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INTRODUCTION

"Substantive due process" is the common name for the principle of federal constitutional law by which courts claim the right to examine legislation for its content and to invalidate that legislation if the content is deemed on some basis to be unsatisfactory.[1] The proclivity of courts to review legislation based on content first emerged in the Nineteenth Century, when the United States Su-

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1. Note that there are other branches of federal constitutional substantive due process law. One is the so-called incorporation theory, by which protections of the Bill of Rights are made applicable to states. *See, e.g.*, 16A Am. Jur. 2d Constitutional Law § 404; Palko v. Connecticut, 302 U.S. 319, 326 (1939). Another is its companion, the "reverse incorporation doctrine." *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (which applied the Equal Protection Clause to the federal government through the 5th Amendment Due Process Clause). Perhaps the best known of the branches of substantive due process law is the law of privacy, by which individual choices regarding personal relationships and reproductive rights are insulated from overreaching government regulation. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152–54 (1973); Lawrence v. Texas, 539 U.S. 558, 573–74 (2003). For a succinct summary of the branches of substantive due process law, see Justice White's dissent in *Moore v. City of East Cleveland*, 431 U.S. 494, 541 (1977). These alternative branches of substantive due process are beyond the scope of this Article.

preme Court handed down two major decisions.[2] The first of these was the famous case of *Marbury v. Madison*, in which the Court proclaimed the judicial power to review legislation for its constitutionality.[3] The second was the famous (and infamous) decision in *Dred Scott v. Sandford*, which declared the Missouri Compromise to be unconstitutional.[4]

The primary provisions of the Federal Constitution relied upon to authorize this judicial practice have been the Due Process Clauses of the Fifth and Fourteenth Amendments, added to the Constitution in 1791 and 1868 respectively.[5] The text of these provisions prohibits the federal government (Fifth Amendment) and state governments (Fourteenth Amendment) from depriving persons "of life, liberty, or property without due process of law."[6] The concluding five words of these passages—"without due process of law"—suggests the Clauses were intended to provide process rights only. So read, the Clauses would not serve to invalidate governmental deprivations of life, liberty or property so long as those deprivations were accomplished *with* due process of law. But the Supreme Court has declined to treat the Clauses as if they were purely procedural restraints, a declination that has engendered a good deal of controversy.[7] The Court, rather, has viewed the Clauses as ensuring "the guarantees of the basic social compact,"

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2. This historical summation intentionally passes over the very early role played by the *ex post facto* clause and the bill of attainder clause. These two provisions operated to protect property before the Due Process Clause rose to prominence. *See generally* Robert L. Hale, *The Supreme Court and the Contract Clause: II*, 57 HARV. L. REV. 512, 514 (1944). Similarly, this discussion accepts but does not critique the early judicial practice of relying on natural law theories to justify judicial review of legislation for its content. *See, e.g.*, Bowditch v. City of Boston, 101 U.S. 16 (1879). With some exceptions, *see, e.g.*, Sandin v. Connor, 515 U.S. 472, 489 (1995) (Ginsburg, J., dissenting, joined by Stevens, J.), reliance on natural law is no longer conventional judicial practice.

3. 5 U.S. 137 (1803).

4. 60 U.S. 393 (1856). In *Dred Scott*, the Court found a 5th Amendment right to own slaves as "property," even when specific states refused to define "property" to include slaves. Thus the Court accorded the Clause a substantive content. In the view of some, *Dred Scott* is given too much credit as a progenitor of substantive due process theory. *See, e.g.*, DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 4 (1978).

5. Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 90 (1948) (Rutledge, J., dissenting). Hence, the term "substantive *due process*." *Id.* This term, apt as it is, did not come into use until 1948. *Id.*

6. U.S. CONST. amend. V.; U.S. CONST. amend. XIV, § 1.

7. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980) ("We apparently need periodic reminding that substantive due process is a contradiction in terms—sort of like 'green pastel redness.'"). *See also,* Ellis v. Hamilton, 669 F.2d 510, 512 (7th Cir. 1982) (referring to substantive due process as a "ubiqui-

and thereby has been willing to use the Clauses to invalidate arbitrary governmental actions, even if they are procedurally unobjectionable.[8]

Substantive due process theory, despite some fits and starts,[9] gained its initial traction in the Nineteenth Century. As early as 1887, the Supreme Court directly engaged the question of whether a statute adequately pursued its announced purposes, ultimately concluding that the legislation under its review was valid.[10] Not long thereafter, in 1894, the Court proclaimed its broad authority to examine state statutes on content grounds.[11] And, in 1905, the Court upheld Massachusetts' compulsory vaccination program because it bore a reasonable and substantial relationship to the protection of public health.[12]

The apex of this trend was the Supreme Court's decision in 1905 in *Lochner v. New York*.[13] In *Lochner*, the Court invalidated

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tous oxymoron"); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 31 (1990) (calling substantive due process a "momentous sham").

8. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 436 (7th ed. 2004). The Court's willingness to come to this view may have been influenced by history. The Due Process Clauses are widely viewed as offspring of the Magna Carta, Chapter 39 of which provides: "No free man shall be taken, imprisoned, desseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by lawful judgment of his peers and by the law of the land." A. E. DICK HOWARD, MAGNA CARTA TEXT AND COMMENTARY 43 (1964). This provision was a "guarantee . . . [of] freedom from arbitrary acts by . . . [the] monarch." *Id.* at 23.

9. As late as 1872, in the famous *Slaughter-House Cases*, the Court characterized the Due Process Clause as a purely procedural provision. The Slaughter-House Cases, 83 U.S. 36, 80–81 (1872). In that decision, the Court held the statute, having been enacted in a procedurally sufficient manner, to be valid despite its conferment of monopoly status upon a single company. *See also*, Munn v. Illinois, 94 U.S. 113, 134 (1877) ("For protection against abuses by legislatures the people must resort to the polls, not to the courts.").

10. *See* Mugler v. Kansas, 123 U.S. 623 (1887). In *Mugler*, the Court upheld, as a valid exercise of the police power, legislation that prohibited the sale and manufacture of liquors without a permit. *Id. Mugler* has been misread in succeeding years. The Supreme Court itself characterized *Mugler* as a case commenting on the issue of how much burden on property is tolerable for takings purposes under the Fifth Amendment. *See, e.g.*, United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) (describing *Mugler* as standing for the principle that "the mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough to establish the owner's right to compensation."). *Id.* at 168. In fact, *Mugler* is not a takings case because the governmental action reviewed therein did not occasion the deprivation of property rights, since the activity regulated in *Mugler* was nuisance behavior, and property rights do not authorize nuisance behavior.

11. *See* Lawton v. Steele, 152 U.S. 133, 137 (1894).

12. Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905).

13. 198 U.S. 45 (1905). *Lochner* has been described as "unprecedented in its time and unmatched since." Armendariz v. Penman, 75 F.3d 1311, 1318 (9th Cir. 1996).

legislation simply because it deemed the legislation to be unsound.[14] The Court then blithely supplanted its own judgment for that of the legislature.[15]

In the years since *Lochner*, substantive due process theory has remained an operative principle of judicial review. But the strident *Lochner* formulation of the doctrine has given way to an approach more deferential to legislatures.[16] In the current day, the judiciary does not invalidate legislation merely because it dislikes what a legislature has done. Courts, rather, hold their fire unless they view the legislation as failing to constitute a reasonable means to a legitimate end.[17]

This Article does not engage the enduring question of whether courts, as a general matter, should review legislation for its wisdom, policy, or efficiency. The Article, rather, will discuss how and why principles of substantive due process have spilled over the canals of the Due Process Clauses to become part and parcel of the law of the Contract Clause[18] and the Takings Clause.[19] These latter Clauses are in place to protect personal rights in contract and in property, respectively, from untoward governmental interference. In early times, the Court invoked these Clauses without regard to, or employment of, substantive due process theory. That is no longer the case. In the current day, whether legislation contravenes either of these constitutional guarantees—that is, whether a government action has objectionably impaired a right in contract or in property—has been made to depend in significant, if not controlling, measure on the worthiness of the government ac-

14. *Lochner*, 198 U.S. at 61 ("We do not believe in the soundness of the views which uphold this law.").

15. For an argument that *Lochner* was less nettlesome than is conventionally understood, see Michael J. Phillips, *How Many Times Was Lochner-Era Substantive Due Process Effective?*, 48 MERCER L. REV. 1049 (1997).

16. *See, e.g.*, Morehead v. New York *ex rel* Tipaldo, 298 U.S. 587, 611–13 (1936).

17. *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, (1987). This shift hearkened back to the teachings of an earlier case, *Lawton v. Steele*, 152 U.S. 133 (1894), *see supra* note 11 and accompanying text, that itself was given short shrift by *Lochner*. *Lawton* advised that "To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." 152 U.S. at 137. *See also*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (upholding a municipal zoning ordinance so long as it was not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.").

18. U.S. CONST. art. I, § 10.

19. U.S. CONST. amend. V.

tion precipitating the alleged offense. In the current day, the closer a statute is to being a reasonable means to a legitimate end, the better its chances to survive Contract or Takings Clause review. It is the underlying thesis of this Article that the migration of substantive due process theory beyond its original home—the Due Process Clauses themselves—has been unjustified.

Part One of the Article reviews the early jurisprudential evolutions of the Contract and Takings Clauses. Part Two discusses the subsequent insinuation of substantive due process doctrine into these areas of constitutional law. Part Three of the Article is a criticism of this doctrinal slippage. Since the Contract Clause has receded in importance over time, the critique in Part Three will concentrate on the impropriety of substantive due process theory in takings law. Part Four introduces and examines a recent Supreme Court decision entitled *Lingle v. Chevron U.S.A, Inc.*[20] In the author's view, *Lingle* represents the first real hope in many years that the law of the Takings Clause (and, to the extent relevant in the current day, the law of the Contract Clause) might repair to a more sensible place, that is, free of the influence of substantive due process.

I

A

The Contract Clause provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."[21] The Takings Clause provides that private property shall not "be taken for public use, without just compensation."[22]

In the early Nineteenth Century, it was the Contract Clause, not the Takings Clause, which played the predominant role in protecting property, rights in which often arise by the vehicle of contract. In place to protect individuals solely from state action,[23] the Contract Clause was useful precisely because it was states that were in the business of interfering with personal rights.[24]

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20. Lingle v. Chevron U.S.A, Inc., 544 U.S. 528 (2005).

21. U.S. CONST. art. I, §10.

22. U.S. CONST. amend. V.

23. *See* Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434 (1931).

24. The Takings Clause could have served the same purposes with respect to federal action, *see* Barron v. Baltimore, 7 U.S. 243, 250–51 (1833), but the federal government at the time was engaged in other endeavors.

In its earliest deliberations, the Supreme Court viewed the Contract Clause as broadly protective of private rights.[25] But it was not long before the Court realized that a Contract Clause of broad reach and protective effect would undercut the increasing need of government to promote the health, safety, welfare and morals of the public.[26] In the Court's view, on some occasions, for government to work, impairments of contracts were necessary. With a rigid non-impairment principle in place, a person seeking to obviate government regulation could do so simply by enshrining his or her proposed action in a contract. Accordingly, in order to fend off this constitutional equivalent of a "get out of jail free" card, the Court undertook to read the Contract Clause more narrowly. Thus, it held, for example, that a law that *revived* a contract otherwise void at common law did not "impair" that contract.[27] Later, it upheld legislation that *added* to contract obligations, on the theory that adding an obligation was distinct from *impairing* a contract.[28] In the same vein, it declined to invalidate legislation that *removed* contract obligations.[29] And it left intact laws that prevented contractual obligations from arising in the future, on the theory that only contractual rights already in existence could be impaired.[30]

This concerted retreat, it should be emphasized, was accomplished by the exclusive mechanism of revising the interpretation of the Contract Clause's specific terms. The Court simply assigned to those terms meanings more narrow in reach and effect than it had in its earlier decisions. At this point, the Court had not infused into the jurisprudence of the Contract Clause considerations

25. *See generally* Sturges v. Crowninshield, 17 U.S. 122, 208 (1819) (invalidating a bankruptcy statute that would have released a debtor from paying the entirety of a credit); Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 654 (1819) (holding that state-induced alterations to a corporate charter violated the Clause). *But see* Ogden v. Saunders, 25 U.S. 213, 270 (1827) (upholding a state bankruptcy law that facilitated the discharge of debts).

26. *See, e.g.*, Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. 420, 580 (1837).

27. Saterlee v. Matthewson, 27 U.S. 380 (1829); Ewell v. Doggs, 108 U.S. 143, 150 (1833).

28. *See, e.g.*, Bernheimer v. Converse, 206 U.S. 516 (1907). This reading was called into question in the early Twentieth Century. *See, e.g.*, Columbia Ry. Gas & Elec. Co. v. South Carolina, 261 U.S. 236, 251 (1923) ("[T]he impairment of a contract may consist in increasing its burdens as well as diminishing its efficiency.").

29. *See Sturges*, 17 U.S. at 208. This latter holding opened the door for enactment of divorce laws, statutes of limitations provisions and other such measures.

30. *See generally* Hale, *supra* note 2, at 518.

of the worthiness of the government actions implicated in the cases.

B

Contemporaneous with this retraction of Contract Clause protection, the Supreme Court was enlarging the protective reach of the Takings Clause. Actually, the Court could hardly have done otherwise. In its earliest decisions, the Court had refrained from invoking the Clause other than in situations involving the exercise of the power of eminent domain.[31] The idea at this time was that the Takings Clause came into play only when government attempted to directly and physically expropriate property against the wishes of the titleholder of that property.[32]

The Court, however, soon observed the many ways government can eliminate or damage rights in property other than by use of eminent domain authority. Consequently, the Court moved to make more available the protections of the Takings Clause. Using analogous reasoning, the Court concluded that if compensation was due when government took title by eminent domain, compensation ought to be due as well when government, using other powers, effectively produced the same harm.

Perhaps the first decision implementing this more expansive view of the Takings Clause was *United States v. Lynah*.[33] In

31. *See, e.g.*, N. Transp. Co. v. Chicago, 99 U.S. 635, 642 (1879) ("[A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision."). *See also* Stephen A. Seigel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1, 81 ("[C]onfinement of the Constitution's protection of property under that takings clause to a proscription of uncompensated seizures was a fundamental facet of nineteenth-century constitutional law.").

32. William Michael, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 711 (1985) (commenting, *inter alia*, on the intended application of the Clause as limited to "direct, physical takings of property by the federal government."). For a recent case affirming this original understanding see *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1057 (1992) (Blackmun, J. dissenting) (noting that the drafters of the Constitution believed the Takings Clause to proscribe only formal expropriations of private property, that it did not reach "regulations of property, whatever the effect."). *But see id.* at 1028 n.15 (Scalia, J., writing for the majority) (characterizing that original limitation as "entirely irrelevant"). Justice Scalia's approach to takings cases has been described as a divergence from his usual originalist methodology of constitutional interpretation. William W. Fisher III, *The Trouble with Lucas*, 45 STAN. L. REV. 1393, 1393–94 (1993).

33. 188 U.S. 445 (1903).

Lynah, the Court awarded compensation when the federal government flooded a parcel of private land.[34] The Court saw this government action as the functional equivalent of a seizure of fee simple title.[35] On the same theory, the Court in a later decision required compensation when government flooded only a portion of a parcel of land.[36] If a total flooding, as in *Lynah,* was tantamount to seizure of a fee interest in land, a partial flooding surely was tantamount to seizure of an easement interest in land.[37]

The Court extended the principle again in 1946, in *United States v. Causby*.[38] In that case, plaintiffs protested the federal government's practice of persistently flying bombers, transports, and fighter planes at low altitudes over their land.[39] The aircraft noise and vibration destroyed the landowners' chicken business and made impossible any normal residential use of the property.[40] In this circumstance, the Court again ordered compensation, even though plaintiffs had not been physically dispossessed. As the Court viewed it, making impossible the reasonable use of land was the practical equivalent of dispossessing the owners of that land. In the Court's language, the fly-overs created land use burdens "in the same category" as those compensated in the earlier cases.[41]

This judicial enlargement of the reach of the Takings Clause shared a common feature with the contemporaneous judicial retraction of the reach of the Contract Clause: in both contexts, the Court undertook its doctrinal evolutions by focusing on constitutional text. In the Contract Clause cases, as noted above, the Court examined when a "contract" had been "impaired." In these Takings Clause cases, it examined when "property" had been "taken." While the end products of these jurisprudential evolutions were disparate—the Contract Clause receded in significance while the Takings Clause grew—and while both evolutions may well have been influenced by policy-driven, external concerns, still the core of the judicial approach was the same. Constitutional

34. *Id.* at 459.

35. *Id.* at 470.

36. United States v. Cress, 243 U.S. 316, 328 (1917). Before *Cress*, the Court had distinguished between incidental damage and damage amounting to a total deprivation of use of land, allowing compensation only for the latter. *See, e.g.*, Richards v. Washington Terminal Co., 233 U.S. 546, 566–67 (1914).

37. *Cress*, 243 U.S. at 329.

38. 328 U.S. 256 (1946).

39. *Id.* at 258–59.

40. *Id.*

41. *Id.* at 265.

meaning was gleaned from clausal text. It was not determined by reference to the efficacy, wisdom, or overall credibility of the various government actions precipitating the controversies.[42]

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42. A comment on the famous 1922 decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), may be in order at this point, for some observers might view *Pennsylvania Coal* as the formal introduction of substantive due process theory into takings law. In the author's view, *Pennsylvania Coal* does not take on that status.

The famous *Pennsylvania Coal* decision presented to the Court the question whether the Kohler Act, a Pennsylvania statute that had stopped the Pennsylvania Coal Company from mining coal it owned, was constitutional. *Id.* at 394. The Company argued the statute deprived it of the entirety of the value of its subsurface property rights and was, for that reason, unconstitutional. Writing for the majority, Justice Oliver Wendell Holmes decided the matter by engaging a balancing exercise. He assessed the quantum of harm produced by the state legislation, which he deemed to be essentially one-hundred percent, and balanced that against the benefit the statute produced, which he determined to be minimal, in large part because the mechanism of simple notice could have produced the same benefits. *Id.* at 413–14. Based on that analysis, the Court declared the statute unconstitutional as applied to the plaintiff's land. *Id.* at 416.

Pennsylvania Coal has been characterized as a major takings case, the decision that moved Takings Clause jurisprudence into the universe of government regulation. Before the decision, government seizures of title or direct interferences with the use or value of land had qualified for Takings Clause review, *see* discussion *infra* Part II.B, but the Takings Clause had not been called upon in a case where the complained-of government action was mere regulation. If viewed as a takings case, *Pennsylvania Coal* can be read as having done just that, and as having incorporating substantive due process reasoning into Takings Clause jurisprudence in the process.

Pennsylvania Coal, however, is better read as a purely substantive due process case. Consider the major components of the decision. As an initial matter, Justice Holmes specifically accepted the litigants' invitation to decide the case by assessing "the general validity of the act." *Id.* at 414. Then he went on to lament the legal state of affairs if regulation could diminish property rights with abandon. Property rights still have some sum and substance, he argued, "or the contract and due process clauses are gone." *Id.* at 413. Indeed, "[G]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.* at 413. Still, he went on, the right of government to burden property rights does have limits, and "[o]ne fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act." *Id.* at 413.

What Justice Holmes was saying in *Pennsylvania Coal* was that any statute that too seriously burdens property rights can be found to be unconstitutional for that reason. As he phrased it: "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." *Id.* at 416. But—and here is the important point—the Kohler Act was not invalid because it violated the Takings Clause. It was invalid, rather, because it inadequately promoted public welfare, that is, it failed to meet the requirements of substantive due process. The enormous detriment the statute visited on private property justified the conclusion that the statute was *not* a reasonable means to a legitimate end. Of course, a statute of this configuration might fail for Takings Clause purposes as well, but that was not Justice Holmes's message in *Pennsylvania Coal*.

II

A

The Court abandoned this judicial approach with respect to the Contract Clause in 1934, when it inoculated the jurisprudence with a strong dose of substantive due process theory. The vehicle for this doctrinal reconstruction was *Home Building & Loan Ass'n v. Blaisdell*,[43] a 5-4 decision examining a state statute, the Minnesota Mortgage Moratorium Law, that was enacted to alleviate burdens on mortgagors during the years of the Depression.[44] In its Contract Clause discussion, the Court began by referencing past decisions, observing in this regard that the Contract Clause was less than absolute in its protective effect.[45] The Court's previous decisions, it acknowledged, had focused on what is a "contract"[46] and what constitutes "impairment" of a contract.[47] But then, instead of relying on those precedents to decide the case at bar, the Court in *Blaisdell* selected a new jurisprudential path seemingly designed to weaken the Contract Clause even more. As an initial matter, the Court declared that the State's sovereign interests should be actually "read into" contracts.[48] By this, the Court

Justice Brandeis's famous dissent in the same case ratified this reading of the majority opinion. As the dissent put it, the Kohler Act easily survived substantive due process review because it was a "restriction imposed to protect the public health, safety or morals from dangers threatened." *Id.* at 417 (Brandeis, J., dissenting). "[T]he state merely prevents the owner from making a use which interferes with paramount rights of the public." *Id.* at 417. Moreover, he added, "[C]oal in place is land, and the right of the owner to use his land is not absolute. He may not use it as to create a public nuisance, and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare." *Id.* at 416.

Importantly, both the Holmes majority opinion and the Brandeis dissent relied for their respective conclusions on appraisals of the reasonableness of the Kohler Act. Nowhere in *Pennsylvania Coal* did Justice Holmes or Justice Brandeis mention the Takings Clause.

43. 290 U.S. 398 (1934).

44. *Id.* at 415–16. The Court decided the case on Contract Clause, Due Process Clause and equal protection grounds.

45. *Id.* at 428.

46. *Id.* at 429–30.

47. *Id.* at 430–34.

48. *Id.* at 434–35 ("[T]he State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile,—a government which retains adequate authority to secure the peace and good order of society.") (citation omitted).

meant that private contracts by their very nature presuppose a continued authority in States to protect society.

This declaration—that contracts actually incorporate the state's interests in promoting the public welfare—was only an initial step. The Court went on to effectively eviscerate its previous case law. It did so with a concise but exceedingly remarkable statement: "the question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end."[49]

This breathtaking passage transformed Contract Clause into a constitutional vehicle for review of legislation based on its content. Why did the Court do this? Surely the dire economic conditions of the Depression years, and the perceived need for a vigorous governmental response to abate these conditions, influenced the judges in the direction of public power. So implied the *Blaisdell* Court itself, when it acknowledged its interest in "prevent[ing] the perversion of the clause through its use as an instrument to throttle the capacity of the States to protect . . . fundamental interests."[50] But still one must wonder. The Court had already significantly disabled the Contract Clause by its prior narrow readings of the Clause's terms.[51] Accordingly, when the Court spoke in *Blaisdell*, the Clause already lacked any real capacity to "throttle" states.

For better or worse, the *Blaisdell* revision of Contract Clause doctrine remains the lodestar of the Court's jurisprudence in this area. Two major judicial decisions of the 1970s are demonstrative. In *United States Trust Co. of New York v. New Jersey*, the Court reviewed a challenge to a New Jersey statute which by its terms

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49. *Id.* at 438. All of this provoked a vigorous dissent from Justice Sutherland, joined by his reliable three colleagues on the Court, Justices Butler, VanDevanter, and McReynolds. Justice Sutherland argued the state lacked power to save financially stressed mortgagors because the Contract Clause flatly prohibits any impairment of contracts. *Id.* at 453–54. In his view, while a state might frustrate a contract, by declaring its premises unlawful, it may not impair a contract otherwise lawful. *Id.* at 478.

> What the legislature has done is to pass a statute which does not have the effect of frustrating the contract by rendering its performance unlawful, but one which, at the election of one of the parties, postpones for a time the effective enforcement of the contractual obligation, notwithstanding the obligation, under the exact terms of the contract, remains lawful and possible of performance after the passage of the statute as it was before.

Id. at 478.

50. *Id.* at 444 (majority opinion).

51. *See* cases cited *supra* notes 26–30.

had repealed a covenant between the State of New Jersey, on the one hand, and the Port Authority of New York and New Jersey, on the other.[52] While the covenant had obligated the State to subsidize rail passenger transportation, the statute unilaterally released the State from this obligation.[53] In other words, the State had used its sovereign power to simply remove significant contract obligations it, the State, had earlier and willingly assumed. Relying on the Contract Clause, a plurality of four justices found the repealing legislation to be invalid.[54] The Court's reasoning: while conceding that "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty," still, in the majority's view, this particular contract was of financial significance only.[55] It did not implicate the State's sovereignty. The invalidation of the statute, therefore, "did not compromise . . . the State's . . . reserved powers."[56] Important for our purposes, the Court grounded its decision in substantive due process theory:

> [A] State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors. We can only sustain the repeal of the 1962 covenant *if that impairment was both reasonable and necessary to serve the admittedly important purposes claimed by the State.*"[57]

This repealer, the plurality determined, was neither reasonable nor necessary.[58]

A second decision that confirmed the ascendancy of substantive due process doctrine in Contract Clause cases was *Allied Structural Steel Co. v. Spannaus*.[59] Following *U.S. Trust* by a year, *Allied* reviewed another Minnesota statute, the Private Pension Benefits Protection Act ("PPBPA").[60] As applied to plaintiff Allied Structural Steel Company, the PPBPA resulted in the im-

52. U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1 (1977).

53. *Id.*

54. *Id.* at 32. The Justices were Blackmun, joined by Burger, Rehnquist and Stevens.

55. *Id.* at 23.

56. *Id.* at 25.

57. *Id.* at 29 (emphasis added).

58. *Id.* at 29–32.

59. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978).

60. *Id.* at 234.

position of a pension funding charge of about $185,000.[61] The company successfully contended this statutorily mandated assessment violated the Contract Clause because it impaired the company's pension contract with its workers.[62] While acknowledging the Contract Clause is not the "Draconian provision" its text would seem to indicate,[63] the Court in *Allied* found the statute's interference to be "severe" and retroactive, indeed, imposing a "completely unexpected liability" of "potentially disabling amounts."[64] The plaintiff, moreover, was being forced to comply *in toto* immediately. Significantly the whole arrangement was not *"necessary to meet an important general social problem."*[65]

U.S. Trust and *Allied* enshrine the central role that substantive due process theory currently plays in Contract Clause cases. In both of these decisions, the Court's gave significant weight to the matter of the character of the legislative enactments giving rise to the controversies. They did not give significant weight to the matter of "impairment" of "contract."

B

From the mid-1930s until the 1970s, during which time the Contract Clause underwent the above-discussed transmutation, Takings Clause jurisprudence was on a different trajectory. Substantive due process theory was having a much harder time insinuating itself into this arena of constitutional law. In fact, during these years, takings law and substantive due process law lived amicably, side by side, separate and distinct. A good example of that peaceful coexistence was the Supreme Court's 1962 decision in *Goldblatt v. Town of Hempstead*.[66] By all appearances a routine case, *Goldblatt* involved a legislative prohibition on sand and gravel mining.[67] The Court took care in *Goldblatt* to isolate its discussions of the disparate constitutional doctrines. First, addressing the takings question, the Court determined that the prohibition under examination caused no unconstitutional deprivation of private property for the reason that the prohibition did not reduce the value of the affected parcel.[68] Having completed

61. *Id.* at 239.
62. *Id.* at 240–50.
63. *Id.* at 240.
64. *Id.* at 247.
65. *Id.* (emphasis added).
66. 369 U.S. 590 (1962).
67. *Id.*
68. *Id.* at 594.

that analysis, the Court engaged the substantive due process question, whether the statute was an appropriate exercise of police power authority. At this juncture, it evaluated the statute's reasonableness, the menace it sought to rectify, the availability of "less drastic protective steps" and (in line with the teachings of *Pennsylvania Coal Co. v. Mahon*[69]), "the loss which appellants will suffer from the imposition of the ordinance."[70] Because there was no evidence tending to demonstrate the statute was unreasonable in design or operation, the Court declined to invalidate it.[71]

Goldblatt's bifurcated approach to these matters was not to endure, however, largely because of the profound influence of one of the giants of the Supreme Court, Associate Justice William J. Brennan, Jr. During his extensive tenure on the bench,[72] Justice Brennan harbored the resolute belief that property rights simply should not stand as an obstacle to the exercise of public power. He had revealed this strong jurisprudential predisposition, in fact, in the *U.S. Trust* decision,[73] and, even more significantly, in the *Allied* case. In his dissent in *Allied*, he explained why the Court should effectively write property rights protection out of the Constitution:

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69. 260 U.S. 393 (1922); *see supra* note 42 and accompanying text.

70. *Goldblatt*, 69 U.S. at 595.

71. *Id.* at 596.

72. Nominated for the Court by President Dwight Eisenhower, Justice Brennan served from October 16, 1956, until July 20, 1990, a total of 33 years, 9 months, and 4 days. Brennan Ctr. for Justice, N.Y. Univ. Sch. of Law, Celebrating Justice Brennan, http://www.brennancenter.org/pages/celebrating_justice_brennan (last visited March 27, 2008).

73. U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 13 (1977); *see also supra* notes 52–58 and accompanying text. In his vigorous dissent in *U.S. Trust Co.*, joined by Justices White and Marshall, he had contended the Contract Clause should *not* stand in the way of New Jersey's repeal of its covenant obligation to subsidize public transportation. Successive legislatures, he asserted, should be entirely free to modify the actions of previous legislatures as necessary to further the public welfare. *U.S. Trust Co. of N.Y.*, 431 U.S. at 46–47. Why?: "[A]ll private rights of property, even if acquired through contract with the State, are subordinated to reasonable exercises of the State's lawmaking powers in the areas of health, environmental protection, and transportation." *Id.* at 50 (citations omitted). The *U.S. Trust Co.* plurality, he intoned, was "creating a constitutional safe haven for property rights embodied in a contract." *Id.* at 33. This "new resolve to protect property owners," in Justice Brennan's view, was entirely inadvisable. *Id.* at 61. Interestingly, Justice Brennan contended the Supreme Court had already endorsed his broader reading of legislative power stating that "lawful exercises of a State's police powers stand paramount to private rights held under contract." *Id.* at 33. Thus, the plurality's approach "substantially distorts modern constitutional jurisprudence governing regulation of private economic interests." *Id.*

> The Contract Clause, of course, is but one of several clauses in the Constitution that protect existing economic values from governmental interference. The Fifth Amendment's command that "private property [shall not] be taken for public use, without just compensation" is such a clause. A second is the Due Process Clause, which during the heyday of substantive due process largely supplanted the Contract Clause in importance and operated as a potent limitation on government's ability to interfere with economic expectations. Decisions over the past 50 years have developed a *coherent, unified interpretation of all the constitutional provisions that may protect economic expectations and these decisions have recognized a broad latitude in States to effect even severe interference with existing economic values when reasonably necessary to promote the general welfare.* At the same time the prohibition of the Contract Clause, consistently with its wording and historic purposes, has been limited in application to state laws that diluted, with utter indifference to the legitimate interests of the beneficiary of a contract duty, the existing contract obligation.[74]

The above-quoted paragraph served to announce Justice Brennan's overarching view that (a) private rights in "existing economic values" should pose no bar to state initiatives on behalf of the public, so long as those initiatives are "reasonably necessary" and (b) Due Process, Contract, and Takings Clause doctrine were, in reality, a single body of doctrine.[75]

While Justice Brennan was never able to convince the Supreme Court to adopt his unitary view of federal constitutional property rights protection, his hard-hitting rhetoric has nonetheless borne fruit. This is especially so with respect to the Takings

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74. Allied Structural Steel Co. v. Spannaus. 438 U.S. 234, 259–60 (1978) (citations omitted) (emphasis added).

75. Notably, for the principle that the Contract Clause should not invalidate state legislation falling short of "diminish[ing] the efficacy of any contractual obligation," Justice Brennan cited *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), a due process/takings case. *See supra* notes 66–71 and accompanying text. In other parts of the opinion, he cited due process cases as authority. *See, e.g., Allied,* 438 U.S. 234 at 255 (citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) and Hadachek v. Sebastian, 239 U.S. 394 (1915)).

As a separate matter, Justice Brennan's dissent in *Allied* characterized the Minnesota statute under review as an attempt to avert the "frustration of expectation interests" that would otherwise fall upon unwary pensioners. *Id.* at 252. This remark displayed what has become another pillar in Justice Brennan's jurisprudence—the idea that expectation interests (as contrasted with conventional property rights) warrant protection. In this case, Justice Brennan did not find the statute's interference with expectation interests to be objectionable.

Clause, for it was Justice Brennan who, more than any other individual, invited substantive due process theory into the law of takings. He extended his warm welcome in 1978, in the landmark decision of *Penn Central Transportation Co. v. New York City*.[76]

Penn Central presented a controversy involving New York City's Landmark Preservation Law, which was enacted to preserve urban architecture of historic significance.[77] Because of the Law, the Penn Central Transportation Company had been denied permission to add an office building atop its Grand Central Terminal in Manhattan.[78] The City disallowed the add-on because it would have diminished Grand Central's "magnificent example of the French beaux-arts style."[79] The Company, for its part, argued that the ordinance worked a taking, but the Court of Appeals for the State of New York found no constitutional infirmity.[80] The United States Supreme Court, per Justice Brennan, affirmed.

Writing for a six-member majority,[81] Justice Brennan began with what might be politely described as an entirely questionable description of Supreme Court precedential authority on the Takings Clause. Past courts, he observed, "quite simply" had been "unable to develop a 'set formula' for determining when 'justice and fairness require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.'"[82] This comment

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76. Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). *Penn Central*, one should observe, was decided essentially contemporaneously with *Allied*. *Penn Central* was argued before the Court on April 17, 1978, and handed down on June 26, 1978; *Allied* was argued on April 25, 1978, and handed down on June 28, 1978.

77. *Penn Central Transp. Co.*, 438 U.S. at 108–09.

78. *Id.* at 116–17.

79. *Id.* at 115. The Commission stated:

> "[We have] no fixed rule against making additions to designated buildings—it all depends on how they are done . . . . But to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass. The 'addition' would be four times as high as the existing structure and would reduce the Landmark itself to the status of a curiosity."

Id. at 117–18.

80. *Id.* at 120.

81. Comprising the majority were Justices Brennan, Stewart, White, Marshall, Blackmun, and Powell. *Id.* at 106.

82. *Id.* at 124. (citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962) ("[T]here is no set formula to determine where regulation ends and taking begins.")). This is not to say that justice and fairness have been irrelevant in takings analysis. Justice and fairness, however those terms might be defined, have been part of takings

propounded the remarkable implication that pre-*Penn Central* takings law was nothing more than a ragbag of random decisions which, taken as a whole, could not qualify to be called a jurisprudence. Justice Brennan then proceeded to make express that which he had implied, by characterizing the body of pre-1978 takings decisions as nothing more than "essentially ad hoc, factual inquiries," falling upon "particular circumstances."[83]

This misdirected commentary neatly disassembled the entirety of preexisting Takings Clause doctrine. With a single stroke, Justice Brennan had freed himself from the burdens of two hundred years of *stare decisis*. He could then proceed to create a new law of takings, and he did so, by unveiling three factors which, as he saw it, had attained "particular significance" in federal takings jurisprudence up to that time.[84] The factors he identified were "economic impact," "interfere[nce] with investment-backed expectations," and "the character of the government action."[85] The precise meaning of each of these factors he left to future cases.

Applying these factors in the *Penn Central* litigation, Justice Brennan had no trouble finding the Landmark Law to be constitu-

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doctrine to the same extent they have been part of all doctrinal law. Indeed, the Court itself has linked takings law with the notion of fairness. *See, e.g.*, United States v. Dickinson, 331 U.S. 745, 748 (1947) ("[The] Fifth Amendment expresses a principle of fairness."). But justice and fairness have served as underlying goals of takings doctrine; they have not been, as *Penn Central* intimated, takings doctrine itself.

83. *Penn Central*, 438 U.S at 124. For a contrary view, *see* discussion *supra* Part I.B, demonstrating a consistent and principled evolution of Takings Clause doctrine over that span of time. The *Penn Central* Court cited two cases for this assertion. The first was *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958). *Central Eureka* was a challenge to a federal mine shutdown order instituted as part of the war effort in World War II. In an introductory passage, the case characterized "whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case." *Central Eureka Mining Co.*, 357 U.S. at 168. The Court found no taking "since the damage to the mine owners was incidental to the Government's lawful regulation of matters reasonably deemed essential to the war effort." *Id.* at 169. The second case cited by the Court was *United States v. Caltex, Inc.*, 344 U.S. 149 (1952). *Caltex*, also a wartime case, was a challenge on takings grounds to the United States' requisition and destruction of an oil depot on the Philippine Islands. The government had destroyed the site to deprive advancing Japanese forces of the value of the depot after their capture of the islands. In finding no right to compensation, the Court commented on the state of the law: "This Court has long recognized that in wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign. No rigid rules can be laid down to distinguish compensable losses from noncompensable losses. Each case must be judged on its own facts." *Caltex*, 344 U.S. at 155–56.

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

85. *Id.*

tional. He noted, first, that none of the participants in the litigation had contested the character of the government action.[86] Given the lack of comment by the parties, the Court assumed the character of the government action to be commendable.[87] With respect to the economic impact to the plaintiff caused by this prohibition on development, Justice Brennan discerned no injury beyond limits deemed allowable in past cases.[88] Last, he concluded the Landmark Law did not interfere in any significant way with the Railroad's investment-backed expectations because the Law did not disturb the present use of the Grand Central Terminal as a railway station.[89] Taken as a group, therefore, all three factors urged a finding of constitutionality.

Penn Central transformed takings doctrine in at least two distinct and significant ways. First (and not examined in the text of this Article) was its identification of investment-backed expectations ("IBEs") as a primary criterion in takings cases.[90] More sig-

86. *Id.* at 129. This absence of commentary might be seen as not unexpected, since the parties to the case lacked prior notice of both the existence and centrality of this newly announced factor.

87. *Id.* at 129.

88. *Id.* at 136. Had the Court viewed "air rights" as a distinct interest in property, it would likely have concluded the economic impact of the application of the Landmark Law to Penn Central's terminal to be unconstitutionally severe. But the Court chose to view "property" as a unitary commodity. Its focus was on rights "*in the parcel as a whole*." *Id.* at 130–31 (emphasis added). Thus, it was "untenable" that a loss of "air rights" would be sufficient to trigger compensation. *Id.* at 130.

The Court has held to this approach in succeeding years. *See, e.g.*, Andrus v. Allard, 444 U.S. 51, 65–66 (1979) ("[A]t least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."). *But see* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (the deprivation of a "single strand" in the bundle, the right to exclude, causes a taking regardless of other considerations).

89. *Penn Central*, 438 U.S. at 136. The Landmark Law examined in *Penn Central* had taken away "air rights" above the Grand Central Terminal. These air rights were, in the Court's view, non-IBE rights. *Id.*

90. The IBE factor has been influential since its introduction. In *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), for example, the Court reasoned the federal government's release of commercial trade secrets could rise to the level of a taking, if those trade secrets were the subject of "reasonable investment-backed expectations." Such trade secrets, the Court found, harbor the major indicia of "property" and, therefore, warrant protection under the Takings Clause. *Id.* at 1002–03. In *Concrete Pipe & Products of California v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993), the Court refused to find a taking when a statutory provision required increases in employer contributions to employee pension plans because the employers "could have had no reasonable expectation that [they] would not be faced with liability." *Id.* at 646. *See also* Blue Diamond Coal Co. v. Shalala, 79 F.3d. 516, 524 (6th Cir. 1995); Creppel v. United States, 41 F.3d. 627, 632 (Fed. Cir. 1994) ("[O]ne who buys with knowledge of a restraint assumes the risk of economic loss."). *But see* Eastern Enterprises v. Apfel, 524 U.S. 498, 538 (1998) (holding a retroactive

nificant, for the purposes of this Article, was the case's infusion of substantive due process into the law of takings. This was done in two ways. The first was via the identification of "justice and fairness" as the goal of takings law. This new goal in practice constitutes an invitation to judges to consider matters beyond economic harm to property rights as they deliberate takings disputes. The second vehicle for the insinuation of substantive due process into takings law was the designation of the new "character of the government action" factor.[91] The character factor requires courts in

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law that increased liability of employers for payments of medical benefits deprived persons of legitimate expectations and was, therefore, a taking).

While in these cases the IBE factor doomed the takings claims, in other cases it can play a minor role or no role at all. In *Palazollo v. Rhode Island*, 533 U.S. 606 (2001), the property owner's knowledge of pre-existing regulations at the time of purchase of real property was thought to defeat his claim that those regulations produced a taking. *Id.* at 626. After all, if he had purchased a parcel of land after a regulation that burdened the parcel's use was on the books, he should have had every expectation that he would hold the property subject to that regulatory burden. Accordingly, the state court in *Palazollo* held the claimant's "postregulation acquisition of title was fatal" to his claim. *Id.* Yet the Court refused to give the State's argument any credence whatsoever, effectively rendering the IBE factor irrelevant to the decision. *Id.* at 627.

> [W]ere we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Id. at 627.

91. *Penn Central*, 438 U.S. at 124–28. Some commentators have concluded the character criterion was foreshadowed in other cases. *See, e.g.*, Craig A. Peterson, *Land Use Regulatory 'Takings' Revisited: The New Supreme Court Approaches*, 39 HASTINGS L.J, 335, 348 (1988) (suggesting that *Penn Central* "amplified the meaning" of a necessarily preexisting character criterion, but not specifying the initial identification of the factor). *See also*, Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1084 (1992). Rubenfeld suggested the decision in *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1872), originated the factor by calling for a *per se* rule for finding a taking in every case of physical occupation. But the judicial focus in *Pumpelly* was on the issue of harm to rights in property: the reason the *Pumpelly* Court declared the physical occupation (flooding) to be a taking was because it harmed the titleholder. *Pumpelly*, 80 U.S. at 181. The case never said nor intimated that all physical occupations, even those causing no injury or only *de minimis* injury, should automatically be declared to be takings.

In support of his character factor, Justice Brennan cited a single sentence from *United States v. Causby*, 328 U.S. 256 (1946). The sentence in *Causby* was the following: "[I]t is the character of the occupation, not the amount of damage resulting from it, so long as the damage is substantial, that determines whether it is a taking." *Causby*, 328 U.S. at 266. *Causby*, however, fails to support Justice Brennan's new factor. In *Causby*, the Court's concern was that the government's flyovers of plaintiff's property caused harms much more than "incidental." *Id.* at 265. For that reason, stated the Court, those flyovers were "in the same category as invasion of the sur-

takings cases to evaluate the worthiness of any statutory enactment purportedly occasioning a harm to rights in property. A statute deemed more worthy becomes commensurately more difficult to overturn,[92] while a statute deemed less worthy becomes less difficult to overturn.[93]

This "marriage" of substantive due process and takings law has produced real-world consequences. In *Andrus v. Allard*,[94] for example, the Court refused to find a taking despite a virtually complete destruction of the plaintiff's affected property rights.[95] It

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face." *Id.* at 265. When the *Causby* Court stated that it is the "character of the occupation" which "determines whether it is a taking," therefore, it was confirming that, in the law of takings, it is harm to property that matters. *Causby,* accordingly, stands for precisely the opposite principle for which Justice Brennan cited it. The *Causby* Court itself cited *United States v. Cress*, 243 U.S. 316 (1917). *Causby,* 328 U.S. at 266. *Cress* was a partial flooding case in which the Court had found a taking. *Cress* used the same "character of the occupation" language, and, like *Causby*, the focus in *Cress* was on harm. *Cress*, 243 U.S. at 328. The *Cress* Court found no constitutional distinction between total and partial flooding cases because "it is the character of the occupation, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." *Id.* The *Cress* Court went on to clarify:

> As the court said, speaking by Mr. Justice Brewer, in United States v. Lynah, . . . 'Where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the 5th Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession, and the fee; and when the amount awarded as compensation is paid, the title, the fee, with whatever rights may attach thereto,—in this case those at least which belong to a riparian proprietor,—pass to the government and it becomes henceforth the full owner.' There is no difference of kind, but only of degree, between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other. If any substantial enjoyment of the land still remains to the owner, it may be treated as a partial instead of a total devesting of his property in the land.

Id.

92. Justice Brennan identified tax laws, zoning laws, and (curiously) laws interfering with interests insufficient to qualify as "property," as among this more worthy group. *Penn Central,* 438 U.S. at 124–25. Governmental actions which "promote the health, safety, morals or general welfare" were placed in this group as well. *Id.* at 125.

93. *See Penn Central*, 438 U.S. 104 at 124 ("[A] taking may more readily be found when the interference with property can be characterized as a physical occupation by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.").

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

95. *Id.* at 65.

did so because it viewed the result to be just and fair.[96] Another example is the decision in *Keystone Bituminous Coal Ass'n v. DeBenedictus*.[97] In *Keystone*, the Court examined Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act,[98] Section 4 of which prohibited mining that caused subsidence damage to three categories of structures.[99] Finding no taking, the Court in *Keystone* wrote: "the character of the government action involved here leans heavily against a taking; the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare."[100]

The character factor and the "just and fair" goal have also spurred the birth of two entirely new takings tests.[101] The first of these is the *per se* "permanent physical occupation" test.[102] Declared into being in *Loretto v. Teleprompter Manhattan CATC Corp.*,[103] this test invalidates as unconstitutional any statute that empowers government to permanently situate a physical object on private property.[104] The other new takings test given life by *Penn Central,* announced in *Agins v. Tiburon*,[105] declared any law that fails to "substantially advance legitimate state interests" to be in violation of the Takings Clause.[106] The permanent physical occupation test authorizes courts to find unconstitutional takings even when the harm to property is *de minimis*,[107] while the "substan-

96. *Id.*

97. 480 U.S. 470 (1987).

98. *Id.* at 474.

99. *Id.* at 476–77. The categories were certain public and noncommercial buildings, private dwellings, and cemeteries. *Id.*

100. *Id.* at 485. The Court found the statute in *Keystone* to be worthier than the Kohler Act of *Pennsylvania Coal*, in that it served "important public interests" and, unlike the Kohler Act, manifested "none of the indicia of a statute enacted solely for the benefit of private parties." *Id.* at 485–86.

101. Beyond the scope of this discussion is yet a third new takings test, announced in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, the Court declared that any government action producing a total loss of property value must fail, *per se*, as an unconstitutional taking. This test is a logical outgrowth of *Penn Central*'s economic impact factor.

102. A *per se* test is one that can invalidate a statute irrespective of any other considerations.

103. 458 U.S. 419 (1982).

104. *Id.* at 432. In *Loretto*, the object installed on private property was equipment necessary for the cable television industry to provide services to urban residents. *Id.* at 421.

105. 447 U.S. 255 (1980).

106. *Id.* at 260.

107. The harm to property rights implicated in *Loretto* was valued at a single dollar. 458 U.S. at 423.

tially advances" test allows invalidations even in cases entirely uninvolved with abrogations of property rights![108]

III

Thus, the Supreme Court has incorporated substantive due process theory into its Contract and Takings Clause cases. It should not have done so.

A fundamental argument against this doctrinal adulteration finds its source in constitutional text. The Contract Clause provides that "[N]o State shall . . . pass any . . . Law impairing the Obligation of Contract."[109] The Takings Clause of the Fifth Amendment provides that property shall "not be taken for public use without just compensation."[110] The text of each of these provisions does nothing more than isolate a constitutional value to be protected—contracts are not to be impaired and property is not to be taken. The Clauses, quite simply, do not provide for otherwise unconstitutional impairments and takings to miraculously become constitutional merely because the government has some perceived good reason for what it does. If the Framers meant for these Clauses to authorize reasonable government behavior rather than restrain such behavior when it compromises designated protected values, they would have said so.[111]

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108. A corollary to the "substantially advances" test can be found in *Yee v. City of Escondido*, 503 U.S. 519 (1992). *Yee* found a taking when an apparently fully efficacious statute treated similarly situated persons dissimilarly: "[W]here the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." *Id.* at 522–23.

109. U.S. CONST. art. I, § 10, cl. 1.

110. U.S. CONST. amend. V. Notably, the early draft of the Takings Clause was in line with the adopted version. The early draft stated that no person shall be "obliged to relinquish his property, where it may be necessary for public use, without a just compensation." 1 ANNALS OF CONG. 452 (Joseph Gales ed., 1834), *quoted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 361 (Neil H. Cogan, ed. 1997) (setting forth a draft of the provision, proposed by James Madison in the House of Representatives on June 8, 1789).

111. The drafters of the Constitution knew how to write. For an example of a constitutional provision designed to authorize government behavior if reasonable, see the Fourth Amendment, which protects "[t]he right of the people to be secure . . . against *unreasonable* searches and seizures." U.S. CONST. amend. IV (emphasis added). Examples of constitutional provisions establishing an inviolable constitutional value or right abound. *See, e.g.*, U.S. CONST. amend. I ("Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ."); U.S. CONST. amend. VI (providing that "in all

With respect to the Takings Clause, an additional consideration militating to this conclusion is its original purpose. The Takings Clause is located in the Bill of Rights. The whole purpose of the Bill of Rights was to make clear that persons would enjoy rights exercisable against the government, that certain individual rights were islands of inviolability beyond governmental interference.[112] With respect to the Takings Clause, the idea was that property might only be confiscated in situations of the most press-

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criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."); U.S. CONST. amend. VII (providing that "in Suits at common law, the right of trial by jury shall be preserved. . . ."); U.S. CONST. amend. II (stipulating "the right of the people to keep and bear Arms, shall not be infringed. . . ."); U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."); U.S. CONST. amend. III (providing that "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

112. As an historical matter, the initial omission of a Bill of Rights by the Framers of the Constitution was not an unthinking one. In fact, Alexander Hamilton, a primary drafter of the Constitution, had actively opposed the addition of such a charter to the document, on the ground that the built-in structural restraints were sufficient to protect individuals from encroaching government. *See, e.g.*, THE FEDERALIST No. 84, 556 (Alexander Hamilton) The rights he thought were already protected were the rights of persons against impeachment to suffer no direct penalty other than loss of rights to public office, U.S. CONST. art. 1, § 3, cl. 7, the protection of *habeas corpus*, U.S. CONST. art. 1, § 9, cl. 2, the restrictions on bills of attainder, U.S. CONST. art. 1, § 3, cl. 3, the restriction on titles of nobility, U.S. CONST. art. 1, § 9, cl. 7, the right to trial by jury, U.S. CONST. art. 3, § 2, cl. 3, and the right to be free of conviction for treason save the testimony of two eyewitnesses, or confession in open court, U.S. CONST. art.3. § 3. All of these protections, with the possible exception of the provision regarding titles of nobility, he stipulated, were "immunities" designed to insulate persons from government intrusion. THE FEDERALIST No. 84, *supra*, at 561. Hamilton argued that some of these rights were greater than those provided in state constitutions. *Id.* at 557.

But, as Edward Mead Earle's 1937 Introduction to a publication of the Federalist Papers testifies, Hamilton's view was not uniformly accepted:

> It speedily became apparent during the debates on ratification that the Constitution was deficient in at least one important respect. Anglo-American constitutional experience has wisely emphasized the importance of individual rights as against the omnipotent power of the state. The State constitutions adopted during the Revolution and subsequently had incorporated bills of rights, specifying those immunities of the citizen which might *in no wise be invaded by his government*. Despite some limitations on governmental power, the Constitution drafted at Philadelphia included no bill of rights, and on no score was it so generally condemned.

Edward Mead Earle, *Introduction* to ALEXANDER HAMILTON, JOHN JAY & JAMES MADISON, THE FEDERALIST xxi (Modern College Library ed., Random House, Inc.) (n.d.) (emphasis added).

Madison himself is on record in support of the protection of property for its own sake. *See, e.g.*, Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. REV. 531, 539 (Summer 1995). The Takings Clause of the Bill of Rights, moreover, was

ing urgency.[113] Accordingly, both the text and history of the Takings and Contract Clauses militate to the conclusion that an interbreeding with substantive due process is unwarranted.[114]

Even if there exists some plausible argument that substantive due process theory has a legitimate home in the Contract and Takings Clauses, the inexorable result is an unworkable doctrinal configuration. First is the problem of complexity. Simply put, the addition of substantive due process theory in these constitutional arenas complicates the judicial task by obliging judges to evaluate the worthiness of legislation—an onerous task in and of itself—and additionally to balance that worthiness with and against the

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added to assure rights in property would serve as a bulwark against encroaching government.

113. The Federal Farmer, No. 6, Dec. 25, 1787, *cited in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 375 (Neil H. Cogan, ed. 1997). *See also* James Madison, *"Property" in* 14 THE PAPERS OF JAMES MADISON 266 (William T. Hutchinson et al. eds., 1977) ("Government is instituted to protect property of every sort. . . . This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.").

This analysis, it should be emphasized, is premised upon an originalist approach to constitutional interpretation, one which maintains the constitution has a fixed meaning that does not change over time. For a particularly effective defense of the originalist approach, see ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990). In Judge Bork's words, "The Constitution may be changed by amendment. . . . It is a necessary implication . . . that neither statute nor Constitution should be changed by judges." *Id.* at 143. Presumably, neither should they be changed by time. Judge Bork contended the Fifth Amendment was meant to apply in any circumstance where government action occasioned uncompensated harm to persons in their capacities as titleholders of property. By his analysis, even if the First Congress had a specific problem or problems in mind at the time of adoption (i.e. the seizure of title to private property by government), its adoption of more general language legitimates the use of the Clause in contexts unforeseen by the Framers. *Id.* at 143–60. Thus, "it is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know. The world changes in which unchanging values find their application." *Id.* at 167–68.

114. While the historical record on the Takings Clause is sparse, it should be noted that some commentators read the history differently. Professor Joseph Sax, for one, in an article written fourteen years before the *Penn Central* decision, asserted the Takings Clause was inserted to require reasonableness in government action rather than to create an island of inviolability for persons. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L. J. 36 (1964). Professor Sax disagreed that the Clause was installed to assure "the substantial maintenance of economic values against governmental diminution." *Id.* at 54. That idea, he contended, is one of the "abiding myths in American constitutional law." *Id.* at 54. In Sax's analysis, the takings principle sprung from the medieval Christian tradition of "just price" and that concept, in turn, necessarily implicates considerations of social justice, *id.* at 55, since the early concern centered on the "imposition of loss by unjust means." *Id.* at 57. The historical evidence to support this view, Professor Sax conceded, is scant. Sax goes on to mention that "no really satisfactory discussion or analysis has been found." *Id.* at 58.

other ambiguous criteria. The result is a jurisprudence of both uncertain content and unpredictable future effect.[115]

The imposition of this balancing test, moreover, superimposes a more general problem of judicial legitimacy. Routine judicial decision-making involves, first, the selection of an applicable legal standard, located in an external source such as a constitution, statute, precedent, or custom, and then the application of that standard to the particular facts of the case. Judicial balancing is the antithesis of this classic judicial function. When judges balance, they must do much more than simply select and apply an external standard. Instead, they must pick and choose among several standards and then assign appropriate weight to each. The practical effect of this exercise is the employment of individual discretion to decide cases. Where one judge may view one standard as more important in resolving a case, another may place greater weight on a competing standard. Resolutions of cases are thus made to depend on judges' personal values. As stated by one observer, "balancing tests do not invite judicial activism; they require it."[116]

Judicial balancing, while always troublesome, is particularly so in the world of takings law. As we have seen, *Penn Central* designates three factors for balancing—economic harm, interference with investment-backed expectations, and the character of the government action. The problem is this: the first two factors (economic harm and IBEs) relate to the *exercise* of government power in a particular case. They inquire whether the government's regulation, when applied to an individual, so harms that individual as to cause a taking. The character factor, on the other hand, typically relates not at all to the specific exercise of government power implicated in a case. Rather, this latter factor assesses the worthiness of a statute as a general matter. The evaluation is a categorical, or *per se*, one.[117] This dichotomy makes the *Penn Central* balancing test all the more unworkable. Is it really possible for courts to delicately balance a single *per se* factor

115. *See supra* Part II.

116. *See*, James L. Huffman, *Retroactivity, the Rule of Law, and the Constitution*, 51 ALA. L. REV. 1095, 1096–97 (2000).

117. *Penn Central* explained the factor on precisely these categorical grounds. Said the Court, "a taking may more readily be found when the interference with property can be characterized as a physical occupation by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

with (or against) two *as applied* factors, and then somehow use that mix to rationally resolve a fact-sensitive takings claim?[118]

One is left to hope that the constitutional law of takings and of contracts might return to first principles, that is, to a condition free from the interference of substantive due process.

IV

On May 23, 2005, the Supreme Court decided a case entitled *Lingle v. Chevron U.S.A., Inc.*[119] Lingle was a challenge on takings grounds to a Hawaii statute enacted to protect independent gasoline retail dealerships from a harm seemingly more imagined than real.[120] The statute prohibited oil companies from acting to convert these dealerships into company-owned outlets, even though no such pattern of conversion had emerged.[121] The lawmakers apparently wished to prevent market concentrations that such a practice might produce.[122]

Among the restrictions instituted by the statute was a limitation on the amount of rent oil companies might charge lessee-operated dealerships.[123] *Chevron U.S.A.* argued this rent cap worked an unconstitutional taking because, under *Agins v. Tiburon*,[124] it failed to substantially advance any legitimate government interest. At the lower level, the litigation became a battle between two competing experts.[125] Finding one expert more persuasive than the other, the lower court concluded the statute substantially advanced a legitimate government interest, and accordingly passed constitutional muster.[126] The Court of Appeals for the Ninth Circuit affirmed.[127]

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118. Note also that using substantive due process theory to control what is essentially a takings case is untenable for the additional reason that it allows litigants to sidestep ripeness requirements. *See, e.g.*, Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186–87 (1985). By prevailing on a substantive due process claim, that is, a facial attack against a statute because of the statute's poor design, the plaintiff escapes any requirement to seek a variance or otherwise attempt to avoid what would be the harmful effect of the application of the ordinance to plaintiff's property.

119. 544 U.S. 528 (2005).

120. *Id.* at 533.

121. *Id.*

122. *Id.* at 544–45.

123. *Id.* at 533.

124. 447 U.S. 255 (1980).

125. *Lingle,* 544 U.S. at 535.

126. *Id.* at 536.

127. *Id.* at 536.

In a unanimous decision authored by Justice Sandra Day O'Connor, the Court reversed, specifically overruling the "substantially advances" test of *Agins*.[128] The Court's rationale was refreshingly straightforward: "[W]e conclude that this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence."[129] The *Agins* opinion, the Court commented, confused, albeit understandably, these two areas of federal constitutional law.[130]

The Supreme Court began its opinion in *Lingle* with a review of takings law, during which it identified the *Loretto* (permanent physical occupation), *Lucas* (total takings), and *Penn Central* (balancing) takings tests.[131] The Court then distinguished these tests from the *Agins* "substantially advances" test. Each of the first three, argued the Court, "aims to identify regulatory actions that are functionally equivalent to the classic taking where government directly appropriates private property or physically ousts the owner from his domain. Accordingly, each of these tests purportedly focuses on the severity of the burden imposed on property rights."[132]

This premise distinguished these tests from the *Agins* "substantially advances" test:

> In stark contrast to the three regulatory takings tests discussed above, the 'substantially advances' inquiry reveals nothing about the *magnitude* or *character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners. In consequence, this test does not help to identify those regulations whose effects are

128. *Id.* at 545.

129. *Id.* at 540.

130. *Id.* at 542.

131. *Id.* at 538–39. The total takings test provides that any government act that strips away all value of land is a *per se* taking. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

132. *Lingle*, 544 U.S. at 539. Referring to the *Loretto* test, the Court contended that a permanent physical occupation imposes a "unique burden" that effectively "eviscerates the owner's right to exclude others from entering and using her property interests." *Id.* The Court described the total takings test of *Lucas* in similar terms, commenting that a "complete elimination of a property's value" is too severe a burden to withstand constitutional scrutiny. *Id.* As for the *Penn Central* balancing test, it "turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Id.* at 540.

> functionally comparable to government appropriation or occupation of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause.[133]

Consequently, proffered the Court, the idea that a regulation accomplishes a taking merely because it is foolish or ineffective was simply "untenable."[134] Beyond that, the Court found the judiciary ill-suited to determine whether laws are foolish or ineffective.[135] A better way to decide these cases, accordingly, would be the bifurcated approach of *Goldblatt*:

> Instead of addressing a challenged regulation's effect on private property, the "substantially advances" inquiry probes the regulation's underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. . . . Conversely, if a government action is found to be impermissible—for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.[136]

The Court strained to create the impression that its decision in *Lingle* was little more than judicial housekeeping. The Court stressed, for example, that no prior judicial decisions invoking the "substantially advances" test—of which there were few in any event—needed to be overturned.[137] And, as explained above, it expressly reaffirmed the continued viability of the other takings tests, including the widely used balancing test of *Penn Central*.[138]

Despite this conscious effort to downplay the decision, *Lingle* ought to be regarded as enormously important, for within it are

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133. *Id.* at 542 (emphasis in original).
134. *Id.* at 543.
135. *Id.* at 544.
136. *Id.* at 543.
137. *Id.* at 545.
138. *Id.* at 548. Perhaps this conscious minimization of the importance of the decision explains why *Lingle* received very little public attention when handed down. Five days after the decision, the *Washington Post* ran a piece slightly longer than 500 words praising the repudiation of the "substantially advances" test. *See* Editorial, *Judicial Takings and Givings*, WASH. POST, May 28, 2005. But other major newspapers, including *The New York Times* and *The Los Angeles Times*, and national magazines as well, remained silent according to a LexisNexis search conducted June 1, 2005, using search terms "Lingle and taking."

the seeds of a ground-level-up reconfiguration of the law of takings. For starters, *Lingle* does not co-exist comfortably with *Loretto*'s permanent physical occupation test. On the contrary, despite the Court's assertions to the opposite, *Lingle* repudiates *Loretto*. In *Lingle*, the Court distinguished *Loretto* on the theory that the permanent physical occupation test dealt with "unique burden[s]" on rights in property.[139] But this characterization—of permanent physical occupations as takings because they impose a "unique burden"—is entirely unconvincing. As a starting point, in many circumstances, permanent physical occupations hardly impose burdens at all.[140] What if, for example, a local government took it upon itself to install smoke detectors in hallways of privately-owned residential buildings. This installation would surely constitute a permanent physical occupation, but a severe burden on property rights it would not be. In fact, such a government action could actually relieve landowners of the legal burden of installing smoke detectors at their own expense.

Beyond that, and more significantly, the permanent physical occupation test was not established in order to save landowners from burdens, unique or otherwise. The test actually has nothing to do with the issue of harm to property rights. When it created the test, the *Loretto* Court was concerned not with burdens on property rights, but rather with the statute that was imposing the complained-of harm. In *Loretto*, a local cable television provider, acting under authority of a New York statute that provided, *inter alia*, that a landlord may not "interfere with the installation of cable television facilities upon his property or premises,"[141] had installed television transmission equipment on the plaintiff's building.[142] The provider did not install much: it affixed some less-than-one-half inch cable along the length of the affected building, about eighteen inches above the roof top, two directional taps, each about four inches cubed, one on the front and the other on the rear of the roof, and two "large" silver boxes along the roof

139. The unique burden such occupations inevitably produce, in the Court's judgment, is the elimination of landowners' rights to exclude non-owners from coming on their land or from placing equipment on their land. *Id.* at 539. The Court characterized the right to exclude as "most fundamental." *Id.*

140. Of course, if a permanent physical occupation imposes no burden at all, it *per force* cannot impose a "unique burden."

141. Loretto v. Teleprompter Manhattan CATC Corp., 458 U.S. 419, 423 (1982). The statute was section 828 of the New York Executive Law. N.Y. EXEC. LAW § 828 (McKinney Supp. 1982).

142. *Loretto*, 458 U.S. at 423.

cables.[143] Part of a cable "highway" in Manhattan, the equipment was in place for two years before the plaintiff acquired property rights to the affected building.[144] The equipment did not disturb the daily use of the building.

On the question of whether this statute worked a taking, the Court of Appeals for the State of New York had found in the negative, reasoning (correctly) that the statute served the legitimate public purpose of promoting cable television and only inconsequentially burdened the property rights of the plaintiff.[145] The Supreme Court reversed because the statute was deficient in its design—so deficient, in fact, that all other takings considerations fell to the wayside. The statutory deficiency was not in the purpose of the enactment, which the Supreme Court agreed was legitimate, but was in the means by which the statute pursued its end.[146] The means, obviously, was by permanent physical occupation by the cable company's transmission equipment of an albeit tiny portion of the exterior of the plaintiff's building. Declaring such intrusions to be "unusually serious," the Court stated that, "[I]n such a case, 'the character of the government action' not only is an important factor in resolving whether the action works as a taking but also is determinative."[147] "In short," the Court elaborated, " when the 'character of the governmental action,' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[148] Thus was the

143. *Id.* at 422.

144. *Id.*

145. *Id.* at 424. The statute required installations to be done so as to protect the affected premises, assessed costs of installation upon the company, and allowed for compensation for any damage that installation or removal of facilities might cause. *Id.* One member of the Court of Appeals panel found the statute to work a taking, but viewed the required compensation payment of one dollar to be just compensation. *Id* at 425.

146. *Id.*

147. *Id.* at 426.

148. *Loretto*, 458 U.S. at 434–35 (citation omitted). *But see* Kaiser Aetna v. United States, 444 U.S. 164 (1979) (in which the Court spoke of physical occupations of real property in terms of harm to property rights, albeit without citing *Loretto*). In *Kaiser*, the Supreme Court held that the Government's imposition of a navigational servitude, which afforded rights to members of the public to gain access to a privately-built pond, was a taking where the landowner had reasonably relied on Government consent in connecting the pond to navigable water. *Id.* at 167, 180. The Court in that case was concerned with the matter of harm to property rights. Accordingly, it held "the right to exclude, so universally held to be a fundamental element of the property

statute found to work a taking even though the economic harm it caused was valued at a single dollar.[149]

The significant fact to take away from this is the last one—*Loretto* declared a taking in circumstances where legislation interfered, as a practical matter, not at all with the exercise of rights in property. The problem was *how* the legislation operated, not the harm it caused to the landowner. The Court was flatly unconcerned with the issue of burden to property, unique or otherwise.[150] Thus, any fair reading of *Lingle* brings one to an unavoidable conclusion: if the reasoning of *Lingle* dooms the substantially advances test, it must also doom the permanent physical occupation test.[151]

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right, falls within this category of interests that the Government cannot take without compensation." *Id.* at 179–80.

149. *Loretto*, 458 U.S. at 426.

150. As a peripheral matter, *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539, 546 (2005), made reference to two other previous Supreme Court decisions, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *Nollan* and *Dolan* were takings cases dealing with impositions of unequal burdens (as distinct from unique burdens) on rights in property. The two cases stood for the principle that unequal burdens were anathema to the Takings Clause. As *Dolan* put it: "[O]ne of the principal purposes of the Takings Clause is to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 384 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

One would speculate that the reasoning in *Lingle* would result in overturning *Nollan* and *Dolan*. But the Court decided rather than overturn these decisions it would recast them. The Court declared these two cases have nothing to do with takings. Rather, stated the *Lingle* Court, the unequal burdens visited upon property owners are illegitimate for an entirely different constitutional reason: they are unconstitutional conditions. *Lingle*, 544 U.S. at 547.

> [The two cases] involve a special application of the 'doctrine of unconstitutional conditions,' which provides that 'the government may not require a person to give up a constitutional right to receive just compensation when property is taken for a public use in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.'

Id.

This new reading of *Nollan* and *Dolan* leaves the law in some disarray. As the Court apparently views it, a "unique" burden (*Loretto*) is a taking *per se* but an "unequal" burden (*Nollan* and *Dolan*) can never be a taking at all.

151. Another Supreme Court decision made vulnerable in the wake of *Lingle* is *Hodel v. Irving*, 481 U.S. 704 (1987). In *Hodel*, the Court held that the destruction of a property owner's right to transfer property to devisees constituted a taking. *Id.* at 718. As in *Loretto*, however, the *Hodel* Court's concern was not with the harm caused to property rights but with the statute causing the harm. The Court in *Hodel* found the statute to be defective, indeed, "extraordinary." 481 U.S. at 716. The Court even went so far as to speculate the statute may well have been constitutional but for its defective statutory design. *Id.* On the other side of the argument, *Hodel* did mention

But *Lingle* is even more significant because, in addition to overturning *Loretto*, *Lingle* also effectively eviscerates the "character of the government action" factor of *Penn Central*. The character factor is on equal footing with the permanent physical occupation test in that neither is concerned with the matter of burden on property rights. Rather, both the factor and the test are all about substantive due process.

As noted earlier, the Court in *Lingle* expressly declined to reject *Penn Central*'s character factor because of its alleged connection with the issue of harm to property.[152] Notable, however, was the Court's decidedly less than forthright way of making its case in this regard. When the *Lingle* Court asserted that all three of the *Penn Central* factors, including the character factor, bore on the issue of harm to property, it appended a telling qualifier. As the Court put it, "the *Penn Central* inquiry turns in large part, *albeit not exclusively*, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests."[153] The "albeit not exclusively" phrase was a giveaway, a concession that to some extent the *Penn Central* factors relate to considerations other than harm to property. Having acknowledged this prospect, the Court quickly dropped the matter and shifted its attention to *Agins*.[154]

But changing the topic did not dissipate the significance of the qualifying phrase. There is only one plausible reason the Court included the phrase "albeit not exclusively," and that is the character factor. For this factor stands on different footing than *Penn Central*'s economic harm and IBE factors. The character factor relates to *how* the government proceeds, not to the burdens on property rights its actions may produce. The character factor, in other words, stands shoulder to shoulder with the permanent physical occupation test and the *Agins* substantially advances test. All three reside in the universe of substantive due process. All three inquire of the behavior of government rather than of the harm to property that behavior might produce. Given that identity of purpose and effect, *Lingle*'s condemnation of the *Agins* test *per force* condemns the *Penn Central* character factor as well.[155]

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that "complete abolition of both the descent and devise of a particular class of property may be a taking." *Id.* at 717.

152. *Lingle*, 544 U.S. at 539.

153. *Id.* (emphasis added).

154. *Id.*

155. Of course, these two tests are not entirely identical. The "substantially advances" test declared a statute to be infirm on efficiency grounds—the failure of a

Significantly, the Supreme Court itself has conceded the point by treating the character factor and the substantially advances test as kindred spirits. In *Webb's Fabulous Pharmacies v. Beckwith*,[156] for example, the Court made the following statement: "[T]his Court has been permissive in upholding governmental action that may deny the property owner of some beneficial use of his property or that may restrict the owner's full exploitation of the property, *if such public action is justified as promoting the general welfare.*"[157] The italicized phrase, obviously, is an alternate phrasing of the substantially advances test of *Agins*. Yet, to support its assertion, the Court did not cite *Agins*, which it had handed down only six months before it decided *Webb's Fabulous Pharmacies*.[158] Rather, the Court cited *Penn Central* as the appropriate legal support.[159] Thus did the Court effectively conjoin the character factor and the substantially advances test.

In this same vein, consider the Court's decision in *Andrus v. Allard*, decided only a year after *Penn Central*.[160] In *Andrus*, the Court examined the Eagle Protection Act,[161] and the Migratory Bird Treaty Act,[162] federal statutes which effectively prohibited commercial activity with respect to birds and bird parts.[163] Rely-

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statute to sufficiently promote the public interest can doom it. The character factor, on the contrary, purports to group government actions into categories of relative virtue. Some statutes are more worthy (and, accordingly, more likely to be declared valid on review) and some are less worthy (and, therefore, less likely to be declared valid on review). As *Penn Central* explained, "[A] 'taking' may more readily be found when the interference with property can be characterized as a physical occupation by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978) (citation omitted). Why governmental regulatory initiatives should enjoy a wider berth for takings purposes was assumed, not explained.

156. 449 U.S. 155 (1980).

157. *Id.* at 163 (emphasis added) (citing *Penn Central,* 438 U.S. 104 at 125–129).

158. *Agins* was argued on April 15, 1980 and decided on June 10, 1980; *Webb's Fabulous Pharmacies* was argued on October 15, 1980 and decided on December 9, 1980. *Webb's Fabulous Pharmacies*, 499 U.S. at 155, 163–164.

159. *Id.* at 163.

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

161. 16 U.S.C. § 668(a) (1972).

162. 16 U.S.C. § 703 (2004).

163. The text of the Eagle Protection Act provides, in pertinent part:

> Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as hereinafter provided in this subchapter, shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle, or any

ing on *Penn Central*, the Court found no taking. Such a finding is simply incoherent if, as the Court in *Lingle* maintained, all three factors of *Penn Central* relate to the issue of harm to property. Were that true, the Court in *Andrus* would have had no choice but to find a taking, for the harm visited upon the plaintiff was virtually total.[164] Concluding to the opposite, the Supreme Court in *Andrus* revealed its view of *Penn Central*:

> Penn Central Transportation Co. v. New York City, is our most recent exposition on the Takings Clause. That exposition need not be repeated at length here. Suffice it to say that government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property.[165]

The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of 'justice and fairness.'[166] There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate. Formulas and factors have been developed in a variety of settings.[167] Resolution of each case, however, ultimately calls as much for the exercise of judgment as for the application of logic.[168]

Andrus, therefore, is a case where (a) no taking was found (b) despite virtually total destruction of rights in property (c) based

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> golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this Act, shall be fined not more than $ 5,000 or imprisoned not more than one year or both: . . . Provided further, That nothing herein shall be construed to prohibit possession or transportation of any bald eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to June 8, 1940, and that nothing herein shall be construed to prohibit possession or transportation of any golden eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to the addition to this Act of the provisions relating to preservation of the golden eagle.

16 U.S.C. § 668 (a) (2007).

164. The Court in *Andrus* did contend that some "property" in the items remained after the regulation hit home, since plaintiffs could still possess, transfer, donate, and devise the animal parts. *Andrus*, 444 U.S. 51, 66. Held the unanimous Court, this was enough value to satisfy the Takings Clause, even though the only remaining *present* value was the right to possess. *Id.* at 67–68. The *Andrus* opinion cited *Pennsylvania Coal* for the proposition that government can infringe on rights in property in many cases *without* paying compensation. *Id.* at 66.

165. *Id.* at 65 (citing *Penn Central*, 438 U.S. 104, 123–128 (1978)).

166. *See* Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962).

167. *See Penn Central,* 438 U.S. at 123–128.

168. *Andrus*, 444 U.S. at 65. The decision in *Andrus* was authored by Justice Brennan.

on the reasoning of *Penn Central*. Either *Andrus* is an abject failure of judicial reasoning or it is proof the *Penn Central* factors are not entirely about harm to property. The second of these alternatives is the obvious option. The Court in *Andrus* understood *Penn Central* for what it is; *Lingle*'s contrary description of the character factor distorts the factor's true meaning. It is unwarranted judicial revisionism.

Even more evidence may be found in the case of *Concrete Pipe & Products of California v. Construction Laborers Pension Trust for Southern California*.[169] *Concrete Pipe*, a post-*Penn Central* case, effectively *dismissed* economic harm as a relevant factor in takings law.[170] The case dealt with liability of employers under federal law to contribute to employee pension plans.[171] In *Concrete Pipe*, the Court made the remarkable assertion that "mere diminution in the value of property, *however serious*, is insufficient to demonstrate a taking."[172]

CONCLUSION

From the 1930s until the decision in *Lingle*, substantive due process has played a substantial role with respect to the capacity of rights in contract and property to deter the exercise of governmental power. *Lingle* offers the first real hope to reduce that influence in the arena of takings law. If the logic of *Lingle* is given expression in future decisions, the influence of substantive due process theory in the law of takings should erode and, one would hope, ultimately end. If read broadly, *Lingle* might serve as well to call into question the similar infusion of substantive due process theory into the law of the Contract Clause.

169. 508 U.S. 602 (1993).

170. *Id.* at 645.

171. *Id.* at 605.

172. *Id.* at 645 (emphasis added). In its application of the *Penn Central* factors, the Court concluded the character of the government action (there, termed the "nature" of the government action) was unobjectionable, since it was merely a regulatory program designed to adjust the benefits and burdens of economic life. *Id.* at 643.