When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System with Integrity

Patrick Wiseman

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WHEN THE END JUSTIFIES THE MEANS: UNDERSTANDING TAKINGS JURISPRUDENCE IN A LEGAL SYSTEM WITH INTEGRITY*

PATRICK WISEMAN**

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** Associate Professor of Law, Georgia State University College of Law. B.A., University of Kent at Canterbury (1971); M.A., University of Colorado (1977); Ph.D., University of Colorado (1980); J.D., Columbia University (1980). I owe an enormous debt of gratitude to my research assistant, Dawn Smith, a 1989 graduate of Georgia State College of Law. My thanks also to my colleagues Jim Bross, Steve Kaminshine, and Chuck Marvin for helpful comments on an earlier draft.

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INTRODUCTION

The incoherence of takings law is legend.¹ Explanations of the incoherence are numerous,² as are attempts to dispel it.³ Some have offered “scientific” accounts,⁴ while others’ accounts are more

¹ This discussion is restricted to alleged takings of real estate; litigants have, however, resorted to the takings clause in many other contexts. See, e.g., Comment, Gideon’s Trumpet at the Crossroads . . . Is It Taps Or Reveille?, 17 S.W. U.L. REV. 351, passim (1987) (discussing application of takings clause to an attorney’s right to practice law). While my analysis may shed light on takings of property other than real estate, such illumination is coincidental.


³ See, e.g., Humbach, Constitutional Limits on the Power to Take Private Property: Public Purpose and Public Use, 66 OR. L. REV. 547 (1988); Humbach, A Unifying Theory for the Just-Compensation Cases: Taking, Regulation and Public Use, 34 RUTGERS L. REV. 243, 245 (1982) (“it is possible not merely to reconcile the police-power taking cases with one another, but also to develop a theory unifying those cases with the general law of eminent domain”); Peterson, Land Use Regulatory “Takings” Revisited: The New Supreme Court Approaches, 39 HASTINGS L.J. 335, 358 (1988) (suggesting plausible, consistent reading of the two different formulations); Ragsdale, A Synthesis and Integration Of Supreme Court Precedent Regarding The Regulatory Taking of Land, 55 UMKC L. REV. 213 (1987) (attempting to synthesize regulatory taking doctrine).

⁴ Bruce Ackerman originally made the distinction between “scientific” and “ordinary” accounts. A scientific approach uses technical concepts of legal discourse, while an ordinary approach uses the “ordinary talk of non-lawyers.” See B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 10-22 (1977). Among the scientific accounts of takings law are R. ÉPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); Michelman, Prop-
ordinary. Some abhor the incoherence; others seem almost to revel in it. The Supreme Court has done little to relieve the confusion, resorting instead to "essentially ad hoc, factual inquiries" whenever confronted with an alleged taking.

The apparent incoherence of takings law is a challenge to the presumption that law is a system with integrity, i.e., a system which is both coherent and principled. I use "integrity" both in the Dworkinian sense that law should be viewed "as a coherent and structured whole," and in the related and more common sense that legal practitioners (lawyers and judges) should be presumed to behave in a principled way.

The challenge to the integrity of the legal system of the apparently incoherent and unprincipled body of takings law is met if takings law can be understood in a principled way.

Understanding takings law in a principled way means understanding that body of law without reducing it to, say, politics or economics. In a legal system with integrity, it must be possible to...
make sense of takings law from the "internal point of view," and not merely from an external point of view. Understanding takings law in a principled way does not, however, mean that takings law must be "reduced to formal rules." While my account includes appeal to certain formal rules, I do not deny the place of balancing in takings law. The choice is not between per se rules which settle each and every takings case in advance and ad hoc balancing which settles nothing in advance. Rather, takings law, properly understood, involves both formal rules and balancing.

I offer the following hypothesis about the jurisprudence of takings, in order to provide a useful set of presumptions for understanding takings cases. The account is dubbed "hypothetical" be-

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12 See H. Hart, The Concept of Law 86-88 (1961). Jurisprudential theories which account for law solely in external terms (for example, reducing law to politics) are deficient, in Hart's view, because they define the internal point of view out of existence. See R. Dworkin, supra note 9, at 13-14.

13 This is not to say that external points of view are not important. If judges decide takings cases in order to serve economic efficiency, for example, this would raise the question whether decisions on the basis of efficiency (as opposed to fairness) were appropriate. Thus, information from the external point of view becomes relevant to a principled practitioner operating from the internal point of view.

14 See Radin, The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 Colum. L. Rev. 1667, 1684 (1988). Professor Radin argues that "neoconservatives think that if takings jurisprudence cannot be reduced to formal rules . . . it must violate the Rule of Law." Id. She concludes, however, that "this is a field in which pragmatic judgment under a standard-an explicit balancing approach-is better." Id.

15 Much of a recent symposium in the Columbia Law Review poses a false dichotomy between these two approaches to takings law. See Symposium, The Jurisprudence of Takings, 88 Colum. L. Rev. 1581 (1988) [hereinafter Symposium]; see also Fischel, Introduction: Utilitarian Balancing and Formalism in Takings, 88 Colum. L. Rev. 1581 (1988) (Professor Fischel introduces the Symposium as one containing two distinct viewpoints—rules versus balancing). This is a false dichotomy which is beginning to plague jurisprudence generally. See, e.g., McFadden, The Balancing Test, 29 B.C.L. Rev. 585, 586 (1988) ("The 'balancing test' . . . directs a judge to eschew the application of formal rules in deciding a case, and instead to balance the competing interests of the litigants (or the competing interests of society more generally), and to give judgment for the side with the weightier interests").

16 The choice, in Hart's words, is not between "a core of certainty and a penumbra of doubt." H. Hart, supra note 12, at 119.

17 The function of a legal hypothesis is to bring coherence to a body of law; the better the account explains a body of law, and the better that account "fits" with other bodies of law, the more "true" it is. It may be that my account bears some resemblance to what Ackerman would call an account of an Ordinary Observer. See B. Ackerman, supra note 4, at 4. I do not take the view, however, that legal language is or should be "ordinary" in the sense required of Ackerman's Ordinary Observer, but neither do I take the position that takings law can be understood by, or should be remade to fit, some "scientific" theory or Comprehensive View. See supra note 4 and accompanying text. As a methodological matter, the presumption of integrity in the legal system requires that we take courts to mean what they say, and that we deconstruct or reconstruct what they say as little as necessary.
cause, although it is accurate descriptively (courts in fact do as I suggest) and plausible prescriptively (courts should do as I suggest), I am not so bold as to claim that mine is the only plausible account. Nonetheless, if the account makes principled sense of takings law, at least the challenge to the integrity of the legal system generally is met.

This Article first describes the "takings" problem and then summarizes the hypothetical solution. An annotated version of the hypothesis follows the summary.

THE "TAKINGS" PROBLEM

The fifth and fourteenth amendments to the United States Constitution impose two limits on the power of government to interfere with property rights. The fifth amendment provides that no person shall "be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." Implicit in the statement of these limitations on government authority is the acknowledgement that government has the powers, with due process of law, to deprive a person of property and, upon payment of just compensation, to take private property for public use. These powers are traditionally referred to as the police power and the power of eminent domain. The due

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18 I have not constructed a model of takings jurisprudence which is both descriptive and prescriptive; at least, not in the sense that all judges do and should answer takings questions in the same way. See Ross, supra note 7. I have constructed a descriptive/prescriptive model in the sense that courts faced with takings typically do and should ask the questions that I pose. In this regard, I differ from Ronald Dworkin in that I do not believe that there is one right answer to any particular takings case, but I do believe that there are right questions. See R. DWORKIN, TAKING RIGHTS SERIOUSLY Ch. 13 (1978).

19 "Government" is used broadly to include all levels (local, regional, state, national) involved in the regulation of land use.

20 U.S. CONST. amend. V. The due process clause of the fourteenth amendment, which limits the authority of state government, and the due process clause of the fifth amendment, which limits the authority of the federal government, are, for our purposes, identical in effect. Cf. Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (noting that the fifth amendment due process clause has equal protection component). Through incorporation, the fifth amendment just compensation clause limits the authority of state, as well as the federal, government. Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897).

21 It is irrelevant to this discussion whether these powers are retained by the government or are created by the fifth amendment. See, e.g., United States v. Carmack, 329 U.S. 230, 241-42 (1946) ("Fifth Amendment . . . is a tacit recognition of a preexisting power to take private property for public use").

22 Whether the eminent domain power is a subset of the police power or a separate power is also of little consequence to our analysis. The United States Supreme Court appears to take the view that any exercise of the eminent domain power in pursuit of legiti-
process clause prohibits the arbitrary exercise of government power, whereas the just compensation clause requires exercise of the eminent domain power when private property is "taken for public use."

While there is thus an evident distinction between "deprivations of property without due process" and "takings of property for public use," some courts have failed to make a clear distinction between the two limitations on government authority, incoherently holding, for example, that a land use regulation which deprives a landowner of property without due process also takes the property for public use. In other words, courts frequently fail to make the distinction between two ways in which government may abuse its power: first, government may act arbitrarily, in violation of due process; second, government may so intrusively regulate the use of property in pursuit of legitimate police power objectives as to take the property without compensation, in violation of the just compensation clause. In the first case, the government action is simply invalid; in the second case, the government action is invalid absent compensation, and so government may either abandon its regulation or validate its action by payment of appropriate compensa-

mate police power objectives is constitutional, suggesting that the eminent domain power is either a subset of the police power or at least identical in its scope. See, e.g., Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1983) ("The 'public use' requirement is... coterminous with the scope of a sovereign's police powers."); see also infra notes 41-61 and accompanying text.

23 "[T]he guaranty of due process... demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." Nebbia v. New York, 291 U.S. 502, 525 (1934). This guaranty of due process applies to whatever power government is exercising, be it the police power, the eminent domain power, the taxing power, or any other power. See Gallo-
way, Means-End Scrutiny In American Constitutional Law, 21 Loy. L.A.L. Rav. 449 (1988). Means-end scrutiny remains "the most common form of analysis used by courts in enforcing constitutional limits on government action," id. at 449, despite Professor Hans Linde's spirited rejection of the approach. See Linde, Due Process of Lawmaking, 55 NEB. L. Rev. 197 (1976). Linde suggests that "the dogma that due process requires every law to be a rational means to a legislative end is... not a rational premise for judicial review, and... is even less plausible as a constitutional command to lawmakers." Id. at 235-36.

24 See, e.g., Seawall Assocs. v. City of New York, 138 Misc. 2d 96, 523 N.Y.S.2d 353 (Sup. Ct. N.Y. County 1987). The Seawall court said, "[h]aving found Local Law 9 violates plaintiffs' due process rights the next issue is whether Local Law 9's regulatory scheme constitutes an unconstitutional taking for which just compensation must be made." Id. at 109, 523 N.Y.S.2d at 361-62. That such a conclusion is incoherent will appear more clearly later. See infra notes 74-87 and accompanying text. Here, let it suffice to say that a land use regulation which violates due process ipso facto serves no legitimate public purpose and so does not take property "for public use."
tion, i.e., by exercising its power of eminent domain. The failure to distinguish between these two abuses of government power has contributed to the confusion and apparent incoherence of takings law.

When faced with an allegation of the first kind of abuse of government power, the appropriate question for courts to ask is whether the government action is substantially related to a legitimate government purpose. This is typically a fairly clear inquiry.

When faced with an allegation of the second kind of abuse of government power, however, courts seem to have an inordinate amount of trouble establishing criteria for determining whether a particular exercise of power effects a taking for public use, so as to require exercise of eminent domain. Whether the property has been taken for public use is a question which is especially puzzling to courts which fail to distinguish between the two kinds of abuse.

"Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain." First English Evangelical Lutheran Church v. Los Angeles, 107 S. Ct. 2378, 2389 (1987).

The Supreme Court has also contributed to this confusion. See, e.g., Agins v. Tiburon, 447 U.S. 255 (1980). "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests." Id. at 260 (citations omitted). What the Agins court suggests, of course, is that the application of a general zoning law deprives an owner of property without due process if the ordinance does not substantially advance legitimate state interests. See also City of Pittsburgh v. Arco Parking Corp., 417 U.S. 369 (1974), in which the Court reviewed a decision of the Pennsylvania Supreme Court invalidating a Pittsburgh ordinance "as an uncompensated taking of property contrary to the Due Process Clause of the Fourteenth Amendment." Id. at 371. The Supreme Court reversed the judgment, but did not correct the Pennsylvania Supreme Court's mischaracterization of the case as a "Fourteenth Amendment taking." Id. at 378-79. Some commentators are guilty of similar confusion. See Strong, On Placing Property Due Process Center Stage in Takings Jurisprudence, 49 Ohio St. L.J. 591, 592 (1988).

Dean Strong argues that, under Pennsylvania Coal, the takings clause is not an independent source of recovery, but rather permits recovery only for exercises of the police power which violate due process by "go[ing] too far." Id. He claims that this is the meaning of Justice Holmes' opinion in Pennsylvania Coal. Id. I concede that Pennsylvania Coal is indeed a due process case. See infra notes 47-51 and accompanying text. But it is a mistake to suggest that the takings clause provides no independent remedy. Government violates the due process clause by regulating without a public purpose; in that case, no taking has occurred regardless of the effect of the regulation on private property. The just compensation clause provides independent justification for invalidating otherwise legitimate exercises of the police power which so interfere with a property owner's rights as to effect an uncompensated taking. For all his insistence that he has clarified matters, it would seem that Dean Strong has obscured them.

The inquiry has been recently clouded by the decision of the United States Supreme Court in Nollan v California Coastal Comm'n., 483 U.S. 825 (1987). See infra notes 75-87 and accompanying text.
These courts fail to recognize that the question whether a government regulation serves a public use is precisely the same as the question whether the regulation serves a legitimate public purpose. The more difficult question, and the question which distinguishes analysis of the first kind of abuse of government power from the second, is whether a particular, otherwise legitimate, exercise of government power constitutes a taking at all. This question also unduly confuses courts, and is perhaps the leading contributor to the apparent intractability of the takings problem.

**The Hypothesis: Summarized**

The takings question is presented when government seeks to achieve a particular purpose, and chooses to use some form of land use control to achieve that purpose. The question can therefore be usefully recast as a series of questions about the nature of the government end and the relationship between that end and the means chosen to achieve it.

Q1. Is the government's end legitimate?

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28 That these questions are identical was once clear to the Supreme Court. See, e.g., Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1983). "The 'public use' requirement [of the fifth amendment] is . . . coterminous with the scope of a sovereign's police powers." Id. at 240; see also infra notes 41-45 and accompanying text. The Court has recently lost its clarity on this point. See Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987). In the Nollan Court's discussion of the standards "for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter," the Court said, "our opinions do not establish that these standards are the same as those applied to due process . . . claims. To the contrary, our verbal formulations in the takings field have generally been quite different." Id. at 834 n.3. While the "verbal formulations" have sometimes been different in the takings context and the due process context, the "substantial relationship" test relied on by the courts in takings cases is derived from, and is in principle indistinguishable from, the "substantial relationship" test in due process cases. See infra notes 75-87 and accompanying text.

29 Whether government entities in fact adopt ends and choose between means to achieve them, is rather doubtful. See Linde, supra note 23, at 201-22. Nonetheless, the judicial presumption of legislative rationality requires courts, when reviewing legislative and other governmental actions, to assess the relationship of means to ends. Certainly, courts persist in using such language, and our presumption of judicial integrity requires that we take them at their word.

30 We might pose a "Question Zero," so-called because it is a pre-taking threshold question, whether a real property right is implicated by the government action. However, there will be little said about that question here, there being ample commentary on what counts as a property interest. See Humbach, supra note 3, at 584-91; Ragsdale, supra note 3, at 216; Reich, The New Property, 73 Yale L.J. 733, 739-46 (1964); Sax, supra note 4, at 155-72.
If not, the government action is invalid;  
if so  
Q2. Is the means substantially related to the end?  
If not, the government action is invalid;  
if so  
Q3. Does the means permanently destroy an essential property right?  
If so, the government action is invalid absent compensation;  
if not  
Q4. Does the value to the public of the end outweigh the private harm occasioned by the means?  
If not, the government action is invalid absent compensation;  
if so, the government action is valid.

While these questions contain terms which need further clarification (e.g. "essential property right," "value to the public"), they should have a familiar ring to anyone who has contemplated takings law. The first two questions are traditional due process questions; the last two questions should be recognizable takings questions. The answers, too, should strike a familiar chord, although the remedial presumptions may be unfamiliar.

Summarized, the rules of decision implicit in this analysis are: an illegitimate end justifies no means; even a legitimate end justifies only related means; no end justifies any uncompensated means which permanently destroys an essential property right; and, the end otherwise justifies the means when the value to the public of the end outweighs the private harm resulting from the means. It is worth noting that the questions are asked in hierarchical order, and so a takings case may be disposed of by answering the current question one way or another, at any stage in the analysis. So, for example, a government regulation which serves no legitimate purpose is invalidated no later in the analysis than Q2. By so disposing of a case, a court need not enter the morass which awaits at Q4. Similarly, Q4 is avoided when a court determines that the government regulation, however weighty its purpose, permanently destroys an essential property right. The truly difficult cases, those which indeed require a balancing of public against private inter-

21 But see Martinez, supra note 6. "Courts employ two legal theories to ascertain whether government action has so affected property as to warrant a remedy: the 'due process approach' and the 'just compensation approach.'" Id. at 164. These two approaches should be viewed not as different theories but as part of a single theory.
ests, are a relatively small subset of takings cases, and there is even a subset of these cases (the "nuisance" cases) which are relatively easy to resolve.

THE HYPOTHESIS: ANNOTATED

The annotated solution is divided into two sections, the liability phase and the remedy phase. Much of the confusion in takings law arises because courts and commentators fail to distinguish these two phases.

I. THE LIABILITY PHASE

In each section an initial philosophical justification for the rule of decision under consideration will be articulated. Inspiration is drawn, sometimes explicitly, from two philosophers whose works are, for rather different reasons, congenial to the U.S. system of government: Locke and Hegel. Rules, however, are abstract and can be fully understood only in application. Accordingly, each section examines judicial decisions to understand better how the rule works in practice.

Although some cases are truly difficult in that they require a balancing of public against private interests, this does not mean that takings law is incoherent or unprincipled. See infra notes 132-52 and accompanying text. Courts frequently reach the balancing stage of the analysis unnecessarily, exacerbating the apparent incoherence of takings law. See, e.g., Corrigan v. City of Scottsdale, 149 Ariz. 553, 565, 720 P.2d 528, 540 (1985) (court found zoning ordinance to be invalid exercise of police power yet continued to examine whether ordinance denied all economically viable use of land); Spaeth v. City of Plymouth, 344 N.W.2d 815, 822 (Minn. 1984) (court found city physically occupied plaintiff's property by flooding it but proceeded to balance the two conflicting interests); Annicelli v. Town of South Kingston, 463 A.2d 133, 141 (R.I. 1983) (court analyzed whether all reasonable use was denied after holding that there had been invalid exercise of police power).

See infra notes 132-41 and accompanying text.

See infra notes 158-60 and accompanying text.

I choose Locke and Hegel because Locke is fairly representative of what might be called the individualist tradition and Hegel is representative of what might be called the communitarian tradition.

This approach is consistent with the general Hegelian view that principles must be worked out in practice; only by examining judicial applications of rules and principles can we understand what those rules and principles mean. See generally C. Taylor, Hegel and Modern Society (1979). The approach is also consistent with our presumption of integrity in the judicial process, which requires, as a methodological matter, that we take courts at their word. See supra text accompanying notes 9-10.
A. The Rules of Decision

1. An Illegitimate End Justifies No Means

The legitimacy of the government’s purpose in enacting or applying a particular land use regulation has been given infrequent attention by the courts since the declaration in Village of Euclid v. Ambler Realty\(^7\) that comprehensive zoning serves the legitimate police power objectives of preserving the public health, safety, morals, and general welfare.\(^8\) Legitimacy of purpose is nonetheless an extremely important threshold question. If government action serves no legitimate purpose, the action is arbitrary and can be justified under no plausible theory of government.\(^9\) Government may pursue only legitimate goals. As a practical matter, we can answer the question of legitimacy by examining the decisions of courts faced with takings claims.\(^10\)

It seems well established that government may regulate land use in pursuit of any otherwise permissible goal. In Hawaii Housing Authority v. Midkiff\(^11\) the Supreme Court reiterated its view, first articulated in Berman v. Parker,\(^12\) that “[t]he ‘public use’ requirement [of the fifth amendment] is . . . coterminous with the scope of a sovereign’s police powers.”\(^13\) The Court held that it was within the police power of Hawaii—hence within the “public use” limitation of the just compensation clause of the fifth amendment—to require certain owners of Hawaiian real estate to sell it

\(^{27}\) 272 U.S. 365 (1926).

\(^{28}\) Id. at 389-90.

\(^{29}\) Locke explicitly rejects any arbitrary exercise of government power. J. Locke, Second Treatise on Civil Government §§ 135-37 (P. Laslett rev. ed. 1963) (3d ed. 1698). Hegel gives an account of arbitrary government action according to which the choice between equally effective alternative means to achieve a particular end is arbitrary, as opposed to philosophically necessary. G. Hegel, Philosophy of Right § 214 (T.M. Knox trans. 1971). This kind of arbitrariness is not prescribed under the theory offered here.

\(^{30}\) The question of the legitimacy of government goals occurs in many different contexts. Since our concern is with land-use regulation, we shall focus on the legitimacy of government goals only in that context. It is worth noting that means-end scrutiny in this context is of the lowest level, as classifications on the basis of property ownership are not inherently suspect, and ordinary property ownership is not a fundamental right. See generally L. Tribe, American Constitutional Law § 16-7 to 16-11 (2d ed. 1988). Professor Radin has suggested that governmental interference with personal property (which she distinguishes from fungible property) should be given a higher level of scrutiny. See Radin, supra note 14, at 1691.


\(^{33}\) Midkiff, 467 U.S. at 240.
to their tenants in order "to reduce the perceived social and economic evils of a land oligopoly traceable to [Hawaii's] monarchs." The decision indicated that a court's role in reviewing a legislature's judgment of what constitutes a public use (i.e. a legitimate public purpose) is "an extremely narrow one."

How narrow this role is recently became clear in *Keystone Bituminous Coal Association v. DeBenedicts.* In that case, a reprise of *Pennsylvania Coal Company v. Mahon,* several Pennsylvania coal companies challenged Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act, prohibiting mining that causes subsidence damage to pre-existing public buildings, private dwellings, and cemeteries. The Pennsylvania Department of Environmental Resources, authorized under the Act to issue regulations to implement the Act, adopted a formula requiring 50% of the coal beneath protected structures to remain in place to provide surface support. The coal companies sued, alleging a taking in violation of the fifth and fourteenth amendments.

Rejecting the companies' takings claim, the Supreme Court contrasted the Subsidence Act with the Kohler Act, challenged in *Pennsylvania Coal.* In an opinion by Justice Holmes, the Court in *Pennsylvania Coal* had found the Kohler Act invalid because it served merely private interests. The Subsidence Act, on the other

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44 *Id.* at 241-42.

45 *Id.* at 240 (quoting *Berman*, 348 U.S. at 32).

46 *Id.* at 240 (quoting *Berman*, 348 U.S. at 32).

47 *Id.* at 240 (quoting *Berman*, 348 U.S. at 32).

48 *Id.* at 240 (quoting *Berman*, 348 U.S. at 32).

49 *Id.* at 240 (quoting *Berman*, 348 U.S. at 32).

50 *Id.* at 240 (quoting *Berman*, 348 U.S. at 32).
hand, bore "[n]one of the indicia of a statute enacted solely for the benefit of private parties identified in Justice Holmes' opinion." By passage of the Subsidence Act, "the Commonwealth is acting to protect the public interest in health, the environment, and the fiscal integrity of the area." In reaching this conclusion, the Supreme Court essentially took the Pennsylvania legislature at its word. The dissenting Justices, while disagreeing with the majority's analysis of the takings question, agreed that the Subsidence Act served a legitimate public purpose. The dissenters did not dispute the appropriateness of deferring to legislative judgment on the question.

This analysis seems to suggest that virtually any purpose pursued by a legislature is legitimate. As the Court noted in Berman v. Parker, the legislative judgment is "well-nigh conclusive." As a matter of process, this is not surprising. A truly representative body can be expected to pursue goals which are in the interest of its constituency; minority interests can be presumed to be properly represented.

a takings case, rather than a due process case.

51 Keystone Bituminous, 480 U.S. at 486.
52 Id. at 488.
53 Id. at 488-88. The act provided that it "shall be deemed to be an exercise of the police powers of the Commonwealth for the protection of the health, safety and general welfare of the people of the Commonwealth." Id. at 1242 (quoting Pa. Stat. Ann. Tit. 52, § 1406.2 (Purdon Supp. 1986)). The Court found no reason to dispute the legislature's position. The Court's willingness to defer to legislative judgment in 1987 and not in 1922 was partly a function of the judicial climate of the two eras. In 1922, the Court was still active in its review of economic legislation and was more willing to scrutinize legislative means and ends sought. See, e.g., Lochner v. New York, 198 U.S. 45 (1905); Coppage v. Kansas, 236 U.S. 1 (1915); Adkins v. Children's Hospital, 261 U.S. 525 (1923); Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926). Nonetheless, in both Pennsylvania Coal and Keystone Bituminous, the Court applied the same principle of substantive law: legislation must serve legitimate public interests.

56 Id. at 32.
57 See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). In this famous footnote, the Court expressed the view that discrete and insular minorities, which are underrepresented in the political process, may seek the protection of the courts against majoritarian excess. Implicit in this statement is the principle that interests which are represented in the political process have little judicial recourse when they lose in the political arena. See, e.g., City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 443 (1985) (Court declined to accord suspect status to classifications on basis of mental retardation, in part by reasoning that legislative response to circumstances of mentally retarded people "belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary"). No elected body is truly representative in the sense that every
There are, of course, substantive constitutional limits to the goals government may pursue,\(^6\) and government may not, even with payment of compensation, take private property in pursuit of goals which exceed those limits.\(^6\) However, absent a substantive proscription, or some basis to be suspicious of the legislature's procedures or motives,\(^6\) the democratic process should suffice to assure us that the goal pursued is legitimate in the sense required by the first question in our analysis. The primary question should be whether interests adversely affected by the government action were properly represented in the legislative process. It is unusual for the interests of property owners to be inadequately represented, and so it will be a relatively rare case in which government action is invalidated at this stage.\(^6\)

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\(^6\) Among the substantive constitutional limits on government goals are those having their origin in the equal protection clause (prohibiting racial exclusion, for example) and in the first amendment (regulating the content of speech). See, e.g., Batson v. Kentucky, 476 U.S. 79 (1986) (state's prosecutorial rights are subject to and limited by equal protection); Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n., 447 U.S. 557 (1980) (state's goal in regulating commercial speech must be directly advanced, and regulation cannot be more extensive than necessary).

\(^6\) See Reynolds v. Sims, 377 U.S. 533, 586 (1964) (“legislative reapportionment is primarily a matter for legislative consideration and determination . . . judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites”).

\(^6\) See Stoebuck, Police Power, Takings, and Due Process, 37 WASH. & LEE L. REV. 1057 (1980). Even under the fifth amendment, the government's power to take property with compensation is not absolute. See id. at 1091.

\(^6\) Whether inevitable but “unintended” consequences of government action should be treated as government ends for purposes of this stage of the analysis is an evidentiary question. In other words, if it is determined that government in fact intended the foreseeable consequences of its conduct, despite government's denial of that intent, the legitimacy of the end should be examined. For an extended discussion of legislative motivation in this context, see generally Brownstein, Illicit Legislative Motive in the Municipal Land Use Regulation Process, 57 U. CIN. L. REV. 1 (1988).

\(^6\) Such cases do exist, however. See Wheeler v. City of Pleasant Grove, 833 F.2d 267, 270 n.3 (11th Cir. 1987). The Wheeler court said:

> Technically, the fifth amendment's just compensation clause is not applicable where there has been no "public use." Such may be the case where, as here, the land use regulation that effected the taking was not enacted in furtherance of the public health, safety, morals, or general welfare. The affected landowner may nevertheless have a damage cause of action under section 1983 since the taking may violate his fourteenth amendment rights to due process. [citations omitted] Regardless of which constitutional provision a taking falls under, the measure of damages to which the aggrieved landowner is entitled is the same.

Id. This latter proposition seems mistaken—the fifth amendment requires that a landowner whose property has been taken for a public use receive just compensation; however, under section 1983, an aggrieved landowner may be entitled not only to the fair market value of
2. Even a Legitimate End Justifies Only Related Means

While the range of permissible purposes is accordingly very broad, government must, in pursuit of legitimate ends, proceed rationally, by using means related to the end. A theory of government is irrational if it requires government to pursue only legitimate ends, but permits it to use any means, however tenuously related to these ends. Indeed, it effectively undermines the insistence upon legitimate ends.62

Until recently, governments could expect courts to defer to their judgment on the means chosen to achieve their end, as well as on their choice of end. In *Hawaii Housing Authority v. Midkiff*,63 the Court addressed the question whether government may legitimately exercise its eminent domain power to effect a change in the distribution of land ownership. “[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.”64 Thus, when a legislature, pursuing a legitimate goal, takes property and compensates the landowner, courts will rarely invalidate the government action.65

A more interesting question arises when government regulates land use in pursuit of a legitimate goal, and, in the process, interferes with property rights without offer of compensation. Even here, deference to legislative judgment had properly become the rule. The Court in *Village of Euclid v. Ambler Realty*66 held that “[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.”67 Thus, if a plausible reason can be given for selecting a

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62 See G. Hegel, *supra* note 39, at 140. Hegel describes the phrase “the end justifies the means” as “trivial and pointless.” “[T]he means is precisely that which is nothing in itself but is for the sake of something else, and therein, i.e. in the end, has its purpose and worth—provided of course it be truly a means.” *Id.*
64 *Id.* at 241 (citations omitted).
65 “[W]hen the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.” *Id.* at 242-43.
66 272 U.S. 365 (1926).
67 *Id.* at 388 (citing Radice v. New York, 264 U.S. 292, 294 (1924)).
particular means to achieve a legitimate end, courts should defer to legislative judgment. The Euclid Court, after summarizing the municipality's reasons for its zoning plan, concluded:

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

Rejecting a plenary challenge to zoning in general, the Euclid Court anticipated that specific challenges to zoning ordinances as applied to a particular owner's property would arise. Such was the case in Nectow v. City of Cambridge. The ordinance in Nectow rendered a strip of Mr. Nectow's property totally useless by zoning for residential use a piece of property which had only commercial/industrial use. The Court invalidated the application of the ordinance to his property, saying, "[t]he governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and . . . such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." The application of the ordinance to Mr. Nectow's property was not invalidated because it effected a taking within the meaning of the just compensation clause, but rather, because, in violation of due process, it deprived him of all use of a piece of

68 Note that deference to legislative judgment at this stage of the analysis does not preclude finding a taking at a later stage. Deference here simply means that the government conduct passes due process muster; the conduct still may have effected a taking. See Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986). The Connolly Court noted the holding of a previous Supreme Court opinion:

["The Court held that retroactive application of the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 did not violate the Due Process Clause of the Fifth Amendment. In these cases, we address the question whether the withdrawal liability provisions of the Act are valid under the Clause of the Fifth Amendment that forbids the taking of private property for public use without just compensation.

Id. at 213.

69 Euclid, 272 U.S. at 395 (citations omitted).

70 See id. at 396-97.

71 277 U.S. 183 (1928).

72 Id. at 188 (citation omitted).
his property without substantially advancing the legitimate purposes otherwise served by the zoning ordinance.\textsuperscript{73}

\textit{Euclid} and \textit{Nectow} thus established that, while zoning is generally within the government's police power, it must be substantially related to legitimate objectives if it is not to run afoul of due process.\textsuperscript{74}

Until \textit{Nollan v. California Coastal Comm'n},\textsuperscript{75} the substantial relationship test rarely served to invalidate legislation; instead courts deferred to legislative judgment about both means and end.\textsuperscript{76} In \textit{Nollan}, beach front property owners challenged the California Coastal Commission's authority to condition a building permit on the grant of an easement to the public across a private beach. The Commission cited several purposes for the condition, which the court assumed \textit{arguendo} were legitimate: "protecting the public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches."\textsuperscript{77} The Court held, however, that the "Commission's imposition of the permit condition cannot be treated as an exercise of its land use power for any of these purposes,"\textsuperscript{78} because lateral access across the beach contributed nothing to the public's view of the beach from the road, and thus had no effect on the public's "psychological barrier" to beach use.\textsuperscript{79} The "essential nexus" be-

\textsuperscript{72} See id. at 188-89. "A taking of property by eminent domain for a use which is not public is such a violation of the basic and essential features of constitutional government that it amounts to a taking without due process of law." \textsc{Nichols}, \textsc{The Law of Eminent Domain} 4-38 (1985 & Supp. 1989).

\textsuperscript{74} It is worth stressing that \textit{Euclid} and \textit{Nectow} are due process cases, not takings cases. Each deals explicitly with an alleged deprivation of property "without due process of law" in violation of the fourteenth amendment and not with a taking for public use without just compensation. \textit{See Euclid}, 272 U.S. at 384; \textit{Nectow}, 277 U.S. at 185. The difference is significant because government action which violates due process cannot be validated by paying for it. Notwithstanding the insistence of the majority in \textit{Nollan v. California Coastal Comm'n}, 483 U.S. 825 (1987), that the "substantial relationship" test in takings cases is different from the similarly named test in due process cases, \textit{Euclid} and \textit{Nectow} are the sources of the substantial relationship test for the legitimacy of land use regulations relied on by the Court in \textit{Nollan}. \textit{See infra} notes 75-86 and accompanying text.

\textsuperscript{75} 483 U.S. 825 (1987).

\textsuperscript{76} \textit{See supra} notes 63-70 and accompanying text.

\textsuperscript{77} \textit{Nollan}, 483 U.S. at 835. The Court assumed, without deciding, that these purposes were legitimate. It would have been quite extraordinary had the Court declared these purposes beyond the scope of the government's police power.

\textsuperscript{78} \textit{Id.} at 839 (footnote omitted).

\textsuperscript{79} Permitting access across a private beach from one public beach to another presumably reduces congestion on the public beaches. The Court held, however, that “[i]t is . . .
tween means and end was lacking. Indeed, the means "utterly fail[ed] to further the end" so that the case did "not meet even the most untailored standards."

The Nollan Court should have concluded that the condition, lacking a substantial relationship to any legitimate purpose, violated due process. Despite history and principle to the contrary, the Court insisted that the "substantial relationship" test applied in takings cases is unique to the fifth amendment takings clause, and is stricter than the similarly named due process standard. As Justice Brennan persuasively argued in dissent, the condition was sufficiently related to legitimate government purposes to pass due process muster. Indeed, if it were not, how could the Court have concluded that if the Commission "wants an easement across the Nollans' property, it must pay for it"?

"In so saying, the Court acknowledged that acquisition of an easement is an appropriate means to achieve the government end, and is therefore consistent with due process. Whether the easement must be paid for, in order to conform to the just compensation clause, is an entirely different question."

This concludes what might be termed the "due process" prong of the inquiry. Government action which survives the due process impossible to understand ... how [the easement] helps to remedy any additional congestion on [the public beaches] caused by construction of the Nollans' new house."

See id. at 837. In reaching this conclusion, the Court "rewrote" the Commission's argument "to eliminate [a] play on words," id. at 839, suggesting that deference to the judgment of some quasi-legislative bodies is a thing of the past. The refusal to defer to the judgment of quasi-legislative bodies may be appropriate. Such bodies do not enjoy the same presumption of representativeness as elected bodies. See supra note 57 and accompanying text. Given the Court's tendency to defer to professional judgment, however, its refusal to do so in the land-use regulation context is somewhat puzzling.

483 U.S. at 837.

Id. at 838.

Id. at 834-35. Decisions such as this only add to the existing confusion in this area.

Id. at 853-61 (Brennan, J., dissenting).

Id. at 842. The reasoning of the Nollan opinion challenges our methodological presumption that courts mean what they say!

The Court correctly answered this question in the affirmative; the Court is correct, however, not because the means is insufficiently related to the end, but because the means (acquisition of an easement) destroys the right to exclude. See infra, notes 104-17 and accompanying text. The Court's analysis suggests that the government may validate its arbitrary action through monetary compensation, a suggestion which could ultimately loosen rather than tighten the means-end standard.

inquiry must still run the takings gauntlet.

3. No End Justifies any Uncompensated Means Which Permanently Destroys an Essential Property Right

As we saw in our examination of *Hawaii Housing Authority v. Midkiff*, if government takes property and provides compensation, this exercise of the power of eminent domain will be upheld if it is rationally related to a legitimate public purpose. Government action which interferes with an owner's use of property without providing compensation for the loss occasioned by the interference is a greater problem. The fundamental questions here are whether there are any property rights so essential that government may not destroy them even in pursuit of legitimate ends without compensation; and, if so, what property rights are to count as essential?

Whether Q3 is posed at all depends upon one's notion of the origin of property—is property held at the will of the sovereign or in trust for the public, or is property ownership a fundamental personal right? If the former, property rights are always subordinate to at least some public interests; if the latter, presumably no public purpose is sufficient to justify destruction of an essential property right. Both Hegel and Locke appear to take the

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clause require that the use of governmental power serve valid objectives, it further requires that the means chosen by government to serve those objectives not be arbitrary, capricious or unreasonable"); Costonis, *supra* note 6, at 485.

88 See Seven Islands Land Co. v. Maine Land Use Regulation Comm'n, 450 A.2d 475, 482 (Me. 1982) (citing Agins v. City of Tiburon, 447 U.S. 255, 262 (1980)). "Since ownership consists of a 'bundle' of property rights, the mere extinguishment of one of those rights does not necessarily amount to a taking without compensation. The question is whether the right in question constitutes 'a fundamental attribute of ownership' such that its extinguishment would render the property substantially useless." *Id.*

86 467 U.S. 229 (1984). *See also supra* notes 63-65 and accompanying text.

90 It seems implicit in the fifth amendment that there are such property rights. *See* Chicago B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 236 (1897) ("Indeed... rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen").

91 Land held at the will of the sovereign or in trust for the public is land held subject to an "implied servitude *ab initio.*" Michelman, *supra* note 50, at 1602 n.14. Property burdened with such a servitude (for example, the navigational servitude of the United States) cannot be used in such a way as to interfere with the servitude. A landowner may not use riparian property in a manner that interferes with the public's use of navigable waters. *See* Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 445 (1892). Insofar as the property is held in trust for the public, a riparian owner has no legitimate expectation of interference with navigation. In this respect, the riparian owner has no cognizable property interest (in interfering with navigation) to be taken. The nuisance cases can be similarly rationalized. *See infra*, notes 132-41 and accompanying text.
second position, at least with respect to those property rights essential to liberty or personhood.

Certain property rights are so essential to liberty (in Lockean terms) or personhood (in Hegelian terms) that they are unassailable by government without preservation of the status quo by payment of compensation.\(^2\) If we take the Lockean view, i.e. that the governed participate in society to protect their property interests, it would be “too gross an absurdity for any man to own” that there be no limits on government’s power to interfere with those property interests.\(^3\) Accordingly, it is not unreasonable to postulate that government may not, without payment of full compensation for the damage caused, destroy an essential property right.\(^4\) It was Hegel’s view that the first objective expression of personality or personhood is the acquisition of property, the subjection of a thing to one’s will.\(^5\) For Hegel, this first expression of personhood is the foundation of civil society and the state.\(^6\) Therefore, if the state were permitted to destroy essential property rights, it would be undermining its own foundation. Locke, rather similarly, viewed government’s existence as a means to protect property rights and were the government to destroy these rights, it would be undermining its own reason for existence.\(^7\) Payment of money, “the universal

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\(^2\) Indeed, some rights are so essential to liberty or personhood that government could not preserve the status quo by payment of compensation for their destruction. “[T]hose goods, or rather substantive characteristics, which constitute my own private personality and the universal essence of my self-consciousness are inalienable and my right to them is imprescriptible.” G. Hegel, supra note 39, § 66, at 52. See also Radin, Property and Personhood, 34 Stan. L. Rev. 957, 1014-15 (1982) (suggesting that “personal” property should be protected from both conflicting “fungible” property claims and from governmental invasion). Government cannot purchase the right to own property, for example. For this reason the Constitution has no clause providing that: “nor shall liberty be taken for public use, without just compensation.” Nonetheless, government may, in pursuit of legitimate government purposes, buy any particular piece of property from its owner.

\(^3\) J. Locke, supra note 39, at § 138.

\(^4\) Degrees of interference short of destruction will be dealt with later. See infra notes 142-52 and accompanying text. That government may, upon payment of compensation, destroy even an essential property right follows from the well-established power of government to dispossess an owner upon payment of compensation, so long as the expropriation serves a legitimate public purpose. If destruction of all property rights in a particular piece of property is within government’s eminent domain power, destruction of an essential property right short of dispossession is also within that power.

\(^5\) G. Hegel, supra note 39, § 44, at 41.

\(^6\) See id. § 258, at 155.

\(^7\) In Locke’s worldview, “[t]he great end of men’s entering into society [is] the enjoyment of their properties in peace and safety.” See J. Locke, supra note 39, at § 134. Accordingly, government “cannot take from any man any part of his property without his own
medium of exchange... which actualizes the... value of all commodities," for the destruction of an essential property right permits government to conduct its necessary business while preserving the status quo ante.

Hegel's account of the acquisition and use of private property is useful in understanding what should be deemed essential property rights. For Hegel, the appropriation of things is the first expression of personality, and is the foundation of the State. One would therefore expect that the state, as its law develops, would protect at least those aspects of property essential to personhood, which, for Hegel, are exclusive possession, use, and alienation.

Hegel would expect these elements, each of which is contemporarily recognized as essential, to be further articulated as society matures.

consent." Id. at § 138. Legislative power "is limited to the public good of the society." Id. at § 135. The government's "power for the regulating of property," id. at § 139, is therefore limited to preserving property, the only reason "men [initially] enter into society." Id. at § 138. Locke used "property" in a rather expansive sense, to include one's life, liberties, and estate. Id. at § 123. Arguably, this is the sense in which the framers of the Constitution intended to use "property," at least in the due process clause of the fifth amendment. See Levy, Original Intent and the Framers' Constitution 276 (1988). Locke's influence on the framers of the United States Constitution is well known, although not entirely uncontroversial. See, e.g., Wills, Inventing America (1978) (arguing that Hume and Hutcheson were more influential on the framers than Locke). Nonetheless, Locke's philosophy remains congenial to the U.S. system, and the framers were thoroughly Lockean in their outlook. See Levy, supra, at 276. It is by no means evident what limits on government goals are imposed under the Lockean scheme, or what the framers understood as the limits.

Preservation of the status quo ante is not necessarily a good thing. The present distribution of property may, after all, be an unjust distribution. Nonetheless, the function of the just compensation clause is an inherently conservative one. See, e.g., B. Ackerman, supra note 4. "There is, I think, an almost inevitably conservative quality to compensation litigation, however much a reformer may try to write an opinion that avoids the symbolic affirmation of the status quo ante involved in compensating property owners aggrieved by the conceded legitimate exercise of public power." Id. at 60. Thus, while the government may "adjust the burdens and benefits of economic life," Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978), and so may act to change the status quo ante by redistribution of property, the government may not achieve its redistributional aims by destruction of essential property rights. Thus, in Hawaii Housing Authority, the government was permitted to redistribute property, but was required to assure that the dispossessed landowners were properly compensated. See Hawaii Hous. Auth., 467 U.S. at 244-45 (1983).

These elements are also recognized as essential by Blackstone. See 2 W. Blackstone, Commentaries 8-15. Indeed, they form the core of the classical liberal conception of property. See Radin, supra note 14, at 1685.

See infra notes 110-31 and accompanying text.

"[T]he constitution becomes progressively more mature in the course of the further elaboration of the laws and the advancing character of the universal business of govern-
Perhaps the Supreme Court’s clearest recognition that government may not destroy an essential property right without payment of compensation came in *Loretto v. Teleprompter Manhattan CATV Corporation*. In *Loretto*, the Court adopted its much-criticized per se rule that any government-authorized physical invasion of private property, however minor and whatever public interest it may serve, is a compensable taking. Despite the rather minor intrusion and minimal interference with the plaintiff’s property use, the Court held that the government had authorized a permanent, physical occupation of her property and must compensate her for it. The Court noted that “[p]roperty rights in a physical thing have been described as the rights ‘to possess, use and dispose of it,’” and concluded that a permanent occupation by government “effectively destroys each of these rights.”

a. The right to exclude

Although the Court in *Loretto* held that a permanent physical occupation destroys all three essential property rights, the right to exclude, “one of the most treasured strands in an owner’s bundle of property rights,” is clearly central. A physical occupation, according to the Court, “is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.”

The right to exclude was also critical to the Court’s decision in

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104 458 U.S. 419 (1982).
105 See, e.g., Costonis, supra note 6, at 501. (“The per se rule is unsatisfactory on linguistic, historical, and functional grounds.”) Although the *Loretto* rule has been subjected to harsh criticism, much of that criticism and indeed much of the confusion about takings law generally stems from a failure to distinguish the liability stage of the inquiry from the remedial stage. It is clear that any government-authorized, permanent, physical occupation of private property amounts to a taking of property, because it destroys the right to exclude. Whether the taking is minor, and so justifies only nominal damages, is a remedy question, not a liability question.
106 *Loretto*, 458 U.S. at 441. In *Loretto*, the plaintiff challenged a New York statute permitting a cable television company to place boxes and cables on her property. *Id.* at 424.
107 *Id.* at 441.
108 *Id.* at 435 (quoting United States v. General Motors Corp., 323 U.S. 373, 378 (1945)).
109 *Id.*
110 *Id.*
111 *Id.* at 436.
Nollan v. California Coastal Commission, in which the Court, citing the Loretto rule, said:

We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

Loretto and Nollan serve to clarify the holding in Pruneyard Shopping Center v. Robins, in which the Court found that, although there was a literal "taking" of the right to exclude, the requirement that appellants [shopping center] permit appellees [citizens] to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants' property rights under the Taking Clause. There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center.

Pruneyard, after Loretto and Nollan, can be understood to mean that a destruction of the right to exclude, while still a taking, may be so de minimis as not to require compensation. Government, in short, may not, even in pursuit of legitimate objectives, permanently destroy the right to exclude without payment of just compensation.

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113 Id. at 832 (footnote omitted). Nollan's interpretation of Loretto tends to confirm the view that the right to exclude is central, as a public easement impairs but does not destroy the rights to use and dispose. Despite the Loretto Court's broader language, the rights to dispose and use were certainly impaired by installation of the cable box but were surely not destroyed.
114 447 U.S. 74 (1980).
115 Id. at 83.
116 This reconstruction of Pruneyard, which strays only slightly from the Court's analysis, serves to illustrate how important it is to clarify the distinction between liability and remedy. Although the Loretto result is counterintuitive when viewed from the remedial perspective, it makes eminent sense when considered as a question of liability.
117 It has recently been argued that the Nollan court ameliorated the Loretto per se taking rule by suggesting that, if there is a sufficient nexus between means (the per se taking) and end, no compensation is required for the taking. See Martinez, supra note 6, at 59-65. This further proves the confusion Nollan has wrought.
b. The right to use

The Lorretto court also acknowledged the importance of the right to use property.\(^{118}\) The right to put land to any particular use is not an essential property right; instead courts have made it clear that a landowner's use of property is subject to government regulation,\(^{119}\) and a landowner may not complain that the property is restricted to a use other than that which is most beneficial.\(^{120}\) Nonetheless, a taking is properly found when a government regulation of land use prohibits all viable use of property.\(^{121}\) In other words, essential to the landowner's bundle of rights is the right to put one's property to some use.\(^{122}\)

Accordingly, government may not permanently destroy the right to use one's property without payment of compensation.\(^{123}\)

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118 Lorretto, 458 U.S. at 436 (1982).

119 See Pruneyard, 447 U.S. at 80-81 (1980). "It is, of course, well established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision." Id. (citations omitted).

120 See Agins v. Tiburon, 447 U.S. 255, 260-61 (1980) (Court looks to degree of infringement and economically viable use, not most beneficial use).

121 See, e.g., Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979) (complete conversion of property is taking); United States v. Causby, 328 U.S. 256, 261 (1946) (if landowner cannot put property to use, loss is complete and a taking has occurred).

122 It is appropriate to note that nuisance cases, which permit the government to prohibit noxious uses, simply affirm the principle that, while a property owner may not be denied all use without payment of compensation, he may be denied any (particular) use deemed by government to be injurious to the public health, safety, morals, or general welfare, without payment of compensation. The nuisance cases, typically couched in terms of the overwhelming weight of the government interest, are simply special cases of the balancing analysis, to which we return later. See infra notes 132-50 and accompanying text.

The cases suggesting that the government may render property useless if pursuing overwhelming ends do not stand for so broad a proposition. See, e.g., Goldblatt v. Hempstead, 369 U.S. 590, passim (1962) (no evidence that town ordinance prohibiting excavation below water level would leave property valueless); Miller v. Schoene, 276 U.S. 272, 279 (1928) (owner retained cedar trees' value as lumber despite comprehensive statutory scheme providing for destruction of trees in order to save apple orchards from communicable plant disease); Hadacheck v. Sebastian, 239 U.S. 394, 411-12 (1915) (city ordinance prohibiting manufacture of bricks within city limits did not render property useless as it did not entirely prohibit removal of red clay by property owner); Mugler v. Kansas, 123 U.S. 623, 654 (1887) (liquor factory owner retained valuable land despite statute prohibiting manufacture and sale of intoxicating liquor). It is inaccurate to cite these cases for the proposition that the government may entirely destroy property value if its purpose is sufficiently overwhelming. Rather, these cases stand for the proposition that government may, in pursuit of a sufficiently weighty public purpose, prohibit any particular use.

123 Even if a landowner retains formal rights in property which has been rendered valueless (such as the right to exclude, the right to visit, etc.), "[i]f that which is left to the property owner is rendered meaningless by that which is taken, compensation is due." Flor-
c. The right to dispose

Also recognized by the Loretto Court as an essential property right is the right to dispose of one’s property. The right to dispose includes the right of devise or descent. In Hodel v. Irving the Court indicated that the complete abolition of the descent and devise of a particular class of property would be a taking. The Court has not unambiguously held that governmental destruction of the right to dispose requires compensation, but a tendency in that direction is evident. Accordingly, government may not permanently destroy the right to dispose of one’s property without payment of compensation.

No other sticks in the bundle of rights called “property” have been declared so essential as to require compensation for their permanent destruction. Indeed, it is perhaps overstating the point to claim that the Supreme Court has unambiguously adopted the liberal conception of property just adumbrated. Nonetheless, contrary to the trend, I would favor more, not fewer, per se rules. Insofar as property is conceptually a set of expectations, any rule which tends to settle expectations is, in that respect at
least, a good rule. As takings law presently stands, however, application of these formal rules is, in a few cases, inconclusive. In the analysis of these few cases, there comes a point when an unabashed balancing is necessary.

4. The End Otherwise Justifies the Means When the Value to the Public of the End Outweighs the Private Harm Occasioned by the Means

Implicit in the rule that government may not destroy an essential property right without payment of compensation is the possibility that government may destroy nonessential property rights without payment of compensation. A sensible theory of the relationship between government and the governed might permit such interference if, at the very least, the injured landowner also benefitted from the regulation. Such is indeed the rationale behind the so-called "public nuisance" exception to the just compensation clause, which permits government to prohibit land uses that are injurious in part on the basis that all landowners benefit from the prohibition.

Although the Supreme Court has not in recent years upheld a land use regulation solely on the basis that it serves such an "overwhelming" public purpose, the "public nuisance" exception to the just compensation clause remains viable. In Keystone Bituminous Coal Association v. DeBenedictis, the Court unanimously approved a "public nuisance" exception to the just compensation clause. According to the majority, the Court hesitates "to find a taking when the State merely restrains uses of property that are

131 See Rose, Crystals and Mud in Property Law, 40 STAN. L. REV. 577, 577 (1988) (hard-edged rules-"crystals"-"signal to all of us, in a clear and distinct language, precisely what our obligations are and how we may take care of our interests"); see also Rose-Ackerman, Against Ad Hocery: A Comment on Michelman, 88 COLUM. L. REV. 1697, 1700 (1988) ("[w]hen legal rules affect behavior, clarity is a value in itself, independent of the actual content of the rule").

132 See Keystone Bituminous Coal Assoc. v. DeBenedictis, 480 U.S. 470, 491 (1987) ("[w]hile each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others").

133 In several early fifth amendment cases, the Court upheld state regulations which prohibited public nuisances, even though the effect on private property owners was extremely severe. See supra note 122. Although the Court in Keystone found that the regulation in question was valid in part because it prohibited a public nuisance, the Court did not rest its decision solely on that ground.

tantamount to public nuisances.” The dissenting Justices agreed that the Court has recognized an exception to the takings clause when the government “exercises its unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use.”

While agreeing that there is such an exception, the dissenting Justices disputed the majority's conclusion that the Subsidence Act satisfied this exception.

Although it has become fashionable to mock courts which rely on prohibition of noxious use in upholding government regulation of land use, the principle underlying the rule seems sound. Landowners should not have the right to use their property in a manner injurious to the public. Whether a particular use is injurious is for the legislature to determine. In other words, courts should not decide whether a use prohibited by government is injurious, but rather should defer to the judgment of a properly representative legislature, acting within appropriate substantive limits. When a government regulation prohibits a use deemed by the legislature to be injurious to public health, safety, morals, or general welfare, and the regulation does not permanently destroy an essential property right, no taking has occurred. Such government purposes presumptively outweigh nonessential private property rights.

On the other hand, when a government regulation serves a legitimate end other than prohibition of a noxious use, and interferes with, but does not destroy, a property owner's use and enjoyment of his property, the takings question turns on the relative weights of the public value and the private harm. Only in such cases is this truly difficult balancing question presented.

In Penn Central Transportation Company v. New York,

135 Id. at 491.
136 Id. at 511 (Rehnquist, C.J., dissenting) (citations omitted).
137 Id. at 513 (Rehnquist, C.J., dissenting).
138 See, e.g., Michelman, supra note 50; Sax, supra note 4.
139 “Significantly, the drafter of the taking clause, James Madison, incorporated the Blackstonian definition in his writing on property and specifically excluded uses of property that harmed others by not 'leav[ing] to every one else the like advantage.'” Kmiec, The Original Understanding Of The Taking Clause Is Neither Weak Nor Obtuse, 88 COLUM. L. REV. 1630, 1635 (1988) (citing Property, Nat'l Gazette, Mar. 27, 1792, reprinted in 14 J. MADISON, THE PAPERS OF JAMES MADISON 266 (1983)).
140 See supra notes 55-61 and accompanying text.
141 See supra note 122.
the owners of Grand Central Terminal challenged the application to the terminal of New York City’s Landmark Preservation Law.143 New York City’s Landmark Commission denied the owners permission to construct an office building atop the terminal, resulting in a significant loss of value to the owners.144 Ruling against the owners, the Court nonetheless indicated that a regulatory taking could occur when the balancing of certain factors, representing private and public interests, is overwhelmingly in favor of the private interest.145 While the Court insisted that it was unable to establish a “set formula” for determining when a regulatory taking has occurred,146 it identified several relevant factors. Among the factors considered relevant on the private side of the balance is “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.”147 While this factor arguably discriminates against landowners whose possession is gratuitous,148 it is appropriately considered in most cases. Also relevant to the balance is “the character of the governmental action.”149 Moreover, a taking will not be found when the landowner enjoys sufficient “reciprocity of advantage.”150

Thus, when a land-use regulation sufficiently interferes with a landowner’s economic expectations, and the public interest served by the regulation is insufficiently weighty, a taking may, at least in

143 Id. at 107.
144 Id. at 130-31.
145 Id. at 124-25. See also Agins v. Tiburon, 447 U.S. 255, 261 (1980) (question whether taking occurred “necessarily requires a weighing of private and public interests”).
146 Penn Central, 438 U.S. at 124. Penn Central is a paradigm example of a hard case making bad law. Having decided, under the circumstances of that case, that it would have to conduct an essentially ad hoc factual inquiry, the Court apparently decided that it would have to do so in all takings cases. The Court has allowed the penumbra of doubt to overwhelm the core of certainty. See H. HART, supra note 12.
147 Penn Central, 428 U.S. at 124. It would appear that the Court derived this language from Michelman. See Michelman, supra note 4. Frustration of economic expectations is arguably a necessary but not a sufficient condition of finding a taking at the balancing stage of the analysis. Other factors are relevant to the question of whether “justice and fairness” require that economic injuries caused by public action be compensated by the government.” Penn Central, 428 U.S. at 124.
148 See Johnson, Compensation For Invalid Land-Use Regulations, 15 GA. L. REV. 559 (1981). Professor Johnson argues that although people who acquire land by inheritance or gift have no “investment-backed” expectations they may nonetheless have expectations which are as worthy of protection as those who have invested. Id. at 569.
149 Penn Central, 438 U.S. at 124.
principle, be found to have occurred. In this case, government may either validate the regulation by payment of compensation or rescind the regulation.\textsuperscript{151} Provided that courts correctly identify and apply the appropriate relevant factors, there is no reason why the balancing test of \textit{Penn Central} cannot be applied in a principled way. Balancing tests, while inherently less predictable than resolution of cases by application of formal rules, are not, by that token, unprincipled.\textsuperscript{162}

The question whether government can be found liable for temporary regulatory takings has been of recent interest. If a regulation survives examination until the balancing stage of the analysis, whether a temporary taking has occurred should turn again on the balance.

As \textit{Loretto} teaches, a physical occupation of private property by government is a compensable taking because it destroys the right to exclude, and probably destroys as well the rights to use and dispose.\textsuperscript{153} Even a temporary physical occupation should be deemed a taking.\textsuperscript{154} The Court in \textit{First English Evangelical Lutheran Church v. Los Angeles}\textsuperscript{166} assumed, by analogy to physical occupation, that a regulation which would take property if permitted to remain in effect permanently takes property even if in effect only temporarily.\textsuperscript{156} If the taking were of the physical occupation

\begin{footnotesize}
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\item See supra note 25 and accompanying text.
\item But see Symposium, supra note 15, at 1589-99 (examination of coherent approach to takings issue often pits rules against balancing).
\item See supra notes 104-24 and accompanying text.
\item See First English Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304, 318 (1987). Although \textit{Loretto} involved a permanent, physical occupation, surely the \textit{First English Church} is right that the government cannot "untake" the property simply by moving out. \textit{Id}. The damage to the owner's property rights has been done. Regulatory takings are different. See \textit{Penn Central}, 483 U.S. at 124. "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." \textit{Id}. (citation omitted).
\item 482 U.S. 304 (1987).
\item Id. at 2388. After citation to a series of physical occupation cases, the Court concludes that "'temporary' takings which ... deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." \textit{Id}. Justice Stevens, dissenting, disputed the Court's reliance on the analogy: "Just because a plaintiff can prove that a land-use restriction would constitute a taking if allowed to remain in effect permanently does not mean that he or she can also prove that its temporary application rose to the level of a constitutional taking." \textit{Id} at 2396 (Stevens, J., dissenting). Justice Stevens surely has the better argument. The Court's presumption stems from the confusion between the liability and remedy stages of the analysis. A landowner subject to a permanent regulation is entitled to a remedy if the regulation takes his prop-
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kind, this proposition would be unexceptional—a physical occupation destroys at least the right to exclude, whether permanent or not. However, the question whether a taking has occurred when an invalid regulation has been only temporarily in effect is very different from the question whether a taking would occur were the regulation to remain in effect indefinitely.\footnote{Even if the Court concludes that the regulation would effect a taking if permitted to remain in force—in which case the Court may invalidate the regulation or require the government to pay compensation should it wish to keep the regulation in effect—its affirmative answer to that question has little bearing on the question of whether a temporary taking has occurred.} Arguably, a temporary taking should be found only if the government regulation destroyed, albeit temporarily, the rights to exclude, use \textit{and} dispose. Such a taking, once committed, cannot be undone by subsequent government conduct.

Furthermore, invalidation of the regulation affects the balance. In other words, to determine whether a temporary taking has occurred, the court should conduct anew the balancing of competing interests. Even if a landowner's property was rendered worthless for a short period of time, a taking may not have occurred if invalidation of the regulation would restore the owner's investment-backed expectations.

Restoration of an owner's economic expectations renders the private harm, in most circumstances, \textit{de minimis}, thereby tipping the balance back in favor of the government. In this respect, a temporary reduction in the value of property, even to zero, does not necessarily constitute a taking, even though a permanent reduction of such magnitude would classify as a taking.

\textbf{B. Distinguishing Liability from Remedy}

It has been suggested that much of the confusion in takings law is caused by a failure to distinguish between the liability and remedy phases of the analysis.\footnote{See supra text accompanying note 34.} The confusion between these phases arises because it seems counterintuitive to hold the government liable for a \textit{de minimis} taking, such as the intrusion in \textit{Loretto}, while not holding the government liable for a significant diminution in value, such as that caused by the refusal to permit development in \textit{Penn Central}. Under the clear theory of liability...
offered here, it should be evident that the State of New York was appropriately found liable for a taking in *Loretto* because it had authorized a permanent, physical occupation and so had destroyed the right to exclude. Damages, nonetheless, were minimal.\(^{159}\) Perhaps less evidently, because the case was resolved at the balancing stage of the analysis, the City of New York, having determined that the terminal was a precious landmark, was appropriately found not liable in *Penn Central* since the terminal’s owners retained property of considerable value. In other words, except in the special, limiting case where loss of value is total,\(^{160}\) the question of liability is not driven by the degree of harm suffered by a landowner subject to government regulation. Indeed, the degree of harm is not even relevant until the balancing stage of the analysis.

II. THE REMEDY PHASE

Some observations on the question of remedy follow from the preceding analysis of takings cases. If a government regulation is determined to be substantially related to a legitimate government purpose, is found not permanently to destroy an essential property right, and is found to serve public interests weightier than any private harm it occasions, then it is valid under the foregoing analysis. Otherwise, two distinct determinations of invalidity are possible: simple invalidity, and invalidity absent compensation.

When a government regulation is declared invalid at the “due process” stage of the inquiry (Q1 or Q2), an injured landowner should be able to recover consequential damages, usually under 42 U.S.C. section 1983.\(^{161}\) Since a regulation which violates due process *ipso facto* serves no legitimate public purpose, it falls outside the public use limitation of the just compensation clause. Accord-

\(^{159}\) See *Loretto v. Group W. Cable*, 135 App. Div. 2d 444, 446, 522 N.Y.S.2d 543, 545 (1st Dep’t 1987), cert. denied, 109 S. Ct. 78 (1988). Rejecting *Loretto*’s application for attorneys’ fees, the Court noted that her success in establishing that the statute effected a taking “is of purely academic interest since, as a practical matter, there is little reason to believe that landlords will receive any greater amount in what is now denominated ‘just compensation’ than they would have previously received in what was then termed ‘reasonable compensation.’” *Id.* at 448, 522 N.Y.S.2d at 546. “Reasonable compensation,” under the statute, would in most cases be $1.00. *Id.*

\(^{160}\) See supra notes 118-21 and accompanying text.

\(^{161}\) 42 U.S.C. § 1983 (1982). Whether recovery is prohibited by the eleventh amendment is a question beyond the scope of this paper. Section 1983 states in pertinent part “Every Person, who, under color of any statute . . . subjects . . . any citizen . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured.”
ingly, government may not validate its arbitrary action by paying for it. Indeed, arbitrary exercise of the eminent domain power is as much a violation of due process as arbitrary exercise of the police power.\(^{162}\)

On the other hand, should the regulation be declared invalid absent compensation at the "takings" stage of the inquiry (Q3 or Q4), the aggrieved landowner, in the event the government wishes to persist in its regulation, should recover just compensation. Indeed, after *First English*, the aggrieved landowner can probably recover some compensation even if the government does not wish to persist in its taking.

The two measures of recovery, damages for deprivation of property in violation of due process, and just compensation for a taking of private property for public use, are not identical. Consequential damages stemming from a due process violation may include loss of profit, loss of potential sales, etc. Under a theory of just compensation, however, the government must pay the fair market value of the property. In *Nollan*, the government had, by its conduct, effectively condemned an easement across the Nollans' property. While the purpose of acquiring the easement was legitimate, and hence fell within the public use limitation of the just compensation clause, the acquisition of the easement destroyed the right to exclude by requiring the Nollans to permit permanent public access across their property.\(^{163}\) Accordingly, while the California Coastal Commission was permitted to acquire the easement in pursuit of its legitimate purposes, it was also required to pay for it.\(^{164}\)

**CONCLUSION**

Three factors contribute to the apparent intractability of the "takings question:"

1. the failure to distinguish between deprivations of property without due process and takings of property without just compensation;
2. the failure to distinguish between questions of liability and questions of remedy; and

\(^{162}\) See supra notes 23 and 39 and accompanying text.

\(^{163}\) See supra notes 112-13 and accompanying text.

\(^{164}\) This statement of the *Nollan* holding follows the analysis developed in this article, rather than the less clear analysis of the Court.
(3) the insistence on applying the *Penn Central* balancing test in cases which can better be resolved by application of formal rules.

Lack of clarity about the distinction between deprivations and takings and the distinction between the liability and the remedy stages of the analysis has led courts to despair of ever finding formal rules that are helpful in resolving takings cases. As the foregoing analysis demonstrates, however, with these distinctions clearly in mind, the takings question is not so inscrutable as it first appears.

Takings law, properly understood, involves both formal rules and balancing. The formal rules, although each has its own "core of certainty" and "penumbra of doubt," serve to solve many deprivation/takings cases. Application of a balancing test is required only after the formal rules have failed to dispose of the case. There are far fewer cases in which courts need to resort to an essentially ad hoc factual inquiry than at first appears. Furthermore, it is possible to conduct such an inquiry in a principled and predictable way, as relevant factors are identified and weighed in the balance from one case to the next.

The law of takings can therefore be understood in a principled way, and its challenge to the view that the legal system is principled is accordingly met.