1-1-1987

Constitutional Limits on the Power to Take Private Property: Public Purpose and Public Use

John A. Humbach
Elisabeth Haub School of Law at Pace University

JOHN A. HUMBACH*

Constitutional Limits on the Power to Take Private Property: Public Purpose and Public Use

[T]he government does not have unlimited power to redefine property rights[1]

IN 1979, the Supreme Court of Colorado held that when the bed of a stream is privately owned, boaters who float along the water's surface are trespassers unless permission has been obtained from the streambed owners.[2] In so holding, the court refused to recognize that public navigation servitude doctrine could apply to privately owned streams. As a result, it denied the public a right of passage to which the streambed owners' rights would have been subjected.[3] In this respect, the holding is contrary to historical common law rule,[4] the dominant American rule,[5] and, quite possi-

* Associate Dean for Academic Affairs and Professor of Law, Pace School of Law; J.D., 1966, Ohio State; B.A., 1963, Miami University.

[1] Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419, 439 (1982).

[2] People v. Emmert, 198 Colo. 137, 597 P.2d 1025 (1979). The court's holding rested primarily on the right of the surface owner to control the superjacent space, *cujus est solum, ejus est usque ad coelum*, as reenacted in the Colorado Aeronautics Act of 1937. COLO. REV. STAT. § 41-1-107 (1984).

[3] *Emmert*, 198 Colo. at 141, 597 P.2d at 1027. By stipulating that the stream in question was "non-navigable," the boaters in *Emmert* essentially admitted that the streambed was privately owned. *Id.* at 140, 597 P.2d at 1026. In Colorado, as in most states, the land underlying a "non-navigable" stream is vested in the owner of the adjoining lands. *Id. See generally* Johnson & Austin, *Recreational Rights and Titles to Beds on Western Lakes and Rivers*, 7 NAT. RESOURCES J. 1, 9-33 (1967). In the court's view, ownership of the streambed conferred the right to exclude others. *See supra* note 2.

[4] Notwithstanding conventional "history," it was well-established under English common law that all streams actually useful for navigation, fresh and salt water alike, were subject to the so-called "navigation servitude." The navigation servitude permits public passage regardless of the private ownership of the streambed. M. HALE, DE JURE MARIS, chs. I & III, *reprinted in* S. MOORE, HISTORY OF THE FORESHORE 370-72, 374-76 (3d ed. 1888); *see generally* Annotation, *Title to Beds of Natural Lakes and*

bly, important recreation and tourism interests within the state.[6] The court observed that if change were needed, the legislature was competent to make it "within constitutional parameters."[7] But can the Colorado legislature feasibly make the change? Would not recognition of a public right of passage in Colorado now entail a bulk expropriation of streambed owners' rights, as against the general public, thus requiring just compensation for all private streambed owners?[8]

When private property is taken for public use, the fifth amendment to the Constitution requires that "just compensation" be

---

Ponds, 23 A.L.R. 757 (1923); Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RESOURCES J. 1, 25-28 (1963).

[5] Although the servitude for public navigation over privately owned streambeds is not uniformly recognized in state court decisions, acceptance of the traditional common law position, with minor variations, appears to be the predominant American position. For a collection of cases, see Annotation, *Public Rights of Recreational Boating, Fishing, Wading, or the Like in Inland Streams the Bed of Which is Privately Owned*, 6 A.L.R. 4th 1030 (1981); *see also* Johnson & Austin, *supra* note 3.

[6] *See* Comment, People v. Emmert: *A Step Backward for Recreational Water Use in Colorado*, 52 U. COLO. L. REV. 247, 257-58 (1981). Though stipulated as "non-navigable," the stream in *Emmert* was navigable in fact for certain small crafts, such as the recreational rafts used to commit the floating trespasses being prosecuted in the case. The court's holding, regardless of its merits, deprives Colorado of a potential recreational resource.

[7] *Emmert*, 198 Colo. at 141, 597 P.2d at 1027.

[8] In Kaiser Aetna v. United States, 444 U.S. 164 (1979), the Court held that the federal government could not confer a public right of passage on lands not previously subject to the navigation servitude without payment of just compensation under the fifth amendment. *See infra* note 9. *See also* Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419 (1982), (a state's imposition of an easement or servitude on private apartment house landlords for the running of cable television lines would be a taking requiring payment of just compensation). *See infra* text accompanying notes 146-51.

A consideration of whether the *Emmert* case could be overruled without compensation to streambed owners presents two separate lines of inquiry. First, to what extent does the Constitution permit state or federal governments to impair existing property rights through changes in the rules of property law? Second, does the federal navigation servitude, under the commerce power, override any state property law provision which, if enforced, would obstruct navigation on waterways that are in fact navigable? On this latter theory, the *Emmert* ruling would simply be unconstitutional impingement on the federal navigation servitude. *See* Gibson v. United States, 166 U.S. 269, 271-72 (1897) ("All navigable waters are under the control of the United States for the purposes of regulating and improving navigation."); *see also* United States v. Republic Steel Corp., 362 U.S. 482, *reh'g denied*, 363 U.S. 858 (1960); United States v. Willow River Power Co., 324 U.S. 49 (1945); Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888); Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Rivers and Harbors Appropriation Act of 1899, 30 Stat. 1121, 1151, 33 U.S.C. § 403 (1986). This latter question presents distinct issues which will not be discussed in this article.

paid.[9] However, what if the government[10] takes property from a private owner, and thereafter turns that same property over to a new private owner; or what if the legislature declares the property of *A* to be the property of *B*?[11] In other words, does the government violate the fifth amendment when it takes private property for a *private* use?

In order to achieve legitimate public objectives, courts or legislatures must reallocate or rearrange private property rights. Such rearrangements may occur en masse, especially in connection with law reform, or they may occur individually. Bulk rearrangements of property rights can occur, for example, as a result of legislation removing ancient encumbrances or limitations on land titles,[12] through statutes or judicial holdings which alter the incidents of the estate system,[13] through modifications of marital property rights in

---

[9] U.S. CONST. amend. V reads: "nor shall private property be taken for public use, without just compensation."

[10] Because the federal constitutional requirement of just compensation applies to both the federal and state governments, references to "government" will not specify which particular level (federal, state or subdivisions of the latter) unless the distinction is relevant. *See* Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 239 (1897).

Although most of the discussion and most of the cases concern takings by legislative rather than judicial action, the same principles should apply to takings by judicial rulings. *See id.* at 236.

[11] The text paraphrases frequently cited dicta from Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798): "[A] law that takes *property* from *A* and gives it to *B*: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and therefore, it cannot be presumed that they have done it." (emphasis in original).

This idea was a recurrent theme during the nineteenth century. *See, e.g.*, Davidson v. New Orleans, 96 U.S. 97, 102 (1878); Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 663 (1875); *see also* Charles River Bridge Co. v. Warren Bridge Co., 36 U.S. (11 Pet.) 420, 642 (1837).

By 1986, however, the Court's position had evolved to the point that "it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another." Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 222 (1986).

[12] *E.g.*, marketable title statutes, such as FLA. STAT. ANN. § 689.18 (West 1969); ILL. ANN. STAT. ch. 30, para. 37e (Smith-Hurd 1969); KY. REV. STAT. ANN. §§ 381.219, 381.221 (Baldwin 1972); *see* Aigler, *Constitutionality of Marketable Title Acts*, 50 MICH. L. REV. 185 (1950); Note, *Retroactive Termination of Burdens on Land Use*, 65 COLUM. L. REV. 1272 (1965); Annotation, *Validity of Statute Canceling, Destroying, Nullifying, or Limiting Enforcement of Possibilities of Reverter or Rights of Re-Entry for Condition Broken*, 87 A.L.R.3d 1011 (1978).

[13] *E.g.*, N.Y. EST. POWERS & TRUSTS LAW §§ 6-5.10, 6-5.11 (McKinney 1981) (eliminating the destructibility of contingent remainders); *In re* Estate of Chun Quan Yee Hop, 52 Haw. 40, 469 P.2d 183 (1970) (cy pres to revise effects of rule against perpetuities); Berry v. Union Nat'l Bank, 164 W. Va. 258, 262 S.E.2d 766 (1980) (simile).

favor of the wife[14], or through reforms which affect the availability of proprietary tort actions, such as trespass, negligence, and nuisance.[15] Revisions of property rights also affect owners on an individualized basis, for example, through the imposition of new statutes of limitation,[16] title recording requirements,[17] or the operation of the doctrine of res judicata.[18] Each of these various rearrangements of private rights may have the effect of impairing or annihilating property rights of some, while conferring new property rights on others — all without compensation. While few would doubt the public purpose or general wisdom of laws which occasion these rearrangements, or the inconvenience which would follow if the government had to pay for the power to effect them,[19] their constitutional status is not entirely clear.

The only constitutional text expressly applicable to compensation for the taking of property is the fifth amendment which states: "[N]or shall private property be taken for public use, without just

---

[14] *See* Kirchberg v. Feenstra, 450 U.S. 455 (1981) (*infra* text accompanying notes 161-65); West v. First Agric. Bank, 382 Mass. 534, 419 N.E.2d 262 (1981); Willcox v. Penn Mut. Life Ins. Co., 357 Pa. 581, 55 A.2d 521 (1947) (legislative declaration of separate property to be community property); *see also* Boan v. Watson, 281 S.C. 516, 316 S.E.2d 401 (1984) (abolished dower on the grounds that it is unconstitutional gender discrimination).

[15] Property rights, such as the right to noninterference by others, are realized and supported by tort actions such as trespass, negligence, and nuisance. Modifications in the availability of these actions can be viewed as cutting back or destroying property rights. *See* Martinez v. California, 444 U.S. 277, 281-82 (1980); Hartman v. Tresise, 36 Colo. 146, 84 P. 685 (1905); *cf.* Bronson v. Kinzie, 42 U.S. (1 How.) 311, 317-18 (1843) (encumbering remedy impairs the right).

[16] *E.g.*, Wilson v. Iseminger, 185 U.S. 55 (1902) (imposition valid under contracts clause if reasonable grace period provided to existing owners).

[17] *E.g.*, Texaco, Inc. v. Short, 454 U.S. 516 (1982). *See infra* notes 178-94 and accompanying text; *see also* Jackson v. Lamphire, 28 U.S. (3 Pet.) 280 (1830) (dicta approving legislation modifying legal effect of completed land transfers).

[18] Unless judicial factfinding and judgments are infallible, the effect of res judicata may operate to take the rights of some and confer them on others. *See* Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940); K. OLIVECRONA, LAW AS FACT 202-03 (2d ed. 1971).

[19] "[T]he great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." Munn v. Illinois, 94 U.S. 113, 134 (1876). If "common-law rights were . . . immune from revision . . . [it] would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development." PruneYard Shopping Center v. Robins, 447 U.S. 74, 93 (1980) (Marshall, J. concurring); *see also Martinez*, 444 U.S. at 282 ("the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational"); Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932); Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924).

compensation."[20] Supreme Court cases interpreting the just compensation clause have followed a remarkably coherent pattern.[21] From this pattern one may formulate a simple unifying principle which distinguishes those takings that do not require compensation from those that do.[22] This unifying principle hinges on the distinction between two identifiably different types of property interests which the government's actions might "take": property *rights* and property *freedoms*.[23]

---

[20] U.S. CONST. amend. V. Since 1897, this requirement has applied against the states through U.S. CONST. amend. XIV. Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 236 (1897).

[21] Only the outcomes of the cases have followed a coherent pattern, not their rationales. The Court has reiterated several times that it has "no set formula" for deciding just compensation cases. *E.g.*, Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224-25 (1986); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962). Rather, "ad hoc, factual inquiries" are required. Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419, 426 (1982), *quoting Penn Cent. Transp. Co.*, 438 U.S. at 124. The Court has mentioned a number of factors which it regards as relevant, such as the occurrence of a "physical invasion," or the degree of economic impact, especially on "investment-backed expectations." *Id.*; *see infra* note 277. However, the Court has not suggested a scheme for combining or weighing such factors. Only the "permanent physical occupation" factor, which appears to be a per se test of taking, has a reliable application across any range of cases. *See Loretto*, 458 U.S. at 434-35. The rest of the cases represent not so much a body of law, but a compendium of window dressing.

Is it possible for conscientious judges to develop, over a period of years, a coherent body of decisions even though they cannot settle upon a definitive formulation of the principles which "regulate" their decisions? The evident answer is yes. Perhaps the best analogy is found in the relationship between the rules of linguistic usage and good speech. Most native speakers of natural languages, even very small children, form syntactically regular sentences according to the usage structures employed by those around them, without the vaguest ability to explicate the grammatical rules which "govern" their speech. The ability to conform to a pattern does not, in other words, necessarily depend on an ability to formulate the rules which describe or define the pattern. *See* D. HOFSTADTER, GODEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID 363 (1979).

[22] The observable pattern found in the cases, and the formula which it suggests for reconciling them, is the subject of the author's earlier article: Humbach, *A Unifying Theory for the Just Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243 (1982).

[23] The two property interests referred to, property "rights" and property "freedoms," represent two different aspects or components of property ownership. The two components of the general ownership concept are carefully defined in accordance with an observable distinction which in fact differentiates those cases which have required compensation from those which have not. The two interests do not correspond to concepts explicitly described as the foundations for decision of the cases, although references to the underlying conceptual distinction do occasionally appear. *E.g.*, Jacob Ruppert v. Caffey, 251 U.S. 264, 303 (1920) (prohibition on sale of alcoholic beverages "was no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use"). The two concepts, rights and freedoms,

In formulating the unifying principle, "rights" are defined as the legal advantage which an owner holds as the beneficiary of legal *duties* imposed on others.[24] The most important of these property rights is the right to exclusivity, and correspondingly, the duty of others not to intrude. When the government acts to acquire property "rights," such as fee title, leaseholds, or easements,[25] the Supreme Court has consistently required that just compensation be paid.[26] Property "freedoms," by contrast, are the legal advantage of *not* being subject to particular behavioral constraints, that is the constraints which follow because others have rights.[27] The landowner's freedom to use his or her land, without being legally answerable to others, is a property "freedom" of major importance.[28] When a government act takes away only property "freedoms," without affecting "rights," as occurs for example with virtually all land-use regulations, the Supreme Court cases have never required compensation.[29] In sum, compensation is virtually always required

---

do correspond closely to a distinction made by jurisprudents from Hobbes to Hohfeld. *See* Humbach, *supra* note 22, at 253 n.49.

It should be noted that, in ordinary usage, the terms "rights" and "freedoms," have a richness of meaning (and, hence, intrinsic ambiguity) which does not apply to the concepts that differentiate the just compensation cases. The "rights/freedoms" dichotomy works to explain the cases only if the terms are carefully confined in their meanings to the stipulated and defined concepts which they designate. *See infra* notes 24-27; Humbach, *supra* note 22, at 251-61.

[24] A legal "right" is formally defined as the legal advantage of having the physical or moral power of the government, invocable by legal action in order to induce the compliance of others or to redress others' noncompliance with some particular set of behavioral requirements. In short, a holder of a "right" is a person who has a cause of action against others who breach certain correlative duties. *See* Humbach, *supra* note 22, at 254-56.

[25] The holder of fee title or leasehold has a "right" to possession—to exclude others who, in turn, have a correlative duty to forebear from intruding or interfering with that owner. The holder of an easement has no "right" to exclude others, but has a "right" to forebearance from unreasonable interferences by the servient owner and others. *See, e.g.*, Orange & Rockland Utils., Inc. v. Philwold Estates, Inc., 52 N.Y.2d 253, 266-67, 418 N.E.2d 1310, 1315-16, 437 N.Y.S.2d 291, 297 (1981); City of Pasadena v. California-Michigan Land & Water Co., 17 Cal. 2d 576, 110 P.2d 983 (1941). *See generally* 2 AMERICAN LAW OF PROPERTY, §§ 8.105-8.108 (A. Casner ed. 1952).

[26] *See* Humbach, *supra* note 22, at 262-68.

[27] A "freedom" is formally defined as the legal advantage one has when, in reference to particular behavior, others cannot by legal action invoke the physical or moral power of the government in order to redress or induce the behavior on one's part. In short, "freedom" means not having a duty, that is, not being subject to legal liability for particular activities or conduct. *See* Humbach, *supra* note 22, at 257-58.

[28] It is the freedom "to use" which gives land and chattels their economic value. The ownership "right" of exclusivity only assures that the economic value, if any, will inure to the particular owner.

[29] *See* Humbach, *supra* note 22, at 269-70. The Supreme Court has held that when

when property "rights" are taken, but never for the taking of property "freedoms."

The rights/freedoms dichotomy tacitly permeates Supreme Court "takings" jurisprudence, and it has an explanatory power which extends to virtually all "takings" cases decided by the Court. Its explanatory power does not, however, extend to the relatively few cases which involve the taking of "rights" for purely *private* use, that is rearrangements of existing private property rights, as opposed to takings for use by the government or its designees in some public service function.[30] Because rearranging the existing pattern of private ownership takes "rights" and not mere "freedoms," we might expect, according to the rights/freedoms pattern, that the Court would uniformly require compensation for all such rearrangements. Yet, Supreme Court cases vary as to whether legislatures can enact laws which reassign existing rights within the property system without the government's "purchase" of existing rights that are adversely affected.[31]

I

"PUBLIC USE" IN THE CONSTITUTION

The specific referent of the just compensation clause is "private

---

regulations go "too far" in their constraint of the freedom to use properly, a taking is deemed to occur. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). However, this doctrine has been limited to historically rare "extreme circumstances." United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126, (1985). One can, however, imagine situations where the use of property is so completely impaired by prohibitions on use that the "right" to the property is barren. Such situations of drastic impairments of use represent, practically speaking, the functional equivalent of a taking of the "right." *See generally* Humbach, *supra* note 22, at 272-75. The *Pennsylvania Coal* concept is not exactly new: "[I]f a man seised of lands in fee by his deed granteth to another the profit of those lands, . . . the whole land itself doth passe; *for what is land but the profits thereof*." E. COKE, COKE UPON LITTLETON 4.b.[g]; *see also* Bronson v. Kinzie, 42 U.S. 311, 317-18 (1843).

[30] *See infra* Parts III and IV.

[31] The metaphor of "regulate by purchase" is borrowed from Andrus v. Allard, 444 U.S. 51, 65 (1979). The idea of imposing such a "purchase" requirement on the government when existing rights are affected was suggested, for example, in Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 601-02 (1935). In *Radford* the Court held that an amendment of the bankruptcy law "taking property from individual mortgagees in order to relieve the necessities of individual mortgagors" must be by eminent domain and funded by taxation. *See infra* text accompanying notes 152-55. A holding in substantive accord, though with strong language to the contrary, is *Pennsylvania Coal*, 260 U.S. at 413, where the Court struck down regulatory legislation as a taking, but said: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."

property . . . taken *for public use*,"[32] for which the clause mandates compensation.[33] There are at least two conceivable interpretations of how this clause might apply to takings for private use: the public use proviso reading and the public use restrictive reading.[34]

To constitute the *public use proviso* reading, the words "for public use" may be read as a proviso under which takings for private use are simply placed outside the subject matter of the just compensation clause. This reading would admit (though not *compel*) the possibility that the government could take for private use without paying at all — at least so far as the just compensation clause is concerned.[35]

On the other hand to achieve the *public use restriction* reading, the clause can be read as imposing a restriction on the government's power to take, prohibiting any taking for other than public use. Under this reading, the clause would forbid takings of private property for private use, even if the government paid compensation.[36]

The second interpretation, which reads into the clause an outright prohibition of private use takings, is somewhat unnatural. The just compensation clause refers to certain takings which clearly require compensation, specifically, those "for public use." How-

---

[32] See *supra* text accompanying note 20 for text of just compensation clause.

[33] As a linguistic matter, the words of the just compensation clause do not "mandate" compensation, but are "merely a limitation upon the use of the [taking] power." United States v. Jones, 109 U.S. 513, 518 (1883). Nonetheless, the Supreme Court has shown a distinct preference for orders of compensation so as to validate challenged uncompensated takings, rather than the issuance of injunctions to prevent them. *Riverside Bayview Homes*, 474 U.S. at 127-28; Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016-19 (1984); Hurley v. Kincaid, 285 U.S. 95, 104 (1932). The actionable right to recover compensation for federal takings rests in theory on an implied contract by the government to pay what common justice and the Constitution require. United States v. Great Falls Mfg. Co., 112 U.S. 645, 656-57 (1884).

[34] A key issue which neither of these readings addresses is the meaning of the word "use" in the phrase "for public use." The Court has occasionally interpreted the words "public use" to mean "use for a public purpose," though not necessarily with respect to the words "public use" in the just compensation clause. *See infra* Part II.

Needless to say, the government's power to take private property can be limited by a public-nexus requirement, even if there is no "public-use" restriction in the just compensation clause. Indeed, as developed in Part II, the historical evidence supports the conclusion that the Supreme Court traditionally viewed the public-nexus restriction as rooted in general due process protections, rather than the just compensation clause.

[35] As the Court wrote in an early case: "[I]t makes no provision for compensation except when the use is public." Cole v. LaGrange, 113 U.S. 1, 8 (1885). *See infra* text accompanying notes 82-101. The reference was to the similarly worded just compensation clause of the Missouri Constitution. *See infra* notes 87-88.

[36] This is the Court's reading in Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984). *See infra* text accompanying notes 52-56.

ever, the clause makes no express reference to the remaining possible set of takings—those for *other than* a public use.[37] A prohibition on takings for a nonpublic use is, at best, a possible negative implication of the clause.[38]

Prior to 1984, the Supreme Court had never declared that the just compensation clause contained a public use restriction on the government's power to take property.[39] In *Hawaii Housing Authority v. Midkiff*,[40] the Court held for the first time that the language of the just compensation clause contains an express "public use" requirement.[41] The Court reached this conclusion while reviewing the constitutionality of the Hawaii land reform statute. The Land Reform Act of 1967[42] was designed to break up the extreme concentration of fee simple titles among relatively few landowners in Hawaii. As a result of this fee ownership concentration, most land occupants, including single-family homeowners, were lessees rather than owners in fee. The purpose of the reform act was to entitle homeowners, under certain conditions, to purchase at a fair price the lots upon which their homes were built. The prices were to be determined by a statutorily prescribed procedure. From the landlords' perspectives, the sales were involuntary. Certain landlords attacked the constitutionality of the land reform program on the ground that the state, by requiring direct transfers from private owners to other private persons, would be taking private property for other than a public use.[43]

The Court could have easily disposed of the landlords' objections by holding that there is no literal "public use" restriction on the government's power to take property in the fifth amendment[44] or

---

[37] *See supra* note 35.

[38] "The weakness of the [negative inference] argument hardly needs stressing." Nichols, *The Meaning of Public Use in Eminent Domain*, 20 B.U.L. REV. 615, 616 (1940).

[39] The Court had consistently recognized that all government takings are subject to a public-nexus requirement, sometimes referred to as a "public use" requirement. *See infra* Part II. However, the Court did not base that requirement on the words "for public use" in the fifth amendment or, for that matter, on any other express wording in the text of the Constitution. *Id.*

[40] 467 U.S. 229 (1984).

[41] The Court described the public use requirement as "the express mandate of the Fifth Amendment." 467 U.S. at 244 n.7. Another innovation of *Hawaii Housing* was the Court's repeated references to what it called the "Public Use Clause" of the fifth amendment — a strikingly instrumentalist description of the clause. *Id.*

[42] HAW. REV. STAT. § 516 (1985).

[43] 467 U.S. at 231-35.

[44] Such a holding would be barred by the "Public Use Restriction" reading of the just compensation clause. *See supra* text accompanying note 36. The "Public Use Proviso" reading would permit such a holding, however. *See supra* text accompanying note 35.

otherwise. It could have upheld the statute by reaffirming that the only prohibition which exists is the longstanding requirement that *all* governmental acts have a justifiable public purpose.[45]

An earlier case, *Berman v. Parker*,[46] had set this precedent. The *Berman* case concerned the constitutionality of a Washington, D.C. urban renewal plan. Under the plan, private lands were condemned with the intention of eventually reselling them to new private owners. In upholding the plan, the Court's reasoning had two main points: first, eminent domain is merely a means to an end, one of many means at the government's disposal, and, second, if the legislative objective is within the proper ambit of the police power,[47] then the means of attaining the object is for the legislature to decide.[48] In other words, the sovereign power of eminent domain is not limited by a requirement that the government must directly own or operate the property taken;[49] it is only necessary that there be a justifiable public purpose for the taking.[50] The *Berman* opinion was silent as to whether the words "public use" in the just compensation clause give rise to, or bear any semantic relation to, the public purpose requirement.

In upholding the Hawaii land reform statute, the Court in *Hawaii Housing* cited *Berman* extensively. However, the Court did not simply rely on the *Berman* theory that the power of eminent domain, like other measures available to government, can be exercised

---

[45] *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 498-500 (1977); Lawton v. Steele, 152 U.S. 133, 137 (1894); *see infra* text accompanying note 253. This "public purpose" requirement is not, however, a warrant for close judicial review of governmental acts, for "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." Berman v. Parker, 348 U.S. 26, 31-35 (1954). For a further discussion of the origins of and constraints imposed by this "public purpose" restriction on takings, see *infra* Part II.

[46] 348 U.S. 26 (1954).

[47] Actually, the issue in *Berman* was the constitutional limits on congressional power, rather than the police power as such.

> [I]n construing the Federal Constitution, Congress must be held to have only those powers which are granted expressly or by necessary implication, but the opposite rule is the one to be applied to the construction of a State constitution. The legislature of a state may exercise all powers which are properly legislative, unless they are forbidden by the State or National Constitution.

Railroad Co. v. County of Otoe, 83 U.S. (16 Wall.) 667, 672-73 (1873). Practically speaking, however, under the *Berman* facts the distinction between the limits on congressional power and state legislative power was irrelevant. *See Berman*, 348 U.S. at 31-32.

[48] *Id.* at 32-33.

[49] *Id.* at 33-34.

[50] *Id.* at 32-33.

for any purpose falling within the police power. Instead, the Court departed from prior Supreme Court case law by holding that the just compensation clause does in fact contain an express public use requirement.[51]

The Court chose a rather surprising juncture to read an express public use requirement into the fifth amendment. Clearly the Court's objective was to uphold rather than to defeat the Hawaii land reform. Adding a new constitutional test for the statute to meet was, at best, a nonessential step in reaching that objective. The Court emphasized, however, that its new test was not meant to significantly hinder governmental solutions to social problems. Rather, the newly discovered fifth amendment " 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers."[52] In other words, the Court seemed to say that anything that serves a public purpose will constitute a "public use," as those words are used in the fifth amendment.[53] Thus, while recognizing an express fifth amendment public use requirement, the Court simultaneously deprived that requirement of any obvious substantive significance by making its constraint "coterminous" with the already applicable limits of the police power.

Structurally, *Hawaii Housing* is simply a case which followed *Berman*, though by a more circuitous analytical route. There is, however, a crucial difference in the dicta surrounding their core rationales. Nothing in *Berman* would have prevented the government from effecting uncompensated transfers of private property from one private person to another, so long as there was a justifying public purpose.[54] By contrast, the *Hawaii Housing* opinion implies that in order for any government-instituted taking to be permissible, it must be a "taking for public use" within the fifth amendment. Every permissible "taking," therefore, would presumably require compensation. In effect, the just compensation clause is left to read:

---

[51] Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 244 n.7 (1984) ("the express mandate of the Fifth Amendment"). The pre-*Hawaii Housing* case law on the source of the public use restriction is discussed in Part II *infra*.

[52] *Hawaii Hous.*, 467 U.S. at 240; *see also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014-16 (1984).

[53] *Hawaii Hous.*, 467 U.S. at 240-43.

[54] In Thompson v. Consolidated Gas Util. Corp., 300 U.S. 55, 80 (1937), the Court stated that "one person's property may not be taken for the benefit of another private person *without a justifying public purpose*, even though compensation be paid." (emphasis added). But the Court in *Thompson* "assumed" that, for a proper purpose, the Constitution would permit a taking from one private person so as to give to another even without compensation. *See id.* at 76-77.

"Nor shall private property be taken except under the police power and with just compensation."

This interpretational development, excluding the possibility of noncompensable "private-use" takings, was totally unnecessary to the outcome of *Hawaii Housing*. Such a universal compensation rule does follow, however, if the Supreme Court really means, first, to treat the words "for public use" as a *restriction* on the taking power, and second, to read "public use" expansively to encompass any use having a public purpose within the police power. Apart from being unprecedented,[55] such an expansive reading forecloses any obvious textual basis in the Constitution for distinguishing a set of takings, such as rights rearrangements in law reform, which have a public purpose but are not "for public use" and thus would not require compensation. A new doctrine of "vested rights," beyond the reach of ordinary legislation, seems to emerge.[56]

The Supreme Court has recently registered support for the idea that, without compensation, existing owners' vested rights cannot be affected by legislation modifying the pre-existing constellation of private property interests. In *United States v. Security Industrial Bank*,[57] for example, the Court considered an amendment[58] to the bankruptcy law[59] which would retroactively destroy a creditor's liens without compensation. The Court expressed "substantial doubt" as to whether the just compensation clause would permit the amendment[60] and sought to avoid constitutional conflict by inter-

---

[55] Although the Court had occasionally employed the words "public use" in the broad sense of "use for a public purpose," it had never interpreted the words "for public use" in the fifth amendment to be coterminous with the government's police power.

[56] In Fleming v. Rhodes, 331 U.S. 100, 107 (1947), the Supreme Court denied that "vested rights" could exist immune from federal regulation, stating: "So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it." The issue was whether the anti-eviction provisions of tardily reenacted federal rent controls could prevent landlords from recovering possession under valid state judgments issued during the interim period, while no controls were in effect. Significantly, however, in *Fleming*, the landlords were presumably entitled to receive rent, so there would have been no issue of *uncompensated* taking.

The notion of "vested rights" referred to in the text means rights immune to legislative changes which take them *without* compensation. As Part V*B* addresses, such a doctrine would indeed be new, insofar as takings of vested rights without compensation has frequently been approved so long as the rights were not taken "for public use."

[57] 459 U.S. 70 (1982).

[58] 11 U.S.C. § 522(f)(2) (1979) (enacted with the Bankruptcy Reform Act of 1978, Pub. L. No. 598, 92 Stat. 2549, 2589 (1978)).

[59] Title 11 U.S.C.

[60] 459 U.S. at 74-78.

preting the bankruptcy amendment in question to apply prospectively only.[61]

Similarly, in the post-*Hawaii Housing* case of *Ruckelshaus v. Monsanto Co.*,[62] the Court held that the government could not amend its environmental regulations relating to the disclosure or internal use of certain trade secret data in government files without risking a compensable taking under the just compensation clause.[63] As a result of varying regulatory commitments to confidentiality made by Congress and the Environmental Protection Agency over the years, trade secret data on file with the EPA under the federal Insecticide, Fungicide, and Rodenticide Act[64] had become subject to at least three different sets of rules, each with a different level of grandfathering.

In the 1982 case of *Texaco, Inc. v. Short*,[65] the four dissenters held the view that if a state "were by simple fiat to 'extinguish' all pre-existing mineral interests in the State, or to transfer those interests . . . to anyone at all, that action would surely be unconstitutional and unenforceable—at least absent just compensation."[66] The majority in *Texaco* tacitly conceded the reality of the taking problem by insisting that the marketable title legislation[67] under attack involved no "simple fiat" or transfer, but rather was a legitimate response to owner neglect.[68]

While the facts of both *Security Industrial Bank* and *Monsanto* may justify a constitutional requirement of compensation, it is not at all clear that the fifth amendment just compensation clause provides the best foundation for that requirement. The rigidly worded compensation requirement of the clause does not readily support a framework for selectively granting or, in the alternative, withholding compensation according to the context in which private property rights are reassigned for a public purpose.[69] Rather, the *Security* and *Monsanto* cases imply, and the four *Texaco* dissenters in essence say, that when new rules of law will destroy existing pri-

---

[61] *Id.* at 78-82.

[62] 467 U.S. 986 (1984).

[63] *Id.* at 1010-12.

[64] 61 Stat. 163, 7 U.S.C. § 136 (1980).

[65] 454 U.S. 516 (1982). *See infra* notes 178-94 and accompanying text.

[66] *Texaco*, 454 U.S. at 542.

[67] Dormant Mineral Interests Act, IND. CODE §§ 32-5-11-1 through 32-5-11-8 (1980).

[68] *Texaco*, 454 U.S. at 530. *See infra* text accompanying notes 178-94.

[69] For a discussion of a possible due process clause basis for requiring compensation, see *infra* Parts IV and V.

vate property, the government must regulate by purchase.[70]

Realistically, despite the implications of *Security* and *Monsanto*, it is unlikely we are entering a new era of legislation by purchase. Yet, this exact eventuality is logically entailed in the Supreme Court's new position, declared in *Hawaii Housing*, that takings under the police power are *ipso facto* "for public use" and thus subject to the requirement that "private property [shall not] be taken for public use, without just compensation."

II

HISTORICAL BASIS OF THE "PUBLIC PURPOSE" RESTRICTION ON TAKINGS

Although the Court in *Hawaii Housing* chose to start its analysis with the 1954 case of *Berman v. Parker*,[71] it is instructive to look a bit further back. In the pre-*Berman* period, the Court's opinions clearly recognized a public-nexus restriction on government takings.[72] However, even though the Court occasionally referred to this public-nexus requirement as one of "public use," especially in the last century,[73] it did not trace the requirement to the words "for public use" in the fifth amendment.[74] Like the power of eminent domain, which "requires no constitutional recognition,"[75] the

---

[70] *See supra* note 31.

[71] *See* 467 U.S. at 239 (citing Berman v. Parker, 348 U.S. 26 (1954)).

[72] *E.g.*, Olcott v. Supervisors, 83 U.S. 678, 694 (1872) ("The right of eminent domain nowhere justifies taking property for a private use."); *see also* Calder v. Bull, 3 U.S. (3 Dall.) 385 (1798) (quoted in *supra* note 11). Typically, cases applying the public-nexus restriction appear to take its existence for granted, without even discussing its justification or origin. *See, e.g.*, Clark v. Nash, 198 U.S. 361, 367-70 (1905) (approving delegation of eminent domain powers to an individual); United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 679 (1896); Shoemaker v. United States, 147 U.S. 282, 297-98 (1893); Cherokee Nation v. Southern Kan. Ry., 135 U.S. 641, 657 (1890).

[73] *See, e.g.*, Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 161 (1896) ("The use for which property is taken must be a public one . . . ."); *Gettysburg Elec. Ry. Co.*, 160 U.S. at 679-81; *Shoemaker*, 147 U.S. at 297-98; Cole v. La Grange, 113 U.S. 1, 7-8 (1885). On other occasions, however, the Court would (without apparent distinction) refer to the requirement as one of "public purpose." *See, e.g.*, Charles River Bridge Co. v. Warren Bridge Co., 36 U.S. 420, 642 (1837).

[74] "We assume that, if the condemnation was for private uses, it is forbidden by the Fourteenth Amendment." Hairston v. Danville & W. Ry. Co., 208 U.S. 598, 605 (1908). The Court added that state courts have held such private-use takings to be "beyond the legislative power . . . on different grounds. Some cases proceed upon the express and some upon the implied prohibitions of state constitutions, and some upon the vaguer reasons derived from what seems to the judges to be the spirit of the Constitution or the fundamental principles of free government." *Id.* at 606. The Court did not suggest that the just compensation clause had any relation to the issue at all.

[75] Boom Co. v. Patterson, 98 U.S. 403, 406 (1878); *see also Gettysburg Elec. Ry. Co.*,

rule restricting government takings to purposes of a public character was also viewed as not requiring any express constitutional basis. On the contrary, in the Court's view, the outer limitation on the government's power to take private property — by eminent domain, taxation,[76] or police power regulation[77]—"grows out of the essential nature of all free governments."[78] Similarly, "whether a use is public or private is not a question of constitutional construction. It is a question of general law."[79]

The federal power of eminent domain remained unexercised until 1872.[80] The fifth amendment's just compensation requirement was not applied against the states until even later.[81] Thus, for nearly a century, no occasion arose for the Court to consider the question of whether the just compensation clause contains a public-use restriction on the government's power to take.

Ninety-three years after the fifth amendment was ratified[82] and seventy years before *Berman*, the Supreme Court finally spoke — albeit in dicta — on the public-nexus restriction on takings in relation to a constitutional just compensation clause. The case was *Cole*

---

160 U.S. at 681 ("The right to condemn . . . is not so given [by the Constitution]."); United States v. Jones, 109 U.S. 513, 518 (1883); Kohl v. United States, 91 U.S. 367, 376 (1876) ("The right of eminent domain always was a right at common law.").

[76] *See infra* notes 79, 83-101 and accompanying text.

[77] *E.g.*, Block v. Hirsh, 256 U.S. 135, 155 (1921).

[78] Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U.S. 239, 252 (1905); *accord* Charles River Bridge Co. v. Warren Bridge Co., 36 U.S. 420, 642 (1937) ("These limitations have been held to be fundamental axioms in free governments, like ours . . . .").

[79] Olcott v. Supervisors, 83 U.S. 678, 690 (1873). The specific reference of the quotation was the "public use" limitation on the government's power to tax, not on the power of eminent domain. *Id.* "But, so far as respects the use, the taking of private property by taxation is subject to the same limit as the taking by the right of eminent domain. Each is a taking by the State for the public use, and not to promote private ends." Cole v. La Grange, 113 U.S. 1, 8 (1885). The *Olcott* Court discussed the limits on the eminent domain power in bolstering its decision that the tax power limits would permit government subsidies to a private railroad company — though it did not "care to inquire" at the time whether the two limits were identical. 83 U.S. at 696.

[80] *See* Kohl v. United States, 91 U.S. 367, 373 (1876).

[81] A federal just compensation requirement was first made applicable to the states in 1897. *See* Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 239 (1897). In *Hawaii Housing* the Court treated the fifth amendment's just compensation clause as applicable *in haec verba* to the states "by incorporation of the Fifth Amendment's Eminent Domain Clause through the Fourteenth Amendment's Due Process Clause." Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 244 n.7 (1984).

[82] The ratification of the fifth amendment was completed on December 15, 1791. THE CONSTITUTION OF THE UNITED STATES OF AMERICA, S. DOC. NO. 82, 93rd Cong., 2nd Sess. 25 n.2 (1973).

v. La Grange,[83] and the issue was the limitations on the breadth of the taxing power, rather than the restrictions on eminent domain.

Although the scheme in *La Grange* was somewhat convoluted, its net effect was plain: a municipality had pledged some of its future tax revenues to support a private commercial venture.[84] Citing two similar tax-revenue bond cases,[85] the Court held the scheme to be ultra vires, stating: "The *general grant of legislative power* in the Constitution of a State does not enable the legislature, in the exercise either of the right of eminent domain, or of the right of taxation, to take private property . . . for any but a *public object*."[86] Thus, there was clear recognition of a public purpose restriction on the exercise of eminent domain. However, the Court did not find the restriction in the fifth amendment (or in its state analogue) but rather as implicit in the "general grant of legislative power." Commenting on the just compensation clause of the Missouri Constitution,[87] whose wording[88] paralleled that of the fifth amendment, the Court wrote: "This [clause] clearly *presupposes* that private property cannot be taken for private use."[89] The Court's choice of words is revealing. If the just compensation clause "presupposes," rather than "provides" or "mandates," that private property not be taken for private use, then the source of the private-use prohibition must be found elsewhere.[90] The Court did not refer to police power by name in *La Grange*. However, it is all but certain from the context that the limits on "[t]he general grant of legislative power" which the Court had in mind are essentially the very mild con-

---

[83] 113 U.S. 1 (1885).

[84] The municipality had issued its public obligation bonds to a local private manufacturing company in order to "donate" the sum of $200,000 to the company. *Id.* at 2-4. Evidently, the bonds were issued without consideration and with the intention that the company sell the bonds to others in order to raise money. Plaintiff was a purchaser of the bonds suing for interest. *Id.* at 1-3.

[85] *Id.* at 6 (citing Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1874); Parkersburg v. Brown, 106 U.S. 487 (1882)).

[86] *La Grange*, 113 U.S. at 6 (emphasis added).

[87] MO. CONST. art. 1, § 16 (1865) (Declaration of Rights), currently MO. CONST. art. 1, § 26 (1945) (Bill of Rights). Although the Missouri just compensation clause was not directly germane to this taxing power case, the Court used it, by analogy, as indirect evidence of the extent of the "general grant of legislative authority."

[88] "[N]o private property ought to be taken or applied to public use, without just compensation." MO. CONST. art. I § 16, *cited in La Grange*, 113 U.S. at 7.

[89] *La Grange*, 113 U.S. at 7 (emphasis added).

[90] Later, the Court highlighted this distinction in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), where it stated that "[t]he protection of private property in the Fifth Amendment *presupposes* that it is wanted for public use, but *provides* that it shall not be taken for such use without compensation." (emphasis added).

straints imposed on exercises of the police power.[91]

Unfortunately, this early Supreme Court pronouncement introduced enduring confusion by selecting the words "public use" to describe the limits on eminent domain.[92] No doubt the Court was led to this terminology in part because it viewed the "public use" limits on legislative power as dovetailing exactly with the public use delimiter in the Missouri just compensation clause.[93] In later cases, the Court slides over the confining terminology of "public use" to that of "public purpose," which better expresses the recognized breadth of the eminent domain power.[94] Even in *La Grange*, however, when the Court talked of a "public use" requirement for eminent domain, it probably did not mean anything so restrictive as ownership and direct use by a governmental entity itself.

In an earlier taxing power case, *Olcott v. Supervisors*,[95] decided twelve years before *La Grange*, the Court was already giving a fairly expansive definition to the delimiting concept of "public use." Referring to tax support of privately owned railroads, the Court in *Olcott* noted that "[t]here are many acknowledged public uses that have no relation to ownership."[96] In a roughly contemporaneous case, the Court held that even a privately operated grist mill could be a public use — eligible for support from the public fund — where the state's legislature had so declared it.[97] There is, therefore, good reason to believe that at the time of *La Grange*, the Court intended the expression "public use" to mean "use for a public purpose"

---

[91] In this context, the Court wrote as though it was dealing with general limits on governmental power, not specific constraints on the power of taxation or of eminent domain. *La Grange*, 113 U.S. at 6. *See supra* text accompanying notes 79 & 86. Otherwise, it would have been odd indeed for the Court to look to a just compensation clause in seeking public nexus limitations on the power to tax.

[92] *See supra* note 79.

[93] Essentially, the Court appeared to believe that the Missouri just compensation clause required compensation for all takings, excepting taxation, that the government was permitted to effect. In the Court's view, the clause fails to compensate ultra vires, private-use takings: "Otherwise, as [the clause] makes no provision for compensation except when the use is public, it would permit private property to be taken or appropriated for private use without any compensation whatever." *La Grange*, 113 U.S. at 8. It is almost certain that the Court was not taking into account valid uncompensated private-use takings of the kind later upheld in cases such as those described in Part III *infra*.

[94] *See* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896); *infra* notes 116-23 and accompanying text.

[95] 83 U.S. 678 (1872).

[96] *Id.* at 697. The Court previously noted that privately owned turnpikes, bridges, ferries, and canals might also qualify as public uses. *Id.* at 695.

[97] Township of Burlington v. Beasley, 94 U.S. 310, 314 (1876).

when talking of the limits on the power of eminent domain.[98]

Quite possibly, the only reason the Court did not find the use of tax funds in *La Grange* to qualify as a "public use" is that it was procedurally foreclosed from even considering the issue.[99] It may overstate to say that the "public purpose" test of *Berman v. Parker*[100] is found in *Olcott* and implicit in *La Grange*, but it does not overstate by much.[101]

In *Head v. Amoskeag Manufacturing Co.*,[102] decided the same day as *La Grange*, the Supreme Court upheld a taking for private use through explicit reference to police-power type concerns. The case involved a redistribution of private property rights by the state, with compensation but *in invitum*, under the Mill Act[103] — a statute intended to maximize the power generating capacity of a stream. The Court referred to ample authority, which might have sustained the statutorily authorized rearrangement of riparian rights in the non-navigable stream based upon the state's power of eminent domain.[104] It preferred, however, to rest its decision on the general legislative power to act for the "public good," reaching a balance "with a due regard to the interests of all . . . ."[105] The Court concluded that the Mill Act "[b]eing a constitutional exercise of the legislative power, and providing a suitable remedy [compensation] . . . has not deprived [plaintiff] of his property without due process of law, in violation of the Fourteenth Amendment . . . ."[106] Significantly, the Court decided to evaluate the forced taking of private property for private use in terms of the substantive due process limits on the legislative power and, in considering those limits,

---

[98] Arguably, the Court in *La Grange* employed the less constrictive expression "public object," as well as writing of "public use" without intending any difference of meaning. *See supra* text accompanying note 86.

[99] Due to the procedural posture of *La Grange*, the Court was required to accept as fact that the use would be for "strictly private enterprise . . . which had nothing whatever of a public character." Cole v. La Grange, 113 U.S. 1, 9 (1885).

[100] 348 U.S. 26 (1954).

[101] A public use may, indeed, consist in the possession, occupation, and enjoyment of property by the public, or agents of the public, but it is not necessarily so. . . . While, then, it may be true that ownership of property may sometimes bear upon the question whether the uses of the property are public, it is not the test.

Olcott v. Supervisors, 83 U.S. 678, 697 (1873).

[102] 113 U.S. 9 (1885).

[103] N.H. STAT. 1868, ch. 20, *cited in* 113 U.S. at 10-11, n.*.

[104] 113 U.S. at 19-21.

[105] *Id.* at 21.

[106] *Id.* at 26.

looked specifically to the legislature's provision for adequate compensation.

To summarize these early cases, it appears that when the Supreme Court first recognized a public-nexus restriction on the taking power it saw the restriction (a) as a *general* one, to be met for taxation and eminent domain alike; (b) as an inherent limit of governmental power, rather than founded on any particular constitutional text; and (c) despite the reference to "public use," failed to see the public-nexus restriction on takings as having any necessary relation to ownership,[107] emphasizing instead that the use must be for a public purpose. It is equally clear that the Court regarded it as constitutionally permissible, while serving the "public good," for the government to take private property from its owner and give it to another private person, at least when compensation was provided.

Other Supreme Court cases decided during the period between the 1870s and *Berman* leave no doubt that takings for purely private *purposes* would be impermissible. Nonetheless, they do not identify the fifth amendment words "for public use" as the source of the public-nexus restriction on eminent domain.[108] In *Missouri Pacific Railway Co. v. Nebraska*,[109] for example, the Court considered a state order requiring a private railroad company to convey a portion of its lands to a group of farmers so that the farmers could erect and maintain a grain elevator on the railroad's premises. Because the grain elevator was for the farmers' private benefit, the Court held that requiring the railroad to donate the site was "in essence and effect, a taking of private property . . . for the private use of [another and, as such, was] a violation of the Fourteenth Article of Amendment of the Constitution . . . ."[110]

Notably, the Court in *Missouri Pacific* must have thought that the prohibition on taking for private use resided in the fourteenth amendment as a matter of general substantive due process[111] and not at all founded on any wording of the just compensation clause. At that time, ideas of imposing the fifth amendment just compensa-

---

[107] Olcott v. Supervisors, 83 U.S. 678, 697 (1872). *See supra* text accompanying note 96.

[108] *See, e.g.*, cases cited *supra* note 72.

[109] 164 U.S. 403 (1896).

[110] *Id.* at 417.

[111] The fourteenth amendment prohibits such a taking by a state as a matter of substantive due process, or, conceivably, of equal protection, and is unrestricted by any wording of the just compensation clause. *Id.*

tion requirement against states via the fourteenth amendment were clearly still in the future; only two weeks earlier, the Court declared: "The Fifth Amendment . . . applies only to the Federal government."[112] On the question of why the grain elevator use would not qualify as a "public use," the Court seemed influenced by the fact that no one even claimed the case involved a taking for public use under the eminent domain power.[113] The initiators, objectives, and beneficiaries of the taking were all strictly private, and the Court simply accepted that no qualifying public use was involved.[114]

It should not, however, be assumed from *Missouri Pacific Railway* that the 1896 Supreme Court had forgotten its earlier broad vision of the kinds of "public use" capable of justifying eminent domain or taxation.[115] In the contemporaneous case of *Fallbrook Irrigation District v. Bradley*,[116] the Court issued an opinion whose tone on the breadth of "public use" is almost identical to *Berman v. Parker*.

The plaintiff-landowners in *Fallbrook* contested the irrigation district's power to levy improvement assessments (a special tax) in order to provide a system of irrigation for the area. As in *La Grange* and *Olcott*, the insight on nontax takings comes from dicta written to bolster the Court's conclusions on the tax questions at issue — on the theory that what is public use for eminent domain is also public use for taxation.[117] Of particular interest is that, by 1896, the Court in *Fallbrook* was using the terms "public use" and "public purpose" almost interchangably.[118] In describing the limits on eminent domain, the Court said that the power of condemnation to create an irrigation system "could be conferred . . . [only] upon the ground that the property they took was to be taken for a public purpose."[119] The Court added: "[T]o bring into . . . cultivation these

---

[112] Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158 (1896). The *Fallbrook* Court declared, only two weeks prior to their decision in *Missouri Pacific*, that "[t]he Fifth Amendment [requirement of] just compensation, applies only to the Federal government . . . [and not to the states.]"

[113] *See Missouri Pacific*, 164 U.S. at 416.

[114] Compare the procedural posture which required the Court to strike down the taking by taxation in *La Grange*. *See supra* note 99 and accompanying text.

[115] *See* Olcott v. Supervisors, 83 U.S. 678 (1872), discussed *supra* in text accompanying notes 95-101.

[116] 164 U.S. 112 (1896).

[117] *See id.* at 160-62.

[118] *Id.* at 161.

[119] *Id.*

large masses of otherwise worthless lands would seem to be a public purpose . . . not confined to the landowners"[120] who actually get the water. At other points in its opinion, however, the Court employs the words "public *use*," instead of "public purpose," stating "the use for which private property is taken must be a public one . . . ."[121] Nevertheless, the Court clearly took a broad view of what would constitute "public use" for taxation and eminent domain purposes. This expansive view is apparent from its conclusion: "[T]he irrigation of really arid lands is a public purpose, and the water thus used [on the privately-owned lands] is put to a public use."[122]

Thus, despite the narrow holding in the *Missouri Pacific* grain elevator case, *Fallbrook* indicates that the Court was contemporaneously prepared to hold that an eminent domain taking for private use could meet the "public use" requirement so long as the taking had a "public purpose." Moreover, the *Fallbrook* case shows that this public purpose restriction was not rooted in the just compensation clause of the fifth amendment. In fact, the restriction was clearly applicable against the states while the fifth amendment specifically was not.[123]

Therefore, by the end of the nineteenth century, the Court had already established that the government's authority to take private property had the breadth and flexibility actually realized in *Berman* and *Hawaii Housing*. The cases of the twentieth century continued in the same general line.[124] In short, even before *Berman v. Parker*, the Supreme Court did not recognize the "public use" restriction on takings as emanating from the just compensation clause. Instead,

---

[120] *Id.*

[121] *Id.*

[122] *Id.* at 164.

[123] *Id.* at 158.

[124] *See, e.g.*, Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U.S. 239, 251 (1905), where the Court limited government takings to "purposes which are of a public character . . . ."

In Rindge Co. v. Los Angeles County, 262 U.S. 700, 707 (1923), the Court, citing *Fallbrook*, reaffirmed that "[i]t is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in an improvement in order to constitute a public use."

In Thompson v. Consolidated Gas Util. Corp., 300 U.S. 55, 76-77 (1937), the Court "assumed" that, for a proper purpose, the Constitution would permit a taking from one private person in order to give to another, even without compensation. Looking at the facts at hand, however, the Court invalidated the regulatory orders at issue stating: "There is here no taking for the public benefit; nor is payment of compensation provided." *Id.* at 78.

due process required only that the government act with a justifiable public purpose. Essentially, the limits of the police power[125] were the only public-nexus restriction that the government need observe. Simply stated, the only constraint on the government's power was that "taking" only be used "for purposes which are of a public character"[126] and not "to promote private ends."[127]

III

TAKINGS FOR PRIVATE USE: WITH AND WITHOUT COMPENSATION

In general, property law is state law, and thus the scope and extent of property rights are for the states to determine.[128] The government's power is not exhausted, however, once state law has created a category of property and defined its dimensions.[129] Rather, the Supreme Court has recognized in various contexts that a state may partially or wholly take back for reallocation to others the private property rights it has created, without paying compensation. Such retakings and reallocations may be effected by enacting new laws that condition,[130] modify,[131] or abolish[132] the rights of

---

[125] Or, in the case of the federal government, the enumerated powers under the Constitution. *See supra* note 47.

[126] *Madisonville Traction*, 196 U.S. at 251.

[127] Cole v. La Grange, 113 U.S. 1, 8 (1884).

[128] *See* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378 (1977); United States v. Fox, 94 U.S. 315, 320 (1876); *accord*, PruneYard Shopping Center v. Robins, 447 U.S. 74, 84 (1979); Board of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ."). Thus, even though "the meaning of 'property' . . . in the Fifth Amendment is a federal question, [the federal definition of property] will normally obtain its content by reference to local law." United States *ex rel.* TVA v. Powelson, 319 U.S. 266, 279 (1943); *see also* Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 517-18 (1938).

[129] [T]he notion that [tangible property is] exempt from legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power . . . under which property rights may be cut down, and to that extent taken, without pay.

Block *ex rel.* Whites v. Hirsh, 256 U.S. 135, 155 (1921).

[130] *See, e.g.*, Texaco, Inc. v. Short, 454 U.S. 516 (1982); *infra* notes 178-94 and accompanying text.

[131] *See, e.g., PruneYard Shopping Center*, 447 U.S. 74; *infra* notes 206-32 and accompanying text; Demorest v. City Bank Farmers Trust Co., 321 U.S. 36; *infra* notes 167-77 and accompanying text.

[132] *See, e.g.*, Kirchberg v. Feenstra, 450 U.S. 455 (1981); *infra* notes 162-66 and accompanying text.

existing owners.

Attempts to reallocate the property rights that state law has conferred have not, however, been uniformly upheld by the Supreme Court.[133] What is more, the reasoning of cases considering the takings which result from such reallocations often "fits but awkwardly"[134] into the analytical framework employed to rationalize other such cases.[135] Nevertheless, even though the rationales may be hard to reconcile, the holdings themselves present discernible patterns. A principle for differentiation emerges from the holdings.

Cases in which the Supreme Court has required compensation for intra-private sector rights reallocations will be considered in Part III*A*. Takings for private use, approved even though without compensation, will be considered in Part III*B*.

A. Rearrangements of Private Rights Requiring Compensation

In a number of cases, the Supreme Court has either held or stated that compensation is constitutionally required in order to validate governmental actions which rearrange existing property rights. Two recent examples, *Ruckelshaus v. Monsanto Co.*[136] and *United States v. Security Industrial Bank*[137] have already been briefly discussed. To this list, one might also add the *Hawaii Housing*[138] case and the four-justice dissent in *Texaco, Inc. v. Short.*[139]

One of the first Supreme Court cases to require compensation for a private rights rearrangement is also coincidentally one of the earliest Supreme Court landmarks in the just compensation field. *Pumpelly v. Green Bay Co.*[140] involved a claim for damages due to the flooding of plaintiff's land caused by defendant's dam. The defendant argued that he was immune from liability for the resultant flooding because the dam was authorized by an act of the state legislature. In effect, the defendant's claim was that the statute authorizing the dam implicitly subjected the plaintiff's lands to an

---

[133] *See infra* text accompanying notes 136-60.

[134] *See* United States v. Security Indus. Bank, 459 U.S. 70, 75 (1982).

[135] Indeed, such cases often seem to rest on outright contradictions of principle. *Compare Security Indus. Bank*, 459 U.S. at 75, *with Kirchberg*, 450 U.S. 455; *infra* text accompanying notes 162-66. *Also compare* text accompanying *infra* note 155 *with* text accompanying *infra* note 174.

[136] 467 U.S. 986 (1984).

[137] 459 U.S. 70 (1982).

[138] Hawaii Hous. Auth. v. Midkoff, 467 U.S. 229, 245 (1984) (referring to the "weighty demand of just compensation").

[139] 454 U.S. 516, 542 (1982) (Brennan, J., dissenting).

[140] 80 U.S. (13 Wall.) 166, 167 (1871).

easement or servitude of flooding for the benefit of the owner of the dam. The Court held, however, that the authorizing statute was void[141] under the state's[142] just compensation clause because it did not provide for compensation.[143] The statutory imposition of an easement over the plaintiff's land for the benefit of the defendant was not in any sense an acquisition of property rights by the state.[144] Yet, the Court seemed to take for granted that the validity of the legislation depended upon compliance with the state's just compensation clause.[145]

The 1982 case of *Loretto v. Teleprompter Manhattan CATV*,[146] also involving a legislative attempt to create private easements or servitudes over private land, is abstractly similar to *Pumpelly*. In *Loretto*, the Court considered a statutory requirement that landlords permit cable television companies to run and maintain lines and equipment upon and across the landlords' apartment buildings. This physical access was crucial to a cable network in dense urban settings.[147] The Supreme Court cited *Pumpelly* in its discussion. It did not, however, jump so readily to the conclusion that the just compensation clause applied merely because there was a physical invasion of the apartment owners' land. Instead, the Court observed that "a physical invasion is subject to a balancing process."[148] Nevertheless, the Court continued, the cases "do not suggest that a *permanent* physical occupation would ever be exempt" from the just compensation clause.[149] It described permanent physical occupation as "the most serious form" of invasion of an owner's property interests[150] and, as such, compensable as a taking without regard to how great the public benefit or how little the economic impact on the owner.[151]

The taking of a much more conceptual form of property was at

---

[141] *Id.* at 181-82.

[142] At that time, the just compensation requirement of the federal Constitution was considered inapplicable against the states. *Id.* at 176-77; *see supra* note 10.

[143] "The property of no person shall be taken for public use without just compensation therefor." WIS. CONST. art. 1, § 13, *cited in Pumpelly*, 80 U.S. (13 Wall.) at 177.

[144] Rather, the creation of the right to backflow waters was, in effect, a transfer of an easement to the private owner of the dam from the owner of the flooded land. *Pumpelly*, 80 U.S. (13 Wall.) at 176-77.

[145] *Id.*

[146] 458 U.S. 419 (1982).

[147] *Id.* at 422.

[148] *Id.* at 432.

[149] *Id.* (emphasis added).

[150] *Id.* at 435.

[151] *Id.* at 434-35.

issue in *Louisville Joint Stock Land Bank v. Radford*.[152] The statute which the Court struck down, the Frazier-Lemke Act,[153] in effect permitted debtors to remove liens on their property by payment of less than a fair amount.[154] The Court spoke of the need to pay just compensation as though there could be no other possibility:

> [H]owever great the Nation's need, private property shall not thus be taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of the individual mortgagees in order to relieve the necessities of the individual mortgagors, resort must be had to proceedings in eminent domain . . . .[155]

In 1982, the Court reaffirmed these sentiments in *United States v. Security Industrial Bank*,[156] while reviewing a bankruptcy reform act[157] provision[158] which, if applied prospectively, would have extinguished liens acquired prior to its enactment: "[H]owever 'rational' the exercise of the bankruptcy power may be, that inquiry is quite separate from the question whether the enactment takes property . . . ."[159]

The only general principle derived from cases like *Pumpelly* and its successors is that if legislative rearrangements of private rights result in uncompensated "takings," the legislation is unconstitutional.[160] Such a principle is, however, too broad to coexist with the cases which have approved takings without compensation, to which we now turn.

---

[152] 295 U.S. 555 (1935); *cf.* Armstrong v. United States, 364 U.S. 40 (1960) (requiring compensation for the taking of a lien).

[153] Ch. 869, 48 Stat. 1289 (1934).

[154] *See Radford*, 295 U.S. at 591-93. Although in *Radford* it was the federal government, rather than the state, which rearranged state-created property rights, there is no indication that any different treatment or distinct principle would apply on that account. "If Congress can 'pre-empt' state property law . . . then the Taking Clause has lost all vitality." Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1012 (1984); Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 517-18 (1938).

[155] *Radford*, 295 U.S. at 602.

[156] 459 U.S. 70 (1982).

[157] The Bankruptcy Reform Act of 1978, Pub. L. No. 598, 92 Stat. 2549 (1978).

[158] 11 U.S.C. § 522(f)(2) (1979).

[159] *Security Indus. Bank*, 459 U.S. at 75.

[160] Justice Stewart's corollary to this principle is that "[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." Hughes v. Washington, 389 U.S. 290, 296-97 (1967) (concurring opinion). In *Hughes* the state had attempted to redefine, to a private owner's detriment, the seaward boundary of littoral (seacoast) land. The attempt was struck down on grounds unrelated to the Constitution.

B. Takings For Private Use Approved Without Compensation

In a number of cases the Supreme Court has approved uncompensated takings which result from the enactment or operation of legislation that rearranges or reassigns existing property "rights."[161] These cases may be divided into several categories according to the rationale given by the Court in upholding the uncompensated takings.

1. Ignoring the Issue

Probably the cleanest way the Supreme Court has handled the problem of upholding a taking of private rights for private use is not to refer to the problem at all. For example, in *Kirchberg v. Feenstra,*[162] the Court approved a taking of a mortgagee's lien without compensation. The lien was an encumbrance on the wife's interest in community property. However, the lien was created by the husband alone under a Louisiana rule which gave the husband, as "head and master," exclusive control over the disposition of community property.[163] The taking occurred when the lien was invalidated in the course of striking down the "head and master" rule as unconstitutional gender discrimination. In contrast to the strong affirmations of constitutional protection for lienholders' property interests expressed in other cases,[164] the Court declared the lien in *Kirchberg* to be invalid without even mentioning the taking issue. It could be argued, of course, that the lien — having been created pursuant to a statute which contravened the fourteenth amendment — was never valid, and hence there was nothing to take.[165] Ac-

---

[161] The term "rights" as used here is defined in the text accompanying *supra* note 24. Note that the discussion which follows is not concerned with any of the so-called regulatory taking cases, (*e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (historic preservation); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (mining prohibition); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (zoning)), which uphold regulations that merely impair the owner's "freedom" to use property, as distinguished from the ownership "rights" themselves. Rather, in each of the cases, the effect of the government's action is to take property "rights," not mere "freedoms," usually through a total annihilation of the entire ownership interest. *See supra* text accompanying notes 21-29.

[162] 450 U.S. 455 (1981).

[163] LA. CIV. CODE Ann. art. 2404 (West 1971), repealed during a complete revision of the Civil Code provisions relating to community property. *See Kirchberg*, 450 U.S. at 458.

[164] *See, e.g.*, United States v. Security Indus. Bank, 459 U.S. 70 (1982); Armstrong v. United States, 364 U.S. 40 (1960); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935).

[165] The federal bankruptcy power is subject to the fifth amendment's just compensa-

cepting this view, however, would worsen the taking problem unless all of the other husband-only dispositions under the unconstitutional "head and master" rule were undone. Wisely, the Court "decline[d] to address" those concerns.[166]

2. *Denial that Rights Existed*

Before vested property rights can be taken, the rights must exist in the first place. For example, an "heir-apparent" or named legatee, who merely has expectations or hopes of succession to property, does not acquire actual rights until the death of the intestate or testator.[167] A remainderman under a trust, on the other hand, has property rights as a direct transferee from the grantor or testator who originally divided up the ownership into the life estate and remainder.[168] Therefore, the remainderman's property would appear to be taken when, pursuant to supervening legislation, the remainderman's interest in the trust estate is used to make payments to the life tenant in excess of the trust income.

Despite the effect on the remainderman's right, the Supreme Court in *Demorest v. City Bank Farmers Trust Co.*[169] approved exactly such a redistribution of property under a statutory[170] income distribution rule. In effect, the Court classified the payments made to a life tenant as "income," even though the payments exceeded the actual income and thus were actually from principal. Looking solely at the scope and dimensions of the interests taken, it is hard to reconcile the insouciance of *Demorest* with the rigorous protection for mortgagees accorded in the *Radford* and *Security Industrial*

---

tion requirement. *Security Indus. Bank*, 459 U.S. at 75; *cf.* Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 517-18 (1938). Can it be that the fourteenth amendment's equal protection provision is likewise subject to the just compensation clause? To be sure, the Court might find good reasons why equal protection should take precedence over the just compensation requirement. But are those reasons for preferring one clause of the Constitution over another so self-evident that they go without saying?

[166] *Kirchberg*, 450 U.S. at 462. Compare Boan v. Watson, 281 S.C. 516, 316 S.E.2d 401 (1984), where the South Carolina Supreme Court held the common-law right of dower to be unconstitutional gender discrimination. However, the *Boan* court decided to apply its holding only prospectively to avoid "upsetting titles to property." *Id.* at 517, 316 S.E.2d at 403. Nevertheless, within the court's analytical framework, the effect was to uphold, perhaps unwittingly, the expropriation of all those who had previously been denied their property rights by the "unconstitutional" operation of dower.

[167] Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942).

[168] *See* 1 AMERICAN LAW OF PROPERTY § 4.25 (Casner ed. 1952).

[169] 321 U.S. 36 (1944).

[170] N.Y. PERS. PROP. LAW. § 17-c, art. 2, *repealed by* N.Y. EST. POWERS & TRUSTS LAW § 14-1.1 (McKinney 1967).

Bank cases.[171]

Justice Jackson's reasoning in *Demorest* contained three main prongs. First, what was "really . . . taken from the remainderman is his right to question the equity of the [income distribution] rule in his individual circumstances."[172] That is, the remainderman suffered a taking only of his remedy, not of his rights, a distinction since repudiated by the Court.[173] Second, the Court offered an argument of practical necessity: "The whole cluster of vexatious problems arising from uses and trusts, mortmain, the rule against perpetuities, and testamentary directions for accumulations or for suspensions of the power of alienation, is one whose history admonishes against unnecessary rigidity."[174] Third, Justice Jackson seemed to treat the respective interests of the life tenant and remainderman as lying, in essence, in the rules governing distributions from the trust, stating that these rules were "tentatively put forward . . . leaving much to discretion."[175] Thus, the legislature should still be able "to make further reasonable rules which in its opinion will expedite and make more equitable the distribution of millions of dollars of property locked in testamentary trusts, even if they do affect the values of the various interests and expectancies under the trust."[176]

The *Demorest* Court did not explicitly rank its three rationales. It seems likely, however, that the policy weight of the second rationale was controlling. In both the general and the specific case, practical necessity would require the possibility of modifying the remainderman's estate. The technical considerations expressed in the first and the third rationales followed that of practical necessity.

Looking at practical necessity to determine the scope and contours of existing property rights is a pragmatic instrumentalism which the law often cannot avoid. The courts and the law cannot immobilize themselves in a web of vested rights. Reallocations of property rights must occasionally be permissible within the confines of substantive due process. Nevertheless, few would regard the legal rules underpinning property rights as "tentatively put forth."

---

[171] *See supra* text accompanying notes 57-61 & 152-58.

[172] *Demorest*, 321 U.S. at 47.

[173] Texaco, Inc. v. Short, 454 U.S. 516, 528 (1982), *citing* El Paso v. Simmons, 379 U.S. 497, 506-07 (1965); *see also* Bronson v. Kinzie, 42 U.S. 311, 317-18 (1843) (encumbering the remedy impairs the right).

[174] *Demorest*, 321 U.S. at 48.

[175] *Id.*

[176] *Id.* at 48-49.

Thus, *Demorest* seems to go too far by allowing the government, by *ipse dixit,* to avoid a taking by declaring that the property never existed, a constitutional position subject to some doubt.[177]

The trouble with the "denial" analysis of *Demorest* is that it fails to take account of the interplay between the conflicting needs of legislative flexibility and the protection of private proprietary expectations. As a way to deal with the just compensation problem in rights rearrangement cases, *Demorest* is an analytical dead end. It offers no power whatsoever to differentiate between those uncompensated takings which ought to be constitutionally acceptable and those which ought not.

3. Owner Had Opportunity to Avoid Taking

The operation of recording acts, marketable title legislation, statutes of limitation on possessory actions, and the case law of estoppel may all have the effect of taking property from one owner and conferring it, or a comparable title, on another private person. In each instance, the rearrangement of property rights is without compensation. Owners may generally avoid takings of these kinds through various measures, however. Title instruments and statements of claim may be recorded, adverse possessors may be ousted from possession within proper time limits, and representations forming the basis of estoppels may be eschewed. In short, an owner can readily prevent, through proper precautions, any takings which would otherwise be triggered by the owner's failure to meet certain standards of diligence.

The Supreme Court recently reviewed its holdings in relation to nondiligence takings in *Texaco, Inc. v. Short,*[178] where it upheld Indiana's Mineral Lapse Act.[179] The Act provided that unused mineral interests existing at the time of its enactment would be extinguished, thus merging into the interest out of which they were carved, unless the mineral interest owner filed a statement of claim in the recorder's office within the prescribed time period.[180] Treat-

---

[177] Allowing the government to avoid compensation in this manner would violate Justice Stewart's previously mentioned corollary. *See supra* note 160. *Cf.* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980) ("[A] State, by *ipse dixit,* may not transform private property into public property without compensation . . . .").

[178] 454 U.S. 516 (1982).

[179] IND. CODE §§ 32-5-11-1 to 32-5-11-8 (1980). The statute was officially entitled the Dormant Mineral Interests Act. *See Texaco,* 454 U.S. at 518 n.1.

[180] IND. CODE § 32-5-11-1 (1980).

ing the problem as one of constitutional conditions, the Court had "no doubt that, just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions . . . ."[181] Since the conditions outlined in the Indiana statute — either use of the mineral interest or a filing — furthered "a legitimate state goal"[182] and "impose[d] such a *slight* burden on the owner while providing such clear benefits to the State,"[183] the Court held the retroactive imposition of these qualifications of owners' rights to be within the state's legislative power.

The takings issue in *Texaco* was not, however, limited to *slight* modifications of existing titles by imposing new statutory "use or file" conditions on existing property owners. The owners' rights in *Texaco* had lapsed under the statute, resulting in an *in toto* expropriation.[184] The overall magnitude of the governmental action thus greatly exceeded the "slight burden on the owner"[185] referred to by the Court. Nevertheless, the Court had no problem upholding the retroactive aspect of the impositions. It did so in a footnote,[186] offering a quote from an analogous statute of limitation case,[187] decided in 1902 under the contracts clause:[188] "It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts."[189] Thus, for marketable title statutes and recording acts, as for statutes of limitation, the problem of retroactive imposition is solved by providing "a reasonable grace period in which owners could protect their rights."[190]

Once the validity of the "use or file" condition was established, the Court felt it could readily dispose of the alleged taking of the mineral interests themselves. The filing requirement, said the Court, "is not itself a 'taking.' "[191] As for the actual extinction of

---

[181] *Texaco*, 454 U.S. at 526.

[182] *Id.* at 529.

[183] *Id.* at 529-30 (emphasis added).

[184] *Id.* at 521.

[185] *Id.* at 529-30.

[186] *Id.* at 527 n.21.

[187] Wilson v. Iseminger, 185 U.S. 55 (1902).

[188] U.S. CONST. art. I, § 10.

[189] *Wilson*, 185 U.S. at 62.

[190] *Texaco*, 454 U.S. at 527 n.21.

[191] *Id.* at 530. This statement is questionable. At the very least, the "use or file" requirement subjects the mineral interests to a kind of condition subsequent or execu-

title to the mineral interests, "[i]t is the owner's failure to make any use of the property — and not the action of the State — that causes the lapse of the property right; there is no 'taking' that requires compensation."[192] It is hard, as a factual matter, to agree with this statement. It is one thing to say that there is no compensable taking when the state redistributes property by taking it from those who do not use it. It is quite another thing to say that such a "lapse" is not caused by action of the state. The uncompensated redistribution of unused property in *Texaco* certainly would not have occurred spontaneously if the state had remained entirely passive.

Unless we are to indulge in wordplay, one must concede that *Texaco* recognizes the power of government to take private property from one private owner and then give it to another without paying compensation. The Court's justifications[193] for upholding uncompensated *Texaco*-type takings are of the utmost importance, but not because they go to the question of whether or not property has been taken. Rather, the state interests served by *Texaco*-type statutes, including the promotion of owner diligence in specific ways, go to the substantive due process issue of whether the taking falls within the "general grant of legislative power."[194] A justifying public purpose, no matter how compelling, does not prevent a taking from being a "taking."[195]

A somewhat related case of constitutional conditions, appearing to involve a less avoidable sort of rights deprivation, was considered by the Court in *Ruckelshaus v. Monsanto Co.*.[196] At issue was a

---

tory limitation. Perhaps, for the reasons stated in *Demorest*, the government should have the reserved power to impose new qualifications on title. *See supra* text accompanying note 174. Although less likely, it is possible the taking which the new impositions entail may be regarded as de minimis. *See infra* text accompanying notes 206-42. Denying the reality of what is actually happening, however, seems the least desirable way to justify the exercise of the government's power to modify property interests in selected cases without compensation. Apart from the fact that denial fools no one, the Court offers no suitable constitutional basis for distinguishing cases which are appropriate for compensation from those which are not.

[192] *Texaco*, 454 U.S. at 530.

[193] *See supra* text accompanying notes 182-83.

[194] *See* Cole v. La Grange, 113 U.S. 1, 6 (1885).

[195] If the existence of a public purpose could prevent a taking from being a "taking," it would seem to follow that *no* takings "for public use" would require compensation — in direct contradiction of the fifth amendment.

[196] 467 U.S. 986 (1984). In *Monsanto*, the Court was faced with three groupings of trade secrets: (1) those embodied in data submitted to EPA before October 22, 1972; (2) those embodied in data submitted between October 22, 1972, and September 30, 1978, and; (3) those embodied in data submitted after September 30, 1978. In an earlier discussion of the case, reference was made to protection for the trade secrets occupying

statutory disclosure requirement[197] applicable to the owners of trade secrets relating to the manufacture of pesticides. The trade secret owners were required to reveal their secrets to the Environmental Protection Agency in order to obtain a license to sell the pesticides. Under the statute, the EPA could later disclose the secrets to others — or use them in evaluating others' applications — under certain prescribed circumstances.[198] In sum, the trade secret owner could be required to relinquish to other private persons its exclusive use of the secret and, hence, give up its property interest in it as a condition to receiving government permission to make any economic use of the secret data at all.

The Court stressed that the decision to submit to the license process and to reveal the secrets rested entirely with the owner. Accordingly, the regulatory scheme did not, in and of itself, effect a taking.[199] However, the Court neglected to stress that a failure to seek a license could deprive the trade secret owner of all practical use of the trade secret asset and thus, by analogy to land-use regulations that go "too far," amount to a taking.[200] This effect would occur in any case where the only practical way for the owner to use the secret would be to make and sell the associated pesticide — presumably the usual situation.[201] In such situations, the disclosure requirement meant that the secret would either be useless or forfeited as a precondition to its use by its owner.[202]

---

the second grouping. *See supra* notes 62-64 and accompanying text. As to these types of secrets, Monsanto had a reasonable expectation of confidentiality and, hence, disclosure of the secret data by EPA could constitute a taking. 467 U.S. at 1010-13. The present discussion concerns trade secrets in the first and third groupings, as to which the Court said that Monsanto relinquished its expectation of secrecy by submitting the data. *Id.* at 1004-10.

197 *See* Insecticide, Fungicide & Rodenticide Act, 61 Stat. 163 (1978) (codified as amended at 7 U.S.C. § 136-136y (1980)).

198 *See* 467 U.S. at 992-97.

199 *Id.* at 1006-08.

200 *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

201 The Court noted that Monsanto sold in the international market. Therefore, its trade secret property would not actually be economically useless if it did not submit to the government's disclosure procedure. 467 U.S. at 1007 n.11. Thus, strictly speaking, under the Court's holding Monsanto would only lose partial use of its trade secret property if it decided not to relinquish its secret data pursuant to the EPA license regulations. Read as a whole, however, the opinion provides little basis to conclude that the presence of an international market in this case (mentioned only in a footnote) was crucial to upholding the regulatory scheme as a nontaking. Nevertheless, the possibility cannot be entirely discounted.

202 *Cf.* Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419, 439 n.17 (1982): "[A] landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation" by third parties.

The Court upheld the validity of the regulatory scheme in *Monsanto,* citing the undeniable power of the government to regulate the sale of pesticides; thus, the conditions were "rationally related to a legitimate Government interest."[203] The Court's conclusion that there is no taking because "a voluntary submission of data . . . can hardly be called a taking,"[204] is less convincing, however. The effect of such a submission is to annihilate the owner's property rights in the data submitted, rights which would be useless without the submission.

The point is not that cases such as *Texaco* and *Monsanto* are objectionable in their outcomes. Recording acts, statutes of limitation, and environmental reviews of hazardous chemicals all have well-recognized public purposes. Compared to the private burdens imposed, the public purposes might easily justify imposition of the private burdens — a point made by the Court in both cases. The objectionable aspect of *Texaco* and *Monsanto* is their stated rationales, that property annihilations effectuated under the statutes are not takings by governmental action, but rather are volitional relinquishments of rights by the owners affected. Denying that the government is taking property rights for private use is tantamount to denying that the rights existed at all.[205] Such denials are not merely specious, they leave no framework for balancing private impositions which in fact do occur against the public purposes that justify the impositions. Significantly, these public purposes, the owner's opportunity to avoid the taking and, most of all, the rational connection between the two, contribute to keeping such takings for private use fully consonant with the requirements of substantive due process. These factors do not, however, prevent them from being takings.

4. Not Enough is Taken

In considering the compensability of expropriative governmental acts, the Supreme Court has occasionally stressed the relative magnitude of the rights impaired. In employing such a magnitude test, compensation has been denied on the grounds that the magnitude of the rights impaired was relatively small.

In *PruneYard Shopping Center v. Robins,*[206] for example, the Court denied compensation for the effects of a California state court

---

[203] *Monsanto*, 467 U.S. at 1007.

[204] *Id.*

[205] *See supra* text following note 178.

[206] 447 U.S. 74 (1980).

ruling[207] which required owners of private shopping centers to permit "speech and petitioning, reasonably exercised"[208] on shopping center premises. The Supreme Court had previously settled the constitutional balance between free expression and private property in favor of property owners, at least for most shopping center cases.[209] The Court decided, however, that its own holding under the federal Constitution did not *ex proprio vigore* limit the states' power to confer a more expansive liberty of expression.[210]

The Court agreed that, under the California court's interpretation of its own state constitution, there had "literally been a 'taking' "[211] of the shopping center owners' right to exclude others, a right which is, according to the Court, "one of the essential sticks in the bundle of property rights."[212] Nevertheless, the California court's ruling in *PruneYard* "clearly [did] not amount to an unconstitutional infringement of appellants' property rights under the Taking Clause."[213] The owners of the shopping center had not shown that the right to exclude others was, under the circum-

---

[207] Robins v. PruneYard Shopping Center, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), *aff'd*, 447 U.S. 74 (1980).

[208] 447 U.S. at 78 (citing *PruneYard*, 23 Cal. 3d at 910, 153 Cal. Rptr. at 860, 592 P.2d at 347).

[209] Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); *see also* Hudgens v. NLRB, 424 U.S. 507 (1976), *overruling* Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

[210] *PruneYard*, 447 U.S. at 81.

[211] *Id.* at 82 (citing Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979)). *See infra* note 212.

[212] *PruneYard*, 447 U.S. at 82. In Kaiser Aetna v. United States, 444 U.S. 164 (1979), decided six months earlier, the Court described the right to exclude as "so universally held to be a fundamental element of the property right [that it] falls within this category of interests that the Government cannot take without compensation." *Id.* at 179-80 (footnote omitted).

In *Kaiser Aetna*, the Court held that a taking would result if the government were to extend the public navigation easement to what was previously "fast" lands. Thus, the effect of the government's acts in both *PruneYard* and *Kaiser Aetna* was to cut back on the private owners right to exclude. In *Kaiser Aetna*, however, the right to exclude was entirely annihilated by creating a public waterway across the plaintiff's property. By contrast, in *PruneYard*, the shopping center owner still had the right to exclude, though not the right to exclude with unbridled selectivity. This distinction may have played a role in the Court's reasoning.

Kaiser Aetna and *PruneYard* are not directly reconcilable in terms of the rights/freedoms dichotomy (*see supra* text accompanying notes 20-29), inasmuch as property "rights" were taken in both cases. However, as suggested below, a distinction having an almost universal range of application may be made between the cases, that is, in *Kaiser Aetna*, a "right" (a navigation servitude) was taken directly *by the government* in its corporate capacity, while in *PruneYard*, there was no such acquisition by the government, *i.e.*, no taking "for public use." *See infra* Parts IV & V.

[213] *PruneYard*, 447 U.S. at 83.

stances, "so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.' "[214]

The Court's rationale in *PruneYard*, that there is some threshold magnitude of impairment below which a taking is not a "taking," recalls a magnitude theme running through many cases involving land use regulations. The magnitude inquiry in land use cases can be traced back to the landmark holding of *Pennsylvania Coal Co. v. Mahon*:[215] "[W]hile property may be regulated to a certain extent, if regulation goes *too far* it will be recognized as a taking. . . . [T]his is a question of degree."[216] Thus, while mere use-regulations are not intrinsically a taking and as such have never required compensation under the just compensation clause,[217] compensation might be required in the unusual case where their magnitude of impact is so great as to render the ownership "rights" virtually nugatory.

While both the *PruneYard* case and land-use regulation cases[218] look at the magnitude of the governmental acts' impact, it should be observed that the role of magnitude in their respective analyses is entirely different. In the land-use regulation cases, the Court uses a magnitude test to determine whether particular use-restrictions, though never *intrinsically* a taking,[219] are so severe as to become the functional equivalent of a taking.[220] In other words, do the restraints go so far that the owner's rights become nugatory?[221] Ordinarily, the "too far" test permits quite severe value or use impairments without requiring compensation.[222] The magnitude test in *PruneYard*, by contrast, allows the Court to disregard governmental actions which *are* intrinsically a taking[223] if their impact is negligible. Only very small impacts would be tolerated under the

---

[214] *Id.* at 84.

[215] 260 U.S. 393 (1922).

[216] *Id.* at 415-16 (emphasis added).

[217] *See supra* text accompanying notes 20-29.

[218] *E.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962). *Cf.* Andrus v. Allard, 444 U.S. 51 (1979) (restriction on personal property).

[219] *See supra* text accompanying notes 27-29.

[220] "To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destoying it." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922). That is, the regulation functions as a taking.

[221] *See supra* note 29.

[222] *See, e.g., Penn Cent. Transp.*, 438 U.S. at 131 ("significantly diminished"); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926) (75% loss); Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915) (over 90% loss).

[223] *See supra* text accompanying note 211.

PruneYard rationale for ignoring insubstantial takings.[224] In other words, the magnitude test of *PruneYard* might be stated simply as *de minimis non curat lex*.

Pennsylvania Coal and *PruneYard* thus place the attention of their respective magnitude tests at entirely opposite ends of the spectrum, the former allowing very severe impairments and the latter allowing minimal impairments. Moreover, prior to *PruneYard*, the Court had never explicitly applied a magnitude test to permit the government to take property "rights" without compensation. Although the potential for applying the de minimis principle is inherent, since *PruneYard* the Court has at least twice cast doubt on the appropriateness of any generalized magnitude test of taking where property "rights" are impaired. In *Loretto v. Teleprompter Manhattan CATV*,[225] compensation was required for a "minor"[226] intrusion on an owner's property. The Court stressed that the intrusion was a "permanent physical occupation" of space and, as such, a type of impingement uniformly found to be a taking without regard to whether the action had only minimal economic impact on the owner.[227] In *United States v. Security Industrial Bank*,[228] the Court rejected the idea that, because the creditor's security interest was nonpossessory and "obviously smaller than . . . a fee simple,"[229] it was therefore less than property.[230] While the Court was able to conveniently cite a magnitude test as grounds for denying compensation in *PruneYard*, later the Court had to admit that a magnitude test "fits but awkwardly" elsewhere, such as when the magnitude is small but nonetheless the totality of the property interest is taken.[231] Indeed, for most rights-rearrangement cases, a magnitude test does not provide any rationale at all for denying compensation. A magnitude test, which works to make a taking not a "taking"

---

[224] The coerced acceptance of free speech in common areas of a shopping center would not, as the Court said, "unreasonably impair the value or use" of the property as a shopping center. PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980).

[225] 458 U.S. 419 (1982). *See supra* text accompanying notes 146-51.

[226] *Loretto*, 458 U.S. at 421.

[227] *Id.* at 434-35.

[228] 459 U.S. 70 (1982). *See supra* text accompanying notes 58-61 & 156-59.

[229] *Security Indus. Bank*, 459 U.S. at 76.

[230] *Security Indus. Bank* can be distinguished on the grounds that the interest taken, though of slight and contingent value, was nonetheless the totality of the property interest which the owner had in the particular items. *Cf.* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130 (1978) (no division of whole parcels into discrete segments for takings analysis). This distinction is useless to explain *Loretto*, however, and it pays scant attention to justice or fairness.

[231] *Security Indus. Bank*, 459 U.S. at 75-76.

only in cases where the magnitude happens to be small,[232] is of course no test at all.

An earlier case abstractly akin to *Prune Yard* in facts and holding is *Heart of Atlanta Motel, Inc. v. United States.*[233] Under the Civil Rights Act of 1964,[234] an innkeeper's previously existing right to exclude others on the basis of race was impaired.[235] In other words, the contours of the "fundamental element of the property right"[236] of certain owners were slightly redefined in order to expand the freedom of other persons.[237] The Supreme Court summarily rejected the claim that the loss of rights entailed in this redefinition of the property right was a compensable taking. Without elaboration the Court stated: "The cases are to the contrary."[238] Rather inappropriately, however, the "contrary" cases cited by the Court were cases where compensation was denied for the merely "consequential" or "incidental" effects of governmental acts.[239]

Although the rule of the consequential injuries cases cited in *Heart of Atlanta* makes sense — consequences cannot be followed

---

232 For example, in Loretto v. Teleprompter Manhatten CATV, 458 U.S. 419 (1982) (*see supra* text accompanying notes 146-51), although the amount taken was "minor," a taking was found.

233 379 U.S. 241 (1964).

234 78 Stat. 243 (codified at 42 U.S.C. §§ 2000a-2000a6 (1982)). *See Heart of Atlanta*, 379 U.S. at 247.

235 A knowing and unpermitted entry on land in the possession of another is a trespass, for which the possessor has a cause of action for damages. *See* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY § 7.1, at 411 (1984). At common law, however, innkeepers did not share with possessors generally the absolute discretion to decide who would and would not enjoy access to the inn. *See* 40 AM. JUR. 2D *Hotels, Motels and Restaurants* § 62 (1968). Nevertheless, the Court must have assumed that innkeepers in Georgia were entitled to discriminate on the basis of race, otherwise there would have been no case or controversy on this point.

236 "[T]he 'right to exclude' [is] . . . universally held to be a fundamental element of the property right," and "the Government . . . may not, without . . . paying just compensation, require [the owners] to allow free access . . . ." Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979).

237 According to the definition set forth earlier, a "right" is the legal advantage accruing because others are subject to correlative duties. *See supra* note 20-29 and accompanying text. Thus, one person's rights are, by this definition, freedom limitations on others. To expand freedoms therefore *means* cutting back on existing rights.

238 *Heart of Atlanta*, 379 U.S. at 261.

239 The cases cited were United States v. Central Eureka Mining Co., 357 U.S. 155 (1958); Omnia Commercial Co. v. United States, 261 U.S. 502 (1923); Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1871). The Court in *Central Eureka* also appeared to rely on a rationale of necessity, coupled with war powers, both of which are irrelevant to the factual context of *Heart of Atlanta*. *See* 357 U.S. at 168; *see also* United States v. Caltex (Philippines), Inc., 344 U.S. 149 (1952); United States v. Pacific R.R., 120 U.S. 227, 233-39 (1887).

out, or paid for, indefinitely[240] — it is nonetheless curious that the Court considered them relevant. In *Heart of Atlanta*, the government's curtailment of innkeepers' exclusivity rights was not merely a consequential effect; rather, it was the whole point of the innkeeper provision in the Civil Rights Act. Though the Court might have said, anticipating *PruneYard*, that there was no taking because so little was taken,[241] that rationale also "fits but awkwardly" in other civil rights situations. It is easy to envision cases in which the underlying policies of the civil rights laws would possibly require a total destruction of a valuable property interest, *e.g.*, the executory interest owned by *B* in a conveyance "to *A* and his heirs, but if the premises are ever sold to a non-Caucasian, then to *B* and his heirs."[242]

It is not, of course, a fatal flaw in the conventional de minimis principle that its application does not explain every case. Rather, the analytical difficulty with cases like *PruneYard* and *Heart of Atlanta* is that they do not rely forthrightly on the de minimis principle and, instead, cite to wholly inapposite precedents like the consequential injury cases and *Pennsylvania Coal*. This effort to make the de minimis holdings appear to be an integral part of the Court's analytical mainstream of takings cases is unnecessarily misleading and serves to confuse.

IV

THE PUBLIC USE PROVISO AND THE DUE PROCESS COMPENSATION REQUIREMENT

In the preceding section, a number of cases were presented in

---

[240] The government can scarcely act without some private consequence. The rules denying compensation for merely "incidental" or "consequential" effects of takings recognize that such effects cannot be followed out indefinitely, nor allowed to paralyze the legislative process. Thus, the just compensation clause "has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of a lawful power." *Legal Tender Cases*, 79 U.S. (12 Wall.) at 551. For example, the government could requisition all of the steel which a seller is to supply under a sales contract without there being any taking of the buyer's property rights in the contract. By contrast, a compensable taking would result if, instead, the government took the contract rights themselves or the buyer's power to enforce it. *See Omnia Commercial*, 261 U.S. at 508-09. Unless the contract right itself is taken, the aggrieved party's losses are due only to the consequential breach of the contract for steel. *Id.* at 510-11.

[241] The Court was, in fact, convinced that *Heart of Atlanta* rights deprivation had little economic significance. 379 U.S. at 260.

[242] *Cf.* Shelley v. Kraemer, 334 U.S. 1 (1948) (approving a taking of a right of entry which was based on a racially discriminatory fee simple on condition subsequent).

which the Supreme Court upheld governmental actions that took private property rights without requiring payment of just compensation. Various reasons were given for denying compensation in these cases, including the fact that not enough was taken, the owner had an opportunity to avoid the taking, and finally, the property rights did not exist in the first place. Even assuming these rationales were apposite to the factual characteristics of the cases in which they were applied,[243] none of the rationales were satisfactory in the sense that they would work in an even application across a significant range. However, these cases have more in common than may be evident initially.

In each of the cases involving a valid uncompensated taking, the rights were taken for private use.[244] In each case there was a public purpose for the taking. However, that public purpose was served not by government acquisition of the private rights, nor by private acquisition for some public-service operation, but by a wholly intra-private sector reassignment of ownership incidents from one private owner to another. By contrast, whenever the government itself has acquired property rights, or caused such acquisition for a public-service operation — together comprising the vast bulk of historical takings — compensation has always been required.[245]

From this observable factual distinction, private use versus "public use," a perceptible line or presumption may be inferred. The takings which always require compensation consist of acquisitions of rights either by government in its corporate capacity and for its own use, or by its designees for public service use, typically public transport/communications facilities or utilities.[246] On the other side of

---

[243] It is far from certain these rationales ever provided even a rough fit with the facts at hand. For example, in Texaco, Inc. v. Short, 454 U.S. 516 (1982), the majority emphasized that the expropriated owners had a chance to avoid the taking, while the four dissenters felt that, due to a lack of notice, the owners did not have such an opportunity in fact. *Id.* at 540-54. *See supra* text accompanying notes 178-94.

[244] For example, in Kirchberg v. Feenstra, 450 U.S. 455 (1981), the mortgagee's interest was taken for the private use of Mrs. Feenstra. In Demorest v. City Bank Farmers Trust Co., 321 U.S. 36 (1944), the remainderman's interest was invaded for the private benefit of the life tenant. In *Texaco*, 454 U.S. 516, it was the surface owners who received the sole use of lapsed mineral interests, and in Robins v. PruneYard Shopping Center, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), it was private persons wishing to express themselves.

[245] The statements made in this paragraph use the term "right" as stipulatively defined for purposes of the rights/freedoms dichotomy. *See supra* notes 20-29 and accompanying text.

[246] *E.g.*, Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419 (1982) (cable television); Brown v. United States, 263 U.S. 78 (1923) (reservoir); Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923) (road); Mt. Vernon-Woodberry Cotton Duck Co. v.

the line are takings for "private use" (though with a public purpose) — transfers, in effect, from private persons to other private persons. These "takings" are typically noncompensable. The text of the just compensation clause itself suggests precisely this distinction which in fact occurs in the cases. By reading the words "for public use" in their natural syntactic sense, as a proviso,[247] and reading the word "use" in its narrower sense to mean *use* and not *purpose*,[248] the clause confines its own application to exactly those kinds of takings for which compensation has consistently been required.

Coupled with the observable rights/freedoms dichotomy,[249] a public use proviso reading of the just compensation clause would provide a relatively compact, but comprehensive, theory which would account for virtually all of the Supreme Court's just compensation holdings. Only a handful of cases would remain, such as *Security Industrial Bank* and *Monsanto*,[250] in which takings were deemed to be constitutionally suspect or void for lack of compensation even though, for a public purpose, private rights were taken for the private use of others. If the just compensation clause were read as confined to takings "for public use" in the narrower sense,[251] the requirement of compensation in this handful of rights rearrangement cases would have to be found elsewhere in the Constitution.

One possibility is suggested by this oft-quoted passage from *Lawton v. Steele*,[252] decided nearly a century ago:

> 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.*[253]

The textual basis for this language was not the just compensation clause but the due process clauses of the fifth and fourteenth

---

Alabama Interstate Power Co., 240 U.S. 30 (1916) (electric utility); Hairston v. Danville & W. Ry., 208 U.S. 598 (1908) (railroad); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896) (irrigation system).

[247] Specifically, as an adverbial phrase modifying "taken."

[248] Because the public-nexus or "public use" restriction on the takings power is not, as a matter of historical fact, based on the words "for public use" in the fifth amendment (*see supra* Part II), a narrow reading of the fifth amendment words would not impinge upon the breadth of eminent domain as confirmed by *Berman v. Parker* and *Hawaii Housing*.

[249] *See supra* notes 20-29 and accompanying text.

[250] *See supra* notes 57-65, 152-59 and accompanying text.

[251] That is, where "use" means use and not "purpose."

[252] 152 U.S. 133 (1894).

[253] *Id.* at 137 (emphasis added).

amendments.[254] As the emphasized portion suggests, a reassignment by the state of private property rights may be reasonably necessary in light of the public interest and yet still be impermissible as a matter of due process, unless provision is made to compensate those whose rights are taken. In other words, to deny compensation might be "unduly oppressive" toward those affected — or, to quote a more recent formulation, might be "particularly 'harsh and oppressive.' "[255]

Consider, for example, the legislative program in *Hawaii Housing*.[256] Though strong public policy concerns lay behind the land reform act and the granting of rights to buy land to the tenants who lived on it,[257] the statute's objectives would by no means require the drastic step of *giving* the land to the tenants. The uncompensated expropriation of some owners in favor of others would have been, under the circumstances, entirely unnecessary to the public-purpose objectives — and hence, in due process terms, "unduly oppressive." The balance of considerations could not justify it.[258]

Although the *Hawaii Housing* land reform statute did provide for compensation, the statutes in *Loretto v. Teleprompter* (the cable television case)[259] and *Pumpelly v. Green Bay Co.* (the dam-flooding case)[260] did not. In both cases, the Supreme Court invalidated legislation that gave easements to private parties without compensating the servient owners. Though the public would have benefited from the easements, it was totally unnecessary that the recipients of the easements receive them gratuitously, precisely the sort of "arbitrary and irrational" windfalls that limited due process review seems ordained to prevent.

In many rights-rearrangements cases, however, the conferral of a benefit on some at the expense of others may be precisely the public-purpose objective to be served. A good example is *Kirchberg v. Feenstra*,[261] the Louisiana community property case. The constitu-

---

[254] U.S. CONST. amends. V & XIV, § 1. Specifically, *Lawton* was concerned with the validity of a state economic regulation challenged under the due process clause of the fourteenth amendment. This historical basis for invalidating economic legislation is now generally considered desuetude. *See infra* notes 271-311 and accompanying text.

[255] Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 733 (1984).

[256] 467 U.S. 229 (1984). *See supra* notes 39-56 and accompanying text.

[257] *See* 467 U.S. at 232-36.

[258] In fact, the Court "assume[d] for purposes of these appeals that the weighty demand of just compensation ha[d] been met." *Id.* at 245.

[259] 458 U.S. 419 (1982). *See supra* notes 146-51 and accompanying text.

[260] 80 U.S. (13 Wall.) 166 (1871). *See supra* notes 140-45 and accompanying text.

[261] 450 U.S. 455 (1982). *See supra* notes 162-65 and accompanying text.

tional equal-protection objective of eliminating the husband's "head and master" control of community property would have been totally defeated if wives were required to purchase their interests in the community property. There were, in other words, strong countervailing constitutional reasons for effectuating the expropriative redistribution. Those reasons outweighed the private property claims of the husbands.

In a case such as *PruneYard*,[262] a state's countervailing constitutional interest in free expression[263] could be enough to outweigh the shopping center owners' private property right of exclusion. Countervailing federal constitutional considerations could also adequately account for the lack of a compensation requirement in a case like *Shelley v. Kraemer*,[264] where the Court approved the taking of a right of entry that was based on a racial condition subsequent to a fee simple. Extremely compelling social considerations alone ought to be sufficient justification for uncompensated rearrangements of rights, as in a case like *Heart of Atlanta Motel*,[265] that cut back innkeepers' rights to exclude in order to prevent discrimination on the basis of race. The balance for uncompensated expropriation might even be based on practical considerations alone. As recognized in *Demorest v. City Bank Farmers Trust Co.*,[266] the simplification and modernization of the common law of estates and trusts could be paralyzed if the government had to pay for all affected interests.

In sum, the propriety of requiring compensation in cases of private-use takings is affected by a diversity of interreacting policy considerations. For some public objectives which require private-use takings, an omission to compensate would be totally unnecessary to the legislative program. For others, such as estate-system or marital rights readjustments, gratuitous transfers from one to another may be practically unavoidable or even the very object of the legislation. For such a mixed bag of cases, a "due process" appraisal would more readily meet the need for flexibility than would the categorically-worded compensation requirement of the just compensation clause. Modulated by words like "legitimate," "rationally,"[267]

---

[262] 447 U.S. 74 (1980). *See supra* notes 206-32 and accompanying text.

[263] Robins v. PruneYard Shopping Center, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), *aff'd*, PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

[264] 334 U.S. 1 (1948).

[265] 379 U.S. 241 (1964). *See supra* notes 233-42 and accompanying text.

[266] 321 U.S. 36 (1944). *See supra* notes 167-77 and accompanying text.

[267] "Provided that the retroactive application of a statute is supported by a *legitimate*

and "unduly,"[268] the due process standards leave the compensation decision to a balance of factors and, not incidentally, leave much room for judicial deference to legislative determinations. The few private-use takings cases which have failed for lack of compensation fit comfortably, and certainly not "awkwardly,"[269] within a substantive due process framework.[270]

A selective due process based compensation requirement, although consistent with the case outcomes, is anything but well developed in the case law.[271] Moreover, given the current style of

---

legislative purpose furthered by *rational* means, judgments about the wisdom of such legislation remain the exclusive province of the legislative and executive branches." Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984) (emphasis added).

[268] Lawton v. Steele, 152 U.S. 133, 137 (1894). *See supra* note 253 and accompanying text.

[269] United States v. Security Indus. Bank, 459 U.S. 70, 75 (1982). *See supra* note 134.

[270] Any conceptual distinction between due process compensability and just compensation clause compensability is, to be sure, less than airtight. For one thing, the federal constitutional just compensation requirement was imposed on the states not because the fifth amendment applies to the states but because "the taking of private property for public use . . . is not due process of law if provision be not made for compensation." Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 236 (1897). The just compensation requirement which the Supreme Court first applied to the states was, therefore, a due process requirement.

The implication in Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 244 n.7 (1984), that the federal just compensation requirement was imposed on the states by incorporating the fifth amendment into the fourteenth, or applying any part of the fifth amendment to the states, is not historically factual. Rather, in the original case applying the requirement to the states the Court discussed the meaning of "due process" and concluded that "a judgment of a state court . . . whereby private property is taken for the State or under its direction for public use, without compensation . . . [is] *wanting in the due process of law required by the Fourteenth Amendment.*" *Chicago, B. & Q. R.R.*, 166 U.S. at 236-41 (emphasis added).

[271] The four dissenters in San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 656 n.23 (1981), suggested that an owner whose property is taken without a justifying purpose "may nevertheless have a damages cause of action under 42 U.S.C. § 1983 for a Fourteenth Amendment due process violation."

An early adumbration of such a due process compensation requirement is found in Head v. Amoskeag Mfg. Co., 113 U.S. 9 (1885). *See supra* text accompanying notes 102-06. Eschewing eminent domain analysis, the Court upheld a taking of property from one to give to another as meeting the due process requirements on the twin grounds that the legislation at issue was "a constitutional exercise of legislative power," *and* that it "provid[ed] a suitable remedy" by compensating for the property taken. 113 U.S. at 26 (emphasis added). See also Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896), where the Court struck down, as violative of the fourteenth amendment substantive due process, legislation requiring a railroad to donate a site for a grain elevator. In the earlier discussion of this case, it was observed that the Court's primary concern was that the taking was not for public use. *See supra* text accompanying notes 109-25. There is, however, little reason to believe that the Court had adopted a narrow view of the "public-nexus" restriction on takings. It is therefore fair to say that the taking for

judicial deference to elected legislatures,[272] a real question exists as to whether the courts should be exercising any review at all over the economic effects of statutes in relation to the benefits gained. Nonetheless, cases such as *Loretto* (the cable television case) suggest that, even in an era of expanded judicial deference, it may be wise to retain an escape valve for rare, but conceivable, instances of egregious legislative favoritism.[273] Although the Supreme Court's approach has been to resort to a takings analysis for this purpose, there are good reasons to conclude that selective substantive due process invalidation for failure to provide compensation would serve the purpose better.

The Supreme Court has never quite renounced its power to strike down legislation on economic due process grounds when it is "particularly 'harsh and oppressive.' "[274] Nonetheless, the modern Court has consistently preferred to decide all compensation-requirement issues under the just compensation clause, even going so far as to expand the reach of that clause beyond its natural import to cover takings for private use. Why? Is it simply a matter of reluctance to reenter the economic due process thicket, even in cases where the Court has manifestly concluded that, at some level, a benefits/detriments review of legislation was called for? If the Court is carrying on an economic due process review of private-use takings, it certainly defeats clarity to do so under the rubric of a just

---

the purpose at hand could have succeeded if the state had only provided for compensation. Alternately, the taking may have failed the due process test for two reasons: having no public use *and* being "unduly" oppressive.

[272] "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, [unless] . . . the legislature has acted in an arbitrary and irrational way." Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984), *quoting* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976).

"The doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded." Ferguson v. Skrupa, 372 U.S. 726, 730 (1963); *see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-7 (1978); McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34. Nevertheless, it may be premature to conclude that substantive due process review of legislation for its effects on property rights is entirely dead. *See infra* note 274.

[273] If the favoritism in *Loretto* does not seem egregious enough, consider the land reform program in *Hawaii Housing*, minus the requirement for compensation. Taking a worldwide perspective, such an uncompensated land-reform is not inconceivable.

[274] *Pension Benefit*, 467 U.S. at 733. Also see PruneYard Shopping Center v. Robins, 447 U.S. 74, 84-85 (1980), in which the Court applied the rational relation test in rejecting the property owners' due process claim. In Moore v. City of East Cleveland, 431 U.S. 494 (1977), the Court struck down a land-use regulation that limited occupancy by narrowly defining "families" on due process grounds.

compensation analysis.[275]

There is an indication in the private-use takings cases that, in considering the relevance of lack of compensation, the Court is reviewing the legislation with what amounts to a due process balancing of economic interests. For example, the Court has said that, except for cases of permanent physical occupation, "a physical invasion is subject to a balancing process"[276] and "[t]he economic impact of the regulation, especially the *degree of interference* with investment-backed expectations, is of particular significance,"[277] echoing the "unduly oppressive" standard of *Lawton v. Steele*.[278] The Court's invocation of due process concerns in private-use takings analysis has reached its fullest expression to date, however, in the 1986 case of *Connolly v. Pension Benefit Guaranty Corp.*[279]

V

CONNOLLY V. PENSION BENEFIT GUARANTY CORP.

The Pension Benefit Guaranty Corporation is a wholly-owned government corporation that provides insurance against insolvency

---

[275] The absolute language of the just compensation clause simply does not provide a suitable analytical basis for the selective balance-oriented compensation requirement needed for such cases. Thus, we find that cases which consider rearrangements of private property rights are difficult to reconcile and even seem to be based upon contradictions of principle. In those private-use cases where justice seems to call for compensation, the Court cites the just compensation clause, sometimes unqualifiedly, as requiring compensation. *See supra* text accompanying notes 136-60. In those private-use takings cases where compensation is not provided, and does not seem called for, ad hoc and sometimes specious rationales, having no range of consistent applicability, are asserted to exclude operation of the clause. *See supra* text accompanying notes 161-242.

[276] Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419, 432 (1982). As noted earlier, however, if the physical invasion amounts to a permanent physical occupation, the balance is decisive in favor of requiring compensation.

[277] *Id.* at 426 (emphasis added).

[278] 152 U.S. 133, 137 (1894). The reference to "investment-backed expectations" in Supreme Court takings analysis first occurred in Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124, 127-28 (1978), and was adopted from Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1233 (1967). Professor Michelman introduced the concept in a discussion of the parallelism between what he termed the "physical occupation" and "diminution of value" tests of takings. According to Professor Michelman, the taking of a specific investment-backed expectation in a thing is an either/or kind of event that explains the "too far" doctrine of *Pennsylvania Coal Co. v. Mahon* better than the vaguely scalar "how much" inquiry of the *Mahon* case itself. Interestingly, however, the Supreme Court has tended to employ the "investment-backed expectations" concept as part of a balancing of considerations, not as an either/or test, that is by stressing the *degree* of interference with investment-backed expectations. *See supra* text accompanying note 277; *see also infra* notes 279-311.

[279] 475 U.S. 211 (1986).

of private pension plans.[280] The so-called multiemployer pension plans were found to present special problems of pension solvency. When employer-participants withdrew from the multiemployer plans, their contributions would cease, often leaving the plan with substantial unfunded liabilities to their employees. These unfunded benefits would have to be made up by the remaining plan participants through increased contributions. Thus, withdrawals by plan participants, especially from financially shaky plans, encouraged further withdrawals, resulting in a vicious downward spiral.[281]

In response to this problem, Congress enacted the Multiemployer Pension Plan Amendments Act (MPPAA).[282] Under the MPPAA, when an employer withdraws from a multiemployer plan, it must pay to the plan its proportionate share of the plan's unfunded vested benefits — including liabilities "inherited" from participants who withdrew before the MPPAA became effective.[283] What the MPPAA authorizes, therefore, is that the assets of certain private persons be turned over to other private persons, the pension plan trustees, for the eventual benefit of an entirely unrelated third group of private persons, former employees of other firms.

The first constitutional attack on the MPPAA to reach the Court came in *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*,[284] where it was argued that the *retroactive* application of the MPPAA to withdrawals before its enactment violated the due process clause. The Court held, however, that the retroactive applicability of MPPAA was "supported by a rational legislative purpose, and therefore withstands attack" under due process standards.[285] Employing the modern "arbitrary and irrational" standard of limited review applicable to economic legislation,[286] the Court found the retroactivity of the MPPAA to be "eminently rational," as a means of discouraging withdrawals during the "lengthy legislative process" of debate and revision.[287]

In *Connolly v. Pension Benefit Guaranty Corp.*, the MPPAA was challenged in its prospective operation, this time by an employer which had been assessed twenty-five percent of its net worth as

---

280 *Id.* at 214.
281 *Id.* at 214-16.
282 29 U.S.C. §§ 1381-1453 (1982).
283 475 U.S. at 216.
284 467 U.S. 717 (1984).
285 *Id.* at 734.
286 *Id.* at 729.
287 *Id.* at 730-31.

withdrawal liability under a multiemployer plan.[288] The employer argued that the MPPAA violated the just compensation clause because it required that the employer's assets be turned over to the private use of others, without compensation.[289] Once again, the challenge to the MPPAA was unsuccessful.

The Supreme Court in *Connolly* began its analysis by conceding that "an employer subject to withdrawal liability is permanently deprived of those assets necessary to satisfy statutory obligation"[290] and that the deprivation was substantial.[291] It also noted at the very beginning, however, that the transfer was "not to the Government but to a pension trust,"[292] a point that it would reiterate later in the opinion.[293] Under a syntactically natural reading of the fifth amendment words "for public use," this fact alone could have been enough, as suggested previously,[294] to dismiss the employer's claim. Following past practice, however, the Court did not reject the possibility that the just compensation clause might apply to private-use takings. Rather, it embarked upon a discussion of whether permanently depriving the employer of substantial assets would be a " 'taking' forbidden by the Fifth Amendment."[295]

In determining whether the operation of the MPPAA would result in a fifth amendment taking, the Court identified three factors which have "particular significance": (1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'[296] The Court first considered the "character of the governmental action" factor. Interestingly, in *Connolly* the Court gave this factor a significantly new twist. Earlier in *Loretto v. Teleprompter Manhattan CATV*, the Court had treated the "character" factor as focusing on whether or not the governmental act had the *character of a physical invasion*.[297] However, the *Loretto* Court denied that a direct invasion by the

---

[288] 475 U.S. at 222.

[289] *Id.* at 221.

[290] *Id.* at 222.

[291] *Id.* The employer's withdrawal liability was assessed at approximately $200,000 or, as noted in the text, about 25% of its net worth.

[292] *Id.*

[293] The identical point is made three times, in two different parts of its discussion, at 475 U.S. at 222, 225-27.

[294] *See supra* Part IV.

[295] 475 U.S. at 224.

[296] *Id.*

[297] Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419, 426-35 (1982).

government should be treated any differently than a taking by private interests.[298] By contrast, the Court in *Connolly* saw the "character" issue as whether or not the government itself appropriated the private assets "for its own use."[299] Though the words "for public use" in the fifth amendment could have been cited as the basis for the "particular significance" of this factor, the Court did not do so.

The other two factors listed by the Court essentially boiled down to considerations of whether the taking under MPPAA is "unduly oppressive" on private interests. For example, in discussing the "severity of the economic impact" factor,[300] the Court noted that an employer's withdrawal liability would not necessarily "be out of proportion to its experience with the plan,"[301] and that the MPPAA contained "a significant number of provisions . . . that moderate and mitigate the economic impact . . . ."[302] These review criteria certainly sound constitutionally pertinent, but they seem to pertain more to whether a given taking is "particularly 'harsh and oppressive' " — an economic due process concern — rather than to whether it is a taking at all.

The last factor discussed by the Court was whether the legislation interferes with "reasonable investment-backed expectations."[303] In this connection the Court observed that pension plans have long been "objects of legislative concern."[304] Therefore, employers could have anticipated that the legislative scheme might be " 'buttressed by subsequent amendments' " triggering additional financial obligations.[305] Now that Congress had enacted the MPPAA to safeguard the "vested rights [workers] were entitled to anticipate would be

---

298 *Id.* at 432-33 n.9.

299 475 U.S. at 227.

300 *Id.*

301 *Id.* at 226. As the question before the Court was whether the MPPAA withdrawal assessment provisions were constitutional on their face, in reviewing a summary judgment, evidence of proportionality was not before the Court.

302 *Id.* at 222.

303 *Id.* at 225-27. In listing the three factors, the Court talked of "*distinct* investment-backed expectations." *See supra* text accompanying note 296. This phrase became transmuted to "*reasonable* investment-backed expectations," however, when the Court actually discussed it. There is no explicit indication that any change in meaning was intended. The changeover from "distinct" to "reasonable" does, however, introduce additional flavor of hardship-balancing to the Court's analysis.

304 *Id.* at 225.

305 *Id.* (quoting FHA v. The Darlington, Inc., 358 U.S. 84, 91 (1958)). The broader significance of this point is not entirely clear. It would be a novel development indeed if the Court means that the compensation requirement for takings no longer applies to property which has become subject to extensive and continuing regulation. Could an

theirs,"[306] the Court saw no reason why the public, rather than voluntary plan participants, ought to "shoulder the responsibility for rescuing plans that are in financial trouble."[307] Again, in balancing these factors the Court seems to be invoking constitutionally pertinent review criteria, although they pertain more to whether the taking was "unduly oppressive" rather than whether it was a taking at all.

In summary, although the *Connolly* case was presented to, and decided by the Court as a case under the just compensation clause, its outcome actually turned on the fact that the government took nothing "for its own use," coupled with a balancing of benefits and interests ringing of traditional substantive due process. By resting its holding solely on the just compensation text and not the due process text, however, the Court reached a conclusion that sounds almost Orwellian—that a permanent and substantial deprivation of assets was not a "taking."[308] For this reason alone, it would have been far preferable for the Supreme Court to have disposed of the just compensation clause question based solely upon the factor of nonpublic use. Certainly, importing a balancing-of-interests analysis into just compensation law is not necessary to avoid a requirement of compensation in cases like *Connolly*, or in any other case where "legislation readjusting rights and burdens"[309] rearranges private property rights. The language of the fifth amendment itself allows the Court to concede that a rights-rearrangement effects a taking, though not a "taking for public use."

Confining the application of the just compensation clause to public-use takings, in accord with the natural reading of its public-use proviso, would adequately account for the constitutionality of not compensating such private-use takings. In principle, there would still be the question of whether the taking was within the due process limits on legislative power. However, such economic due process questions receive very limited review. In any event, in *Gray &*

---

environmentally protected wetland now be acquired gratis to establish a public park? Or could land tightly zoned be taken, without payment, to build a public school?

[306] *Id.*

[307] *Id.*

[308] Obviously, the constitutional term-of-art "taken" will not necessarily correspond exactly to the word "taken" in ordinary parlance. But when an owner is subjected to a governmental action and winds up without any aspect whatsoever of his or her former property (right to exclude, freedom to use, or power to convey), it must strain even the most willing imagination to conclude that nothing has been "taken."

[309] 475 U.S. at 227 (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16 (1975)).

Co. and *Connolly* the Court did in fact review the economic due process question. The rational basis for the MPPAA was implicitly decided in *Gray & Co.*,[310] and any claims that it might be "unduly oppressive" were disposed of in *Connolly* — for the reasons cited by the Court in its "just compensation" analysis.[311]

CONCLUSION

The Supreme Court has long recognized that the governmental power to take private property is limited to takings for a public purpose. Although this public-purpose limitation was occasionally confusingly referred to as a "public use" requirement, particularly in the older cases, historically the limitation has not been based upon the words "for public use" in the fifth amendment, nor has it been based on any other explicit constitutional text. Rather, the public-purpose limitation, from the outset, has been nothing more than a limitation on the extent of the general grant of legislative power. At any rate, the limitation is no great impingement on the taking power, broadly allowing its exercise for any purpose within the police power itself.

In a small subset of takings cases, the Supreme Court has recognized that private property rights may validly be taken even though the rights taken are turned over to other private persons for an essentially private use. It is only necessary that there be a validating public purpose for such takings, such as authorization under the police power or, for the federal government, under one of the enumerated powers. In the preponderance of such cases, the Court has permitted property rights to be taken without requiring any payment of compensation.

It is essential that the government have some power to modify the legal rules affecting property rights after the rights have been created. The rationales of recent holdings, however, such as *Ruckelshaus v. Monsanto Co.*[312] and *United States v. Security Industrial*

---

[310] Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984). In deciding that Congress had a rational basis to apply the MPPAA retroactively, the Court must have accepted that it was rational for Congress to enact the MPPAA at all.

[311] As announced in *Lawton*, the test of economic due process has two parts: there must be a rational basis for the legislature to take the action it did, and the action must not be "unduly oppressive" on individuals. *See supra* text accompanying note 253. While judicial review with respect to these criteria is very limited, this is a different matter. The point in the text is that, in *Connolly* and *Gray & Co.*, the Court did review the MPPAA with respect to these two criteria.

[312] 467 U.S. 986 (1984).

Bank,[313] superficially seem to signal a move towards a constitutional protection of vested property rights — a matter of some concern. Furthermore, on its face, *Hawaii Housing Authority v. Midkiff*[314] has provided a doctrinal anchor for vested rights protection by making the fifth amendment words "public use" coterminous with public purpose. If "public use" and "public purpose" are read as truly coterminous, however, then every governmental act which takes property must, if it has a validating public purpose, be "for public use" within the just compensation clause. This would result in a compensable taking within the meaning of the clause.[315] This requirement of compensation for all takings, even those for private use, would be a major deviation from the historical line of holdings.

In the past the Supreme Court has never required payment under the just compensation clause for use-regulations or other governmental impingements on property "freedoms" unless there is also a taking, in fact or in functional effect, of property "rights."[316] Moreover, even for takings of "rights," payment has almost never been required unless the rights were taken in an acquisition by government or by its designees for some public service function. The Court has sometimes, albeit rarely, struck down for lack of compensation legislation which effected a taking of "rights" for private use. However, these few cases are better explained in terms of substantive due process, whose balancing methodology is more conducive to the selectivity evident in such decisions. Thus, an analytical approach that draws a distinction between takings of "rights" and of "freedoms" (the rights/freedoms dichotomy) and reads the words "for public use" in their narrower sense (to mean *use*) and as a proviso, can comprehensively account for the cases under the just compensation clause.[317]

The statements in *Hawaii Housing*, albeit dicta, treating the fifth amendment words "for public use" as a restriction on the takings power and equating them with use for a public purpose, were a significant departure from the precedents. The Court could have

---

[313] 459 U.S. 70 (1982).

[314] 467 U.S. 229 (1984).

[315] Thus, if the public interest required that property be taken from *A* to give to *B*, "resort must be had to proceedings in eminent domain." Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 602 (1935).

[316] That is, property "rights" as distinguished from property "freedoms". *See supra* text accompanying notes 20-29.

[317] *Id.*; *see* Humbach, *supra* note 22.

reached the result in *Hawaii Housing* by simply following *Berman v. Parker.*[318] To avoid the unexamined implications of its departure in *Hawaii Housing*, virtually a "vested rights" doctrine for all existing property rights, the Court should reexamine whether the fifth amendment contains an express "public use" requirement. It should return to the concept of a general due process "public purpose" requirement followed consistently up through *Berman*. The traditional "public purpose" requirement did not logically entail any just compensation clause requirement of compensation for private-use takings and indeed, as has historically been the case, takings for private use would usually be upheld even if compensation were not provided. Thus, legislative actions affecting the property rights system would be valid, even without compensation, except for very rare cases of "undue oppression" in egregious cases of legislative favoritism.

[318] 348 U.S. 26 (1954).