THE TAKINGS ISSUE AND THE DUE PROCESS CLAUSE: A WAY OUT OF A DOCTRINAL CONFUSION

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The U.S. Supreme Court's jurisprudence of property regulation rests on two independent clauses of the Fifth Amendment to the Constitution. The Due Process Clause provides that no person shall be "deprived of . . . property, without due process of law."[1] The Takings Clause states, "[N]or shall private property be taken for public use, without just compensation."[2]

Since the New Deal Era, the Court generally has read the property clauses as establishing only modest substantive constraints on government regulation of property, and has effectively disavowed its earlier celebrated interpretation of the Due Process Clause as a national guarantee of economic liberalism.[3] However, coincident with the rise in recent years of an increasingly conservative federal bench, there has been renewed interest in divining constitutional limits to property regulation. For reasons that appear rooted largely in history, commentators and litigants have turned to the Takings Clause as the more favorable foundation upon which to attempt to erect new constitutional limits on property regulation.[4] Over the last ten years, the Supreme Court has issued a series of decisions expanding the Takings Clause.[5]

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1. U.S. CONST. amend. V.

2. *Id.*

3. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

4. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

5. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899 (1992) (reversing South Carolina Supreme Court decision rejecting takings challenge to state coastal law and defining new "categorical rule" for regulations that render property "valueless"); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (invalidating requirement that owner allow public access across beach property as a condition of receiving regulatory approval to rebuild house); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) (Fifth Amendment Takings Clause mandates payment of monetary compensation for regulatory taking).

Paradoxically, in the course of developing the Takings Clause as a substantive constraint on property regulation, the Court, in ad hoc fashion, has incorporated into its takings analysis standards the Court formerly utilized exclusively in its review of regulatory activities under the Due Process Clause. At the same time, the Court continues to adhere to principles that it has long regarded as central to takings doctrine. The result is a confused body of law containing contradictory principles and standards.

To arrive at a coherent and consistent doctrine of "takings," the Court must begin by addressing squarely the relationship between the Due Process and Takings Clauses, and then must reconcile the two clauses by respecting their distinctive language and constitutional function. That analysis yields the conclusion that the Takings Clause should be interpreted to apply only to outright appropriations or physical invasions of property, and to regulatory activities that are the functional equivalent of appropriations or occupations. Although other types of regulations may be irrational or unduly oppressive, and should be subject to constitutional challenge on those bases, those challenges should be treated as raising claims exclusively under the Due Process Clause.

I. MUDDLING THE DUE PROCESS AND TAKINGS CLAUSES

A. Traditional Due Process and Takings Analyses

The Court uttered its classic statement of the standards for evaluating challenges to government regulation under the Due Process Clause in *Lawton v. Steele*: "To justify the State in thus 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."[6] Although the Due Process Clause has fallen into relative disuse, the Court basically has continued to adhere to the standards of *Lawton* up to the present day.

6. Lawton v. Steele, 152 U.S. 133, 137 (1894).

The traditional remedy for a regulation that violates due process has been an injunction against its further implementation.[7] Furthermore, at least since the New Deal Era, judicial review under the Due Process Clause has included a presumption in favor of the validity of the legislation, at least in the arena of economic regulation.[8] The plaintiff, the Court has repeatedly said, bears the burden of proof on the issue of "reasonableness."[9]

In *Pennsylvania Coal Co. v. Mahon*, the Court launched, under the Takings Clause, an alternative mode of analysis that focuses on whether a regulation goes "too far."[10] The meaning of the Court's "too far" formulation has spawned endless debate, but it is clear, as a first approximation, that the Court's primary focus was on the magnitude of the burden that a regulatory program imposes on a property owner.

The Court's early interpretations of both the Due Process and the Takings Clauses included the burden of the regulation as a factor. Yet, apart from this common element, the Court viewed the takings and due process inquiries as quite distinct. The difference in approach is demonstrated by a comparison of the *Lawton* standards with the language the Court employed in *Mahon*.

Under the *Lawton* standards, a court must inquire into the reasonableness of the purposes of the regulatory program. However, the *Mahon* Court suggested that that issue was outside the scope of the takings inquiry. As the *Mahon* Court stated, "[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."[11] Thus, the Court did not closely scrutinize the public or private interests served by regulation of coal mining under the Kohler Act. Instead, the Court simply "assume[d] . . . that the statute was passed upon the conviction that an exigency existed that would

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7. *See* Eide v. Sarasota County, 908 F.2d 716, 722 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1073 (1991).

8. *See, e.g.*, Bibb v. Navajo Freight Lines, 359 U.S. 521 (1959).

9. Salsburg v. Maryland, 346 U.S. 545, 553 (1954).

10. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

11. *Id.* at 415 (emphasis added).

warrant it."[12] "[T]he question at bottom" under the Takings Clause, the Court said, "is upon whom the loss of the changes desired should fall."[13]

Similarly, in *Lawton* the Court examined the closeness of the fit between the legislative ends and the means selected to achieve those ends. But review of the legislative means had no place in the *Mahon* analysis. The Court in *Mahon* did not, for example, speculate as to whether some other, less burdensome approach might have achieved the goals of the Pennsylvania Legislature as well as the Kohler Act.

In subsequent cases, the Court recognized that claims under the Due Process and Takings Clauses presented distinct issues. For example, in 1962, in *Goldblatt v. Town of Hempstead*, the Court considered a challenge to a municipal ordinance prohibiting the continued operation of a sand and gravel operation as a violation of both the Due Process and the Takings Clauses.[14] The Court rejected the takings challenge on the ground that the plaintiff failed to show any reduction in the value of his property as a result of the ordinance's enactment. The Court also rejected the due process challenge, but based on a different set of standards, which included "the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance."[15] However, as takings doctrine has evolved further, and particularly in the last ten years, the distinctive character of the due process and takings inquiries has become obscured.[16]

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12. *Id.* at 416.

13. *Id.*

14. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).

15. *Id.* at 595.

16. A number of commentators have previously observed the Supreme Court's confusion of traditional due process concepts and takings doctrine. *See, e.g.*, William B. Stoebuck, San Diego Gas: *Problems, Pitfalls and a Better Way*, 25 J. URB. & CONTEMP. L. 3 (1983); Ross A. Macfarlane, Note, *Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis*, 57 WASH. L. REV. 715 (1982); Robert I. McMurry, Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 UCLA L. REV. 711 (1982); Jeffrey T. Haley, Note, *Balancing Private Loss Against Public Gain to Test for a Violation of Due Process or a Taking Without Just Compensation*, 54 WASH. L. REV. 315 (1979).

B. Means-Ends Analysis

In a handful of cases spanning a decade, the Court has incorporated an analysis of the fit between regulatory ends and regulatory means in takings cases. This is the starkest example of importing due process thinking into the takings issue. Equally stark is the absence of reasoned explanation for this doctrinal development.

The Court took the first explicit step toward incorporating means-ends analysis into the takings inquiry in *Penn Central Transportation Co. v. New York City*.[17] In his opinion for the Court, Justice Brennan, citing *Nectow v. City of Cambridge*,[18] stated that "[i]t is, of course, implicit in *Goldblatt* that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose."[19]

In fact, neither *Goldblatt* nor *Nectow* support the stated proposition. As previously discussed, *Goldblatt* involved a challenge to a regulation under both the Due Process and the Takings Clauses. The Court dealt with the due process and takings claims as raising distinct issues. To the extent the Court addressed the relationship of legislative goals to the means employed to achieve these goals, it did so only in the context of the Due Process Clause. Nothing in the Court's *Goldblatt* opinion suggested that the due process inquiry was related to, much less a part of, the takings inquiry.

Similarly, the Court's decision in *Nectow* provided no support for the statement in *Mahon* that a test of means-ends rationality is implicit in the takings inquiry. *Nectow* involved a straightforward due process challenge to a zoning ordinance, and contained no reference whatsoever to the Takings Clause, nor any support for the suggestion that due process analysis was somehow "implicit" in the takings inquiry.

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17. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 127 (1978).
18. Nectow v. City of Cambridge, 277 U.S. 183 (1928).
19. *Penn Central*, 438 U.S. at 127.

The Court's decision a few years later in *Agins v. City of Tiburon* reinforced the innovation introduced in *Penn Central*.[20] In its now familiar summation of the law of takings, the *Agins* Court stated, in part, that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests."[21] Other than following *Penn Central*, upon which it did not expressly rely, the Court's statement in *Agins* had no better support in precedent than the Court had at the time it issued *Penn Central*. Nor did the *Agins* Court offer any independent rationale for why this standard should be incorporated into takings doctrine.

Six years later, in *Nollan v. California Coastal Commission*, Justice Scalia, speaking for the Court, boldly declared that "[w]e have *long recognized* that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests.'"[22] In support of this proposition, Justice Scalia cited only *Agins* and *Penn Central*. Thus, over a mere ten-year period, an unsupported legal proposition became part of the firmament of takings doctrine!

More remarkably, relying on the specific language of *Agins* and *Penn Central*, Justice Scalia concluded that the means-ends inquiry under the Takings Clause requires a tighter fit than the Court requires in the due process context. Without contesting that a means-ends inquiry is appropriate in a takings case, Justice Brennan, in dissent, argued that "our standard for reviewing the threshold question whether an exercise of the police power is legitimate is a uniform one" under the Due Process and Takings Clauses.[23] Justice Scalia expressly rejected this argument. However, Justice Scalia offered no reasoning to support the conclusion that the takings inquiry includes a means-ends test that is more rigorous than in the due process context. Instead, he simply observed that "there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long

20. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

21. *Id.* at 260.

22. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987) (emphasis added).

23. *Id.* at 845 n.1 (Brennan, J., dissenting).

as the regulation of property is at issue the standards for takings challenges [and] due process challenges . . . are identical."[24]

C. Regulatory Purpose

In a similar process, the Supreme Court has adopted in certain of its takings decisions, including one handed down last Term,[25] the due process notion that the courts must weigh the significance and reasonableness of the regulatory objective in passing on a program's constitutionality. The *Mahon* decision rests on the premise that the regulatory objective is assumed to be valid, and that the takings inquiry focuses on the question of upon whom, the property owner or the public, the economic burden of regulatory action should fall. This theme is repeated in many subsequent Supreme Court decisions. In *First English Evangelical Lutheran Church v. County of Los Angeles*, for example, the Court stated that the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power."[26] "This basic understanding of the Amendment," the Court continued, "makes clear that it is designed not to limit governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."[27]

Despite the Court's repeated assertion that regulatory goals are irrelevant in takings analysis, the Court's current takings jurisprudence contains a distinct and contradictory mode of analysis. Under this approach, the Court weighs the public interest served by a regulatory program before determining whether the regulation effects a taking. For example, in *Agins v. City of Tiburon*, the Court said that the takings inquiry "necessarily requires a weighing of private and public interests."[28] This last Term, in *Yee v. City of Escondido*, the Court reaffirmed this approach.[29] The only issue explicitly decided in that case was whether the plaintiff could challenge California's mobile home

24. *Id.* at 835 n.3.
25. Yee v. City of Escondido, 112 S. Ct. 1522, 1526 (1992).
26. *First English*, 482 U.S. at 314.
27. *Id.* at 315.
28. *Agins*, 447 U.S. at 261.
29. *Yee*, 112 S. Ct. at 1522.

rent control and residency laws as a form of physical occupation, and therefore avail himself of the Court's per se takings rule for physical occupations, established in *Loretto v. Teleprompter Manhattan CATV Corp.*[30] The Court ruled against the plaintiff on that claim, but declined to foreclose the possibility that he could successfully challenge the laws as a "regulatory taking." Echoing the language in *Agins*, the *Yee* Court said that the regulatory taking challenge would "entail[] complex factual assessments of the *purposes* and economic effects of government actions."[31]

The Court sometimes appears to rely on the significance of the regulatory goals to uphold a program against a takings challenge without explicitly acknowledging that it is doing so. For example, in *Penn Central*, the Court's opinion opens with a lengthy, sympathetic exposition on historic preservation efforts across the country. Although the three-part balancing test originating in *Penn Central* does not refer to regulatory purpose as a relevant consideration, it is unmistakable that the Court's perception of the importance of the regulatory objective affected the outcome of the case. As the Court stated in its concluding remark, it found no taking in part because it believed the New York City landmarks law was "related to the promotion of the general welfare."[32]

Perhaps Justice Stevens provided the most straightforward statement of this alternative understanding of the Takings Clause in his concurring opinion in *Williamson County Planning Commission v. Hamilton Bank*:

> In most litigation involving a challenge to a governmental regulation . . . the government contends that the public interest *justifies* the harm to the property owner and that no compensation need be paid. If the government fails to convince the court that such is the case—that is, if it is not entitled to impose an uncompensated permanent harm on the property owner—the court can express its ruling on the merits by stating that the regulation is invalid, or by characterizing it as

30. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426-27 (1982).

31. *Yee*, 112 S. Ct. at 1526 (emphasis added).

32. *Penn Central*, 438 U.S. at 138.

> a "taking." In either event, the essence of the holding is a conclusion that the harm caused by the regulation is one that the government may not impose unless it is prepared to pay for it.[33]

If Justice Stevens accurately described the Court's approach in at least certain takings cases, how is one to reconcile this statement of the law with the Court's frequent affirmation that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change"?[34] The Court's decisions do not offer a clue.

II. THE CONSEQUENCES OF THE MUDDLE

The Court's incorporation of due process thinking into the Takings Clause is problematic for at least three reasons. As a result of the incorporation, the Court has adopted an ambiguous, sometimes contradictory posture on whether, and to what extent, the courts should defer to the judgments of the political branches of government in reviewing property regulation; sowed confusion and uncertainty over the appropriate remedy in the event a regulation is determined to effect a taking; and, lastly, developed a jurisprudence of property regulation that is difficult if not impossible to square with the constitutional text. These problems impede the development of a coherent takings doctrine.

A. Presumption of Constitutionality?

It is a commonplace observation that in evaluating government action under the Due Process Clause the courts must grant substantial deference to the legislative branch. The courts start with a presumption of constitutionality. In general, at least in the arena of economic regulation, the regulation will be upheld if any set of known or plausible facts support the regulatory action.[35]

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33. Williamson County Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 202-03 (1985) (Stevens, J., concurring) (emphasis added).

34. *Mahon*, 260 U.S. at 416.

35. *See Carolene Prods.*, 304 U.S. at 154.

If the Supreme Court has thoroughly melded due process standards with takings doctrine, has the Court also incorporated the attitude of legislative deference? Several of the Court's recent decisions suggest some degree of deference. In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, for example, the Court referred to the "heavy burden" placed upon a property owner challenging a land use regulation as a taking.[36] And the Court's *Penn Central* decision obviously reflects, even if it does not explicitly acknowledge, substantial deference to the judgment of New York City (and other communities) that landmark preservation serves important public purposes. In general, however, at least facially the Court's decisions are devoid of any indication that a presumption of constitutionality operates in the law of takings. The explanation may lie in part in the patent impossibility of reconciling a presumption of constitutionality with the Court's observation that the Takings Clause is "designed not to limit the governmental interference with property rights *per se*."[37] In the regulatory context, the Takings Clause is ostensibly concerned merely with whether the public must pay compensation as a condition of pursuing a regulatory program, rather than with the validity of the regulatory program. Thus, a takings challenge, it can be said, does not question the legislative judgment to adopt the program itself. If, by assumption, the takings inquiry does not implicate the validity of a regulatory program, there is simply no aspect of the Court's analysis in which legislative deference can be applied appropriately.

The implications of this understanding of the Takings Clause go beyond rendering deference to legislative judgment irrelevant. Once the takings inquiry is understood as not being concerned with the validity of governmental ends, the burden of proof subtly shifts to the government to explain in each case why compensation is not due. In a typical case, one or more individuals present discrete economic injuries resulting from the adoption or implementation of a regulatory program; the taking claim raises the question of whether this burden should be shifted to the public in whose name, and presumably on whose behalf, the program was adopted. In other words, if as Justice Holmes put it, the inquiry

36. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 493 (1987).

37. *First English*, 260 U.S. at 315.

"at bottom is upon whom the loss . . . should fall,"[38] it is difficult in many, if not most, cases to avoid the conclusion that the burden would be most fairly placed on the general public.

The Court's decision last Term in *Lucas v. South Carolina Coastal Council*,[39] under one plausible reading, represents a logical extension of this understanding of the Takings Clause. In that case the Court did not consider the purposes of the South Carolina Beachfront Management Act, or the rationality of the state's setback requirement to limit development of shorelines in determining the validity of Lucas' claim. The only critical inquiry was whether the economic harm suffered by David Lucas as a result of the law's enactment could be justified on the ground that it prohibited conduct that Lucas had no right to engage in from the beginning. To avoid the compensation requirement, the Court stated, the State of South Carolina was generally required to demonstrate that the law's restrictions "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[40] The burden of proof apparently rested on the state to show that this exception applies.

To be sure, the holding in *Lucas* is limited explicitly to the situation where a regulation effects a "total taking," or as the trial court found, the regulation renders the property "valueless." But it is difficult to see, based on the Court's reasoning, why the *Lucas* analysis may not also apply when the economic injury is less than a complete destruction of a plaintiff's property interest. If the government must justify certain economic burdens imposed to advance the public welfare, why should it not be required to justify all such burdens, whether the effect is to deprive the property owner of 100%, 50%, or even 10% of his property? Read in this fashion, *Lucas* would not simply represent a new categorical rule for the extreme case, but would provide a potential template for the analysis of takings challenges to all kinds of regulatory actions that adversely affect property value.

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38. *Mahon*, 260 U.S. at 416.
39. *Lucas*, 112 S. Ct. at 2886.
40. *Id.* at 2900.

The irony, of course, is that this shifting of the burden of proof to the government is facilitated by the Court's traditional assertion that a takings challenge presupposes that a regulatory program aims at a legitimate goal. A takings challenge ostensibly does not question the legislative ends; in fact, the natural tendency, once legislative ends are read out of a case, is to place the burden on the government to justify why compensation should not be required. And the irony is simply compounded by the fact that the Court routinely relies on due process standards to evaluate whether the Takings Clause has been violated, and therefore whether compensation is owed.[41]

B. Remedy

The conundrum of legislative purpose is closely related to the second problem raised by the Court's melding of due process thinking with takings doctrine: the question of the appropriate remedy in a takings case. The traditional remedy in a due process case is an injunction. On the other hand, as the Court recently affirmed in *First English*, the Takings Clause must be read according to its terms, and where a taking has occurred just compensation is the appropriate remedy. At least superficially, the law appears to offer two distinct remedies for distinct constitutional violations.

However, the muddling of due process concepts and takings doctrine has muddied the remedy issue. In *Nollan*, for example, the plaintiffs sought and obtained an injunction against the enforcement of a condition attached to a California coastal permit

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41. The tortured judicial results that can emerge from the Court's ambivalent posture on regulatory purpose are demonstrated by the Federal Circuit's decision in Florida Rock Industry v. United States, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987). On the one hand, the court reversed the claims court's decision that denial of a wetland permit effected a taking because that action was not necessary to prevent pollution; a takings challenge assumes the governmental action is valid, the court of appeals ruled, and therefore it was improper for the claims court to assess the validity of the permit denial in this takings challenge. *Florida Rock Indus.*, 791 F.2d at 899-900. On the other hand, the court also said, citing *Agins*, that the claims court on remand would need to weigh the competing public and private interests, noting that the permittee in the case appeared to be only "a moderate and *pro forma* polluter." *Id.* at 904. *But see* Deltona Corp. v. United States, 657 F.2d 1184, 1189, 1192 (Ct. Cl.), *cert. denied*, 455 U.S. 1017 (1982) (stating that "[t]he *validity* of the permit denials is . . . not before this court," and at the same time affirming the conclusion that no taking had occurred because the government action "substantially advance[d] legitimate and important governmental interests").

that required the permittees to allow free public access across the private beach property in front of their house.[42] Despite the Court's statement in *First English*, decided in the same month, that "government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation,'"[43] the Court did not even pause to consider why compensation was not the sole or at least an appropriate remedy in *Nollan*. The practical answer, of course, is that the plaintiffs in *Nollan* opposed the requirement that the public have access across their property, and preferred to seek invalidation of the requirement rather than compensation for the taking. But if the Nollans were actually challenging a taking, why were they not compelled to accept compensation? And what became of the notion, again expressed the same month in *First English*, that takings doctrine "is designed not to limit the governmental interference with property rights *per se*"?[44]

What, if anything, is the actual significance of the choice between an injunction and an award of compensation? The notion that the Takings Clause generally requires payment of compensation rather than invalidation of a regulation is obviously the basis for the Court's observation that the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power."[45] But is this distinction, in fact, meaningful? Is there a difference in kind between an injunction and an award of compensation in terms of the potential interference with the goals of a regulatory program? Does compensation, as the Court has suggested, interfere less than an injunction with the exercise of political judgment by the legislative branch?

In a sense, an injunction and financial compensation are merely the opposite sides of a single coin. In *First English*, the Court stated that once a regulation has been determined to effect a taking, the government has the option of either rescinding the regulation or leaving the regulation in place and paying compen-

42. *Nollan*, 483 U.S. at 838-40.

43. *First English*, 482 U.S. at 315.

44. *Id.*

45. *Id.* at 314.

sation.[46] An injunction, however, presents the government with essentially the same choice. For example, after *Nollan*, the California Coastal Commission was presumably free to acquire the beach area in front of the Nollan's home for public recreational use through eminent domain proceedings. Whether a regulation is "rescinded" by an act of the legislature or as a result of a judicial injunction, an available option in both cases is to pursue the same objective using the eminent domain power.

Even the question of temporary damages presents a strong similarity between the two remedies. In *First English*, the Court held that even if the regulation is rescinded after it is determined to effect a taking, the government cannot avoid the constitutional mandate to pay compensation for the taking that already occurred while the regulation was in place. Similarly, however, a property owner who has succeeded in obtaining an injunction against the continued enforcement of a statute on due process grounds is entitled to pursue a § 1983 damages action for the injuries that cannot be avoided by prospective relief.[47] The measure of damages is presumably different in each case—"just compensation" in the taking case, and actual damages in the due process case—but whether one or the other would provide a larger recovery is difficult to discern in the abstract. To be sure, a § 1983 action is capable of being defeated on various grounds, such as lack of governmental responsibility or official immunity, that are not available to the government in a takings case seeking just compensation directly under the Fifth Amendment.[48] The fact remains that the potential for recovery for temporary takings is significant whether the action is viewed as arising under the Takings Clause or the Due Process Clause.

Despite these essential similarities between the compensation and injunction remedies, a strong argument still can be made that the choice between the two matters because it determines the

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46. *Id.* at 321.

47. *See* 42 U.S.C. § 1983 (1988); *see, e.g.*, Sullivan v. Town of Salem, 805 F.2d 81 (2d Cir. 1986) (§ 1983 damages action challenging municipal land use regulatory activity as a due process violation).

48. *E.g.*, Monell v. Department of Social Servs., 436 U.S. 658, 694 (1978) (liability of a municipality will depend upon establishing that the challenged regulatory activity constituted official town policy); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (government officials might be able to assert a defense of qualified good faith immunity).

starting place. To rescind a statute after it has been found to effect a taking obviously requires legislative action; similarly, to initiate eminent domain proceedings after the continued implementation of a statute has been enjoined requires at least executive, and possibly legislative, action as well. In either case, obtaining government action requires a difficult and time-consuming effort to alter the status quo. Thus, the choice between these two remedies arguably matters, if only because the starting place is most likely, everything else being equal, to be the end point as well.

But, finally, even if this is correct, the ultimate question is whether one remedy actually tends to frustrate the objectives of a regulatory program more than the other. To be sure, an injunction directly disables the government from continuing to implement the program. The injunction may be entered in a case presenting an "as applied" challenge based on the law's specific impact on the plaintiff, or the injunction may be entered in a facial challenge to the law; in the latter case, the effect of an injunction is obviously both direct and sweeping. On the other hand, a compensation award will be more narrowly focused in favor of the particular plaintiff, but it may well set a precedent creating the risk of substantial and—equally important—unpredictable government liability to other similarly effected property owners. This, too, can effectively disable the government from proceeding with the program. In the case of the South Carolina coastal program, for example, David Lucas' claim against the Coastal Council for compensatory damages in excess of $1,000,000 arguably had a more profound effect on the future of the program than would have been the case if Lucas had simply obtained an injunction against its implementation with respect to his two coastal lots.

C. The Constitutional Text

Finally, turning to the Constitution itself, the Court's muddling of the Due Process Clause and takings doctrine is plainly problematic in arriving at a coherent reading of the constitutional text. The differences in language between the Due Process and Takings Clauses strongly suggest that each clause has a different scope and meaning. Virtually any economic regulation could be said to "deprive" a person of some property

interest; the word "deprivation" focuses simply on the effect of the regulation on the property owner. In contrast, the Takings Clause appears, on its face, to be narrower in scope, triggered not merely by the owner's deprivation, but by some kind of appropriation of the property by the government as well. The requirement that the taking be for "public use" arguably further circumscribes the type of government action covered by the Takings Clause.

In its recent property decisions, the Court appears to have ignored the potential significance of the differences in language between the Due Process and Takings Clauses. Even those vigorously opposed to the notion that the Constitution can be given a literal, mechanical application would likely concede that the language should be consulted in determining how to interpret these two clauses.

III. THE UNDECIDED ISSUE

It is remarkable to observe that the Supreme Court has never addressed the relationship between the Due Process and the Takings Clauses squarely in its property jurisprudence.[49] The Court obviously has melded due process standards with takings doctrine, but the Court has never actually paused to consider whether or why this might be an appropriate step. The Court also has never considered whether the Takings and Due Process Clauses are truly fungible, or whether each has a different scope. Had the Court addressed these questions, it is possible that a great deal of doctrinal confusion could have been avoided.

The Court flirted with the relationship between the Due Process and the Takings Clauses in a series of five cases decided between 1981 and 1987.[50] The specific question in these cases, as framed by the Court, was whether plaintiffs who allege a taking may be limited to injunctive relief. In 1987, in *First*

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49. In several recent decisions, the Court has considered challenges to land use regulations under both the Due Process and Takings Clauses without, however, explicitly addressing the interrelationship between the two clauses. *See, e.g.*, Pennell v. City of San Jose, 485 U.S. 1 (1988); Hodel v. Indiana, 452 U.S. 314 (1981); *see also* Moore v. City of East Cleveland, 431 U.S. 494, 514 (1977) (Stevens, J., concurring).

50. *First English*, 482 U.S. 304; McDonald, Sommer & Frates v. County of Yolo, 447 U.S. 340 (1986); *Williamson*, 473 U.S. 172; San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); *Agins*, 447 U.S. 255.

English, the Court finally resolved the issue by ruling that the government cannot avoid a demand for compensation, at least for the period that the challenged regulation has been in effect and the taking was effective.

As the Court observed in several cases, however, this remedial issue raised, at least implicitly, a more fundamental question: why should a regulation ever be deemed to effect a taking rather than a violation of the Due Process Clause? Although the Court ultimately resolved the remedial issue, it has never explicitly resolved the underlying question. Furthermore, the Court has never addressed the next logical question: assuming a regulation *can* effect a taking in certain circumstances, are there other circumstances in which a regulation can *never* effect a taking?

The remedial issue arose from a number of state court decisions that had grappled with the potential application of the Takings Clause to regulatory activity. In a handful of decisions handed down in the 1970s, the California Supreme Court determined that a person challenging a regulation as a taking could not sue on the theory of inverse condemnation and seek monetary compensation.[51] The California Supreme Court recognized that a regulation may be so oppressive that its effect is "equivalent to the lawful taking of property."[52] But, the court ruled that "while such governmental action is invalid because of its excess, remedy by way of damages in eminent domain is not thereby made available."[53]

In *Fred F. French Investing Co. v. City of New York*, the New York Court of Appeals adopted a related rule for distinguishing takings from merely oppressive regulations:

> [W]hen the State "takes", that is appropriates, private property for public use, just compensation must be paid. In contrast, when there is only regulation of the uses of private property,

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51. *See* Agins v. City of Tiburon, 598 P.2d 25 (Cal. 1979), *aff'd on other grounds*, 447 U.S. 255 (1980); HFH, Ltd. v. Superior Court of Los Angeles County, 542 P.2d 237 (Cal. 1975), *cert. denied*, 425 U.S. 904 (1976).

52. *Agins*, 598 P.2d at 28.

53. *Id.*

> no compensation need be paid. Of course, and this is often the beginning of confusion, a purported "regulation" may impose so onerous a burden on the property regulated that it has, in effect, deprived the owner of the reasonable income productive or other private use of his property and thus has destroyed its economic value. In all but exceptional cases, nevertheless, such a regulation does not constitute a "taking", and is therefore not compensable, but amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid.[54]

Relying on this analysis, the New York Court of Appeals rejected a takings challenge to an amendment to the New York City zoning laws that effectively converted private property into a public park; the court did, however, strike down the amendment under the Due Process Clause.

The New York Court of Appeals' approach leads to the same basic conclusion as the California Supreme Court's rule—that is, in all or most regulatory takings challenges, no monetary compensation is available. But the courts' formulations of the issue were significantly different. The California court acknowledged that a regulation can amount to a taking, but nonetheless ruled that compensation is not an appropriate remedy, in part because of its policy concern that the specter of monetary liability would unreasonably interfere with local efforts to regulate land use. By contrast, the New York court focused less on the issue of remedy than on the underlying question of when, if at all, a regulation can ever effect a taking. If the U.S. Supreme Court had reviewed the New York decision rather than the California rule, the Supreme Court might not so easily have avoided addressing the substantive question underlying the remedial issue.

In the seven years leading up to *First English*, the Supreme Court granted certiorari in four other cases that appeared to present opportunities to resolve the remedial issue. In one case, *Agins v. City of Tiburon*, the Court concluded that the regulation

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54. Fred F. French Investing Co. v. City of New York, 350 N.E.2d 381, 384-85 (N.Y.), *cert. denied*, 429 U.S. 990 (1976).

did not effect a taking,[55] and in the remaining three cases the Court concluded that unresolved factual issues made resolution of the remedial issue premature.[56] In the latter three cases, however, various members of the Court, either in dictum or in dissenting opinions, addressed the underlying question of the relationship between the Due Process and Takings Clauses. Because the issue has never been explicitly resolved, these discussions provide the best available starting point for considering how the Court might address the issue today.

In *San Diego Gas & Electric Co. v. City of San Diego*, Justice Brennan, speaking for himself and three other Justices, dissented from the conclusion that the California court had not entered an appealable final order.[57] He then proceeded to describe how he would have resolved the remedial issue. He observed that a "corollary issue" was "implicit" in the remedial issue: specifically, "whether a government entity's exercise of its regulatory police power can ever effect a 'taking' within the meaning of the Just Compensation Clause."[58] Because it had logical priority, he addressed this "implicit" question before turning to the question of remedy.

Justice Brennan answered the implicit question by concluding that a regulation can effect a taking. First, he pointed to several recent decisions in which the Court rejected takings challenges, but implicitly recognized that, at least in some cases, a regulation could effect a taking; he also pointed to *Mahon*, which he read as having "rejected the proposition that police power restrictions could never be recognized as a Fifth Amendment 'taking.'"[59] Justice Brennan also rejected the argument, adopted in *Fred F. French*, that *Mahon* actually rested on due process grounds and that the Supreme Court had used the term "taking" in *Mahon* only "metaphorically" to characterize the oppressive character of the regulation.[60]

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55. *Agins*, 447 U.S. at 262-63.

56. *See McDonald*, 477 U.S. at 350-53; *Williamson*, 473 U.S. at 186; *San Diego Gas*, 450 U.S. at 633.

57. *San Diego Gas*, 450 U.S. at 646 (Brennan, J., dissenting).

58. *Id.* at 646-47 (Brennan, J., dissenting).

59. *Id.* at 650 (Brennan, J., dissenting).

60. *Id.* at 649 n.14 (Brennan, J., dissenting).

Second, Justice Brennan pointed to the "essential similarity of regulatory 'takings' and other 'takings.'"[61] The Court had frequently "found 'takings' outside the context of formal condemnation proceedings," he observed, "in cases where government action benefiting the public resulted in destruction of the use and enjoyment of private property."[62]

> From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property.[63]

"It is only logical," he stated, to conclude that government regulation "can be a 'taking,' and therefore a *de facto* exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property."[64]

Three years later in *Williamson County Regional Planning Commission v. Hamilton Bank*, another case which raised but did not resolve the validity of the California rule, the Court again addressed the issue of whether a regulatory action can effect a taking.[65] Justice Blackmun, speaking for the Court, briefly laid out the theory:

> [T]hat . . . government regulation does not effect a taking for which the Fifth Amendment requires just compensation; instead, regulation that goes so far that it has the same effect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment.[66]

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61. *Id.* at 651 (Brennan, J., dissenting).
62. *Id.* at 651-52 (Brennan, J., dissenting).
63. *Id.* at 652 (Brennan, J., dissenting).
64. *Id.* at 653 (Brennan, J., dissenting).
65. *Williamson*, 473 U.S. at 185.
66. *Id.* at 197.

Justice Blackmun did not express an opinion on this theory. However, unlike Justice Brennan, who thought *Mahon* definitively resolved that a regulation can effect a taking, Justice Blackmun appeared to leave open for future consideration the question of whether *Mahon* should be best viewed as involving a claim under the Due Process Clause.

Finally, in 1986, in *McDonald, Sommer & Frates v. County of Yolo*, the Court once more declined to reach the remedial issue.[67] Once again, however, commentary was directed toward Justice Brennan's "implicit issue." In a dissenting opinion, Justice White, joined by three other Justices, adopted the views expressed by Justice Brennan in his *San Diego Gas* dissent.[68] Since Justice Brennan (and Justice Marshall, who joined Brennan in *San Diego Gas*) voted with the majority in *McDonald*, it was thereafter clear that a firm majority of the Court had decided to adopt Justice Brennan's view rejecting the notion that a regulation can never effect a taking.

Following the meaty doctrinal debates that preceded it, *First English* was something of an anticlimax. The only issue the Court decided was whether the Takings Clause requires the payment of compensation, at least for a temporary taking. The Court answered that it does, relying on the constitutional text as an unambiguous command to the courts to require compensation, and on various precedents involving temporary outright appropriations or physical invasions. The Court did not allude to Justice Brennan's "implicit question" at all, other than to observe that the trial court "did . . . [not] rely on the theory that regulatory measures . . . may never constitute a taking in the constitutional sense."[69]

The line of cases culminating in *First English*, fairly read, establish that at least certain types of regulations can indeed result in a taking. Yet, these decisions provide no definite guidance on the relationship between the Due Process and Taking Clauses, or on when, and if so why, a regulation should be deemed a taking in addition to or instead of a due process

67. *McDonald*, 477 U.S. at 350-53.

68. *Id.* at 361-62 (White, J., dissenting).

69. *First English*, 482 U.S. at 311-12.

violation. In resolving the remedial issue in *First English*, the Court assumed that the plaintiff had asserted a valid claim by alleging that the regulation had "taken" her property by depriving her of "all use" of the property. Each of the prior decisions in the remedial line of cases was based on similarly extreme allegations. Nothing in this line of cases, either explicit or implicit, supports the conclusion that a regulation with less drastic effect can constitute a taking.

Although the Supreme Court apparently rejected the notion that a regulation can *never* effect a taking, it most assuredly did not adopt the view that *any* regulation can effect a taking. Justice Brennan, in *San Diego Gas*, used classical takings, such as physical appropriations and occupations, as the touchstone for his analysis. He stated that the Takings Clause should be extended to regulatory actions that share an "essential similarity" to classical takings, where regulation results in the "*destruction* of the use and enjoyment of private property."[70] This statement certainly does not foreclose—indeed perhaps it supports—the conclusion that just as some regulations can amount to takings, others cannot.

IV. Re-establishing the Distinction Between Due Process and Takings Violations

The Court should begin the task of unraveling the confusion in takings doctrine by addressing the relationship between the Due Process and the Takings Clauses squarely. Assuming certain regulations can effect a taking, is the scope of each clause necessarily the same and are the standards under each identical? Or do the Takings Clause and the Due Process Clause have a different scope, so that a regulation subject to challenge under one clause might not be subject necessarily to challenge under the other?

A. Toward a New Takings Standard

A logical starting place is the language of each clause. As discussed in part II, the prohibition against "takings" (as opposed

70. *San Diego Gas*, 450 U.S. at 651-52 (Brennan, J., dissenting) (emphasis added).

to mere "deprivations," as in the Due Process Clause) as well as the limitation that the taking be for a "public use" argue strongly for interpreting the Takings Clause as encompassing a smaller category of government actions than the Due Process Clause. A regulation susceptible to challenge as a due process violation should not be viewed necessarily as a potential taking.

The constitutional text obviously does not yield a bright line where takings doctrine would end and due process begin. However, the word "taking" implies not only a deprivation on the part of the landowner, but also a receiving on the part of the government. This suggests that for a regulation to effect a taking, the regulation must not merely result in economic harm, but the government also must in some sense appropriate the property. The phrase "for public use" further suggests that the appropriation must be for some governmental or at least public purpose.

A second relevant point of reference would be the actual intent of the drafters of the Bill of Rights. The available research leads to the conclusion that the drafters included the Takings Clause in the Bill of Rights to address outright physical appropriations of property.[71] Justice Scalia, speaking for the Court in *Lucas*, acknowledged as much, but dismissed the relevance of the evidence that "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all."[72] He argued that the Court in *Mahon* had already rejected the argument that the Takings Clause does not apply to regulations, and also observed that the text "can be read" to encompass regulatory as well as physical deprivations. On the first point, the actual meaning of *Mahon* is open to debate and in any event an erroneous seventy-year-old precedent would hardly justify adhering to an erroneous interpretation of the Constitution. On the second point, Justice Scalia's observation that the Takings Clause "can be read" to support his position begs the question whether, if the language is ambiguous, the drafters' intent can be simply disregarded in choosing between plausible readings of the text. In *Lee v. Weisman*, the Establishment Clause decision handed down together with *Lucas* during the last week of the

71. *See* William M. Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 708 (1985).

72. *Lucas*, 112 S. Ct. at 2900 n.15.

Court's 1991 Term, Justice Scalia argued that any ambiguity in the constitutional text should be resolved by resort to the drafters' original intent.[73] If that approach was correct in *Weisman*, how did the drafters' intent become irrelevant in *Lucas*?

Finally, the Court must resolve whether an attitude of judicial deference to legislative goals, as traditionally applied in the due process context, is also appropriate in a case raising a claim under the Takings Clause, or whether, as some of the Court's takings decisions suggest, no particular deference is due in a takings case. For the reasons discussed in part II, a compensation award is just as likely to interfere with the achievement of regulatory goals as an injunction. Therefore, the notion that takings awards do not effect the achievement of regulatory goals is simply a fiction that should be abandoned.

All regulatory programs readjust the extent and nature of individual property rights. How existing rights should be adjusted or redefined ultimately represents a matter of policy judgment. Although judges are often capable of making these policy judgments, the legislative branch is in a far better position to assure that these judgments actually conform to community norms. Everything else being equal, in a democratic society we prefer that, to the maximum extent possible, policy choices be left to elected officials. Thus, the primary responsibility for defining the appropriate ends and means of property regulation should be left to the legislature rather than the courts. In other words, in reviewing governmental regulation of property rights, the courts should presume the regulation is constitutional and place the burden of proving otherwise on the party challenging the regulation.

On the other hand, the Takings Clause, at its core, reflects the intuitively correct conviction that government should, in some cases, be required to pay compensation regardless of whether that requirement will frustrate the governmental objective. Whether the government seeks land for a military installation, a new road, or a schoolhouse, the requirement that the government pay compensation cannot be avoided by contending that the require-

73. Lee v. Weisman, 112 S. Ct. 2649, 2679 (1992) (Scalia, J., dissenting).

ment would burden the government's ability to act. Similarly, the requirement cannot be avoided by contending that the appropriation would have only a modest economic impact on the property owner. The requirement to pay compensation rests more on the nature of the government action than on its purpose or the weight of the economic burden it imposes.

This analysis does not yield any clear line demarcating governmental actions that effect takings from those that do not. However, it does begin to provide a path out of the Court's doctrinal confusion in a fashion that gives distinct substantive content to the Due Process and Takings Clauses. In brief, the takings doctrine is fundamentally concerned with the situation where the government can properly be required to pay compensation without regard to the importance of the governmental objective. Where, on the other hand, the weight and significance of the governmental purpose is a relevant factor, the burden imposed by a government regulation should be subject to constitutional challenge, if at all, under the Due Process Clause. Combined with a reading of the constitutional text, and relying on the evidence concerning the drafters' apparent intent, the basic inquiry in determining whether a regulation can constitute a taking is whether it represents the functional equivalent of an outright appropriation or physical condemnation.

This proposed test undeniably raises a number of difficult boundary issues, but cases falling on one side of the line or the other can be clearly identified. Whether and to what extent private property ownership should be conditioned on a requirement to avoid injury to endangered species, for example, turns on profoundly political judgments about the value of preserving the world's biodiversity and intergenerational equity; these political judgments should be considered in any judicial review of endangered species regulations and therefore any challenge to such regulations should fall outside the scope of the takings doctrine. Similarly, whether floodplain development should be limited to minimize flood damage involves complex policy judgments about the fairest and most efficacious means of addressing flooding problems; again, the judgment, at least in the first instance, belongs to the legislature, and therefore any constitutional challenge to floodplain regulations should not raise a potential taking claim. This is not to suggest, however, that regulatory

activity can be excluded categorically from scrutiny as a potential taking. As Justice Brennan correctly observed, it would unreasonably elevate form over substance to suggest that a regulation can never effect a taking.

If a municipal government selects a splendid farm on the outskirts of the community for a public park, few would question that, in the absence of a willing seller, the municipality could not properly proceed to acquire the property other than through formal eminent domain proceedings. If the municipality instead enacted an ordinance declaring that the farm should not be developed, mandated exclusive public use for recreational purposes, and required the owner to maintain various improvements for public convenience—if in effect the municipality created a park by legislative fiat—there should be no dispute that the ordinance effects a *de facto* exercise of the power of eminent domain. Unless the municipality rescinds the regulation, the courts should award compensation regardless of the magnitude of the public benefit that this functional appropriation of private property would provide.

B. Lucas *Reconsidered*

One plausible interpretation of the Supreme Court's *Lucas* decision is as a template to analyze all regulatory takings claims regardless of the magnitude of the economic harm involved.[74] However, the Court's decision rests squarely on the trial court finding that the South Carolina coastal law rendered Lucas' property "valueless." The Court's opinion carefully framed its new categorical rule to apply only in this extreme case, even if some of the reasoning in the opinion might suggest a potentially broader application.

However, there is an alternative, equally plausible interpretation of *Lucas* that conforms to our proposed rethinking of the Court's jurisprudence of property regulation. From the landowner's point of view, a regulation that deprives her of all the value of property is indistinguishable in terms of its effects from outright condemnation of the fee. And as Justice Scalia fairly

74. *See supra* text accompanying notes 38-40.

observed, if a regulation has such drastic effects, it is less plausible to assume "that the legislature is simply 'adjusting the benefits and burdens of economic life.'"[75] Perhaps the Court in *Lucas*, instead of laying the foundation for a revolutionary expansion of takings doctrine, was merely groping to define the limiting case that distinguishes regulatory activity entitled to legislative deference from regulatory activity that is not entitled to similar deference because it is functionally the same as appropriation and occupation.

Although the Court in *Lucas* stated that it was establishing a "categorical" rule, it is obvious from the decision as a whole that the rule is actually far from categorical. Under the Court's decision, even if a regulation renders property valueless, the government still has an opportunity to avoid paying compensation by demonstrating that the regulation simply parallels limitations that already inhere in the title under state nuisance or property law, or by demonstrating some overwhelming public necessity. Ultimately, the *Lucas* decision only identifies a category of regulatory actions that, by virtue of their extreme impact, can be viewed as potentially effecting a taking. Despite dicta to the contrary, the Court has left unresolved the question of whether regulations with less drastic effects can ever constitute a taking. Rather than being at the core of a new, broad doctrine of regulatory takings, perhaps *Lucas* represents the outer limits of the takings doctrine. If so, then regulations that fall outside the *Lucas* rule might be subject still to constitutional challenge, but only under the deferential standards applied to the Due Process Clause.

75. *Lucas*, 112 S. Ct. at 2894.