

The Police Power Revisited: Phantom Incorporation and the Roots of the Takings Muddle

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ABSTRACT: This article traces the roots of the current muddle in the Supreme Court’s regulatory takings jurisprudence to an ill-considered “phantom incorporation” holding in *Penn Central v. New York* (1978), the seminal case of the modern regulatory takings era. The *Penn Central* Court anachronistically misread a long line of Fourteenth Amendment Substantive Due Process cases as Fifth Amendment Takings Clause cases, misattributing to *Chicago Burlington & Quincy v. Chicago* (1897) (“*Chicago B & Q*”) the crucial holding that the Fifth Amendment Takings Clause applied to the states. In fact, like other cases of its era, *Chicago B & Q* was decided strictly on Fourteenth Amendment Due Process grounds, and was utterly silent on the Fifth Amendment Takings Clause, its relation to the Fourteenth Amendment, and its applicability to the states. Nor did *Chicago B & Q* overrule *Barron v. Baltimore* (1833), which had expressly held that the Fifth Amendment Takings Clause applied only to the federal government. Indeed, for another half century after *Chicago B & Q*, the Court continued to cite *Barron* as good law, in several cases relying on *Barron* to summarily reject Fifth Amendment Takings Clause claims against states. Nor did *Chicago B & Q* or subsequent cases understand the Fourteenth Amendment Due Process and Fifth Amendment Takings prongs of just compensation law to be doctrinally identical requirements. Prior to *Penn Central*, courts scrupulously distinguished the two doctrines, relying exclusively on Fifth Amendment Takings Clause concepts and precedents to decide claims against the federal government, and Fourteenth Amendment Due Process Clause concepts and precedents in claims against states.

Penn Central, not *Chicago B & Q*, was the first case to incorporate the Fifth Amendment Takings Clause against the states. It did so without analysis (apart from its erroneous citation to *Chicago B & Q*), without briefing on the incorporation issue, without benefit of prior adjudication in the courts below, and without considering the implications of its incorporation holding for property law. Blending elements of Substantive Due Process and Fifth Amendment Takings doctrine into an incoherent pastiche, *Penn Central*’s ill-considered incorporation holding sowed enormous doctrinal confusion. Its most important consequence was to deprive states of their principal defense against Due Process-based just compensation claims. All states had long claimed as a “background principle of state property law” that all property was held subject to the state’s reserved police power to regulate to protect the public health, safety, morals, and welfare. On pre-*Penn Central* understandings, a valid police power regulation could never result in a compensable “taking” of property, for the simple reason that the claimant’s property rights were and always had been subject to the inherent limitation that

such rights could be limited by the state’s exercise of its police power. Armed with the police power defense, states had considerable latitude to make dynamic adjustments in property law in response to changing social needs, conditions, and understandings, even at the height of *Lochner*-era Substantive Due Process jurisprudence. Stripping state property law of its historically dynamic and progressive character, and sharply curtailing the role of state law in determining the extent of a claimant’s property rights for purposes of adjudicating when a regulation amounts to a “taking” of property, the Court’s current regulatory takings jurisprudence has also made a hash of federalism principles that historically lay at the center of our constitutional law of property.

While the principle of *stare decisis* counsels strongly against reversing course on the question of Fifth Amendment incorporation, this Article urges adjustments in Takings Clause doctrine to afford a prominent role for the police power as a judicially cognizable “background principle” of state property law, consistent with historic understandings and the overriding social need for property to remain a dynamic and vibrant social institution capable of adapting to changing social conditions. More generally, the Court must acknowledge that a determination whether a taking of *property* has occurred requires, as a logically prior question, an inquiry into the boundaries and limitations of a claimant’s legal property rights under state law. That inquiry is seldom made under current doctrine, which emphasizes diminution of value as measured by market expectations, while largely leaving state property law out of the equation.

Introduction

Regulatory takings law is by all accounts a “muddle.”¹ Despite a series of highly publicized and heavily analyzed opinions over the last twenty-five years, the Supreme Court has failed to solve the riddle it posed for itself in the seminal case of modern regulatory takings jurisprudence, *Penn Central Transp. Co. v. New York*.² When does a

¹See Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 561-63 (1984) (stating that takings law is characterized by “confusion” as courts pursue the “elusive[] . . . meaning of ‘taking’ in our law”); Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 1070 (2000) (“outsiders have pronounced the Court’s property jurisprudence incoherent, and some of the Justices have been kinder only in form”); John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of Doctrinal Confusion*, 17 VT. L. REV. 695, 695 (1993) (labeling takings doctrine a “confused body of law containing contradictory principles and standards”).

²*Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978). The *Penn Central* Court traced the “regulatory takings” puzzle to the 1922 case *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922) (hereinafter *Mahon*), in which Justice Holmes famously opined that “if regulation goes too far it will be recognized as a taking.” This Article joins Robert Brauneis and others in arguing that *Mahon* was not a

governmental regulation burdening property rise to the level of a compensable “taking” under the Fifth Amendment Takings Clause?³

This Article does not attempt to answer that riddle directly. Instead, it traces the historical roots of the current doctrinal confusion to the *Penn Central* Court’s anachronistic misreading of a series of Fourteenth Amendment Substantive Due Process cases as if they were Fifth Amendment Takings Clause cases, thus conflating two distinct lines of doctrine that the Court had taken pains to keep separate for more than a century. This doctrinal merger effectively eliminated Fourteenth Amendment Substantive Due Process as a distinctive category of inquiry in just compensation law, and eviscerated any meaningful role for what had been the principal defense available to states: the “police power,” a background principle of property law long asserted by all states, under which all property was understood to be held subject to the state’s reserved power to regulate to protect the public health, safety, morals, and general welfare.⁴ Elimination of the

Fifth Amendment Takings case at all, but rather a Fourteenth Amendment Substantive Due Process case. See *infra* Part IV. See also Robert Brauneis, “*The Foundation of Our ‘Regulatory Takings’ Jurisprudence’*: *The Myth and Meaning of Justice Holmes’ Opinion in Pennsylvania Coal Co. v. Mahon*,” 106 *Yale L.J.* 613 (1996).

³“ . . . nor shall private property be taken for public use, without just compensation.” U.S. Const., Amdt. V.

⁴Representative cases by the states’ highest courts include: *Federal Land Bank of New Orleans v. John D. Nix, Jr., Enterprises*, 117 So. 720, 723 (La. 1928) (“Everyone holds his property, under the Constitution, subject to a legitimate exercise of the police power”); *Appeal of White*, 134 A. 409 (Pa. 1926) (“No matter how seemingly complete our scheme of private ownership may be under our system of government, all property is held in subordination to the right of its reasonable regulation by the government clearly necessary to preserve the health, safety, or morals of the people”); *Ingram v. Brooks*, 111 A. 209, 212 (Conn. 1920) (“all property is held subject to this [police] power”); *Schiller Piano Co. v. Illinois Northern Utilities Co.*, 123 N.E. 631, 632 (Ill. 1919) (“All property in a state is held on the implied condition or obligation that the owner will so use it as not to interfere with the rights of others and subject to such reasonable regulations as the Legislature may impose” under the “police power of the state”); *Schmitt v. F.W. Cook Brewing Company*, 120 N.E. 19, 20 (Ind. 1918) (“there can be no property rights which are not subject to this [police] power”); *State ex rel. Euclid-Doan Bldg. Co. v. Cunningham*, 119 N.E. 361, 362 (Oh. 1918) (under the police power, “in the interest of public welfare a property owner must submit to a reasonable regulation and limitation of the use of his property, and, in matters of such character, when private interests and public welfare conflict, the former must give way to the latter”; “[s]uch regulations are in no wise an invasion of property rights”); *People v. Gillson*, 17 N.E. 343, 345 (N.Y. 1888) (“all property is held under the general police power of the state to regulate and control its use in a proper case as to secure the general safety and the public welfare”); *Pool v. Trexler*, 76 N.C. 297 (N.C. 1877) (“Every citizen holds his land subservient to such police regulation as the Legislature in its wisdom may enact for the general welfare”); *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 84-85

police power defense, in turn, radically diminished the role of state property law in defining the content and limits of property rights against which a “taking” (or “deprivation”) of property would be measured, thus undercutting a longstanding federalist division of labor in property law and sewing confusion as to what counts as “property” for purposes of a takings claim.

Although lacking a coherent theoretical foundation, the elements of the Supreme Court’s current regulatory takings doctrine are easy enough to state in their broadest outlines. Regulations that result in the permanent physical occupation of property⁵ or total deprivation of all economically viable use of land⁶ are *per se* takings—except when they’re not.⁷ Exactions, which condition land development approvals upon the surrender of a valuable property right, are subject the *Nollan* “essential nexus”⁸ and *Dolan* “rough proportionality” requirements, designed to prevent “extortion.”⁹ All other

(Mass. 1851) (“every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community”).

⁵*Loretto v. Teleprompter Manhattan CATC Corp.*, 458 U.S. 419, 426 (1982) (holding that “a permanent physical occupation authorized by the government is a taking without regard to the governmental interest it may serve”).

⁶*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028-31 (1992) (holding that regulations that “eliminate all economically viable use” of land are “inconsistent with the historical compact recorded in the Takings Clause”). By its terms, *Lucas* limits this *per se* “total taking” test to property in land. See *id.* For other forms of property, such as personal property, some other analysis is required. See *id.* (distinguishing *Andrus v. Allard* in which the Court held a regulation of trade in eagle feathers that resulted in total loss of economic value of plaintiff’s feather collection not to be a compensable “taking”).

⁷See *Lucas*, 505 U.S. at 1028-29 (stating that notwithstanding the *per se* “total takings” rule, a regulation authorizing a permanent easement or denying all economically viable use of land may be non-compensable if it reflects a “limitation” that “inhere[s] in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership”).

⁸See *Nollan v. California Coastal Commission*, 483 U.S. 825, 836-37 (1987) (holding that when the government conditions regulatory approval upon the surrender of a valuable property right that if appropriated directly would constitute a compensable “taking,” the condition must have an “essential nexus” to the purpose of the regulatory scheme).

⁹See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (holding that when the government conditions regulatory approval upon the surrender of a valuable property right, it “must make some kind of individualized determination that the required dedication is related both in nature and extent to the

regulatory takings claims are decided under the *Penn Central* balancing test, requiring a case-specific, fact-intensive weighing of the character of the government's action against the loss incurred by the property owner, taking into account "distinct investment-backed expectations."¹⁰ Given the difficulties inherent in applying a test that calls for the court to balance incommensurables, however, courts sometimes simplify the *Penn Central* balancing test to the *Agins v. Tiburon* short form, in which the court need only make two threshold determinations: a regulation that does not advance *any* legitimate governmental purpose or that deprives the owner of *all* economically viable use is deemed a compensable taking, but otherwise probably passes constitutional muster.¹¹

The indefinite contours of these doctrines make them far more difficult to apply in practice than to state in the abstract, however.¹² Worse, the Supreme Court has failed to articulate any coherent underlying rationale to tie together the disparate strands of its

impact of the proposed development").

¹⁰See *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 124 (1978) (stating that factors of "particular significance" in regulatory takings analysis are the "economic impact on the claimant," the "extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action"). Arguably, the *Penn Central* opinion itself does not expressly articulate a balancing test. Instead, it states that "takings" inquiries are "essentially ad hoc" and "case-specific," and identifies some of the factors prominent in the analysis. See *id.* at 123-24. Subsequent cases, however, have interpreted the *Penn Central* factors as a balancing test, pitting the legitimacy and importance of the governmental interest on one side of the ledger, against the burden on the property owner and deprivation of investment-backed expectations on the other side. See, e.g., *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Authority*, 216 F.3d 764, 772-74 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002) (characterizing the *Penn Central* factors as a "test" in which regulatory takings claims are "resolved by balancing the public and private interests at stake, with three primary factors weighing in the balance").

¹¹See *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land"). For an application of *Agins*, see, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 484-85 (1987) (citing *Agins* to uphold a state statute requiring coal mines to provide subjacent support to surface property, on grounds that the regulation advances a legitimate governmental interest in public safety and does not deny coal owners all economically viable use).

¹²See John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1006 (2003) (stating that takings law is "unpredictable in application"); Eric T. Freyfogle, *Regulatory Takings, Methodically*, 31 ENVTL. L. REP. 10313, 10313 (2001) (hereinafter Freyfogle, *Regulatory Takings*) (regulatory takings jurisprudence . . . has become an ungainly body, awkward for citizens and judges to apply").

regulatory takings jurisprudence.¹³ New tests appear to be invented ad hoc,¹⁴ often on fractious 5-4 votes with multiple dissents and concurrences,¹⁵ leaving many loose doctrinal threads.¹⁶ Even when the Court purports to apply an established “test” like *Penn Central* balancing, decisions typically turn on case-specific facts, and consequently carry little precedential weight and offer little practical guidance to parties in future disputes.¹⁷ The Court regularly insists there must be some limit to government’s power to impose regulatory burdens on property owners,¹⁸ but it articulates no consistent, principled basis for determining where to draw that line.¹⁹

¹³See *id.* (stating that takings law is “lacking in theory”); *Eagle*, *supra* note 1, at 979-80 (“the Court has been unwilling to vindicate . . . [property] rights through a coherent theory”).

¹⁴See, e.g., *Lucas*, 505 U.S. at 1036 (Blackmun, J., dissenting) (accusing the Court of “creat[ing] simultaneously a new categorical rule and a new exception . . . neither of which is rooted in our prior case law, common law, or common sense” and “question[ing] the Court’s wisdom in issuing sweeping new rules to decide such a narrow case”).

¹⁵See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (decided in part 6-3 and in part 5-4, with two concurring opinions, two dissents, and one partial concurrence and partial dissent). Part II-B provided the crucial holding that a regulatory takings claim is not barred by the fact that the regulation was already in force at the time the property was acquired. That Part was decided 5-4, but Justices O’Connor and Scalia filed separate concurrences stating incompatible interpretations of the crucial holding. Compare *Palazzolo*, 533 U.S. at 632-33 (O’Connor, J., concurring) (stating that the holding in Part II-B does not state a blanket rule making the timing of the regulation irrelevant to takings analysis), with *id.* at 636 (Scalia, J., concurring) (stating that his “understanding” of Part II-B “is not Justice O’Connor’s,” insofar as “the fact that a restriction existed at the time the purchaser took title . . . should have no bearing” on the takings analysis).

¹⁶See ; see also *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002) (acknowledging that the Court’s regulatory takings jurisprudence “is characterized by essentially ad hoc, factual inquiries . . . designed to allow careful examination and weighing of all the relevant circumstances”)(citations omitted).

¹⁷See Freyfogle, *Regulatory Takings*, *supra* note , at 10313 (“leading decisions have arisen from peculiar facts and messy procedural contexts, yielding rulings that are hard to apply elsewhere”).

¹⁸See, e.g., *Lucas*, 505 U.S. at 1014 (Scalia, J.) (“if the protection against physical appropriations of private property . . . [is] to be meaningfully enforced, the government’s power to redefine the range of interests included in the ownership of property . . . [is] necessarily constrained by constitutional limits”)

¹⁹See *id.* at 1015 (acknowledging that neither *Mahon* nor more than 70 years of subsequent jurisprudence established a “set formula” for determining when a regulation constituted a taking); *Palazzolo*, 533 U.S. at 617 (“Since *Mahon*, we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking”).

The Court also asserts that regulatory takings law is fundamentally about “fairness,” quoting the principle enunciated in *Armstrong v. United States* that “[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”²⁰ Yet at the end of the day, the relation between the various regulatory takings tests enunciated by the Court and the goal of achieving fundamental fairness by preventing the unprincipled “singling out” of some property owners for special burdens not borne by others appears attenuated, at best.²¹

The consequence is an incoherent, chaotic pattern of decisions that more closely resemble the arbitrary rule of censors than the rule of law. Meanwhile, academics attempting to step into the breach with their own unifying theories have met at best mixed success.²²

This Article will resist the temptation to join the parade of academic theorists attempting to provide a comprehensive resolution to the takings problem. Instead it undertakes the more modest task of unpacking some of the origins of the current regulatory takings muddle, in the belief that diagnosis is the first step toward cure.

The Article argues that much of the current confusion is the result of the evisceration of federalism principles from the Supreme Court’s regulatory takings

²⁰*Armstrong v. United States*, 364 U.S. 40, 49 (1960).

²¹See *infra*, TAN

²²Prominent academic efforts to bring order to takings law include, *inter alia*: RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); Joseph L. Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36 (1964); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 *HARV. L. REV.* 1165 (1967) [hereinafter Michelman, *Property, Utility, and Fairness*]; Lawrence E. Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 *CAL. L. REV.* 569 (1984) Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 *CAL. L. REV.* 1299 (1989); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 *CAL. L. REV.* 53 (1990); Daniel A. Farber, *Public Choice and Just Compensation*, 9 *CONST. COMMENTARY* 279 (1992); Jed Rubinfeld, *Usings*, 102 *YALE L.J.* 1077 (1993).

jurisprudence,²³ a problem that stems from the Court’s anachronistic misreading of late nineteenth and early twentieth century Fourteenth Amendment Substantive Due Process cases as Fifth Amendment Takings Clause cases. In particular, the Court’s current regulatory takings jurisprudence rests on erroneous retroactive reinterpretations of two now-canonical cases. The first of these is the 1897 case *Chicago Burlington & Quincy R. Co. v. City of Chicago*²⁴ [hereinafter *Chicago B & Q*], said to stand for the proposition that the Fifth Amendment Takings Clause was made applicable to the states through operation of the Fourteenth Amendment Due Process Clause.²⁵ The second is Justice Holmes’ cryptic 1922 majority opinion in *Pennsylvania Coal v. Mahon*,²⁶ said to have established the principle that a regulation that “goes too far” may constitute a compensable Fifth Amendment regulatory taking.²⁷

Understood in their proper historical context, however, neither *Chicago B & Q* nor *Mahon* had anything to say about the Fifth Amendment Takings Clause, which at the time was thought to apply only to the federal government. Both cases were decided under the Fourteenth Amendment Due Process Clause, which on its face applies to the states and not to the federal government.²⁸ To be sure, *Chicago B & Q* did hold that states were subject to a “just compensation” requirement whenever they deprived owners of

²³See Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas as Judicial Conservatism*, 35 WM. & MARY L. REV. 301 (1993) [hereinafter Michelman, *Property and Federalism*].

²⁴*Chicago, Burlington and Quincy R. Co. v. Chicago*, 166 U.S. 226 (1897) [hereinafter *Chicago B & Q*].

²⁵See, e.g., *Penn Central*, 428 U.S. at 122 (citing *Chicago B & Q* for the proposition that the Fifth Amendment Takings Clause “is made applicable to the States through the Fourteenth Amendment”).

²⁶*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

²⁷See, e.g., *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 325 (2002) (stating that Justice Holmes’ opinion in *Mahon* “gave birth to our regulatory takings jurisprudence”).

²⁸“ . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law” U.S. Const., Amdt. XIV, Sec. 1. In an important doctrinal development, however, the Supreme Court held in 1954 that the Fourteenth Amendment Equal Protection Clause applies to the federal government through a process of “reverse incorporation” by way of the Fifth Amendment Due Process Clause. See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (extending *Brown v. Board of Education*’s prohibition on racially segregated public schools to the District of Columbia on Fifth Amendment Due Process grounds).

property through exercise of their power of eminent domain.²⁹ But as Part III of this Article will show, this holding was understood neither by the *Chicago B & Q* Court itself, nor by its successors for the next half century or more, to mean that the Fifth Amendment Takings Clause now applied to states.³⁰ That would have been a very different kettle of fish. Since *Barron v. Baltimore* in 1833, the Fifth Amendment Takings Clause had been understood to apply only to the federal government and not to the states.³¹ This understanding clearly survived the Supreme Court's decision in *Chicago & Q*, as courts continued to cite *Barron* as good law at least until the 1950s.³²

For nineteenth and early twentieth century courts, the just compensation principle found in the Fifth Amendment Takings Clause was a straightforward matter of applying the text of a constitutional amendment understood from its inception to apply exclusively to the federal government.³³ In contrast, the just compensation principle found in Fourteenth Amendment Due Process Clause was said to be derived from principles of "universal law" and "natural equity."³⁴ As the Court explained in *Twining v. New Jersey*, decided a few years after *Chicago B & Q*, states were bound to pay just compensation in eminent domain cases because that principle was "included in the conception of due process of law," and "not because those rights are enumerated in the first eight Amendments."³⁵

²⁹*Chicago B & Q*, 166 U.S. at 236 ("Due process of law, as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public.")

³⁰See *infra* Part

³¹See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250-51 (1833) (holding that the Fifth Amendment Just Compensation clause applies only to the federal government).

³²See *infra* notes and accompanying text

³³See *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (stating that in Fifth Amendment Takings claims against the United States "we need not have recourse to natural equity . . . for in this fifth amendment there is stated the exact limitation on the power of the government to take private property for public uses").

³⁴See *Chicago B & Q*, 166 U.S. at 237-36 (quoting with approval earlier justifications of the just compensation principle as a matter of "natural equity" and "universal law").

³⁵*Twining v. New Jersey*, 211 U.S. 78, 93 (1908).

Mahon was part of that same century-long line of Fourteenth Amendment Substantive Due Process jurisprudence,³⁶ an unbroken string of precedent that dated from shortly after the Fourteenth Amendment’s enactment³⁷ and persisted down to the mid-1970s.³⁸ During this entire period, the Court scrupulously distinguished the Substantive Due Process compensation principle applicable to the states from its Fifth Amendment Takings Clause doctrine applicable to the federal government.³⁹

Although the two lines of just compensation cases bear a strong facial similarity, Part III will show that courts from *Chicago B & Q* on down regarded their family resemblance as that of cousins, not siblings, and certainly not that of a singular personage.⁴⁰ The two strands of doctrine were understood as parallel, and not identical

³⁶See Brauneis, *supra* note , at . The core holding of *Mahon* is that Pennsylvania’s Kohler Act requiring mine operators to reserve pillars of coal to provide subjacent support to surface owners fell outside the scope of the state’s police power, and therefore effected a compensable deprivation of property under the Fourteenth Amendment Due Process Clause. See *Mahon*, 260 U.S. at 413 (“The question is whether the police power can be stretched so far”); *id.* at 414 (“It is our opinion that the act cannot be sustained as an exercise of the police power”). Holmes’ opinion does make a single passing reference to the Fifth Amendment Takings Clause, but only to note that it broadly parallels the Fourteenth Amendment just compensation principle at issue in *Mahon*. See 260 U.S. at 415 (stating that the Fifth Amendment “provides that [property] shall not be taken for [public] use without compensation” and that “a similar assumption is made in the decisions upon the Fourteenth Amendment”). See also *infra* Part .

³⁷See, e.g., *Munn v. Illinois*, 94 U.S. 116, 125 (1876) (upholding railroad rate regulation against complain that it unconstitutionally deprived railroads of property without Due Process, on grounds that “statutes regulating the use, or even the price of the use, or private property [do not] necessarily deprive[] an owner of his property without due process . . . Under some circumstances they may, but not under all”).

³⁸See, e.g., *City of Pittsburg v. Alco Parking Co.*, 417 U.S. 369 (1974) (upholding 20% city tax on parking against claim that it was so unreasonably high and confiscatory as to constitute an unconstitutional “taking” or deprivation of parking operators’ property without due process of law); *Dean v. Gadsden Times Pub. Corp.*, 412 U.S. 543 (1973) (upholding Alabama statute requiring employers to pay employees regular compensation during jury duty against claim that statute was an unconstitutional “taking” depriving employer of property without Due Process). The *Alco* and *Dean* cases were decided strictly on Fourteenth Amendment Substantive Due Process grounds and make no mention of the Fifth Amendment.

³⁹See, e.g., *Mahon*, 260 U.S. at 415 (describing Fifth Amendment Takings Clause and Fourteenth Amendment just compensation principle as “similar”);

⁴⁰See, e.g., . See also *infra* Part and cases cited therein.

requirements. They differed both in origin and in content, and each operated by its own distinctive set of family rules.

The most important difference arose from a fundamental point of federalism. State law, not federal law, was understood to be the principal determinant of the nature and extent of property rights actually held by the claimant. Fifth Amendment Takings Clause claims against the federal government therefore had to take state-recognized property rights more or less as given; the outcome turned principally on whether the federal action so abridged those state-created property rights as to amount to a “taking” of the claimant’s property, even if the federal action were otherwise legitimate.⁴¹

Fourteenth Amendment Due Process claims against states played out very differently, however. Because state law determined the nature and scope of property entitlements, a claim that a state regulatory enactment had deprived a claimant of property could be (and usually was) met with the defense that the claimant had simply misunderstood the scope of her property rights under the applicable state law, and no compensable “deprivation” of property had occurred because the claimant had no legitimate property entitlement to the interest allegedly taken.⁴² The crucial element in this defense was the state’s assertion that under its law, *all* property entitlements were qualified by, and held subject to, the state’s reserved “police power” to regulate for protection of the public health, safety, morals, and general welfare. The police power thus operated as an inherent limitation on property rights, the exact contours of which could never be fully specified in advance.⁴³ Because all property was held subject to this somewhat indefinite prospective limitation, it also followed that the precise contents of an individual’s property rights could never be fully specified once and for all time. Instead of operating as a fixed, invariable, and determinate quantum, property rights were understood to be somewhat indefinite at the boundaries and variable over time

⁴¹See, e.g., *Armstrong*, 364 U.S. 40, 44-48 (1960) (holding that otherwise lawful federal action to take title to uncompleted ships from a bankrupt shipbuilder effected a compensable Fifth Amendment taking of materialmen’s liens recognized as property under Maine law); *Monongahela Navigation Co. v. U.S.*, 148 U.S. at 336 (“like the other powers granted to congress by the constitution, the power to regulate commerce is subject to all limitations imposed by such instrument, and among them is that of the fifth amendment”).

⁴²See, e.g., . See also *infra* Part .

⁴³See . See also *infra* Part

and across jurisdictions, as states enacted new police power regulations or altered or amended old ones. In short, it was understood that both the state's police power and the individual's concomitant rights of property had to be flexible enough to accommodate changing social conditions, societal needs, and legal and political understandings.

Against this background understanding, most just compensation claims against states under the Due Process Clause turned on arguments concerning the nature and scope of the state's police power, and whether the challenged regulation legitimately fell within its bounds.⁴⁴ A determination that the challenged action was a valid exercise of the police power was dispositive, for it led to the conclusion that the claimant's property entitlement did not extend so far as to preclude the challenged regulation, and consequently no "deprivation" (or "taking") of property had occurred. Because there was no direct federal analog to the states' police power, or more generally to the states' power to define the scope of property entitlements, these sorts of arguments ordinarily had no place in Fifth Amendment Takings Clause jurisprudence.⁴⁵

The pre-*Penn Central* separation of the two lines of cases thus reflected a deep and abiding commitment to principles of federalism in the Court's constitutional property jurisprudence. The core notion was that because in our federal system state and federal governments play very different roles in defining the primary rules of property law, the

⁴⁴See, e.g. . See also *infra* Part

⁴⁵See, e.g., *Armstrong v. United States*, 364 U.S. 40, 44-48 (1960) (holding that federal action to take title to uncompleted ships from a bankrupt shipbuilder destroyed the value of materialman's liens recognized as property rights under Maine law, effecting a compensable taking under the Fifth Amendment). Federal laws applicable to the District of Columbia and other federal territories were an exception to this general principle, however, insofar as the federal government did have a general police power over these jurisdictions but was nonetheless bound by the Fifth Amendment Takings Clause. See, e.g., *Block v. Hirsh*, 256 U.S. 135, 156 (1921) (upholding wartime rent control in the District of Columbia as a legitimate exercise of the police power). And Congress' plenary power over public lands has been held to be "analogous to," if not altogether coextensive with, the states' police power. See *Camfield v. United States*, 167 U.S. 518, 525 ("The general government doubtless has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case"); *id.* at 525-26 ("While we do not undertake to say that congress has the unlimited power to regulate against nuisances within a state which it would have within a territory, we do not think the admission of a territory as a state deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the 'police power,' so long as such power is directed solely to its own protection").

legal analysis of seemingly similar property-based claims against federal and state governments under nominally parallel constitutional requirements would necessarily proceed along separate paths. Analytically, doctrinally, and genetically, the two lines of precedent were distinct.

Then, in a single swift blow, without precedent and without a shred of explanation or analysis, the Supreme Court in *Penn Central* conflated its longstanding Substantive Due Process just compensation jurisprudence with an even longer line of Fifth Amendment Takings Clause cases.⁴⁶ Out of the spillage congealed the current takings muddle.

Collapsing the two doctrines into one, *Penn Central* silently but effectively read the states' police power defense out of the equation, and thereby undercut the basis for a distinct Fourteenth Amendment just compensation jurisprudence. To be sure, this development was broadly consistent with, and possibly motivated by, the Court's general march toward incorporation of crucial elements of the Bill of Rights against the states.⁴⁷ But such "whole hog" incorporation in the property context was ill-considered, for it failed to account for the fundamental distinction between the federal and state roles when it came to defining the scope of property rights, a distinction the Court had labored to keep at the forefront of its property jurisprudence for nearly two centuries.

In the decades of the 1960s and 1970s prior to *Penn Central*, the Supreme Court had hinted in dicta—in a series of cases extending Fourteenth Amendment Due Process

⁴⁶The majority opinion in *Penn Central* drew indiscriminately on Fourteenth Amendment Due Process cases and Fifth Amendment Just Compensation clause cases, attempting to weave them into a coherent narrative of a unified "takings" jurisprudence. See *Penn Central*, 438 U.S. at 123-28 (citing eight Fifth Amendment Takings Clause cases against the United States and 18 Fourteenth Amendment Due Process cases against states or their subdivisions). No previous Supreme Court case had so thoroughly conflated the two lines of cases. Compare *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 593-94 (1962) (citing six Fourteenth Amendment Substantive Due Process cases for the controlling legal principle that if a restrictive town ordinance "is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional"), with *Armstrong v. United States*, 364 U.S. 40, 48 (1960) (citing seven Fifth Amendment Takings Clause cases against the United States for controlling legal principles applicable in a Fifth Amendment case against the United States). The *Armstrong* Court did cite *Mahon* in passing, however, without explaining the significance of that reference. See 364 U.S. at 48.

⁴⁷See *infra* Part VI.

protection to other elements of the Bill of Rights—that *Chicago B & Q*'s holding that just compensation was required in eminent domain cases as a matter of Fourteenth Amendment Due Process might be understood to stand for a kind of proto-incorporation of the Fifth Amendment Takings Clause against the states.⁴⁸ Individual justices or minority blocs had more boldly proclaimed it an example of full-scale incorporation in a long series of separate concurrences and dissents.⁴⁹ But before *Penn Central*, the full Court had never so held. Nor had it ever offered any analysis of the implications of such a holding. Perhaps persuaded by its own dicta in previous cases, the *Penn Central* Court simply treated the incorporation question as a *fait accompli*, erroneously citing *Chicago B & Q* as the controlling precedent.⁵⁰ In so doing, the *Penn Central* Court itself effected a backhanded holding of incorporation,⁵¹ without analysis or explanation of the implications of that holding for property federalism and the unique role of the states in defining property rights.

⁴⁸See, e.g., *Malloy v. Hogan*, 378 U.S. 1, 4 (1964) (Brennan, J) (characterizing *Chicago B & Q* as a precursor to subsequent extensions of Fourteenth Amendment Due Process to rights guaranteed by the Bill of Rights); *Duncan v. Louisiana*, 391 U.S. 145, 148 (White, J.) (stating that “many of the rights guaranteed by the first eight amendments have been held to be protected against state action by the Due Process Clause,” and citing *Chicago B & Q* for the proposition that this includes “the right to compensation for property taken by the State”).

⁴⁹See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring);

⁵⁰See *Penn Central*, 438 U.S. at 122 (citing *Chicago B & Q* for the proposition that the “takings” clause of the Fifth Amendment “of course is made applicable to the States through the Fourteenth Amendment”).

⁵¹I use the term “incorporation” throughout this Article in the strong sense in which the Supreme Court now uses that term, to mean that the language and legal principles of the Fifth Amendment Takings Clause now apply directly to the states as well as to the federal government. See *Penn Central*, 438 U.S. at 122 (stating the question to be whether New York City’s landmark regulations “effect a ‘taking’ of appellants’ property for a public use within the meaning of the Fifth Amendment, which of course is made applicable to the States through the Fourteenth Amendment”). Historically, the meaning of the term “incorporation” has varied, and at times the term may have suggested a looser, analogical relationship between the specific requirements of the first eight amendments applicable to the federal government and the elements of Fourteenth Amendment Due Process applicable to the states. It is only on that looser analogical understanding that *Chicago B & Q* could be said to have “incorporated” a just compensation principle similar to that found in the Fifth Amendment Takings Clause into the concept of Due Process in the Fourteenth Amendment. But that is a very different from saying that the Fifth Amendment Takings Clause itself now “applies to” the states, the position the Supreme Court now holds and the position the Court erroneously attributes to *Chicago B & Q*.

Henceforth, the Court's regulatory takings jurisprudence would treat the role of states as perfectly analogous to that of the federal government in just compensation cases, with all such cases to be decided under the Fifth Amendment rather than the Fourteenth.⁵² Whether the defendant is a state or the federal government, the Court's takings inquiry takes as its baseline the immediate *status quo ante* of the property claimant's expectations, apparently on the theory that the claimant has a property right to do anything not specifically prohibited under heretofore applicable law, and the only question is whether the diminution measured against that expectation "goes too far" and should be deemed a "taking."⁵³ Little or no consideration is given to the reasonableness of the claimant's expectations, given what until *Penn Central* had been the central question in Fourteenth Amendment Due Process just compensation cases: what are the legal limits, qualifications, and conditions on the claimant's property entitlement under state law, and in particular, had the state in its initial assignment of property entitlements qualified the claimant's property right by making it subject to the state's reserved power subsequently to enact a regulation of the kind in question? The police power defense was dead,⁵⁴ the role of the states in defining and redefining the scope and

⁵²See, e.g.,

⁵³Cf. FRED BOSSELMAN, DAVID CALLIES & JOHN BANTA, *THE TAKING ISSUE* 240 (1973) ("The idea that a regulation of the use of land which prevents the owner from making money can amount to a taking assumes that a landowner has a constitutional right to use and develop his land for some purpose which will result in a personal profit, regardless of the effect that such development will have on the public"). As a practical matter, this means the claimant often begins with an extraordinary benefit of the doubt, as the Court assumes as a baseline, and without reference to state law, the maximum property entitlement the claimant alleges, and then works backward to calculate whether a "taking" has occurred by measuring the severity of "diminution" from that (possibly inflated) *status quo ante* expectation. Under the *Penn Central* balancing test, which treats "distinct investment-backed expectations" as a separate element in the takings analysis, the property claimant is apparently entitled to an additional bonus in the takings equation if she invested in detrimental reliance on her own (possibly inflated) expectations. This, of course, raises the disturbing possibility of self-entrenching property entitlements, in which private parties can expand their constitutionally protected property rights by making speculative investments.

⁵⁴See, e.g., *Loretto v. Teleprompter Manhattan CATC Corp.*, 458 U.S. 419, 425 (1982) (conceding that a state regulation requiring landlords to allow cable television wires on their property is a valid police power regulation, but stating that it is "a separate question . . . whether an otherwise valid regulation so frustrates property rights that compensation must be paid"); *Lucas*, 505 U.S. at 1028-29 (stating that *Loretto* stands for the proposition that a permanent physical occupation of land is compensable "no matter how weighty the asserted 'public interests'" and "similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically viable use of land"); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) ("It is, of course, well established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as

limits of property entitlements much diminished,⁵⁵ and the federalism principle in the Court's property jurisprudence mortally wounded.⁵⁶

The phantom incorporation holding in *Penn Central* inadvertently laid the groundwork for extraordinary doctrinal confusion.⁵⁷ With state law largely deprived of

the restrictions to not amount to a taking"). While not specifically addressing the issue, the *Penn Central* decision effectively acknowledged that New York City's landmarks law served valid police power purposes, but treated that conclusion as not dispositive of the takings issue. See *Penn Central*, 438 U.S. at 129 (acknowledging that state and municipal land use regulations that "enhance the quality of life by preserving the character and desirable aesthetic features of a city" embrace an "entirely permissible governmental goal," then proceeding to analyze appellant's claims that the New York City law nonetheless effects a compensable taking). See also *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 647-50 (1981) (Brennan, J., dissenting) (citing and discussing Supreme Court cases holding that a police power regulation may effect a Fifth Amendment taking, and stating that this principle "has its source" in *Mahon* which "rejected the proposition that police power restrictions could never be recognized as a Fifth Amendment 'taking'").

⁵⁵See Michelman, *Property and Federalism*, supra note , at 327 (warning that contemporary regulatory takings jurisprudence threatens to make "the Federal Constitution, specifically the Takings Clause, dictate to the States the jurisprudential spirit in which their general laws of property and nuisance are to be read and construed, whether contained in legislative enactments or judicial decisions").

⁵⁶See *id.* at 303 (describing the "bad fit" between the "market conservative" project of contemporary regulatory takings doctrine and the "legal conservative" project of federalism in which property rights are understood to be principally determined by state law)

⁵⁷Cf. Echeverria & Dennis, supra note 1, at 695 ("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"). Echeverria and Dennis argue that the current confusion in Takings doctrine is the result of the Court's having errantly slipped elements of Substantive Due Process analysis into Takings law. See *id.* at 698 ("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"; *id.* at 699 (incorporation of "analysis of the fit between regulatory ends and regulatory means in takings cases . . . is the starkest example of importing due process thinking into the takings issue"). Unlike this Article, however, Echeverria and Dennis do not attribute this confusion to the backhanded conflation of the two doctrines that occurred in *Penn Central*. Instead, they assume that incorporation of the Fifth Amendment Takings Clause against the states occurred much earlier, in such a way that states were constrained by the both the Takings Clause and Substantive Due Process independently, with each inquiry proceeding under a distinctive mode of analysis. See *id.* at 697 (stating that *Pennsylvania Coal v. Mahon* was decided "under the Takings Clause" which employed "an alternative mode of analysis" to that used in Substantive Due Process inquiries); *id.* at 698 (stating that *Goldblatt v. Town of Hempstead* addressed both Due Process and Takings Clause questions, and resolved each "on a different set of standards"). In contrast, this Article argues that both *Mahon* and *Goldblatt* were simply pre-incorporation Substantive

its historic role as the principal determinant of the scope and limits of property entitlements, we are left without a principled way to determine the baseline of property rights to which a “takings” claimant is legitimately entitled, a logically necessary predicate for gauging whether a “taking” of the claimant’s property has occurred. The result has been a rudderless and vagrant series of *ad hoc*, intuitive, and highly discretionary “know it when we see it” judicial determinations as to whether the challenged governmental action effected a “taking,” without reflection on the legitimate extent and limits of the claimant’s property entitlement.⁵⁸ This confusion, I submit, lies the heart of the incoherence that pervades contemporary regulatory takings doctrine.

The conundrum is of the Court’s own making. Its solution does not lie in further judicial and academic parsing of the verb “to take” or the derivative noun form “taking,”⁵⁹ nor does it lie in further pondering upon the deep “essential attributes” of “property” in general.⁶⁰ With apologies to Gertrude Stein—and to the City of Oakland, which deserves better—there simply is no “there” there.⁶¹ Instead, the solution must come from a straightforward, albeit doctrinally challenging, inquiry into the nature, scope, and limits of private property rights in a democratic polity, and the nature, scope, and limits of the state’s concomitant power, on behalf of the demos, to define and periodically to readjust the legal boundaries determining the specific content of those rights. That discussion, predicated upon the understanding that the law of property as a fundamental social institution must be dynamic and malleable to be capable of adapting to changing social needs and conditions, is one in which nineteenth and early twentieth century courts and commentators were regularly and constructively engaged through

Due Process cases implicating the “just compensation” element in Substantive Due Process analysis. See *infra* notes and accompanying text (discussing *Mahon*); *infra* notes and accompanying text (discussing *Goldblatt*).

⁵⁸See *supra* note .

⁵⁹Cf. *Penn Central*, 438 U.S. at 122 (stating the question as whether New York City’s regulatory restrictions “effect a ‘taking’ of appellants’ property for a public use within the meaning of the Fifth Amendment”); *Rose*, *supra* note 1, at 563 (characterizing takings law as an effort by courts to plumb the “elusive[] . . . meaning of ‘taking’ in our law”).

⁶⁰Cf. *Dolan*; *Palazzolo*

⁶¹Cf. GERTRUDE STEIN, *EVERYBODY’S AUTOBIOGRAPHY* 289 (1937) (“What was the use of my having come from Oakland it was not natural to have come from there yes write about it if I like or anything if I like but not there, there is no there there.”)

their discourse on the police power and its limits.⁶² It is a discourse that in the post-*Penn Central* era we have largely abandoned, much to the impoverishment of our property jurisprudence.

I. POSITIVISM AND FEDERALISM

In our post-*Erie v. Tompkins*⁶³ world, the ordinary legal presumption is that property law—like the law of tort and contract—is primarily a matter of state law.⁶⁴

⁶²For example, Ernst Freund’s influential 1904 treatise stated that the police power must be understood “not as a fixed quantity, but as the expression of social, economic and political conditions. As long as those conditions vary, the police power must continue to be elastic, i.e., capable of development.” ERNST FREUND, *THE POLICE POWER* 3 (1904).

Justice Holmes expressed a similar view in *Block v. Hirsh*:

“The fact that tangible property is also visible tends to give rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the 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 in its proper sense, under which property rights may be cut down, and to that extent taken, without pay.”

Block v. Hirsh, 256 U.S. 135, 155 (1921).

⁶³*Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). *Erie* held that a tort case heard in federal court under diversity jurisdiction should be decided under state law and not general federal common law. As the *Erie* Court famously declared: “Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. There is no federal general common law.” *Id.* at 78-80. Some commentators have argued that the *Erie* rule applies only in diversity cases, but the prevailing view in the academy and the courts is that the *Erie* doctrine is founded in constitutional principles. See Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 996-99 & nn. 335 & 336 (1995) (summarizing the debate and concluding that “the prevailing view” is that *Erie* “does indeed rest on a constitutional base”).

⁶⁴See Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 993-94 & n. 224 (2000) (tracing the roots of the longstanding “understanding that property is a positive right largely (if not exclusively) defined by state law”). But cf. Freyfogle, *Regulatory Takings*, *supra* note , at (“In determining ownership rights, consideration should be given to all valid laws that affect an owner’s rights in the thing owned” and a “sound inquiry . . . is not confined to common law, nor to state law generally, but includes all laws, in all forms, from all levels of government”). Some property rights are

Indeed, even in the pre-*Erie*, *Swift v. Tyson*⁶⁵ heyday of general federal common law, federal courts routinely invoked state law rather than general federal common law to determine the extent of parties' property rights for purposes of federal constitutional adjudication.⁶⁶ As the Supreme Court explained in *Sauer v. City of New York*, a 1907 case rejecting a landowner's claim that construction of an elevated railway over the street right-of-way effected an uncompensated deprivation of his property in violation of Fourteenth Amendment Due Process: "this court has neither the right nor the duty . . . to reduce the [property] law of the various states to a uniform rule which it shall announce and impose."⁶⁷

Respect for this basic federalism principle followed from a distinction recognized in *Swift* itself: "local law" should be given effect with respect to matters of a "strictly local" nature, including "rights and titles to things having a permanent locality, such as the rights and titles to real estate," while in "matters of a more general nature" such as contract interpretation and commercial law, "general law" should apply.⁶⁸ Thus, for example, in the 1927 case *Fox River Paper Co. v. Railroad Comm'n*, the Court held that for purposes of adjudicating a claim that plaintiff was deprived of property in violation of the Fourteenth Amendment Due Process guarantee, "the nature and extent of the rights of the state and of riparian owners . . . are matters of state law to be determined by the

created by federal law. For example, certain intellectual property rights are created by Congress pursuant to federal patent and copyright laws. And certain other entitlements, such as social security disability benefits, have been recognized to rise to the level of constitutionally protected property interests. See generally Merrill, *supra*, at .

⁶⁵*Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18-19 (1842) (holding that § 34 of the Judiciary Act of 1789, providing that state laws "shall be recognized as rules of decision" in federal courts, is not applicable in the context of commercial law or other "questions of a more general nature").

⁶⁶See Merrill, *supra* note , at n. 224 and cases cited therein. See also *Eldridge v. Trezevant*, 160 U.S. 452 (1906) (holding that construction of a public levee on private waterfront land did not deprive owner of property in violation of the Fourteenth Amendment Due Process Clause because under Louisiana law, all land fronting on navigable waterways is subject to a servitude or easement for maintenance of levees, roads, or other public works).

⁶⁷*Sauer v. City of New York*, 206 U.S. 536, 548 (1907) (rejecting plaintiff's 14th Amendment Due Process claim of uncompensated "taking" because "under the law of New York, as determined by its highest court, the plaintiff never owned the easements which he claimed, and . . . therefore there was no property taken")

⁶⁸See *Swift*, 41 U.S. (16 Pet.) at 18-19.

statutes and judicial decisions of the state.”⁶⁹

For most purposes we continue to adhere to the view that state law, not federal law, is the primary source and determinant of the scope of property rights. This longstanding principle has only been reinforced by the demise of general federal common law under the *Erie* doctrine. Further bolstering this view is the widespread influence of the positivist- and Realist-inspired understanding that property law, and *a fortiori* the scope of property rights, are grounded neither in universal principles of natural right⁷⁰ nor in timeless common law precepts,⁷¹ but in judge-made state common law as modified from time to time by legislative enactments.⁷² A property owner’s rights thus ordinarily extend only as far as the property law of the state says they do, and under federalism principles and within constitutional limits, we can expect that states will have considerable discretion to determine their primary rules of property law in the first instance, and to make necessary and prudent adjustments to that body of law over

⁶⁹*Fox River Paper Co. v. Railroad Comm’n*, 274 U.S. 651, 655 (1927)

⁷⁰See Michelman, *Property and Federalism*, *supra* note , at 305 (“By an argument that reaches back at least to Bentham, property’s scope and content—property’s existence, even—are completely dependent upon standing law,” consequently “the term ‘property’ in the Fourteenth Amendment denotes nothing except what some corpus of extant positive law happens to make into property”); Eric T. Freyfogle, *Private Land Made (Too) Simple*, 33 ENVTL. L. REP. 10155 (2003) (hereinafter Freyfogle, *Private Land*) (stating that “natural rights justifications” for property law “were wisely cast aside . . . and do not withstand scrutiny today”); see also JEREMY BENTHAM, *THEORY OF LEGISLATION* 111 (C.K. Ogden ed., 1931) (“[T]here is no such thing as natural property; . . . it is entirely the work of law”); *id.* at 113 (“Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases”). For a contrary view, see Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549 (2003) (arguing for revival of a 19th Century conception of property rights derived from universal principles of natural right which find their expression in constitutional norms and general common law).

⁷¹See Joseph L. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 490 (1988) (“The realists argued that the concept of property . . . embraced competing values and principles” and courts “therefore could not deduce specific principles from the abstract concept of property”); Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295, 1295 (1998) (“The legal realists of the 1920s and ‘30s demonstrated that all law is ‘public’—that is, dependent upon the state”).

⁷²See, e.g., Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Process*, 2001 UTAH L. REV. 379, 402-04 (2001) (describing property law as the product of dynamic interplay between state court common law decisions and state legislative enactments with no sharp line of demarcation, as common law developments are legislatively codified and long-established legislative enactments are incorporated into the common law background).

time through legislative enactments and evolving judicial doctrines, just as they may from time to time adjust their laws of tort or contract.⁷³

Given that background understanding, we should expect that property rights in our federal system will be both dynamic and divergent, as the legislative and judicial organs of various states act to create new property rules and to extend, trim, or modify old ones.⁷⁴ For example, the scope and content of property rights under Louisiana law, rooted in the French and Spanish civil law traditions,⁷⁵ may differ considerably from property rights in New York, derived largely from the English common law as grafted onto an earlier Dutch colonial legal system⁷⁶ but adjusted over the years by a series of

⁷³See Walston, *supra* note , at 404 (describing how California adopted English common law wholesale by legislative enactment in 1850 and subsequently modified common law water rights through judicial decisions and legislative enactments that created the prior appropriation doctrine); Merrill, *supra* note , at ; Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1446 (1993) (“Historically, property definitions have continuously adjusted to reflect new economic and social structures, often to the disadvantage of existing owners”); *id.* at 1448-49 (citing major adjustments in property law including abolition of feudal tenures, primogeniture, and entails; termination of imprisonment for debt; modifications to dower and curtesy; abolition of riparian water rights in the arid West; abolition of husbands’ rights in their wives’ estates; and modifications to the law of trespass in company towns and shopping centers).

⁷⁴See Merrill, *supra* note , at 945 (stating that “[p]roperty is a dynamic institution that evolves over time in response to changing technologies and changing levels of supply and demand,” and citing property innovations that adapted to changing social and economic needs such as abolition of the fee tail and the rise of equitable servitudes, community property, condominiums, securitized debt, and certain intellectual property rights).

⁷⁵See, e.g., *Eldridge v. Trezevant*, 160 U.S.452 (1896) (holding that construction of a public levee on private waterfront land did not deprive the landowner of property because under Louisiana law traceable to the Code Napoleon, the public holds a servitude or easement over lands abutting navigable waterways for purposes of maintaining levees, roads, and other public works); *In re Brown*, 189 B.R. 653 (Bkrcty., M.D. La. 1995) (interpreting a unique provision of Louisiana law exempting “arms and military accoutrements” from “seizure under any writ, mandate or process whatsoever,” and tracing this exemption to the Code Napoleon and earlier French and Spanish property law).

⁷⁶See Joseph A. Ranney, *Anglicans, Merchants and Feminists: A Comparative Study of the Evolution of Married Women’s Rights in Virginia, New York, and Wisconsin*, 6 WM. & MARY J. WOMEN & L. 493, 503 (2000) (stating that early New York property law retained elements of Dutch law, including “important strains of a community property system,” but these were eventually replaced with English property law).

legislative acts and evolving judicial doctrines.⁷⁷ Property law in Virginia, although derived from the same common law tradition as New York's, might also diverge considerably from that of New York, having followed its own unique evolutionary trajectory.⁷⁸ And so on.

On this federalist understanding, we might further expect that federal constitutional property guarantees like the Due Process⁷⁹ and Takings Clauses⁸⁰ must take state property law more or less as given. As the Supreme Court famously put it in a leading Procedural Due Process case, *Board of Regents v. Roth*: "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" ⁸¹ This division of legal labor is foundational to the architecture of our

⁷⁷See, e.g., Ranney, *supra* note , at 506-12 (tracing the dramatic expansion of married women's property rights in New York and the corresponding diminution of the rights of husbands over spousal property under a series of court decisions, legislative enactments, and state constitutional provisions adopted in the 19th century).

⁷⁸See Ranney, *supra*, at 516-25 (describing divergent paths of New York and Virginia in recognition of married women's property rights).

⁷⁹U.S. Const., Amdt. XIV, § 1 (" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law").

⁸⁰U.S. Const., Amdt V (" . . .nor shall private property be taken for public use, without just compensation").

⁸¹*Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). See also *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980) ("Nor as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define 'property' in the first instance"); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 ("Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States"); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944) ("The great body of law in this country which controls the acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state"); *United States v. Powelson*, 319 U.S. 266, 279 (1943) ("Though the meaning of 'property' as used in . . . the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law."); *United States v. Craft*, 535 U.S. 274 (2002) ("The federal tax lien statute itself 'creates no property rights but merely attaches consequences, federally defined, to rights created under state law.'") (quoting *United States v. Bess*, 371 U.S. 51, 55 (1958)).

federalist system.

Oddly, however, despite property federalism's prominence in Procedural Due Process jurisprudence,⁸² it often gets short shrift the Supreme Court's contemporary regulatory takings jurisprudence.⁸³ The Court pays lip service to the notion that there is no federal constitutional definition of property, but is at best inconstant in the degree to which it actually relies upon state law to inform its inquiry as to the existence, nature, and limits of the property entitlement allegedly "taken."⁸⁴ Indeed, on at least one occasion the Court has expressly repudiated a "takings" claim that turned on the idiosyncracies of a particular state's property law, dismissing such arguments as resting on mere "legalistic distinctions."⁸⁵ More recently in *Palazzolo v. Rhode Island* the Court

⁸²See, e.g., *American Mfrs. Mutual Ins. v. Sullivan*, 526 U.S. 40, 60-61 (1999) (rejecting procedural due process claim on grounds that plaintiff had not acquired a property interest under Pennsylvania law); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) ("Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to . . . state law"); *Perry v. Sinderman*, 408 U.S. at 601 ("mutually explicit understandings" may create property interests but such understandings must support "a legitimate claim of entitlement" under state law); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) ("Respondents' federal constitutional claim depends upon their having had a property right in continued employment" under state law, and "[i]f they did, the State could not deprive them of this property without due process").

⁸³See Michelman, *Property and Federalism*, supra note , at 303 (describing the "bad fit" between the "market conservative" project of contemporary regulatory takings doctrine and the "legal conservative" project of federalism in which property rights are understood to be principally determined by state law); *id.* at 327 (warning that contemporary regulatory takings jurisprudence threatens to "federalize the law of land use in a particularly profound way," making "the Federal Constitution, specifically the Takings Clause, dictate to the States the jurisprudential spirit in which their general laws of property and nuisance are to be read and construed, whether contained in legislative enactments or judicial decisions").

⁸⁴But cf. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984) (holding that Monsanto's interest in health, safety, and environmental data is protected by the Takings Clause to the extent such information is recognized as a "trade secret property right" under Missouri law); *Armstrong v. United States*, 364 U.S. 40, 44, 46 (1960) (holding that a materialman's lien recognized as a property right under Maine law is protected against federal abrogation by the Takings Clause).

⁸⁵See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 500 (1987) (acknowledging that under Pennsylvania law the "support estate" is considered a separate interest

backhandedly straightjacketed states' ability to redefine property rights, expressly rejecting Rhode Island's argument that its ongoing authority to "shape and define property rights" through prospective regulation necessarily must inform what counts as "reasonable investment-backed expectations," and therefore that postenactment acquisition of property with notice that it was subject to regulation should bar a subsequent takings claim.⁸⁶

In principle, the state's law of property ought to matter for purposes of regulatory takings analysis in our federalist system. If what counts as "property" is ordinarily determined by reference to state law, then a court adjudicating a claim that "property" was compensably "taken" by government action should find it necessary, as an inquiry logically antecedent to the "taking" determination, to advert to state law to determine whether the claimant's property rights actually extend as far as the claimant alleges.⁸⁷

in land, but stating that "our takings jurisprudence forecloses reliance on such legalistic distinctions"); *id.* at 518-20 (Rehnquist, J., dissenting) (chiding the Court for failing to properly credit state property law as the basis for determining the extent and nature of claimants' property rights). At issue in *Keystone Bituminous* was a Pennsylvania statute requiring that 50% of the underground coal be kept in place to provide surface support to dwellings, public buildings, and cemeteries. Justice Holmes' now-famous decision in *Pennsylvania Coal v. Mahon* held a similar statute constitutionally impermissible, based in part upon Pennsylvania law's recognition of the support estate as a distinct estate in land severable from both the surface right and the subsurface mineral right. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) (stating that by requiring subjacent support, the statute "purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate").

⁸⁶*Palazzolo v. Rhode Island*, 533 U.S. 606, 626-27 (2001) (holding that a takings claim is not barred by post-enactment acquisition on notice that the acquired property was subject to the challenged regulation). However, a majority of the *Palazzolo* Court was unwilling to go so far as to hold that notice is flatly irrelevant to the takings claim, as Justice Scalia suggested in his concurrence. Compare *Palazzolo*, 533 U.S. at 637 (Scalia, J., concurring) ("In my view, the fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination whether the restriction is so substantial as to constitute a taking"), with *id.* at 633 (O'Connor, J., concurring) (rejecting Scalia's position, stating that "[t]oday's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the Penn Central analysis").

⁸⁷*Cf.* Freyfogle, *Regulatory Takings*, *supra* note , at ("A court in a takings case faces two, sequential questions. First, what are the plaintiff's property rights, under the various valid laws . . . [and second] has that property been taken?").

To be sure, the Court acknowledged some residual role for state property law in takings adjudication when it stated in *Lucas v. South Carolina Coastal Council* that property rights may be subject to “limitations” that “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.”⁸⁸ But having gotten that far, the *Lucas* Court lost its conceptual grip. What are these “inherent limitations” to be found in “background principles of the state’s law of property”? Without explicitly so holding, the *Lucas* opinion strongly intimates that judicially cognizable “inherent limitations” should be confined to longstanding common law principles of private and public nuisance.⁸⁹ But why should that be? After all, the common law no longer holds a privileged place in our legal order; in most circumstances it can be trumped by ordinary legislative enactments,⁹⁰ and of course it is fundamental to our legal order that “later laws abrogate prior laws that are contrary to them.”⁹¹ There is no obvious reason why property law

⁸⁸Lucas, 505 U.S. at 1028-29.

⁸⁹See 505 U.S. at 1029 (stating that a law denying the owner all economically viable use of land “must . . . do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise”); *id.* at n.16 (“The principal ‘otherwise’ that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of real and personal property . . . to prevent . . . fire or to forestall other grave threats to the lives and property of others”).

⁹⁰See Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L.REV. 873, 904-04 (1987) (“The common law is not prepolitical” and “[e]fforts to change the common law background are not by virtue of the fact constitutionally suspect”); Michael D. Shumsky, *Severability, Inseparability, and the Rule of Law*, 41 HARV. J. ON LEGIS. 227 (2004) (“it is beyond question that constitutional requirements trump any contrary statutory enactments and that valid statutory enactments, in turn, trump judicially crafted common law”); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2107 (2002) (stating that the “accepted hierarchy of federal law” is that “the Constitution always trumps statutes, but statutes always trump the common law”).

⁹¹See Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 288 (1990) (citing 2A C. SANDS, SUTHERLAND ON STATUTES AND STATUTORY INTERPRETATION, § 51.02 & n. 7 (N. Singer rev. 4th ed. 1984)).

should be any different in that regard.⁹²

Lucas warns that legislative enactments cannot themselves be considered “background principles of state law” at the time of their enactment.⁹³ That seems reasonable enough on its face. Perhaps new law should never be regarded as instant background. It is somewhat more difficult, however, to see why legislative enactments might not become “background principles” with the passage of time—a possibility the Court comes close to ruling out in the more recent *Palazzolo* case.⁹⁴

Moreover, despite its rhetorical nod to the primacy of background principles of state law and its ultimate remand to the state courts to determine the precise contours of that law, the *Lucas* Court at times treads perilously close to adopting a general federal common law baseline definition of property, as it pontificates at length on the general contours of public and private nuisance doctrine without tethering its discussion to South Carolina statutes, common law, or case law precedent.⁹⁵

⁹²See Freyfogle, *Regulatory Takings*, supra note , at & n. 9 (disputing the contention that common law rules are the sole relevant source of property law for purposes of regulatory takings analysis, and stating that it is the “rights crafted by the interactions” of “all laws, in all forms, from all levels of government” that determines “what the law generally, and hence the Constitution, deems property”); Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265, 281 (1996) (“For almost a century now, legislators—with judicial acquiescence—have taken over the task of refining and specifying the range of acceptable landowner practices, once defined only by judicially administered trespass and nuisance law on a case-by-case basis”).

⁹³See *Lucas*, 505 U.S. at

⁹⁴This is essentially the dispute between Justices O’Connor and Scalia in *Palazzolo*. See supra note . On Scalia’s interpretation of the majority’s holding, it would appear that each successive owner of property would inherit all regulatory takings claims that might have been made by her predecessor, in a potentially infinite chain. On that theory, it is difficult to see how a legislative enactment could ever pass into “background principle.”

⁹⁵See *Lucas*, 505 U.S. at 1030-31 (citing Restatement (2nd) of Torts for appropriate common law nuisance principles, but concluding that the “question . . . is one of state law to be dealt with on remand”). See also Michelman, *Property and Federalism*, supra note , at 309 (stating that Justice Scalia writes parts of his opinion in *Lucas* “as if there is just one American background law of property and nuisance—supportive, as it happens, of *Lucas*’ claim—that is common to the national jurisdiction and all the state jurisdictions”).

II. The Police Power as “Background Principle” and “Inherent Limitation”

Suppose a state were to claim that *its* “background principles of property law” include, and have included from time immemorial, the following principle:

All property subject to this state’s jurisdiction is held subject to, and inherently limited by, the state’s reserved power to enact subsequent regulations to protect the health, safety, morals, and general welfare of its citizens.

Thus when a new regulation falling within the scope of the reserved power is enacted (the state might argue), it is not the new regulation itself that becomes a “background principle of state law.” Instead, the relevant “background principle inhering in the title” is that all property in the state is held, and always has been held, subject to the state’s ongoing reserved right to make such regulatory readjustments over time, as the need arises.

Under that background principle, a subsequent regulatory enactment falling within the scope of the state’s reserved power could never result in a compensable “taking” or deprivation of property, for the scope of the property entitlement itself was always limited by the possibility that a regulation of this kind might be enacted. In short, no property was taken by the regulation, because the property right never extended so far as to preclude a regulation of this kind.

Such a broad and open-ended assertion of “inherent limitation” on property rights might sound odd and perhaps radical today after more than twenty-five years of post-*Penn Central* regulatory takings jurisprudence, and all the more so in light of the *Lucas* Court’s crabbed interpretation of “background principles” of property law.⁹⁶ But it would not have sounded odd to nineteenth and early twentieth century courts and

⁹⁶See James Burling, *The Latest Take on Background Principles and the States’ Law of Property After Lucas and Palazzolo*, 24 U. HAW. L.REV. 497, 499 (2002) (“the notion that a government can avoid the reach of the Takings and Just Compensation clauses by merely invoking a harm-preventing police power rationale were [sic] put to rest in *Lucas*”).

legislatures.⁹⁷ For this is precisely the claim that lay at the heart of Substantive Due Process property jurisprudence for roughly a century after adoption of the Fourteenth Amendment. Even at the height of the *Lochner* era of aggressive Substantive Due Process review of regulatory enactments,⁹⁸ property rights were understood never to be absolute or fixed for all time, but instead remained always subject to redefinition at the margins by state police power regulation. On this long-held view, *all* property rights were held subject to an inherent limitation arising from the state's police power to regulate in the interest of preventing harm and advancing the general welfare of the community.

As Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court explained in an early and hugely influential 1851 police power case, *Commonwealth v. Alger*:

“We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth . . . is . . . held subject to those general regulations, which are necessary to the common good and general welfare.”⁹⁹

The state's police power to enact regulations for the purpose of protecting the public health, safety, morals, and general welfare was thus seen (borrowing latter-day terminology) as a “limitation inhering in the title” arising from “background principles

⁹⁷See supra note 4 for a list of representative state high court cases asserting the police power as a background inherent limitation on property rights.

⁹⁸*Lochner v. New York*, 198 U.S. 45 (1905) (invalidating statutory limitation on length of work day for bakery workers as impermissible deprivation of liberty of contract under 14th Amendment Due Process clause). In the post-New Deal era, the *Lochner* case became emblematic of judicial second-guessing of legislative policy determinations, hostility to regulatory enactments, and bias in favor of private ordering under common law precepts in constitutional adjudication. See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L.REV. 873, 873-74 (1987)

⁹⁹*Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 84-85 (1851)

of the state’s law of property.”¹⁰⁰ As a corollary, it followed that the exact scope, content, and limits of a property owner’s rights could never be fully, precisely, and permanently delineated *ex ante*, because however far rights might appear to extend at any given moment, those rights always remained subject to the state’s reserved power to adjust the boundaries subsequently through legitimate police power enactments.

Adoption of the Reconstruction Amendments did not fundamentally alter this background understanding of the inherent limits and mutability of property rights. As the U.S. Supreme Court explained in 1884 in *Barbier v. Connolly*:¹⁰¹

“[N]either the [Fourteenth] amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.”¹⁰²

Only if an action fell outside the legitimate bounds of the state’s police power would it be construed as an implicit exercise of the power of eminent domain, and therefore compensable under principles of Due Process. As the Court explained as early as 1887 in *Mugler v. Kansas*:¹⁰³

“Nor can legislation of that character [i.e., police power regulation] come within the fourteenth amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the states have of prohibiting such

¹⁰⁰See *supra* note and accompanying text.

¹⁰¹ *Barbier v. Connolly*, 113 U.S. 27 (1884).

¹⁰² 113 U.S. at 31.

¹⁰³See *Mugler v. Kansas*, 123 U.S. 623 (1887) (“Nor can legislation of that character [i.e., police power regulation] come within the fourteenth amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law.”)

use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.”¹⁰⁴

Thus although a legitimate exercise of the police power could never give rise to a compensable taking,¹⁰⁵ states did not have license to run roughshod over property owners’ rights. Some state actions ostensibly taken pursuant to the police power could not be justified as legitimate exercises of that power. State actions of this character might be deemed implied exercises of the state’s power of eminent domain, and therefore compensable under established principles of due process.¹⁰⁶ The eminent domain power and the police power were thus understood to be complementary and mutually exclusive categories.

Under Substantive Due Process review, then, the first and most important question for a court when confronted with a claim that a state action had effected an unconstitutional deprivation of property was: “Is this action a legitimate exercise of the state’s police power?” An affirmative answer to that question precluded a judgment that compensation was due. A negative answer led either to the conclusion that the action would be deemed an implied exercise of the power of eminent domain, thus

¹⁰⁴123 U.S. at 669.

¹⁰⁵See *Chicago & Alton R. Co. v. Tranbarger*, 238 U.S. 67, 78 (1915) (“And it is well settled that the enforcement of uncompensated obedience to a legitimate regulation established under the police power is not a taking of property without compensation, or without due process of law, in the sense of the 14th Amendment”).

¹⁰⁶See, e.g., *Martin v. District of Columbia*, U.S. (1907) (“Under the police power, in its strict sense, a certain limit might be set to the height of buildings without compensation; but to make that limit 5 feet would require compensation and a taking by eminent domain”); *Belleville v. St. Clair Co. Turnpike Co.*, 84 N.E. 1049, 1053 (Ill 1908) (stating that a restraint on the use of property to prevent harm to others or to advance the general welfare is “a regulation and not a taking, an exercise of the police power and not of eminent domain. But the moment the Legislature passes beyond mere regulation, and attempts to deprive an individual of his property, or of some substantial interest therein, under the pretense of regulation, then the act becomes one of eminent domain” and just compensation is due).

effecting a compensable “taking” under established principles of due process; or that the action simply lay beyond any power held by the state, and must be invalid.¹⁰⁷

Federal regulations affecting property rights, however, were subject to a very different analysis. Under most circumstances, the *federal* government does not have power to determine in the first instance what is, and what is not, “property.”¹⁰⁸ That, the Supreme Court insisted repeatedly, is first and foremost a matter of *state* law.¹⁰⁹ Nor does the federal government possess general police power to regulate property in the interest of harm-prevention or the general welfare.¹¹⁰ Consequently, if federal laws

¹⁰⁷The eminent domain power was subject to the additional requirement that the compensable “taking” be for a “public use,” a qualification expressly applicable to the federal government under the Fifth Amendment Takings Clause, and independently held applicable to the states as a requirement of Fourteenth Amendment Due Process. See *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (1896) (reaffirming that the Fifth Amendment “public use” clause applies only to the federal government, but holding that “the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the state, instead of the federal, government” as a matter of Fourteenth Amendment Due Process). Regulatory actions that fell outside the police power and failed the “public use” test for eminent domain were simply declared void. See, e.g., *Missouri Pac. R. Co. v. Nebraska*, 164 U.S. 403 (1896) (*Missouri Pac. I*) (invalidating regulatory order directing railroad to make part of its right-of-way available to private parties to construct a grain elevator, stating that the “taking by a state of the private property of one person or corporation, without the owner’s consent, for the private use of another, is not due process of law”).

¹⁰⁸The federal government can create additional property rights beyond those recognized by state law—for example, intellectual property rights such as patents and copyrights, or guaranteed entitlements such as Social Security benefits. See, e.g.,

¹⁰⁹See *supra* notes and accompanying text.

¹¹⁰See, e.g., *U.S. v. Morrison*, 529 U.S. 598, 618 (2000) (striking down federal Violence Against Women Act on Commerce Clause grounds, stating that “we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and the vindication of its victims”); *U.S. v. Lopez*, 514 U.S. 549, 552, 567 (1995) (overturning federal Gun-Free School Zones Act on Commerce Clause grounds, stating that to uphold the government’s expansive commerce clause claim “would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States”); *Hamilton v. Kentucky Distillers & Warehouse Co.*, 251 U.S. 146, 156 (1919) (“That the United States lacks the police power, and that this was

truncated *state*-defined property rights, they might more readily be counted as “takings” of property, and by the terms of the Fifth Amendment Just Compensation Clause require compensation.¹¹¹ The federal-state division of labor in the realm of property law, then, was understood to imply that different standards of what counts as a compensable “taking” or “deprivation” of property applied to the federal and state governments.

Courts continued to recognize this underlying federalist dualism in property law through all of the late nineteenth and most of the twentieth centuries, in such celebrated cases as *Chicago, Burlington and Quincy v. Chicago*,¹¹² *Hadacheck v. Sebastian*,¹¹³ *Miller v.*

reserved to the states by the Tenth Amendment, is true.”); *Brown v. Maryland*, 12 Wheat. 419 (1827) (the police power “unquestionably remains, and ought to remain, with the states”); *McCulloch v. Maryland*, 4 Wheat. 316 (1816) (“Th[e] [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it ... is now universally admitted”).

¹¹¹See, e.g., *U.S. ex rel. TVA v. Powelson*, 319 U.S. 266, 279 (1943) (“Though the meaning of ‘property’ as used in . . . the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law”); but cf. *Hamilton v. Kentucky Distillers & Warehouse Co.*, 251 U.S. 146, 156-57 (1919) (“[T]he Fifth Amendment imposes . . . no greater limitation upon the national power than does the Fourteenth Amendment upon state power. If the nature and conditions of a restriction upon the use or disposition of property is such that a state could, under the police power, impose it consistently with the Fourteenth Amendment without making compensation, then the United States may for a permitted purpose impose a like restriction consistently with the Fifth Amendment without making compensation.”). *Hamilton* rejected a takings challenge to a federal law closing distilleries, enacted pursuant to Congress’s war powers. The *Hamilton* Court concluded that a federal regulatory measure that imposes a burden on a property owner no greater than that which could be imposed by the state pursuant to its police power should be deemed not to trigger the Fifth Amendment Just Compensation requirement. A plausible rationale for such a holding might be that it is only by examining the fullest extent of the state’s police power that we can determine how far the plaintiff’s (state-defined) property rights really extend.

¹¹²*Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897) (holding that city’s acquisition of an easement for a public street required just compensation as a matter of Due Process, but consequential costs arising from safety measures required under police power are not compensable).

¹¹³*Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (upholding Los Angeles ordinance prohibiting brickmaking in designated zone as valid police power regulation and therefore not a Due Process violation, even though it extinguished most of the value of an existing brickyard).

Schoene,¹¹⁴ *Pennsylvania Coal v. Mahon*,¹¹⁵ and *Goldblatt v. Town of Hempstead*.¹¹⁶ Indeed, it remained a foundational element in constitutional just compensation jurisprudence right up until the Supreme Court’s crucial 1978 decision in *Penn Central R. Co. v. New York*,¹¹⁷ which, as Part III will show, retroactively rewrote eighty years of jurisprudential

¹¹⁴*Miller v. Schoene*, 276 U.S. 272 (1928) (upholding Virginia Cedar Rust Act, providing for destruction of infected trees to prevent spread of disease, as a valid police power regulation and therefore not a Due Process violation).

¹¹⁵*Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922) (invalidating Kohler Act, which required mine operators to leave in place pillars of coal providing subjacent support to surface property in cases where surface and subsurface rights had been severed, on grounds that it served “limited” public interest and could not be sustained as valid police power regulation).

¹¹⁶*Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (upholding as a valid police power regulation and therefore not a Due Process violation a local ordinance banning mining of sand and gravel below the water table, effectively shutting down Goldblatt’s gravel mining business). The *Goldblatt* case did introduce an important ambiguity, however. Citing *Pennsylvania Coal v. Mahon*, the *Goldblatt* Court stated that “governmental action in the form of regulation [might] be so onerous as to constitute a taking which constitutionally requires compensation.” 369 U.S. at 594. Since the record had not demonstrated any loss of value in the parcel as the result of termination of mining, however, the Court proceeded to consider whether the ordinance “is otherwise a valid police power regulation.” 369 U.S. at 594 (emphasis added). Read in light of contemporary regulatory takings doctrine as developed in *Penn Central* and subsequent cases, this may sound like a bifurcation of the Substantive Due Process (police power) and Takings inquiries, and it has been so read by some subsequent commentators. See, e.g., Echeverria & Dennis, *supra* note 1, at (interpreting *Goldblatt* to address both Fourteenth Amendment Due Process and Fifth Amendment Takings questions). Understood in light of *Mahon* and other Substantive Due Process cases that preceded it, however, the “taking” and “otherwise within the police power” questions appear to be dual aspects of a single inquiry: whether the ordinance fell outside the bounds of the police power and therefore violated Due Process, either because it “went too far” in imposing burdens on a property claimant while producing insufficient public benefit per *Mahon*, see *infra* notes and accompanying text, or “otherwise,” for example, because the measure was demonstrably unreasonable, cf. *Goldblatt*, 369 U.S. at 595. Note also that the *Goldblatt* case came to the U.S. Supreme Court on direct appeal from the New York Court of Appeals which had based its decision exclusively on state and federal Due Process grounds. See *Town of Hempstead v. Goldblatt*, 211 N.Y.S.2d 185, 186 (N.Y. 1961).

¹¹⁷*Penn Cent. R. Co. v. New York*, 438 U.S. 104 (1978) (upholding New York City’s landmark designation of Grand Central Terminal and establishing a balancing test for constitutional Takings claims, weighing the gravity of the state’s interest against harm to regulated party and factoring in “distinct investment-backed expectations”).

history and made a hash of established doctrines, with consequences that courts and commentators are still trying to untangle. Since *Penn Central*, courts and commentators alike have largely lost sight of the federalism dimension of constitutional just compensation law, fully conflating the Fourteenth Amendment Due Process standard which had until then applied to the states with the Fifth Amendment Takings Clause standard applicable to the federal government.

III. Phantom Incorporation: *Penn Central* Misreads *Chicago, Burlington & Quincy*

The Supreme Court has never adequately addressed the federalism implications of incorporating the Fifth Amendment Takings Clause against the states. Although it is now widely assumed that incorporation occurred in 1897 in the case of *Chicago Burlington & Quincy v. City of Chicago* [*Chicago B & Q*],¹¹⁸ this Part will argue that *Chicago B & Q* did not effect the incorporation now attributed to it. It was not until 1978 in *Penn Central Transp. Co v. City of New York*,¹¹⁹ the seminal case of the contemporary regulatory takings era, that the Supreme Court first explicitly held the Fifth Amendment Takings Clause applicable to the states.

The *Penn Central* Court backed into incorporation, resting its holding on an anachronistic misreading of *Chicago B & Q* which, properly understood, had nothing to say about the Fifth Amendment. As a consequence, the *Penn Central* Court decided the incorporation issue without analysis, without briefing, without the benefit of lower court adjudications on the incorporation issue, and without ever explicitly considering the consequences of incorporation for principles of federalism in the Court's just compensation jurisprudence. After *Penn Central*, incorporation has simply been assumed. As a result, we have never had an airing of the critical federalism principles at

¹¹⁸See, e.g., *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 232 n.6 (2003) (citing *Chicago B & Q* for the proposition that “the Just Compensation clause” of the Fifth Amendment “applies to the States as well as the Federal Government”); *Dolan v. City of Tigard*, 512 U.S. 374, 383 (1994) (citing *Chicago B & Q* for the proposition that “[t]he Takings Clause of the Fifth Amendment . . . [was] made applicable to the States through the Fourteenth Amendment”).

¹¹⁹*Penn Cent. R. Co. v. New York*, 438 U.S. 104 (1978).

stake in the incorporation of the Fifth Amendment Takings clause against the states.

Prior to the Reconstruction Amendments, of course, the Fifth Amendment Takings Clause—like the rest of the Bill of Rights—was understood to apply only to the federal government, and not to the states.¹²⁰ Indeed, for what it is worth, it appears that the Takings Clause was originally intended as a federalism amendment, a safeguard against overreaching by a distant central authority that might be tempted to seize land and slaves from wealthy Southern planters,¹²¹ or to conscript supplies for military use without compensation in the high-handed manner of its imperial predecessor, the English crown.¹²² This conclusion rests in part on the legislative history of the Bill of Rights, which emerged out of the ratification debates as an effort by Madison and other leading advocates of the new constitution to mollify anti-federalist concerns about the dangers of vesting too much authority in a centralized power, a danger still fresh in the

¹²⁰See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250-51 (1833) (holding that the Fifth Amendment Takings Clause applies only to the federal government, not to the states).

¹²¹See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L.REV. 782, 837-39 (arguing that Madison favored a Takings Clause in the Bill of Rights to protect property owners against seizures of land and chattels including slaves); *id.* at 850-53 (arguing that Madison believed land and slaves were the forms of property most vulnerable to majoritarian impulses at the federal level).

¹²²See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 79-80 (1998) (arguing that the Fifth Amendment Takings Clause is best understood as a federalism amendment aimed at safeguarding states and their property-holding citizens against federal “impressment” of property for military use, a despised practice widely employed by British colonial and military authorities); Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 292-93 (1988) (arguing on Madisonian grounds that the Takings Clause was aimed at restraining the propensity of a remote central government to aggrandize itself by confiscating property); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1122-23 (1993) (tracing the history of the Takings Clause to concerns about “appropriation of private property to supply the army during the Revolutionary War”). See also *Barron v. Baltimore*, 32 U.S. (7 Pet.) at 249-50 (opining that if at the time of ratification the people had “required additional safe-guards to liberty from the apprehended encroachments of their particular [state] governments . . . the remedy was in their own hands,” but instead they directed the Bill of Rights “against the apprehended encroachments of the general government—not against those of the local governments”).

lived experience of the erstwhile revolutionists.¹²³ Most tellingly, in one of the few interpretive texts roughly contemporaneous with the Takings Clause's enactment, St. George Tucker wrote in 1803 that the clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment."¹²⁴

Unlike the First Amendment,¹²⁵ however, the Fifth Amendment is not expressly limited by its terms to the federal government.¹²⁶ This initially left some room for interpretive doubt as to whether the Takings Clause applied only to the federal government or also to the states. That issue was squarely decided in the 1833 case *Barron v. Baltimore*, in which plaintiffs attempted to bring a Fifth Amendment Takings Clause

¹²³See Akhil Reed Amar, *Hugo Black and the Hall of Fame*, 53 ALA. L. REV. 1221, 1223-24 (2002) (describing origins of the Takings Clause and the Bill of Rights generally as a response to "anxieties of anti-federalists" in "the shadow of a Revolutionary War waged by local governments against an imperial center").

¹²⁴See AMAR, *supra*, at 79. Such abuses were not solely the province of the British Crown. Pursuant to a resolution by the Continental Congress, the Pennsylvania Board of War in 1777 seized provisions from Pennsylvania citizens, including one Sparhawk, to prevent them from falling into enemy hands. The British managed to capture the goods anyway, and after the war Sparhawk unsuccessfully sued the Commonwealth of Pennsylvania for compensation. The Pennsylvania Supreme Court held that it lacked jurisdiction because Pennsylvania had not waived sovereign immunity. The Court went on to say, however, that even if it had jurisdiction Sparhawk would lose on the merits because the loss was merely a "natural and necessary incident" to "the powers of war" and therefore not compensable as it would be in peacetime. See *Respublica v. Sparhawk*, 1 Dall. 357 (Pa. 1788).

¹²⁵"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const., Amdt. I.

¹²⁶The full text reads: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const., Amdt. V. On its face, then, the Fifth Amendment is silent as to whether it protect persons against federal authority, state authority, or both.

claim against the mayor and city council of Baltimore.¹²⁷ The Supreme Court dismissed the case for lack of subject-matter jurisdiction, reasoning that because the Takings Clause, and for that matter the entire Bill of Rights, were appended to the Constitution in direct response to fears of abuse by the central government, the Fifth Amendment's silence on the question of its scope should not be interpreted as an implicit extension of its coverage to the states.¹²⁸

Barron later came to stand for the proposition that the entire Bill of Rights applied only to the federal government¹²⁹—a view supported by the reasoning and broad language of the *Barron* opinion.¹³⁰ Its core holding, however, and the only conclusion of law strictly necessary to its outcome, was that the Fifth Amendment Takings Clause did not apply to states or their political subdivisions.¹³¹

Later cases affirmed this view, which prevailed long after ratification of the Fourteenth Amendment. The 1871 case *Pumpelly v. Green Bay Co.*,¹³² for example, is now

¹²⁷*Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (dismissing Fifth Amendment Takings Clause claim against municipal officials for lack of subject-matter jurisdiction).

¹²⁸*Barron*, 32 U.S. (7 Pet.) at 250-51 (holding that “the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use, without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states”).

¹²⁹See, e.g., *Ex Parte Spies*, 123 U.S. 131, 166 (1887) (citing *Barron* to support the proposition that “the first 10 articles of amendment were not intended to limit the powers of the state governments in respect to their own people, but to operate on the national government alone”).

¹³⁰See *Barron*, 32 U.S. (7 Pet.) at 250 (“These amendments [the Bill of Rights] demanded security against the apprehended encroachments of the general government—not against those of the local governments” and “[h]ad the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention”).

¹³¹*Barron*, 32 U.S. (7 Pet.) at 250-51.

¹³²*Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871) (holding that a state law authorizing construction of a mill dam that caused flooding on plaintiff's land, effected a compensable taking under the Wisconsin constitution).. The Fourteenth Amendment was ratified in 1868, three years

widely cited in the literature as a major “takings” case. But the *Pumpelly* Court, relying on *Barron*, expressly rejected plaintiff’s claim that the Fifth Amendment Takings Clause applied to the states.¹³³ Instead, the Court resolved the dispute by applying a similar “takings” provision in the Wisconsin state constitution, while explicitly acknowledging the necessity to defer to prior Wisconsin Supreme Court interpretations of that state constitutional guarantee which might not be identical to the federal constitutional doctrine.¹³⁴

Again in the 1888 case *Nashville C. & St. L. Ry. Co. v. Alabama*, the Court cited *Barron* for the proposition that the Fifth Amendment “only applies a limit to federal authority, not restricting the powers of the state.”¹³⁵ In 1904, in *Winous Point Shooting Club v. Caspersen*, the Court dismissed a Fifth Amendment Takings Clause claim against the state of Ohio for lack of federal question jurisdiction, once again stating that the Fifth Amendment “is a restriction on Federal power, and not on the power of the states”¹³⁶ In the 1918 case *Palmer v. Ohio*, the Court summarily dismissed another Fifth Amendment Takings Clause claim against the state of Ohio for lack of subject-matter jurisdiction, labeling such a claim “palpably groundless” under the *Barron* precedent.¹³⁷

before *Pumpelly*.

¹³³80 U.S. at 176-77 (“though the Constitution of the United States provides that private property shall not be taken for public use without just compensation, it is well settled that this is a limitation on the power of the Federal government, and not on the States”).

¹³⁴80 U.S. at 179-80 (“As it is the constitution of that State that we are called on to construe, these decisions of her Supreme Court, that overflowing land by means of a dam across a stream is taking private property, within the meaning of that instrument, are of special weight if not conclusive on us”).

¹³⁵*Nashville C. & St. L. Ry. Co. v. Alabama*, 128 U.S. 96, 101 (1888) (construing railroad’s claim that an Alabama statute requiring it to test its employees for color-blindness effected an unconstitutional deprivation of its property to rest on the Fourteenth Amendment rather than the Fifth, because “the latter only applies a limit to federal authority, not restricting the power of the state”).

¹³⁶*Winous Point Shooting Club v. Caspersen*, 193 U.S. 189, 191 (1904).

¹³⁷*Palmer v. Ohio*, 248 U.S. 32, 34 (1918).

Indeed, the Supreme Court continued to cite *Barron* as good law all the way up until the 1950s, usually for the broader proposition that the entire Bill of Rights applied only to the federal government.¹³⁸ As part of the original Bill of Rights—indeed, the only part of the Bill of Rights strictly and necessarily implicated in the *Barron* holding—the Fifth Amendment Takings Clause would of course have been included in that broader proposition. The specific question of the Takings Clause’s applicability to states did not re-emerge in the Supreme Court for a long time after the *Palmer v. Ohio* decision in 1918, but very likely this simply reflected widespread acceptance of the unambiguous holding in *Barron* and its progeny. The issue did periodically arise in the state courts, however, which until the 1970s continued to adhere to the view that Fifth Amendment applied only to the federal government.¹³⁹

¹³⁸See, e.g., *Brown v. New Jersey*, 175 U.S. 172 (1899) (citing *Barron* for the proposition that “[t]he first ten Amendments to the Federal Constitution contain no restrictions on the powers of the states, but were intended to operate solely on the Federal government”); *Twining v. New Jersey*, 211 U.S. 78, 93 (1908) (same); *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916) (citing *Barron* for the proposition that “the first ten amendments . . . are not concerned with state action, and concern only federal action”); *Gasquest v. Lapeyre*, 242 U.S. 367, 369 (1917) (citing *Barron* for the proposition that the Fifth Amendment “is not restrictive of state, but only of national, action”); *U.S. v. Lanza*, 269 U.S. 377, 382 (1922) (citing *Barron* for the proposition that “the fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the federal government”); *Feldman v. United States*, 322 U.S. 487 (1944) (“for more than one hundred years, ever since *Barron v. Baltimore* . . . one of the settled principles of our Constitution has been that these [Bill of Rights] Amendments protect only against invasion of civil liberties by the [federal] Government whose conduct they alone limit”) (citation omitted); *Irvine v. California*, 347 U.S. 128, 141 (1952) (citing *Barron* for the proposition that “the Fifth Amendment may not itself prohibit states from using their power to force self-incriminatory statements”); *Knapp v. Schweitzer*, 357 U.S. 371, 376 & fn.2 (1958) (citing *Barron* to support the proposition that the provisions of Bill of Rights “are not restrictions upon the vast domain of the criminal law that belongs exclusively to the states,” and quoting at length from the *Barron* opinion).

¹³⁹ See, e.g., *Citizens Utility Co. v. Metropolitan Sanitary Dist.*, 322 N.E.2d 857, 860 fn. 4 (Ill. App. 1974) (5th Amendment Takings Clause “is a limitation only on the powers of the federal government”); *Farmington River Co. v. Town Plan & Zoning Comm’n* 197 A.2d 653, 658 (Conn. Super. 1963) (Fifth Amendment Takings Clause “does not restrain a state in the exercise of its authority”); *Williams v. State Highway Comm’n*, 113 S.E.2d 263, 265 (N.C. 1960) (“is a limitation upon the federal government, and not upon the states”); *Elkins-Swyers Office Equip. Co. v. Moniteau County*, 209 S.W.2d 127, 130 (Mo. 1948) (“applies only to the Federal government and not to the states”); *Demeter Land Co. v. Florida Public Service Co.*, 128 So. 402, 405-06 (Fla. 1930) (“was not intended to limit the powers of states, but to operate on the national government alone”); *Nectow v. City of Cambridge*, 157 N.E. 618, 620 (Mass. 1927)

There were dissenters to this view, of course. Justice John Marshall Harlan argued forcefully in his dissent in *Maxwell v. Dow* (1900) that the entire Bill of Rights had been incorporated against the states through the Fourteenth Amendment, either by way of its Privileges and Immunities Clause¹⁴⁰ or through the Due Process Clause.¹⁴¹ Harlan was unable to persuade a majority of the Court of that view, however, and the issue entered a long period of dormancy. In the 1940s, Justice Hugo Black took up the cry, arguing that the Fourteenth Amendment Due Process clause had effectively repealed *Barron* and

(“does not govern the actions of the several states, but only of the federal government” and “has no bearing on the case at bar”); *Smith v. Cameron*, 210 P. 716, 718 (Or. 1922) (“is a restriction upon Congress, and not upon state Legislatures,” and interpretation of parallel state constitutional provision is purely “a local affair”); *Banner Milling Co. v. State*, 191 N.Y.S. 143, 150 (N.Y. Ct. Cl. 1921) (“has no application” to a takings claim against the state “because it is elementary that the first ten amendments to that instrument are applicable only to the federal government, are restrictions upon its action, and are not limitations upon the powers of the states”); *Los Angeles v. Allen*, 163 P. 697, 700 (Cal. 1917) (“need not be considered, since that amendment is one of those which are restrictive of the power of the federal government, and not restraints upon the states”); *Wright v. House*, 121 N.E. 433, 435 (Ind. 1919) (“applies only to the federal government” and “does not apply to the government of the several states, and . . . a state statute cannot be held invalid because it may conflict with the provisions of this amendment”); *Riley v. Charleston Union Station Co.*, 51 S.E. 485, 487 (S.C. 1905) (“has no application to the case at bar, the provisions of that amendment having been and being intended as limitations upon the powers of Congress, and as restraints upon the government of the United States, and not upon a state government”).

¹⁴⁰See *Maxwell v. Dow*, 176 U.S. 581, 606 (Harlan, J., dissenting) (arguing that for purposes of the Fourteenth Amendment guarantee, “privileges and immunities embrace at least those expressly recognized by the Constitution of the United States and placed beyond the power of Congress to take away or impair”).

¹⁴¹*Maxwell*, 176 U.S. at 614 (“When, therefore, the Fourteenth Amendment forbade the deprivation by any state of life, liberty, or property without due process of law, the intention was to prevent any state from infringing the guaranties for the protection of life and liberty that had already been guarded against infringement by the national government”). Notably, Harlan cited *Chicago B & Q* to refute *Hurtado*-type arguments that express inclusion of specified rights elsewhere in the Bill of Rights precluded their being considered part of Fourteenth Amendment Due Process. See *id.* Harlan, in dissent, was thus the first explicitly to equate the just compensation requirement found in Fourteenth Amendment Due Process with that of the Fifth Amendment Takings Clause, though of course his overall position was that selective incorporation through *Chicago B & Q* would have been unnecessary because the Fourteenth Amendment had effected a blanket incorporation of the entire Bill of Rights.

incorporated the entire Bill of Rights against the states.¹⁴² Black was no more successful than Harlan in persuading the Court of that view, however, and gradually the Court's pro-incorporation wing began to turn its attention toward articulating and advancing the doctrine of selective incorporation, in which particular individual rights said to be "essential to the concept of well-ordered liberty" were brought into the scope of Fourteenth Amendment Due Process protection piecemeal.¹⁴³

Today courts and commentators alike take it as commonplace that the Fifth Amendment Takings Clause applies to the states because it was selectively "incorporated" through the operation of the Fourteenth Amendment Due Process Clause. The seminal regulatory takings case of the contemporary era, *Penn Central v. New York*,¹⁴⁴ treated this point as so obviously settled that it did not merit discussion or analysis, dispatching the incorporation question in a single offhanded assertion that the question before it was "whether the restrictions imposed by New York City's law . . . effect a 'taking' of appellants' property for a public use within the meaning of the Fifth Amendment, which of course is made applicable to the States through the Fourteenth Amendment"¹⁴⁵

Yet if *Barron's* holding that the Fifth Amendment Takings Clause applied only to the federal government had remained good law until the 1950s in the Supreme Court, and into the 1970s in the eyes of state high courts, when exactly had this alleged incorporation occurred?

As the sole authority in support of its affirmative assertion of Takings Clause incorporation, the *Penn Central* Court relied on a relatively obscure 1897 case, *Chicago*,

¹⁴² See, e.g., *Adamson v. California*, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting) (arguing that "one of the chief objects" of the Fourteenth Amendment was to overturn *Barron v. Baltimore* and "make the Bill of Rights applicable to the states").

¹⁴³ See, e.g., *Near v. Minnesota*, 283 U.S. 697 (1931) (First Amendment guarantees of free speech and free press are part of "liberty" protected against state encroachment by Fourteenth Amendment Due Process clause); *Jones v. City of Opelika*, 319 U.S. 105, 120 (1943) (Fourteenth Amendment Due Process clause "now is held to have drawn the contents of the First Amendment into the category of individual rights protected from state deprivation").

¹⁴⁴ *Penn Cent. R. Co. v. New York*, 438 U.S. 104 (1978).

¹⁴⁵ 438 U.S. at 122 (emphasis added).

Burlington & Quincy Railroad v. City of Chicago [*Chicago B & Q*].¹⁴⁶ Both the conclusion and the citation have subsequently gained widespread currency, and are now routinely recited in cases,¹⁴⁷ casebooks,¹⁴⁸ treatises,¹⁴⁹ and law review articles.¹⁵⁰

But with that citation, the *Penn Central* Court was rewriting history, and in the process causing much mischief. In fact it was *Penn Central* in 1978, not *Chicago B & Q* in 1897, that incorporated the Fifth Amendment Takings Clause against the states. A careful reading of *Chicago B & Q* in its proper historical context reveals that it did *not* apply the Fifth Amendment Takings Clause to the states. Indeed, the *Chicago B & Q* opinion nowhere mentions the Fifth Amendment Takings Clause.¹⁵¹ Instead, *Chicago B & Q* was argued and decided purely on Fourteenth Amendment Substantive Due Process grounds,¹⁵² a relatively common occurrence in the late nineteenth and early twentieth century heyday of Substantive Due Process jurisprudence—the so-called *Lochner* era.¹⁵³

The precise question at issue in *Chicago B & Q* was the constitutionality, on

¹⁴⁶*Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897)

¹⁴⁷See, e.g.,

¹⁴⁸See, e.g.,

¹⁴⁹See, e.g.,

¹⁵⁰See, e.g.,

¹⁵¹See *Dolan v. City of Tigard*, 512 U.S. at 405 (Stevens, J., dissenting) (stating that the *Chicago B & Q* opinion “contains no mention of either the Takings Clause or the Fifth Amendment”).

¹⁵²See *Chicago B & Q*, 166 U.S. at 235 (stating the question before the Court to be “whether the due process of law enjoined by the fourteenth amendment requires compensation to be made or adequately secured to the owner of property taken for public use under authority of a state”).

¹⁵³See *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating state regulation of bakers’ working hours as unwarranted state interference with liberty of contract protected by Fourteenth amendment Due Process guarantee). See also Sunstein, *Lochner’s Legacy*, *supra* note , at 873 (describing *Lochner* as “the most important of all defining cases” over a half century of constitutional jurisprudence).

Fourteenth Amendment Due Process grounds, of a jury award of nominal compensation of one dollar for a public easement the City of Chicago had acquired by eminent domain for purposes of constructing and maintaining a public street across the railroad's right-of-way.¹⁵⁴ The eminent domain proceeding that led to this disquieting result had duly observed the procedural requirements set forth in the state enabling statute. A judgment was entered to enforce the jury verdict, and the Illinois Supreme Court affirmed.¹⁵⁵

Entertaining the railroad's Due Process challenge, the Supreme Court held that "[i]n determining what is due process of law, regard must be had to substance, not to form."¹⁵⁶ In an eminent domain case, the Court concluded, "[d]ue process of law as applied to judicial proceedings instituted for the taking of private property for public use means such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public."¹⁵⁷ The Court went on to affirm the Illinois Supreme Court's judgment, however, holding that because all the city had obtained was the right to construct a street across the railroad's land, the trial court had not erred in instructing the jury that the measure of compensation should be the difference between the value of the right-of-way not so encumbered, and the value of the same right-of-way subject to a street crossing.¹⁵⁸

The *Chicago B & Q* opinion cited no controlling precedent for its holding that Due Process required payment of just compensation in eminent domain cases,¹⁵⁹ but neither was the Court breaking significant new conceptual ground. Instead, it was merely applying a principle it had enunciated repeatedly in dicta over the course of more than two decades of prior Fourteenth Amendment Substantive Due Process jurisprudence

¹⁵⁴166 U.S. at 230.

¹⁵⁵See *Chicago, Burlington & Quincy R. Co. V. City of Chicago*, 37 N.E. 78 (Ill. 1894).

¹⁵⁶166 U.S. at 234.

¹⁵⁷166 U.S. at 236.

¹⁵⁸166 U.S. at 255-56. The *Chicago B & Q* Court confined itself to examining whether the jury instructions were erroneous as a matter of law and did not expressly affirm the jury's award of one dollar in compensation, stating that it was beyond its power to re-examine jury determinations of fact. See *id.* at 245-46. By holding that the jury award was not based on faulty instructions, however, the Court backhandedly endorsed the result reached below.

¹⁵⁹See 166 U.S. at 237-38 (citing state cases holding that due process requires just compensation, and dicta in previous Supreme Court cases citing that doctrine with approval).

without ever having had occasion to squarely decide the issue.¹⁶⁰ As the Court had explained as far back as 1876 in one of its first great Fourteenth Amendment Due Process cases, *Munn v. Illinois*:

“The power of the State over the property of the citizen under the [Fourteenth Amendment Due Process] constitutional guaranty is well defined. The *State may take his property for public uses, upon just compensation being made therefor*. It may take a portion of his property by way of taxation for the support of the government. It may control the use and possession of his property, so far as may be necessary for the protection of the rights of others, and to secure to them the equal use and enjoyment of their property.”¹⁶¹

The “just compensation” language in *Munn* was only dicta, however, and consequently had limited precedential value. In the 1877 case *Davidson v. City of New Orleans*, Justice Bradley’s concurrence forcefully expressed the view that “[i]f a State, by its laws, should authorize private property to be taken for public use without compensation . . . I think it would be depriving a man of his property, without due process of law.”¹⁶² As a concurrence, of course, this statement, too, carried little precedential weight. Similarly, the 1886 majority opinion in *Stone v. Farmer’s Loan & Trust Co.* stating that the state’s power to regulate railroad rates under the police power “is not a power to destroy” and does not extend to “that which in law amounts to a taking of private property for public use without just compensation, or without due process of law,”¹⁶³ could not be considered a constitutional holding of binding precedential effect.

The next year in the hugely influential case *Mugler v. Kansas*, the Court again opined that when states exercised their power of eminent domain, it necessitated payment of just compensation, although the Court did not expressly ground this requirement in the Due Process guarantee.¹⁶⁴ Three years later, in *Searl v. School Dist. No. 2 of Lake County*, the Court yet again

¹⁶⁰In the previous term, a case brought by the Chicago and Northwestern Railroad against the City of Chicago on facts almost identical to those of *Chicago B & Q* came before the Court, but was dismissed on grounds that the railroad had failed to preserve the constitutional issue in its state court pleadings. See *Chicago & N.W. Ry. Co. v. Chicago*, 164 U.S. 454 (1896).

¹⁶¹*Munn v. Illinois*, 94 U.S. 116, 145-46 (1876) (emphasis added).

¹⁶²*Davidson v. City of New Orleans*, 96 U.S. 97, 107 (1877) (Bradley, J., concurring).

¹⁶³*Stone v. Farmer’s Loan & Trust Co.*, 116 U.S. 307, 331 (1876)

¹⁶⁴*Mugler v. Kansas*, 123 U.S. 623, 668 (1887) (under the states’ power of eminent domain, “property may not be taken for public use without just compensation”)

stated that as a matter of universal law, the eminent domain power “cannot be exercised except upon condition that just compensation shall be made to the owner,”¹⁶⁵ but once again did not expressly hold that Fourteenth Amendment Due Process so required. The Court reiterated this principle once more in 1895 in *Sweet v. Rechel*, indicating that a state may enact police power regulations without paying compensation, but when “the legislature provides for the actual taking and appropriation of private property for public uses, authority to enact such a regulation rests upon its right of eminent domain” and “it is a condition precedent to the exercise of such power that the statute make provision for reasonable compensation to the owner.”¹⁶⁶ Once again, however, there was no express Fourteenth Amendment holding on the just compensation question.

Despite their limited value as precedent, these cases make it abundantly clear that long before *Chicago B & Q* was decided—indeed, throughout the entire course of its Fourteenth Amendment jurisprudence—the Supreme Court had understood the core requirements of Due Process to include the principle that any exercise of the eminent domain power required payment of just compensation. The significance of the *Chicago B & Q* holding was that it securely anchored this well-established conception of the Due Process guarantee in binding legal precedent. That was its only significance.

The *Chicago B & Q* case also required the Court to decide a second issue, however. That issue implicated another, equally important strand in the Court’s Fourteenth Amendment Due Process jurisprudence. The railroad argued that in addition to receiving full compensation for the value of the right-of-way taken by eminent domain, it should also be compensated for the cost of constructing gates, an operating tower, planking and fill, as well as the additional operating costs associated with a grade crossing necessitated by the city’s construction of the street across its rail line. The Court roundly rejected this claim. *Munn*¹⁶⁷, *Mugler*¹⁶⁸ and other seminal Fourteenth Amendment Due Process cases had clearly established that while just compensation would be required in any exercise of the eminent domain power, compensation would never be required for losses sustained in consequence of a valid exercise of the state’s police power.¹⁶⁹ Applying that

¹⁶⁵ *Searl v. School Dist. No .2 of Lake County*, 133 U.S. 553, 562 (1890)

¹⁶⁶ *Sweet v. Rechel* 159 U.S. 380, 398-99 (1895)

¹⁶⁷ 94 U.S. at 145-46.

¹⁶⁸ 123 U.S. at 668.

¹⁶⁹ 166 U.S. at 251-52. As the court put it, “it is not a condition of the exercise of that [police power] authority that the state shall indemnify the owners of property for the damage or injury resulting from its exercise. . . . The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the state by reasonable regulations to protect the

distinction to the case at hand, the *Chicago B & Q* Court flatly rejected the railroad's claim for compensation to recoup the costs of safety measures.¹⁷⁰ These costs, the court said, were incident to a valid exercise of the police power, being necessary for the safe operation of the railroad. As the *Chicago B & Q* Court explained, "all property, whether owned by private persons or by corporations, is held subject to the authority of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people," and any property

damaged or diminished in value in consequence of such police power regulations "is not, within the meaning of the constitution, taken for public use, nor is the owner deprived of it without due process of law."¹⁷¹

The *Chicago B & Q* decision thus perfectly mirrored the well-established nineteenth century understanding that the state's powers were sharply bifurcated. When the state exercised its eminent domain power, just compensation was owed. When it enacted a valid police power regulation, however, there was by definition no deprivation of property because the owner's property rights had always been held subject to the inherent police power limitation; consequently, because no property was taken, no compensation was owed.¹⁷² Indeed, prior to *Penn Central*, *Chicago B & Q* was cited almost as frequently for the proposition that no compensation was owed in police power cases, as for the proposition that Due Process required payment of compensation in cases of eminent domain.¹⁷³

lives and secure the safety of the people." Id.

¹⁷⁰166 U.S. at 251-52.

¹⁷¹166 U.S. at 251-52.

¹⁷²See *Sweet v. Rechel*, 159 U.S. 380, 398-99 (1895) (stating that the state may enact police power regulations without paying compensation, but when "the legislature provides for the actual taking and appropriation of private property for public uses, authority to enact such a regulation rests upon its right of eminent domain" and "it is a condition precedent to the exercise of such power that the statute make provision for reasonable compensation to the owner").

¹⁷³See, e.g., *West Chicago St. Ry. Co. v. People*, 201 U.S. 506, 526 (1906) (citing *Chicago B & Q* in support of holding that costs to the railroad of removing structures that obstruct navigation "cannot be deemed a taking of private property for public use" but are "only the result of the lawful exercise of a governmental power for the common good"); *Florida East Coast Ry. Co. v. Martin County*, 171 So.2d 873, 877 (Fla. 1965) (citing *Chicago B & Q* in support of holding that costs incurred by railroad in constructing safety measures at a grade

To reach the holding that exercises of the eminent domain power must be accompanied by just compensation, the *Chicago B & Q* Court did not find it necessary to hold that the Fifth Amendment Takings Clause had been made applicable to the states. Nor did the Court rely on any prior Fifth Amendment Takings Clause case for precedent in support of its holding, presumably because the inapplicability of that clause to states was a well-established and foundational element in the Court's constitutional jurisprudence. Instead, the *Chicago B & Q* Court found that the just compensation requirement in eminent domain was implicit in, and an "essential element of," the Fourteenth Amendment Due Process guarantee itself.¹⁷⁴ In support, the Court cited its own dicta in prior Due Process cases, several lower court Due Process holdings, and Thomas Cooley's influential treatises as general "authority" for the proposition that "natural equity" and "universal law" demanded just compensation in exercises of the eminent domain power.¹⁷⁵ The Court also argued by analogy from its related holdings in previous cases that Fourteenth Amendment Due Process prohibited a state from taking one person's property and transferring it to another, absent a demonstrable "public use."¹⁷⁶ In all jurisdictions, this familiar public use requirement operated in tandem with the just compensation principle to constrain the exercise of the eminent domain power. Since Due Process already had been held to require a public use in cases of eminent domain, it seemed a reasonable inference that Due Process also must require

crossing are "the result of the exercise of the police powers of the state" and not compensable); *Pennsylvania-Reading Seashore Lines v. Board of Public Unity Comm'rs*, 81 A.2d 28, 31 (N.J. App. Div.1951) (same); *Houston & T.C. Ry. Co. v. City of Houston*, 41 S.W.2d 352, 354 (Tex. Civ. App. 1931) (same).

¹⁷⁴166 U.S. at 235

¹⁷⁵See 166 U.S. at 235-41.

¹⁷⁶See 166 U.S. at 235-36 (citing *Davidson v. New Orleans* and *Missouri Pac. R. Co. v. Nebraska*). In *Davidson*, the Court had held that "a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision." *Davidson v. New Orleans*, 96 U.S. 97, 102 (1877). See also *Missouri Pac. R. Co. v. Nebraska*, 164 U.S. 403, 417 (1896) ("The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the fourteenth article of amendment of the constitution of the United States.") Neither case made reference to the Fifth Amendment Takings clause which by its terms prohibits the taking of private property except for public use and upon payment of just compensation.

the familiar companion element of just compensation.

Nowhere, however, did the *Chicago B & Q* Court equate the scope and contours of the Fourteenth Amendment Due Process Clause just compensation requirement with the Fifth Amendment Just Compensation Clause. Indeed, nowhere did the *Chicago B & Q* opinion mention the Fifth Amendment.¹⁷⁷

Nor did the *Chicago B & Q* Court make any reference to *Barron v. Baltimore*, the well-known and widely-cited case it would have had to overrule, had it understood its holding to extend the Fifth Amendment Takings Clause to the states.¹⁷⁸ Indeed, the Court had just recently reaffirmed the *Barron* holding earlier in the same term, a mere three-and-a-half months before issuing its *Chicago B & Q* opinion. In *Fallbrook Irrigation Dist. v. Bradley*, the Court emphatically stated:

“There is no specific prohibition in the federal constitution which acts upon the states in regard to their taking private property for any but a public use. The fifth amendment, which provides, among other things, that such property shall not be taken for public use without just compensation, applies only to the federal government, as has many times been decided. In the fourteenth amendment the taking of private property is omitted, and the prohibition against the states is confined to its depriving any person of life, liberty, or property, without due process of law.”¹⁷⁹

The *Fallbrook* case involved a claim that the foreclosure sale of Mrs. Bradley’s property for non-payment of an assessment by a California irrigation district had effected an unconstitutional deprivation of property in violation of the Fourteenth Amendment Due Process requirement. Central to Bradley’s argument was the assertion that the irrigation assessment was not for a “public use,” but instead for the private benefit of other landowners. The outcome hinged on the “public use” requirement, which clearly applied to the federal government through the Fifth Amendment Takings

¹⁷⁷See 166 U.S. at 226-263 (nowhere mentioning Fifth Amendment)

¹⁷⁸See supra notes and accompanying text.

¹⁷⁹*Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (Nov. 16 1896) (citation omitted). *Chicago B & Q* was decided some three-and-a-half months later, on March 1, 1897, without reference to *Fallbrook’s* reaffirmation of *Barron*.

Clause. While expressly reaffirming the longstanding *Barron* rule that the Fifth Amendment applied *only* to the federal government, the *Fallbrook* Court nonetheless acknowledged that states might be under a similar constraint through the operation of the Fourteenth Amendment Due Process guarantee.¹⁸⁰ Finding that irrigation was a valid “public use” in an arid state like California, the *Fallbrook* Court went on to affirm the validity of the assessment, and consequently of the foreclosure sale.

The language and structure of the *Fallbrook* opinion make it abundantly clear that the Court regarded the Fifth Amendment Takings and Fourteenth Amendment Due Process guarantees as independent and parallel, and not interdependent or identical requirements. First and not least, of course, the Court explicitly reaffirmed *Barron*. Just as importantly, the Court hinted that the precise boundaries of what counted as “public use” might vary from state to state in the Fourteenth Amendment context, depending upon local law and local conditions.¹⁸¹ Thus, the Court seemed to be saying, the Fourteenth Amendment Due Process just compensation guarantee had to embrace federalism principles; what counted as a legitimate “public use” might differ from one state to the next, and the Court would not impose identical, straightjacketing constraints everywhere.

The contours of the Fourteenth Amendment Due Process guarantee were at issue again a few months later in *Chicago B & Q*. But the *Chicago B & Q* Court did not bother to revisit the question of the Fifth Amendment Takings Clause’s relation to the Fourteenth Amendment Due Process guarantee, a question on which it had so recently expounded in *Fallbrook*. The only reasonable explanation is that the *Chicago B & Q* Court thought

¹⁸⁰The Court stated that through operation of the Fourteenth Amendment Due Process Clause, “the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the state, instead of the federal, government.” *Fallbrook*, 164 U.S. at 158.

¹⁸¹Stating that “what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned,” the Court opined that “the irrigation of lands in states where there is no color of necessity therefor” might not count as a “public use,” but “in a state like California, which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power.” *Fallbrook*, 164 U.S. at 159-60.

that question well-settled and undisturbed by its own holding.¹⁸²

That view is affirmed by subsequent developments. Two years after *Chicago B & Q*, the Court again cited *Barron* as good law, making no reference to *Chicago B & Q* as having overruled *Barron* or any part of it.¹⁸³ The Court continued to cite *Barron* as good law for at least another six decades,¹⁸⁴ and remarkably, *Barron* has never been expressly overruled to this day,¹⁸⁵ although the conclusion seems inescapable that *Penn Central*, at least, abrogated it by implication. At no time prior to *Penn Central* did any majority Supreme Court opinion ever hold that *Chicago B & Q* had overruled or limited *Barron*, or that it had extended the scope of application of the Fifth Amendment Takings Clause to the states.¹⁸⁶ Quite to the contrary: on at least two occasions subsequent to *Chicago B &*

¹⁸²Indeed, in the decades that followed, courts more often cited *Fallbrook* for the proposition that the Fifth Amendment Takings Clause did not apply to states than *Chicago B & Q* for the opposite proposition. See, e.g., *Luedtke v. Milwaukee County*, 521 F.2d 387, 389 (7th Cir. 1975) (citing *Fallbrook* for the proposition that 5th Amendment Takings Clause applies only to the federal government and not to state); accord, *Riley v. Atkinson*, 413 F. Supp. 413, 415 (N.D. Miss. 1975); *Luedtke v. Milwaukee County*, 371 F.Supp. 1040, 1043 (E.D. Wi. 1974); *City of Boston v. Mass. Port Auth.*, 320 F. Supp. 1317, 1319 (D. Mass. 1971); *Elkins-Swyers Office Equip. Co. v. Moniteau County*, 209 S.W.2d 127, 130 (Mo. 1948); *Demeter Land Co. v. Florida Public Serv. Co.*, 128 So. 402, 405-06 (Fla. 1930); *Wright v. House*, 121 N.E. 433, 435 (Ind. 1919); *Bemis v. Guirl Drainage Co.*, 105 N.E. 496, 498 (Ind. 1914).

¹⁸³See *Brown v. New Jersey*, 175 U.S. 172 (1899) (citing *Barron* for the proposition that “[t]he first ten Amendments to the Federal Constitution contain no restrictions on the powers of the states”).

¹⁸⁴See *supra* note and cases cited therein.

¹⁸⁵Westlaw’s KeyCite service, for example, lists *Barron* as having “some negative history but not overruled,” and cites only two lower court cases as “negative indirect history.” One of those, *Silveira v. Lockyer*, 312 F.3d 1052, 1066 n.17 (9th Cir. 2002), cites *Barron* in a footnote as a “now-rejected” precedent for some cases it seeks to distinguish, without offering any support for that characterization. Similarly, *U.S. v. Emerson*, 270 F.3d 203, 221 n.13 (5th Cir. 2001), questioned the applicability of precedents based on *Barron* in a footnote not germane to the ultimate disposition of the case.

¹⁸⁶Even Justice Harlan’s famous dissent in *U.S. v. Wong* did not make this assertion. Harlan argued that blanket incorporation of the entire Bill of Rights had been effected directly by adoption of the Fourteenth Amendment Due Process clause.

Q, first in *Winous Point Shooting Club v. Caspersen* in 1904¹⁸⁷ and again in *Palmer v. Ohio* in 1918,¹⁸⁸ the Supreme Court flatly rejected Fifth Amendment Takings Clause claims against states, dismissing the cases for lack of subject-matter jurisdiction on grounds that the Fifth Amendment applied only to the federal government. Lower federal courts also adhered to the view that the Fifth Amendment Takings Clause applied only to the federal government,¹⁸⁹ as did state courts¹⁹⁰ and leading commentators.¹⁹¹

To be sure, *Chicago B & Q* did hold that by virtue of the Fourteenth Amendment

¹⁸⁷*Winous Point Shooting Club v. Caspersen*, 193 U.S. 189, 191 (1904) (dismissing Fifth Amendment Just Compensation claim against the state of Ohio for lack of federal question jurisdiction, stating that the Fifth Amendment “is a restriction on Federal power, and not on the power of the states”)

¹⁸⁸*Palmer v. Ohio*, 248 U.S. 32 (1918) (dismissing for want of subject matter jurisdiction plaintiff’s claim against the state of Ohio under the Fifth Amendment Takings Clause). The *Palmer* court cited *Barron* in support of its conclusion that there was no cognizable federal question in plaintiff’s “palpably groundless” Fifth Amendment claim against the state. *Id.* at 34. In neither case did the Court cite *Chicago B & Q*.

¹⁸⁹See, e.g., *Matter of Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 799 F.2d 317, 326 (7th Cir., 1986) (“The Takings Clause does not apply directly to the states, but the Supreme Court has used the Due Process Clause of the fourteenth amendment to supply a similar set of rules”); *Luedtke v. Milwaukee County*, 521 F.2d 387, 389 (7th Cir. 1975) (5th Amendment Takings Clause “applies only to a taking by the federal government, and not to actions by state agencies or private parties”); *Luedtke v. Milwaukee County*, 371 F.Supp. 1040, 1043 (E.D. Wisc. 1974) (“applies only to a taking by the federal government and not to actions by state agencies or private airlines”); *City of Boston v. Mass. Port Auth.*, 320 F. Supp. 1317, 1319 (D. Mass. 1971)(same); *Riley v. Atkinson*, 413 F. Supp. 413, 415 (D. Miss. 1975) (“bears only upon the exercise of powers of the United States Government, and affords no ground for relief against the State or the County Board of Supervisors”); *Gulf & S.I. R. Co. v. Ducksworth*, 286 F. 645, 647 (5th Cir. 1923) (“bears alone upon the exercise of power by the United States government and affords no ground for relief against the state or its officers”).

¹⁹⁰See *supra* note and cases cited therein

¹⁹¹For example, Ernst Freund’s influential treatise on the police power, published in 1904—seven years after *Chicago B & Q*—flatly stated that “the first ten amendments apply only to the federal government itself,” while “[t]he fourteenth amendment and the commerce clause are at present chiefly relied upon as checks upon the police power of the states.” FREUND, *supra* note , at 65

Due Process clause, states were obligated to pay just compensation if they took private property by eminent domain, a holding that at first blush sounds virtually indistinguishable from the command of the Fifth Amendment Takings Clause. Does my argument, then, amount to empty formalism or mere semantic quibble, a “distinction without a difference”? I submit that it does not.

Later courts and commentators certainly understood *Chicago B & Q* as an important Due Process precedent,¹⁹² but at no time prior to *Penn Central* did the Court expressly hold that the two requirements were identical or coextensive, or that the requirements of the Fifth Amendment had somehow been made directly applicable to the states through the Fourteenth. The Fifth Amendment Takings and Fourteenth Amendment Due Process guarantees were seen, from *Fallbrook* and *Chicago B & Q* onward, as parallel and similar, but nonetheless distinct, independent, and in all probability non-identical requirements.

Justice Holmes’ opinion in *Pennsylvania Coal v. Mahon*, for example, characterized the Fifth Amendment Takings Clause and the Fourteenth Amendment Due Process compensation principle as “similar.”¹⁹³ In ordinary parlance, however, “similar” connotes resemblance, not identity; it implies two distinct entities sharing some but possibly not all characteristics.¹⁹⁴ In his characteristically oblique way, Holmes might

¹⁹²See, e.g., Freund, *supra* note , at 541-42 (stating that “the taking for public use without compensation has never in any civilized country been regarded as a legitimate exercise of state power, and the payment of compensation is therefore correctly held to be a requirement of due process under the Fourteenth Amendment,” and citing *Chicago B & Q* for the constitutional holding that “[d]ue process of law as applied to judicial proceedings instituting the taking of private property for public use means such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public”).

¹⁹³See, e.g., *Pennsylvania Coal v. Mahon*, 260 U.S. at 415 (characterizing the “similar”). See *infra* note and accompanying text.

¹⁹⁴To adapt a famous example from Gottlob Frege, if we say, “The morning star is the evening star,” we mean they share a single identity; both descriptors connote the same object, the planet Venus. If we say, “The morning star is identical to (or the same as) the evening star,” we would imply that they were alike in all relevant respects. But if we were to say, “The morning star is similar to the evening star,” we would merely be noting that they share some common characteristics, while at least leaving open the possibility that they are unlike in some other respects.

even have been hinting that the doctrines were merely similar and not identical, insofar as he followed this statement with a citation to *Hairston v. Danville & W. R. Co.*, a 1908 case in which the Court again held, following *Fallbrook*, that the precise contours of the Fourteenth Amendment Due Process just compensation requirement might vary from state to state, depending upon variations in state law with respect to what counted as a legitimate “public use.”¹⁹⁵ The logical upshot of that position would be that what counts as “public use” for the federal government would also differ from “public use” for states; consequently the range of permissible exercises of eminent domain would also be different for the federal government under the Fifth Amendment than for states under the Fourteenth.

Because the Fifth and Fourteenth Amendment guarantees were seen as distinct strands of constitutional doctrine, just compensation claims against states and their political subdivisions continued to be brought directly, and exclusively, under the Fourteenth Amendment Due Process Clause, while claims against the federal government were brought exclusively under the Fifth Amendment Takings Clause. The result was two entirely separate lines of cases, each with its own canonical precedents. Courts did not borrow freely from Fifth Amendment precedents to resolve Fourteenth Amendment claims, or vice versa.¹⁹⁶

¹⁹⁵*Hairston v. Danville & W. R. Co.*, 208 U.S. 598, 607 (1908) (noting the “propriety of keeping in view by this court, while enforcing the 14th Amendment, the diversity of local conditions, and of regarding with great respect the judgments of the state courts upon what should be deemed public uses in that state” in “conformity with its laws”).

¹⁹⁶Compare, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (Fourteenth Amendment Due Process case, citing as precedent such previous Fourteenth Amendment Due Process cases as *Hadcheck v. Sebastian*, *Mahon*, and *Mugler*) with *United States v. Causby*, 328 U.S. 256 (1946) (Fifth Amendment Takings Clause case, citing as precedent such previous Fifth Amendment Takings Clause cases as *U.S. v. Miller*, *U.S. v. Powelson*, *U.S. v. Cress*, and *U.S. v. General Motors*). A singular exception is *Griggs v. Allegheny County*, 369 U.S. 84 (1962), in which Justice Douglas, for the Court, relied on a Fifth Amendment Takings Clause case against the federal government, *U.S. v. Causby*, to resolve a claim against a local government body that had been brought under the Fourteenth Amendment Due Process Clause. Both *Griggs* and *Causby* involved overflights of private property in the vicinity of airports, and the legal question—whether authorization for such overflights effected a “taking” of the property of nearby homeowners—appeared to be virtually indistinguishable. Compare *Griggs*, 369 U.S. at 531 (“The question is whether respondent has taken an air easement over petitioner's property for which it must pay just compensation as required by the Fourteenth Amendment”), with *Causby*, 328 U.S. 256, 258 (1946) (“The problem presented is whether respondents' property was taken

In the 1901 case *Wight v. Davidson*, the Court openly expressed skepticism that prior Fourteenth Amendment Due Process just compensation decisions could have any precedential value in a Fifth Amendment Takings Clause proceeding, although the Court did not find it necessary to decide the issue.¹⁹⁷ In *Wight*, a property owner in the District of Columbia challenged a special assessment for street improvements as a Fifth Amendment Takings Clause violation, citing a recent Supreme Court case, *Norwood v. Baker*, which on similar facts had held an action by an Ohio municipality to effect an unconstitutional deprivation of property under the Fourteenth Amendment.¹⁹⁸ The *Wight* Court declined to apply the Fourteenth Amendment precedent, stating that although the two requirements may be similar, “it by no means necessarily follows that a long and consistent construction put upon the 5th Amendment, and maintaining the validity of the acts of Congress relating to public improvements within the District of Columbia, is to be deemed overruled by a decision concerning the operation of the 14th Amendment as controlling state legislation.” The Court found it unnecessary to hold that the two doctrines were different, however, because it was able to resolve the case on other grounds.¹⁹⁹ The *Wight* Court’s statement disavowing any equation between the two constitutional requirements prompted an impassioned dissent by Justice Harlan, who wrote: “It is inconceivable to me that the question whether a person has been deprived of his property without due process of law can be determined upon principles applicable under the 14th Amendment but not applicable under the 5th Amendment, or

within the meaning of the Fifth Amendment by frequent and regular flights of army and navy aircraft over respondents’ land at low altitudes.”) Justice Douglas authored both opinions. Douglas plainly frames the *Griggs* case as a Fourteenth Amendment question, but nonetheless proceeds to treat the Fifth Amendment holding in *Causby* as dispositive without addressing either the incorporation issue (which the Court had not yet decided) or the propriety of such inter-doctrinal borrowing in the absence of incorporation. Unlike most Fourteenth Amendment Due Process just compensation claims, however, *Griggs* did not turn on the legitimate scope of the state’s police power. At issue in *Griggs* was not a police power regulation, but whether the regular physical invasion of a portion of the claimant’s property by aircraft amounted to the “taking” of an easement. With the police power not at issue, it may have been less problematic for the Court to engage in inter-doctrinal borrowing to determine that an identical physical invasion constituted a “taking” under either the Fifth or the Fourteenth Amendment branch of just compensation law.

¹⁹⁷See *Wight v. Davidson*, 181 U.S. 371, 384 (1901).

¹⁹⁸*Norwood v. Baker*, U.S.

¹⁹⁹See *Wight*, 181 U.S. at

upon principles applicable under the 5th and not applicable under the 14th Amendment.”²⁰⁰ Harlan’s was, of course, the minority view. Lower courts continued to cite *Wight* for the proposition that the Fifth and Fourteenth Amendments were separate and mutually exclusive as to their scope of application until as late as 1940.²⁰¹

On the Court’s understanding, the obligation of states to pay just compensation in eminent domain cases arose not *because* the Fifth Amendment prohibition on uncompensated takings had been extended to the states, but because the requirement of just compensation in cases of eminent domain inhered in the nature of “due process” itself by dint of natural law and universal practice.²⁰² As the Court observed next term, in the 1898 case *Holden v. Hardy*:

“Recognizing the difficulty in defining with exactness the phrase ‘due process of law,’ it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man’s property, or right to property, shall be taken for the benefit of another, or for the benefit of the state, without compensation, and that no one shall be condemned in his person or his property without an opportunity of being heard in his own defense.”²⁰³

The Court emphasized the independence of the Fourteenth Amendment just compensation requirement from the Fifth Amendment Takings Clause in the 1908 case *Twining v. New Jersey*:

“[I]t is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. If this is so, it is

²⁰⁰*Wight*, 181 U.S. at 387 (Harlan, J., dissenting). Note, however, that Harlan’s dissent argues that the Fifth and Fourteenth Amendment Due Process clauses must be read as identical, not that the Fifth Amendment Takings Clause is identical to the Fourteenth Amendment Due Process just compensation requirement.

²⁰¹See, e.g., *Neild v. District of Columbia*, 110 F.2d 246, 250 n. 10 (D.C. Cir. 1940); *Lappin v. District of Columbia*, 22 App. D.C. 68 (D.C. Cir. 1903);

²⁰²*Chicago, B. & Q.*, 166 U.S. at 238.

²⁰³*Holden v. Hardy*, 169 U.S. 366, 390-91 (1898).

*not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.”*²⁰⁴

Indeed, the Court throughout this period was at some pains to explain how the Fourteenth Amendment concept of Due Process could include a just compensation requirement at all, given the embarrassing complication that the Fifth Amendment contained both Due Process and Just Compensation guarantees. Reading just compensation into the notion of Due Process thus threatened to render the Fifth Amendment Takings Clause “superfluous.”²⁰⁵ Why would the Framers have included a separate Takings Clause if its core requirements were understood to fall within the ambit of Due Process?²⁰⁶ It would be equally embarrassing, however, to say that the two Due Process Clauses had different meanings or content, for why would the drafters of the Fourteenth Amendment employ a phrase already used elsewhere in the Constitution and attach to it a different meaning?²⁰⁷ Courts attempted to resolve this dilemma—not entirely satisfactorily—by appealing to essentialist arguments: as the Court explained in *Powell v. Alabama*, even though ordinary principles of interpretation might counsel

²⁰⁴*Twining v. New Jersey*, 211 U.S. 78, 99-100.

²⁰⁵As the Court said in *Hurtado v. California*, where it rejected a claim that Fourteenth Amendment Due Process includes a right to grand jury presentment or indictment in state criminal cases:

“According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is that, in the sense of the constitution, 'due process of law' was not meant or intended to include . . . the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase [“Due Process”] was employed in the fourteenth amendment to restrain the action of the states, it was used in the same sense and with no greater extent; and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the states, it would have embodied, as did the fifth amendment, express declarations to that effect.”

Hurtado v. California, 110 U.S. 516, 534 (1884). *Hurtado* has never been overruled.

²⁰⁶See, e.g., *Powell v. Alabama*, 287 U.S. 45, 66 (1932).

²⁰⁷See *Hurtado*, 110 U.S. at 534 (“when the same phrase [“Due Process”] was employed in the fourteenth amendment to restrain the action of the states, it was used in the same sense and with no greater extent” than when it is used in the Fifth Amendment).

otherwise, the scope of Fourteenth Amendment Due Process protection would ultimately turn on whether “the right involved is of such a character that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.’”²⁰⁸

But perhaps the most important distinction was along a federalism dimension. Throughout the pre-*Penn Central* period, the Court adhered to the bifurcated view of state powers expressed earlier in *Munn, Mugler*, and *Chicago B & Q* itself: valid exercises of the state’s police power could never amount to a compensable deprivation of property, because the state’s regulatory power to adjust the boundaries of property rights in the interest of harm prevention and the public good operated as an inherent limitation on property rights themselves.. In contrast, federal regulations—even if valid exercises of Congress’s Commerce Clause power—were not understood to operate as an inherent limitation on property rights, and could, at least in principle, amount to a “taking” of property compensable under the Takings Clause. As the Court explained in 1903 in *U.S. v. Lynah*:

“[L]ike the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the 5th Amendment Congress has supreme control over the regulation of commerce, but if in exercising that supreme control it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this 5th Amendment, and can take only on payment of just compensation.”²⁰⁹

Thus, although state powers were bifurcated into two mutually exclusive categories—non-compensable police power regulations and compensable exercises of the eminent domain power—valid federal Commerce Clause regulations were *not* understood to be exempt from Takings Clause analysis.

²⁰⁸287 U.S. at 67 (quoting *Hebert v. Louisiana*, 272 U.S. 312 (1926)).

²⁰⁹*U.S. v. Lynah*, 188 U.S. 445, 471 (1903) (quoting *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 336 (1893)). See also *U.S. v. Williams*, 188 U.S. 485 (1903) (same); *Scranton v. Wheeler*, 179 U.S. 141, 153 (1900) (“[I]n its exercise of the power to regulate commerce Congress may not override the provision that just compensation must be made when private property is taken for public use.”).

The distinction between the just compensation principle implicit in the Fourteenth Amendment Due Process guarantee and the Fifth Amendment Takings Clause was more than mere word play or empty formalism. It led to significant differences in how cases were argued and analyzed. Well into the 1960s, courts persisted in the view that under well-established precepts of Fourteenth Amendment Due Process jurisprudence, a valid police power regulation could never result in a compensable deprivation of property, even if the consequence was nearly total destruction of the value of property—a view expressed early on in *Munn*²¹⁰ and *Mugler*,²¹¹ to which the Supreme Court adhered in an unbroken line of police power cases including *Chicago B & Q*,²¹² *Powell v. Pennsylvania*,²¹³ *Reinman v. Little Rock*,²¹⁴ *Hadacheck v. Sebastian*,²¹⁵ *Miller v. Schoene*,²¹⁶ and *Goldblatt v. Hempstead*.²¹⁷ In every case brought against a state or its political subdivision under the

²¹⁰See *Munn v. Illinois* 94 U.S. 116, 145-46 (1876) (drawing distinction between taking of property for public use and valid police power regulations).

²¹¹*Mugler v. Kansas*, 123 U.S. 623.

²¹²

²¹³*Powell v. Pennsylvania*, 127 U.S. 678, 683 (1888) (upholding Pennsylvania statute prohibiting sale of oleomargarine as a valid police power regulation, and “the fourteenth amendment was not designed to interfere with the exercise of that power by the states”).

²¹⁴*Reinman v. Little Rock*, 239 U.S. 39 (1915) (upholding as valid police power regulation a local ordinance prohibiting operation of livery stables within designated zone, forcing closure of established business).

²¹⁵*Hadacheck v. Sebastian*, 239 U.S. 394 (1915). (upholding city ordinance prohibiting brickmaking in designated zone as a valid exercise of police power, despite near-total destruction of value of property used in brick manufacture).

²¹⁶*Miller v. Schoene*, 276 U.S. 272 (1928) (upholding as a valid police power regulation, and therefore non-compensable, a state statute that provided for destruction of infected trees to prevent spread of disease).

²¹⁷*Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (upholding as a valid police power regulation, and therefore non-compensable, a local ordinance prohibiting gravel mining even though it resulted in near-total loss of value of plaintiff’s property). As the *Goldblatt* court explained the traditional Substantive Due Process rule: “If this ordinance is otherwise a valid exercise of the town’s police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional.” 369 U.S. at 592.. The *Goldblatt* Court cited prior Fourteenth Amendment Due Process cases like *Hadacheck*, *Mugler*, *Walls v. Midland Carbon*, and *Reinman v. Little Rock*. Notably, it cited *Mugler* for the relevant distinction between a police

Fourteenth Amendment Due Process clause, the first and singularly crucial step in the Court's analysis was to ask: "Is this regulation a valid exercise of the state's police power?" An affirmative answer to that inquiry was dispositive: if the challenged state action were deemed a valid exercise of the police power under established doctrines, Due Process was satisfied and no compensation was owed. As the *Mugler* Court had bluntly explained:

"Nor can legislation of that character [i.e., police power regulation] come within the fourteenth amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the states have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community."²¹⁸

Courts acknowledged, however, that some purported exercises of the police power might be pretextual or otherwise unreasonable. As the Court explained in 1914 in *Atlantic Coast Line R. Co v. Goldsboro*:

"Of course, if it appear that the regulation under criticism is not in any way designed to promote the health, comfort, safety, or welfare of the community, or that the means employed have no real and substantial relation to the avowed or ostensible purpose, or that there is wanton or arbitrary interference with private rights, the question arises whether the law-making body has exceeded the legitimate bounds of the police power."²¹⁹

power exercise and the eminent domain power, but acknowledged along with *Mahon* that a regulation may "go too far" and become a "taking" in the Fourteenth Amendment sense, that is, it may fall outside the police power and therefore be considered a backdoor exercise of eminent domain. See *id.* at .

²¹⁸*Mugler*, 123 U.S. at

²¹⁹*Atlantic Coast Line R. Co v. City of Goldsboro*, 232 U.S. 548 (1914). See also Freund, *supra* note , at 124 ("Under the Fourteenth Amendment the United States is competent to protect individual liberty and property against arbitrary or unequal state legislation enacted under color

This placed the judiciary in the delicate position of policing the rather indefinite boundary that separated “valid” police power regulations from disguised exercises of the (compensable) power of eminent domain.²²⁰ If the challenged state action fell outside the legitimate bounds of the police power, it could be held to violate the Due Process guarantee. The default rule, however, was that such non-police power actions would be deemed implied exercises of the state’s power of eminent domain and as such, compensable under the just compensation requirement established in *Chicago B & Q*.

So, for example, in the 1910 case *Missouri Pac. R. Co. v. Nebraska*, the Court held that a state statute requiring the railroad to construct, at its own expense, a side track to serve a grain elevator located adjacent to the railroad’s right-of-way “goes beyond the limit of the police power,” and therefore effected an unconstitutional deprivation or “taking” of property under the Fourteenth Amendment Due Process Clause.²²¹ In an opinion that anticipated *Pennsylvania Coal v. Mahon* by more than a decade, Justice Holmes writing for the Court explained that while it is “true that the states have power to modify and cut down property rights to a certain limited extent without compensation, for public purposes, as a necessary incident of government—the police power,” nonetheless “there are constitutional limits to what can be required of owners under either the police power or any other ostensible justification for taking such property away.”²²²

IV. *Mahon* in the Muddle

of protection of safety and health, but having in reality no such justification”)

²²⁰See, e.g., *Block v. Hirsch*, 256 U.S. 135, 156 (1921) (“For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law”);

²²¹*Missouri Pac. R. Co. v. Nebraska*, 217 U.S. 196, 206 (1910) (hereinafter *Missouri Pac. II*). The case was in part a reprise of an earlier case, also styled *Missouri Pac. R. Co. v. Nebraska*, 164 U.S. 403 (1896) (hereinafter *Missouri Pac. I*), in which the court struck down a state regulatory commission order compelling the railroad to lease a portion of its right-of-way on non-discriminatory terms to private parties for purposes of constructing a grain elevator. The *Missouri Pac. I* Court held the action violated due process because of the action was for private benefit, not public use

²²²217 U.S. at 206.

Seen in its proper context as one of a long line of Fourteenth Amendment Due Process cases deciding the sometimes murky boundary between non-compensable valid police power regulations and compensable exercises of the eminent domain power, *Pennsylvania Coal v. Mahon*²²³ was unremarkable at the time it was decided.²²⁴ Probably for that reason, it went largely unnoticed for the next five decades, during which it was

²²³*Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1923)

²²⁴Nor was *Mahon* the first case to invalidate a legislative or regulatory enactment as an impermissible deprivation or “taking” of property on Due Process grounds. See, e.g., *Missouri Pac. R. Co. v. Nebraska*, 164 U.S. 403 (1896) (*Missouri Pac. I*) (holding that a state order authorizing an association of private citizens to build a grain elevator on the railroad’s right-of-way was “a taking of private property of the railroad corporation, for the private use of the petitioners” and therefore “not due process of law”); *Dobbins v. Los Angeles*, 195 U.S. 393 (1904) (holding that a municipal ordinance imposing sudden, unexplained, and drastic changes in rules governing a privately owned gas works so as to make it not commercially viable was an “arbitrary and discriminatory exercise of the police power which amounts to a taking of property without due process of law”); *Missouri Pac. R. Co. v. Nebraska*, 217 U.S. 196, 206 (1910) (*Missouri Pac. II*) (holding unconstitutional a statute requiring railroad to construct a sidetrack at its own expense to serve private grain elevators on land adjacent to the railroad’s right of way on grounds that it exceeds the police power and “does not provide indemnity for what it requires”); *St. Louis, I.M. & So. R. Co. v. Wynne*, 224 U.S. 354 (1912) (holding unconstitutional a statute requiring railroad to pay double liability and attorneys fees’ if it fails to promptly pay demand for killing of livestock on grounds that it deprives the railroad of property without due process); *Eubank v. City of Richmond*, 226 U.S. 137 (1912) (holding unconstitutional an ordinance authorizing two thirds of the property owners on a block to establish building setback requirements applicable to the entire block on grounds that it is “an unreasonable exercise of the police power” with no demonstrable connection to health, safety, morals, or general welfare, placing standardless discretion in some private parties to arbitrarily restrict the property rights of others); *Chicago, Milwaukee & St. Paul R. Co. v. Polt*, 232 U.S. 165 (1914) (holding unconstitutional a statute doubling railroad’s liability if it does not pay demand for compensation within 60 days); *Buchanan v. Warley*, 245 U.S. 60 (1917) (holding unconstitutional an ordinance barring sales of property to persons of color on grounds that it deprived white owners of their right to freely alienate property without a legitimate police power justification, and therefore infringed 14th Amendment due process guarantee); *Truax v. Corrigan*, 257 U.S. 312, 328, 329 (1921) (holding unconstitutional a statute prohibiting courts to enjoin picketing by striking employees on grounds that it “deprives the owner of the business and the premises of the property without due process, and cannot be held valid under the Fourteenth Amendment” because it operates as “a purely arbitrary or capricious exercise of [the police] power whereby a wrongful and highly injurious invasion of property rights . . . is practically sanctioned”).

cited only rarely,²²⁵ and then often for the otherwise well-established proposition that “while [the] police power is broad, there are limitations to its exercise, which the courts have not attempted to accurately define.”²²⁶ Other cases cited *Mahon* for Holmes’ eloquent statement of the necessity for the inherent police power limitation on property rights: “Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,” consequently “some values are enjoyed under an implied limitation and must yield to the police power.”²²⁷ Others cited the case for other, similarly uncontroversial propositions concerning the nature and limits of the police power, often as part of long string cites.²²⁸ Whatever the particular proposition for which it was taken to stand, however, *Mahon* was consistently recognized in the pre-*Penn Central* era as a conventional Fourteenth Amendment Due Process case, turning on the outer limits of

²²⁵As of March 29, 2004, Westlaw’s KeyCite service listed 1103 judicial citations to *Mahon* by all federal and state courts, the vast majority of them in the post- *Penn Central* era. By my count, *Mahon* was cited a total of 321 times over a period of almost six decades between its issuance and the *Penn Central* decision, an average of fewer than six citations per year. In the post*Penn Central* period from mid 1978 through March, 2004, *Mahon* was cited 782 times, an average of more than 30 citations per year. Even assuming increased judicial caseloads and a greater volume of reported cases over this period, the difference is striking.

²²⁶*Women’s Kansas City St. Andrew Soc. v. Kansas City*, 58 F.2d 593, 598 (8th Cir. 1932) (citing *Mahon* and six other cases, including two that pre-date *Mahon*, for the quoted proposition). See also, e.g., *Western Intern. Hotels v. Tahoe Regional Planning Agency*, 387 F. Supp. 429, 434 (D. Nev. 1975) (citing *Mahon* for the proposition that “police power regulation had its limits,” but noting that this idea “antedates even Holmes”).

²²⁷See, e.g., *Brecciaroli v. Connecticut Commr. of Env’tl. Protection*, 362 A.2d 948, 951 (Conn. 1975).

²²⁸See, e.g., *Nashville, C. & St.L. Ry. v. Walters*, 294 U.S. 405, 415 (1935) (citing *Mahon* and eight other cases for the proposition that the “police power is subject to the constitutional limitation that it may not be exercised arbitrarily or unreasonably”); *Whitney v. California*, 274 U.S. 357, 374 (1927) (citing *Mahon* and four other cases for the proposition that “[p]rohibitory legislation has been held invalid, because unnecessary, where the denial of liberty involved was that of engaging in a particular business”); *Appeal of Key Realty Co.*, 182 A.2d 187, 191 (Pa. 1962) (citing *Mahon* and 11 other cases for the proposition that police power regulations are valid “whenever they are necessary for the preservation of public health, safety, morals, or general welfare, and not unjustly discriminatory, or arbitrary, or unreasonable, or confiscatory in their application to a particular or specific piece of property”).

the state's police power.²²⁹

Then, like *Chicago B & Q*, *Mahon* was plucked from obscurity and anachronistically reinterpreted as a Fifth Amendment Takings Clause case by *Penn*

²²⁹For example, a 1927 Harvard Law review article lists *Mahon* as one of 28 “police power cases” decided between 1896 and 1927 in which the Supreme Court invalidated “substantive legislation of a social or economic character” on Due Process grounds. See Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L.REV. 943, 944 & fnn. 7-10 (1927). Holmes himself subsequently characterized *Mahon* as a 14th Amendment police power case. See *Frost v. Railroad Comm’n*, 271 U.S. 583, 601 (1926) (Holmes, J., dissenting) (characterizing *Mahon* and *Edgar A Levy Leasing Co. v. Siegel*, 258 U.S. 242, as “extreme cases” on opposite sides of the “delicate” line separating legitimate exercises of the police power from impermissible deprivations of private property rights). This view also prevailed in other courts. See, e.g., *Fred F. French Investing Co. v. City of New York*, 385 N.Y.S.2d 5, 9 (N.Y. 1976) (stating that in *Mahon* “the gravamen of the constitutional challenge to the regulatory measure was that it was an invalid exercise of the police power under the due process clause” and the case was “decided under that rubric”); *Beal v. Reading Co.*, 87 A.2d 214, 218 (Pa. 1952) (stating that *Mahon* held the Kohler Act “unconstitutional, as an improper exercise of the police power”); *Hulen v. City of Corsicana*, 65 F.2d 969, 971 (5th Cir. 1933) (citing *Mahon* and seven other cases for the proposition that because the limits of the police power are “shadowy, vague, and apparently shifting, it is in the last analysis for the courts to say whether questioned action has properly called into being the exercise of the [police] power, and whether the power is being exercised reasonably and within the limits of public necessity”); *Marblehead Land Co. v. City of Los Angeles*, 47 F.2d 528, 532 ((9th Cir. 1931) (stating that *Mahon* “held that [the Kohler Act] was so unreasonable an exercise of the police power that it was violative of the constitutional rights guaranteed to the Pennsylvania Coal Company and therefore void”); *Cromwell-Franklin Oil Co. v. Oklahoma City*, 14 F.Supp. 370, 377 (D. Okla. 1930) (stating that *Mahon* “held . . . that the prohibition in the legislative act exceeded the police power, whether viewed as a protection to private surface owners or to cities having surface rights”). The California Supreme Court aptly summed up the conventional, pre-*Penn Central* view of *Mahon* as follows:

“That was an action between two private parties, the statute involved admittedly destroyed previously existing rights of property and contract as reserved between the parties, and the propriety of the statute's prohibition upon the single valuable use of the property for coal-mining operations was considered in relation to special benefits to be gained by an individual rather than by the whole community. In those circumstances application of the statute to the property was held to effect such diminution in its value as to be unconstitutional and beyond the legitimate scope of the police power.”
McCarthy v. City of Manhattan Beach, 264 P.2d 932, 41 Cal. 2d 879, 891 (1954).

Central and its progeny.²³⁰ In that guise it came to serve as one of the pillars of the Court's contemporary regulatory takings jurisprudence.²³¹

That *Mahon* was a Fourteenth Amendment Due Process case—and not a Fifth Amendment Takings Clause case as is now widely assumed—is clearly seen from the posture in which it reached the Supreme Court. *Mahon* involved the constitutionality of Pennsylvania's Kohler Act, which prohibited owners of subsurface coal from mining pillars of coal that provided subjacent support to surface owners.²³² Mahon, the owner of surface rights acquired by a deed from the Pennsylvania Coal Company, had invoked the Kohler Act in seeking to enjoin the Pennsylvania Coal Company from continuing mining operations that, if unchecked, were expected to cause subsidence.²³³ Complicating matters, Mahon's deed had expressly reserved the Company's right to mine all the subsurface coal, and further stated that the surface owner assumed all risk of subsidence and waived any claim for damages arising therefrom.²³⁴

²³⁰See *Penn Central*, 438 U.S. at 127 (citing *Mahon* as “the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a ‘taking’”). See generally Brauneis, *supra* note

²³¹See, e.g., *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, U.S. 535 U.S. 302, 325 (2002) (stating that *Mahon* “gave birth to our regulatory takings jurisprudence”); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734 (1997) (citing *Mahon* for the proposition that “a regulation that ‘goes too far’ results in a taking under the Fifth Amendment”); *Lucas*, 260 U.S. at 1014 (stating that prior to *Mahon*, “it was generally thought that the Takings Clause reached only a ‘direct appropriation’ of property”); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 649-49 (1981) (“the principle that a regulation can effect a Fifth Amendment ‘taking’ . . . has its source in Justice Holmes’ opinion for the Court in *Pennsylvania Coal Co. v. Mahon*”). This Article argues that these claims are false on two fronts: *Mahon* was not a Fifth Amendment Takings Clause case, nor was it the first Fourteenth Amendment Substantive Due Process case to hold that a regulation “went too far” to be sustained as a legitimate exercise of the police power, and therefore effected a compensable deprivation or “taking” of property. See *supra* note and cases cited therein.

²³²See *Pennsylvania Coal v. Mahon*, 266 U.S. at 412; *Mahon v. Pennsylvania Coal Co.*, 118 A. 491, 494-95 (1922) (setting forth provisions of the Kohler Act)

²³³See *Pennsylvania Coal v. Mahon*, 266 U.S. at 412; *Mahon v. Pennsylvania Coal Co.*, 118 A. at 493-94.

²³⁴*Pennsylvania Coal v. Mahon*, 266 U.S. at 412; *Mahon v. Pennsylvania Coal*, 118 A. at 494 (“so far as the contractual rights of the parties are concerned, as shown by the paper titles to the properties involved, defendant is expressly authorized to mine the subjacent strata owned by

The Company defended on grounds that the statute effected an unconstitutional deprivation of its property in contravention of the Fourteenth Amendment Due Process Clause. The Pennsylvania Supreme Court held, strictly on Fourteenth Amendment Substantive Due Process grounds, that the Kohler Act was “a reasonable and valid exercise of the police power.”²³⁵

The Company filed a writ of error, seeking reversal of the Pennsylvania Court’s constitutional holding. Thus the sole issue before United State Supreme Court was, as Holmes stated it, “whether the police power can be stretched so far” as to sustain the Kohler Act under the Fourteenth Amendment Due Process Clause.²³⁶

As a conventional Substantive Due Process case turning on the limits of the state’s police power, *Mahon* broke little new conceptual ground. Holmes begins his opinion with an elegant restatement of the longstanding distinction between a valid police power regulation and an implied exercise of the eminent domain power:

“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. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain

it without any obligation to support the surface owned by plaintiffs”).

²³⁵ *Mahon v. Pennsylvania Coal Co.*, 118 A. at 494. The Pennsylvania Supreme Court stated the familiar, controlling legal principle as follows:

“In order to serve the public welfare, the state, under its police power, may lawfully impose such restrictions upon private rights as, in the wisdom of the Legislature, may be deemed expedient; . . . for 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community' . . . [and] a statute enacted for the protection of public health, safety or morals, can be set aside by the courts only when it plainly has no real or substantial relation to these subjects, or is a palpable invasion of rights secured by the fundamental law. If 'it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination is conclusive.”

Id. at 497-98 (quoting *Nolan v. Jones*, 263 Pa. 124)

²³⁶260 U.S. at 413.

and compensation to sustain the act.”²³⁷

Thus, Holmes seems to be saying, there is no bright line demarcating the boundary separating legitimate (and non-compensable) exercises of the police power from implied (and compensable) exercises of the eminent domain power; government actions are arrayed along a continuum, and may fall into either category depending upon the facts and circumstances of the case. “One fact for consideration”—presumably, only one of several, on Holmes’ view²³⁸—is the “extent of the diminution.”

This statement is often cited by contemporary courts and commentators as Holmes’ enunciation of a novel “diminution of value” test for regulatory takings.²³⁹ If there is any doctrinal innovation to be found in *Mahon*, it surely lies in Holmes’ suggestion that diminution of value alone, if severe enough, may signal the absence of a police power justification sufficient to save the regulation from being deemed an implied exercise of eminent domain. Yet while Holmes flirts with the proposition that every regulation effecting a diminution of a “certain magnitude” should be deemed to fall outside the police power, the *Mahon* opinion never squarely so holds. Strictly speaking, the statement that when “diminution . . . reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain” is dictum. For the extent of the diminution becomes all but irrelevant to Holmes’ resolution of the *Mahon* case.

At bottom, and on arguments that closely track the dissenting opinion in the Pennsylvania Supreme Court’s disposition of the *Mahon* case,²⁴⁰ Holmes’ opinion simply finds the state’s proffered police power justifications for the Kohler Act wanting. To

²³⁷260 U.S. at 413.

²³⁸As the Supreme Court later interpreted *Mahon* in the 1962 case *Goldblatt v. Hempstead*, “diminution of value” is a relevant factor in drawing the boundary between a legitimate police power regulation and a compensable taking, but in itself not conclusive. See *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962) (“There is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant, see *Pennsylvania Coal Co. v. Mahon*, supra, it is by no means conclusive”)

²³⁹See, e.g.,

²⁴⁰See *Mahon v. Pennsylvania Coal*, 118 A. at 507 (Kephardt, J., dissenting) (deriding majority’s broad conception of the scope of the police power through which “property may be transferred, by the Legislature from one person to another without compensation” even though “the limitation of power so to act was heretofore one of the chief obstacles in the way of those favoring this socialistic principle”).

Holmes' eye, the Act's restrictions on subsurface coal mining appear to be directed principally toward protecting the private interests of a specified class of surface owners—those surface owners who had not taken the precaution to bargain for subjacent support from the owners of the underground coal as they clearly could have done under Pennsylvania law, and who now stand to gain a windfall at the expense of the subsurface owners who had bargained for the right to mine the coal. In subsidence affecting this narrow class of surface owners, Holmes says, “the damage is not common or public.”²⁴¹ As evidence of the narrow “class” nature of the regulatory scheme, Holmes points to the fact that the statutory prohibition on the mining of coal pillars that provide subjacent support does not extend to situations where the mining company itself owns the surface rights.²⁴² Certainly, the regulation may protect one class of surface owners, and Holmes concedes that “there is a public interest even in this, as there is in every purchase and sale and in all that happens in the commonwealth.”²⁴³ But the public interest in such a case, Holmes concludes, is “limited,”²⁴⁴ and it is advanced only at the cost of truncating the rights of another class of property owners, the owners of subsurface coal. To Holmes, as to other judges of that era, that smacks of naked redistribution, not enhancement of the “general welfare” or any genuine “public interest.”²⁴⁵ By the time *Mahon* was decided, the Supreme Court had ample precedent for striking down such regulatory redistributions of property rights as impermissible deprivations or “takings” of private property under the Fourteenth Amendment Due Process Clause.²⁴⁶ As Holmes himself later

²⁴¹260 U.S. at 413; cf. *Mahon v. Pennsylvania Coal*, 118 A. at 510 (stating that the Kohler Act “transfers an independent property right to plaintiff, vesting the permanent use and perpetual enjoyment of this right in one who is not required to pay anything for what he so acquires, and which he may sell in selling his surface, with the increased value given it by this legislation added”)

²⁴²260 U.S. at 413-14 (“The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal”).

²⁴³260 U.S. at 413.

²⁴⁴260 U.S. at 413.

²⁴⁵Cf. *Mahon v. Pennsylvania Coal*, 118 A. at 514 (Kephardt, J., dissenting) (the “intention [of the Kohler Act] was not to protect lives or safety generally, but merely to augment property rights of the few; the public generally, as distinguished from this particular class, is not interested”). To judges of the Substantive Due Process era, such redistributive “class legislation” fell outside the police power, see *infra* note and accompanying text.

²⁴⁶See, e.g., *Missouri Pac. R. Co. v. Nebraska*, 164 U.S. 403, 417 (1896) (*Missouri Pac. I*) (overturning regulatory order compelling railroad to lease a portion of its right-of-way to farmers for construction of a grain elevator on grounds that “the taking by a state of the private property of one person or corporation, without the owner’s consent, for the private use of another, is not

explained in a letter to Frederick Pollock:

“My ground [for decision in the *Mahon* case] is that the public only got on this land by paying for it and that if they saw fit to pay only for the surface rights they can’t enlarge it”²⁴⁷

Similarly, in Holmes’ view the statute cannot be sustained as a reasonable safety regulation because the protection of public safety could be achieved just as effectively by a simple notice requirement²⁴⁸—and in any event, Holmes says, the mining company did give actual notice in this instance, so there was no genuine threat to Mahon’s safety.²⁴⁹

due process of law”); *Missouri Pac. R. Co. v. Nebraska*, 217 U.S. 196, 206-08 (1910) (*Missouri Pac. II*) (overturning statute requiring railroad to build sidings to serve private grain elevators adjacent to its right-of-way on grounds that the requirement “unquestionably does take its property” and advances only private, not public, interests); *Eubank v. City of Richmond*, 226 U.S. 137, 144 (1912) (overturning ordinance authorizing two thirds of property owners on a block to establish building setback requirements applicable to the entire block on grounds that it “enables the convenience or purpose of one set of property owners to control the property right of others” and has no discernible connection to a legitimate police power purpose of protecting the public health, safety, morals, or general welfare). Holmes wrote the majority opinion in *Missouri Pac. II* and joined the majority in *Eubank*. In contrast, when the Court perceived that a strong public interest was at stake, even regulations effecting substantial redistributions of property rights were upheld. See, e.g., *Block v. Hirsh*, 256 U.S. 135, 156 (1921) (“All the elements of a public interest justifying some degree of public control are present” in a Washington, DC emergency wartime housing regulation limiting landlords’ rights to evict holdover tenants, and the regulation does not “go too far” to be sustained as a reasonable exercise of the police power); *Edward A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922) (upholding a wartime tenant-landlord laws similar to those at issue in *Block v. Hirsh*, stating that “the existing circumstances clothed the letting of buildings for dwelling purposes with a public interest sufficient to justify restricting property rights in them” under the police power). Holmes wrote the majority opinion in *Block* and joined the majority in *Siegel*.

²⁴⁷See BOSSELMAN ET AL., *supra* note , at 244 (quoting HOLMES-POLLOCK LETTERS, MARK DE WOLFE HOWE, ED. 108-09 (1941).

²⁴⁸260 U.S. at 414; cf. *Mahon v. Pennsylvania Coal*, 118 A. at 512 (Kephardt, J., dissenting) (“If the Legislature had desired to protect life and limb it could have required a notice, given sufficient time in advance, from the operator to the surface owner, when mining was to be done under his or her land,” indicating that “the real purpose of the Legislature and the framers of the act was in the interest of property, and property alone—not to prevent the ‘terrible menace to human life, public safety and morals’”).

²⁴⁹260 U.S. at 414.

The *Mahon* analysis, while at the broadest level proceeding along the standard police power path, nonetheless signals a subtle, characteristically Holmesian departure from the more formalistic treatment a similar case might have received at the hands of earlier judges of the Substantive Due Process era. For Holmes, the determination whether a police power justification is sufficiently robust to support the regulation in question is not a simple, categorical “yes or no” question; instead, as Holmes says, it is a “question of degree” and “cannot be disposed of by general propositions.”²⁵⁰ In each case it is a pragmatic judgment call, requiring a case-specific weighing of the “public interest” advanced by the regulation against the burden imposed on private parties.²⁵¹ Weighing the relevant factors in *Mahon*, Holmes concludes that while there is some public interest in protecting a narrow class of surface owners who had not had the foresight to protect themselves, that public interest is exceedingly slight. In contrast, the burden imposed on subsurface coal owners is substantial, and certainly more than necessary to achieve to purported police power purpose of protecting public safety. Consequently, the police power rationale fails on Holmes’ sliding-scale calculus.

Even on this score, however, *Mahon* broke no new ground. Holmes had articulated this same sliding-scale approach to Fourteenth Amendment Substantive Due Process review some sixteen years earlier in the 1907 case *Martin v. District of Columbia*, when he wrote:

“. . . [T]here should not be extracted from the very general language of the 14th Amendment, a delusive exactness and merely logical form. . . . Constitutional rights like others are a matter of degree. To illustrate: Under the police power, in its strict sense, a certain limit may be set to the height of buildings without compensation; but to make that limit 5 feet would require compensation and a taking by eminent domain.”

Later that same year, Holmes reiterated this view in *Interstate Consol. St. Ry. v. Massachusetts*, in the course of upholding as a legitimate exercise of the police

²⁵⁰*Mahon*, 166 U.S. at 416. See also BOSSELMAN ET AL., *supra* note, at 134 (“in Justice Holmes’ view the difference between regulation and taking was one of degree not kind”).

²⁵¹To that extent, Holmes’ sliding-scale approach to Substantive Due Process review anticipates the Penn Central Court’s multi-factor balancing test in Takings clause adjudication, and suffers many of the same defects. See *supra* note and accompanying text (criticizing Penn Central balancing); *infra* notes and accompanying text (criticizing Substantive Due Process review on similar grounds).

power—and therefore not a violation of Fourteenth Amendment Substantive Due Process—a Massachusetts statute mandating half-price streetcar fares for school children:

“[C]onstitutional rights, like others, are matters of degree, and . . . the great constitutional provisions for the protection of property are not to be pushed to a logical extreme, but must be taken to permit the infliction of some fractional and relatively small losses without compensation, for some, at least, of the purposes of wholesome legislation.”²⁵²

Further clarifying his views in the 1908 case *Hudson Co. Water Co. v. McCarter*, Holmes suggested that the most important constraint on this case-by-case balancing of public and private interests was not any abstract principle, but rather the slow, incremental process of constitutional common law adjudication, which over time would provide a series of benchmarks against which subsequent cases could be measured:

“All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping

²⁵²*Interstate Consol. St. Ry. v. Massachusetts*, 207 U.S. 79, 86-87 (1907) (hereinafter *Interstate Consolidated*). Bosselman, Callies and Banta trace Holmes’ sliding-scale balancing approach to police power adjudication back even further, to the 1889 Massachusetts case *Rideout v. Knox*. See Bosselman et al. *supra* note , at 124-25. Anticipating *Mahon* by more than three decades, Holmes, then serving on the Massachusetts Supreme Judicial Court, wrote in upholding a regulation limiting the height of yard fences to six feet:

“It may be said that the difference is only one of degree; most differences are when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing manifest evil; larger ones could not be except by the right of eminent domain.”
Rideout v. Knox, 19 N.E. 390, 392 (Mass. 1889) . See also *id.* at 393 (“On the whole, having regard to the smallness of the injury [to regulated property owners], the nature of the evil to be avoided, the quasi accidental character of the defendant’s right to put up a fence for malevolent purposes, and also to the fact that police regulations may limit the use of property in ways which greatly diminish its value, we are of the opinion that the act is constitutional to the full extent of its provisions”).

to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.”²⁵³

Again in the 1911 case *Noble State Bank v. Haskell*, upholding against a Substantive Due Process challenge an Oklahoma statute imposing an assessment on banks to create a depositors’ guarantee fund, Holmes stressed the anti-formalist character of his sliding-scale approach:

“[W]e must be cautious about pressing the broad words of the 14th Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter *a nolumus mutare* as against the lawmaking power.”²⁵⁴

In cases like *Martin*, *Interstate Consol. St. Ry.*, *Hudson Water Co.*, *Noble State Bank*, and *Mahon*, Holmes is not engaging in a one-dimensional “diminution of value” analysis of the sort now commonly attributed to him.²⁵⁵ Nor is it necessary on his sliding-scale

²⁵³*Hudson Co. Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (Holmes, J.) (upholding a New Jersey statute prohibiting export of fresh water to other states against a Fourteenth Amendment Substantive Due Process challenge).

²⁵⁴*Noble State Bank v. Haskell*, 219 U.S. 104, 110 (1911). See also *Truax v. Corrigan*, 257 U.S. 312, 342 (1921) (Holmes, J. dissenting) (warning of the “dangers of a delusive exactness in the application of the Fourteenth Amendment” and stating that “[d]elusive exactness is a source of fallacy throughout the law”).

²⁵⁵See, e.g., Sax, *Takings and the Police Power*, *supra* note , at 40-42. Sax places great weight on Holmes statement in *Interstate Consolidated* that “the question narrows itself to the

calculus to find a total deprivation of value in order to find that a regulation falls outside the police power. Instead, he is engaged in a case-specific balancing of the “public interest” against the private loss,²⁵⁶ an approach that appears to have won broader acceptance on the Court in the years leading up to *Mahon*.²⁵⁷ Having found the proffered police power justification in *Mahon* vanishingly weak and unconvincing, Holmes is prepared to find that just about *any* burden placed on subsurface coal owners amounts to a compensable deprivation under the Fourteenth Amendment Due Process guarantee. That such a deprivation occurred is an easy call for Holmes, because the Act clearly deprives coal mine owners of the commercially valuable right to mine coal that Pennsylvania law explicitly recognizes as theirs so long as they have expressly reserved

magnitude of the burden imposed.” See *id.* at 41. But that statement must be considered in its proper context. In weighing whether the regulatory mandate of reduced fares for school children “went too far” to be sustained as a valid police power regulation, Holmes first pointed out that provision of public education was considered a police power purpose of the first magnitude in Massachusetts. See *Interstate Consolidated*, 207 U.S. at 87 (“Education is one of the purposes for which what is called the police power may be exercised. Massachusetts always has recognized it as one of the first objects of public care. It does not follow that it would be equally in accord with the conceptions at the base of our constitutional law to confer equal favors upon doctors, or working men, or people who could afford to buy 1000-mile tickets”). After having placed such a great weight on the “public interest” side of the ledger, Holmes proceeds to consider the economic burden placed on the railroad, and it is only once he has reached that point in his sliding-scale analysis that “the question narrows itself to the magnitude of the burden imposed.” See 207 U.S. at 87. Holmes then finds the private burden slight in comparison with the very substantial public interest implicated in this regulation, and upholds the statute.

²⁵⁶See *BOSELMAN ET AL.*, *supra* note , at 139 (describing Holmes’ approach as a “balancing test”).

²⁵⁷See, e.g., *Eubank v. City of Richmond*, 226 U.S. 137, 144 (1912) (McKenna, J., for a unanimous Court) (stating that the police power “necessarily has its limits and must stop when it encounters the prohibitions of the Constitution” but “must be flexible and adaptive,” and the “point where particular interests or principles balance cannot be determined by any general formula in advance”); *Truax v. Corrigan*, 257 U.S. 312, 356-57 (1921) (Brandeis, J., dissenting) (“Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary can ordinarily be determined only by a consideration of contemporary conditions, social, industrial, and political, of the community to be affected thereby” and “involves a weighing of public needs as against private desires, and likewise a weighing of relative social values”); *Camfield v. U.S.*, 167 U.S. 518, 524 (1897) (Brown, J., for a unanimous Court) (citing Holmes’ Massachusetts Supreme Judicial Court opinion in *Rideout v. Knox* for the proposition that “the police power is not subject to any definite limitations, but is co-extensive with the necessities of the case and the safeguard of the public interests”)

the severable “support estate.”²⁵⁸ Whether the diminution is total or partial, great or small, is all but irrelevant to the outcome of this case on Holmes’ balancing approach, given the negligible weight Holmes discerns on the “public interest” side of the scale.²⁵⁹

Boiled to its irreducible core, the holding in *Mahon* was simply that the Kohler

²⁵⁸See 260 U.S. at 414-15.

²⁵⁹Holmes had applied similar reasoning in the 1910 case *Missouri Pac. R. Co. v. Nebraska*, 217 U.S. 196 (1920) (*Missouri Pac. II*), which held that a state statute requiring the railroad, at its own expense, to provide sidings to privately owned grain elevators along the railroad’s right-of-way effected an unconstitutional deprivation of property under the Fourteenth Amendment Due Process Clause. Holmes, writing for the Court, concluded that the statute served only the private interests of grain elevator operators, at the expense of the railroads. See 217 U.S. at 207 (“Why should the railroads pay for what, after all, are only private connections? We see no reason”). In the absence of a strong showing of public interest, even a modest deprivation of the railroad’s property—the cost of a few hundred dollars incurred to construct the necessary sidings—was sufficient to lead to the conclusion that the deprivation was unconstitutional. See 217 U.S. at 205 (“In the present cases, the initial cost is said to be \$450 in one and \$1,732 in the other, and to require the company to incur this expense unquestionably does take its property, whatever may be the speculations as to the ultimate return for the outlay”). Notice also that in the *Missouri Pac. II* case the characterization of this relatively modest economic burden as a “taking” (or deprivation) of the railroad’s property was not itself a constitutional conclusion, as in the Fifth Amendment Takings Clause context, but instead was a statement of obvious fact that served as a foundational premise for the constitutional analysis that follows. “Unquestionably,” Holmes says, there was a deprivation (“taking”) of the railroad’s property, to the tune of \$2,182 total, but that fact in itself doesn’t resolve the constitutional issue, which is whether this particular deprivation was constitutionally permissible as an exercise of the police power, or instead was a constitutionally prohibited deprivation of property without due process. Holmes, discerning little or no public, had little difficulty concluding under his sliding-scale test that the regulation “went too far” and fell outside the police power, see 217 U.S. at 208 even though railroads had been required to absorb much greater costs to achieve legitimate police power objectives. See, e.g., *Chicago B. & Q.*, 166 U.S. at 251-52 (holding that the railroad was not entitled to compensation for the costs of constructing gates, an operating tower, planking and fill, and additional operating costs associated with a grade crossing necessitated by the city’s construction of the street across its rail line, because “all property . . . is held subject to the authority of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people,” and “it is not a condition of the exercise of that authority that authority that the state shall indemnify the owners of property for the damage or injury resulting from its exercise”).

Act “cannot be sustained as an exercise of the police power,”²⁶⁰ and although the Act might be justified as an exercise of the companion power of eminent domain,²⁶¹ under established Fourteenth Amendment Due Process precedent an exercise of the eminent domain power requires payment of just compensation.²⁶²

Indeed, Holmes himself later placed *Mahon* squarely in this procession of Fourteenth Amendment Substantive Due Process cases turning on the legitimate scope of the police power, to be decided on the Holmesian sliding scale by balancing public against private interests against the background benchmarks of previously decided cases. Dissenting in the 1926 case *Frost v. Railroad Comm’n*, Holmes wrote:

“The only valuable significance of the much abused phrase police power is this power of the State to limit what otherwise would be rights having a pecuniary value, when a predominant public interest requires the restraint. The power of the State is limited in its turn by the constitutional guarantees of private rights, and it is often a delicate matter to decide which interest preponderates and how far the State may go without making compensation. The line cannot be drawn by generalities, but successive points in it must be fixed by weighing the particular facts. Extreme cases on the one side and on the other are *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, and *Pennsylvania Coal v. Mahon*, 260 U.S. 393.²⁶³

²⁶⁰260 U.S. at 414 (“It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved.”)

²⁶¹260 U.S. at 416 (“We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain”).

²⁶²260 U.S. at 415 (“260 U.S. at 415 (“The 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. A similar assumption is made in the decisions upon the Fourteenth Amendment”); *id.* at 416 (“We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change”).

²⁶³*Frost v. Railroad Comm’n*, 271 U.S. 583, 601 (1926) (Holmes, J., dissenting). In *Frost* the Court invalidated on Fourteenth Amendment Substantive Due Process grounds a California statute that conditioned the right of private contract carriers to use public highways upon their submission to being regulated under the same standards as common carriers. Holmes, dissenting,

What of Holmes' now famous statement that "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking?"²⁶⁴ Understanding *Mahon* in its proper historical context as a Substantive Due Process case turning ultimately upon the legitimate scope of the state's police power, this statement can only be understood to reiterate, in Holmesian sliding-scale terms, the well-established principle enunciated by Holmes himself a decade earlier in *Missouri Pac. R. Co.*,²⁶⁵ and by the Supreme Court forty-five years earlier in *Mugler*.²⁶⁶ Not every regulatory enactment purported by the state to be an exercise of the police power would be deemed by the courts to be legitimate. It was up to courts to police the murky boundary separating legitimate police power regulations from disguised exercises of eminent domain. As the *Mugler* Court explained :

"It belongs to that department [the legislature] to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety. It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, *limits beyond which legislation cannot rightfully go*. While every possible presumption is to be indulged in favor of the validity of a statute, the courts must obey the constitution rather than the law-making department of government, and must, upon their own responsibility,

thought the statute "well within the legislative power" as a straightforward effort by the state to regulate business traffic on potentially congested public highways, citing *Mahon* as one of the "extreme" guideposts to determine the legitimate scope of the police power. See 271 U.S. at 601. At the other extreme of this continuum, Holmes cited *Edward A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922), which had upheld as a legitimate exercise of the police power wartime emergency New York State housing statutes that had limited landlords' rights to evict holdover tenants and prohibited "unjust and unreasonable" rents.

²⁶⁴166 U.S. at 415.

²⁶⁵See *supra* note an accompanying test.

²⁶⁶*Mugler v. Kansas*, 123 U.S. 623 ("Nor can legislation of that character [i.e., police power regulation] come within the fourteenth amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law.")

determine whether, in any particular case, these limits have been passed.”²⁶⁷

In the 1894 case *Lawton v. Steele*, the Court elaborated further:

“The extent and limits of what is known as the ‘police power’ has been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance.” But “[t]o justify the state in thus interposing its authority in behalf of the public, it must appear--First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations; in other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.”²⁶⁸

As Holmes himself put it in applying his own sliding-scale variant on this principle in the 1921 case *Block v. Hirsh*—a case that predated *Mahon* by two years—under the police power “property rights may be cut down, and to that extent taken, without pay,”²⁶⁹ but it is “open to debate . . . whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain . . . regulations of the present sort if pressed to a certain height might amount to a taking without due process of law.”²⁷⁰

In fine, *Mahon’s* now widely-cited pronouncements that “the inherent limitation must have its limits” and “if regulation goes too far it will be recognized as a taking” reiterated the well-established Substantive Due Process doctrine that at some point purported police power regulations may fall outside the legitimate bounds of that power, and therefore run afoul of the Fourteenth Amendment Due Process guarantee.

²⁶⁷*Mugler v. Kansas*, 123 U.S. 623, 660-61 (1887) (emphasis added).

²⁶⁸*Lawton v. Steele*, 152 U.S. 133, 136-37 (1894).

²⁶⁹*Block v. Hirsh*, 256 U.S. 135, 155 (1921).

²⁷⁰256 U.S. at 156.

For that reason, and throughout the next fifty-five years of the pre-*Penn Central* era,²⁷¹ courts understood *Mahon* neither to have effected a major doctrinal innovation nor, as a case concerning the outer limits of the states' police power, to have any particular relevance to the Fifth Amendment Takings Clause.

V. The Long March Toward Incorporation

Part III established that, notwithstanding *Penn Central*, neither the *Chicago B & Q* Court nor its successors for the next eight decades understood that case to have made the Fifth Amendment Takings Clause applicable to the states. How could the *Penn Central* Court have made such an egregious blunder? Might some intervening doctrinal development have retroactively reinterpreted *Chicago B & Q*, so that its transubstantiation into an incorporation case had already been completed by the time *Penn Central* was decided?

To be sure, some eighty years of incorporation jurisprudence had passed between *Chicago B & Q* and *Penn Central*, and in the latter stages of that progression, *Chicago B & Q* had come to be cited with increasing frequency as a harbinger, and possibly an early prototype, of selective incorporation. But no Supreme Court decision prior to *Penn Central* had ever expressly held the Fifth Amendment applicable to the states. Nor had any majority opinion prior to *Penn Central* ever squarely attributed that holding to *Chicago B & Q*. In short, *Penn Central* was egregiously wrong in its history. *Penn Central*, not *Chicago B & Q*, was the defining moment when the scope of application of the Fifth Amendment Takings Clause was extended to the states.

²⁷¹See, e.g., *First Nat. Benefit Soc. v. Garrison*, 58 F. Supp. 972, 981-82 (S.D. Cal. 1945). The *Garrison* court cites *Mahon* for the proposition that “if a regulation goes too far it will be recognized as a taking,” but places that statement squarely in the context of a careful exegesis on the nature and limits of the police power, immediately after the statement that the “police power may be exerted . . . only when such legislation bears some real and substantial relation to the public health, safety, morals, or some other aspect of the general welfare.” 58 F. Supp. at 981. The clear import is that Holmes’ “goes too far” language means only, and precisely, that regulations falling outside the police power because they do not bear a “real and substantial relation” to police power objective—for example, because like the Kohler Act they neither materially advance public safety nor do they confer broad public benefits—will be deemed compensable exercises of the eminent domain power. Other pre-*Penn Central* cases are consistent with this interpretation. See *supra* note (listing cases characterizing *Mahon* as a substantive due process case turning on the limits of the police power.

The incorporation saga starts, of course, with the first Justice John Marshall Harlan, who originated the incorporation concept. As early as the turn of the twentieth century, in his forceful dissent in *Maxwell v. Dow*,²⁷² Harlan argued that all the rights citizens hold against the federal government under the original Bill of Rights to the Constitution had been fully incorporated against the states through the Fourteenth Amendment, either as “privileges and immunities of citizens of the United States” which states are forbidden to “abridge”²⁷³ or as “liberties” protected against “deprivation” under the Due Process guarantee.²⁷⁴ Harlan lost that debate.²⁷⁵ The incorporation idea would then lie dormant for nearly four decades before re-emerging in 1937 in *Palko v. Connecticut*.²⁷⁶

Like *Maxwell*, *Palko* was not a property case. The precise issue was whether Fourteenth Amendment Due Process prohibited a state from subjecting a criminal defendant to a second trial, a practice long prohibited to the federal government under the Fifth Amendment rule against double jeopardy. *Palko* thus gave the Court an occasion to opine on the relation between the Fifth Amendment and the Fourteenth. The *Palko* Court reaffirmed that the Fifth Amendment “is not directed to the States, but only to the Federal government,”²⁷⁷ and in so doing squarely rejected petitioner’s effort to

²⁷²*Maxwell v. Dow*, 176 U.S. 581, 605 (1900) (Harlan, J., dissenting). The majority held that the Bill of Rights guarantees of a jury trial and grand jury proceeding in criminal cases were not made applicable to the states through the Fourteenth Amendment. See *Maxwell*, 176 U.S. at 604-05.

²⁷³176 U.S. at 606 (Harlan, J., dissenting) (“privileges and immunities embrace at least those expressly recognized by the Constitution of the United States and placed beyond the powers of Congress to take away or impair”).

²⁷⁴*Maxwell v. Dow*, 176 U.S. at 614 (Harlan, J., dissenting) (“When . . . the Fourteenth Amendment forbade the deprivation by any state of life, liberty, or property without due process of law, the intention was to prevent any state from infringing the guaranties for the protection of life and liberty that had already been guarded against infringement by the national government”).

²⁷⁵See *Maxwell*, 176 U.S. at 604-05 (holding that the Fifth Amendment clauses guaranteeing rights to indictment by a grand jury and trial by jury are not made applicable to the states, either as “privileges and immunities” or as necessary to “due process of law”).

²⁷⁶*Palko v. Connecticut*, 302 U.S. 319, 323 (1937).

²⁷⁷302 U.S. at 322.

revive Harlan's blanket incorporation thesis.²⁷⁸ Justice Cardozo's majority opinion did acknowledge, however, that certain of the "immunities that are valid as against the federal government by force of the specific pledges of particular amendments" in the Bill of Rights have independently "been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states."²⁷⁹

Palko thus echoed the view expressed earlier in *Twining v. New Jersey*²⁸⁰ that some provisions of the Bill of Rights might run in parallel to requirements of the Fourteenth Amendment—not because the scope of application of the original amendments had been extended to the states, but because the concept of Due Process itself so required. The *Palko* Court specifically included in its list of independent but parallel Fourteenth Amendment protections the *Chicago B & Q* principle that compensation was required in cases of eminent domain,²⁸¹ reaffirming the longstanding view that the Fifth Amendment Takings and the Fourteenth Amendment Due Process Clauses independently embraced similar, though not necessarily identical, just compensation requirements.

A decade later, in 1947, Justice Hugo Black again tried—unsuccessfully—to revive Justice Harlan's blanket incorporation theory in his impassioned dissent in *Adamson v. California*,²⁸² when the relation of the Fifth Amendment to the Fourteenth was again at issue. The specific question was whether the Fifth Amendment privilege against self-incrimination applied to the states through Fourteenth Amendment Due Process. By a slender 5-4 majority, the *Adamson* Court again rejected the blanket incorporation thesis, following *Palko* in holding that the "due process clause of the Fourteenth Amendment . . . does not draw all the rights of the federal Bill of Rights under its protection."²⁸³ In an influential concurring opinion, Justice Frankfurter argued that the Fourteenth Amendment "neither comprehends the specific provisions by which the founders

²⁷⁸302 U.S. at 323 (petitioner contends that "[w]hatever would be a violation of the original bill of rights if done by the federal government is now equally unlawful by force of the Fourteenth Amendment is done by a state" but "[t]here is no such general rule").

²⁷⁹302 U.S. at 324-25.

²⁸⁰See *supra* notes and accompanying text.

²⁸¹302 U.S. at 326 & n. 4 (quoting *Twining*)

²⁸²332 U.S. 46 (1947).

²⁸³332 U.S. at 53.

deemed it appropriate to restrict the federal government nor is it confined to them.” Instead, Frankfurter emphasized, the Fourteenth Amendment has “independent potency” and an “independent function,”²⁸⁴ and is not to be understood as merely “a shorthand summary of the first eight amendments”²⁸⁵ for it “would be extraordinarily strange for a Constitution to convey such specific commands in such a roundabout and inexplicit way.”²⁸⁶

It would not be until the 1960s that the Court’s pro-incorporation wing, which included at various times Justices Black, Douglas, Brennan, and Goldberg, began to gain the upper hand. When they succeeded, however, it was not by arguing for blanket incorporation. Instead, their triumph was the result of patient, piecemeal expansion of the list of “fundamental rights” thought to be entailed in the Fourteenth Amendment Due Process “liberty” guarantee. Increasingly, the Court also began to advert to the original Bill of Rights to inform its understanding of the specific content of that list of Fourteenth Amendment “fundamental rights.” This approach came to be known as “selective incorporation.”

With the rise of the “selective incorporation” doctrine, citations to *Chicago B & Q* also became more frequent, indeed almost obligatory. In every selective incorporation case, win or lose, the pro-incorporation wing of the Court would recite the growing list of “fundamental rights” that had been held to constrain the states through the Fourteenth Amendment Due Process Clause, and parallels would be drawn to cognate rights found in the Bill of Rights. The right to just compensation in eminent domain, found in *Chicago B & Q* as far back as 1897, was a prominent member of every such list by virtue of its early vintage and durable years of service.²⁸⁷

These rote citations to *Chicago B & Q* were, strictly speaking, dicta. At no time prior to *Penn Central* did the Court have occasion to hold that *Chicago B & Q* had effected “incorporation” of the Fifth Amendment against the states, or that the Fifth Amendment

²⁸⁴332 U.S. at 66 (Frankfurter, J., concurring).

²⁸⁵332 U.S. at 62 (Frankfurter, J., concurring).

²⁸⁶332 U.S. at 63 (Frankfurter, J. concurring)

²⁸⁷See, e.g., *City of El Paso v. Simmons*, 379 U.S. 497, 534 (1965) (Black, J., dissenting) (arguing in dissent that the Fifth Amendment Takings Clause “is made applicable to the States by the Fourteenth Amendment”)

itself was now to be understood to apply to the states. Indeed, many of the references to *Chicago B & Q* in the majority opinions of this period display a profound (and probably intentional) ambiguity as to exactly what the *Chicago B & Q* holding did mean, and what it implied about the relation between the Fifth Amendment and the Fourteenth.

In *Duncan v. Louisiana* in 1968, for example, the Court stated that it “increasingly looked to the Bill of Rights for guidance” to determine “the meaning of this spacious language” of Fourteenth Amendment Due Process, and went on to state that “many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause,” including “the right to compensation for property taken by the State,” citing to *Chicago B & Q*.²⁸⁸ That proposition may be true as far as it goes, but it is decidedly ambiguous as to whether under *Chicago B & Q* the Fifth Amendment Takings Clause was “made applicable to” the states (as *Penn Central* would later hold), or whether instead the Fifth and Fourteenth Amendment just compensation requirements were still understood as separate, independent, parallel, and cognate, but possibly non-identical guarantees, as per the understanding of the *Chicago B & Q* Court and its successors.

Similarly, the statement in *Gideon v. Wainwright* that “the Court has made obligatory on the states the Fifth Amendment’s command that private property shall not be taken without just compensation”²⁸⁹ retains at least some ambiguity as to whether the Fifth Amendment is to be understood to be applicable to the states, or whether instead the Fourteenth Amendment is to be understood merely to encompass a parallel and cognate, though perhaps not identical, “command.” A similar ambiguity enshrouds *Griswold v. Connecticut*’s formulation that “the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal rights.”²⁹⁰

Perhaps the strongest pre-*Penn Central* pro-incorporation interpretation of the import of *Chicago B & Q* came in 1970 in *Oregon v. Mitchell*, where Justice Black, announcing the judgment of a fractured Court but expressing his opinion only, cited

²⁸⁸*Duncan v. Louisiana*, 391 U.S. 145 (1968). The citation to *Chicago B & Q* was curious in this context, for at no point in the *Chicago B & Q* opinion had the Court “looked to the Bill of Rights for guidance.” See *supra* notes and accompanying text.

²⁸⁹*Gideon v. Wainwright*, 372 U.S. 335, 341-42 (1963).

²⁹⁰*Griswold v. Connecticut*, 381 U.S. 479, 488 (1965).

Chicago B & Q to stand for the proposition that the Fifth Amendment was among “those protections of the Bill of Rights which we have held the Fourteenth Amendment made applicable to the States.”²⁹¹ But this citation to *Chicago B & Q* was only a passing mention in a long string cite,²⁹² with no analysis to back up its interpretation of that case. Like other references to *Chicago B & Q* in selective incorporation opinions in this period, it was also pure dicta, a clue perhaps to the Court’s emerging mode of analysis in selective incorporation jurisprudence, but utterly unnecessary to the holding of the case at hand.²⁹³ Moreover, the Black opinion would carry precious little precedential value in any event, insofar as it expressed the views of a single Justice—albeit in the unusual context of an opinion announcing the judgment of a divided Court that apparently could agree only on the result, and not on the rationale for its decision.

Pro-incorporation Justices occasionally made bolder claims about *Chicago B & Q*’s meaning and effect in a series of separate concurrences and dissents, but by their very nature these, too, had limited precedential value. For example, *Martin v. Creasy*, a 1959 case, concerned a claim by Pennsylvania property owners that conversion of the state roadway abutting their property to a limited access highway deprived them of property without due process in violation of the Fourteenth Amendment.²⁹⁴ The Court held that lower federal courts should abstain from enjoining the statute until plaintiffs had exhausted their state law remedies, which included a procedure for adjudicating compensation claims. Dissenting in part, Justice Douglas flatly stated that “these property owners are entitled to a declaratory judgment by the federal court, determining whether access to a highway is a property right, compensable under the Fifth

²⁹¹*Oregon v. Mitchell*, 400 U.S. 112, 129 & n.11 (1970)

²⁹²See U.S. at 129 & n.11 (listing *Chicago B & Q* in a footnote as one of 12 cases in which provisions of the Bill of Rights had been “made applicable to the States”).

²⁹³*Mitchell* concerned the constitutional permissibility under Congress’s power to enforce the Fourteenth and Fifteenth Amendments of a federal statute establishing a national voting age of 18 in both state and federal elections. See *Mitchell*, 400 U.S. at 117. Justice Black’s passing reference to Fifth Amendment incorporation is introduced by way of a gratuitous argument that Congress’s enforcement power is “not unlimited” because it may not, for example, “undermine those protections of the Bill of Rights which we have held the Fourteenth Amendment made applicable to the States.” 400 U.S. at 128-29.

²⁹⁴*Martin v. Creasy*, 360 U.S. 219 (1959).

Amendment (and made applicable to the States through the Fourteenth).²⁹⁵ Douglas cited *Chicago B & Q* in support of the applicability of the Fifth Amendment to the states.²⁹⁶

Two years later, in dissent in *Cohen v. Hurley*, Justice Brennan came close to adopting Douglas' reinterpretation, stating that the *Chicago B & Q* Court, "in fact if not in terms, applied the Fifth Amendment's just-compensation requirement to the States, finding in the Fourteenth Amendment a basis which Chief Justice Marshall in *Barron* found lacking elsewhere in the Constitution."²⁹⁷ In a 1965 separate concurrence in *Pointer v. Texas*, Justice Goldberg joined the parade of reinterpreters.²⁹⁸ Meanwhile Justice Black, while still arguing in favor of blanket incorporation, also endorsed the *Chicago B & Q* reinterpretation in 1965, stating in dissent in *City of El Paso v. Simmons* that the Fifth Amendment Takings Clause "is made applicable to the States by the Fourteenth Amendment."²⁹⁹ Black reiterated that position in 1970 in *In re Winship* when he stated, again in dissent, that "since the adoption of the Fourteenth Amendment this Court has held almost all the provisions of the Bill of Rights applicable to the States," including the Fifth Amendment—citing *Chicago B & Q*.³⁰⁰

Similar are the dissents by Justice Douglas in *Walz v. Tax Comm'n*³⁰¹ and *Johnson v. Louisiana*,³⁰² and separately by Justice Brennan in the latter case.³⁰³ But the pro-

²⁹⁵ 360 U.S. at 226 (Douglas, J., dissenting).

²⁹⁶ See 360 U.S. at 226.

²⁹⁷ *Cohen v. Hurley*, 366 U.S. 117, 155 (1961) (Brennan, J., dissenting)

²⁹⁸ *Pointer v. Texas*, 380 U.S. 400, 411-12 (Goldberg, J., concurring) ("The Court has held that the Fourteenth Amendment guarantees against infringement by the states the liberties of . . . the Just Compensation Clause of the Fifth Amendment," citing *Chicago B & Q*)

²⁹⁹ *City of El Paso v. Simmons*, 379 U.S. 497, 534 (1965) (Black, J., dissenting). Notably, in support of this proposition Black cited not only *Chicago B & Q* but also *Mahon* and *Griggs v.*

³⁰⁰ *In re Winship*, 397 U.S. 358 (Black, J., dissenting)

³⁰¹ *Walz v. Tax Comm'n*, 397 U.S. 358 (Douglas, J. dissenting)

³⁰² *Johnson v. Louisiana*, 406 U.S. 380 (Douglas dissenting)

³⁰³ *Johnson v. Louisiana*, 406 U.S. 395 (Brennan dissenting)

incorporation forces were apparently unable to muster clear majority support for the strong form of their revisionist reinterpretation of *Chicago B & Q* at any time through the 1960s and most of the 1970s.

Then along came *Penn Central*. Justice Brennan, writing for the Court, suddenly found that he commanded a majority to support a pro-incorporation holding. Remarkably, no dissent pointed out the import of that holding. It is not clear from this vantage point whether by this time the Court had come to believe its own rhetoric under the steady drumbeat of nearly two decades of dissents and concurrences reinterpreting *Chicago B & Q* as an incorporation case; or whether instead Justice Brennan's one-line disposition of the heretofore unresolved incorporation issue represented a sly piece of doctrinal legerdemain. Perhaps we shall never know. Perhaps in the end it does not matter what led the Court to this egregious misreading of its own history. What does matter is that the *Penn Central* Court held for the first time that "the Fifth Amendment . . . is made applicable to the States through the Fourteenth Amendment,"³⁰⁴ erroneously—and anachronistically—citing *Chicago B & Q* as its sole support for this historic and profoundly important incorporation holding, which would consolidate the Substantive Due Process and Takings Clause branches of "just compensation" law under a single roof, and thenceforth treat "takings" claims against states as virtually indistinguishable from claims against the federal government.

VI. Phantom Incorporation II: The Non-Argument in *Penn Central*

The *Penn Central* case came to the Supreme Court as it had been decided in the courts below: as a conventional Fourteenth Amendment Substantive Due Process case, decided by examining the legitimate bounds of the state's police power and how far that power allowed states to go in adjusting the boundaries of property rights. While hinting that the constitutionality of the legislative scheme might be a close call, both the New York Appellate Division and the New York Court of Appeals had upheld New York City's landmark preservation ordinance as a valid police power regulation, therefore constitutionally permissible under established Due Process doctrine.³⁰⁵ On appeal to the

³⁰⁴*Penn Central*, 428 U.S. at 122.

³⁰⁵See *Penn. Cent. Trans. Co. v. City of New York*, 50 A.D.2d 265, 271, 274, 377 N.Y.S.2d 20, 27, 29 (N.Y. App. Div. 1st Dept.1975) ("the line between a compensation 'taking' and a noncompensable 'regulation' is sometimes difficult to discern" but "New York City's

U.S. Supreme Court, appellee New York City and the states of California and New York as amici continued to argue the case exclusively on Fourteenth Amendment Substantive Due Process grounds, the pivotal issue being whether protection of historic landmarks fell within the scope of the police power.³⁰⁶ Given the impressive line of Fourteenth Amendment Due Process precedent on their side, their litigation strategy must have seemed warranted.

Appellant Penn Central Transportation Co., however, took a different tack. While framing the question as whether just compensation was owed under principles of Fourteenth Amendment Due Process,³⁰⁷ Penn Central's brief nonetheless relied almost exclusively on Fifth Amendment Takings Clause precedents involving the federal government.³⁰⁸ Perhaps recognizing the weakness of its incorporation argument, the railroad relegated that discussion to a single brief footnote where it stated in conclusory fashion, without support or analysis, that *Chicago B & Q* had established that "the

Landmarks Preservation Law is a valid exercise of its police power"); *Penn Cent. Transp. Co. v. City of New York*, 42 N.Y.2d 324, 328, 397 N.Y.2d 914, 916 (N.Y. Ct. App.1977) ('the regulation does not deprive plaintiffs of property without due process of law, and should be upheld as a valid exercise of the police power').

³⁰⁶Appellee New York City's brief argued straightforwardly that the city's landmarks ordinance was a valid police power regulation and therefore not compensable under established Due Process doctrine, relying on such classic police power cases as *Goldblatt v. Hempstead*, *Hadacheck v. Sebastian*, *Euclid v. Ambler*, and *Village of Belle Terre v. Boraas*. See *Penn Cent. Transp. Co. v. City of New York*, Appellees' Brief at *20-*40. Amicus briefs filed separately by the states of New York and California attempt to rebut Appellant's contention that the case involved principles of eminent domain.

³⁰⁷See *Penn Cent. Transp. Co. v. City of New York*, Brief for Appellants (Jan. 18, 1978), available at: 1978 WL 206882 [hereinafter Appellants Brief], at *12, n. 10 ("Penn Central argues here that the City of New York's action violates the Due Process Clause of the Fourteenth Amendment"); id at *6 (stating that Penn Central was seeking "equitable relief and monetary damages, alleging, inter alia, that the action of the Landmarks Commission . . . constituted a taking of private property without compensation in violation of due process and equal protection of the laws"). The twinning of "due process" and "equal protection" unmistakably adverts to the requirements of the Fourteenth Amendment as the basis for Penn Central's constitutional claim.

³⁰⁸Appellants Brief, at *12- *43 (citing inter alia *U.S. v. Causby*, *U.S. v. Fuller*, *U.S. v. Reynolds*, *U.S. v. General Motors*, *U.S. v. Dickinson*, *U.S. v. Cress*, *Armstrong v. U.S.*, *Monongahela Navigation Co. v. U.S.*, *Olson v. U.S.*, *U.S. v. Virginia Electric Power Co.*, *Portsmouth Co. v. U.S.*, *U.S. v. Twin City Power Co.*, and *U.S. v. Miller*).

constitutional protections” of the Due Process and Takings Clauses “are the same.”³⁰⁹ This, of course, was simply inaccurate as a historical matter: the *Chicago B & Q* Court had never even mentioned the Fifth Amendment Takings Clause, much less expressly equated it with the requirements of Fourteenth Amendment Due Process,³¹⁰ and in the eight decades subsequent to *Chicago B & Q* the Court had continued to treat the two just compensation requirements as separate and distinct³¹¹ and applied distinctive modes of analysis to cases arising under each.³¹²

In the alternative, the Penn Central brief suggested in a single sentence in the same footnote that the “same result” —that is, the unity of the Fourteenth Amendment Due Process and Fifth Amendment Takings Clause flavors of just compensation law—“is reached under the ‘incorporation doctrine.’”³¹³ For this proposition the Penn Central brief cited not *Chicago B & Q*, but rather *Gideon v. Wainwright*, the 1963 case in which the Supreme Court had held the accused’s right to counsel in a criminal case applied to the states as a matter of Fourteenth Amendment Due Process.³¹⁴ Justice Black’s majority opinion in *Gideon* had indeed made a passing reference, in dicta, to *Chicago B & Q*’s inclusion of a just compensation principle in Substantive Due Process as a kind of rough precedent for expansion of Due Process to include other “fundamental” rights guaranteed by the Bill of Rights.³¹⁵ But the precedent that the Penn Central brief was able to muster for its incorporation claim was exceedingly meager and indirect, the analysis in support of that claim virtually non-existent, and discussion of the broader implications of such a holding entirely absent.

Neither the City of New York as appellee, nor the states of New York and

³⁰⁹Appellants Brief at *12, n. 10.

³¹⁰See supra notes and accompanying text.

³¹¹See supra note and accompanying text

³¹²See supra notes and accompanying text

³¹³Appellants Brief at *12, n. 10.

³¹⁴*Gideon v. Wainwright*, 372 U.S. 335 (1963)

³¹⁵*Gideon*, 372 U.S. at 341-42 (“though not always in precisely the same terminology, the Court has made obligatory on the States the Fifth Amendment’s command that private property shall not be taken for public use without just compensation”)

California as amici, bothered to mount a response to the railroad's slender incorporation argument,³¹⁶ suggesting that they regarded the incorporation claim far-fetched under the Supreme Court's established property jurisprudence. Instead, their briefs made the standard sorts of Fourteenth Amendment Substantive Due Process arguments, directed toward showing that New York City's landmarks ordinance was a valid exercise of the police power,³¹⁷ and that appellant Penn Central had not made the requisite affirmative showing that it had been denied all economically viable use of its property.³¹⁸ Indeed, the New York City, New York State, and California briefs express more than a trace of dismay and astonishment at what they regard as the Penn Central brief's brazen disregard of applicable Fourteenth Amendment Due Process and police power precedents,³¹⁹ and its seemingly equally bizarrely misplaced reliance on Fifth Amendment Takings Clause precedents.³²⁰ Neither appellant, nor appellee, nor any of

³¹⁶See Penn Central Transp. Co. v. City of New York, Brief for Appellees (Mar. 2, 1978), available at: 1978 WL 206883, at *20-39 [hereinafter Appellee's Brief] (arguing that the City's action "did not deprive the owner of due process" because on traditional Fourteenth Amendment Due Process principles the Landmarks Ordinance was a legitimate exercise of the police power, while not responding to appellant's incorporation argument); Brief of the State of New York, Amicus Curiae (Mar. 6, 1978), available at: 1978 WL 206891 [hereinafter NY State Brief]; Brief of Amicus State of California (Mar. 1, 1978), available at: 1978 WL 206888 [hereinafter California Brief].

³¹⁷See Appellee's Brief at *16 ("The appellants, without any analysis, have argued that the City of New York, in applying the Landmarks Law to the Grand Central Terminal, has taken their property and must pay the appellants compensation It is our position that the designation of the Grand Central Terminal as a landmark was a proper exercise of the police power. Since the appellants did not establish that the property, as restricted, was not economically viable, the complaint was properly dismissed").

³¹⁸See

³¹⁹See Appellee's Brief at *22 ("This Court has established a substantial body of precedent setting forth the appropriate criteria for determining whether a land use regulation is a valid exercise of the police power"). New York State Brief at *17 ("Recognizing the extreme nature of their position, appellants seek to paint this case as one in which a different rule for landmarks [than for other police power regulations] is established. But that is not the case. The City's law is valid under the traditional police power rules within which this Court has steered for decades").

³²⁰See, e.g., Appellee's Brief at *22 ("It is our position that appellants have improperly confused principles of eminent domain . . . with principles governing a lawful exercise of the police power"); New York State Brief at *17 ("Likewise, appellants' portrayal of this as a

the amici discussed the federalism implications of the sort of sweeping incorporation holding the *Penn Central* Court ultimately would make.³²¹

What is perhaps most puzzling about the Supreme Court's *Penn Central* decision is how casually it swept away a century of Fourteenth Amendment Due Process jurisprudence, seeming not to entertain seriously the possibility that the case should be decided—as it had been decided in the courts below, and as the parties had argued it—on Fourteenth Amendment Substantive Due Process grounds. Nor did the Court consider for even a moment that possibility that what should count as a “taking” (“deprivation”) of property by a state or its political subdivision without Due Process under the Fourteenth Amendment might differ from what counted as a “taking” of property by the federal government under the Fifth Amendment Takings Clause, as courts had long insisted.

Instead, almost *sua sponte*—and without benefit of thorough briefing on the incorporation issue or adjudication of that issue in the courts below—the *Penn Central* Court collapsed a century of Fourteenth Amendment Substantive Due Process precedent into an even longer line of Fifth Amendment Takings Clause doctrine, indiscriminately lifting precedents from what had been until then distinct lines of cases and weaving them into a new, unified “regulatory takings” doctrine applicable to the states and the federal government alike.³²²

But the results were far from a merger of equals. Instead, Substantive Due Process principles—including most prominently the robust police power defense available to states and their subdivisions, on which Substantive Due Process cases had

‘taking’ case, as if it were eminent domain, is unwarranted and misleading”); *id.* at *21 (“The last-ditch attempt to portray this as an eminent domain case blatantly ignores the factual findings below and forty years of decisions broadening the police power of the municipalities, notably in the land-use area.”); California Brief at * 4 (“*Penn Central*’s legal analysis flows from the premise that the actions of New York City in regard to the Grand Central Terminal constituted a taking of private property for public use. We shall demonstrate that this is an incorrect premise. Once the faulty nature of that premise is recognized, the irrelevance of much of *Penn Central*’s argument becomes apparent”).

³²¹Rather than offering a lengthy footnote attempting to “prove the negative,” this Article invites the reader to examine the briefs in the *Penn Central* case, available on Westlaw.

³²²*Penn Central*,

mainly turned—would be virtually eliminated from regulatory takings analysis.³²³ Henceforth, all regulatory “takings” analysis would attempt to apply the text of the Fifth Amendment Takings Clause to the facts at hand, requiring endless judicial parsing of the opaque constitutional terms “take” and “taking.” Lost in the shuffle was the notion, well understood by the Courts of the Substantive Due Process era, that as a logically prior question, before one could decide whether a claimant’s property was “taken,” one first had to ascertain whether the claimant’s property rights extended as far as claimed; and that answering this question with the aid of state law and the state’s reserved police power to alter such law within pre-determined limits was a sounder approach to resolving the bulk of such claims.

VII. The Rise and Fall of the Police Power: What We’ve Lost

The police power was always a spongy, indefinite concept. As nineteenth and early twentieth century courts never tired of pointing out, its uncertain contours could never be fully specified in advance.³²⁴ A typical account was that given in the 1926 case *Village of Euclid v. Ambler Realty Co.*, where the Court said: “The line which in this field separates the illegitimate assumption of power is not capable of precise delineation. It varies with circumstances and conditions.”³²⁵

This indeterminacy was both the police power’s greatest virtue and its greatest vice. On the positive side, it left ample room for the law of property to evolve in response to changing social needs, conditions, and understandings. As Ernst Freund argued in his 1904 treatise, the police power was to be understood “not as a fixed quantity, but as the expression of social, economic and political conditions. As long as these conditions vary, the police power must

³²³See *infra* notes and accompanying text.

³²⁴See, e.g., *Adair v. US*, 208 U.S. 161, 173 (1908) (“There are, however, certain powers existing in the sovereignty of each state in the Union, somewhat vaguely termed ‘police powers,’ the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the 14th Amendment was not designed to interfere”).

³²⁵*Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926).

continue to be elastic, i.e., capable of development.”³²⁶

More ominously, however, such indeterminacy left both legislatures and property claimants with a great deal of *ex ante* uncertainty as to the ultimate scope of property entitlements and the boundaries of the state’s reserved power to alter property rules through regulation. Legal uncertainty in turn invited frequent litigation,³²⁷ and left much discretionary power in the hands of judges to determine—on a case-by-case, situation-specific basis, and without the aid of clear rules or well articulated guiding principles—when a regulation “went too far” and overstepped the proper bounds of the state’s police power.

These problems were compounded by the conceptual trajectory of the police power itself. Originally conceived as an important but relatively narrow power to prevent public and private nuisances through prophylactic regulation, reflecting the old common law maxim *sic utere tuo ut alienum non laedes*,³²⁸ the police power had evolved over the years into a broad, all-encompassing justification for all manner of governmental regulation thought to advance “public welfare” or “the public interest.”³²⁹

Early formulations emphasized the state’s inherent power to supplement the largely

³²⁶Freund, *supra* note , at 3.

³²⁷See Freund, *supra* note , at 65 (“It is moreover a most significant fact that there is hardly any important police legislation which is not questioned in the Supreme Court as violating the Fourteenth Amendment”).

³²⁸See, e.g., *Munn v. Illinois*, U.S. (“the establishment of laws requiring each citizen to so conduct himself, and so use his property, as not unnecessarily to injure another . . . is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedes*. From this source come the police powers . . .”); *Richmond, F.&P. R. Co. v. City of Richmond*, 96 U.S. 521, 528 (1877) (prohibitions on the use of locomotives in the public streets “clearly rest upon the maxim *sic utere tuo ut alienum non laedas*, which lies at the foundation of the police power”); *Euclid v. Ambler*, 272 U.S. at 386 (“In solving doubts [about the legitimate scope of the police power], the maxim ‘sic utere tuo ut alienum non laedes,’ which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of the power”); *Leisy v. Hardon*, 135 U.S. 100 (1890) (“The police power includes all measures for the protection of the life, the health, the property, and the welfare of the inhabitants, and for the promotion of good order and the public morals. It covers the suppression of nuisances, whether injurious to the public health, like unwholesome trades, or to the public morals, like gambling-houses and lottery tickets.”)

³²⁹See *Berman v. Parker*, 348 U.S. 26 (1954)

retrospective common law doctrines of public and private nuisance with prophylactic regulation aimed at preventing nuisance-like injuries to the rights of other property owners or to the public health, safety, and morals. As Chancellor Kent explained in his *Commentaries*:

“But though property be thus protected, it is still to be understood that the law-giver has the right to prescribe the mode and manner of using it, *so far as may be necessary to prevent the abuse of the right, to the injury or annoyance of others, or of the public*. The government may, by general regulations, interdict such uses of property as would create nuisances and become dangerous to the lives, or health, or peace, or comfort of the citizens. Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam-power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, *on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community.*”³³⁰

Kent, writing his *Commentaries* in 1826, could not have anticipated the role the police power would later come to play in Fourteenth Amendment property jurisprudence. But his view that private property rights were inherently limited by the state’s reserved power to enact prophylactic, nuisance-preventing regulations gained general adherence in ante-bellum property jurisprudence under the denomination “police power.”³³¹ When this police power limitation on

³³⁰2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 276 (1826). See also THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 595 (1868) (listing examples of legitimate exercises of the police power, including restrictions on “[t]he keeping of gunpowder in unsafe quantities in cities and villages, the sale of poisonous drugs, unless labeled, allowing unmuzzled dogs to be at large when danger of hydrophobia is apprehended; or the keeping for sale unwholesome provisions”).

³³¹See, e.g., *Coates v. City of New York*, 7 Cow. 585 (S. Ct. N.Y. 1827) (upholding against constitutional challenge an ordinance prohibiting interment of the dead in New York City, stating that it “stands on the ground of being an authority to make police regulations in respect to nuisances,” and “[e]very right, from absolute ownership in property down to a mere easement, is purchased and holden subject to the restriction that it shall be so exercised as not to injure others”); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827) (“the power to direct the removal of gunpowder is part of the police power, which remains, and unquestionably ought to remain, with the States”); *Baker v. Boston*, 29 Mass. 184, 198 (1831) (“Police regulations to direct the use of private property so as to prevent its proving pernicious to the citizens at large, are not void, although they may in some measure interfere with private rights without providing for compensation,” for “every citizen holds his property subject to such regulations”); *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 84-85 (1851) (“We think it a settled principle, growing out of the nature of a well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of its

property rights was later absorbed into Fourteenth Amendment Substantive Due Process jurisprudence, it arrived not as an artificially contrived “exception” to takings law, but as part of the Supreme Court’s understanding that it was longstanding background principle of every state’s law of property, and therefore a principle that must inform adjudication of every claim of an unconstitutional deprivation of “property.”³³²

Over time, a catch-all category of “general welfare” was added to “public health, safety, and morals” in the list of legitimate police power purposes, and courts and commentators came to understand the police power as exceeding the narrow bounds of nuisance prevention. As Ernst Freund stated in 1904:

“[M]ost of the self-evident limitations upon liberty and property in the interest of peace,

may be so regulated, that it shall not be injurious to the equal enjoyment of other having an equal right to the enjoyment of their property, nor injurious to the rights of the community,” and “the power we allude to is . . . the police power”); *Woodbridge v. City of Detroit*, 8 Mich. 274 (1860) (exercises of the police power are “not generally supposed to come within the [state] constitutional provisions against taking of private property for public use”); *Dorman v. State*, 34 Ala. 216 (1859) (the police power “is derived, not from a narrow interpretation of this constitutional guaranty [i.e., state constitutional due process clause], but from a principle of the common law older than constitutions, coeval with the earliest civilized ideas of property, that every man shall so use his own so as not to injure another”).

³³²See, e.g., *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306, 308 (1905) (stating that it is “firmly established in the jurisprudence of this court that the states possess, because they have never surrendered, the power . . . to prescribe such regulations as may be reasonable, necessary, and appropriate for the protection of the public health, safety, and comfort; and that no person has an absolute right to be at all times and in all circumstances free from restraint; but persons and property are subject to all kinds of constraints and burdens, in order to secure the general comfort, health, and general prosperity of the state”); *Powell v. Pennsylvania*, 127 U.S. 678, 683 (1888) (“as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects, and . . . the fourteenth amendment was not designed to interfere with the exercise of that power by the states”); *Barbier v. Connolly*, 113 U.S. 27, 31 (1884) (“neither the [Fourteenth] amendment--broad and comprehensive as it is--nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity”); *Northwestern Fertilizing Co. v. Village of Hyde Park*, 97 U.S. 659, 667 (1878) (upholding prohibition on transportation of offal through the village as a valid police power regulation, stating “[t]hat power belonged to the states when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction”).

safety, health, order and morals are punishable at common law as nuisances. . . . But no community confines its care of the public welfare to the enforcement of the principles of the common law. The state . . . exercises its compulsory power for the prevention and anticipation of wrong by narrowing common law rights through conventional restraints and positive regulations which are not confined to the prohibition of wrongful acts. It is this latter kind of state control which constitutes the essence of the police power.”³³³

In the late nineteenth and early twentieth century heyday of Substantive Due Process, however, the term “general welfare” was usually narrowly construed to mean something like “for the reciprocal benefit of property owners generally”³³⁴ or “for the benefit of the entire public.”³³⁵ Most importantly, the “general welfare” was thought to exclude “class” legislation that treated like cases differently, or had the purpose or effect of redistributing rights or benefits from one person or class to another. Regulations of these kinds simply fell outside the police power. As the Supreme Court explained in the 1884 case *Barbier v. Connolly*: “Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated” is constitutionally permissible.”³³⁶ A decade later, in the 1894 case *Lawton v. Steele*, the Court elaborated:

“To justify the state in thus interposing its [police power] authority in behalf of the public,

³³³Freund, *supra* note , at 6.

³³⁴See, e.g., *Fallbrook Irrigation Dist, v. Bradley*, 164 U.S. 112, 163 (1896) (“Statutes authorizing drainage of swamp lands have frequently been upheld independently of any effect upon the public health, as reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property”).

³³⁵See, e.g., *Chicago B. & Q. Ry. Co. v. Illinois*, 200 U.S. 561, 592 (1906) (“We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety.”); *Bacon v. Walker*, 204 U. S. 311, 318 (1907) (stating that the police power is not confined “to the suppression of what is offensive, disorderly, or unsanitary,” but “extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people”); *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911) (stating that the police power “extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce.”)

³³⁶*Barbier v. Connolly*, 113 U.S. 27, 32 (1884).

it must appear--First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.”³³⁷

Later courts and commentators offered additional refinements on the tests for determining the legitimacy of an assertion of police power authority: a purported police power regulation would be presumed valid unless it was “arbitrary,” “unreasonable,” or the means chosen bore no substantial relation to the end sought.³³⁸ Under these restrictions the police power, which operated as an inherent limitation on property rights, also “had its limits.”³³⁹

As the primary rubric under which Fourteenth Amendment Due Process claims of alleged regulatory “deprivations” (or “takings”) of property were analyzed, the police power had real substantive bite: it both empowered the state to regulate to achieve broad, public-regarding purposes, while at the same time it limited the scope of that power. Courts refused to draw bright-line rules or clearly articulated standards to delineate the precise boundaries of the state’s police power *ex ante*,³⁴⁰ and they professed deference to legislative authority to make that determination in the first instance.³⁴¹ A surprisingly large number and variety of regulations passed constitutional muster, even if the effect was to place substantial financial burdens on property

³³⁷Lawton v. Steele, 152 U.S. 133, 136 (1894)

³³⁸See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 385 (1926) (“it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare”); Truax v. Corrigan, 257 U.S. 312, 355 (1921) (“although the change may involve interference with existing liberty and property of individuals, the statute will not be declared a violation of the due process clause, unless the court finds that the interference is arbitrary or unreasonable or that, considered as a means, the measure has no real or substantial relation of cause to a permissible end”); Great Northern Railway v. Clara City, 246 U.S. 434, 439 (1918) (“the state is primarily the judge of regulations required in the public interest. Such statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the state in the public interest”).

³³⁹Cf. Mahon, 166 U.S. at ; Mugler, 123 U.S. at 661 (“There are, of necessity, limits beyond which legislation cannot rightfully go”).

³⁴⁰See, e.g.,

³⁴¹See, e.g., Gitlow v. New York, U.S. (legislative determinations of police power authority “must be given great weight. Every presumption is to be indulged in favor of the validity of the statute”);

claimants.³⁴² Yet the state could not safely assume that every regulatory enactment would be a slam dunk winner against a Substantive Due Process challenge. Some regulatory enactments were held impermissible, either because the means chosen did not exhibit a sufficiently close “fit” with the alleged purpose of the regulatory scheme,³⁴³ or because the scheme was thought to draw “arbitrary” distinctions, or to burden some for the benefit of others in the manner of “class legislation”,³⁴⁴ or because courts were simply unpersuaded by what they regarded as “unreasonable,” inadequate, irrational, or unconvincing justifications for the regulation in question.³⁴⁵

Throughout this period, the term “taking” was routinely invoked as a casual synonym for a prohibited “deprivation” of property without due process of law in violation of the Fourteenth Amendment.³⁴⁶ But the Substantive Due Process branch of just compensation cases did not turn on a careful parsing of the verb “to take” or its noun form “taking.” Instead, the analysis centered on the extent of the claimant’s property rights in light of the state’s reserved power to regulate. To delineate that boundary in any particular case required a careful examination of the nature of, and justification for, the governmental action, and whether that action was fairly embraced within the scope of the state’s reserved regulatory power—the police power.

The spotlight thus shone directly on the central questions in property law: how are we to understand the nature and limits of property rights in this case and in general, and how are we to understand the nature and proper limits of the state’s power to alter and amend property rights over time in response to important and changing social needs? These questions were confronted directly and candidly, in marked contrast to today’s regulatory takings jurisprudence which supplies answers to those same questions only obliquely, through the Supreme Court’s occasional, disjointed, and undertheorized delphic utterances on the deep interior meaning of the words “to take” and “taking.” Direct attention to the central issues in property regulation within a framework that expressly acknowledged and accommodated the need for dynamic change in the law of property as a vital social institution in a complex and ever-changing world should be regarded a singular virtue of Substantive Due Process property jurisprudence.

But there was a dark side to Substantive Due Process review. Terms like “arbitrary” and “unreasonable” are highly indefinite and malleable, consequently susceptible to inconsistent application, manipulation, and conscious or unconscious interposition of the subjective policy preferences of the reviewing court into constitutional adjudication. Placing broad discretionary

³⁴²See, e.g., *Mugler, Hadachek, Miller v. Schoene, Goldblatt v. Hempstead*

³⁴³See, e.g.,

³⁴⁴

³⁴⁵See, e.g.,

³⁴⁶See, e.g.,

power in the hands of reviewing courts, Substantive Due Process review led to the well-known abuses of the *Lochner* era, not least the tendency of some common law judges to second guess the political branches on fundamental questions of social policy in light of their own allegiance to longstanding common law precepts or tacit bias in favor of private ordering.³⁴⁷ Eventually, *Lochner*-ization led in turn to the late New Deal repudiation of Substantive Due Process as the occasion for searching review of economic regulation of any kind.³⁴⁸

Arguably, however, the New Deal reaction only compounded the difficulties associated with the police power. As both cause and consequence of post-New Deal courts' extreme deference to governmental assertions of police power authority, the once-narrow concept of the "general welfare" swelled to include almost any legislative finding of a "public interest," whether or not the benefit was confined to a particular class. With unchecked expansion of one of its core components, the police power itself became increasingly bloated, and began to lose its analytical bite.

Inflation of the police power, especially under the rubric of the "general welfare," was well underway by the early twentieth century. In part, this reflected the influence of Justice Holmes, whose anti-formalist resistance to categorical line-drawing led him to find some degree of public interest in every legislative enactment.³⁴⁹

Inflation of the police power reached its apex in *Berman v. Parker*,³⁵⁰ an influential 1954 Supreme Court case in which that quintessential New Dealer, Justice William O. Douglas, pronounced the police power virtually without limits. Ironically,

³⁴⁷See

³⁴⁸See, e.g., *Nebbia v. New York*, 291 U.S. 502, 537 (1934) (upholding New York statute setting minimum prices for milk, stating that if "the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied"); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding a Washington statute setting a minimum wage for women over the dissent of four Justices who argued that on established Substantive Due Process standards the legislation arbitrarily interfered with the liberty of contract, redistributing rights from employers to benefit a particular class of workers); *Lincoln Federal Labor Union No 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536-37 (1949) (construing *Nebbia* and *West Coast Hotel* as rejecting the due process philosophy of the *Lochner* era, stating that "the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a straight jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare").

³⁴⁹See

³⁵⁰*Berman v. Parker*, 348 US 26 (1954).

Berman need not have been a police power case at all, and arguably at least, its utterances on the police power might be regarded as mere dicta unnecessary to the outcome of the case. The question before the *Berman* Court was whether an urban renewal scheme in the District of Columbia, which would condemn and demolish existing buildings and turn the vacant land over to new private developers, constituted a valid “public use” sufficient to satisfy the Fifth Amendment eminent domain clause, which of course required not only “just compensation” but also a “public use.”³⁵¹

Inexplicably, and without analysis or citation to authority, Justice Douglas equated the “public use” requirement in eminent domain with the “police power,” and both with a “public purpose”³⁵² or “public interest.”³⁵³ Perhaps given the particular facts of the case, the confusion is understandable. In enacting the statute authorizing the urban renewal, Congress had set out a police power-like justification, stating that substandard housing and blighted areas are “injurious to the public health, safety, morals, and welfare.”³⁵⁴ Simultaneously, the statute had simply declared public acquisition of property in these areas to be a “public use.”³⁵⁵ Courts had previously thought a police power justification was not necessary to support a legitimate exercise of eminent domain—and indeed, Substantive Due Process courts had regularly held that state actions falling outside the police power were by default to be deemed implied exercises of the eminent domain power,³⁵⁶ clearly suggesting that the police power and the eminent domain power (or its “public use” requirement) had not been understood as not co-extensive. Be that as it may, the *Berman* Court characterized the police power (as well as the public use requirement from which it was now indistinguishable) in an

³⁵¹“ . . . nor shall private property be taken for public use, without just compensation.” U.S. Const., Amdt V. The Fifth Amendment applied in the District of Columbia because it was a federal district, governed pursuant to acts of Congress.

³⁵²348 U.S. at 32 (stating that the principle that it is for the legislature and not the courts to determine the proper boundaries of the police power “admits of no exception merely because the eminent domain power is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one”).

³⁵³See 348 U.S. at 42.

³⁵⁴See 348 U.S. at 28.

³⁵⁵See 348 U.S. at 29.

³⁵⁶See *supra* notes and accompanying text.

unprecedentedly expansive way, stating that any “attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts,”³⁵⁷ and “[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”³⁵⁸

In short, *Berman* seemed to say that the police power is more or less whatever the legislature proclaims it to be, because “the concept of the public welfare is broad and inclusive,”³⁵⁹ “the values it expresses are spiritual as well as physical, aesthetic as well as monetary,”³⁶⁰ and “[i]t is within the power of the legislature to determine that a community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”³⁶¹

With no apparent judicially enforceable limit to the “general welfare,” there was no longer any meaningful limit to the police power. Without such limits, the police power could no longer serve to delineate the outer boundaries of legitimate governmental assertions of authority. The project of judicial policing of the outer limits of the police power, long the defining edge in the Court’s Substantive Due Process property jurisprudence, was largely a spent doctrinal force.

In two of the most influential legal articles of the 1960s, Joseph Sax and Frank Michelman separately argued for abandonment of the police power defense in “takings” cases on grounds that the indefinite contours of the doctrine left it open to manipulation and inconsistent application in the hands of both legislators and courts.³⁶² The degree to which the Sax and Michelman critiques actually influenced subsequent Supreme Court jurisprudence is beyond the scope of this Article, but it is a plausible supposition that the views of two of the most eminent property scholars of the era may have contributed

³⁵⁷348 U.S. at 32.

³⁵⁸348 U.S. at 32.

³⁵⁹348 U.S. at 33 (citing *Day-Brite Lighting v. Missouri*, 342 U.S. 421, 424)

³⁶⁰348 U.S. at 33.

³⁶¹348 U.S. at 33.

³⁶²See Joseph L. Sax, *Takings and the Police Power*, 74 *Yale L.J.* 36 (1964); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation”* *Law*, 80 *HARV. L. REV.* 1165 (1967).

to the Court’s ultimate abandonment of the police power as a vehicle for analysis in the Fourteenth Amendment Substantive Due Process just compensation context. Perhaps we will never know, however, for the Supreme Court has never acknowledged that it abandoned the police power defense; much less did it offer a coherent rationale for so doing. Instead, the Court quietly achieved that objective through the back door in *Penn Central* and its progeny, when it collapsed all “takings” cases into a single Fifth Amendment Takings Clause category and thereby eliminated the independent role of the Fourteenth Amendment Due Process just compensation requirement—and with it, the police power defense on which the Due Process cases had turned.

Sax and Michelman’s critiques of the courts’ police power jurisprudence are powerfully argued and in important respects persuasive. They echo the late New Deal repudiation of *Lochner*-style Substantive Due Process review of legislative enactments, and of legal formalism more generally.³⁶³ Each after its own fashion attempts to reconstruct takings law and to place it on a more modern, theoretically elegant footing.

Both accounts are also in important respects ahistorical. Both Michelman and Sax begin by assuming a unified law of “takings,” attributing full incorporation of the Fifth Amendment Takings Clause to the states by way of *Chicago, Burlington & Quincy*.³⁶⁴ This echoed the argument that the pro-incorporation wing of the Supreme Court had been advancing in a series of dissents and separate concurrences in the period leading up to publication of the Sax and Michelman articles,³⁶⁵ but as Part documents, the applicability of the Fifth Amendment Takings Clause to the states was not yet the law of the land by the mid-1960s, and certainly was not the understanding in the late nineteenth and early twentieth centuries.³⁶⁶ Sax’s retrospective reading of Substantive Due Process cases from this period as providing a gloss on the meaning of the Fifth Amendment

³⁶³See Sax, *supra* note , at 37 (“Harlan’s theory reduces the constitutional issue to a formalistic quibble” and has not “proved able to produce satisfactory results”).

³⁶⁴See Sax, *supra* note , at 36 n. 2 (stating that “[t]he constitutional provision at issue here is that of the fifth amendment which provides ‘nor shall private property be taken for public use without just compensation.’ This requirement has traditionally been viewed as incorporated into the fourteenth amendment,” and citing *Chicago B & Q*); Michelman, *Property, Utility and Fairness* *supra* note , at

³⁶⁵See *supra* notes And accompanying text.

³⁶⁶See *supra* Part

Takings Clause is therefore as deeply ahistorical as the *Penn Central* Court's subsequent misreading of the previous century of property jurisprudence.

Sax's general strategy is to trace what he calls the police power "exception" to Fifth Amendment Takings law to a series of conceptual or formal distinctions advanced by Justice Harlan in *Mugler v. Kansas* and echoed in subsequent cases. On Sax's account of Harlan's theory, the reviewing court need merely discern whether the challenged governmental action regulates the use of property—in which case it would count as a non-compensable exercise of the police power—or instead it effects a physical occupation or appropriation of a proprietary interest, in which case a compensable taking would be found.³⁶⁷ In a second variant on Harlan's theory, Sax says, the difference between a taking and a non-compensable police power exercise turned on the character of the property owner's activity; abatement of a noxious use was entirely permissible, while governmental interference with "unoffending property" was compensable.³⁶⁸ Sax argues that Harlan's categorical and qualitative approach reduced takings law to a "formalistic quibble,"³⁶⁹ but he concedes this approach remained more or less workable so long as the regulation had only a minor economic impact, as most

³⁶⁷See Sax, *supra* note , at 38 (stating that on Harlan's theory in *Mugler v. Kansas*, mere regulation of the use of property "was not in any sense a 'taking' because it involved no appropriation of property for the public benefit but merely a limitation upon use by the owner for certain purposes declared to be injurious to the community," a "theory Harlan apparently derived from the literal language of the fifth amendment , which deals only with the 'taking' of property). Problematically for Sax's account, however, *Mugler* was decided purely on Fourteenth Amendment Substantive Due Process grounds, makes no mention of the Fifth Amendment Takings Clause, and in any event pre-dates *Chicago B & Q*, the case which is supposed to have effected incorporation of the Fifth Amendment Takings Clause against the states. Just as importantly, *Mugler* explicitly disclaims the view that all regulations of the "use" of property would pass constitutional muster. See *Mugler*, 123 U.S. at 661 ("It does not at all follow that every statute enacted ostensibly for the promotion of these [police power] ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go.").

³⁶⁸See Sax, *supra* note 39 ("Harlan distinguished innocent from noxious uses" and held that "abatement of a noxious use is not a taking of property, since uses in contravention of the public interest are not property").

³⁶⁹See Sax, *supra* note , at 37.

early regulatory enactments did.³⁷⁰

By the early twentieth century, however, the economic impact of governmental regulation began to grow dramatically, necessitating a doctrinal shift. Sax claims Justice Holmes responded by introducing a sliding-scale economic calculus meant only to ensure minimal fairness in the inevitable pitched battle between established property interests and changing social demands.³⁷¹ According to Sax, *Pennsylvania Coal v. Mahon* and a series of other previous and subsequent Holmes opinions on the police power redefined takings law by reducing it to a simple quantitative test based on diminution of economic value to the property owner.³⁷² Not only is this approach atextual and ahistorical, Sax argues, but it fails to recognize that not all expectations of economic gain or economic value rise to the constitutionally protected status of property interests. Consequently, it is not obvious where we should begin our calculation of diminution of value.³⁷³

There are several problems with Sax's account. First, and most importantly for purposes of this Article, Sax mistakenly conceives of the police power as a categorical "exception" to Fifth Amendment Takings doctrine.³⁷⁴ But this stands the police power inquiry on its head. As this Article has argued at length, nineteenth and early twentieth century courts of both the Harlan and Holmes eras understood the police power to operate as an inherent limitation on state-recognized property rights. Its constitutional significance was not as an "exception" to the Fifth Amendment Takings Clause—which was not considered applicable to the states in any event³⁷⁵—but as an aid in determining

³⁷⁰See Sax, *supra* note , at 39-40 (“Within a relatively narrow area Harlan’s conceptual approach produces not only clear-cut distinctions, but also satisfactory results,” but “[a]s the scope of governmental regulations grew . . . the economic impact of government regulation undermined the rationality of Harlan’s conceptual distinctions”).

³⁷¹See Sax, *supra* note , at 40-41.

³⁷²See *id.* at 41 (“While he never flatly stated that degree of economic harm was *the* factor in his theory, a reading of his opinions leaves little doubt that this was the theory he devised”).

³⁷³See *id.* at 50-60

³⁷⁴See Sax, *supra* note , at 37, 39 (“Harlan’s theory reduces the constitutional to a formalistic quibble,” and “distinguish[es] takings from exercises of the police power by artful definition of the terms ‘taking’ and ‘property’”)

³⁷⁵See *supra* Parts III and IV.

what counted as a protectible property interest for purposes of determining whether a deprivation of property had occurred in violation of the Fourteenth Amendment Due Process Clause.³⁷⁶ In short, the state's reserved police power operated as one of the most important constitutive rules of the state's law of property. Its function in Fourteenth Amendment adjudication was to help answer the very question Sax says is missing from the equation: does the claimant have a constitutionally protectible property entitlement, or not?³⁷⁷

Second, Sax's account does justice neither to Harlan's nor to Holmes' version of the police power inquiry. The approach of nineteenth and early twentieth century courts was more subtle and nuanced than Sax allows. While it is broadly true that the earlier, Harlan-era approach was conceptual and categorical, the categories employed were more numerous and richer than appears from Sax's description. Substantive Due Process courts continually probed and teased out the implications not only of terms like "nuisance," "noxious use," and "regulation," as Sax indicates, but also the critical subunits that were thought to make up the police power: "public health," "safety," "morals," and "general welfare." Sax wholly ignores, for example, the rich debate over what characteristics distinguished the "general welfare" from "class legislation,"³⁷⁸ and he is similarly inattentive to the Court's insistence throughout that not every purported police power regulation would pass muster: courts would police the boundary and weed out "arbitrary" and "unreasonable" regulations that did not substantially advance a legitimate police power objective.³⁷⁹ To be sure, these debates were highly formalistic, and the categories sometimes frustratingly indeterminate. But within those limitations, these were real debates over the central issues in property law, going to the nature and limits of private property rights in a democratic polity. Courts of the Substantive Due Process era grappled constantly, and often intelligently, with how they should understand the constitutional legitimacy of public-regarding property legislation that might reasonably alter the precise boundaries of private expectations over time, in the context of an overriding need for the social institution of property to adapt and evolve in response to changing social needs, norms, and understandings.

³⁷⁶See supra notes and accompanying text.

³⁷⁷See Sax, supra note ., at 61 ("Since the question being asked is what sort of protection is to be given to property, the initial task must be to develop a workable concept of what we mean when we talk about property");

³⁷⁸See supra notes and accompanying text.

³⁷⁹See supra notes and accompanying text.

Nor did the Holmes era of Substantive Due Process abandon those debates. Instead, Holmes introduced new subtleties and refinements, in important ways bringing this discussion beyond mere formal categorization to recognize that quantitative values might also play a role. Holmes recognized that some quantum of “public interest” might be found even in redistributive regulation that might previously have been ruled impermissible “class legislation,” and that the weight of that public interest ought to count for purposes of determining whether it advances the “general welfare.”³⁸⁰ He introduced the notion that at some level, it was not merely the categorical determination that a private party had incurred a loss but the magnitude of that loss in relation to the magnitude of the public interest to be served by the regulation that should figure into the calculus as to whether the regulation should be deemed a legitimate exercise of the police power, and whether the private interest ought to count as a constitutionally protectible property interest. To that extent, Holmes went some distance toward bringing Substantive Due Process review out of nineteenth century formalism and into the modern era.

At the end of the day, however, Sax and Michelman were probably right. Substantive Due Process and the police power, hatched in the days of nineteenth century formalism, had trouble adapting. Nor were Holmes’ doctrinal innovations entirely helpful in salvaging Due Process and the police power: these remained highly indeterminate concepts on Holmes’ sliding-scale interpretation, and consequently subject to just as much or possibly even more *Lochner*-like manipulation than Harlan’s formalist versions.³⁸¹ Just as troubling, the radical indeterminacy of the concepts would eventually lead to the near-total collapse of meaningful judicial review of police power claims in the post-New Deal, post-*Berman v. Parker* era. Once the pendulum swung that far, perhaps it became inevitable that *Penn Central* and its progeny would arise to bring it back, albeit now disguised in the borrowed doctrinal garb of a Fifth Amendment

³⁸⁰See e.g., *Pennsylvania Coal v. Mahon*

³⁸¹Supreme Court reversals of property regulation on Substantive Due Process grounds increased sharply during Holmes’ tenure on the Supreme Court. While it would be unwise to attribute this entirely to Holmes’ influence, Holmes joined the majority in most of those reversals, wrote the majority opinion in several, and supplied the highly indefinite and arguably manipulable sliding-scale analytical framework under which still others were decided. Indeed, while Holmes is justly famous for his dissents in *Lochner* and a number of other important Substantive Due Process cases turning on the scope of constitutionally protected “liberty” interests, his views on the “property” branch of Substantive Due Process do not appear to have been far outside the *Lochner*-era mainstream.

Takings Clause previously thought inapplicable to the states.³⁸²

But by simply abandoning *sub silentio* the police power defense and Substantive Due Process review as a separate category of just compensation law, we have also lost something. We have lost the old notion, central to nineteenth and early twentieth century Substantive Due Process police power jurisprudence, that any regulatory “takings” inquiry must logically begin with a baseline assessment of the nature, extent, and limits of the constitutionally protectible property rights that the claimant is legitimately entitled to assert.³⁸³ We have lost sight of the notion that such an inquiry must be informed first and foremost by the applicable law of property—state law in the main, and therefore variable by jurisdiction.³⁸⁴ We have lost sight of the notion that the

³⁸²Numerous commentators have noticed and criticized the uncanny resemblance of much of the Supreme Court’s contemporary regulatory takings doctrine to earlier, *Lochner*-style Substantive Due Process review. See, e.g., Echeverria & Dennis, *supra* note 1, at . This Article argues that the resemblance is no accident. Having submerged the Substantive Due Process branch of just compensation law into a Takings Clause now made applicable to the states, the Court has now proceeded to refashion Takings doctrine to recapitulate some, but not all, elements of Substantive Due Process review.

³⁸³Perhaps the most egregious contemporary case is *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), where a four-justice plurality determined that a congressionally enacted retroactive liability scheme to fund health benefits for retired coal miners placed such a heavy and “unjust” financial burden on a former coal operator that it effected a compensable Fifth Amendment “taking.” As Justice Kennedy’s concurrence and the four dissenting justices pointed out, however, this “takings” determination was not grounded in a governmental invasion of any specific, identifiable property interest, but instead was a general economic liability which coal companies could fund out of any assets they had available, and to that extent was more akin to a tax than to a regulatory “taking” of any identifiable “property.” See 524 U.S. at 540 (Kennedy, J., concurring in the judgment) (“The Coal Act imposes as staggering economic burden on the petitioner, Eastern Enterprises, but it regulates the former mine owner without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest”); *id.* at 554 (Breyer, J., dissenting) (“This case involves not an interest in physical or intellectual property, but an ordinary liability to pay money, and not to the Government, but to third parties.”)

³⁸⁴The Supreme Court’s contemporary takings decisions are rarely rooted in the specific law of property of the jurisdiction in question. Instead, the opinions are littered with pronouncements on the “essential” and “universal” attributes of property in general, most prominently the “right to exclude” which the Court has declared to be the *sine qua non* of all property rights. See, e.g., *Kaiser Aetna v. U.S.*, 444 U.S. 164, 179-80 (1979) (holding that imposition of a federal navigational servitude on a privately owned pond newly connected to other navigable channels effected a compensable “taking” because it invaded the “right to exclude” which is “so universally held . . . a fundamental element of the property right” that it “falls within this category of interests that the Government cannot take without compensation”); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (holding that conditioning permit approval on landowner’s grant of an easement for public recreational use was an unconstitutional taking

applicable state law of property might include, if the state so asserts, the background understanding that all property is held subject to an inherent limitation consisting of the state's ongoing power to regulate for the common good.³⁸⁵ And we have lost sight of the notion, so clearly understood by nineteenth and early twentieth century Substantive Due Process courts, that if a system of private property within a democratic polity is to have ongoing vitality, this reserved regulatory power cannot be wholly without limits, yet it must also be sufficiently flexible and dynamic to evolve over time as social needs and understandings change, through an ongoing dialogue among courts, legislatures, private rights-holders, and the public at large.³⁸⁶ That is actually a very progressive notion. Whether it is workable ultimately depends upon the good faith of courts, legislatures, and private property claimants.

Lacking these concepts, the current Court's regulatory takings jurisprudence has lost its way.

of the landowner's right to exclude, "one of the most essential sticks in the bundle of rights that are commonly characterized as property"). Another prominent feature of contemporary cases, following *Penn Central*, is the Court's assessment of the impact of the challenged law on the claimant's "distinct investment-backed expectations." See, e.g., *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 84 (finding no compensable "taking" as a result of California Supreme Court ruling that state constitution required shopping center to remain open to free speech activities, in part because there was no significant interference with "distinct investment-backed expectations"). The implication is that the very same change in the law might effect a taking if the cost to the shopping center were greater. The *PruneYard* Court made no effort to inquire into the "background principles" of California property law that might inform the determination as to how far the claimant's property rights extended.

³⁸⁵Compare *Lucas*, U.S. at , with (pick any prominent police power case)

³⁸⁶A fairly representative statement is that made by the Illinois Supreme Court in 1944:

"The police power is considered capable of development and modification within certain limits, so that the powers of governmental control may be adequate and meet changing social and economic conditions. The power is not circumscribed by precedents arising out of past conditions but is elastic and capable of expansion in order to keep pace with human progress. It is not a fixed quantity, but it is the expression of social, economic and political conditions. In the exercise of this power the legislature may enact laws regulating, restraining or prohibiting anything harmful to the welfare of the people, even though such regulation, restraint or prohibition interferes with the liberty or property of an individual. Neither the fourteenth amendment to the Federal constitution nor any provision of the constitution of this State was designed to interfere with the police power to enact and enforce laws for the protection of the health, peace, morals or general welfare of the people."

Zelney v. Murphy, 56 N.E.2d 754 (Ill. 1944).

Conclusion: Re-historicizing Just Compensation Law

As *Mahon* and the other cases discussed in this Article clearly illustrate, Fourteenth Amendment Due Process just compensation cases in the pre-*Penn Central* era turned principally on the nature of, and the justification for, the governmental action. The analysis employed the standard tools of *Lochner*-era Substantive Due Process review. Courts refused to draw bright-line rules to delineate the precise boundaries of the police power.³⁸⁷ They professed deference to legislative authority to make that determination in the first instance,³⁸⁸ and a surprisingly large number of regulatory enactments passed constitutional muster, even if their effect was to place large burdens on property claimants.³⁸⁹ But at the end of the day courts remained deeply skeptical of what seemed to them arbitrary or unreasonable regulations, or inadequate, irrational, or unconvincing justifications for regulatory enactments.³⁹⁰ To be sure, *Lochner*-era Substantive Due Process review was subject to a litany of problems—not least, the tendency for some courts to second guess the political branches on fundamental questions of public policy in light of their own policy preferences, loyalty to longstanding common law precepts, or

³⁸⁷See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926) (“In the realm of constitutional law, especially, this court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police, with which we are here concerned.”).

³⁸⁸See, e.g.,

³⁸⁹See, e.g., *Mugler v. Kansas* (upholding state law making brewery virtually worthless); *Hadachek v. Sebastian* (upholding ordinance prohibiting brickyards in residential zones, destroying most of the value of complainant’s property); *Welch v. Swasey*, 214 U.S. 91 (1909) (upholding building height restrictions); *Erie R. Co. v. Public Utilities Comm’rs*, 254 U.S. 384, 410 (1921) (upholding regulation requiring railroads to install costly grade crossing improvements in the interest of public safety); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding municipal zoning ordinance); *Goreib v. Fox*, 274 U.S. 603 (1927) (upholding building setback requirement); *Miller v. Schoene* (upholding state law requiring destruction of disease-carrying trees); *Goldblatt v. Hempstead* (upholding local prohibition on operation of sand and gravel mines).

³⁹⁰*Mahon* is perhaps the clearest example. Others include *Ex parte Davison*, 13 S.W.2d 40 (Mo. 1928) (overturning ordinance prohibiting sand and gravel quarries within city because it was not related to a valid police power purpose of protecting public health, safety, morals, or general welfare);

implicit bias in favor of private ordering and against public regulation.³⁹¹

Yet for all its faults, Fourteenth Amendment Substantive Due Process review in just compensation cases also had some singular virtues. This jurisprudence kept its eye trained squarely on the principle that all property, everywhere, is always and inescapably subject to the “inherent limitation” that followed from the state’s reserved right as sovereign to adjust the precise boundaries and meaning of property rights over time in response to changing conditions and altered social understandings.³⁹² The appropriate extent of that inherent limitation on property rights, and the corresponding outer constitutional limits to the state’s reserved power to modify property rights, were the subject of continuous dialogue among the courts, the legislatures, and private property claimants. That dialogue was shrouded in the language and categorical distinctions of the police power, concepts that may sound quaint and antiquated to the contemporary ear. As Part VI demonstrated, these concepts grew unsustainably leaky over time. But at least they provided some underlying coherency to the Court’s just compensation jurisprudence, founded as it was on principles of property federalism and recognition that property law is necessarily a dynamic institution that must respond and adapt to changing social needs. As Justice Sutherland so eloquently put it in the 1926 case *Village of Euclid v. Ambler Realty*, upholding the then-novel regulatory technique of land use zoning,:

“Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different

³⁹¹See

³⁹²See, e.g., *Block v. Hirsh*, 256 U.S. 135, 155 (1921) (Holmes, J.) (“The fact that tangible property is also visible tends to give rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the 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 in its proper sense, under which property rights may be cut down, and to that extent taken, without pay.”)

conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise.”³⁹³

Then the bottom fell out. At one swoop, *Penn Central* dissolved these longstanding concepts and distinctions, and collapsed just compensation claims based on Fourteenth Amendment Due Process and those grounded in the Fifth Amendment Takings Clause into a single “regulatory takings” category, uniformly applicable to the states and the federal government alike.

It is probably too late in the day to question the Fifth Amendment’s applicability to the states. After *Penn Central* and its progeny, that is a matter of established constitutional doctrine, unlikely ever to be reversed. But it is not too late to come to grips with the fact that incorporation of the Fifth Amendment Takings Clause against the states is a latter-day judicial innovation whose nascence coincides precisely with the emergence of the Supreme Court’s contemporary regulatory takings jurisprudence in all its muddled grandeur. Nor is it too late to recognize that this incorporation emerged full-grown from *Penn Central* without benefit of the normal gestation of full briefing, informed argument, well-reasoned judgment, and adjudication in the courts below. Whether it occurred through blind error as the result of a grand historical misreading of *Chicago B & Q* and subsequent lines of cases, or through a fancy piece of doctrinal legerdemain at the hands of pro-incorporation Justices with different ends in view, is beyond the scope of this Article, and perhaps beside the point. Whatever its origins, we are now reaping the consequences: massive doctrinal confusion in the law of regulatory takings.

Where, then, do we go from here? At the outset this Article disclaimed any ambition to provide a comprehensive resolution to the takings muddle.³⁹⁴ The principal contribution of the Article is to diagnose the malady, not to prescribe a cure. That latter project awaits subsequent inquiry and a follow-up Article. The remainder of this Article will merely begin to sketch out some tentative directions that such further inquiry might take.

First, the history of just compensation law suggests that state lawmakers—legislatures as well as courts—traditionally have enjoyed broad latitude to

³⁹³*Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

³⁹⁴See *supra* TAN

define, interpret, and adjust the boundaries of property law in response to changing conditions, social needs, and evolving understandings of the appropriate role of property as a social institution. Nothing in the text, history, or pre-*Penn Central* doctrine of the Fifth Amendment Takings Clause requires that state lawmakers be deprived of that power. Nor, in the view of this Article, is the post-*Penn Central* trend toward increasingly rigid and straightjacketing interpretations of the Takings Clause consistent with fundamental tenets of federalism in property law. Nor is it advisable on policy grounds if property is to continue to adapt and thrive as a dynamic social institution. From that perspective, the last twenty-five years of Takings Clause jurisprudence represent a great historical aberration, one that must be corrected by doctrinal adjustments that restore substantial discretion to state lawmakers.

This is not to say, however, that state adjustments to the law of property should enjoy blanket immunity from federal judicial scrutiny. Giving state judges and legislators carte blanche authority to rewrite the rules of property on an *ad hoc* basis, free from federal judicial oversight, is an open invitation to abuse. Prior to the Reconstruction era amendments, any such abuse perpetrated by the states was no concern of federal law, for prevailing constitutional doctrine was predicated on the assumption that the people themselves had power to correct through ordinary political means the abuses practices of their own state governments.³⁹⁵ But the Civil War and the Reconstruction era amendments—especially the Fourteenth—forever changed the relation of federal to state power, and with it, the nature of “Our Federalism.”

From shortly after the Civil War right up until *Penn Central*, federal courts found in the Fourteenth Amendment Due Process Clause all the means they needed to provide a meaningful check on excessive or unscrupulous exercises of state authority to readjust the bounds of property law, reviewing claims that some state-law adjustments “went too far” and therefore fell outside what were understood to be the legitimate bounds of the state’s police power. That line itself was uncertain and shifted over time, evolving with ever-changing legal norms. Courts declined even to try to articulate a fixed standard for what counted as “too far” under Substantive Due Process, and while on the whole they exhibited considerably more deference toward the states than the post-*Penn Central* Court has under its more recent turbocharged, incorporated, and restrictive Takings

³⁹⁵See *Barron v. Baltimore*, 32 U.S. (7 Pet.) at 249-50 (opining that if at the founding the people had “required additional safe-guards to liberty from the apprehended encroachments of their particular [state] governments . . . the remedy was in their own hands,” but instead they directed the Bill of Rights “against the apprehended encroachments of the general government—not against those of the local governments”).

doctrine, they did intervene on occasion to overturn state legislative judgments that appeared to reflect some form of abuse or excess.³⁹⁶

One possible way to set just compensation doctrine back on a sounder course, then, might be simply to revive Substantive Due Process as the appropriate doctrinal category for review of state adjustments to property law, while reserving the Fifth Amendment Takings Clause for review of claims against the federal government—in effect, to reverse *Penn Central* on the insufficiently considered question of Fifth Amendment incorporation. That approach seems unpromising for several reasons, however.

First is the principle of *stare decisis*. It is difficult at this late date to imagine the Supreme Court simply admitting that it erred in *Penn Central* and reversing itself on Fifth Amendment Takings Clause incorporation. Nor would such a reversal be consistent with the overall thrust of selective incorporation doctrine, which has now “selectively” reached almost every meaningful guarantee of the original Bill of Rights.³⁹⁷ Nor (as this Article shall argue below) is such a reversal doctrinally necessary.

Beyond *stare decisis*, the language of Substantive Due Process and the police power will strike many as hopelessly antiquated, and the concepts themselves excessively malleable and therefore subject to *judicial* abuse and excess. To the skeptic, in short, a return to Substantive Due Process carries with it the threat of reviving the worst excesses of *Lochner*-era judicial review. Indeed, some scholars have criticized the Court’s post-*Penn Central* Takings jurisprudence on grounds that it bears a disturbingly close resemblance to *Lochner*-era Substantive Due Process review, albeit dressed up in new garb that disguises its true character and origins.³⁹⁸ While it might be argued that an explicit return to the language of Substantive Due Process would at least bring some candor and transparency to the Court’s just compensation doctrine—calling it what it is—the *Lochner*-phobic response is that an explicit return to Substantive Due Process

³⁹⁶See supra note and accompanying text (citing cases).

³⁹⁷See Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 423 (2004) (stating that the Supreme Court “has consistently adopted the selective incorporation approach and it spent several decades in the mid-Twentieth Century gradually incorporating most of the relevant Bill of rights provisions”).

³⁹⁸See, e.g., Echeverria & Dennis, supra note 1, at 699 (characterizing the Court’s contemporary Takings Clause jurisprudence as “importing due process thinking into the takings issue”).

review would only threaten to entrench and re-legitimate a just compensation law that has gone seriously awry by once again recasting it in a new, re-historicized doctrinal pedigree.

Yet Substantive Due Process and the police power have also undergone a good deal of conceptual evolution since their *Lochner*-era heyday. After *Nebbia*,³⁹⁹ *West Coast Hotel*⁴⁰⁰ and *Carolene Products*,⁴⁰¹ the court's standard approach to Substantive Due Process review of economic regulation has become the highly deferential "rational relation" test: the legislature is not required to supply its actual rationale for acting as it did, and if the court can imagine that the enactment might be rationally related to achieving some legitimate public purpose, then the challenged regulation passes constitutional muster.⁴⁰² Additionally, since *Berman v. Parker*⁴⁰³ and *Hawaii Housing Authority v. Midkiff*,⁴⁰⁴ the police power has become so broad as to be virtually meaningless: any goal or objective deemed by the legislature to be "in the public interest" is apparently now good enough to count as a legitimate police power justification. Given these exceedingly deferential standards, then, the central problem posed by a return to Substantive Due Process might not be re-*Lochnerization*, but rather a paucity of opportunity for meaningful judicial review of state action. For if all that is required is that the court be able to imagine some circumstance under which the

³⁹⁹*Nebbia v. New York*, 291 U.S. 502, 537 (1934)

⁴⁰⁰*West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)

⁴⁰¹*U.S. v. Carolene Products Co.*, 304 U.S. 144, 155 (1938) (stating that in a facial Due Process challenge to the validity of a statute, "where the legislative judgment is drawn in question," the inquiry "must be restricted to the issue whether any state of facts either known or which could reasonably be assumed afford support for it")

⁴⁰²See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483, 491 (1955) (speculating on possible legislative purposes that might be advanced by a challenged regulation and concluding that because "[w]e cannot say that the regulation has no rational relation to that objective" it cannot be ruled "beyond constitutional bounds").

⁴⁰³*Berman v. Parker*, 348 US 26 (1954) (equating "police power" with "public use" and both with any "public purpose" or "public interest" determined by the legislature, and emphasizing the narrow scope for judicial review of these legislative determinations).

⁴⁰⁴*Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240-41 (1984) (stating that in eminent domain law the "'public use' requirement is coterminous with the scope of a sovereign's police powers" and "the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation'")

legislature might have thought it was advancing some public interest by readjusting property rights, few if any such readjustments are likely ever be held unconstitutional, short of an express declaration of legislative intent to impermissibly deprive a property owner of her rights.

There is arguably a middle ground to be found in Substantive Due Process jurisprudence, however, between re-*Lochnerization* on the one hand and ultra-deferential rational relation-cum-liberal police power review on the other. The famous *Carolene Products* Footnote Four drew two important distinctions. First, it stated that there “may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution”; and second, that prejudice against “discrete and insular minorities” who might be insufficiently protected by ordinary political processes “may call for a correspondingly more searching judicial inquiry.”⁴⁰⁵

The first *Carolene Products* distinction offers little help. Although it might be argued that protection of property under the Due Process and Takings guarantees is itself a robust constitutional norm calling for a less deferential standard of review than the ordinary “rational relation” test, it would be deeply ahistorical and doctrinally problematic to place every adjustment in the state’s law of property in the category of actions deemed presumptively unconstitutional on their face, even as the beginning point in a longer analysis. In addition, this avenue quickly lapses into the same circularity that infects the Court’s current Takings Clause jurisprudence; for if state law defines property rights in the first instance, and if the state’s law of property is to have latitude to evolve along with other law, how are we to know when a state law adjustment implicates a “deprivation of property without Due Process” (or a “taking” of property), except by reference to state law itself which defines the bounds of property rights?

The second *Carolene Products* distinction, on the other hand, seems more promising, for it appears to go to the heart of what motivates just compensation law. As the ultimate rationale for the necessity of a vital Takings Clause jurisprudence, the Supreme Court regularly invokes the principle enunciated in *Armstrong v. U.S.*, that the purpose of just compensation law is to prevent government from “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the

⁴⁰⁵U.S. v. *Carolene Products*, 304 U.S. 144, 153 n. 4 (1938)

public as a whole.”⁴⁰⁶ This problem of “singling out” some property owners for singularly harsh treatment appears to be what originally animated the Takings Clause, which grew out of the anti-Federalist fear that a distant and unresponsive central government would be tempted to “single out” some local property owners to bear unfair and unreasonable burdens which would be of but little concern to national majorities, yet would lie beyond the powers of the presumptively more responsive state governments to prevent or to cure.⁴⁰⁷ The “no singling out” principle has found echoes throughout the history of the Court’s Takings Clause jurisprudence.⁴⁰⁸ It is also, at a deep level, the principle that defined the Substantive Due Process era’s concern with the legitimate bounds of the police power, which although malleable could extend neither to any “arbitrary and unreasonable” deprivation of property for any purpose,⁴⁰⁹ nor to any “taking from A to give to B.”⁴¹⁰ More recently, such thoughtful scholars as William Fischel, Saul Levmore, Susan Rose-Ackerman, and Dan Farber have advanced, in various ways, their own formulations of the “singling out” problem as the motive force

⁴⁰⁶*Armstrong v. U.S.*, 364 U.S. 40, 49 (1960). Scarcely a major Takings Clause case has been decided by the Supreme Court in the post-*Penn Central* era without an obligatory recitation of the *Armstrong* principle. See, e.g., *Tahoe-Sierra Preservation Council v. U.S.*, 535 U.S. 302, 304 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 302, 304 (2001); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702 (1999); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522 (1998); *Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994); *Lucas*, 505 U.S. at 1071; *Nollan*, 483 U.S. at 836; *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 315 (1987); *Webb’s Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 163 (1980); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 (1980); *Penn Central*, 438 U.S. at 123. In each of the cited cases, however, the *Armstrong* principle operates as little more than a colorful rhetorical backdrop; in none of these cases is *Armstrong* itself called upon to do any heavy doctrinal lifting.

⁴⁰⁷See *supra* notes and accompanying text; see also *Barron v. Baltimore*, 32 U.S. (7 Pet.) at 249-50 (stating that if the people had “required additional safe-guards to liberty from the apprehended encroachments of their particular [state] governments . . . the remedy was in their own hands,” and concluding that the Bill of Rights “against the apprehended encroachments of the general government—not against those of the local governments”).

⁴⁰⁸See *Monongahela Navigation Co. v. U.S.*, 148 U.S. 312, 325 (1893) (stating that takings law “prevents the public from loading upon one individual more than his share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him”).

⁴⁰⁹See *supra* note and accompanying text.

⁴¹⁰See *supra* note and accompanying text.

behind just compensation law.⁴¹¹ Despite the Supreme Court's recurrent invocation of the *Armstrong* "singling out" principle as a rhetorical backdrop for its Takings decisions, however, that principle is not fairly reflected at an operational level in the Court's contemporary Takings Clause jurisprudence, which instead seems consumed with devising *quantitative* tests of what counts as a Taking, while neglecting questions of comparative fairness or "singling out."⁴¹²

The *Armstrong* "singling out" problem can be fairly understood as a variant on the *Carolene Products* "discrete and insular minorities" problem. Both *Carolene Products* and the *Armstrong* principle revolve around defects in the political process, and in particular the non-self-correcting problems that arise when political majorities trample on minority rights.⁴¹³ While *Carolene Products* contemplated that readily identifiable racial, ethnic, or religious minorities would be most vulnerable, the problem of majoritarian excess extends well beyond those groups. In the property context, in particular, we should

⁴¹¹See WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 4-6 (1995) (asserting that fair distribution of societal burdens is both the historical basis and the appropriate modern normative basis for takings law); historical; Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L.REV. 285, 306-07 (1990) (arguing that "'occasional individuals' are protected by the takings clause" because it is "unlikely that such individuals can compete effectively in the political arena"); Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1708 (1988) ("the problem for takings jurisprudence is to decide when an individual has borne more than his or her 'just share of the burdens of government'"); Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279, 2307-08 (1992) (advancing a "uniformity theory" of takings law as a prophylactic against discriminatory treatment in compensation policies, recognizing that politically powerful groups are likely to win compensation through the political process but politically disadvantaged groups require the protection of a formal rule).

⁴¹²See *Peterson II*, supra note , at 56 (stating that despite the Court's frequent appeals to the *Armstrong* principle, "the Court has made little effort to develop a principled basis for determining when fairness requires the payment of compensation"); Glynn S. Lunney, *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892 (1992) (stating that the Court "has not . . . used this articulated purpose to identify the takings factors" it uses in modern cases, with the result that Takings doctrine "does not prevent the government from unfairly 'forcing some people alone to bear public burdens'"). None of the major Takings tests devised by the post-*Penn Central* Supreme Court— *Penn Central* balancing or its simplified *Agins* variant, *Lucas* "total takings," *Nollan* "nexus," *Dolan* "rough proportionality," *Loretto* "permanent physical invasion"—addresses the fundamentally comparative question of "singling out," namely how is this property owner (or class of property owners) being treated in comparison with others similarly situated?

⁴¹³Cf. Fischer, supra note, at 206-07 (arguing that governments does not always look to aggregate social welfare in allocating the costs of governmental decisions, but instead may systematically force costs onto some property owners for the benefit of others).

expect that any “unreasonable” impositions on a *majority* of property owners will generate strong political reaction, and stand a fair chance of being corrected through ordinary political processes. But when majorities, whether local or national, are tempted to place special burdens on *minorities* of property owners—for example, non-resident (and therefore non-voting) owners in a local municipality—ordinary political processes may offer the burdened parties little meaningful recourse.. It is as a safeguard against that sort of abuse that a judicially administered constitutional just compensation law, operating as a check on ordinary legislation, can play a legitimate and constructive role. Thus a *Carolene Products*-like heightened Substantive Due Process scrutiny in cases that appear to involve a “singling out” of some identifiable class of property owners owing to defects in the political process might offer a promising middle ground between a too-stringent re-*Lochnerization* of the Court’s property jurisprudence on the one hand, and an excessively deferential “rational relation” cum relaxed “anything goes” police power jurisprudence on the other.

Yet at the end of the day, a revival of Substantive Due Process as the basis for review of just compensation claims against the states appears from this vantage point neither likely, nor necessary, nor entirely desirable. Let us assume, for starters, that on grounds of *stare decisis*, consistency with broader trends in selective incorporation doctrine, and sheer stubborn unwillingness to confess error, the Supreme Court declines to turn back the clock and reverse *Penn Central’s* phantom incorporation holding—with the result that states remain subject to the Fifth Amendment Takings Clause. In that case, is there any way out of the doctrinal trap which the Court has built for itself?

I submit that it may be possible to salvage Takings Clause doctrine after all, following the broad outlines hinted at in the preceding pages of this Article. First, the Court must recognize that every Takings Clause case necessarily must turn on the question, “Has a taking of *property* occurred in this case?” To answer that question, the Court must in turn advert to the relevant law of property—principally state law—to determine just how far the claimants’ property rights legitimately extend, and in particular, what (if any) limits to those rights “inhere in the title” as a matter of state law. That is to say, not only must the Court begin to take the law of *property* seriously in its Takings Clause jurisprudence, but it must also begin to take seriously the principle it articulated in *Lucas*, which stated that an exercise of state lawmaking authority expressing a “limitation that inheres in the title” as a matter of “background principles of the State’s law of property and nuisance” can never count as a regulatory “taking,” for the

simple reason that no *property* is taken as a result of such an action.⁴¹⁴ Third, the Court must also begin to take seriously the history of our law of property. That history teaches that states have always claimed, as a “background principle of the State’s law of property,” the reserved police power to alter the law of property at the margins for purposes of protecting the public health, safety, morals, and general welfare; and further that under their law of property, all property is always held subject to this inherent limitation.⁴¹⁵

Does that mean, then, that anything goes, that states have free rein to alter property rules as they will, without restraint? No. For here there is room for the Court usefully to interject, and for once to take seriously, the *Armstrong* principle that it so regularly invokes as a rhetorical matter. If the Fifth Amendment Takings Clause does extend to the states, then that clause must be interpreted to stand as a safeguard against just the kinds of abuses of governmental power that led to its being appended to the Constitution in the first place. That is, the Takings Clause must stand as a safeguard against the arbitrary “singling out” of either individual property owners or “discrete and insular” classes of property owners for harsher treatment than the rest, whether for the benefit of other identifiable individuals or classes, or for the benefit of the public generally. The question, then, becomes not simply how much is “taken” from the property claimant as measured against *ex ante* expectations; for mere expectations, without more, are not “property” under anyone’s law. The question is—or at any rate, ought to be—has the state abused its claimed police power by arbitrarily imposing burdens on the few that ought legitimately be borne by the many, owing to defects in the political process?

This four-part readjustment of Takings Clause doctrine—in which the Court begins to take seriously what counts as “property,” what counts as an “inherent limitation” under *Lucas*, what role is played by the states’ historic claim to an inherent and dynamic police power limitation on property rights, and what role should finally be made in Takings doctrine for a robust version of the *Armstrong* “singling out” principle as a judicial check on arbitrary exercises of state authority—could do much to set just compensation law back on course, and begin to chart a path out of the Takings muddle. These are, however, but tentative conclusions, the full implications of which remain to be elaborated out in subsequent work.

⁴¹⁴See *Lucas*, 505 U.S. at 1028-29.

⁴¹⁵See *Supra* Part II.