonial Roots*

The principle of private property in the United States did not always exist.[16] The theory only gained widespread acceptance in the American colonies before the turn of the eighteenth century.[17] For instance, upon Virginia's initial settlement, all real property was owned by the Virginia Company.[18] Likewise, in the early Plymouth Colony, property was communally possessed.[19] Yet, private ownership soon became the norm because the polity believed

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15. *See, e.g.*, McClay v. Airport Mgmt. Servs., Inc., 596 S.W.3d 686, 692 (Tenn. 2020) ("[A] jury determines, as a question of fact, the amount of any noneconomic damages sustained by a plaintiff. The trial judge then applies, as a matter of law determined by the legislature, the statutory cap on noneconomic damages in entering the final judgment."); *cf.* Hubbard, *supra* note 12, at 291 ("Statutory noneconomic damage caps, however, require judges to reduce those damages awarded by the jury to an injured plaintiff that exceed the ceiling of the cap.").

16. *See* WILLIAM E. NELSON, E PLURIBUS UNUM: HOW THE COMMON LAW HELPED UNIFY AND LIBERATE COLONIAL AMERICA, 1607–1776 115–16 (2019).

17. *Id.*

18. *Id.* at 115.

19. *Id.*

that "a man could have the independence required to participate in the politics of a free state only when his economic well-being was firmly protected by law."[20] Despite the shift from communal land to private property, colonists readily accepted "that private ownership [of land] was subject to regulation in the public interest as well as to a variety of public practices, stimuli, and procedures that aimed at promoting community development."[21] Thus, the colonies recognized private property rights but understood that property remained subject to the sovereign's regulation.[22]

Meanwhile, in England, prior to and during the American Colonial and Revolutionary Eras, private property was recognized, but the Crown could take or destroy private property with no recompense.[23] Nevertheless, Parliament could compensate the aggrieved owner despite the law not requiring it.[24] Renowned common law commentator, William Blackstone, argued that compensation should be required when the government appropriates a citizen's private property, but this idea did not attract Parliament's approval.[25] Indeed, the Magna Carta only provided for

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20. *Id.* at 116.

21. *Id.*

22. *Id.*

23. Jonathan Lahn, Note, *The Uses of History in the Supreme Court's Takings Clause Jurisprudence*, 81 CHI.-KENT L. REV. 1233, 1251 (2006) ("[T]he common law of England . . . had a strong tradition of protecting private property rights against governmental interference . . . ."); Derek T. Muller, Note, *"As Much Upon Tradition as Upon Principle:" A Critique of the Privilege of Necessity Destruction Under the Fifth Amendment*, 82 NOTRE DAME L. REV. 481, 497–98 (2006) ("At English common law, the government as sovereign owed no compensation for any taking, destruction, or otherwise, unless parliament granted it.").

24. Muller, *supra* note 23, at 497–98.

25. Muller, *supra* note 23, at 505 ("Though Blackstone's native England did not look so kindly upon his commentary, the Founders relied upon Blackstone and adopted a compensation clause in the Bill of

compensation when the government took personal, rather than real, property.[26] Thus, the Fifth Amendment provided more protections than the English common law, which was an anomaly for United States constitutional protections.[27]

Following English common law, most American colonies did not demand compensation for government takings.[28] Only two colonies required compensation.[29] First, Massachusetts' stipulated that a government seizure of private *personal* property required recompense.[30] Notably, Massachusetts did not provide the same protections for real property.[31] Meanwhile, in North Carolina, John Locke's Fundamental Constitution of Carolina of 1669 guaranteed compensation for real property takings.[32]

Rights.").

26. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 830–31 n.252 (1995).

27. *See id.*; *cf.* Nicole Stelle Garnett, *"No Taking Without a Touching?" Questions from an Armchair Originalist*, 45 SAN DIEGO L. REV. 761, 766 (2008) ("[U]nlike many other provisions of the Constitution, the Takings Clause had no colonial or British antecedents: No colonial charter mandated compensation, even for physical appropriations, in all cases.").

28. Garnett, *supra* note 27, at 766; Lahn, *supra* note 23, at 1252 ("In keeping with the pattern of broad governmental power over private property, the colonies did not always follow the Blackstonian maxim that government appropriation of private lands required renumeration . . . ."); Treanor, *supra* note 26, at 785 ("Precedents for the Fifth Amendment's Takings Clause were relatively few . . . with respect to physical seizures of property by the government, the compensation requirement was not generally recognized at the time of the framing of the Fifth Amendment."). *But see* James W. Ely, Jr., *"That Due Satisfaction May be Made:" The Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1, 4 (1992) ("A review of the historical evidence amply demonstrates the wide acceptance of the compensation principle by colonial Americans from the time of initial settlement.").

29. Treanor, *supra* note 26, at 785–86.

30. *Id.* at 785.

31. *Id.*

32. *Id.* at 785–86.

Other colonies offered some safeguards against government takings, but those protections were often procedural rather than substantive.[33] For example, New York required that the government provide a fair process before taking a citizen's property.[34] Despite few legal protections in colonial charters, colonies usually compensated individuals from whom the government took property, except for undeveloped land, for which most colonial governments did not compensate.[35] Accordingly, the Takings Clause was not based entirely on the English common law or colonial government practices; instead, the American experience during the Revolutionary War prompted the Framers to provide additional protections from the government's long arm.[36]

Four Revolutionary Era property issues prompted the Takings Clause.[37] First, the Colonial Army regularly took loyalist real and personal property to build roads and supply the military with goods.[38] Second, the Continental Congress and colonial legislatures issued paper money in large quantities, which spurred rapid inflation.[39] Compounding inflation, some legislatures required creditors to accept inflated paper money for debts already owed thereby

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33. *Id.* at 786. *But see* Ely, *supra* note 28, at 5 ("[C]olonial statutes invariably required the award of compensation to the owners when land was taken for the erection of public buildings.").

34. Treanor, *supra* note 26, at 786–87.

35. *Id.* at 787. *See also* Ely, *supra* note 28, at 7–11 (detailing compensation requirements for colonial takings of property to build roads in the colonies).

36. *See* Treanor, *supra* note 26, at 786; *see, e.g.*, Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L.J. 1245, 1278–82 (2002).

37. *See, e.g.*, William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 698 (1985).

38. *Id.*

39. Harrington, *supra* note 36, at 1278.

allowing debtors to pay less value for their debts.[40] Third, during the Revolutionary War, the government seized over twenty million dollars' worth of loyalist property without recompense.[41] Finally, some states enacted laws setting wage and price limits.[42] Consequently, individuals concerned about property abuses advocated for including a just compensation clause in the Bill of Rights.[43] The Takings Clause, therefore, was less rooted in the common law and more grounded in worries about the inviolability of property that sprang from the Revolutionary Era.[44]

B. *Development of Takings Clause Jurisprudence in the United States*

The Takings Clause has prompted difficult questions for the Supreme Court. The Court has developed its interpretation of the Takings Clause in distinguishable categories of cases: differentiating between intangible rights and tangible property rights;[45] incorporation of the Takings Clause;[46] defining the eminent domain power;[47] and drawing the line between physical and regulatory takings.[48]

1. Legal Rights

Shortly after the Bill of Rights' ratification, the Court had to determine whether legislation devested individuals of property rights that they held as a matter of law by title.[49]

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40. *Id.*

41. Treanor, *supra* note 26, at 790.

42. *Id.*

43. *See, e.g.*, Harrington, *supra* note 36, at 1279.

44. *Id.*; Treanor, *supra* note 37, at 704–05.

45. *Infra* Part II.B.1.

46. *Infra* Part II.B.2.

47. *Infra* Part II.B.3.

48. *Infra* Part II.B.4.

49. *See* Sampeyreac v. United States, 32 U.S. 222, 237–40 (1833);

These cases dealt with whether an act of a state legislature could alter the status of property, not whether the government could take or render unusable someone's tangible property.[50] Notably, these cases grappled with legal rights or entitlement to property by virtue of the law.[51] Ultimately, the Court often found that although the plaintiff had a legal right to their property, the legislature had the authority to modify that right.[52]

For instance, in *Sampeyreac v. United States* in 1833, the Court scrutinized the constitutionality of a federal law that changed the timing in which an appeal must be filed for land claims in the formerly Spanish-held Louisiana territory.[53] Joseph Stewart purchased property from John J. Bowie, who had allegedly purchased the property from Bernardo Sampeyreac in December 1828.[54] A year prior, an Arkansas Superior Court determined that Sampeyreac owned marketable title to approximately four hundred arpents of land granted to him by the Spanish governor of Louisiana.[55] The United States did not appeal in the one-year period provided by the 1824 statute; however, the United States appealed in April 1830 under a new, retrospective federal law that permitted later appeals.[56] At the Supreme Court, the parties stipulated that Sampeyreac was a fictitious

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Satterlee v. Matthewson, 27 U.S. 380, 414 (1829) (holding that a state law that created the relationship of landlord and tenant in Pennsylvania to titles granted as part of Connecticut did not violate the Takings Clause though it divested persons of a vested right).

50. *See Sampeyreac*, 32 U.S. at 237–40; *Satterlee*, 27 U.S. at 414.

51. *Sampeyreac*, 32 U.S. at 237–40.

52. *Sampeyreac*, 32 U.S. at 237–40; *Satterlee*, 27 U.S. at 414.

53. *Sampeyreac*, 32 U.S. at 223–25, 237.

54. *Id.* at 224.

55. *Id.* at 223–24. According to N. Stephan Kinsella, "An arpent of land is an area equalling [sic] approximately 0.85 acres." N. Stephan Kinsella, *A Civil Law to Common Law Dictionary*, 54 LA. L. REV. 1265, 1266 (1994).

56. *Sampeyreac*, 32 U.S. at 223–24.

person, that any deed to him was a forgery, and that Mr. Bowie never had legal title to the land to convey to Mr. Stewart.[57] Still, Mr. Stewart claimed that the United States had waived its defense by neglecting to appeal within the year provided by the 1824 statute, which had vested a legal right in Mr. Stewart to the arpents Mr. Bowie purportedly conveyed to him.[58] The Court held that Congress is permitted to create retrospective laws that relate to remedies affecting property rights without infringing upon the Constitution, and thereby invalidated Mr. Stewart's property claim.[59]

The question of legal rights versus property rights has remained prominent on the Court's docket.[60] Around the turn of the twentieth century, the Court considered whether

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57. *Id.* at 237–38.

58. *Id.* at 225–27.

59. *Id.* at 237–40, 242.

60. *See generally*, United States v. Fuller, 409 U.S. 488 (1973) (finding that no taking of private property occurred where the government took property held by the plaintiff pursuant to a revocable permit provided by the State of Arizona); Omnia Com. Co. v. United States, 261 U.S. 502 (1923) (holding that the Fifth Amendment does not provide for compensation where the United States government overtakes all production at a steel plant from which the plaintiff had a commercial contract to purchase steel plates at a certain quantity for a price below market value as this was a consequential, indirect damage); Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82 (1913) (declaring that the possessor of a title to the soil lying beneath a bay of water in New York was not entitled to compensation when the government of the United States dredged in that bay and destroyed an oyster plantation through which the owner of the title to the soil earned a profit because the owner did not have a legal property right not to have the property interfered with by the government upon a navigable waterway); Kelly v. Pittsburg, 104 U.S. 78, 82–83 (1881) (holding that taxation of farm land for city purposes is not a government taking that requires compensation or that violates due process even if the taxed amount is disproportionate to the benefit received by the property owner); Union Pac. R.R. v. United States, 99 U.S. 700, 738 (1878) ("Indeed, it may be said that whatever rights are created by contract, or held under it, if they relate to property, are themselves, in a very real sense, property, and as such are protected by the [F]ifth [A]mendment to the Constitution.").

owners of property along St. Mary's River in Michigan possessed any legal right to use the water's flow to create electricity.[61] The government sought to prevent the owners, who by state law owned the soil to the River's middle thread, from constructing appliances in the River that would create electricity from the River's current.[62] Consistent with precedent, the Court held that the riparian owners' rights were subjugated to Congress's powers to regulate commerce and the navigable waters on which it is transacted.[63] Accordingly, the United States owed the property owners no recompense for preventing them from constructing the electricity machinery in the river bed.[64] Thus, the property owners could claim the soil beneath the water to the middle thread and prevent others from interfering with it subject to Congress's commerce powers.[65]

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61. United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 60 (1913).

62. *Id.* at 61 ("[T]he claim is that the United States, in the exercise of the power to regulate commerce, may not exclude the rights of riparian owners to construct in the river and upon their own submerged lands such appliances as are necessary to control and use the current for commercial purposes . . . .").

63. *Id.* at 62, 70 ("[E]very . . . structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation, and must be removed if Congress . . . shall determine that their continuance is determinantal to the public interest . . . ."). *But see* United States v. Cress, 243 U.S. 316 (1917) (declaring that a tributary from a river is not a navigable stream subject to Congress's Commerce Power and Congressional actions, taken by the agents of the federal government, that affect an owner's rights to a tributary or creek may be deemed a taking for which just compensation must be paid).

64. *Chandler-Dunbar Water Power Co.*, 229 U.S. at 74 ("[T]he court below erred in awarding $550,000, or any other sum, for the value of what is called 'raw water,' that is, the present money value of the rapids and falls to the . . . riparian owners of the shore and appurtenant submerged land.").

65. *Id.* at 72 ("The qualified title to the bed of the river . . . is absolutely subordinate to the right of navigation, and no right of private property

In 1932, the Court held that no vested property right accrued to owners of property adjoining a park in Washington, D.C.[66] Congress had ordered the construction of a fire station inside the park that adjoining landowners claimed would reduce their property values.[67] Because the originating legislation established the land as a park in perpetuity, the landowners argued they possessed a vested right in keeping the park undisturbed.[68] The Court disagreed by noting that Congress did not deprive itself of the ability to modify the property's use, and not every change that damages abutting property values is compensable.[69] More recently, the Court has recognized that contracts create a vested property interest in the obligee.[70] When that contract involves the government, the Takings Clause protects its enforceability.[71] If the government breaks the contract for

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would have been invaded if such submerged lands were . . . kept free from such obstructions in the interests of navigation.").

66. Reichelderfer v. Quinn, 287 U.S. 315, 318 (1932) ("By dedicating the lands thus acquired to a particular public use, Congress declared a public policy, but did not purport to deprive itself of the power to change that policy by devoting the lands to other uses.").

67. *Id.* at 317 ("The Commissioners are directed by Congress to build the engine house at the designated location within the park. The presence of such a structure will, it is admitted, diminish the attractiveness of respondents' lands for residence purposes, and, in consequence, decrease their exchange value.") (internal citations omitted).

68. *Id.* at 317–18.

69. *Id.* at 319 ("The case is clear where . . . value was both created and diminished [by] government. For, if the enjoyment of a benefit thus derived from the public acts of government were a source of legal rights to have it perpetuated, the powers of government would be exhausted by their exercise.")

70. Lynch v. United States, 292 U.S. 571, 579 (1934).

71. *Id.* ("Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.") (citing United States v. Cent. Pac. R.R., 118 U.S. 235, 238 (1886)).

public use, it must pay the obligee just compensation.[72]

2. Incorporation of the Takings Clause Against the States

The Court has also tackled the Takings Clause's applicability to the states.[73] In *Barron v. Baltimore*, the successors in interest of two wharf owners sued Baltimore

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72. *Id.*

73. *See generally* Barron v. City of Baltimore, 32 U.S. 243 (1833) (declaring that the Takings Clause of the Fifth Amendment did not apply to the individual states of the United States). Notably, this case was before the Court prior to the drafting, adoption, and ratification of the Fourteenth Amendment through which selective incorporation of the Bill of Rights has occurred. For more on selective incorporation, see Jerold H. Israel, *Selective Incorporation Revisited*, 71 GEO. L.J. 253 (1982). For more on *Barron*, see WILLIAM DAVENPORT MERCER, DIMINISHING THE BILL OF RIGHTS: *BARRON V. BALTIMORE* AND THE FOUNDATIONS OF AMERICAN LIBERTY (2017) (detailing the questions and arguments presented to the Court in *Barron* along with the Court's decision and reasoning); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1198 (1992) ("Narrowly framed, the issue raised by *Barron* was whether the Fifth Amendment's takings clause limited not just the federal government, but states and municipalities as well."); Michael Kent Curtis, *The Bill of Rights and the States Revisited after* Heller, 60 HASTINGS L.J. 1445, 1446 (2009) ("In *Barron v. Baltimore*, the Court rejected a landowner's claim for compensation under the Takings Clause. His wharf had become inaccessible after . . . Baltimore dumped dirt and gravel from a road repair project around it. Chief Justice John Marshall rejected application of the Bill of Rights to the states . . . ."); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949) (discussing selective incorporation's history while noting that the Due Process Clause did not exist before *Barron*); Emlin McClain, *Federal Protection Against State Power*, 6 HARV. L. REV. 405 (1893) (arguing that *Barron* was properly decided even after the Fourteenth Amendment because *Barron* promoted state sovereignty and federalism); Aviam Soifer, *Text-Mess: There is No Textual Basis for Application of the Takings Clause to the States*, 28 U. HAW. L. REV. 373 (2006) (asserting that the Reconstruction Congress's omission of a Takings Clause in the Fourteenth Amendment indicates that *Barron v. Baltimore* and the literal text of the amended Constitution do not support applying the Takings Clause to the states).

for destroying their wharf business's profitability.[74] The plaintiffs claimed that Baltimore had changed the course of streams through road paving and street grading, thereby flooding the wharf with "large masses of sand and earth" that "rendered [the wharf] so shallow that it ceased to be useful for vessels of any important burden, lost its income, and became of little or no value as a wharf."[75] The constitutional question for the Court was whether the Takings Clause applied to state actions.[76] The Court held that the Fifth Amendment's protections did not apply to state action because the Takings Clause was intended to apply only to the federal government, while state constitutions could offer added safeguards in their jurisdictions.[77] Consequently, the

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74. *Barron*, 32 U.S. at 243–44; *see* MERCER, *supra* note 73, at 89 ("[Barron and Craig] claimed that the city intentionally damaged their property by diverting streams, grading and paving roads, and placing embankments and other dams that caused the water adjacent to the wharves to fill up with sand and dirt. For these actions, Barron and Craig demanded $20,000 in damages.").

75. *Barron*, 32 U.S. at 243–44. As historian William Davenport Mercer has chronicled, Baltimore faced a serious problem on Fell's Point wherein the lack of a sewage and drainage system left "water and sediment" in the streets. MERCER, *supra* note 73, at 25. As Mercer has noted:

> In 1817, the city became serious about addressing the problem. In April, the city council passed two ordinances that together would effectively redirect all of the water flowing through Fell's Point. The city ordered streets paved and embankments built. This channeled all the waters that had flowed south-westerly across Fell's Point and redirected them east to empty at one spot in the eastern harbor of the peninsula, directly north of Barron and Craig's wharf.

Id. at 26.

76. *Barron*, 32 U.S. at 247 at 247 ("The plaintiff in error contends, that it comes within that clause in the [F]ifth [A]mendment to the [C]onstitution, which inhibits the taking of private property for public use, without just compensation. . . . If this proposition be untrue, the [C]ourt can take no jurisdiction of this cause.").

77. *Id.* at 247–49 ("Had the people of the several states, or any of them, required changes in their constitutions; had they required additional safe-guards to liberty from the apprehended encroachments of their

Takings Clause applied only to the federal government.[78]

The Court grappled with the issue of the Fifth Amendment's incorporation again in 1897.[79] In *Chicago, Burlington and Quincy Railroad Company v. Chicago*, the railroad challenged Chicago's use of eminent domain to create a perpetual easement across one of the Company's railways.[80] A jury found that the City took the Company's property for public use and provided one dollar as "just compensation."[81] The Court held that one dollar was not just compensation under the Fifth Amendment, as incorporated through the Fourteenth Amendment's Due Process Clause.[82]

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particular governments the remedy was in their own hands, and could have applied by themselves.").

78. *Id.* at 250–51 ("We are of opinion, that the provision in the [F]ifth [A]mendment to the [C]onstitution . . . is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states."); *see* Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revising the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L.J. 1509, 1531 (2007) ("Chief Justice Marshall, in *Barron v. Baltimore*, almost certainly got it right in 1833 in holding that the Bill of Rights, by itself, was never properly understood to apply to the states.").

79. Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226 (1897); *see also* Bryan H. Wildenthal, *The Road to* Twining*: Reassessing the Disincorporation of the Bill of Rights*, 61 OHIO ST. L.J. 1457, 1501 (2000).

80. *Chicago, Burlington & Quincy R.R.*, 166 U.S. at 230; *see also* Sheldon A. Evans, *Taking Back the Streets? How Street Art Ordinances Constitute Government Takings*, 25 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 685, 705 (2015) ("[T]he issue before the Court was that of just compensation due to the railroad company's diminished use of land, not the physical taking of land.").

81. *Chicago, Burlington & Quincy R.R.*, 166 U.S. at 230.

82. *Id.* at 241. The Court declared:

> 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 [F]ourteenth [A]mendment to the

> [C]onstitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument.

Id.; *see also* Kyron J. Huigens, *Majestic Law and the Subjective Stop*, 51 SETON HALL L. REV. 669, 727 (2021) ("In *Chicago, Burlington & Quincy Railroad Company v. City of Chicago*, the Court held that the Fourteenth Amendment Due Process Clause required compensation for property condemned by local governments under eminent domain . . . ."). For more on the Reconstruction Amendments, including the Fourteenth Amendment, see ERIC FONER, THE SECOND FOUNDING (2019) (outlining the history of the passage and implementation of the Reconstruction Amendments and asserting that the ratification of these Amendments acted as a "Second Founding" for the United States, especially as it related to its Constitution); *see also* Justin Collings, *The Supreme Court and the Memory of Evil*, 71 STAN. L. REV. 265 (2019) (claiming that the Court has interpreted the Fourteenth Amendment too narrowly as the close to an evil period of United States history rather than as a call to continuing aggressive judicial action to eradicate America's evils); Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 COLUM. L. REV. 1585 (2012) (maintaining that the Court has too often relied on the early historiography of Reconstruction, which viewed federal intervention to secure the rights of recently freed enslaved persons as a mistake, and has thereby rendered and failed to overturn decisions based on an outdated and repudiated historical narrative). For more on the power and authority granted to Congress through the Reconstruction Amendments, and the debate over whether the Court has properly interpreted the Amendments, see Peter Nicolas, *Reconstruction*, 10 U.C. IRVINE L. REV. 937, 941 (2020); Alexander Tsesis, *Enforcement of the Reconstruction Amendments*, 78 WASH. & LEE L. REV. 849, 884 (2021). Nicolas has recalled, "The U.S. Supreme Court's interpretation of the Reconstruction Amendments has undergone a seismic shift. . . ." Nicolas, *supra* note 82, at 941. Nicolas added, "The Court's opinions in the decades immediately following the Civil War suggested that the Reconstruction Amendments were quite limited in their reach. In contrast, the Court's decisions in the 1960s and 1970s suggested that the Reconstruction Amendments were breathtakingly broad in reach." *Id.* Tsesis has directly contested the Court's recent view of the Reconstruction Amendments, stating, "By adopting the Reconstruction Amendments, the nation committed itself to throwing off the yoke of slavery and incidents of bondage; securing due process, equal protection, the privileges or immunities of citizenship; and advancing the franchise." Tsesis, *supra* note 82, at 884. Tsesis continued by decrying, "But by 1883, in the *Civil Rights Cases*, the Supreme Court had overstepped its Article III bounds, donned the mantle of interpretive supremacy, and effectively thwarted

Consequently, from before the turn of the nineteenth century onward, state action depriving individuals of their property for public use demanded just compensation according to the amended Constitution.[83]

3. Eminent Domain

i. Right to Eminent Domain

A common category of Takings Clause cases relate to the government's authority to take property through eminent

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the reconstruction of civil rights and civil liberties in the United States." *Id.*

83. *Chicago, Burlington & Quincy R.R.*, 166 U.S. at 241; *see also* Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379, 425 (2001) ("In *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, the Supreme Court held in 1897 that the Due Process Clause . . . incorporates the Takings Clause of the Fifth Amendment, thus requiring that states pay compensation when they take private property for public use."). Notably, there is some scholarly, if not judicial, debate as to whether *Chicago, Burlington & Quincy Railroad* selectively incorporated the Takings Clause to the states. *See* Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle,"* 90 MINN. L. REV. 826, 829 (2006). Bradley Karkkainen has argued that the Takings Clause was not incorporated until 1978 in *Penn Central Transportation Company v. New York*. *Id.* at 844. Karkkainen stated, "It is now widely assumed that the Fifth Amendment Takings Clause was incorporated against the states in 1897 in *Chicago B & Q*." *Id.* Karkkainen added, "Challenging conventional wisdom . . . it was not until 1978 in *Penn Central Transportation Company v. New York* that the Supreme Court first explicitly held the Takings Clause applicable to the states." *Id.*; *see also* Mason E. Heidt & Joshua Wysor, *Don't Condemn My Creek: Using Eminent Domain to Satisfy Environmental Obligations*, 7 BELMONT L. REV. 370, 375 (2020) ("Although there is debate as to the Supreme Court's first application of the incorporation doctrine, the most likely candidate is *Chicago, Burlington & Quincy Railroad Co. . . . .*"); Colin Starger, *Exile on Main Street: Competing Traditions and Due Process Dissent*, 95 MARQ. L. REV. 1253, 1303 n.234 (2012) ("That *Chicago, Burlington & Quincy* qualifies as the Court's first due process incorporation case is uncontroversial.").

domain.[84] After the Civil War, the Court addressed the federal government's eminent domain power in the states.[85] In 1875, some Ohio perpetual leasehold owners claimed the federal government could not use eminent domain in the states, thus the United States could not take their land to establish a post office.[86] The Court rejected this contention by noting that the Takings Clause necessarily implies that the federal government can take citizens' private property within the states.[87] Moreover, the Court noted that holding otherwise would subject the federal government to landowners' whims or to the states to acquire property for the federal government.[88]

ii. Definition of Public Use

Questions of which takings are for the public's use have become more prominent since the mid-twentieth century.[89]

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84. *See* United States v. Buffalo Pitts Co., 234 U.S. 228, 234–35 (1914) ("All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property. The government may take personal or real property whenever its necessities or the exigencies of the occasion demand."); *see also* Newport & C. Bridge Co. v. United States, 105 U.S. 470, 481 (1881).

85. *See* Kohl v. United States, 91 U.S. 367, 371 (1875) ("It has been seriously contended during argument that the United States government is without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity.").

86. *Id.* at 368.

87. *Id.* at 372–73 ("The [F]ifth [A]mendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken?").

88. *Id.* at 371 ("If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory . . . .").

89. *See, e.g.*, United States v. Pewee Coal Co., 341 U.S. 114, 115–17 (1951) (finding a taking for public use when the federal government took over a coal mining company to avert a nation-wide miner strike); *see also*

President Franklin D. Roosevelt, facing a nation-wide coal miner strike, directed the federal government to overtake coal mines and employ miners as government agents from May 1, 1943 to October 12, 1943.[90] Following the occupation, Pewee Coal Company sued and received $2,241.26 in compensation.[91] The government appealed the determination that the government had effectuated a taking.[92] The Court found that the government had taken the Coal Company's property for public use.[93] The Court focused its opinion on the government's proclamation that it was taking the mines to operate them; the government "required mine officials to agree to conduct operations as agents for the Government; required the American flag to be flown at every mine; required placards reading 'United States Property!' to be posted on the premises; and appealed to the miners to dig coal . . . as a public duty."[94] Accordingly, the Court found that the government had taken the Company's property for public use, even if the underlying motivation was to prevent a miner strike.[95]

Thereafter, the Court found that the District of

John D. Echeverria, *What is a Physical Taking?*, 54 U.C. DAVIS L. REV. 731, 756 (2020) (scrutinizing the holding of *United States v. Pewee Coal Company*); L.K. Furgurson, Jr., *Labor Law—Government Seizure—Liability for Operating Loss*, 30 N.C. L. REV. 78, 78–81 (1951) (discussing the facts and opinions in *United States v. Pewee Coal Company*).

90. *Pewee Coal Co.*, 341 U.S. at 115–16; Furgurson, Jr., *supra* note 89, at 78–79.

91. *Pewee Coal Co.*, 341 U.S. at 115.

92. *Id.* The United States also appealed the amount of compensation made to Pewee Coal Company. *Id.* The Supreme Court affirmed the $2,241.26 granted by the United States Court of Claims. *Id.* at 117.

93. *Id.* at 115.

94. *Id.*

95. *Id.* ("[I]t . . . will not be assumed that the seizure of the mines was a mere sham or pretense to accomplish some unexpressed government purpose instead of being the proclaimed actual taking of possession and control.").

Columbia's taking of private property to promote redevelopment and aesthetic upgrades was for public use.[96] The Court established that the legislature's judgment in determining the public's interests should not be readily overturned.[97] Thus, if the legislature believes appropriating private land is necessary for the public's benefit, the judiciary will defer to that judgment.[98]

The Court further defined the public use requirement in 1984 when it held that the use of eminent domain to divest title to land held in Hawaii to redistribute to the state's citizens was a public use.[99] Owing to Hawaii's monarchical history, land was heavily concentrated in select few hands in the 1960s.[100] To make land ownership attainable to more citizens, Hawaii permitted eminent domain proceedings to decentralize title to the state's property with compensation to the previous owners.[101] Then, the Hawaii Housing Authority could sell that land to the individuals who had previously leased the property.[102] In so holding, the Court

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96. Berman v. Parker, 348 U.S. 26, 31–32 (1954).

97. *Id.* at 32 ("Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.").

98. *Id.* ("In such cases, the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia, or the States legislating concerning local affairs.") (internal citations omitted).

99. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 243–44 (1984).

100. *Id.* at 232 ("In the mid-1960's, after extensive hearings, the Hawaii Legislature discovered that, while the State and Federal Governments owned [about] 49% of the State's land, another 47% was in the hands of only 72 private landowners.").

101. *Id.* at 233–24 ("Under the Act's condemnation scheme, tenants living on single-family residential lots within developmental tracts at least five acres in size are entitled to ask the Hawaii Housing Authority (HHA) to condemn the property on which they live.").

102. *Id.* at 234 ("HHA may sell the land titles to tenants who have applied for fee simple ownership. HHA is authorized to lend these tenants up to 90% of the purchase price, and it may condition final

stated, "As the unique way titles were held in Hawaii skewed the land market, exercise of the power of eminent domain was justified."[103] The Court continued, "The Act advances its purposes without the State's taking actual possession of the land. In such cases, government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause."[104]

Similarly, the Court held in 2005 that the government's condemnation of a home for a private economic development project was a public use.[105] The Court reasoned, "For more than a century, our public use jurisprudence has wisely

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transfer on a right of first refusal for the first 10 years following [the] sale.").

103. *Id.* at 244.

104. *Id.*

105. Kelo v. City of New London, 545 U.S. 469, 475, 489–90 (2005). For more on *Kelo*, see Clayton P. Gillette, Kelo *and the Local Political Process*, 34 HOFSTRA L. REV. 13 (2005); Julia D. Mahoney, Kelo*'s Legacy: Eminent Domain and the Future of Property Rights*, 2005 SUP. CT. REV. 103 (2005); Brent Nicholson & Sua Ann Mota, *From Public Use to Public Purpose: The Supreme Court Stretches the Takings Clause in* Kelo v. City of New London, 81, 91–101 (2005); Ilya Somin, *The Case Against Economic Development Takings*, 1 N.Y.U. J.L. & LIBERTY 949, 950–54 (2005); Sonya D. Jones, Note, *That Land is Your Land, This Land is My Land . . . Until the Local Government Can Turn It for a Profit: A Critical Analysis of* Kelo v. City of New London, 20 BYU J. PUB. L. 139 (2005); Brett D. Liles, Note, *Reconsidering* Poletown*: In the Wake of* Kelo*, States Should Move to Restore Private Property Rights*, 48 ARIZ. L. REV. 369 (2006); Randy J. Bates II, Note, *What's the Use? The Court Takes a Stance on the Public Use Doctrine in* Kelo v. City of New London, 57 MERCER L. REV. 689 (2006); Kristi M. Burkard, Note, *No More Government Theft of Property! A Call to Return to a Heightened Standard of Review after the United States Supreme Court Decision in* Kelo v. City of New London, 27 HAMLINE J. PUB. L. & POL'Y 115 (2005); R. Ashby Pate, Note, *Constitutional Law—Public Use Clause—Use of Eminent Domain to Promote Economic Development Held Constitutional*, 36 CUMB. L. REV. 407 (2006); Ryan J. Sevcik, Note, *Trouble in Fort Trumbull: Using Eminent Domain for Economic Development in* Kelo v. City of New London, 85 NEB. L. REV. 547 (2006).

eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[106] The Court added, "Promoting economic development is a traditional and long-accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized."[107] Therefore, the Court proclaimed that the legislature determines the public's interest, and economic development is an acceptable public use.[108]

iii. Definition of Just Compensation

As the United States transitioned from an agrarian society to an industrial economy, the government turned to eminent domain for transportation routes.[109] In fact, some states delegated their eminent domain powers to pseudo-public entities that could take properties for navigation systems.[110] The Court scrutinized one such taking in 1893.[111]

Monongahela Navigation Company challenged the value of just compensation for the government's taking of a lock and dam system that the Company had built and

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106. *Kelo*, 545 U.S. at 483.

107. *Id.* at 484.

108. *Id.* at 483–84.

109. *See generally* FRIEDMAN, *supra* note 1, at 152–54 ("In the first half of the nineteenth century, the state itself did not use eminent domain very much. Rather, it lent it out freely to private businesses that served "public" purposes—canal or turnpike companies, very notably. The companies could then take over the land they needed."); KERMIT L. HALL & PETER KARSTEN, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 130–32 (2d ed. 2009) ("Eminent domain became an indirect subsidy without which promoters of public developments would have been left at the mercy of any single property owner who 'decided to hold out for an extortionate price.'").

110. *See* FRIEDMAN, *supra* note 1, at 152–54.

111. *See* Monongahela Navigation Co. v. United States, 148 U.S. 312, 344–45 (1893).

operated.[112] The Company claimed that just compensation included the tangible property's value and lost toll profits.[113] The Court agreed, stating:

> [T]he question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken, and when . . . the owner is actually deprived of the franchise to collect tolls, just compensation . . . [includes] the franchise of which he is deprived.[114]

The Court further held that the judiciary, not Congress, determines just compensation.[115] In *Monongahela*, Congress had appropriated a sum to pay the Company for this taking, which was less than the Company's annual toll receipts.[116] The Court declared, "[T]his is a judicial; and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial."[117] Accordingly, *Monongahela* clarified two factors for eminent domain: the compensation to be paid when taking a business's instruments and the separation of powers for just compensation.[118]

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112. *Id.* at 324.

113. *Id.* at 328–30.

114. *Id.* at 343.

115. *Id.* at 327.

116. *Id.* at 315–19.

117. *Id.* at 327. *But see* Bauman v. Ross, 167 U.S. 548, 593 (1897) ("[T]he estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury; but may be intrusted [sic] by [C]ongress to commissioners appointed by a court or by the executive . . . .").

118. *Monongahela Navigation Co.*, 148 U.S. at 327, 343. While the Court in *Monongahela* held that the government must compensate a business owner when the government directly renders that business untenable, the Court has traditionally ruled the opposite when considering collateral damages associated with a taking. *See* United

The Court has struggled with questions of just compensation. In 1923, the Court declared that just compensation for a requisition of coal by the Navy during World War I was the market value of the coal, including international markets, available to the coal company during the taking.[119] The government had argued that it owed only the domestic market price, discounted for the owner's cost and profit margin.[120] The Court rejected these arguments, ruling that just compensation is intended to place the owner of taken property in as good a pecuniary position as it would have been absent the government's taking.[121] The Court

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States v. Gen. Motors Corp., 323 U.S. 373, 379 (1945). The Court has declared:

> The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. No doubt all these elements would be considered by an owner in determining whether, and at what price, to sell.

Id. However, the Court has professed that when the government takes less than the fee—the complete property—the "market value" of the property should necessarily include the incidental expenses caused by the temporary nature of the government's intrusion upon the owner's interest. *Id.* at 383 ("Such items may be proved, not as independent items of damage but to aid in the determination of what would be the usual—the market—price which would be asked and paid for such temporary occupancy of the building then in use under a long term lease.").

119. United States v. New River Collieries Co., 262 U.S. 341, 345 (1923).

120. *Id.* at 343–44.

121. *Id.* ("The owner was entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied if its property had not been taken."); *see also* Campbell v. United States, 266 U.S. 368, 371 (1924) ("[H]e became entitled to have the just compensation safeguarded by the Fifth Amendment . . . the value of the land taken and the damages inflicted . . . such a sum as would put him in as good a position pecuniarily as he would have been if his property had not been taken.")

added in 1949, "In view . . . of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property . . . is properly treated as part of the burden of common citizenship."[122] The Court continued, "Because gain to the taker, [on] the other hand, may be wholly unrelated to the deprivation imposed on the owner, it must also be rejected as a measure of public obligation to requite for that deprivation."[123] Accordingly, the Court concluded as it related to rental value loss for a laundry company overtaken by the United States in World War II, "The value compensable . . . is only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent. Its measure is the amount of that equivalent."[124]

4. Distinction between Physical and Regulatory Takings

i. Physical Takings

Government taking of tangible property through condemnation is typically easier to discern than a government taking by regulation. Yet, in numerous cases, litigants have presented the Court with complicated questions of whether the government effectuated a physical taking.[125] For instance, the Court held in 1914 that a taking

(citing Seaboard Air Line R.R. v. United States, 261 U.S. 299, 304 (1923)).

122. Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949).

123. *Id.*

124. *Id.* at 3–5.

125. *See, e.g.*, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2066–67 (2021) (proclaiming a regulation permitting union organizers to enter a business's private property for up to three hours per day on 120 days per year amounts to be a *per se* physical, not regulatory, taking); United States v. Fuller, 409 U.S. 488 (1973) (finding no taking of private property occurred where the government took property held by the plaintiff pursuant to a revocable state permit); Griggs v. Allegheny Cnty., 369 U.S. 84 (1962) (declaring that a county government took an air easement over private property where the noise from a local airport rendered the plaintiff's home untenable for residential use); United

occurred when a railroad tunnel, built following an eminent domain action, emitted gases that rendered a nearby landowner's property uninhabitable.[126] The Court stated that the railroad created a public nuisance because the railroad was constructed for the public benefit and upon Congress's authority.[127] Because the railroad damaged the plaintiff's property, the government either had to compensate the owner for the loss of value or condemn the property.[128]

In 1920, the Court rejected a landowner's claim that he was entitled to lost profits from selling cattle below market value when the government condemned his farm leaving him

States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950) (holding the government's construction of a dam that raised water levels permanently to their ordinary high water mark that damaged private property was a taking); Union Bridge Co. v. United States, 204 U.S. 364 (1907) (ordering that the required expenditure by a bridge company to comply with a mandate from the Secretary of War to modify an existing bridge's footprint was not a taking because of Congress's superior right to regulate navigable waterways); Bedford v. United States, 192 U.S. 217 (1904) (finding the federal government's building of retaining walls to prevent the Mississippi River from further eroding land broadening that eventually flooded the plaintiff's property was not a taking of the plaintiff's land because a property owner is not entitled to the government permitting a natural degression of a navigable waterway); Scranton v. Wheeler, 179 U.S. 141, 163–65 (1900) (declaring no taking occurred where the United States built a pier in a river that rendered the plaintiff, who owned the land beneath the water, from using the waterway to access navigable waters); Meyer v. Richmond, 172 U.S. 82, 99 (1898) (holding that Virginia did not commit a taking where it permitted a railroad company to obstruct access to a road that led to the plaintiff's property).

126. Richards v. Washington Terminal Co., 233 U.S. 546, 556–57 (1914).

127. *Id.* at 550.

128. *Id.* at 557 ("If the damage is not preventable by the employment at reasonable expense of devices such as have been suggested, the plaintiff's property . . . may be acquired by purchase or condemnation, and pending its acquisition defendant is responsible.") (internal citations omitted).

with nowhere to house the cattle.[129] The Court of Claims had granted the plaintiff compensation for the value of his land and the loss of hay.[130] The Supreme Court reasoned, however, that the government, by virtue of erecting the dam, had neither taken the cattle nor forced the farmer to sell, only to move the cattle, which was not a taking.[131]

ii. Regulatory Takings

The Court's regulatory takings cases started in the twentieth century.[132] In the 1920s, the Court declared that regulations that harm a person's property can be takings.[133] In *Pennsylvania Coal Company v. Mahon*, the Court held that a Pennsylvania statute that prevented coal mining under residences was a regulatory taking of a mining

129. Bothwell v. United States, 254 U.S. 231, 232 (1920).

130. *Id.* at 232 ("[T]he [trial court] denied appellants' claim for the hay, and for loss consequent upon forced sale of the cattle and destruction of the business. . . . The present suit was initiated to recover for the items so disallowed. The court below gave judgment for the value of the hay only . . . .").

131. *Id.* at 233 ("[N]othing could have been recovered for destruction of business of loss sustained through enforced sale of the cattle. There was no actual taking of these things by the United States, and consequently no basis for an implied promise to make compensation."); *see also* Mitchell v. United States, 267 U.S. 341, 345 (1925) (holding that loss of a business as an unintended consequence of a real property taking is not compensable absent proof showing that the government intended to take the business in addition to the property itself).

132. *See* Hadacheck v. Sebastian, 239 U.S. 394, 409–11 (1915) (holding a state's police power includes the authority to regulate land use as long as the regulations are not arbitrary); Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 AM. UNIV. L. REV. 181, 235 (1999) (asserting that the Supreme Court rendered a regulatory takings ruling as early as 1870).

133. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

company's rights to mine under a home.[134] The Court declared the public policy considerations, stating, "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[135]

The Court decided the seminal regulatory takings case in 1978.[136] In *Penn Central Transportation Company v. City of New York*, the Court scrutinized the constitutionality of New York City's landmark law, which permitted a commission to declare historic properties as landmarks and regulate them.[137] New York had designated Grand Central Terminal as a landmark.[138] In early 1968, Penn Central, the Terminal's owner, executed a lease with UGP Properties, Inc. to occupy a multistory office complex to be built above

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134. *Id.* at 414 ("To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.").

135. *Id.* at 416.

136. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 602 (2014) (noting the importance of the *Penn Central* holding to the Supreme Court's later regulatory takings jurisprudence). For more on *Penn Central* and its consequences, see J. Peter Byrne, Penn Central *in Retrospect: The Past and Future of Historic Preservation Regulation*, 33 GEO. ENVTL. L. REV. 399 (2021); Thane DeNimmo Scott, *Alas in Wonderland: The Impact of* Penn Central v. New York *Upon Historic Preservation Law and Policy*, 7 B.C. ENVTL. AFF. L. REV. 317 (1978); Daniel L. Siegal, *How the History and Purpose of the Regulatory Takings Doctrine Help to Define the Parcel as a Whole*, 36 VT. L. REV. 603 (2012); Chauncey L. Walker & Scott D. Avitabile, *Regulatory Takings, Historic Preservation and Property Rights since "*Penn Central*": The Move Toward Greater Protection*, 6 FORDHAM ENVTL. L.J. 819 (1995).

137. *Penn Central Transp. Co.*, 438 U.S. at 107 ("The question presented is whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks . . . without effecting a 'taking' requiring the payment of 'just compensation.'").

138. *Id.* at 115–16.

Grand Central Terminal.[139] Subsequently, Penn Central sought the Landmark Preservation Commission's approval to build a more than fifty-story office structure above the Terminal, which the Commission denied.[140] Penn Central sued New York City claiming the City's application of the landmark law was a taking.[141]

The Court acknowledged that its prior regulatory takings holdings established that government regulations could be takings, but admonished that each such case required an ad-hoc, fact-based inquiry.[142] The Court identified a three-factor scheme for discerning regulatory takings.[143] First, the Court ascertains "[t]he economic impact of the regulation on the claimant."[144] Next, the Court scrutinizes "the extent to which the regulation has interfered with distinct investment-backed expectations."[145] Finally, the Court considers "the character of the governmental action."[146] Based on these factors, the Court found that the landmark law's application did not take Penn Central's property.[147]

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139. *Id.* at 116 ("On January 22, 1968, appellant Penn Central, to increase its income, entered into a renewable 50-year lease and sublease agreement with appellant UGP Properties, Inc. (UGP) . . . UGP was to construct a multistory office building above the Terminal.")

140. *Id.* at 116–17.

141. *Id.* at 119.

142. *Id.* at 124 ("In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance.").

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* The Court clarified this final factor in greater detail, noting, "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.*

147. *Id.* at 138.

In 1982, the Court established the first bright-line regulatory takings rule.[148] The Court, in a case involving a cable company installing permanent wiring on a building's exterior surface without the owner's consent, held that any permanent physical invasion of property is a taking.[149] This holding established the first categorical regulatory takings rule.[150]

Ten years later, the Court articulated the second categorical rule.[151] David Lucas purchased two beachfront

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148. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) ("We affirm the traditional rule that a permanent physical occupation of property is a taking."). For more on *Loretto*, see John J. Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983); Kathy L. Beich, Note, *Constitutional Law—New York Cable Television Statute Works a "Taking,"* 29 WAYNE L. REV. 1245 (1983); Randall J. Prick, Note, Loretto v. Teleprompter*: A Restatement of the Per Se Physical Invasion Test for Takings*, 35 BAYLOR L. REV. 373 (1983); Robert D. Rubin, Comment, *Taking Clause v. Technology:* Loretto v. Teleprompter Manhattan CATV*, A Victory for Tradition*, 38 UNIV. MIAMI L. REV. 165 (1983).

149. *Loretto*, 458 U.S. at 441.

150. *See* Lee Anne Ferrell, *Escape Room: Implicit Takings after* Cedar Point Nursery, 17 DUKE J. CONST. L & PUB. POL'Y 1, 6 (2022) ("Under the old regime, there were two *per se* rules, both fairly narrow, that could automatically make something an implicit taking: if it worked a permanent physical occupation, or if it deprived the owner of all economically beneficial use of the property.").

151. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). For more on *Lucas*, see Charles H. Clarke, *Harmful Use and the Takings Clause in the Eye of the Beholder:* Lucas v. South Carolina Coastal Council, 41 CLEV. ST. L. REV. 31 (1993); Stephen Durden, *Unprincipled Principles: The Takings Clause Exemplar*, 3 ALA. C.R. & C.L. L. REV. 25, 39–40 (2013); Richard A. Epstein, Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993); William W. Fisher III, *The Trouble with* Lucas, 45 STAN. L. REV. 1393 (1993); Cotton C. Harness III, Lucas v. South Carolina Coastal Council*: Its Historical Context and Shifting Constitutional Principles*, 10 PACE ENVTL. L. REV. 5 (1992); Harv. L. Rev. Ass'n, *Takings Clause–Regulatory Takings*, 106 HARV. L. REV. 269 (1992); Jan G. Laitos, *The Takings Clause in America's Industrial States After* Lucas, 24 UNIV. TOL. L. REV.

lots on South Carolina's Isle of Palms in 1986 on which to build homes.[152] Two years later, South Carolina enacted a law to protect its coasts that prevented construction on Lucas's lots.[153] Lucas sued claiming the law took his property.[154] The Court held that a regulation that denies a landowner "all economically beneficial or productive use of land" is a categorical taking.[155] Thus, the Court established the second *per se* regulatory takings rule, and if neither of those standards fit a specific case, the Court turns to the *Penn Central* factors.[156]

III. PRIOR TAKINGS CLAUSE CHALLENGES TO TORT CAPS

Though rare, some litigants have successfully raised tort

281 (1993); James W. Sanderson & Ann Mesmer, *A Review of Regulatory Takings after* Lucas, 70 DENV. L. REV. 497 (1993); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433 (1993); Linda S. Somerville, *Constitutional Law-Fifth Amendment-Eminent Domain-Regulatory Taking-The United States Supreme Court Held that Land Use Regulations that Deprive a Landowner of All Economically Viable Use of Property Categorically Require Compensation*, 31 DUQ. L. REV. 427 (1993); Ann T. Kadlececk, Note, *The Effect of* Lucas v. South Carolina Coastal Council *on the Law of Regulatory Takings*, 68 WASH. L. REV. 415 (1993); Jeffrey T. Palzer, Note, *"Taking" Aim at Land Use Regulations:* Lucas v. South Carolina Coastal Council, 26 CREIGHTON L. REV. 525 (1993); Steven Ward, Note, Lucas v. South Carolina Coastal Council*: A Categorical Rule in the Muddle of Takings Analysis*, 61 UMKC L. REV. 165 (1992).

152. *Lucas*, 505 U.S. at 1006–07.

153. *Id.* at 1007.

154. *Id.* at 1009.

155. *Id.* at 1015. *But see* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 330–31 (2002) (holding that the *Lucas* categorical rule did not apply to a thirty-two-month mandated hold on a property to determine the environmental impact of proposed development but rather the *Penn Central* factors were the appropriate standard).

156. *Lucas*, 505 U.S. at 1015–16.

cap challenges based on the Takings Clause.[157] One of the first suits involved the interpretation of Mississippi's Takings Clause.[158] A school bus crash injured multiple

157. To my knowledge, the following is a near-exhaustive list of tort cap challenges at least tangentially based on the Takings Clause: Schmidt v. Ramsey, 860 F.3d 1038 (8th Cir. 2017); Tubbs v. Surface Transp. Bd., 812 F.3d 1141 (8th Cir. 2015); Estate of McCall v. United States, 642 F.3d 944 (11th Cir. 2011); Engquist v. Or. Dep't of Agric., 478 F.3d 985 (9th Cir. 2007); Cisson v. C.R. Bard, Inc., No. 2:11-CV-00195, 2015 WL 251437 (S.D.W. Va. Jan. 20, 2015), *aff'd sub nom*. In re C.R. Bard, Inc., MDL. No. 2187, Pelvic Repair Sys. Prods. Liab. Litig., 810 F.3d 913 (2015); Clemons v. United States, Nos. 4:10-CV-209-CWR-FKB, 4:10-CV-210-CWR-FKB, 2013 WL 3943494 (S.D. Miss. June 13, 2013); Watson v. Hortman, 844 F. Supp. 2d 795 (E.D. Tex. 2012); Smith v. Price Dev. Co., 125 P.3d 945 (Utah 2005); Cheatham v. Pohle, 789 N.E.2d 467 (Ind. 2003); Gourley *ex rel.* Gourley v. Neb. Methodist Health Sys., Inc., 663 N.W.2d 43 (Neb. 2003); Evans *ex rel.* Kutch v. State, 56 P.3d 1046 (Alaska 2002); DeMendoza v. Huffman, 51 P.3d 1232 (Or. 2002); Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307 (Va. 1999); Wells *ex rel.* Wells v. Panola Cnty. Bd. of Educ., 645 So.2d 883 (Miss. 1994); Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635 (Ga. 1993); Gordon v. State, 608 So.2d 800 (Fla. 1992); Kirk v. Denver Publ'g Co., 818 P.2d 262 (Colo. 1991); Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc., 473 N.W.2d 612 (Iowa 1991).

158. *Wells*, 645 So.2d at 894–95; *see also* Clemons v. United States, Nos. 4:10-CV-209-CWR-FKB, 4:10-CV-210-CWR-FKB, 2013 WL 3943494, at *15 (S.D. Miss. June 13, 2013) (finding no valid takings claim based on the Mississippi Supreme Court's analysis in *Wells*). Specifically, the Mississippi Constitution's Takings Clause proclaims:

> Private property shall not be taken or damaged for public use, except on due compensation first being made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for use alleged to be public, the question is whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public.

Wells, 645 So.2d at 895 (quoting MISS. CONST. art. 3, § 17). (quoting MISS. CONST. art. 3, § 17). Meanwhile, the Fifth Amendment to the United States Constitution declares, in relevant part: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The question of what a taking is appears to be identical, or at least extremely similar, for both texts. *See id.*;; MISS. CONST. art. 3, § 17.

children, and one child incurred medical expenses of $600,000.[159] Based on a Mississippi statute that limited recoveries for school bus accidents to $10,000 per person, the child was unable to recover more than the cap.[160] The child's parents challenged the tort cap statute on state constitutional grounds, including Mississippi's Takings Clause.[161] The Mississippi Supreme Court found that the recovery limitation for school bus wrecks was not a taking because a cause of action, and any remedy therefor, is not a protected property right.[162] The court noted, "[T]he legislature may abrogate common law causes of action, and alter or substitute remedies through statutory schemes. Moreover, it may be noted that the legislature may bar recovery entirely, even where a remedy exists, through statutes of repose and statutes of limitations."[163]

Virginia's Supreme Court faced a similar question in 1999.[164] In a medical malpractice action, a jury returned a

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159. *Wells*, 645 So.2d at 885.

160. *Id.* The child, by and through his parents, nevertheless filed suit against the Panola County School Board seeking $5,000,000 in both compensatory and punitive damages. *Id.* However, the trial court dismissed the child's cause of action for failure to state a claim upon which relief can be granted pursuant to the bus crash cap statute. *Id.*

161. *Id.* at 885–86.

162. *Id.* at 895 ("We have never construed the clause to apply to a cause of action, or a right to sue, as Wells seems to suggest it should be applied.").

163. *Id.* Essentially, the Mississippi Supreme Court summarily rejected Wells' "creative" argument without engaging in any real takings analysis, as least as that consideration has been formulated at the federal level. *Id.* The court centered its opinion on what that court has traditionally held to be property for takings purposes, and the court concluded that without a tradition of finding causes of action to be property, Wells could not satisfy a takings claim. *Cf. id.* ("None of these actions have been held to be a 'taking' as that term has been interpreted by this [c]ourt.").

164. Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307 (Va. 1999).

verdict of over $2,000,000, which the trial court reduced to $1,000,000 under Virginia's damage limits.[165] The plaintiffs alleged this judicial reduction was a taking.[166] The court rejected this argument, however, because the legislature may abrogate the common law and statutes.[167] The court added that no property right vests in a cause of action until it accrues, and if the legislature abrogates the rule before the cause of action accrues, no taking occurs.[168]

Thereafter, the Alaska Supreme Court found that a statute requiring payment of half of every punitive damage award to the State was not a taking.[169] The court,

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165. *Id.* at 310.

166. *Id.* at 317.

167. *Id.* at 317–18.

168. *Id.* at 318 ("One cannot obtain a property interest in a cause of action that has not accrued, and there was nothing to prevent the General Assembly from limiting the remedy, so far as unaccrued causes of action are concerned, to attain a permissible legislative objective . . . .").

169. Evans *ex rel.* Kutch v. State, 56 P.3d 1046, 1058 (Alaska 2002). States other than Alaska have also found that the state taking from a punitive damage award is not a "taking." *See* Cheatham v. Pohle, 789 N.E.2d 467 (Ind. 2003); Cheatham v. Pohle,789 N.E.2d 467 (Ind. 2003); DeMendoza v. Huffman, 51 P.3d 1232, 1245–46 (Or. 2002) (finding punitive damage allocation statute did not affect a taking because Oregon took no vested property interest); Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635, 639 (Ga. 1993) ("A plaintiff has no vested property right in the amount of punitive damages which can be awarded in any case, and the legislature may lawfully regulate the amount of punitive damages which can be awarded."); Gordon v. State, 608 So.2d 800, 801–02 (Fla. 1992) ("[I]t is the general rule that, until a judgment is rendered, there is no vested right in a claim for punitive damages. It cannot, then, be said that the denial of punitive damages has unconstitutionally impaired any property rights of appellant.") (quoting Ross v. Gore, 48 So.2d 412, 414 (Fla. 1950)); Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc., 473 N.W.2d 612, 619 (Iowa 1991) ("Under our view of punitive damages, we adopt the position . . . that plaintiff did not have a vested right to punitive damages prior to the entry of judgment."). *But see* Smith v. Price Dev. Co., 125 P.3d 945, 952 (Utah 2005) (finding that punitive damage award recipients had a vested right therein); Kirk

interestingly, distinguished between caps applied before or after the jury's award, saying, "If [the statute] is construed as a cap on punitive damages, limiting them *before* they are awarded to successful plaintiffs, no constitutional problem exists."[170] Thus, Alaska joined Virginia and Mississippi in denying the plaintiff relief because tort damages are not vested property rights.[171] Notably, Alaska's Supreme Court suggested that if the punitive damage limits were enforced *after* the jury awarded them, the cap could be unconstitutional.[172] A year later, Nebraska's highest court dispensed with a similar takings challenge.[173] The court grounded its holding on two principles.[174] First, the court

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v. Denver Publ'g Co., 818 P.2d 262, 272 (Colo. 1991). In *Kirk*, the Colorado Supreme Court invalidated a punitive damage contribution statute requiring successful litigants to contribute one-third of their punitive damage awards to Colorado's Treasury under the federal Takings Clause, as well as its Colorado counterpart. *Id.* at 273. The Colorado court stated:

> In our view, forcing a judgment creditor to pay to the state general fund one-third of a judgment for exemplary damages in order to fund services which have already been funded by other revenue-raising measures, and without conferring on the judgment creditor any benefit or service not furnished to other civil litigants not required to make the same contribution, amounts to an unconstitutional taking of the judgment creditor's property in violation of the Takings Clause of the United States and the Colorado Constitutions.

Id. at 272.

170. *Evans*, 56 P.3d at 1058 (emphasis original).

171. *Id.*; *see* Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307, 317–18 (Va. 1999).; Wells *ex rel.* Wells v. Panola Cnty. Bd. of Educ., 645 So.2d 883, 895 (Miss. 1994).

172. *Kutch*, 56 P.3d at 1058.

173. Gourley *ex rel.* Gourley v. Neb. Methodist Health Sys., Inc., 663 N.W.2d 43, 76 (Neb. 2003). Nebraska's Takings Clause declares, "The property of no person shall be taken or damaged for public use without just compensation therefor." NEB. CONST. art. I, § 21. Accordingly, the texts of the United States and Nebraska Takings Clauses are similar. *See* U.S. CONST. amend. V; NEB. CONST. art. I, § 21.

174. *Gourley*, 663 N.W.2d at 76.

recalled, "[W]e have held that a person has no property and no vested interest in any rule of the common law or a vested right in any particular remedy."[175] Second, the court asserted, "[C]ourts have rejected the argument that a cause of action and determination of damages are property."[176]

The first federal court Takings Clause challenge to a punitive damage allocation statute occurred in 2007.[177] The Ninth Circuit Court of Appeals found, similarly to the state supreme courts before it, that litigants do not have a vested property interest in punitive damages, and thus no taking occurs where the legislature requires a portion of punitive damages to be paid to the state.[178] The Ninth Circuit grounded its decision on three factors.[179] First, the litigant's expectations are different for compensatory and punitive damages.[180] While compensatory damages are mandatory if the jury finds in a party's favor, punitive damages are optional, reducing any expectation interest in punitive damages.[181] Second, the court recalled that the policy served

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175. *Id.*

176. *Id.*

177. Engquist v. Or. Dep't of Agric., 478 F.3d 985 (9th Cir. 2007); *see also* Cisson v. C.R. Bard, Inc., No. 2:11-CV-00195, 2015 WL 251437, at *4–5 (S.D.W. Va. Jan 20, 2015) (relying on the reasoning of *Engquist* to hold a Georgia punitive damage award allocation statute not violative of the Takings Clause).

178. *Engquist*, 478 F.3d at 1002–05.

179. *Id.*

180. *Id.* at 1002–04.

181. *Id.* at 1002–03. Specifically, the Ninth Circuit stated, "[P]unitive damages are 'never awarded as a matter of right, not matter how egregious the defendant's conduct,' in contrast to compensatory damages, which 'are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss.'" *Id.* at 1003. The court continued, "Because of the inherently uncertain nature of punitive damages, which are a 'discretionary moral judgment' by the jury, a plaintiff's interest in receipt of any certain amount of punitive damages is too speculative to constitute property under the Takings Clause." *Id.*

by punitive damages is deterring wrongful conduct, not compensating an injured party, which further reduces a plaintiff's expectation of punitive damages.[182] Finally, the court acknowledged that a majority, though not all, of state supreme courts that had considered the same question had determined that litigants have no vested interest in punitive damages.[183]

Later, a district court found that Texas's medical malpractice damage limit was not a taking.[184] The judge found that property rights are defined by state law.[185] In Texas, a person who suffered an injury after the legislature altered the common law remedies for medical malpractice does not have a vested interest in any amount of noneconomic damages, but a person whose cause of action accrued before the legislature enacted the caps could have a property interest.[186] Nevertheless, the judge applied the *Penn Central* factors to the healthcare liability damage caps.[187] For the first factor, the court asserted, "[T]he damages limitation affects only a portion of a plaintiff's claim—the ability to recover noneconomic damages . . . Additionally, because none of the plaintiffs

182. *Id.* at 1004 ("As a 'fortuitous beneficiary,' a tort claimant does not possess an interest cognizable as a property right under the Takings Clause.").

183. *Id.* at 1005.

184. Watson v. Hortman, 844 F. Supp. 2d 795, 804 (E.D. Tex. 2012); *see also* Estate of McCall *ex rel.* McCall v. United States, 642 F.3d 944, 951 (2011) (holding that litigants have no vested right in any rule of the common law or any remedy for an injury and thus Florida did not take any property from litigant whose recovery was reduced pursuant to tort caps).

185. *Watson*, 844 F. Supp. 2d at 801 ("The Constitution itself does not create property rights; instead, property rights must stem from an independent source, such as state law.").

186. *Id.* at 802–03.

187. *Id.* at 803–04; *see also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

have recovered a jury verdict, they are unable to show how significantly [the cap] affects them."[188] To the second factor, the court stated, "[T]he plaintiffs in this case have not established that they had any distinct investment-backed expectations to recover uncapped noneconomic damages for their health care liability claims."[189] Finally, as to "the character of the government action," the court noted, "[T]he State has not appropriated any of the plaintiffs' property to its own use. Rather, by limiting the amount of noneconomic damages . . . the State has enacted legislation in an effort to 'adjust the benefits and burdens of economic life to promote the common good.'"[190] Therefore, even if a plaintiff's action accrued before the legislature enacted the caps, the government had not committed a regulatory taking.[191]

The Eight Circuit decided the most recent federal Takings Clause challenge to noneconomic damage caps in 2017.[192] The court summarily dismissed an injured child's Takings claim where a jury awarded $17,500,000, which the trial court reduced to $1,750,000.[193] The Eight Circuit noted that a plaintiff has no vested right in the common law or any specific remedy.[194] However, the court acknowledged that a litigant has a vested right in a damage award once the jury's verdict becomes a final judgment.[195]

In sum, most courts have held that reducing a litigant's noneconomic damages is not a taking.[196] The courts have

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188. *Watson*, 844 F. Supp. 2d at 803.

189. *Id.*

190. *Id.* at 803–04.

191. *Id.* at 804; *see also Penn Cent. Transp. Co.*, 438 U.S. at 124.

192. Schmidt v. Ramsey, 860 F.3d 1038 (8th Cir. 2017).

193. *Id.* at 1042–43, 1046.

194. *Id.* at 1046 (quoting Gourley at 76).

195. *Schmidt*, 860 F.3d at 1046.

196. *See id.* at 1038; Tubbs v. Surface Transp. Bd., 812 F.3d 1141 (8th Cir. 2015); Estate of McCall v. United States, 642 F.3d 944 (11th Cir.

opined that litigants do not have vested property interests in the amount of noneconomic or punitive damages because the legislatures may abrogate the common law and the remedies for wrongdoing.[197] However, some courts have found a Takings Clause violation.[198] Likewise, at least Alaska has recognized a distinction between the possibility of damages and judicial reduction of a damage award following a jury's assessment.[199] Importantly, though, these challenges have not made the same argument advanced in this Article, which is that the reading of the jury's damage award to a litigant creates a vested right in those damages when the injured party learns of the award.[200]

IV. TORT CAPS VIOLATE THE TAKINGS CLAUSE

The Takings Clause's historical and jurisprudential development establishes a strong foundation for the claim that noneconomic damage caps are uncompensated takings.[201] This Part advances this argument by highlighting

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2011); Engquist v. Or. Dep't of Agric., 478 F.3d 985 (9th Cir. 2007); Cisson v. C.R. Bard, Inc., No. 2:11-CV-00195, 2015 WL 251437 (S.D.W. Va. Jan 20, 2015); Clemons v. United States, Nos. 4:10-CV-209-CWR-FKB, 4:10-CV-210-CWR-FKB, 2013 WL 3943494 (S.D. Miss. June 13, 2013); Watson v. Hortman, 844 F. Supp. 2d 795 (E.D. Tex. 2012); Cheatham v. Pohle, 789 N.E.2d 467 (Ind. 2003); Gourley *ex rel.* Gourley v. Neb. Methodist Health Sys., Inc., 663 N.W.2d 43 (Neb. 2003); Evans *ex rel.* Kutch v. State, 56 P.3d 1046 (Alaska 2002); DeMendoza v. Huffman, 51 P.3d 1232 (Or. 2002); Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307 (Va. 1999); Wells *ex rel.* Wells v. Panola Cnty. Bd. of Educ., 645 So.2d 883 (Miss. 1994); Mack Trucks v. Conkle, 436 S.E.2d 635 (Ga. 1993); Gordon v. State, 608 So. 2d 800 (Fla. 1992); Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc., 473 N.W.2d 612 (Iowa 1991).

197. *See supra* note 171 and accompanying text.

198. Smith v. Price Dev. Co., 125 P.3d 945, 952 (Utah 2005); Kirk v. Denver Publ'g Co., 818 P.2d 262, 272 (Colo. 1991).

199. *Cf.* Evans *ex rel.* Kutch v. State, 56 P.3d 1046, 1058 (Alaska 2002)

200. *Infra* Part V.

201. *Supra* Part IV; *infra* Part V.A.

the substantive legal principles supporting a Takings Clause violation for noneconomic damage limits,[202] the procedural considerations for suits making this argument,[203] and a survey of some of the policy considerations involved.[204]

A. *Substantive Legal Principles*

The elements of a Takings Clause violation are: (1) a taking; (2) of private property; (3) by the government; (4) for public use; (5) without just compensation.[205]

1. Taking by the Government

The easiest of these elements with which to dispense is that the government must do the taking.[206] If noneconomic damage verdicts are vested property interests taken from a successful plaintiff, it is the government that takes that property.[207] Though a verdict may be reduced following a defendant's motion, it is the judge, a government agent, who reduces the damages award pursuant to the legislature's dictates.[208] Thus, the government action element of taking is

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202. *Infra* Part V.A.

203. *Infra* Part V.B.

204. *Infra* Part V.C.

205. U.S. CONST. amend. V. State action, though not expressed, has always been understood to be required for a Takings Clause violation. *See, e.g.*, Treanor, *supra* note 26, at 782 ("The original understanding of the Takings Clause of the Fifth Amendment was clear on two points. The clause required compensation when the *federal government* physical took private property, but not when *government* regulations limited the ways in which property could be used.") (emphasis added).

206. *Cf.* Treanor, *supra* note 26, at 782.

207. *See, e.g.*, Hubbard, *supra* note 12, at 291 ("Statutory noneconomic damage caps . . . *require judges to reduce those damages* awarded by the jury to an injured plaintiff that exceed the ceiling of the cap.") (emphasis added).

208. *Id.*

satisfied.[209]

2. Without Just Compensation

Additionally, the element of "without just compensation" is easily fulfilled.[210] As the Supreme Court's has proclaimed, the value of just compensation is that which will place the owner of the taken property in as good a pecuniary position as they would have been absent the taking.[211] In the case of a noneconomic damage verdict, the value of just compensation is evident: the amount of the jury's verdict, less the damages already paid.[212] This value will put the injured plaintiff in as good a monetary position as they otherwise would have been without the taking.[213] Therefore, the remaining elements for the Takings Clause violation are a taking of private property for public use.[214]

3. Private Property

As the Supreme Court has held nearly since the ratification of the Bill of Rights, legal rights are protected by the Fifth Amendment the same as tangible property rights.[215] The Clause's historical underpinnings also indicate the Framers' desire that the Takings Clause apply to legal rights.[216] In fact, one reason for the Fifth Amendment's just compensation provision was the newly formed country's monetary policies that caused rapid inflation, as well as

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209. U.S. CONST. amend. V; *cf.* Hubbard, *supra* note 12, at 291.

210. U.S. CONST. amend. V.

211. *See, e.g.*, United States v. New River Collieries Co., 262 U.S. 341, 344 (1923).

212. For instance, if the jury awards a plaintiff $1,000,000 in noneconomic damages in a state with a cap of $750,000, the amount of just compensation is $250,000.

213. *New River Collieries Co.*, 262 U.S. at 344.

214. U.S. CONST. amend. V.

215. *See infra* Part II.B.1.

216. Harrington, *supra* note 36, at 1278.

colonial legislatures' permitting debtors to pay debts with inflated money.[217] Thus, the Framers' intent for the Takings Clause was for it to protect, beyond tangible property, intangible legal rights—including creditors' rights and paper money's value.[218]

Numerous courts, however, have found that litigants have no vested right in any common law rule or specific remedy for a common law or statutory violation because the legislature may alter the common law and statutory schemes.[219] Yet, prior Takings Clause litigation against noneconomic damage caps has attacked the statutes from a different angle than that advocated here.[220] Specifically, about half of the cases that tangentially advanced this argument asserted that the vested property interest involved was a chose in action,[221] the caps were unconstitutional under the Takings Clause prior to a jury's award,[222] or grappled with punitive damages.[223]

The other cases that have more closely advanced this argument did not articulate the correct reasoning.[224] While

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217. *Id.*

218. *Id.*

219. *See infra* Part III.

220. *See infra* Part IV.

221. *See* Wells *ex rel.* Wells v. Panola Cnty. Bd. of Educ., 645 So. 2d 883, 894–895 (Miss. 1994).

222. *See* Watson v. Hortman, 844 F. Supp. 2d 795, 798 (E.D. Tex. 2012).

223. *See* Engquist v. Oregon Dep't of Agric., 478 F.3d 985, 990 (9th Cir. 2007); Cisson v. C.R. Bard, Inc., No. 2:11-CV-00195, 2015 WL 251437, at 1 (S.D.W. Va. Jan 20, 2015); Cheatham v. Pohle, 789 N.E.2d 467, 468 (Ind. 2003); Evans *ex rel.* Kutch v. State, 56 P.3d 1046, 1058 (Alaska 2002); DeMendoza v. Huffman, 51 P.3d 1232, 1245–46 (Or. 2002); Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635, 639 (Ga. 1993); Gordon v. State, 608 So. 2d 800, 801–02 (Fla. 1992); Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc., 473 N.W.2d 612, 619 (Iowa 1991). *But see* Smith v. Price Dev. Co., 125 P.3d 945, 952 (Utah 2005); Kirk v. Denver Publ'g Co., 818 P.2d 262, 272 (Colo. 1991).

224. *See* Schmidt v. Ramsey, 860 F.3d 1038, 1046 (8th Cir. 2017);

each of those cases addressed judicial reduction of a jury's rendered damages verdict, none of them offered the justification for finding that a jury's noneconomic damage award was a vested property interest, which is that the judge or foreperson read the verdict to the successful litigant.[225] Instead, those litigants offered the conclusion only—that they were entitled to the full jury's award because it was property.[226]

Concededly, citizens do not have a vested interest in a cause of action, or in any specific remedy for an injury.[227] That does not, however, foreclose a successful Takings Clause challenge to noneconomic damage caps. Notably, the Supreme Court has never directly ruled on this question.[228] Two lower courts have indicated that there is a constitutional distinction between damage caps before and after a jury

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McCall *ex rel.* McCall v. United States, 642 F.3d 944, 951 (11th Cir. 2011); Gourley *ex rel.* Gourley v. Nebraska Methodist Health Sys., Inc., 663 N.W.2d 43, 76 (Neb. 2003); Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307, 317 (Va. 1999).

225. *Cf. Schmidt*, 860 F.3d at 1046 (arguing that the tort cap violated the litigant's Fifth Amendment rights because it overturned "adjudicated compensation only after the jury place[d] a fair value on the property") (internal quotation marks omitted); *McCall*, 642 F.3d at 951 (noting that the plaintiff challenged the caps based on the Takings Clause but not providing any reasoning for the challenge while also discussing when a cause of action or remedy vests, but nothing regarding the successful plaintiff's awareness of the verdict); *Gourley*, 663 N.W.2d at 76 (expressing that the plaintiff argued that "a cause of action and a jury's determination of damages are property" but again, the plaintiffs did not argue that the jury's verdict was a vested interest because of the plaintiff's awareness of the damage award); *Pulliam*, 509 S.E.2d at 317 (acknowledging that the plaintiff asserted that they were entitled to the jury's full damages award, but this argument also did not provide the foundation for that conclusion).

226. *See Schmidt*, 860 F.3d at 1046; *McCall*, 642 F.3d at 951; *Gourley*, 663 N.W.2d at 76; *Pulliam*, 509 S.E.2d at 317.

227. *See, e.g.*, *Schmidt*, 860 F.3d at 1046; *McCall*, 642 F.3d at 951; *Gourley*, 663 N.W.2d at 76; *Pulliam*, 509 S.E.2d at 317.

228. *Cf. supra* Part II.B.

awards them.[229]

Yet, while the Supreme Court has not ruled directly on this issue, the Court has acknowledged the importance of a property owner's expectancy.[230] For instance, in *Penn Central*, the Court stated that one of the factors for the regulatory takings analysis is "the extent to which the regulation has interfered with distinct investment-backed expectations."[231] While it may not necessarily be an "investment-backed expectation[]," a plaintiff who has endured pain and suffering and who goes through years of litigation at great expense for experts and attorneys must be said to have some "investment-backed expectations" for their lawsuit.[232] Much more must the expectation interest be of a

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229. *Cf.* Watson v. Hortman, 844 F. Supp. 2d 795, 803 (E.D. Tex. 2012) (acknowledging that the court could not fully analyze the plaintiff's Takings claim because the court was not presented with a verdict of damages due to the procedural posture being a declaratory judgment action); Evans *ex rel.* Kutch v. State, 56 P.3d 1046, 1058 (Alaska 2002) (stating and emphasizing that a punitive damage cap that applied before a jury's award did not effectuate a taking, and thereby suggesting that the court may have reached a different decision if the caps were construed to apply after a jury's determination of damages).

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

231. *Id.*

232. *Id.* Admittedly, every plaintiff's expectations necessarily involve the risk of losing their case entirely, and much of the litigation costs in tort cases is fronted by the plaintiff's lawyer based on a contingency fee agreement. *See* Lester Brickman, *The Market for Contingency Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 CARDOZO L. REV. 65, 68 (2003) ("Virtually all tort claiming is financed by plaintiff lawyers through the medium of contingent fees."); Douglas R. Richmond, *Turns of the Contingent Fee Key to the Courthouse Door*, 65 BUFF. L. REV. 915, 915 (2017) ("Courts and proponents describe contingent fees as the 'key to the courthouse door' because they enable poor plaintiffs to pursue litigation they could not afford to maintain if their lawyers charged them by the hour."). However, whether tort litigation is brought pursuant to a contingency fee agreement or otherwise, it is a costly endeavor that creates—at least partially—an expectancy of receiving a return on investment, much like the speculative real estate investing involved in

plaintiff for whom a jury has already awarded compensatory damages and placed a value on those damages, both economic and noneconomic. When the court reads the jury's damages calculation to the parties, the litigant expects to receive the amount of damages granted by the jury. Therefore, the Supreme Court has recognized a proper role for a plaintiff's expectations in a takings analysis;[233] likewise, as a matter of logic, a successful plaintiff for whom a jury has awarded substantial noneconomic damages, of which the trial court has informed the plaintiff, has a reasonable expectation to receive the full quantum of noneconomic damages.

The assertion that a plaintiff has a vested property interest in a noneconomic damage award once the court informs the litigant of the jury's award is buoyed by the plain language definitions of vested right and vested interest.[234] Black's Law Dictionary defines a vested right as "[a] right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent."[235] Meanwhile, Black's Law Dictionary explains that a vested interest is "[a]n interest for which the right to its enjoyment, either present or future, is not subject to the happening of a condition precedent."[236] Similarly, Merriam-Webster's Legal Dictionary defines a vested interest as "an

Lucas. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1006–07 (1992); *Richmond*, *supra* note 232, at 916 ("Litigation is expensive no matter who you are, and an adversary can make it more costly through time-consuming discovery and motion practice.").

233. *See, e.g.*, Lucas, 505 U.S. at 1016; Penn Cent. Transp. Co., 438 U.S. at 124.

234. *See Interest*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Right*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Vested-Rights Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also Vested Interest*, MERRIAM-WEBSTER (June 30, 2022), https://www.merriam-webster.com/dictionary/vested%20interest#legalDictionary.

235. *Right*, BLACK'S LAW DICTIONARY (11th ed. 2019).

236. *Interest*, BLACK'S LAW DICTIONARY (11th ed. 2019).

interest (such as a title to an estate) carrying a legal right of present or future enjoyment."[237]

Applying these definitions to legislatively limited noneconomic damage awards, the right is sufficiently definite and complete when it is rendered by the jury because there is a specific number assigned to the verdict, and the jury served as the trier of fact. The judge has no right, once the verdict is handed in, to alter the findings of fact—though the tort caps presently permit the judge to modify the damage award as a matter of law.[238] Thus, the jury has completed the findings of fact and offered a complete, definite amount of damages for the plaintiff.[239] Similarly, the plaintiff's right to the amount of damages determined as a matter of fact by the jury is no longer subject to a condition precedent.[240] Prior to a jury's award of damages, the amount of damages is subject to a condition precedent, which is the jury finding in the plaintiff's favor and awarding noneconomic damages. However, after the jury has reached a verdict and the court has informed the parties of that determination, there are no remaining conditions precedent to the amount of noneconomic damages the plaintiff will recover. Therefore, the legal definitions of vested right and vested interest support finding a protected property interest in a noneconomic damage award of which a plaintiff is aware.

Furthermore, there is support, by analogy, for recognizing a legal consequence in the timing of when the

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237. *Vested Interest*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/vested%20interest#legalDictionary (June 30, 2022).

238. *See supra* Part II.

239. *Cf. Right*, BLACK'S LAW DICTIONARY (11th ed. 2019) (the right vests with the plaintiff because of its completeness and definiteness that is made known to the successful litigant, and the court has no ability to change it as a matter of fact, though it is disputed herein that the court may reduce it as a matter of law, which makes it immune from impairment or taking without the plaintiff's consent).

240. *Interest*, BLACK'S LAW DICTIONARY (11th ed. 2019).

right vests—whether it is before or after the jury's verdict is read by the court. Particularly, multiple lower courts have recognized that an accrued cause of action is a vested right worthy of the Fifth Amendment's safeguard.[241] Thus, based on those holdings, if a party is injured in a manner for which recompense is recoverable at the time of the injury in a jurisdiction, the prospective litigant has a vested property interest in that accrued cause of action with which the legislature may not interfere.[242] More concretely, if a cause of action accrues one minute before the state's legislature abolishes that action, then the litigant has the right to bring the action and the new law cannot extinguish that right.[243] Similarly, the timing of a noneconomic damage award Takings deprivation is critically important. No violation occurs if the government takes the noneconomic damages before the court informs the plaintiff of the jury's calculation, but when the court tells the plaintiff the jury's noneconomic damage determination, the right vests.

In sum, this question would be one of first impression for the Supreme Court, but lower courts have addressed it indirectly.[244] The Court, however, has acknowledged the importance of a property owner's expectations in the takings analysis.[245] Lower courts that have considered the question most similar to that advanced here have still not answered the question of the timing of the vesting of the right to the

241. *See, e.g.*, Estate of McCall *ex rel.* McCall v. United States, 642 F.3d 944, 951 (11th Cir. 2011); Watson v. Hortman, 844 F. Supp. 2d 795, 802–03 (E.D. Tex. 2012); Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307, 317–318 (Va. 1999).

242. *See McCall*, 642 F.3d at 951; *Watson*, 844 F. Supp. 2d at 802–03; *Pulliam*, 509 S.E.2d at 317–18.

243. *See supra* note 242 and accompanying text.

244. *See supra* Part III; Part IV.

245. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

full noneconomic damage award.[246] Likewise, the definitions of vested right and vested interest create a plausible argument that a jury's noneconomic damage verdict of which the successful plaintiff is made aware is one such vested right or interest.[247]

4. Taking

Accepting that a successful plaintiff gains a vested property interest in the full noneconomic damage award upon learning of it, the next question is whether the judicial reduction of noneconomic damages is a taking. As a preliminary conclusion, this is not a matter where the government is explicitly seeking to take a citizen's property as through eminent domain.[248] Nor is this a purported physical taking, because this is not the government taking

246. *Cf.* Schmidt, v. Ramsey, 860 F.3d 1038, 1046 (8th Cir. 2017) (arguing that the tort cap violated the litigant's Fifth Amendment rights because it overturned "adjudicated compensation only after the jury place[d] a fair value on the property") (internal quotation marks omitted); Estate of McCall *ex rel.* McCall v. United States, 642 F.3d 944, 951 (11th Cir. 2011) (noting that the plaintiff challenged the caps based on the Takings Clause but not providing any reasoning for the challenge while also discussing when a cause of action or remedy vests, but nothing regarding the successful plaintiff's awareness of the verdict); Gourley *ex rel.* Gourley v. Nebraska Methodist Health Sys., Inc., 663 N.W.2d 43, 76 (Neb. 2003) (expressing that the plaintiff argued that "a cause of action and a jury's determination of damages are property" but again, the plaintiffs did not argue that the jury's verdict was a vested interest because of the plaintiff's awareness of the damage award); Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307, 317 (Va. 1999) (acknowledging that the plaintiff asserted that they were entitled to the jury's full damages award, but this argument also did not provide the foundation for that conclusion).

247. *See Interest*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Right*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Vested-Rights Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019). *See also Vested Interest*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/vested%20interest#legalDictionary (June 30, 2022).

248. *See supra* Part III.B.3, i.

tangible property for some project.[249] Rather, judicial reduction of noneconomic damages is a regulatory taking.[250] Moreover, neither of the categorical rules espoused in *Loretto* and *Lucas* applies to this taking because there is no permanent *physical* occupation and this is not a case in which a tangible property owner has been deprived of all beneficial use of the property.[251] The three-factor *Penn Central* ad hoc analysis, consequently, is the appropriate standard.[252]

Weighing the first factor, which is "the economic impact of the regulation on the claimant," the impact is significant in most cases in which the caps apply.[253] For instance, the

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249. *See supra* Part III.B.4, i.

250. This postulation is supported by the similar finding in *Watson v. Hortman*, in which the District Judge accepted *arguendo* that one plaintiff had a vested right based on an accrued cause of action before the legislature capped noneconomic damages. *See* Watson v. Hortman, 844 F. Supp. 2d 795, 803 (E.D. Tex. 2012). Subsequently, the *Watson* court assessed the potential vested interest involved under the ad hoc *Penn Central* analysis. *Id.*

251. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982). Again, this supposition is buoyed by the *Watson* analysis, which employed the ad hoc *Penn Central* factors to assess a similar Takings Clause challenge. *See Watson*, 844 F. Supp. 2d at 803. Furthermore, even if *Lucas* is read to apply to legal rights as well as tangible property, it could not be reasonably maintained that noneconomic damage caps deprive a successful litigant of *all* beneficial use of the property, because the caps do not prevent any award of noneconomic damages, just a reduced amount. *Lucas*, 505 U.S. at 1016. *See also Watson*, 844 F. Supp. 2d at 803 ("So viewed, the damages limitation affects only a portion of a plaintiff's claim—the ability to recover noneconomic damages. The challenged legislation has not deprived a plaintiff of the *entire value* of the claim.") (emphasis added).

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

253. *Id.*; *see* McClay v. Airport Mgmt. Servs., LLC, 596 S.W.3d 686, 705–06 (Tenn. 2020) (Lee, J., dissenting) (acknowledging that tort caps only apply in the worst cases that involve significant injuries for which

injured newborn child in *Gourley* ex rel. *Gourley* in Nebraska suffered from "brain damage . . . cerebral palsy and significant physical, cognitive, and behavioral difficulties" because of the negligent care of his mother's obstetrician, as determined by a Nebraska jury.[254] For these injuries and the lifelong suffering the child would undoubtedly endure, the jury awarded the Gourleys $5,625,000, which the court reduced to $1,250,000 in accordance with Nebraska's noneconomic damage caps.[255] In the Gourleys' case and invariably in others as well, the economic impact on the injured plaintiff whose damages are arbitrarily reduced is substantial.[256]

Second, the regulation "interfere[s] with distinct investment-backed expectations."[257] Tort litigation is expensive and time consuming, and injured plaintiffs have reasonable expectations of receiving a return on that investment.[258] More importantly, once the court reads the jury's verdict for more than the noneconomic damage caps to the plaintiff, the successful litigant immediately gains a concrete and "distinct investment-backed expectation[]" in the uncapped noneconomic damages.[259] Thus, especially when the plaintiff is aware of the jury's verdict, the regulation that requires the court to reduce the damages significantly "interfere[s] with distinct investment-backed

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the noneconomic damages allowed under the caps are insufficient); Hubbard, *supra* note 12, at 292 ("Many have criticized the unfairness of these damage caps.").

254. Gourley *ex rel.* Gourley v. Nebraska Methodist Health Sys., Inc., 663 N.W.2d 43, 56 (Neb. 2003).

255. *Id.*

256. *Id.*; *see Penn Central*, 438 U.S. at 124.

257. *Penn Central*, 438 U.S. at 124.

258. Richmond, *supra* note 232, at 916 ("Litigation is expensive no matter who you are, and an adversary can make it more costly through time-consuming discovery and motion practice.").

259. *See Penn Central*, 438 U.S. at 124.

expectations."[260]

Finally, "the character of the governmental action," though admittedly less so than the first two factors, also supports finding a taking.[261] As the Court noted in *Penn Central*, "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when the interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[262] However, the Court has also noted on numerous occasions that a taking may not require "individual property owners [to] bear[] public burdens 'which, in all fairness and justice, should be borne by the public as a whole.'"[263]

Here, the state legislatures that have enacted noneconomic damage caps have done so to reduce insurance premiums and encourage business investment; certainly, this could be said to be "adjusting the benefits and burdens of economic life to promote the common good" because lower insurance premiums and more high-paying jobs in a state is beneficial for much of the populace, so long as a tortfeasor does not seriously injure that population.[264] Yet, requiring only the most injured plaintiffs to bear the burden of lower insurance premiums and high-paying jobs contradicts the Court's longstanding requirement that a select few citizens cannot be made to suffer property deprivations for the

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260. *Id.*

261. *Id.*

262. *Id.*

263. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 332 (2002) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960).

264. *See, e.g.*, McClay v. Airport Mgmt. Servs., LLC, 596 S.W.3d 686, 709 (Tenn. 2020) (Lee, J., dissenting) ("The majority's decision . . . tells the citizens of Tennessee that their right . . . to be fairly compensated for noneconomic damages are trumped by the desire to limit the financial exposure of big corporations and insurance companies in civil negligence lawsuits."); *supra* note 4 and accompanying text.

collective benefit.[265] Though a closer question, the third *Penn Central* factor cuts in favor of a taking.[266]

Therefore, applying all three *Penn Central* factors, and accepting as true that successful plaintiffs have a vested property interest in a complete noneconomic damage award, tort caps are regulatory takings.[267] The noneconomic damage limit legislation has a substantial economic impact on injured plaintiffs.[268] Once a successful litigant learns of their full noneconomic damage award, they have a "distinct investment-backed expectation[]" in the full amount of the verdict.[269] And, the "character of the governmental action" requires the most injured members of society to bear the burdens of lower insurance premiums and business investment; this cannot be so.[270] Noneconomic damage caps, consequently, are regulatory takings of a plaintiff's vested right to the full amount of noneconomic damages as decided by the trier of fact.

5. Public Use

It cannot be genuinely disputed that noneconomic damage caps were instituted for a public use. As the Court held in *Kelo*, promotion of economic development is a public use.[271] Additionally, as the Court has professed multiple times, it is the legislature's job to determine, within reason,

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265. *Tahoe-Sierra*, 535 U.S. at 332.

266. *See Penn Central*, 438 U.S. at 124.

267. *See id.*

268. *See id.*; *supra* note 253 and accompanying text.

269. *See Penn Central*, 438 U.S. at 124; Richmond, *supra* note 232, at 916.

270. *See Tahoe-Sierra*, 535 U.S. at 332; *Penn Central*, 438 U.S. at 124; McClay v. Airport Mgmt. Servs., LLC, 596 S.W.3d 686, 709 (Tenn. 2020) (Lee, J., dissenting).

271. Kelo v. City of New London, 545 U.S. 469, 485 (2005) ("[T]here is no basis for exempting economic development from our traditionally broad understanding of public purpose.").

which takings are for the public's benefit.[272] Noneconomic damage caps were enacted in many jurisdictions in response to a perceived crisis of rising insurance premiums and unfriendly business environments wherein corporations were at risk of runaway verdicts.[273] Doing so shifted the burdens of tortious injuries from the populace through higher insurance premiums and less high-paying jobs to a select few gravely injured plaintiffs.[274]

Similar to the Pfizer manufacturing facility in *Kelo*, tort cap legislation is supposed to serve an economic development

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272. *See, e.g.*, *id.* at 482 (citing Hairston v. Danville & Western R.R., 208 U.S. 598, 606–07 (1908)); Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 242–43 (1984); Berman v. Parker, 348 U.S. 26, 31–32 (1954).

273. *See, e.g.*, Roland Christensen, *Behind the Curtain of Tort Reform*, 2016 BYU L. REV. 261, 263–70 (2016) (methodically surveying the arguments regarding tort reform); Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link between Damage Caps and Access to the Civil Justice System*, 55 DEPAUL L. REV. 635, 642 (2006) ("The political rhetoric surrounding civil justice reform does not advocate caps on noneconomic damages for reasons of principle. Rather, caps are sold to the public for very practical reasons. The rhetorical logic says that caps will lead to significantly lower malpractice insurance for physicians."); Pamela Burch Fort et al., *Florida's Tort Reform: Response to a Persistent Problem*, 14 FLA. ST. U. L. REV. 505, 518 (1986) ("It is contended that because the increases in huge jury awards have contributed to the spiraling costs of liability insurance premiums, and because noneconomic losses make up the largest portion of jury awards, the most obvious way to reduce damage awards would be to [limit a plaintiff's noneconomic damages]."); *see also* Bill Haslam, State of the State Address 2011: Transforming the Way We Do Business 1, 6 (Mar. 14, 2011), https://www.tn.gov/content/dam/tn/governorsoffice-documents/governorsoffice-documents/2011_State_of_the_State_Address.pdf ("Let me add, I hope that the changes we have proposed in tort reform will make our state even more competitive with our surrounding states in attracting and landing more high quality jobs.").

274. *See, e.g.*, Scott DeVito & Andrew W. Jurs, *"Doubling-Down" for Defendants: The Pernicious Effects of Tort Reform*, 118 PENN ST. L. REV. 543, 592–96 (2014) (considering the harmful effects of tort reform).

function that will benefit a whole jurisdiction.[275] The Court professed in *Kelo*, "[c]learly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose."[276] Seeking to attract businesses, physicians, and lower insurance premiums to save money for the majority of a state's citizens must be said to be an economic development project. Hence, noneconomic damage caps are for the public's use.

6. Conclusion on Substantive Legal Taking

In sum, judicial reduction of noneconomic damages after the trial court has informed a successful plaintiff of the uncapped jury's verdict violates the Takings Clause.[277] A plaintiff has a vested right or interest in a jury's entire noneconomic damages verdict once the court reads it to the parties.[278] The government takes this vested property through a regulation based on a *Penn Central* analysis.[279] The government, acting through the judge who is enforcing the legislature's dictates, is the entity responsible for reducing a plaintiff's recovery, and thus any taking is a product of state action.[280] If the taking is for an economic development purpose to reduce insurance premiums and encourage business investment, it constitutes a public use.[281] This taking is without just compensation because the government does not place the aggrieved plaintiff in as good a pecuniary position as they otherwise would be if they recovered the full noneconomic damage award.[282]

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275. *Kelo*, 545 U.S. at 473.

276. *Id.* at 485.

277. *See supra* Part IV.A.1–5.

278. *See supra* Part IV.A.3.

279. *See supra* Part IV.A.4.

280. *See supra* Part IV.A.1.

281. *See supra* Part IV.A.6.

282. *See supra* Part IV.A.2.

B. *Procedural Considerations*

There are two potential avenues for pursuing a Takings Clause challenge to judicial reduction of a jury's noneconomic damages verdict for aggrieved plaintiffs: direct appeal or collateral civil rights action.[283] On balance, a direct appeal has the likeliest chance of success for multiple reasons.[284]

1. Action for Deprivation of Civil Rights, 42 U.S.C. § 1983

Individuals in the United States may sue government officials for deprivations of constitutional or statutory rights.[285] If judicial reduction of a plaintiff's noneconomic

283. *See generally* The Ku Klux Klan Act of 1871, 42 U.S.C. § 1983 (2018); Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219 (2013) (discussing the right to direct appeal). Some may also propose that a third viable method of challenging noneconomic damage cap statutes is through a declaratory judgment action. *Cf.* Watson v. Hortman, 844 F. Supp. 2d 795, 799 (E.D. Tex. 2012) (the *Watson* plaintiffs were persons who had been injured by alleged tortfeasors in Texas and who likely had cognizable causes of action to bring based on those torts, though those cases had not been adjudicated, who attacked Texas's noneconomic damage caps through a declaratory judgment action). However, because of the knowledge requirement for the successful plaintiff's right to the full noneconomic damage award requires a verdict above the caps to be known by the plaintiff, a declaratory judgment action would not succeed. *See id.* at 803 (noting that the court faced difficulty in evaluating the plaintiffs' Takings Clause claims because the plaintiffs had not received a verdict on which the court could ground its consideration).

284. *See infra* Part V.B.1–2.

285. The text of Section 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

damages verdict is a regulatory taking in violation of the Fifth Amendment, an aggrieved litigant may bring suit pursuant to Section 1983 for that deprivation.[286] Logistically, a plaintiff whose noneconomic damage award was reduced by a trial court would allow that reduction to be reduced to a final judgment order; then, the injured plaintiff would file a Section 1983 action asserting that the government had taken the plaintiff's vested private property.[287] The action would seek as a remedy the difference in the value of the jury's full noneconomic damage award and the compensation already paid pursuant to the final judgment as this would put the plaintiff in the same pecuniary position they would have been in without the taking.[288]

The primary advantage of this method is the ability to file in federal court, which may be attractive to some litigants.[289] This approach has significant drawbacks. First,

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42 U.S.C. § 1983 (2018). For more on the historical context of Section 1983, see SARAH E. RICKS & EVELYN M. TENENBAUM, CURRENT ISSUES IN CONSTITUTIONAL LITIGATION 3–24 (3d ed. 2020).

286. *See supra* Part IV.A.

287. *See* Knick v. Township of Scott, 139 S. Ct. 2162, 2167 (2019) ("A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it.").

288. *See, e.g.*, United States v. New River Collieries Co., 262 U.S. 341, 343 (1923) ("The owner was entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied, if its property had not been taken.").

289. Though debated, there is evidence that litigants receive better quality judicial process in the federal courts for several reasons, and there is some support for that thesis. *See* Evan Tsen Lee, *On the Received Wisdom in Federal Courts*, 147 U. PA. L. REV. 1111, 1123–24 (1999) ("People whose constitutional claims normally would have been heard in federal court will be shunted to state court, *where they are less likely to receive high-quality adjudication*.") (emphasis added); Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2145 (2019) ("Although it is difficult to capture with precision the concept of judicial decay, several strands of evidence support the idea that state courts are not as well funded as federal courts, lack vibrancy, and are no longer developers of the common law."); *see also*

there are potential justiciability issues if the litigant is not careful about when they present their claim.[290] Second, there are sovereign, absolute, and qualified immunity problems.[291] Third, the Supreme Court is increasingly hostile toward so-called constitutional torts.[292] Fourth, a Section 1983 suit will likely take much longer than a direct appeal to reach a final decision.[293]

Though not fatal, a litigant would need to exercise caution in avoiding justiciability issues.[294] Primarily, if a plaintiff files their case prior to the final order reducing their noneconomic damage award, the litigant would be subject to dismissal in federal court because the claim is not ripe for adjudication and the plaintiff has not yet suffered an actual injury.[295] Issues of immunity are far more concerning. The Eleventh Amendment, as interpreted, prohibits a citizen from suing a state, which is known as sovereign immunity.[296] While this prevents any Takings Clause deprivation suit

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Steven H. Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. MIAMI L. REV. 381, 549–50 (1984) (discussing the role of state courts in deciding Section 1983 actions).

290. *See* Russell W. Galloway, Jr., *Basic Justiciability Analysis*, 30 SANTA CLARA L. REV. 911, 918, 922–23 (1990).

291. *See infra* notes 296–98 and accompanying text.

292. *See infra* note 302 and accompanying text.

293. *See infra* text accompanying note 306.

294. Justiciability refers to the ability of a court to adjudicate a claim. *See, e.g.*, Ellis v. Wilkinson, 81 F. Supp. 3d 229, 236 (E.D.N.Y. 2015) ("Justiciability is a term of art embracing the constitutional and related jurisprudential limitations placed upon the jurisdiction of federal courts. To determine whether a case is justiciable under Article III, a court must consider the doctrines of ripeness, standing, mootness, advisory opinion, and political question.") (internal quotation marks and citations omitted).

295. *See* Clapper v. Amnesty Int'l, 568 U.S. 398, 409 (2013); Warth v. Seldin, 422 U.S. 490, 499 n. 10 (1975); Galloway, *supra* note 290, at 922–23.

296. *See* U.S. CONST. amend. XI; RICKS & TENENBAUM, *supra* note 285, at 887–91.

against the state that reduced a noneconomic damage award, the Supreme Court has permitted official capacity suits against government officials tasked with enforcing the state's laws.[297] Those actions, though, may only seek injunctive relief.[298] Thus, aggrieved plaintiffs seeking just compensation have no remedy by suing any state officer.[299]

An injured plaintiff could file an action against a state official involved in noneconomic damage cap enforcement in their individual capacity; doing so, however, is also unlikely to succeed. The officials involved who could satisfy the traceability element of standing[300] would be the legislators who passed tort reform and the judge who reduced the jury's verdict. However, both have absolute immunity in their official functions, and legislating and issuing final judgments, respectively, are within a legislator's and judge's official functions.[301] Thus, immunities make it highly unlikely that an action for deprivation of civil rights would be successful.

If immunities alone were not fatal, the Supreme Court's increasing hostility toward so-called constitutional torts renders creative actions for deprivations of civil rights

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297. Ex Parte Young, 209 U.S. 123, 159–60 (1908).

298. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651, 663 (1974).

299. *Id.*

300. *See* Galloway, *supra* note 290, at 923–24.

301. *See* 42 U.S.C. § 1983 (2018); *see also* Bogan v. Scott-Harris, 523 U.S. 44, 48–49 (1998); Pierson v. Ray, 386 U.S. 547, 553–54 (1967). For more on absolute judicial immunity, see Bailey D. Barnes, *Rebalancing Judicial Immunity for Civil Rights Actions*, 91 TENN. L. REV. (forthcoming 2024). Furthermore, even if a court found that a judge acted outside their judicial function when reducing a noneconomic damage award, which is exceedingly improbable, the judge would be entitled to qualified immunity. *See* Forrester v. White, 484 U.S. 219, 230 (1988). For more on qualified immunity, see Bailey D. Barnes, *A Reasonable Person Standard for Qualified Immunity*, 55 CREIGHTON L. REV. 33, 40–44 (2021).

risky.[302] In the Court's most recent, the conservative majority upended the *Miranda* doctrine to avoid making it a basis for suit under Section 1983, and found that a plaintiff could not sustain a *Bivens* action against a United States Border Patrol agent for purported excessive force.[303] Accordingly, the Court appears hostile to originative constitutional remedy arguments.[304]

Finally, even if justiciability, immunities, and the Court's growing distaste for constitutional torts were not enough, a civil rights action would take significantly longer to reach a final decision than a direct appeal.[305] In a collateral civil rights challenge, the parties would need to develop a record at a trial based solely on the alleged constitutional deprivation, assuming that no party seeks and receives an interlocutory appeal based on immunity.[306] Then, the unsuccessful party at trial will invariably file an appeal

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302. *Cf.* Vega v. Tekoh, 142 S. Ct. 2095, 2107 (2022) (holding that a *Miranda* violation did not necessarily constitute a deprivation of a Fifth Amendment right and therefore could not serve as a basis for a Section 1983 action); Egbert v. Boule, 142 S. Ct. 1793, 1804–05 (2022) (refusing to permit a *Bivens* action against a U.S. Border Patrol agent who allegedly committed excessive force). *See generally* Bailey D. Barnes, *The Constitution's Waning Enforceability: Constitutional Torts After* Egbert & Vega, 50 HASTINGS CONST. L.Q. 69 (2023) (detailing the Supreme Court's recent constitutional tort rulings).

303. *See Vega*, 142 S. Ct. 2095; *see also Egbert*, 142 S. Ct. 1793.

304. *See Vega*, 142 S. Ct. 2095 (Kagan, J., dissenting) ("The majority here, as elsewhere, injures the right by denying the remedy.")

305. *Cf.* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 730 (2007) (acknowledging, albeit in the criminal context, the additional time involved and that collateral attacks require a new trial or hearing by noting that it would "reopen old wounds on collateral attack").

306. *See, e.g.*, Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 DRAKE L. REV. 539, 565 (1998); Mark R. Brown, *Qualified Immunity and Interlocutory Fact-Finding in the Courts of Appeals*, 114 PENN ST. L. REV. 1317, 1317 (2010).

as of right to the United States Court of Appeals.[307] Finally, barring a remand that could basically restart the process, the losing party at the Court of Appeals would likely file a petition for a writ of certiorari to the Supreme Court, where is it is unlikely—yet possible—that the Court would grant it.[308]

2. Direct Appeal

The better option to challenge noneconomic damage caps under the Takings Clause is through a direct appeal. This method requires the trial court to issue a final judgment with the reduced damage award and then the aggrieved party would appeal to the appropriate appellate court in the jurisdiction.[309] The benefits of this approach include swifter adjudication, a full record on which to appeal, and fewer justiciability and immunity issues.[310] Additionally, if the appeal lies from a state court, those jurisdictions may be less hostile to this argument than the Supreme Court has recently signaled.[311] Finally, a direct appeal would simply render a statute unconstitutional rather than require the government to pay the just compensation owed, thus ensuring that the tortfeasor—not the taxpayers—must pay the noneconomic damage award.[312] Therefore, to avoid

307. *See, e.g.*, FED. R. APP. P. 3–4; FED. R. APP. P. 4.

308. *See, e.g.*, SUP. CT. R. 10. The Court grants about 1.4 to 2.1% of the petitions for a writ of certiorari that it receives each year. *Supreme Court Procedures*, UNITED STATES COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1.

309. For more about appeals, see Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 18–19 (1994).

310. *See supra* Part V.B.1.

311. *See supra* note 302 and accompanying text. For a discussion about the states' ability to develop constitutional theories, see JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

312. Holding a tortfeasor accountable accords with tort law's goals. *See*

procedural pitfalls, promote quicker adjudication, potentially find a more favorable venue, and hold the tortfeasor accountable, a direct appeal is the best method for raising this challenge.

C. *Policy Arguments*

First, tort caps effectively deprive the most injured litigants of noneconomic damages awarded to them by a jury. Because the caps require a verdict of more than the limit to apply, the caps only affect the most serious injury cases.[313] If the economic damage recovery did not account for future medical costs or accurately reflect a plaintiff's lost wages, the noneconomic damage caps could also prompt an injured litigant to seek government benefits later in life. It is poor public policy to require the taxpayers to subsidize the injuries a tortfeasor caused.[314]

Second, tort caps threaten the American civil justice system's foundations. The civil justice system prevents vigilantism and promotes peaceable conflict resolution.[315] If

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Alex Stein, *The Domain of Torts*, 117 COLUM. L. REV. 535, 539–40 (2017); Christina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320, 1326–27 (2017).

313. *See* McClay v. Airport Mgmt. Servs., LLC, 596 S.W.3d 686, 709 (Tenn. 2020) (Lee, J., dissenting).

314. *See, e.g.*, Timothy D. Lytton, *Should Government be Allowed to Recover the Costs of Public Services from Tortfeasors?: Tort Subsidies, the Limits of Loss Spreading, and the Free Public Services Doctrine*, 76 TUL. L. REV. 727, 759–65 (2002).

315. *See* STEVEN P. CROLEY, CIVIL JUSTICE RECONSIDERED: TOWARD A LESS COSTLY, MORE ACCESSIBLE LITIGATION SYSTEM 28–29 (2017) (acknowledging the purposes and goals of the civil justice system); Steven B. Hantler et al., *Is the "Crisis" in the Civil Justice System Real or Imagined?*, 38 LOY. L.A. L. REV. 1121, 1123 (2005) ("The American civil justice system has two purposes: to compensate people for injuries caused by others, and to deter future misconduct of the type that caused those injuries."); Christopher Placitella & Justin Klein, *The Civil Justice Bridges the Great Divide in Consumer Protection*, 43 DUQ. L. REV. 219, 230 (2005) ("The courtrooms of the American civil justice system are

the civil justice system ceases to remedy private wrongs by capping damages, the civil justice system is weakened. Individuals seeking redress for their injuries, consequently, may resort to extralegal measures for recompense.[316] Thus, invalidating noneconomic damage caps through the Takings Clause fundamentally supports tort law and the civil justice system.

Third, finding noneconomic damage caps to violate the Takings Clause also effectuates the Framers' intention when including a compensation clause for government takings—to

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among the few places in the nation where it is the individual who has the power to initiate action."); Jason M. Solomon, *What is Civil Justice?*, 44 LOY. L.A. L. REV. 317, 329 (2010) ("[C]ivil justice is a legal regime that responds to wrongdoing by vindicating the right of the victim to hold the wrongdoer accountable."). Though discussing the United Kingdom's, specifically England's, civil justice system, on which the United States' scheme is based, Hazel G. Genn has articulated the purposes of a civil justice regime. Genn stated:

> [T]he machinery of civil justice sustains social stability and economic growth by providing public processes for peacefully resolving civil disputes, for enforcing legal rights and for protecting private and personal rights. The civil justice system provides the legal architecture for the economy to operate effectively, for agreements to be honoured and for the power of government to be scrutinised and limited. Th e civil law maps out the boundaries of social and economic behaviour, while the civil courts resolve disputes when they arise. In this way, the civil courts publicly reaffirm norms and behavioural standards for private citizens, businesses and public bodies. Bargains between strangers are possible because rights and responsibilities are determined by a settled legal framework and are enforceable by the courts if promises are not kept. Under the rule of law, government is accountable for its actions and will be checked if it exceeds its powers. Th e courts are not the only vehicle for sending these messages, but they contribute quietly and significantly to social and economic well-being. They play a part in the sense that we live in an orderly society where there are rights and protections, and that these rights and protections can be made good.

HAZEL G. GENN, JUDGING CIVIL JUSTICE 3 (2010).

316. *See, e.g.*, Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 180–82 (2004).

ensure the sanctity of private property from the long arm of the government.[317] As the Framers had witnessed during and after the Revolutionary War, colonial legislatures took actions that diminished private property's sanctity and enacted monetary policies that devalued creditors' claims and citizens' funds.[318] Now, state legislatures have attempted to avert a "crisis" of runaway jury verdicts and skyrocketing insurance premiums, legislators are once again diminishing the claims of creditors, albeit involuntary, in favor of tortfeasor debtors. Though the legislatures may have some policy justification for that decision, as did colonial statehouses in the Revolutionary Era, the sanctity of property should be shielded.[319]

Finally, prioritizing the making of real people whole over profits and business gains is an altruistic goal.[320] As evidenced by the United States continued reliance on the social safety net of Medicare, Medicaid, and Social Security, Americans acknowledge, though they may not always like, the collective role in caring for vulnerable members of society. Surely those injured by no fault of their own, and for whom a jury has awarded a significant noneconomic damage award to compensate for their suffering, are worthy of protection as vulnerable members of society. Paying higher insurance premiums and potentially missing out on some business investment to ensure that injured people are properly compensated serves an altruistic public policy function. Moreover, even if caring for others is not some of

317. *See supra* notes 37–44 and accompanying text.

318. *See supra* notes 37–44 and accompanying text.

319. *See supra* notes 37–44 and accompanying text.

320. *See, e.g.*, Gary M. Lucas, Jr. & Slavisa Tasic, *Behavioral Public Choice and the Law*, 118 W. VA. L. REV. 199, 206–08 (2015) (acknowledging the role of altruism in American voting patterns and that many voters seek altruistic objectives with their votes); Lynn A. Stout, *Judges as Altruistic Hierarchs*, 43 WM. & MARY L. REV. 1605 (2002) (discussing empirical evidence about altruism in human behavior and its role in certain policy considerations).

the public's motivation, the possibility that they might one day find themselves sitting in that plaintiff's chair while the court slashes their noneconomic damage award should be worthy of their consideration.

The most likely pitfall in finding a Takings Clause violation for reducing noneconomic damage awards is that an infringement is easily avoidable for the legislature. Because this theory hinges on a plaintiff's knowledge of the verdict, a state could simply inform the jury of the cap before rendering its decision, thereby preventing the jury from providing damages above the statutory limits. However, in some states, this could invalidate noneconomic damage caps based on a state right to a jury.[321] Otherwise, because many people are likely presently unaware that the caps exist, informing juries could be a costly political calculation for some state legislators. While at least one recent opinion poll has indicated the public's slight support for tort reform, the American Bar Association has criticized the poll as "slanted."[322] Thus, making the public more aware of the role of noneconomic damage caps by informing a jury of them before it deliberates could backfire politically, and it may well be unconstitutional under some state constitutions.

Second, if legislatures respond to courts finding noneconomic damage caps to be impermissible takings and those legislatures repeal tort reform laws, there is a possibility that insurance companies will raise premiums. There is mixed evidence, however, that tort reform has had any real economic effect on insurance policies anyway. According to multiple studies, tort reform is only marginally effective at achieving one of its primary objectives—reducing

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321. *See, e.g.*, Barnes, *supra* note 5, at 14.

322. *Cf.* Clifton Barnes, *Tort Reform Momentum Slowed but Not Stopped*, 29 B. LEADER 6, 6 (2005) ("Last year, the ABA criticized the [U.S. Chamber of Commerce] for using a 'slanted opinion poll' that it commissioned to 'undermine public confidence in American judges, and the legal system,' which would result in undercutting public safety and security.").

insurance costs.[323] Thus, while it is theoretically possible that insurance companies will hike premiums, this fear—used to usher in tort reform—is likely overstated.

Third, if legislators do not respond to courts holding noneconomic damage caps as takings and instead choose to pay just compensation from state treasuries, the tortfeasors are off the hook while the taxpayers must pay large noneconomic damage awards. It would seem this is an improbable outcome, as it is unlikely that state legislators would wish to withstand the public's wrath for making innocent taxpayers pay for tortfeasors' wrongs. However, if legislators chose this path, it is not inconsistent with other United States public policies, such as the social safety net, that ask Americans to help fund social programs that help society's vulnerable population. If legislators choose to spread the risk of insurance cost increases and reduced business investment by having the taxpayers foot the bill of tortfeasor actions, that is concededly a drawback of a Takings Clause infringement; yet the Constitution's demands should not be discarded because of this reality.

Finally, some will deride this theory as judicial activism run amok. Yet, extending a constitutional right to apply in innovative situations is not a new phenomenon. Over this nation's modern history, though admittedly less in recent years, the Supreme Court has applied established constitutional provisions to society's modern realities.[324]

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323. *See id.* at 7 ("Those who oppose caps on medical malpractice awards often point to studies that show that lower awards will not necessarily mean lower insurance premiums.").

324. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390 (2020); Obergefell v. Hodges, 576 U.S. 644 (2015); Lawrence v. Texas, 539 U.S. 558 (2003); Eisenstadt v. Baird, 405 U.S. 438 (1972); Loving v. Virginia, 388 U.S. 1 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Griswold v. Connecticut, 381 U.S. 479 (1965); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Brown v. Bd. of Educ., 347 U.S. 483 (1954). *But see* Dobbs v. Jackson Women's Heath Org., 142 S. Ct. 2228 (2022); Vega v. Tekoh, 142 S. Ct. 2095 (2022).

Moreover, simply because this is a question of first impression for the Court does not mean that it is not consistent with the Court's precedents. As previously argued, there is jurisprudential and historical support for extending the Takings Clause to apply to noneconomic damage caps.[325] Accordingly, while naysayers will decry this theory as judicial activism, it is not.

CONCLUSION

While Justice Samuel Alito has expressed that "law review articles are not reticent about advocating new rights," proposing that the Takings Clause protects rendered noneconomic damage verdicts is not advocacy for a new right.[326] Rather, the Takings Clause already shields against regulatory takings of property interests,[327] and noneconomic damage awards reached by a jury and read to a litigant are vested property rights worthy of the Fifth Amendment's protections.

Tort caps harm the most wounded plaintiffs while protecting large corporations, business interests, and insurance companies.[328] The officials who have championed tort reform have stated their objective—to increase business investment and lower insurance premiums.[329] Legislators have left behind the regular people injured by tortfeasors' actions.[330] While legislatures have the authority to make

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325. *See supra* Part III.

326. *See Dobbs*, 142 S. Ct. at 2248 (2022).

327. *See supra* Part III.B.

328. *See, e.g.*, McClay v. Airport Mgmt. Servs., LLC, 596 S.W.3d 686, 709 (Tenn. 2020) (Lee, J., dissenting) ("The majority's decision . . . tells the citizens of Tennessee that their right . . . to be fairly compensated for noneconomic damages are trumped by the desire to limit the financial exposure of big corporations and insurance companies in civil negligence lawsuits. I will not join in sending this message.").

329. *See supra* note 273 and accompanying text.

330. *See, e.g.*, *McClay*, 596 S.W.3d at 709 (Lee, J., dissenting).

these policy determinations, legislators cannot ask a handful of citizens—here, successful plaintiffs in tort actions—to bear the societal costs of business investment and lower insurance premiums.[331] Accordingly, the states are committing a regulatory taking of these litigants' property, and the states must compensate these injured parties to prevent them from being unevenly burdened.[332]

The Takings Clause, as incorporated through the Fourteenth Amendment's Due Process Clause, provides that the government cannot take property from one citizen for the public's benefit without just compensation.[333] These protections apply to noneconomic damage caps that are enforced after a jury's verdict is read to a successful plaintiff because the caps are a taking of a vested property interest for public use.[334] This Article draws no conclusions about whether it is wise for the government to leave noneconomic damage caps undisturbed while paying just compensation to injured plaintiffs, only that the state cannot ask a select few of its citizens to bear the costs of economic development.[335]

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331. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 332 (2002) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

332. *See supra* Part V.A.

333. U.S. CONST. amend. V; *id.* amend. XIV; Chi., Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 241 (1897).

334. *See supra* Part V.A.

335. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 485 (2005); *Tahoe-Sierra*, 535 U.S. at 332.