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## PICTURING TAKINGS

Lee Anne Fennell\*

*Takings doctrine, we are constantly reminded, is unclear to the point of incoherence. The task of finding our way through it has become more difficult, and yet more interesting, with the Supreme Court's recent, inconclusive foray into the arena of judicial takings in Stop the Beach Renourishment. Following guideposts in Kelo, Lingle, and earlier cases, this essay uses a series of simple diagrams to examine how elements of takings jurisprudence fit together with each other and with other limits on governmental action. Visualizing takings in this manner yields surprising lessons for judicial takings and for takings law more generally.*

### INTRODUCTION

The Supreme Court's recent decision in *Stop the Beach Renourishment*<sup>1</sup> intrigued and unsettled legal commentators by raising, but not resolving, the question of judicial takings.<sup>2</sup> Like *Kelo*<sup>3</sup> before it, the

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1 *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592 (2010).

2 See *infra* text accompanying notes 98–101 for an overview of the judicial takings question and the Court's decision in *Stop the Beach*. A great deal of scholarship and commentary has been produced on *Stop the Beach* during its short life, and many more contributions are doubtless underway. See, e.g., D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 RICH. L. REV. 903 (2011); Amnon Lehavi, *Judicial Review of Judicial Lawmaking*, 96 MINN. L. REV. 520 (2011); Eduardo M. Peñalver & Lior Jacob

case has prompted a resurgence of scholarly interest in takings. And, like the less famous but equally important *Lingle v. Chevron*,<sup>4</sup> it implicates core questions about the scope and bounds of the Takings Clause. Property scholars and students now face fresh challenges in understanding how different elements of takings jurisprudence fit together with each other and with other limitations on governmental power.

In puzzling through this set of questions, I found myself turning again and again to iterative graphical representations. These pictures soon became more than just a way to pin down what I thought I knew about takings. Rather, they turned into vehicles for asking new questions and for seeing aspects of the takings field—including, but not limited to, the question of judicial takings—from new angles. The result was this essay, written around a series of simple diagrams. The analysis proceeds in three steps. Part I provides a visual primer on (nonjudicial) takings law that lays the groundwork for what follows. Part II introduces some puzzles about wrongs and remedies, again sticking with legislative and administrative takings. Part III examines the implications of this analysis for judicial takings.

The diagrammatic approach pursued here illuminates three underappreciated features of takings law that can help fit judicial takings into the existing doctrinal framework. First, it draws attention to the two distinct doctrinal boundaries implicated in takings law and the ways that institutional competencies influence the strategies for policing them. Second, it emphasizes a category of confiscatory acts that are not deemed to be takings. Third, it highlights the fact that traditional takings law slots governmental acts into three “zones”—dubbed here the “free zone,” the “pay zone,” and the “no-go zone”—a taxonomy that suggests a fourth possibility,<sup>5</sup> and one that turns out to

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Strahilevitz, *Judicial Takings or Due Process?*, 97 CORNELL L. REV. 305 (2012); Symposium, *Stop the Beach Renourishment: Essay Reflections from Amici Curiae*, 35 VT. L. REV. 413, 413–514 (2010); Symposium, *Judicial Takings: Exploring the Boundaries of the Fifth Amendment*, 6 DUKE J. CONST. L. & PUB. POL’Y 1, 1–134 (2011); Symposium, *Stop the Beach Renourishment, Inc. v. Fla. Department of Environmental Protection*, 61 SYRACUSE L. REV. 203, 203–314 (2011); *Symposium on Judicial Takings*, 21 WIDENER L.J. 621, 621–888 (2012). A classic article on judicial takings that long predates the current academic flurry is Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990).

3 Kelo v. City of New London, 545 U.S. 469 (2005).

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

5 This follows from the famous four-rule taxonomy set out in Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1115–18 (1972). The way in which this taxonomy maps onto eminent domain has been discussed in, for example, Carol M. Rose, *The*

have interesting implications for judicial takings. I show (without endorsing) how these features could plausibly combine to render judicial takings a nearly null set, occupying even less conceptual space than the set of legislative or administrative takings that flunk the Supreme Court's public use test.

This is an essay about the architecture of takings doctrines and the limiting principles built into their structure, not an effort to explicate or advocate a new theory of takings, judicial or otherwise. My goal throughout is analytic rather than normative. I start with takings doctrines as they currently exist, try to find the best conceptual and diagrammatic characterization of them, and then see where judicial takings might fit into the story.

## I. MAPPING (NONJUDICIAL) TAKINGS

Setting aside the enticing topic of judicial takings for the moment, we can begin with takings doctrine as it has been applied to actions emanating from the legislative and executive branches, which I will refer to in this essay collectively as “nonjudicial” takings.

### A. *Three Zones*

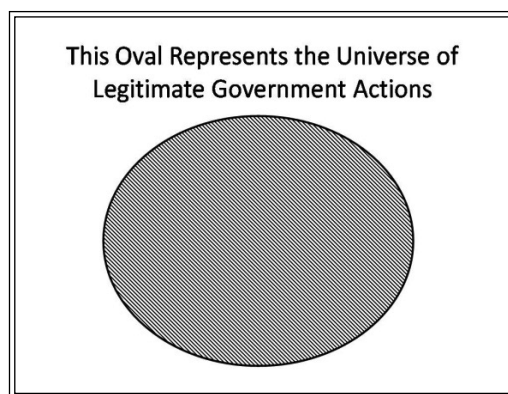
Our story starts simply enough. There are some things that the government<sup>6</sup> can do, and other things it is prohibited from doing. For now, we need not worry about why it cannot do the things it cannot do, or how we can tell whether a given act lies inside or outside the realm of legitimate government action. We need only assume that there are some fixed limits on government action. That lets us define an area within which the government may act if it so chooses, as shown in Slide 1.

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*Shadow of The Cathedral*, 106 YALE L.J. 2175, 2180–81 (1997). The three alternatives outlined in the text suggest a fourth alternative in which the landowner pays the government not to take. See, e.g., James E. Krier, *The Regulation Machine*, 1 SUP. CT. ECON. REV. 1, 23–25 (1982); *infra* Part III.C.

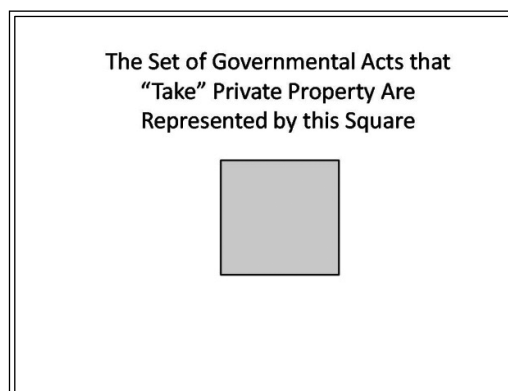
6 My focus in this Part is on governmental actors in the political branches. Different actors within these branches will face different constraints on their actions; I will reference these differences to the extent they become relevant to the analysis.

## SLIDE 1



We can then identify the surrounding space as the realm of impermissible governmental acts. Now we can start to think about “takings.” The Takings Clause in the U.S. Constitution reads: “nor shall private property be taken for public use, without just compensation.”<sup>7</sup> The category of “takings” includes exercises of eminent domain (where the government admits it is engaging in a taking) as well as certain other physical and regulatory incursions that are found to rise to the level of a taking.<sup>8</sup> The doctrines are complex, but the universe of “takings” can nonetheless be represented by Slide 2’s simple square.

## SLIDE 2



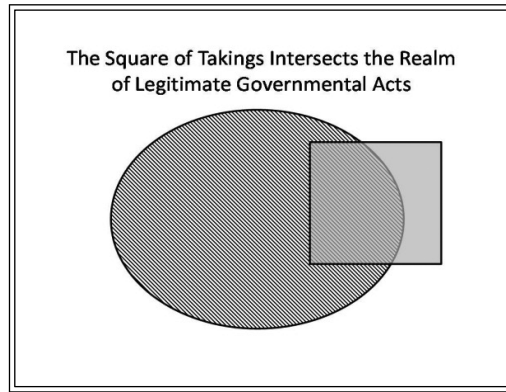
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7 U.S. CONST. amend. V. The Takings Clause is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. Additionally, nearly all state constitutions contain their own takings clauses. See JESSE DUKEMINIER ET AL., PROPERTY 1061 n.2 (7th ed. 2010).

8 See *infra* notes 22–24 and accompanying text.

Next, we must consider how this square of governmental takings intersects with the respective realms of legitimate and impermissible government actions depicted in Slide 1. That relationship is illustrated in Slide 3.

SLIDE 3



As this intersection suggests, a governmental “taking” may or may not be a legitimate governmental act. In order for it to be legitimate, two criteria must be met. First, it must be for “public use.”<sup>9</sup> Second, it must ultimately be accompanied by “just compensation.”<sup>10</sup> If both these criteria are met, the taking falls within the realm of legitimate government action. This is represented by the overlapping area shown in Slide 3. Conversely, takings that fail to meet either the “public use” or “just compensation” criteria would fall into the realm of impermissible governmental acts represented by the portion of the takings square that does not overlap with the oval of legitimacy.<sup>11</sup>

At this point, we can identify three functional zones in our picture. First, there is a “free zone” (the part of the oval that does not

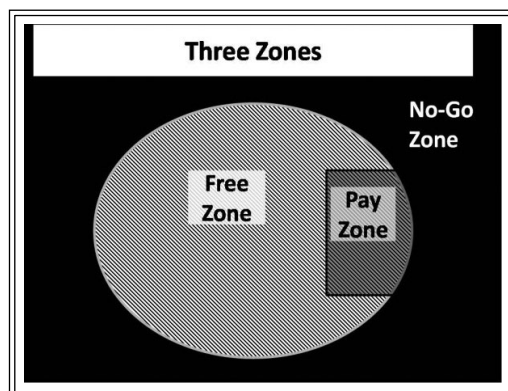
9 U.S. CONST. amend. V. The Fifth Amendment’s Takings Clause uses the term “public use” to describe takings for which just compensation must be paid, but the constitutional source of the public use *requirement* arguably lies elsewhere, in the Due Process Clause. See *infra* notes 47–49 and accompanying text.

10 U.S. CONST. amend. V. Regulatory takings will not initially be accompanied by just compensation, but can still constitute legitimate governmental actions if ultimately validated by the payment of just compensation. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) (“The Fifth Amendment does not require that compensation precede the taking.” (citation omitted)); see *infra* Part II.B.

11 The remedial approach used in this area effectively rules out the possibility that acts will be found illegitimate due to the lack of just compensation alone, however. Rather, courts transform otherwise valid but uncompensated takings into legitimate ones by ordering just compensation for the period of the taking. See *infra* Part II.B.

overlap with the square). In this area, which includes ordinary exercises of the police power, the government can go about its business without paying just compensation.<sup>12</sup> Second, there is a “pay zone” (the overlap between square and oval), where just compensation is required. Finally, there is a “no-go zone” (everything else, including the non-overlapping portion of the takings square).<sup>13</sup> Slide 4 shows these zones, with the entire no-go zone, including the impermissible portion of the takings square, rendered as black space.<sup>14</sup>

SLIDE 4



Note that, as represented here, the “pay zone” falls entirely within the area of legitimate governmental action.<sup>15</sup> To be sure, impermissible takings can occur (consider the non-overlapping part of the takings square) but these acts do not qualify for the liability rule regime

12 This zone is “free” in the sense that no cash compensation requirement is constitutionally imposed. This does not necessarily mean it is free of political costs—the costs we’d expect governmental actors to attend to. See generally Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000).

13 Following Calabresi and Melamed, there is a fourth logical possibility: that parties can keep the government from acting by paying it *not* to do something. Calabresi & Melamed, *supra* note 5, at 1116–18. This possibility has limited applicability in the case of nonjudicial takings, although it bears a family resemblance to the exactions considered in *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). I will discuss below how a version of this fourth alternative may feature in judicial takings analysis. See *infra* Part III.C.

14 In some of the images that follow, the missing (impermissible) part of the takings square will reappear for expositional purposes, but these three basic zones should be held in mind throughout the balance of the analysis.

15 See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005) (describing an inquiry into the validity of a governmental act as “logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose.”).

established by the Takings Clause; the appropriate judicial response is injunctive relief, not just compensation.<sup>16</sup>

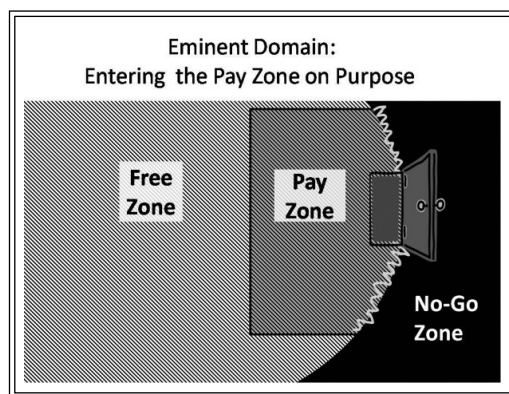
### B. *In and Out of the Pay Zone*

How does a governmental actor end up in the “pay zone” shown in Slide 4? There are two ways in: purposeful exercises of eminent domain, and regulatory actions that are deemed by the court to be the functional equivalent of eminent domain. I will discuss each of these paths into the pay zone before turning to some interesting territory that lies outside that zone.

#### 1. Eminent Domain

The first way into the pay zone is to consciously undertake a condemnation. There is no question that exercises of eminent domain are takings; the only question is whether the taking is for public use. If so, it falls within the oval of legitimate governmental conduct. Here, public use operates like a door that lets governmental entities enter into the pay zone on purpose.

SLIDE 5



In other words, the Takings Clause establishes a liability rule regime in which the government unilaterally accomplishes transfers from private parties to itself upon the payment of just compensation—but only if the taking is for public use. The gray squiggles sur-

16 Saying an act *is* a taking does not necessarily mean it is governed by the liability rule regime established in the Takings Clause or that it violates the Takings Clause. By its terms, the Takings Clause’s just compensation requirement only applies to a subset of possible takings—those of private property for public use. As discussed below, *impermissible* takings are better understood as violations of constraints lying outside the Takings Clause. See *infra* notes 47–49 and accompanying text.



rounding the door in Slide 5 represent this limiting principle; the government must enter through the “public use” door in order to qualify for the liability rule regime. The Supreme Court has held that this portal allows in all takings that are rationally related to a public purpose.<sup>17</sup> This standard gives a great deal of deference to governmental determinations that a particular taking constitutes a public use. Nonetheless, the Court has warned that purely pretextual takings—ones that accomplish a naked transfer from private party *A* to private party *B*, accompanied only by a thin and unconvincing excuse for a public justification—would not satisfy the public use requirement.<sup>18</sup> So the squiggles stay in the picture.

Significant controversy surrounds the size and the shape of the public use door, and the way in which it is policed. *Kelo* sparked a flurry of legislation to beef up the limits on public use beyond those articulated by the Supreme Court.<sup>19</sup> Some state supreme courts have also read the takings clauses in their own state constitutions more restrictively than the U.S. Supreme Court read the Takings Clause in the U.S. Constitution.<sup>20</sup> Thus, some jurisdictions have installed tougher bouncers at the public use door.<sup>21</sup>

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17 See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 487–89 (2005) (declining to apply a “heightened form of review” in interpreting “public use”); *id.* at 490 (Kennedy, J., concurring) (observing that the public use standard the Court has long applied “echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses”) (citations omitted); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (“[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.”). Notably, however, the *Kelo* majority does not repeat the rational basis standard of review, which could be read as a toughening of the standard. See Thomas W. Merrill, *Six Myths About Kelo*, 20 PROB. & PROP. 19, 21 (2006); *infra* notes 56–59 and accompanying text.

18 See *Kelo*, 545 U.S. at 477 (“[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.”).

19 See generally Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100 (2009) (describing these reforms and questioning the efficacy of many of them).

20 For example, in a case predating *Kelo*, the Michigan Supreme Court held that takings that deliver property into private hands must fit within one of three specified categories in order to qualify as public use. *County of Wayne v. Hathcock*, 684 N.W.2d 765, 773 (Mich. 2004) (overruling *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981)).

21 The effect of a stricter state public use standard on this analysis is discussed below. See *infra* text accompanying notes 61–69. These state limits resemble the ones set out by the U.S. Supreme Court insofar as “public use” is used to divide illegitimate takings from permissible ones for which compensation must be paid. A very different meaning of “public use” would use the clause to filter from the class of *permissible*

Regardless of the source and content of the requirements that act to guard the door into the liability rule regime associated with eminent domain, one thing is clear: the validity of a governmental act of eminent domain depends upon the payment of just compensation. While disputes may arise about the magnitude of this compensation, governmental actors who exercise the power of eminent domain have consciously chosen to enter the “pay zone.” Like diners who enter a restaurant for a meal, they expect to get a bill; they should not come in if they are not willing to pay.

## 2. Regulatory Takings

There is another way into the pay zone. Instead of affirmatively exercising eminent domain, governmental actors may find themselves in the pay zone when the ordinary work they were doing in the “free zone” goes “too far.”<sup>22</sup> A permanent physical occupation, even a trivial one, always goes too far.<sup>23</sup> Other regulatory actions that impact property may or may not count as compensable takings.<sup>24</sup> The notori-

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takings those for which compensation must be paid. See Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993). On Rubenfeld’s reading, other constitutional limits do the work of separating permissible from impermissible governmental takings, leaving the Public Use Clause to split up permissible takings between those that involve affirmative “use” by the government (and hence require compensation on his account) and those that do not involve such use (and hence would not require compensation on his account). *Id.* at 1114–15. Rubenfeld’s approach would avoid some textual problems he flags with the Court’s reading of “public use,” including the fact that it makes the language superfluous. See *id.* at 1079 (describing the current reading of the “so-called ‘public-use requirement’” as “simply duplicative of the legitimate-state-interest test that every deprivation of property must satisfy under the Due Process and Equal Protection Clauses”); see also *infra* Part II.A (examining the source of the public use requirement). His approach would also go some distance toward addressing the linguistic awkwardness of the category I refer to below as “confiscatory nontakings” by allowing for some “takings” to be both permissible and noncompensable. See *infra* Part I.B.3; Rubenfeld, *supra*, at 1148–49.

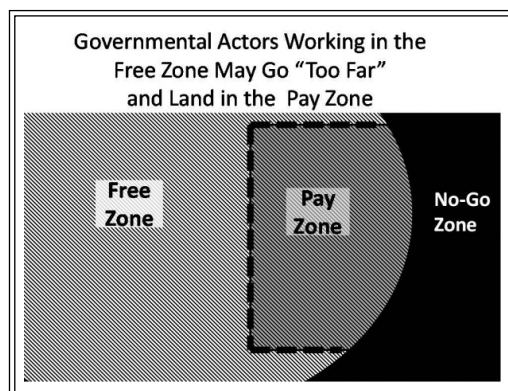
22 See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

23 See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Some caveats are discussed below, see *infra* Part I.B.3.

24 Those regulatory acts that remove all economically viable use from a property and that are not justified by “background principles” will always be compensable takings. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029–31 (1992). However, determining what counts as “all” presents challenges, as does the question of what counts as “background principles.” Although it stands for a per se rule, *Lucas* does little to brighten the line between the pay zone and free zone. The prevailing framework for evaluating regulatory takings continues to be the one set out in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). The *Penn Central* factors, reiterated in *Lingle*, include “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct

ously ill-defined line dividing the free zone from the pay zone appears in Slide 6 as a thick dashed line.

# SLIDE 6



This way of landing in the pay zone differs in important ways from the exercises of eminent domain discussed above. In the case of eminent domain, the act's location within the square of takings was a given, and the only question was whether it fell within the legitimate portion of that square (the pay zone) by qualifying as a public use. Where regulatory takings are at issue, the situation is reversed. Here, the regulatory takings analysis starts with the assumption that the governmental act falls within the realm of legitimate governmental activity—the shaded oval.<sup>25</sup> What is contested is the act's location relative to the line dividing compensable takings (the pay zone) from the ordinary stuff of governance, which requires no compensation (the free zone). Where the condemning authority who exercises eminent domain seeks the shelter of the pay zone to legitimate what is unquestionably a taking, the regulatory actor hopes to stay out of the pay zone.

There is another difference as well. The governmental entity who enters the pay zone by crossing over from the free zone will not have (yet) satisfied the just compensation requirement. Unlike an actor undertaking a conscious exercise of eminent domain, who will expect (if not exactly welcome) the associated bill, governmental

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investment-backed expectations” and the “character of the governmental action.” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538–39 (2005) (quoting *Penn Cent.*, 438 U.S. at 124).

<sup>25</sup> Plaintiffs may well challenge the legitimacy of a governmental act (on any number of grounds) and *also* argue that it is a regulatory taking. The point in the text is simply that an act only becomes a candidate for a regulatory taking if it is otherwise legitimate. See *Lingle*, 544 U.S. at 542.

actors who have inadvertently crossed over from the free zone may not be expecting a bill at all.<sup>26</sup> These actors can choose to pay just compensation and go on regulating, or they can limit their financial exposure by abandoning the acts that went too far. In the latter case, however, they still may be on the hook for compensation associated with the time that the regulation was in force.<sup>27</sup>

### 3. Confiscatory Nontakings

As important as knowing how actors can land in the pay zone is understanding how they stay out. It might seem that certain confiscatory acts, like appropriating or destroying a home or business outright, would always fall within the core meaning of a “taking.” But this is not the case. Instead, the law delineates a few categories of governmental acts that will never constitute takings in the constitutional sense, even when they involve the outright appropriation or destruction of private property.<sup>28</sup> This seeming anomaly can be explained by the idea that title is held subject to background principles that allow such actions under specified conditions, so that nothing has really been “taken.”<sup>29</sup>

The best known of the “never a taking” per se rules is the “nuisance exception.” Actions directed at controlling common law nuisances are deemed not to be takings, even when they have devastating effects on private property.<sup>30</sup> However, the application of the nuisance exception is far from clear cut, and the exception ultimately folds into the much-remarked difficulty locating the line between compensable and noncompensable governmental acts. Standard applications of the nuisance exception involve regulatory acts rather than outright confiscation or destruction, although the economic

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26 Of course, the finding that an act constituted a regulatory taking is unlikely to come as a complete surprise, and in some cases governmental entities may be fully aware that an act runs a high risk of being found to be a compensable taking.

27 See *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 318–19 (1987); see *infra* Part II.B.2.

28 An excellent account of these categories, which has greatly informed this section of the essay, is found in DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* 110–20 (2002).

29 See *supra* note 24; *infra* note 30.

30 This exception, combined with other traditional exceptions to the Takings Clause, evolved into the “background principles” exception articulated in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). The *Lucas* Court held that regulatory actions that eliminate all economically viable use will always be takings, unless the limitation in question “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.” *Id.* at 1029.

effects may be similar. Indeed, a nuisance-like rationale for the exercise of eminent domain, such as “blight,” is not generally thought to relieve governmental actors of the requirement that just compensation be paid if land is taken away permanently.<sup>31</sup> This might often be explained by the fact that the use in question does not, in fact, rise to the level of a common law nuisance.<sup>32</sup> But even where it plainly does, the compensation requirement could still be justified by breaking the governmental act into two temporally bounded components—nuisance abatement and affirmative use (or resale) of the land—and exempting only the former from compensation.<sup>33</sup> A more difficult case is the demolition of property in the name of nuisance control where the governmental actor does not take title to the property.<sup>34</sup>

Other per se exceptions permit confiscation or destruction without compensation. A representative example is the “conflagration rule,” which holds that a public official fighting a raging fire may destroy property without compensation in order to create a fire-

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31 See, e.g., *Berman v. Parker*, 348 U.S. 26, 36 (1954) (holding, in a case involving condemnation for redevelopment of a blighted area, that “[t]he rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking”). It is true that the property that was the subject of the challenge in *Berman* was not itself blighted (but lay within a blighted area), *id.* at 31, but the Court gave no indication that the compensation requirement would be altered for those structures that were in fact blighted.

32 Although the blight rationale is premised on the existence of a harmful or subnormal use, that use may or may not qualify as a nuisance under the common law.

33 This point is clearer if we think first of the state regulating rather than confiscating. In year one, it might order an owner to destroy a blighted housing unit on (uncontroverted) nuisance grounds. No compensation is required, because this is nuisance control. The owner complies, and thenceforth maintains the property in a way that creates no nuisance. In year two, the state cannot come back and demand the owner destroy all improvements on the land simply because there used to be a nuisance there. Nor could it demand the owner hand over the property for free by citing the past presence of a nuisance on the site. Doing so would be pretextual; it would go “too far.” What the state cannot do in two steps, it should not be able to do by blurring them together into one.

34 A recent Texas Supreme Court case addressed one facet of this issue in holding that “independent court review” is required by the Texas constitution when a landowner appeals a nuisance determination made by an administrative agency to support an uncompensated demolition. See *City of Dallas v. Stewart*, 361 S.W.3d 562, 564 (Tex. 2012). One might also argue that some efforts at nuisance control should be compensable even if they do not amount to takings. See Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 1009–13 (1999) (presenting a category of compensable nontakings that would follow from their approach of decoupling compensation choices from the determination of whether a taking has occurred).

break.<sup>35</sup> Similarly, courts have held that no compensation is due when police destroy property in the course of apprehending suspects or protecting the public order<sup>36</sup> or where property is destroyed in a military emergency.<sup>37</sup> Forfeitures of property that occur in accordance with statutory and due process requirements are also exempted from Takings Clause scrutiny.<sup>38</sup> Property damage that occurs pursuant to the federal government's use of a navigational servitude has

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35 See DANA & MERRILL, *supra* note 28 at 118–20; *Lucas*, 505 U.S. at 1029 n.16 (citing *Bowditch v. Boston*, 101 U.S. 16, 18–19 (1880)) (discussing “litigation absolving the State (or private parties) of liability for the destruction of ‘real and personal property, in cases of actual necessity, to prevent the spreading of a fire’ or to forestall other grave threats to the lives and property of others”); *Surocco v. Geary*, 3 Cal. 69, 73 (Cal. 1853) (“A house on fire, or those in its immediate vicinity which serve to communicate the flames, becomes a nuisance, which it is lawful to abate, and the private rights of the individual yield to the considerations of general convenience and the interests of society.”).

36 See, e.g., *Customer Co. v. City of Sacramento*, 895 P.2d 900 (Cal. 1995) (holding no just compensation due when police caused severe damage to a convenience store in order to apprehend a suspect). The California Supreme Court found ample support for its decision in “the so-called emergency exception to the just compensation requirement,” which it described as having “had a long and consistent history in both state and federal courts.” *Id.* at 909. Nonetheless, there has been some variation in state court approaches to this issue, with a few jurisdictions showing a willingness to find some law enforcement destructions to be takings. See, e.g., *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38 (Minn. 1991) (holding, based on the Minnesota constitution’s takings provision, that “the better rule, in situations where an innocent third party’s property is taken, damaged, or destroyed by the police in the course of apprehending a suspect, is for the municipality to compensate the innocent party for the resulting damages”); Charles E. Cohen, *Takings Analysis of Police Destruction of Innocent Owners’ Property in the Course of Law Enforcement: The View from Five State Supreme Courts*, 34 McGEORGE L. REV. 1 (2002); Lior J. Strahilevitz, Case Note, *When the Taking Itself is Just Compensation*, 107 YALE L.J. 1975 (1998). The U.S. Supreme Court addressed the question in *YMCA v. United States*, 395 U.S. 85 (1969), a case that held troops’ occupation of buildings that were under siege by rioters not to be a taking. The *YMCA* Court focused on the fact that the property owner was a “particular intended beneficiary” of the act, a point that might be viewed as supporting compensation (under at least some circumstances) for destruction undertaken for public benefit. *Id.* at 92. See Strahilevitz, *supra*; *Wallace v. City of Atlantic City*, 608 A.2d 480 (N.J. Super. Ct. Law Div. 1992).

37 See *United States v. Caltex*, 344 U.S. 149, 153, 156 (1952) (holding that no compensation was due when the Army “destroy[ed] property of strategic value to prevent the enemy from using it to wage war the more successfully”).

38 See DANA & MERRILL, *supra* note 28, at 115–16; *Bennis v. Michigan*, 516 U.S. 442, 452 (1996) (holding that “government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain”). The use of the word “already” in *Bennis* is interesting insofar as it suggests some logically antecedent stage in which property claims are properly stripped from claimants before the issue of a

been likewise deemed to be beyond the reach of the Takings Clause.<sup>39</sup> It is debatable how well each of these per se exceptions holds up to scrutiny, but a variety of interesting arguments have been put forward on behalf of a number of them.<sup>40</sup>

Together, these doctrines mark out an area within the governmental “free zone” that looks and feels a great deal like what a lay person might call a taking, but which does not qualify for that label as a doctrinal matter.<sup>41</sup> We already know that a governmental decision to appropriate property is not a necessary precondition to a finding of a taking; regulatory bodies may end up in the pay zone without meaning to do so. The category of confiscatory nontakings outlined above further establishes that a governmental decision to appropriate property is not always sufficient to constitute a taking, either. To show this, Slide 7 overlays a triangle representing outright governmental appropriations on our three-zone model.<sup>42</sup> Outright appropriations may be impermissible acts,<sup>43</sup> legitimate takings (conscious exercises of emi-

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taking ever arises. The notion bears some resemblance to the idea of background principles articulated in *Lucas*. See *supra* note 25.

39 See DANA & MERRILL, *supra* note 28, at 116–18.

40 See, e.g., Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1344–48 (1991) (distinguishing compensable takings from tort-regulating governmental interventions on the grounds that the former but not the latter involve singling out); Rubinfeld, *supra* note 21, at 1114–15 (discussing governmental impoundments as noncompensable takings based on his reading of the public use clause).

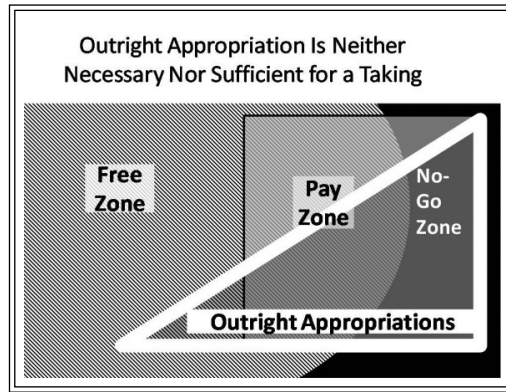
41 Taxation represents another type of governmental appropriation that has been deemed to fall categorically outside the Takings Clause’s purview. For discussion and critique, see RICHARD A. EPSTEIN, *TAKINGS* 283–305 (1985).

42 I use the term “outright” here rather than “intentional” to avoid some ambiguities surrounding the notion of intent. Presumably, the government is always engaging in intentional (as opposed to somnambulant or coerced) acts, even if it hopes an act will not lead to liability as a taking. Yet focusing on intended *outcomes* introduces possibilities like disingenuousness or fecklessness. “Outright” speaks not to what an actor actually intended but rather whether the actor has taken a decision that it would publicly characterize as a confiscation or destruction of property. See *infra* note 46 and accompanying text. Other work on judicial takings has used the notion of intent in various ways to classify judicial acts. See generally Barros, *supra* note 2; Peñalver & Strahilevitz, *supra* note 2.

43 Some governmental takings may flunk the conditions set out in the Takings Clause without being outright appropriations. For example, suppose that a regulatory action were undertaken for purely private benefit. Depending on the extent of the regulation, it might be considered a taking, but it would (more importantly) also be a violation of the constitutional requirement that acts bear some rational relationship to a conceivable public purpose. Hence, it would fall into the “no go” portion of the takings square, even if the governmental actor did not appropriate property outright. The same can be said of regulatory acts that are *ultra vires*. See generally Mat-

nent domain), or legitimate, noncompensable acts (such as property forfeitures for criminal conduct).

### SLIDE 7



### C. Taking Stock

#### 1. Two Contested Boundaries

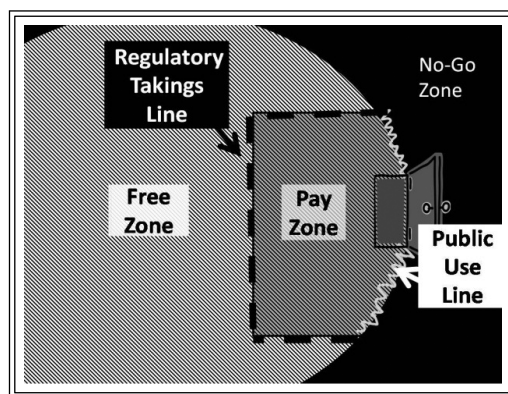
As the analysis thus far has established, takings jurisprudence grapples with two contested boundaries: 1) the line between takings that are not for public use and those that are (“the public use line”); and 2) the line between legitimate governmental acts that can be carried out without paying compensation and legitimate governmental acts that require compensation (“the regulatory takings line”). The placement of the public use line determines the scope of eminent domain, while the regulatory takings line determines the scope of regulatory takings. Huge literatures address each of these boundaries, and academics have debated a variety of procedures for determining the location of these lines. For our purposes, it is enough to note their presence together in our takings picture, as shown in Slide 8.

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thew D. Zinn, Note, *Ultra Vires Takings*, 97 MICH. L. REV. 245 (1998). For this reason, there is a corner of the impermissible portion of the takings square that is not overlaid by Slide 7’s triangle of outright appropriations.



## SLIDE 8



Putting the two boundaries together in the same diagram highlights an important contrast that will become important to the later analysis. The line defining the scope of regulatory takings—the boundary between the free zone and the pay zone—is actively policed by courts.<sup>44</sup> In contrast, the line defining the scope of eminent domain—the boundary between the no-go zone and the pay zone—is, at least as far as the Supreme Court’s jurisprudence goes, largely self-policed by the political actors engaged in condemnations.<sup>45</sup> This difference can be chalked up to differences in institutional competence. Courts view themselves as relatively good at telling when regulation goes “too far” but less good at determining what does and does not serve a public purpose. Hence, they are willing to defer to legislative and executive branch actors in the latter case, but not in the former.

## 2. Characterizations and Outcomes

The two boundaries just discussed relate to two different ways that a governmental actor might characterize a given property-impacting act.<sup>46</sup> First, the actor might characterize the act as legiti-

44 See Thompson, *supra* note 2, at 1449 (“Although the question of when a particular legislative or executive action constitutes a ‘taking’ is relatively muddled, the courts actively police the legislative and executive branches and, with growing frequency, invalidate actions that have gone too far.”).

45 See *Kelo v. City of New London*, 545 U.S. 469, 483 (2005) (“For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”).

46 I focus here on how the actor characterizes the act rather than what the actor “intends,” recognizing that there may be instances when the two do not match. It is reasonable to assume that no actor will claim to be undertaking an act that is not for a public purpose, but that does not mean that serving the public is always what the actor truly “intends.”

mate and noncompensable, part of her ordinary duties in adjusting the benefits and burdens of life in a complex society. Alternatively, the actor might characterize the act as an outright appropriation of some sort that is undertaken for public use.

A reviewing court may slot the act into any one of the three basic zones delineated in Slide 4. The act might be deemed not for a public purpose at all, and hence be placed in the no-go zone; it might fall in the free zone as an act that is for public use but is not a taking; or it might be deemed a taking for public use for which just compensation is required.

Table 1 shows the possible ways in which a governmental actor’s characterization and the court’s holding intersect to produce legal outcomes in takings cases. The rows indicate the actor’s characterization, and the columns indicate the zone in which the court ultimately locates the act.

TABLE 1: OUTCOMES IN TAKINGS CASES

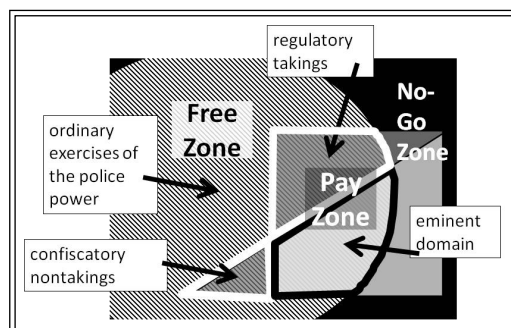
<div>Court's Holding</div> <div>Actor's Characterization</div>	Not for Public Use [No-Go Zone]	Not a Taking (But Is for Public Use) [Free Zone]	Taking for Public Use [Pay Zone]
Legitimate, Noncompensable Governmental Act	impermissible act	ordinary exercise of the police power	regulatory taking
Outright Appropriation for Public Use	pretextual, invalid A to B transfer	confiscatory nontaking	eminent domain

Table 1’s top row gives us three alternative outcomes when a governmental actor is not engaging in an outright appropriation. These, reading from left to right, are: 1) it will be found to be an impermissible act, outside the realm of legitimate government activity; 2) it will be an ordinary exercise of the police power that is not compensable; or 3) it will be found to be a regulatory taking for which just compensation must be paid. There are also three alternative outcomes when the governmental actor understands itself to be engaging in an appropriation. These (again left to right) are: 1) it will be found to be a pretextual use of the eminent domain power, and hence invalid as a naked A to B transfer; 2) it will be found to fit within an exception such as the conflagration rule and thus treated as a confiscatory nontaking for which no compensation is due; or 3) it will be found to

be a legitimate exercise of the eminent domain power for which just compensation must be paid.

Slide 9 locates Table 1's four categories of legitimate governmental acts on the basic takings diagram. Pretextual takings and other impermissible acts are lumped together in the no-go zone.

SLIDE 9



## II. WRONGS AND REMEDIES

With the basic terrain of takings jurisprudence in mind, we can take on some complexities involving the boundaries depicted in Part I—how they are policed, what crossing them means, and how identified wrongs are remedied. As suggested above, takings of private property are subject to two constitutional requirements: that the property be taken for public use and that just compensation be paid. I will examine these requirements in turn, and then make some observations about how and by whom the two boundaries identified above—the public use line, and the regulatory takings line—are policed. In working through this analysis, I will continue to focus (for now) on nonjudicial takings.

### A. *Public Use*

Consider first the public use requirement. Suppose that a governmental actor engages in an appropriation of private property that fails this test, perhaps by authorizing a clearly pretextual transfer from the actor's enemy, A, to the actor's friend, B. Interestingly, this does not violate the literal terms of the Takings Clause.<sup>47</sup> The clause bans taking private property for public use unless just compensation is

<sup>47</sup> See *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988) (noting the Takings Clause's "silence" on takings for private use); John D. Echeverria, *Stop the Beach Renourishment: Why the Judiciary is Different*, 35 VT. L. REV. 475, 483 (2010) (discussing the view that "the Takings Clause only applies to takings

paid. It does not, by its terms, have anything to say about taking private property for private use, whether to settle a score, pain an enemy, delight a friend, or accomplish any other purely private goal. This is not to say that takings for private use are constitutional. But it suggests we must look outside the Takings Clause to understand why.<sup>48</sup> One possibility has received recent attention: a taking that fails the public use test is a due process violation.<sup>49</sup>

This answer fits together neatly with the Supreme Court's test for public use. The test is whether the taking in question is rationally related to a public purpose.<sup>50</sup> This is a means-ends test. In *Lingle v. Chevron*, the Court made clear that means-ends tests have no place in Takings Clause jurisprudence. The focus in *Lingle* was on a more demanding means-ends test that had been carelessly repeated in a series of regulatory takings cases, but the point was stated quite broadly.<sup>51</sup> The best way of understanding the "public use" require-

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for public use, and does not apply at all to actions that do not serve a public use" and citing *Coniston*).

48 Courts and commentators have generally assumed that the public use requirement is a requirement of the *Takings Clause*, but the language is in tension with that interpretation. Judge Posner discusses this point at some length in *Coniston*:

It can be argued that if the taking is not for a public use, it is unconstitutional, but perhaps not as a taking; for all the takings clause says is "nor shall private property be taken for public use, without just compensation." This language specifies a consequence if property is taken for a public use but is silent on the consequences if property is taken for a private one. Perhaps the effect of this silence is to dump the case into the due process clause. The taking would then be a deprivation of property without due process of law.

*Coniston*, 844 F.2d at 464. Posner goes on to detail a number of difficulties with this interpretation, including its apparent inconsistency with some, but not all, prior statements on the matter by the Supreme Court, before deciding that the matter need not be decided in order to handle the case at hand. *Id.*

49 See Peñalver & Strahilevitz, *supra* note 2, at 327 ("A better way to describe the situation of takings for private use is that they do not fall within the scope of the State's power to act at all and, for the same reason, violate due process."); John Paul Stevens, The Ninth Vote in the "Stop the Beach" Case, Transcript of Address at Chicago-Kent College of Law, Oct. 3, 2012, at 16, available at [http://www.supremecourt.gov/publicinfo/speeches/sp\\_10-03-12.pdf](http://www.supremecourt.gov/publicinfo/speeches/sp_10-03-12.pdf) (describing due process protections as "the true source of the prohibition against takings for a purely private purpose."); see also *Coniston*, 844 F.2d at 464; Zinn, *supra* note 43, at 282–83 & n.193 (discussing and citing sources on the connections between public use and due process).

50 See *supra* note 17.

51 It is certainly possible to question the crispness of the distinction the *Lingle* Court draws between the means-ends analysis that it associates with due process and the Takings Clause's concern with burden distribution. See *infra* note 87. Nonethe-

ment in the Takings Clause, then, is as a prerequisite for qualifying for the clause's liability rule regime.<sup>52</sup> When a taking does not qualify, it simply does not fall within the Takings Clause at all, much less violate it.<sup>53</sup> Instead, it is better understood as violating substantive due process.<sup>54</sup>

This analysis suggests that there is nothing special about the impermissible portion of the takings square; it disappears into a general prohibition on governmental actors undertaking acts that fail to meet the requisite means-ends test. Thus, it seems appropriate for our purposes to depict impermissible takings as of a piece with all other forms of prohibited governmental actions; they all fall within the no-go zone first identified in Slide 4 above. It is worth emphasizing here that governmental acts can be impermissible for a wide variety of reasons other than failing means-ends tests. Further, different means-ends tests apply in different contexts.<sup>55</sup> I do not mean to suggest that all of these ways of exceeding legitimate power are indistinguishable from each other for all purposes, only that takings that are not for public use fall within a broader class of prohibited government acts, rather than constituting a meaningfully unique category of their own.

There remain a few wrinkles to work through. One question is whether the Supreme Court's test for public use is identical to, or more stringent than, the ordinary rational basis review that defines the minimum standard for due process. *Kelo* indicates that the public use requirement would not be met if the condemnor had an impermissible purpose of transferring property for purely private benefit.<sup>56</sup>

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less, the public use test as stated by the Court is squarely positioned on the means-ends side of the line.

52 See *Coniston*, 844 F.2d at 464 ("Rather than being viewed simply as a limitation on governmental power the takings clause could be viewed as the source of a governmental privilege: to take property for public use upon payment of the market value of that property . . ."); see also *id.* (describing the Supreme Court's decision in *Montana Pac. Ry. Co. v. Nebraska*, 164 U.S. 403 (1896) as follows: "once the privilege created by the takings clause was stripped away, the state was exposed as having taken a person's property without due process of law").

53 See Peñalver & Strahilevitz, *supra* note 2, at 327.

54 See *id.* It might also violate other limits on governance contained in the Constitution or in relevant statutory provisions.

55 Rational basis review is the default standard for economic and social legislation. However, elevated scrutiny applies when suspect classifications or fundamental rights are at issue.

56 *Kelo v. City of New London*, 545 U.S. 469, 478 (2005) ("Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.").

Some scholars have read this statement to mean that *Kelo* requires the condemnor to be actually pursuing a public purpose.<sup>57</sup> This would indeed be a stronger requirement than the usual rational basis standard that requires only a *conceivable* public purpose. But *not* having an improper purpose is a different and easier requirement to meet than actually having a proper purpose—and the former seems to be already embedded in the usual rational basis analysis.<sup>58</sup>

Nonetheless, there are some indications in *Kelo* (both in Justice Stevens's opinion for the Court and in Justice Kennedy's concurrence) that planning efforts may be relevant to the validity of economic development takings.<sup>59</sup> These suggestions might be read to contemplate a somewhat more purposeful pursuit of the public interest than is usually required by rational basis review—one that is consistent with understanding public use as a door that a government actor must open and enter by engaging the appropriate institutional apparatus. Yet, even if a somewhat stronger means-ends test were applied as a matter of federal constitutional law, *Lingle*'s analysis still tells us it would remain a due process standard and not a Takings Clause standard.<sup>60</sup> As far as current federal constitutional law goes, then, there is

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57 Peñalver & Strahilevitz, *supra* note 2, at 322; see also Merrill, *supra* note 17, at 21 (quoting *Kelo*, 545 U.S. at 478) (observing that “the decision appears to contemplate that courts should carefully review condemnations that result in a private retransfer of property, or are not carried out in accordance with some planning exercise, to determine whether the government is taking property ‘under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit’”).

58 Peñalver and Strahilevitz recognize this, characterizing any distinction between the rational basis standard and the standard for public use as “more apparent than real,” insofar as any legislation that is actually found to be motivated by an improper purpose will be struck down on rational basis review. Peñalver & Strahilevitz, *supra* note 2, at 324–25 n.79 (citing Justice Kennedy's concurrence in *Kelo*, 545 U.S. at 491).

59 See Nicole Stelle Garnett, *Planning as Public Use?*, 34 *ECOLOGY L.Q.* 443, 444 (2007) (referencing the “Court's implicit suggestion [in *Kelo*] (made explicit by Justice Kennedy in concurrence) that public, participatory planning is a constitutional safe harbor and may separate impermissible ‘private’ takings from presumptively valid public ones”).

60 *Lingle* goes further, however, by rejecting the possibility of *any* elevated means-ends analysis in the regulatory takings context (exactions cases aside). The Court cites prudential considerations for rejecting the “substantially advances” test that would apply with equal force if the test were imported into the due process analysis. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 544 (2005) (explaining that “the ‘substantially advances’ formula is not only *doctrinally* untenable as a takings test—its application as such would also present serious practical difficulties” because “it would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited”). Hence, *Lingle* not only evicts the medium-tough “substantially advance a legitimate state interest” test from the Takings Clause and exiles it to the land of due process, but also suggests its beefed-up formulation

neither daylight nor overlap between a due process violation and a taking that meets the public use requirement; a given condemnation is either one or the other, never both, and never neither.

A trickier issue is presented by the heightened public use requirements that some states have imposed as a matter of statutory or state constitutional law.<sup>61</sup> Could these additional hurdles make a condemnation impermissible under state law (because it does not meet the heightened state standard) while still leaving it in compliance with the federal requirements for due process? The key question is whether state law constrains what counts as a legitimate state interest (or its alter ego, “a public use”) for federal due process purposes.<sup>62</sup> If so, there would again be neither daylight nor overlap between a permissible taking (this time under state law) and a federal due process violation. If not, we would run into the following interesting situation: that one and the same act could land in the pay zone for federal law purposes and in the no-go zone for state law purposes.<sup>63</sup>

Clearly, a state could not meaningfully apply stricter public use limits than those in the U.S. Constitution (as Justice Stevens, writing for the Court in *Kelo*, emphasized they could<sup>64</sup>) if governmental actors could continue to access the “pay zone” regardless of what state law says about it. Hence, the violation of heightened state public use standards must be enjoined. In the typical eminent domain case, this would mean no taking would occur at all, and hence there would be nothing left to fall within the federal pay zone. It would be logically possible for a regulatory taking that failed to meet a heightened state public use requirement to be enjoined and yet still be subject to a just

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has no place at all in federal constitutional jurisprudence surrounding land use decisions. See Lynn E. Blais, *The Problem With Pretext*, 38 FORDHAM URB. L.J. 963, 982–983 (2011) (arguing that the *Lingle* Court’s “doctrinal fit” and “institutional legitimacy” concerns “also dictate that the concern for pretext fall out of eminent domain jurisprudence”).

61 See *supra* notes 19–20 and accompanying text.

62 This same question will return later in an even more interesting guise. See *infra* Part III.A.1.

63 Cf. Ilya Somin, *Stop the Beach Renourishment and the Problem of Judicial Takings*, 6 DUKE J. CON. L. & PUB. POL’Y 91, 97 (2011) (stating that “even if the court’s action is illegal under state law that does not mean that it cannot also qualify as a taking under federal constitutional law”). Although Somin discusses the situation where state law is violated by a court, his logic would also apply with equal force to nonjudicial actors who violate a state’s elevated public use requirement.

64 See *Kelo v. City of New London*, 545 U.S. 469, 489 (2005) (“We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.”); Robert C. Ellickson, *Federalism and Kelo: A Question for Richard Epstein*, 44 TULSA L. REV. 751, 762–63 (2009) (lauding the federalism implications of the Supreme Court’s stance in *Kelo*).

compensation requirement (for any interim period) under federal law.<sup>65</sup> But this seems out of keeping with the Supreme Court's view of the Takings Clause as a domain in which *otherwise valid* acts are evaluated to determine if compensation is required.<sup>66</sup>

An answer more consonant with existing doctrine and principles of federalism is that a taking that does not meet state public use requirements can never truly be "for public use" for federal constitutional purposes either, since it is an act that by all rights never should have happened.<sup>67</sup> The Supreme Court has treated *ultra vires* acts in just this manner,<sup>68</sup> and whether or not a given taking literally falls into that category, the same reasoning arguably applies.<sup>69</sup> Importing state law to limit public use seems as appropriate, and as necessary, as importing state law into the meaning of property itself.

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65 I set aside here the procedural questions that might be associated with such possibilities.

66 See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005). Allowing federal compensation for interim takings that violate state public use requirements could also introduce moral hazard concerns, if it delayed challenges on public use grounds at the state level by those hoping to glean a large interim payment in addition to an injunction.

67 To be sure, the Court has held in other contexts that a governmental actor may violate state law without necessarily committing a federal constitutional violation. See, e.g., *Virginia v. Moore*, 553 U.S. 164 (2008) (holding that an arrest that violates state law did not violate the Fourth Amendment); *Snowden v. Hughes*, 321 U.S. 1 (1944) (holding that there was no equal protection violation when a state election law was violated). But the issue here is distinct in that the very thing that legitimates the act at the federal level is its pursuit of a public purpose, a term that is meaningless without reference to the purposes a given state actor is empowered by its jurisdiction to pursue.

68 See *Hooe v. United States*, 218 U.S. 322, 335–36 (1910) ("The constitutional prohibition against taking private property for public use without just compensation is directed against the Government, and not against individual or public officers proceeding without the authority of legislative enactment. The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government."); see also Zinn, *supra* note 43, at 252–54 (discussing *Hooe's* treatment of *ultra vires* actions).

69 The question of how to treat various kinds of governmental errors or excesses under takings law has received some scholarly attention. See generally David W. Spohr, "What Shall We Do With the Drunken Sailor?" *The Intersection of the Takings Clause and the Character, Merit, or Impropriety of Regulatory Action*, 17 SOUTHEASTERN ENVTL L.J. 1 (2008); Zinn, *supra* note 43; John D. Echeverria, *Takings and Errors*, 51 ALA. L. REV. 1047 (2000). See also *infra* Part III.A.1 (discussing *ultra vires* acts in the context of judicial takings).



### B. *Just Compensation*

Consider next the just compensation requirement. Once a governmental act qualifies as a taking for public use, just compensation must be paid. It might seem, then, that a taking for which a governmental actor did not pay at all, or did not pay enough, would fall into the impermissible realm as surely as would a taking that was not for public use. Certainly, courts regularly consider the possibility that the Just Compensation Clause has been violated in just such ways. But thinking about where such a governmental act fits into our diagram reveals an interesting wrinkle.

#### 1. A Fine Fix

Otherwise legitimate governmental acts that amount to takings are not relegated to the impermissible realm simply due to an actor's failure to voluntarily pay full just compensation. The reason is simple: whenever an uncompensated taking is otherwise legitimate (for public use, and not in violation of any other limitation on governmental action), courts force governmental bodies to pay just compensation for as long as the taking continues.<sup>70</sup> The remedy for violation of the Just Compensation Clause is nothing less than mandatory compliance with that clause. In other words, one need not pay in advance, or pay willingly, to end up in the "pay zone." One merely needs to do otherwise legitimate acts for which compensation is due. The zone, then, is best understood not as an "already paid" or "willingly paid" zone, but rather as a "must pay zone."

Paying just compensation transforms what otherwise would have been an impermissible governmental act into a permissible one under the Takings Clause, even if the governmental entity did not initially offer to make the payment. Even if the government chooses to discontinue the act that is found to be a taking, it still must pay just compensation for the time period that the taking for public use was in effect.<sup>71</sup> Once just compensation is paid, the violation disappears and is replaced by a legitimate governmental act that complies with the Takings Clause.

In other words, there is an implicit doctrinal rule that any past or ongoing taking that *can* be legitimated by just compensation *must* be legitimated by just compensation—unless and until the government

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<sup>70</sup> See *First English Evangelical Lutheran Church of Glendale v. County of L.A.*, 482 U.S. 304, 319 (1987) (requiring compensation when an ordinance has worked a taking for a period of time prior to invalidation).

<sup>71</sup> *Id.*

stops doing it.<sup>72</sup> Known cases of nonjudicial takings in which just compensation has not been paid are addressed with a payment requirement that has the interesting effect of validating the governmental act *ex post*.

## 2. No Way Out

The flip side of the remedial point just made is that governmental actors may get stuck with an unexpected bill. Once a governmental actor enters the pay zone, whether by exercising eminent domain or by crossing a hazy line in the course of regulating, there is “no way out” in the following sense: whatever has been taken must be paid for. In the eminent domain context, this principle works in a straightforward way, subject only to disputes about the appropriate measure of just compensation.<sup>73</sup> In the context of regulatory takings, however, things become more complex. The governmental actor is not forced to *go on* taking, and can give up the regulation in question in response to the litigation outcome. This does not pull the earlier action out of the pay zone during the time it was in force, however; just compensation must still be paid for whatever is found to have been taken.<sup>74</sup> Governmental bodies can thus respond to a finding of a regulatory taking by keeping the regulation in place and paying just compensation for the full impact on the property, or withdrawing the regulation and paying a prorated price for the interim period.<sup>75</sup>

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72 Accordingly, those whose property has been taken by a governmental party with the ability to pay are entitled to nothing more (and nothing less) than just compensation. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984); see also *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot.*, 130 S. Ct. 2592, 2617 (2010) (Kennedy, J., concurring) (citing *Ruckelshaus*); *infra* Part III.D.2 (discussing the remedial question in the judicial takings context).

73 Some states do, however, have what amounts to a liberal return policy in which a condemnor confronted with the fiscal consequences of just compensation has the choice to decide not to go through with the purchase after all. *Stop the Beach*, 130 S. Ct. at 2613–14 (Kennedy, J., concurring). Even there, however, payments are required to make up for the delay and dislocation associated with the condemnation. *Id.*

74 *First English*, 482 U.S. at 321 (“[W]here the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.”).

75 Alternatively, the governmental actor may amend the regulation, again paying for any interim taking. See *id.* (“Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain.”). Significantly, the fact that governmental actors who are found to have

The requirement that regulators who abandon their regulatory takings must nonetheless pay just compensation for the interim period was established in *First English*.<sup>76</sup> That rule was not changed in *Tahoe-Sierra*, a case that held there is no per se taking where a moratorium renders property valueless for a time.<sup>77</sup> Squaring the two cases is a conceptual challenge, and it is worth noting that not one Justice signed onto both majority opinions.<sup>78</sup> The tension between the cases arises because *First English* holds that a governmental actor must pay even if its taking (it turns out) only lasted for a while, whereas *Tahoe-Sierra* suggests that rendering property valueless temporarily is not a per se compensable taking.<sup>79</sup> The fancy footwork required to square the two cases focuses on whether something is, or is not, “really” a taking, a question that seems to be answered from an ex ante perspective. Thus, the fact that a taking ends does not keep it from having been, during its short life, a taking for which compensation is due.<sup>80</sup> This is true even if a similar regulation that was designed from the outset to have a similar effect and duration would not be a compensable taking.<sup>81</sup>

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committed takings have this range of choice does not mean that reviewing courts can choose among these remedies at will.

76 *Id.* at 319 (“Where this burden [on the owner] results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period.”).

77 *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002).

78 Both cases were decided 6–3 less than fifteen years apart, but the Court experienced significant turnover in the interim. Chief Justice Rehnquist authored the majority opinion in *First English*, joined by Justices Brennan, White, Marshall, Powell, and Scalia. Justice Stevens dissented, joined in part by Justices Blackmun and O’Connor. *First English*, 482 U.S. 304. In *Tahoe-Sierra*, Justice Stevens penned the majority opinion, joined by Justices O’Connor, Kennedy, Souter, Ginsburg, and Breyer. Chief Justice Rehnquist dissented, along with Justices Scalia and Thomas. *Tahoe-Sierra*, 535 U.S. 302.

79 This does not mean, of course, that the temporary interference might not be a taking under *Penn Central*. Still, the Court’s refusal to apply a per se test suggests that at least some regulations that temporarily remove all economically viable use will fail to amount to takings.

80 *First English*, 482 U.S. at 319 (“Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a ‘temporary’ one, is not a sufficient remedy to meet the demands of the Just Compensation Clause.”).

81 Such a regulation would be deemed “prospectively temporary” and hence subject to *Tahoe-Sierra*’s rule that *Penn Central* balancing applies. See ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS* 264–65 (3d ed. 2005) (distinguishing

The conceptual tension remains when we consider the just compensation requirement. If the assessment that an action “was” a taking is based on the whole thing having been taken, and if the smaller time slice would not have been a taking on its own,<sup>82</sup> then how does a court arrive at the conclusion that the time slice (and only the time slice) must be compensated for? One explanation would be that the government is actually required to, and does, compensate for the full (permanent) taking, but does so only partly in cash. The rest of the compensation is provided in kind by relinquishing the regulation.<sup>83</sup> The ability to pay for takings in kind is not open-ended, as the exactions analysis in *Nollan* and *Dolan* establishes.<sup>84</sup> But within this limited context, recognizing an implicit in-kind payment may offer the clearest conceptual way of understanding what is going on.

### C. *The Inviolable Takings Clause?*

The public use and just compensation analyses together suggest that once a court finds a taking has occurred, it will classify the act in one of two ways. Either it will be deemed an impermissible act that does not qualify for the Takings Clause’s liability rule regime at all, or it will be an act which can, and hence must, be validated by the payment of just compensation for however long the taking continues. Slide 10 shows how these observations map onto the diagrams developed above.

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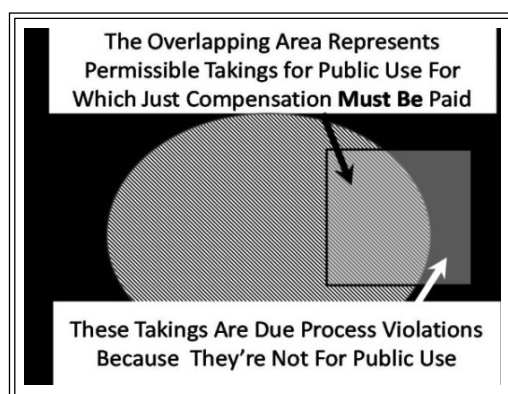
“retrospectively temporary” takings from “prospectively temporary” actions and citing cases).

82 Of course, it is possible that a given time slice might be a taking on its own. See *supra* note 79. But if we assume that at least some time slices would not be takings on their own, the conundrum spelled out in the text would remain.

83 Cf. EPSTEIN, *supra* note 41, at 195–215 (1985) (discussing “implicit in-kind compensation” as an alternative to cash payments in the regulatory takings context).

84 *Nollan* held that the government cannot exact concessions that would constitute takings if appropriated outright as a condition of lifting regulations unless there is an “essential nexus” between the reason for the original regulation and the concession requested. *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 837 (1987). *Dolan* added a requirement of “rough proportionality” between the concession and the problem to which the original regulation responded. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1993). Together, these cases appear to limit the ability of governments to pay for what would otherwise be takings by offering “in kind” regulatory concessions. A clever extension and examination of this point is provided in Douglas T. Kendall & James E. Ryan, “Paying” for the Change: Using Eminent Domain to Secure Exactions and Sidestep *Nollan* and *Dolan*, 81 VA. L. REV. 1801, 1803–04 (1995) (describing a circumvention of *Nollan* and *Dolan* in which a governmental entity takes land through eminent domain, and then offers the landowner a choice between cash compensation and a development permit—an approach the authors describe as “not obviously constitutional”).

## SLIDE 10



It might seem, then, that the Takings Clause cannot actually be violated in a lasting way, once the courts get hold of a case. To be sure, during the time when no, or inadequate, compensation has been paid, there is an ongoing violation of the Takings Clause that might, in fact, never get addressed through a payment of compensation. Moreover, if we contemplate the possibility that a governmental actor without access to any funds (i.e., a court) can engage in takings, then this after-the-fact validation through payment might no longer be available. The point is not to declare the Takings Clause literally inviolable, but rather to observe that the clause builds in a liability-rule fix that so neatly erases the violation and legitimates the underlying act as to effectively take the question of other remedies off the table—in the nonjudicial context. If the clause is to be applied in situations where that fix is unavailable, the question of remedies must be confronted anew.<sup>85</sup>

#### *D. Two Borders, Different Patrols*

The analysis thus far has focused on ways that actors may run athwart boundaries, while saying little about how those boundaries are policed. Thinking about Slide 8's two boundaries in tandem leads to the following observation: courts police the regulatory takings line more actively than they police the public-use line.<sup>86</sup> Institutional com-

<sup>85</sup> The problem of remedies is well recognized in the judicial takings literature and is also evidenced by the conflicting views of the plurality and of Justice Kennedy in *Stop the Beach*.

<sup>86</sup> By "actively," I do not mean to suggest anything about the government's win-loss rates—an inquiry that would be complicated in any event by selection effects. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). I mean only that there is more analytic engagement with the question of regulatory takings, as evidenced by the raft of complex, interacting tests, than

petence provides an explanation, and one that is illuminated by the reasoning in *Lingle v. Chevron*. In *Lingle*, the Court held that the Takings Clause is meant to protect against undue burdens selectively placed on particular property owners, while the Due Process Clause is meant to address issues relating to an improper means-ends fit. Determining what constitutes an inordinate burden on property owners can be understood as the kind of counter-majoritarian check for which courts are especially well suited. Conversely, because determining the relationship between means and ends is the province of the nonjudicial branches, judicial review in this area is (under most circumstances) limited to a highly deferential rational basis test.

Separating out problems of inordinate burdening from problems of means-ends fit works out less cleanly than the Court's discussion in *Lingle* might suggest.<sup>87</sup> Nonetheless, we can draw at least a rough distinction between the two boundaries depicted in Slide 8 based on which sort of inquiry dominates.

### 1. Policing the Public Use Line

As already suggested, the public use line embodies a means-ends test that is highly deferential to legislative and executive actors, on the grounds that they are best able to determine how to achieve legitimate governmental objectives. If these actors appear to be deploying their institutional faculties appropriately by, for example, engaging in planning and remaining free of the influence of any particular rent-seeker, courts will generally accept their judgment on the public use issue.

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with the question of what counts as a "public use"—at least in the context of the U.S. Constitution.

87 See Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENVTL. L.J. 525, 529 (2009) (suggesting that the "character of the government action" in the *Penn Central* test may reintroduce considerations that look a great deal like substantive due process). See generally Thomas W. Merrill, *Why Lingle Is Half Right*, 11 VT. J. ENVTL. L. 421 (2010) (arguing that the "substantially advances a legitimate state interest" test might play a role in takings jurisprudence conceptualized as "boundary maintenance" between non-compensable government actions and those that require just compensation). One way of approaching the question of whether I am unduly burdened by a particular type of regulatory action is to ask what I get back from it in expected value terms, if we were to imagine a hypothetical *ex ante* bargain. And what I get back depends, in turn, on the relationship between the regulation and its legitimate governmental goals. See, e.g., Fenster, *supra*, at 552 (discussing the possibility that in some regulatory takings cases the state will "be able to identify the *increased* property value the owner enjoys as a result of a regulatory program that also restricts her neighbors' property").

Courts do, however, stringently police the payment of just compensation.<sup>88</sup> This too can be understood in terms of the institutional division of labor suggested above—failure to provide just compensation relates directly to the problem of inordinate burdens. The lenient public use test can be criticized to the extent that remaining undercompensation causes exercises of eminent domain to embed an element of inordinate burdening,<sup>89</sup> but the basic institutional division of labor it embodies follows the distinction set out in *Lingle*.<sup>90</sup>

## 2. Policing the Regulatory Takings Line

Regulatory takings doctrine is notoriously muddled.<sup>91</sup> But this is in large part because courts are more actively engaged in policing

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88 I thank Richard Epstein for raising this point. As has been well noted, the constitutional standard for payments of just compensation is fair market value, which embeds a certain degree of undercompensation. See, e.g., EPSTEIN, *supra* note 41, at 183; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 74 (8th ed. 2011). To be sure, many actual exercises of eminent domain provide richer compensation packages than fair market value. See Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 105, 121–26 (2006). But this does not eliminate the need for adequate judicial checks.

89 It would be possible to do more to break out the remaining burden for judicial scrutiny. I have argued elsewhere that eminent domain can be usefully broken into two components—the compensated taking, and the uncompensated appropriation of the increment by which the compensation is incomplete. Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 958–59 (2004). This latter component, I argue, should be assessed using standards that resemble those which separate compensable from non-compensable regulatory takings. See *id.* at 981–92. This reformulation would more precisely allocate the means-ends portion of the process to legislative and executive actors, leaving only the issue of inordinate burdens with the courts.

90 A deferential federal standard also arguably advances the values of federalism and subsidiarity by allowing states to offer greater protections. See Ellickson, *supra* note 64, at 762–63.

91 See, e.g., Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 743 (1999). Not all commentators attach a negative connotation to the muddle, however. See, e.g., Fenster, *supra* note 87, at 529–30 (“To invoke the jargon of software design, this messiness is neither a bug nor a feature in regulatory takings doctrine but part of its operating instructions . . .”); Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 190 (2002) (“As an essentially contested concept, [regulatory takings doctrine] is fertile and generative precisely because it is inevitably, and perhaps quintessentially, vague and unresolvable.”). Moreover, as James Krier has noted, takings is hardly unique in its doctrinal difficulty:

[A] lot of questions in the legal world are inherently hard to deal with—and are so for the same reasons that takings questions are—yet, so far as I can

whether a given regulatory act crosses the line. Even if the great majority of regulatory acts are not viewed as takings, there are enough instances of pushback to keep the doctrinal wheels churning. Yet for all its complexity, regulatory takings doctrine has always been underpinned by a basic commitment to allowing governmental actors to carry on the ordinary business of governance without the constant need for compensation. Justice Holmes's words in *Pennsylvania Coal* set up the point nicely: "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."<sup>92</sup>

Holmes then discusses the scope of this implied limitation, including the famous line that "if regulation goes too far it will be recognized as a taking."<sup>93</sup> What it means for government to go "too far" has received a great deal of attention, but it is equally useful to think about the implicit requirement (couched as a limitation on all property) that government be permitted to "go on" at all.

There are reasons why courts might be especially well qualified to make this judgment. As actors that oversee the common law development of property, courts are arguably best positioned to know when a given act interferes so severely with established expectations surrounding property as to require compensation, and when instead it merely instantiates a business-as-usual application of the police power. The Court indicated in *Lingle* that questions of inordinate burden lie at the heart of the takings analysis,<sup>94</sup> and the regulatory takings tests are generally directed at identifying the kinds of burdens on property owners that should in fairness be borne by the community as a whole.<sup>95</sup> These questions of burden-assessment, bound up as they are in issues of background principles about what property means and

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see, all of those hard questions taken together have provoked nowhere near the claims of Babel that run through the takings literature.

James E. Krier, *The Takings-Puzzle Puzzle*, 38 WM & MARY L. REV. 1143, 1150 (1997).

92 Pa. Coal v. Mahon, 260 U.S. 393, 413 (1922).

93 *Id.* at 415.

94 *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (characterizing takings tests as "focus[ing] directly upon the severity of the burden that government imposes upon private property rights").

95 *Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The 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.").



what expectations accompany it, are ones that courts might seem especially well-equipped to evaluate.

Some aspects of the *Penn Central* test do seem to embed questions of means-ends fit.<sup>96</sup> How, for example, can we assess the character of the government's action unless we know something about what the regulation is meant to accomplish?<sup>97</sup> How can we know whether a party is unduly burdened by a regulation unless we know whether the regulation also produces the promised benefits? These means-ends elements would seem to blend due process questions into the takings analysis on the Court's own account, making the institutional competence question harder to parse. More generally, there is plenty of room to criticize the specific ways in which regulatory takings doctrine has developed. But the dominance of the undue burden and background principle inquiries in establishing the line between compensable and noncompensable takings helps to explain the Court's relatively greater involvement in policing that line.

### III. JUDICIAL TAKINGS, ILLUSTRATED

My discussion to this point has been limited to takings (or alleged takings) by actors in the political branches. Can a court, by issuing a decision impacting property rights, also commit a taking within the meaning of the Takings Clause? This question was raised but not resolved in *Stop the Beach*, a case that involved a challenge by beach-front property owners to a Florida Supreme Court decision.<sup>98</sup> The U.S. Supreme Court unanimously held that the Florida Supreme Court had not committed a judicial taking.<sup>99</sup> The facts of the case are less important for our purposes than the disagreements that erupted among the Justices about the existence and possible contours of a judicial takings doctrine. A four-Justice plurality (Justice Scalia, joined by Chief Justice Roberts and Justices Alito and Thomas) whole-heart-

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96 See *supra* note 87.

97 See Fenster, *supra* note 87, at 571 (arguing that after *Lingle*, the "character factor" in the *Penn Central* test "gives courts the discretion to consider the significance of the government's regulatory purpose in cases in which that purpose might justify exceptional economic harm to the property owner").

98 The Florida Supreme Court read state property law to permit a legislatively directed avulsive widening of the public portion of the beach. The fact that the judicial decision at issue in *Stop the Beach* followed upon and ratified a legislative act places it in a different category factually than the purely court-initiated changes I will discuss here. See *infra* notes 107-108 and accompanying text.

99 *Stop the Beach Renourishment v. Fla. Dep't of Env't'l Prot.*, 130 S. Ct. 2592 (2010). All eight Justices participating in the case joined the portion of Scalia's opinion finding that there was no taking. Justice Stevens recused himself. *Id.* at 2613.

edly endorsed the idea of a judicial takings doctrine. The plurality maintained that a taking is a taking, regardless of which branch of government commits it.<sup>100</sup> The other Justices expressed doubts about the viability of such a doctrine, as well as concern about a number of procedural and remedial issues that would be raised if such a doctrine were recognized.<sup>101</sup> The result was an inconclusive mass of contradictory signals that has become, for property scholars at least, an endless source of speculation, concern, and fascination.

A primary worry expressed in the judicial takings literature to date is that an unconstrained doctrine could have devastating effects on the evolution of the common law of property.<sup>102</sup> Indeed, without any limiting principles capable of saving the ordinary adjudication of property disputes from takings scrutiny, the enterprise of recognizing judicial takings at all seems doomed from the outset.<sup>103</sup> Some might respond that the enterprise *should* be doomed—that judicial takings is a bad idea for a whole host of practical and conceptual reasons. But because four members of the Supreme Court have indicated a willingness to entertain judicial takings challenges, it is worth giving attention to the question of how such a doctrine might be limited.<sup>104</sup> Like others who have written on this topic, I will assume in what follows

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100 See *id.* at 2601 (plurality opinion) (“It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.”).

101 Justice Kennedy, joined by Justice Sotomayor, argued that the Due Process Clause, not the Takings Clause, should provide the first line of defense against improper judicial actions. *Id.* at 2614 (Kennedy, J., concurring in part and concurring in the judgment). Justice Breyer, joined by Justice Ginsburg, took the plurality to task for “unnecessarily address[ing] questions of constitutional law that are better left for another day.” *Id.* at 2618 (Breyer, J., concurring in part and concurring in the judgment).

102 See, e.g., Stacey L. Dogan & Ernest A. Young, *Judicial Takings and Collateral Attack on State Court Property Decisions*, 6 DUKE J. CONST. L. & PUB. POL’Y 107, 107–08 (2011); Timothy M. Mulvaney, *The New Judicial Takings Construct*, 120 YALE L.J. ONLINE 247 (2011). Concerns about the federalism implications of a judicial takings doctrine have also been raised. See, e.g., Dogan & Young, *supra*; Richard Ruda, *Do We Really Need a Judicial Takings Doctrine?*, 35 VT. L. REV. 451, 456–58 (2010). But see Thompson, *supra* note 2, at 1509 (maintaining that federalism arguments fail to “explain why we should apply different constitutional constraints to state courts than to state legislatures and administrative agencies”).

103 Justice Breyer expressed concerns along these lines in his *Stop the Beach* concurrence, noting “the failure of [the plurality’s] approach to set forth procedural limitations or canons of deference . . . .” 130 S. Ct. at 2619 (Breyer, J., concurring in part and concurring in the judgment).

104 Or as Peñalver and Strahilevitz colorfully put it (without necessarily endorsing the premise behind the metaphor): “When a car is careening off the road, it is better to have it crash into the bushes than into a crowded café.” Peñalver & Strahilevitz, *supra* note 2, at 368.

that there can be such a thing as judicial takings. However, I will suggest some plausible limiting principles that could make judicial takings something rarely encountered in the wild.<sup>105</sup>

These limiting principles emerge when we adapt the diagrams above to the judicial context. Three features are of particular importance. The first is the presence of two different, and differently policed, boundaries. The second is the category of confiscatory nontakings. The third is a feature notable for its absence in the earlier diagrams: a fourth category to add to the triad of no-go zone, free zone, and pay zone. Following Calabresi and Melamed, there must be (and is) a fourth possibility in which the government does not take if the would-be *takee* pays. Although this possibility has limited applicability to legislative and administrative takings,<sup>106</sup> it can play a significant role in judicial decisionmaking, as we will see. Each of these features suggests a set of potential limits on a judicial takings doctrine. In combination, they could render judicial takings a nearly null set.

My discussion here will be limited in two important ways. First, I focus only on how a judicial takings doctrine might be developed to govern stand-alone judicial decisions that alter or reinterpret property rights. For example, a court might make a pronouncement in a trespass case that affects the rights of many beachfront property owners, completely independently of any action by a legislature or agency. In contrast, many scenarios in which judicial takings challenges might arise (including *Stop the Beach* itself) involve judicial ratification of legislative or executive acts that themselves allegedly constitute takings. These scenarios tangle together two questions: 1) what forum(s) should hear the challenge to the initial governmental act? and 2) do the effects of the court's decision, above and beyond ratifying the underlying act of the nonjudicial actor, constitute a taking?<sup>107</sup> The first question implicates procedural issues that I will not address here,<sup>108</sup> while the second question can be analyzed as if it were the product of a stand-alone judicial decision.

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105 See Dogan & Young, *supra* note 102, at 134 (contending that “[e]xcept in unusual situations, judicial takings should remain the stuff of law review articles and plurality opinions, rather than the law of the land”).

106 See *infra* text accompanying notes 147–150.

107 See Barros, *supra* note 2, at 958 (explaining that this set of cases cannot be completely dispensed with by addressing the legislative or executive taking if the court also influenced property rights with its pronouncement). It is the marginal effect of the judicial action, however, that should be of interest, since the underlying nonjudicial act can be treated on its own.

108 For discussion of procedural issues as they relate to judicial takings, see Barros, *supra* note 2, at 943–53.

Second, my goal in this Part, as in the piece as a whole, is analytic rather than normative. I show how limits on a judicial takings doctrine might be formulated in a way that would be consistent with existing taking doctrines. In so doing, I mean neither to endorse those existing doctrines nor advocate any particular way of accommodating judicial takings doctrine to them. Instead, I mean to present some underexplored limiting principles that could render the doctrine more tractable, if that result were desired. Whether or not *any* judicial takings doctrine should be pursued is another question, and one I do not take up here.<sup>109</sup>

### A. *Two Boundaries, Again*

Consider again the two contested boundaries set out in Slide 8: the public use line and the regulatory takings line. Thinking about how each of these boundaries maps onto the judicial takings context raises important issues of institutional competence.<sup>110</sup>

#### 1. Adapting the Public Use Line

The public use line, as framed above, separates the realm of legitimate government takings with just compensation (the pay zone) from due process violations that flunk the rational basis means-ends test (the no-go zone). In the nonjudicial context, this line is outfitted with a door through which governmental actors consciously enter on the understanding that they must pay. An important initial question is whether judges have access to this same door.

The fact that courts have no purse might suggest a negative answer<sup>111</sup> for two reasons. First, just as it would violate our society's

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109 Nonetheless, the analysis here does bear on that question in the following way: the easier it is to create a manageable judicial takings doctrine, the harder it is to rule out the possibility on prudential grounds, and, conversely, the more convoluted the conceptual and doctrinal twists are required to make such a doctrine plausible, the harder the case for recognizing it becomes. I will leave it to the reader to decide whether what follows makes a judicial takings doctrine look more or less viable.

110 Other commentators have similarly focused on questions of institutional competence in considering the question of judicial takings. *See, e.g.*, Echeverria, *supra* note 47, at 485–86 (discussing the role of “comparative institutional analysis” in considering judicial takings); Lehari, *supra* note 2 (discussing institutional issues arising from conceptualizing judges both as “lawmakers” and as actors charged with reviewing the acts of others).

111 Thompson discusses the related assumption by most courts and commentators “that the taking protections, if applied to the judiciary . . . would bar the judiciary from making any change constituting a taking. This is because the judiciary has no purse from which to pay compensation.” Thompson, *supra* note 2, at 1499.

transaction structure<sup>112</sup> to enter a restaurant and eat a meal if you knew, going in, that you had no means to pay, so too would it seem to be beyond the power of courts to consciously incur financial obligations that they have no wherewithal to meet. This is not a complete answer, however, because courts might order other parties to pay money.<sup>113</sup> The real issue is whether courts have any legitimate basis on which to access those monies to fund their own takings. This brings us to a second reason for doubting the power of courts to undertake eminent domain, suggested by Justice Kennedy, in his *Stop the Beach* opinion: that the political branches, not the courts, are the proper parties to decide when a taking “makes financial sense.”<sup>114</sup>

Here it becomes helpful to think again about the public use door, and what it is meant to let in and screen out. The basic test for public use is (or at least approximates) the same loose-fitting rational basis test that applies to exercises of the police power generally.<sup>115</sup> Moreover, courts (at least in interpreting federal constitutional requirements) have told legislative and executive branch actors that they can largely decide when to let themselves in. There are some limits, but the overall approach is highly deferential. This is explicable in the context of a means-ends test. Legislative and executive actors are thought to be institutionally competent to make judgments about how best to achieve legitimate ends in a way that courts are not.

This does not mean, however, that courts are wholly disabled by principles of substantive due process from making means-ends judgments in the course of their work.<sup>116</sup> We could hardly expect a court to decide what counts as possession in a given context, or how an ease-

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112 See Alvin K. Klevorick, *On the Economic Theory of Crime*, in NOMOS XXVII: CRIMINAL JUSTICE 289, 301–03 (J. Roland Pennock & John W. Chapman eds., 1985) (discussing lawbreaking in terms of “transaction structures”).

113 See Thompson, *supra* note 2, at 1513–14. Whether their orders will be heeded or not is another matter. See *id.* at 1514 n.250. Thompson discusses some alternatives that would leave to the legislature the final decision about whether or not to pay. *Id.* at 1513–21. Under one model (“automatic compensation”), payment is ordered unless the legislature overrides the change by statute, while under another (“legislative choice”), the change is made contingent on the legislature authorizing the payment. For a recent take on how courts might incur and meet financial obligations associated with legal transitions, see generally Frederic Bloom & Christopher Serkin, *Suing Courts*, 79 U. CHI. L. REV. 553 (2012).

114 *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2614 (2010) (Kennedy, J., concurring in part and concurring in the judgment).

115 See *supra* note 17 and text accompanying notes 50–60.

116 A broad reading of Justice Kennedy’s invocation of the Due Process Clause as a limit on judicial authority in *Stop the Beach* might seem to tend in this direction, although Kennedy does emphasize the competence of courts to make incremental changes. See Lehari, *supra* note 2, at 547–49 (discussing Kennedy’s argument and

ment is established, or how privity requirements should apply, without resorting at some level to logical inferences about how the world works and what sorts of rules tend to produce what sorts of results. Justice Kennedy's invocation of the fiscal judgments that are implicated by the exercise of eminent domain offers a much more specific basis for limiting the court's role. John Echeverria expands on Kennedy's point, arguing that "only the political branches are in a position to make the tradeoffs between potentially expensive takings and other public funding priorities" and citing the Takings Clause's "virtually unique money-mandating nature"<sup>117</sup>

Thus, courts appear institutionally ill-positioned to make the fiscally sensitive means-ends judgments that would give them access to the door to the pay zone. Judicial acts of condemnation might be regarded as due process violations in the following sense: the court is selecting property for condemnation, but lacks the budgetary and political data to enable it to coherently make the means-ends assessment that is demanded in such a case.<sup>118</sup> If that assessment is correct, then the judicial takings version of the public use line lacks a door; conscious choices to enter the pay zone are impermissible. The oval is instead bounded by institutional razor wire as shown in Slide 11.<sup>119</sup>

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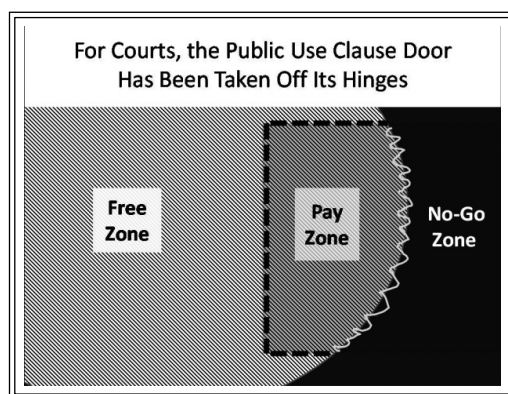
noting difficulties distinguishing "incremental modifications" from larger changes in property rights).

117 Echeverria, *supra* note 47, at 487. As Echeverria explains, this argument is premised on Kennedy's view "that exercises of the eminent domain power necessarily entail a government obligation to pay just compensation, a premise that Justice Scalia disputes." *Id.* For the reasons elaborated in the text and images above, I agree with Kennedy's premise. However, it does not follow from the fact that an actor has an *obligation* to pay just compensation that compensation is the only available remedy when the obligation has been breached. See *infra* Part III.D.2.

118 See Echeverria, *supra* note 47, at 487.

119 I do not mean to suggest that judges are more strictly excluded from *paying* for improper acts than they are from just engaging in them for free. The razor wire merely conveys that a boundary that is permeable for a legislature is not for a court.

## SLIDE 11



Judges might still try to engage in conscious appropriations of private property for public use in a manner akin to the exercise of eminent domain, but, on this account, those acts fall outside the realm of legitimacy as violations of due process.

One challenge to that story runs as follows. Unless there is some federal limit on state separation of powers that would rule out courts' use of the condemnation power *even if state law delegated it to them*, it would appear that state law (that is, its failure to make such a delegation) is the only thing that makes the court's act of condemnation impermissible.<sup>120</sup> It might then seem to follow that a given condemnation could be both a compensable taking (properly within the pay zone as a matter of federal law) *and* a prohibited act under state law.<sup>121</sup> Yet here, as above,<sup>122</sup> it makes sense to limit what will count as "public use" for federal purposes to public uses that are defined as

120 Clearly, it would be inconsistent with the Takings Clause for a legislature to get the judiciary to do condemnations on its behalf without paying just compensation. See Dogan & Young, *supra* note 102, at 110 ("If a state could avoid paying just compensation by transferring its condemnation authority to the courts, that would invite a fairly obvious end run around the Takings Clause."). A different question is whether there would be any federal constitutional constraint on a legislature delegating to a court the power to condemn along with a commitment to pay for any takings that the court decides are necessary. In *Stop the Beach*, Justice Scalia indicates no such constraint exists, contrary to the suggestion implicit in some of Justice Kennedy's comments. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2605 (2010) (plurality opinion).

121 See Somin, *supra* note 63, at 97. Somin's argument differs subtly from the one in the text insofar as he does not view compensation as the only remedy. See *id.*

122 This is another incarnation of the issue flagged earlier in connection with more stringent state public use requirements. See *supra* notes 61–69 and accompanying text.

such by state law.<sup>123</sup> The due process requirement that a public purpose be pursued must also implicitly require that it be a purpose of, and pursued by, an authorized state actor using authorized state means.<sup>124</sup> Thus, whether or not one thinks that a state *could* constitutionally delegate condemnation authority to a court, the fact that no such authority has in fact been delegated would seem to preclude purposeful access to the pay zone as a matter of federal law.<sup>125</sup>

How then should we think about a situation in which a court grants an expanded easement for public beach access—an act that might seem to take private property for public use?<sup>126</sup> One response is that it would be highly unusual for a court to announce that it has decided on its own, without any law on its side, to take property away from one party to give to the public.<sup>127</sup> Rather, the decision will be couched as a vindication or rediscovery of pre-existing rights vouchsafed to the public, to which the private parties' claims were always really subordinate (even if this fact somehow escaped the notice of

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123 See Zinn, *supra* note 43, at 249 (arguing that “unauthorized agency actions by definition do not advance public uses” and referencing the Court’s statement in *First English* that Takings Clause analysis is limited to “otherwise proper” government actions (quoting *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 315 (1987))).

124 See Echeverria, *supra* note 47, at 485 (discussing the possibility “that judicial takings would be *ultra vires*, and not the acts of government at all”); Zinn, *supra* note 43, at 286 (“Where a regulatory action lacks legislative authorization, the legislature cannot be said to have approved the action’s purpose as public.”). Presumably no one would think it would be a compensable taking under federal law if a private party (call her Robin Hood) commandeers another individual’s chattel property and uses the proceeds to pursue what she personally believes to be a public purpose. There seems to be no basis on which to distinguish the case in which the court acts outside of the authority vested in it by state law.

125 There is authority for the proposition that the legislature cannot evade the compensation requirement of the Takings Clause by authorizing actions that amount to takings by statute and formally withholding condemnation power. See Zinn, *supra* note 43, at 245 n.4. The situation that state courts are in is quite distinct, however, assuming they have been given no authority whatever to engage in eminent domain. Nonetheless, this argument does help explain why courts might be capable of committing non-eminent domain takings in the course of carrying out their authorized judicial duties. See *infra* text accompanying note 134.

126 Beach access examples are prevalent in the literature on judicial takings, as well as in the case law to date. See Thompson, *supra* note 2, at 1501 (“[M]any of the cases that have been challenged as judicial takings over the last decade have expanded public access to, or called for preservation of, unique resources such as beaches and waterways.”).

127 See *infra* Part III.B (discussing the sorts of circumstances that might lead to such a pronouncement).



courts for quite some time).<sup>128</sup> It is fair to worry that courts may disingenuously invoke past rights,<sup>129</sup> but the upshot of their doing so is not a free pass. For one thing, there may be reputational constraints against handing down a decision that is plainly based on a misreading of precedent or misapplication of longstanding common law principles. Nor is a judge necessarily off the hook as far as judicial takings are concerned merely because she frames the decision in a way that takes it out of the mold of conscious takings for public use. There is yet another boundary to consider.

## 2. Adapting the Regulatory Takings Line

The regulatory takings line in the nonjudicial model separates ordinary exercises of the police power that do not require compensation (the free zone), from regulatory takings requiring compensation (the pay zone). What does this line denote in the judicial takings context? Justice Holmes's concern that government be allowed to "go on" applies equally in this context, and offers some basic guidance in locating the line. Of course, what it means for government to "go on" means something different when we are talking about a judicial actor than when we are talking about a legislative or administrative body.

As a conceptual matter, the line that separates compensable judicial takings from ordinary judicial activity depends in significant part on what it means to carry out the ordinary work of adjudicating property disputes in a common law system.<sup>130</sup> Although property tends to be highly inertial, it is also a creature of the common law, and hence subject to processes of growth and evolution. Property owners know that their holdings may change in a variety of ways as law changes, and they are compensated in kind for this by the benefits of a property system that is capable of adapting to new circumstances and condi-

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128 Thompson, *supra* note 2, at 1478 ("Courts seldom confess to changing the law, claiming instead to clarify, integrate, or correct prior precedents.").

129 Justice Scalia worried in *Lucas v. South Carolina Coastal Council* that giving a pass to all harm-prevention efforts would test only whether a legislature had "a stupid staff." 505 U.S. 1003, 1025 n.12 (1992). An analogous "stupid law clerk" argument might apply here, were it not for the fact that other checks on judicial behavior exist, as explained in the text.

130 Scholars have expressed concern that "the everyday business of common-law courts" could be subject to takings challenges. Dogan & Young, *supra* note 102, at 112. Cf. Merrill, *supra* note 87, at 424–28 (describing a "boundary maintenance" approach to regulatory takings that examines both how much a given regulatory act resembles eminent domain and how much it resembles an exercise of the police power).

tions.<sup>131</sup> This does not seem particularly controversial—nearly everyone would agree that a certain amount of change and adaptation is part of the overall property bargain. But how much change, how quickly, and with what kinds of effects?

The answers will depend on one's conception of property, as Barton Thompson emphasized in his classic exploration of judicial takings.<sup>132</sup> An initial and fundamental question is how to establish the baseline from which to measure change. If the baseline can always be moved (or, rather, can be found to have “always” been in another place), it is hard to see how anything can be “taken.” Thus, a purely positivist approach in which property law aligns with whatever the state courts have to say on the matter would suggest a virtually nonexistent role for the judicial takings doctrine.<sup>133</sup> The absence of a judicial takings doctrine would not leave courts free to do anything they wanted with respect to property law. Limits, however, would emanate from sources of law other than the Takings Clause. For example, due process independently prohibits courts from consciously undertaking an act that is the functional equivalent of eminent domain, for the reasons already given. Similarly, bribery and corruption would be policed independently of any judicial takings doctrine, since such acts would never be for public use under any interpretation.

If judicial takings are in fact a null set, then the universe of judicial acts looks like Slide 12.

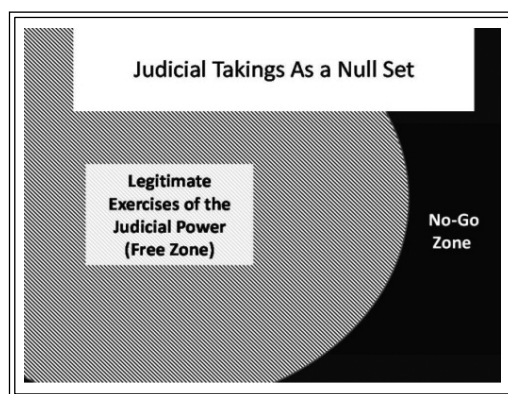
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131 See EPSTEIN, *supra* note 41, at 195–215 (discussing in-kind compensation); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1219–24 (1967) (applying a Rawlsian analysis to just compensation questions). We also have a federal system that enables state courts to learn from and offer guidance to each other (just as state legislators or agencies might), and the prospects for adoption, adaptation, and experimentation that this entails are also arguably an important part of what it means to own property in the United States.

132 Thompson, *supra* note 2, at 1522–41.

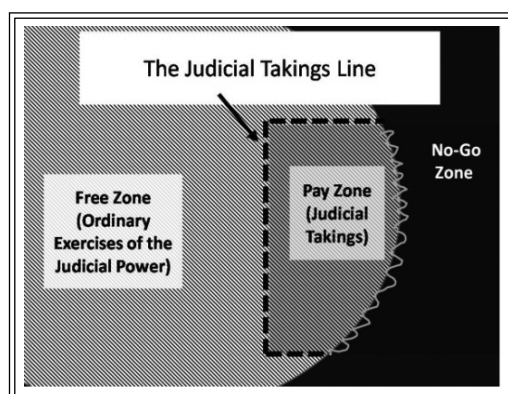
133 See *id.* at 1531–38.

## SLIDE 12



If we rule out (for present expositional purposes) the possibility that judicial takings are nonexistent, then the task remains of locating the line between ordinary exercises of the judicial power and compensable judicial takings. This judicial takings line is shown in Slide 13.

## SLIDE 13



Even if one believes that many of the ways in which courts might violate the rights of property owners would fall under some other constitutional rubric, such as substantive due process, the judicial takings line must still be addressed unless judicial takings is deemed to be a null set. No matter how much scholarly energy is poured into determining the line between legitimate and impermissible government acts (what we might think of as the "edge of oval" inquiry), we still must contend with the line between compensable legitimate acts and noncompensable ones.

Two preliminary points about this line require attention. First is the question of whether it is even possible for courts to cross over into the "pay zone," given their lack of budgets to pay for takings. When

reached from the business-as-usual side, the pay zone represents only a “must pay” zone rather than one in which payment has already been rendered, as discussed above. This is not a satisfying answer, however, if courts would never be able to provide compensation under any circumstances. If we are going to rule out judicial exercises of eminent domain on the grounds that courts cannot pay, why not these sorts of judicial takings as well? One distinction is that judicial exercises of eminent domain fail for a second reason, that of falling outside courts’ institutional role as defined by state law, while the adjudicative work that might “go too far” falls well within that role.<sup>134</sup> In addition, although courts cannot access funding for condemnations, they do have access to various forms of in-kind compensation and other tools through which parties to disputes can be made to compensate each other. These alternatives might be employed in cases where inadvertent lapses into the pay zone occur while courts are carrying out their ordinary work.<sup>135</sup>

Second, more important than the location of the line is the question of who will police it, and with what level of scrutiny or deference. I suggested above that courts engage in fairly complex and active management of the regulatory takings line and show a willingness to expend significant judicial resources to determine on which side of a given line a particular act lies. This I attributed to their institutional competence in evaluating the effects of background principles and the burdens that restrictions on property will impose. Those same points hold true where courts must evaluate their own conduct relative to the judicial takings line. Courts presumably know how to identify and apply background principles, and how to manage incremental change from existing baselines in ways that do not impose inordinate burdens.<sup>136</sup> In short, courts might be thought institutionally well-equipped to make sure that their own decisions do not go “too far.” Accepting this principle would not mean that there would be no federal constitutional check on the actions of state courts, but it does suggest that the review would be highly deferential.<sup>137</sup>

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134 See *supra* text accompanying notes 123–125.

135 I will have more to say about this later. See *infra* Part III.D.2.

136 See Dogan & Young, *supra* note 102, at 115 (“Because they generally act incrementally and in the context of specific factual disputes, we think courts bring particular institutional advantages to the process of legal change.”).

137 It is true that any institutional advantages attributed to courts in general would apply to the reviewing court as well as to the court initially making the decision that allegedly committed a taking. Here, however, principles of federalism play a role, given the general authority state courts have to determine the content of state property law, as well as the greater familiarity that state courts will have with their own state

It might initially seem odd to entrust the same actor whose actions are governed by a given line with the task of policing it. But this is just what is done with respect to the public use line. The Supreme Court has shown itself willing to defer to judgments by legislative and executive actors about what counts as public use, with relatively minimal limits, again based on assessments of institutional competence. If legislative and administrative bodies are largely free to self-certify that their acts fall within public use in cases of eminent domain, it seems no more anomalous to allow courts to largely determine for themselves whether their acts are on the noncompensable or compensable side of the line.<sup>138</sup> The fact that courts do not have resources of their own with which to pay compensation only strengthens this point. Even though courts will wish to avoid a finding that their acts amounted to judicial takings for other reasons (like the desire to avoid being reversed),<sup>139</sup> the fact that they do not have revenue and payment streams to manage would arguably reduce any temptation to substitute “free” inputs for purchased ones.<sup>140</sup>

### B. *Confiscatory Nontakings Revisited*

Suppose we accept the premise above that courts are left largely free to self-police the judicial-takings line but are deemed institution-

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law. For further discussion of the federalism implications of judicial takings law, see, e.g., Dogan & Young, *supra* note 102; Ruda, *supra* note 102, at 456–58.

138 Similar in spirit is the possibility Thompson discusses of allowing for a judicial takings concept for “exhortative or pedagogical purposes” without having federal courts undertake active review of state court decisions. Thompson, *supra* note 2, at 1496.

139 See Peñalver & Strahilevitz, *supra* note 2, at 335 (discussing the possibility that courts would incur “reputational costs” of a reversal if a judicial taking were found, and possibly even “a greater stigma” associated with the takings finding itself).

140 This is a concern with ordinary takings, and it forms an efficiency justification for just compensation. See POSNER, *supra* note 88, at 73 (observing that “government would have an incentive to substitute land for cheaper inputs that were, however, more expensive to the government” were it not for the “just compensation” requirement). Of course, even legislative and executive actors do not literally pay out of their own pockets; they have access to revenues raised coercively through taxation. It is questionable how closely the political price that they pay to engage in compensated takings corresponds to the amount of the compensation itself. See Levinson, *supra* note 12, at 348; Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 969–71 (2005). But whatever checks just compensation does place on political actors are surely blunted for judicial actors. See Bloom & Serkin, *supra* note 113, at 577 (“At best the effect of compensation [for judicial takings] will be diffuse and occluded . . .”); Peñalver & Strahilevitz, *supra* note 2, at 336 (observing that Levinson’s argument about the potential inefficacy of just compensation “carries even more force as far as the judiciary is concerned”).

ally unable to engage in condemnations for public use. How, then, might we approach instances in which a court declares outright that it is changing the law in a way that represents a sharp break from the past and that seems to impose inordinate burdens on some property owners?

Imagine, for example, that a court in a northern state declares that, although property law in the state has always allowed owners to keep hunters off their land, this rule must be updated to permit those hunting polar bears to enter the lands of others without liability. Polar bears, it turns out, have become a scourge in the area after being displaced from their native habitat due to global warming, and the hungry, disgruntled bears are creating a grave threat to the population. We can also specify that the bears are not distributed randomly in the state but instead have particular “attack zones” that have been well mapped out by local authorities, so that an identifiable two percent of property owners are affected.

One possibility is that this is that rare entity, a judicial taking. But another possibility should also be considered, reasoning by analogy to the categories of confiscatory nontakings that already exist in takings doctrine. Even acts that appropriate or destroy property may not count as takings under certain sets of circumstances, and an exigency like the one specified may well qualify for reasons like those that permit tearing down houses to stop fires or damaging convenience stores to apprehend criminals.<sup>141</sup> If the animating principle is to avoid singling out some property owners for undue burdens,<sup>142</sup> then the non-random nature of the property affected might present a problem. (On the other hand, if the court were to state its principle more broadly to encompass the pursuit of any marauding beasts, whether the polar bears that are creating the current crisis, or other threatening animals that may present similar crises in the future, the incidence of the impact would be less predictable). Yet another response would rely on in-kind compensation or average reciprocity of advantage to

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141 See text accompanying notes 35-37, *supra*. Another way to address the issue would be to characterize it as consistent with existing state property law insofar as there are overarching doctrines of necessity that are only being applied to a new setting. This observation connects to a larger issue about the level of generality at which property law is thought to operate. When we assess whether property law has “changed,” we must make some assumption about whether property law is made up of narrow doctrinal rules, broad overarching principles, or something in between. I thank Jim Krier for discussions on this point.

142 See Levmore, *supra* note 40, at 1344-48 (1991); see also Michelman, *supra* note 131, at 1217 (distinguishing “randomly generated” losses from those that are strategic impositions of a “self-determining and purposive” majority); Thompson, *supra* note 2, at 1477-78 (citing and discussing Michelman on this point).

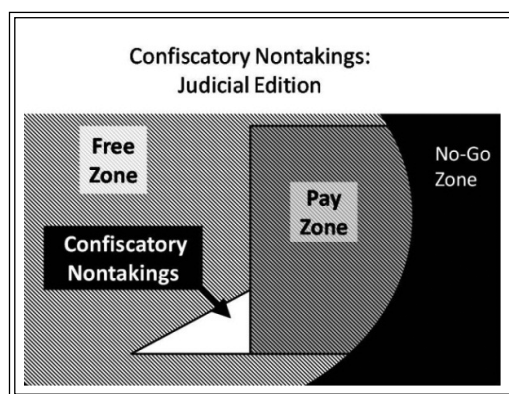
argue that the bear-rich areas are not only more heavily burdened by trespasses by bear hunters, they are more greatly benefited as well.

What about a less dramatic case involving beachfront property? Suppose that a court simply states outright that henceforth a new policy is in effect: although history and precedent running as far back as the memory of humankind has given the public only the portion of the beach up to the mean high tide line, the public may now access an additional 100 landward feet of beach. Such forthrightness of purpose is likely to be occasioned by some pressing need—if not a public emergency, then some seismic shift in the resources that people need for survival, or some other broad societal change that calls for a realignment of property rights. Suppose, for example, that the water had become too polluted in an area for anyone to enter, so that getting access to the mean high tide line was not enough to allow anyone to really enjoy the beach. Yet the result may be to single out an identifiable class of the population (owners of beachfront property) and force them to contribute to the good of the populace as a whole.

The court may be deemed to have significant latitude to administer the public-trust doctrine, just as there is great latitude where it comes to navigational servitudes, but it is not unimaginable that some acts would still go too far. The fact that forfeitures that comply with due process requirements are not deemed to be takings also muddies the waters in a more global sense by suggesting that, in some contexts, the provision of procedural due process pulls a given act out of the takings realm altogether.

These issues are complex ones that I cannot resolve here, but the well-established fact that not all acts that look and feel like appropriations actually count as takings is important to keep in mind in thinking about the judicial takings line. Slide 14 brings back the confiscatory nontakings corner of Slide 7's triangle of outright appropriation. As already suggested, courts cannot (legitimately) undertake condemnations; hence the eminent domain portion of the triangle does not show up in the judicial edition of this image. But, like their nonjudicial counterparts, courts can engage in a variety of noncompensable acts that do result in the appropriation or destruction of property.

## SLIDE 14

C. *Zone Four?*

Anyone who has spent a great deal of time with Calabresi and Melamed's classic *Cathedral* article will be unable to look at the three zones depicted in the takings diagrams (the "free zone," the "pay zone," and the "no-go zone") without asking the question: isn't there a fourth zone? Calabresi and Melamed developed their famous four-rule scheme in the context of a private nuisance dispute between a factory and a homeowner, which a court could resolve in any of four ways: by granting the entitlement to the homeowner and protecting it with a property rule (Rule 1, injunctive relief); by granting the entitlement to the homeowner and protecting it with a liability rule (Rule 2, damages); by granting the entitlement to the factory and protecting it with a property rule (Rule 3, no relief); or, innovatively, by granting the entitlement to the factory and protecting it with a liability rule (Rule 4, compensated injunction).

With respect to governmental takings, the "no-go zone" would seem to correspond to Rule 1; these takings can be enjoined altogether, and are not validated by payment. The "pay zone" looks like Rule 2, with the just compensation rule operating like liability rule protection for the property owner.<sup>143</sup> Actions the government can undertake for free fit with a Rule 3 regime; the property owner gets no relief.<sup>144</sup> Rule 4 in this context would work something like this: the

143 See Calabresi & Melamed, *supra* note 5, at 1108 (observing that "eminent domain is simply one of numerous instances in which society uses liability rules").

144 Property rule protection is not entirely accurate here. Insofar as the property owner cannot freely bargain with the government to keep it from regulating, a type of inalienability rule applies.



owner could unilaterally get the government *not* to appropriate the property by making a specified payment.<sup>145</sup>

The possibility that property owners could pay the government not to take their property has surfaced in the law and economics literature in the context of discussing how inefficient takings might be avoided.<sup>146</sup> The concern is that governmental entities might strategically threaten to take in order to collect payments. The same or a different governmental entity might even threaten to take repeatedly from the same owner.<sup>147</sup> An owner, foreseeing this, would never bother paying the government not to take, removing whatever Coasean check the ability to bargain over the taking might otherwise have added.<sup>148</sup> The fact that political actors cannot bind future decision makers rules out the kind of permanent bargain that would

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145 See ELICKSON & BEEN, *supra* note 81, at 331 (explaining that “[i]n the land regulation context, the ‘rule-four’ approach entitles a landowner to free itself from regulation by compensating the government”); Krier, *supra* note 5, at 25 (raising “the example of citizens paying the government a judicially determined amount to turn off the regulation machine”); see also Note, *Taking Back Takings: A Coasean Approach to Regulation*, 106 HARV. L. REV. 914, 924 (1993) (arguing that “society can achieve efficient levels of regulation either by requiring the state to compensate owners or by allowing owners to buy exemptions to regulation”). My focus in the text is on applications of Rule 4 to acts that would otherwise be takings (so that the landowner buys out the government’s option to take), but as the citations above suggest, Rule 4 could be construed more broadly to include buying out a wide range of regulatory acts of the political branches (through user fees, tradable permits, and so on). I thank Eric Biber and Saul Levmore for discussions on this point.

146 See Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473, 480 (1976) (explaining that under conditions of zero transaction costs, eminent domain would produce optimal results because a landowner who valued the property above the expected court award could “offer the buyer the difference to prevent the taking of the parcel”); Benjamin E. Hermalin, *An Economic Analysis of Takings*, 11 J. L. ECON. & ORG. 64, 72–73 (1995) (presenting a “buy-back rule” in which an owner retains the property only “if she pays the state the social benefit,” and stating that this will achieve the “first-best outcome” if the government is benevolent); see also THOMAS J. MICELI, *THE ECONOMIC THEORY OF EMINENT DOMAIN* 93–96 (2011) (discussing Hermalin’s buy-back rule).

147 See William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of “Just Compensation” Law*, 17 J. LEGAL STUD. 269, 278 n.19 (1988) (mentioning “landowners’ anticipation that their property may be retaken once they repurchase their rights” as a possible impediment to payments to avoid takings).

148 This connects to a larger problem of multiple takings that has been identified with liability rule protection. See Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 765–66 (1996). But see Oren Bar-Gill & Nicola Persico, *Exchange Efficiency with Weak Property Rights* (2012), available at <http://ssrn.com/abstract=2161659> (arguing that liability rules that enable multiple takings can nonetheless support exchange efficiency).

immunize property from a later taking—or a later threatened taking.<sup>149</sup> Even if such a binding bargain could be made, the problem of excessive initial takings threats would remain.<sup>150</sup>

Applying a Rule 4 approach in the judicial context, however, might present fewer worries, for reasons that can best be appreciated by considering an example. Imagine an adverse possession dispute involving a possessor who unwittingly installed a flight of steps that encroached trivially on a neighbor's land.<sup>151</sup> Suppose that existing law in the jurisdiction makes state of mind irrelevant to an adverse possession claim, and that all other elements of adverse possession are clearly met—it is a slam dunk case in the possessor-stairbuilder's favor under settled law. The court, however, decides to add a “bad faith” requirement to its adverse possession rubric, something that has never before been required in that jurisdiction.<sup>152</sup> Because this possessor's encroachment was accidental, he does not meet the new requirement; the court therefore rules in favor of the record owner. The possessor might then try to argue that the strip of land upon which it had encroached has been judicially taken from it by this new requirement.

We have already seen that the court has some good responses to this claim, including the fact that the common law must be able to evolve and that everyone benefits when property law is nimble enough

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149 A bonding mechanism or escrow fund that would guarantee money back upon a later threatened retaking might be used to address this issue. More generally, the difficulty the government has keeping commitments is matched by entrenchment devices that make it harder for the government to later change its mind, and these devices can support certain kinds of durable deals. See generally Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879 (2011).

150 It might be possible to successfully construct a limited form of “pay not to take” through the use of an auction mechanism to select parcels within a designated redevelopment area, where not all parcels are necessary to the project. See Robert G. Hammond, *Selling Eminent Domain Exemptions: A Mechanism to Reveal Private Values*, unpublished manuscript on file with author; see also Scott Duke Kominers & E. Glen Weyl, *Holdout in the Assembly of Complements: A Problem for Market Design*, 102 AM. ECON. REV.: PAPERS & PROC. 360 (2012) (distinguishing different types of assembly problems). A developer's offer to forgo the right to have properties condemned within project boundaries upon payment by the owner was at issue in *Didden v. Village of Port Chester*, 322 F. Supp. 2d 385, 390 (S.D.N.Y. 2004), *aff'd* 173 F. App'x 931 (2d Cir. 2006).

151 Adverse possession is another standard factual template employed in judicial takings literature; the facts here resemble those in *Mannillo v. Gorski*, 255 A.2d 258 (N.J. 1969).

152 Such a standard would allow an adverse possessor to gain title *only* if she were aware that the land she was occupying was not her own. See Lee Anne Fennell, *Efficient Trespass: The Case for “Bad Faith” Adverse Possession*, 100 NW. U. L. REV. 1037, 1037–38 (2006).

to respond to societal changes and new conditions. That this is not a compensable taking is probably already overdetermined. But if there were doubt on that point, consider the following: in ruling for the record owner, the court need not, and in fact probably would not, grant injunctive relief to the record owner and force the innocent encroacher to destroy his improvements. Rather, a liability rule solution would be most likely, one in which the court allows the possessor to forcibly buy the encroached-upon land. Normally we would think of this remedy as a garden variety application of Rule 2; the encroacher can pay and stay. But when put into the context of an alleged judicial taking, it offers something more: the ability of the party *alleging* a taking to keep any physical taking from occurring by making a payment. From this perspective, the remedy looks something like Rule 4.<sup>153</sup>

To be sure, the party who must make a payment just to hang onto what he thought was his is still losing something. But, interestingly, offering the option to pay may alter the doctrinal consequences. Recall that in the context of nonjudicial takings, significant diminutions in value are often viewed as perfectly consistent with noncompensable governmental actions. The law treats a physical encroachment (or something that might as well be one) differently from a mere decrease in value.<sup>154</sup> Similarly, taxes are treated much differently from takings,<sup>155</sup> and user fees, impact fees, and other payments are often collected without triggering a compensation requirement. Thus, there is reason to think that the “pay not to take” Rule 4 regime I describe here would frequently fall on the noncompensable side of the line.<sup>156</sup>

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153 Carol Rose has suggested instead that eminent domain itself maps onto Rule 4. Rose, *supra* note 5, at 2180–81. The mirror-image quality of the Calabresi & Melamed taxonomy makes this interpretation equally valid as the one in the text; in that case, however, there would still be a shadow Rule 2 in which the would-be condemnee (who is made to stop the use upon the government’s payment) would himself be able to continue the use (that is stop the condemnation) upon paying.

154 See Armen A. Alchian, *Property Rights*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS (Steven N. Durlauf & Lawrence E. Blume, eds.) (2d ed. 2008) (“It is important to note that it is the physical use and condition of a good that are protected from the action of others [by private property rights], not its exchange value.”); Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in Lucas v. South Carolina Coastal Council*, 26 LOY. L.A. L. REV. 955, 957–59 (1993) (criticizing the distinction takings law draws between physical takings and regulatory takings).

155 See Amnon Lehari, *The Taxing/Taking Taxonomy*, 88 TEX. L. REV. 1235, 1239 (2010).

156 There is at least one indication in the other direction. The Kohler Act, 1921 Pa. Laws 1198, which was held to work a taking in *Pennsylvania Coal Co. v. Mahon*, 260

This is not to suggest that takings law would be friendly to legislative or executive actors who threatened takings and then agreed to halt the condemnation upon payment.<sup>157</sup> In those settings, something more than a mere financial burden is at issue—the concern that the burden is being manufactured for its own sake, to effect a transfer payment. But courts have no independent ability to reach out and burden citizens by threatening to take things from them if they do not pay. Moreover, when property owners do pay to avoid some injunctive result, the court has access to tools that enable it to make that deal stick. For example, in *Boomer v. Atlantic Cement Co.*, the court explained that if the factory paid permanent damages, the injunction would be lifted and replaced by a servitude on the neighbors' land that would preclude them from bringing additional actions based on the factory's operations. That servitude would run with the land and provide lasting protection for the factory for as long as it chose to operate.<sup>158</sup> Courts cannot keep *other* plaintiffs from complaining

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U.S. 393 (1922), was accompanied by the Fowler Act, 1921 Pa. Laws 1192, which gave coal companies an option to pay a two percent tax on the coal instead of being subjected to the Kohler Act's limitations. See Lawrence M. Friedman, *A Search for Seizure: Pennsylvania Coal Co. v. Mahon in Context*, 4 LAW & HIST. REV. 1, 21 (1986). Because neither Holmes's majority opinion nor Brandeis's dissent in *Mahon* mentioned the Fowler Act, it is difficult to draw any conclusions about the relevance of this option. See *id.*

157 Although not directly on point, the Court's approach in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), suggests that concerns about strategic governmental behavior loom large. Those cases differ from the Rule 4 cases I am discussing in the text in that the governmental restriction to be lifted was not one that would itself amount to a taking; rather it was in each case assumed to be a legitimate exercise of the police power that would not require compensation. The "takings" angle in these cases stemmed instead from the concession that the landowners were asked to give up in order to get the regulation lifted. Because this concession would have been a taking if carried out independent of the regulatory change, the Court held that it could not be required unless it met standards of nexus and proportionality. Nonetheless, statements in *Lingle v. Chevron U.S.A. Inc.*, 554 U.S. 528 (2005), that suggest *Nollan* and *Dolan* may be limited to physical exactions (as opposed to monetary impact fees) would be consistent with my textual distinction between monetary and in-kind losses. *Koontz v. St. John's River Water Management District* (cert. granted, Oct. 5, 2012) may provide clearer guidance on the conceptual boundaries of the Court's exactions jurisprudence.

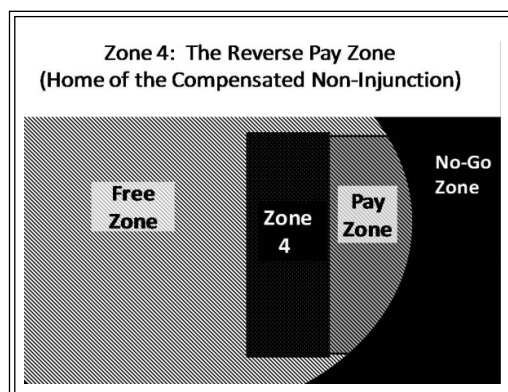
158 See *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 875 (N.Y. 1970). To be sure, this protection takes the form of a property interest that could itself be extinguished through later legislative or judicial action. For example, a new legislative scheme might give Atlantic Cement's neighbors the right to sue for damages regardless of any contrary servitudes burdening their land. That extinguishing act could in turn be the subject of a takings claim. Whether or not that claim is successful, it would not create a situation in which the factory would be asked to *repurchase* an

about effects on them that were not treated in an earlier case, but those additional complaints would again not have the character of strategic governmental behavior.

Zone 4, then, can be designated a “reverse payment zone,” one in which a court’s initial act must be lifted upon a payment flowing from, and not to, the affected property owner. Whereas the traditional Rule 4 relief is a compensated injunction, in this context, we would have a compensated *non-injunction*. Without the reverse payment feature, acts in this zone would be judicial takings. The deciding court could voluntarily provide a reverse payment feature that might largely immunize the act against a takings claim, or a reviewing court could find that the act falls within the reverse payment zone and apply that feature itself.

This approach would again shrink the operative range of judicial takings by providing a different way to validate acts that go over what would otherwise be the judicial takings line. The results are shown in Slide 15.

#### SLIDE 15



#### D. *The Not-Quite-Null Set*

I have explained above how judicial takings, conditional on being recognized at all, could plausibly become nearly a null set. Institutional competence considerations argue for a largely self-policing judicial takings line, and the category of judicial takings is further reduced

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entitlement to impose impacts on its neighbors. If it is legally possible for such a servitude to burden the neighbors’ property, the factory would already own it under principles of property law and *res judicata*; if such a servitude is no longer legally possible, the factory would not be in a position to repurchase it (and might be entitled to compensation for losing it).

to the extent that categories of confiscatory nontakings are recognized. Recognizing a fourth category, the “reverse payment zone,” offers further opportunities for limiting any judicial takings doctrine. Shrinking the class of potential challenges could make the doctrine more a curiosity than a threat to states’ authority to determine their own property law. Nearly null is not the same as null, however, and the many questions that have been raised about judicial takings—procedural, remedial, conceptual—would continue to trouble courts and engage commentators. Although I cannot delve into all of these issues here, it is appropriate to follow up the discussion of limits with some brief comments about how courts may nonetheless land in the pay zone, and what can be done about it.

### 1. What’s Left?

My goal in this essay has been to isolate questions rather than provide answers, but readers will understandably wonder what remains in the category of judicial takings after all the limits above are applied. It cannot just be limits all the way down. Other judicial takings scholarship has articulated underlying visions of property that either cabin what courts can ultimately do,<sup>159</sup> or, alternatively, suggest that certain restrictions are anathema.<sup>160</sup> Another possibility is an expectations-based approach that might assess how drastic or surprising are particular judicial changes, although it cannot be expectations all the way down, either.<sup>161</sup>

A different way to pour content into the judicial-takings doctrine would focus on instances in which the court’s decision works a transformation of an owner’s discrete property interest through aggregation. While regulatory takings analysis to date has focused primarily on what has been taken and much less on what has been done with it,<sup>162</sup> political branch takings are almost invariably associated with reconfiguring sets of rights into larger and more valuable configura-

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159 See, e.g., Richard A. Epstein, *Littoral Rights Under the Takings Doctrine: The Clash Between the Ius Naturale and Stop the Beach Renourishment*, 6 DUKE J. CONST. L. & PUB. POL’Y 37 (2011).

160 See, e.g., J. Peter Byrne, *Stop the Stop the Beach Plurality!*, 38 ECOLOGY L.Q. 619 (2011).

161 See Thompson, *supra* note 2, at 1538–41; see also Rubenfeld, *supra* note 21, at 1110 (noting “the seemingly patent circularity of a court’s distinguishing among property rights on the basis of reasonable expectations about their continuation”).

162 A notable exception is Rubenfeld, *supra* note 21.

tions. Eminent domain can generate an assembly surplus<sup>163</sup> explicitly by combining parcels of land. In the regulatory arena, different kinds of regulatory assemblages can be achieved, like getting everyone in the neighborhood access to cable television or saving an ecologically sensitive area. Because (legitimate) nonjudicial takings are invariably in service of some larger goal, that part of the story rarely receives attention. Instead, attention turns to other matters, such as whether the thing taken represents a “discrete twig” that would be both easy to settle over and especially demoralizing for the owner to lose.<sup>164</sup>

Most adjudicated property disputes do involve a “discrete twig” (some particular disputed property interest), but the question is usually just “who owns the twig?” Either way the case goes, it will remain a twig. Assembly of many twigs to achieve a larger goal is rarer in the judicial context. When it occurs, it is more likely to generate surpluses like those that political actors generate through their regulatory acts than is a decision that awards a twig to *A* over *B* in the course of resolving a dispute.<sup>165</sup> On this account, a court that establishes a new easement across the property of many landowners to allow passage of large numbers of people would be doing something considerably different than a court that finds party *A* has an easement across the land of party *B* solely in order to access *B*’s own land. The reason is not that “the public” or “the government” is involved in the first

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163 There could also be disassembly surplus if gains were achieved by dividing property among many owners. Cf. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (approving the exercise of eminent domain to break up a land oligopoly).

164 Michelman, *supra* note 131, at 1233 (illustrating the idea of “some distinctly perceived, sharply crystallized, investment-backed expectation” by describing the right to continue an existing use as a “discrete twig”); *id.* at 1234 (setting out—and suggesting some uncertainty about—the assumptions required to reach the textual conclusion, notably “that deprivation of one of these mentally circumscribed things is an event attended by pain of a specially acute or demoralizing kind, as compared with what one experiences in response to the different kind of event consisting of a general decline in one’s net worth”). This idea of discrete investment-backed expectations forms part of the *Penn Central* test for regulatory takings that was reiterated in *Lingle v. Chevron U.S.A. Inc.*, 554 U.S. 528 (2005). See *supra* note 24 and accompanying text.

165 This distinction resembles, in some respects, Joseph Sax’s distinction “between the role of government as participant and the government as mediator in the process of competition among economic claims.” Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 62 (1965). See also Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 5–6 (distinguishing an intermediate type of property disruption that is bound up with social transition from lower-level “housekeeping” disruptions and from larger-scale expropriations that are based on denials of membership within a community).

case.<sup>166</sup> Although often there may be correlations along those lines, a court might also assemble a set of easements for the benefit of residents of a private neighborhood or students of a private university.

Treating such aggregative decisions as more likely candidates for judicial takings analysis dovetails with the twin goals of allowing courts to carry out their ordinary business without interference, while still keeping them from undertaking acts that, if undertaken by a political actor, would count as takings. And it fits with the account of institutional competence that has been developed in this essay. Coupled with the limits that have been identified, judicial takings might be identified with a surplus-generating reconfiguration of property rights that is accomplished independent of background principles and not as a function of common law evolution, without any rationale that would make it into a compensatory nontaking, and in a setting where the need for aggregation makes a reverse payment option infeasible. A rare animal indeed, but one we cannot rule out as a theoretical possibility.

## 2. Remedies for the Purseless

If a judicial taking were found, the purseless court would not be able to make the taking good retroactively by paying for it, although the legislature could step in to do so. With invalidation (or the application of a Rule 4 alternative) standing as the only institutionally appropriate responses, a lingering question involves the interim period between the initial decision that amounted to a taking and the invalidation or modification of that decision. *First English* makes the interim period a compensable taking even if the act in question is abandoned after it is adjudged to be a taking. An initial question is whether *First English* should even apply in the judicial context. Despite the *Stop the Beach* plurality's insistence that the identity of the governmental actor does not matter, the *First English* remedy may address a problem that is not implicated in the judicial context: that an actor could engage in a series of regulatory takings with impunity by simply dropping or amending a given regulation upon losing a challenge.<sup>167</sup> The reasoning here is similar to that raised above;

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166 See Barros, *supra* note 2, at 906–09 (suggesting a distinction based on party identity).

167 Justice Brennan raises this concern pointedly in his dissent in *San Diego Gas & Electric Co. v. City of San Diego* when he quotes from remarks prepared by a California City Attorney for a National Institute of Municipal Law Officers conference in California: “IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.” 450 U.S. 621, 655 n.22 (1981) (Brennan, J., dissenting) (quoting



courts are generally thought to lack the incentives that political actors arguably have to substitute unpaid inputs for paid ones in achieving public ends.

If *First English* applies, however, we are faced with the specter of a constitutional wrong—the interim taking—without a remedy. What to do, then, about a governmental actor that has a duty to pay but no means to pay? In private law contexts, the problem of judgment-proof defendants can be addressed by requiring those engaging in conduct that may create liability to carry insurance or post bonds. Judicial takings insurance, perhaps funded by court fees, is not an institutional impossibility. But it would send an odd signal and could introduce moral hazard concerns by making property owners less prone to pursue takings claims promptly.<sup>168</sup> And it may be unnecessary.

Judicial decisions differ from other governmental actions in that they have identifiable winners and losers listed right in the case caption, whose resources are reachable through standard procedural means.<sup>169</sup> Thus, it could well be workable to have the party who gains by (what turns out to be) a taking compensate the takee for the interim loss.<sup>170</sup> The famously passive-voiced Takings Clause does not

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James Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, in 38B NIMLO MUNICIPAL L. REV. 192–93 (1975)).

168 Cf. Peñalver & Strahilevitz, *supra* note 2, at 337–39 (raising concerns that litigants would underinvest in advocacy, to the detriment of property law, if compensation were available for certain kinds of judicially-produced deprivations). The just compensation requirement already operates as insurance, as has been well noted, and moral hazard concerns have been raised in other takings contexts. See, e.g., Fischel & Shapiro, *supra* note 149; Lawrence Blume et al., *The Taking of Land: When Should Compensation Be Paid?*, 99 Q.J. ECON. 71 (1984); see also ELLICKSON & BEEN, *supra* note 81, at 152–53 (discussing and collecting sources on the moral hazard problem associated with compensation).

169 To be sure, neither the win nor the loss may be in cash. But whatever just compensation bill may be accruing in the judicial takings context corresponds to a benefit someone is receiving.

170 Peñalver and Strahilevitz similarly observe that a private party, rather than the government, might be the “most appropriate defendant” in a takings case. Peñalver & Strahilevitz, *supra* note 2, at 340 n.126 (suggesting that where private party Paul wins property rights formerly held by private party Peter, and redistribution between the two is not the goal, “imposing liability on the State . . . makes less sense than drawing on Paul’s resources to make Peter whole”). The procedure described in the text would do just that. As Peñalver & Strahilevitz note, this point relates to scholarship on “givings”—the always-present flip-side of takings. *Id.*; see also RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 4–5 (1993); *WINDFALLS FOR WIPEOUTS* (Donald G. Hagman & Dean J. Misczynski eds., 1978); Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547 (2001). While usually benefits are not charged against the recipients, things look quite different when the recipient is a single, identifiable private party who has come looking for this benefit through a lawsuit.

specify who must provide just compensation. At least in simple cases with private parties on both sides, ensuring compensation could be as simple as adapting familiar procedural tools like stays of judgment and supersedeas bonds.<sup>171</sup> I have just suggested that simple cases of this sort are not the likeliest candidates for judicial takings, but if a different vision of judicial takings carries the day, such mechanisms could become important.

Suppose a property case involving an easement is resolved in favor of Winner and against Loser, with the result that Loser can no longer keep Winner from crossing her land. If Loser can make out a plausible takings claim, then she could get a stay of the judgment until the takings claim is resolved, subject to any bonding requirements that may be necessary to protect Winner.<sup>172</sup> Winner might then be given the opportunity to get immediate enforcement of the judgment by posting a bond that ensures he (Winner) would be able to pay just compensation for the property in the event it is found to be a taking. The details of this procedure could be constructed to promote the prompt and diligent pursuit of takings claims.<sup>173</sup> By letting Loser avoid the possibility of an uncompensated temporary taking and making Winner liable for any taking that in fact results, it would address the “wrong without a remedy” concerns associated with judicial takings. It would also remove any concern that Winner and Loser would collude in the initial property case, with Loser agreeing to take the loss and later seek compensation from the State.<sup>174</sup>

Admittedly, the procedure would not work well in cases where a large and diffuse public stands on one side and a small and cohesive set of property owners stands on the other. The ability for the public to come up with a bond may be limited by free rider problems and ordinary transaction costs. An impediment likewise exists where one party simply lacks money. If the party challenging the taking cannot post a bond, it risks suffering an uncompensated loss if the decision is

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171 See FED. R. CIV. P. 62.

172 Standards for issuing such a stay might take into account a number of factors, including probability of success on the merits.

173 For example, the amount of the initial bond would be keyed to the length of suspension, which would in turn be keyed to the expected amount of time to diligently pursue a takings claim to resolution.

174 See Peñalver & Strahilevitz, *supra* note 2, at 339–41 (outlining the potential for collusion where compensation for a taking is available). It is questionable whether collusion presents a significant worry in this context, much less one of sufficient uniqueness, insolubility, and magnitude to drive doctrine, but the approach in the text would alleviate such concerns, to the extent they exist.

ultimately found to be a taking.<sup>175</sup> Nor would off-the-rack stay or bonding approaches deal well with the claims of property owners who are affected by the court's judgment but who are not parties to the initial lawsuit.<sup>176</sup> Courts might, however, find ways to adapt existing procedural tools to try to address such cases. Alternatively, the legislature could endorse a given judicial decision, putting itself on the hook for the potential interim payments, or, alternatively, override it. If a further check were needed, a remedy for a judicial breach of the Just Compensation Clause could be a judicial bonding or insurance requirement, as discussed above. My point in raising these possibilities is not to advocate for any particular model, but rather to show that there may well be ways for courts to satisfy the dictates of the pay zone on the rare instances their actions place them there.

### CONCLUSION

The current spotlight on judicial takings reveals conceptual ambiguities in takings law as a whole, and offers an opportunity for reexamining the relationships among different parts of the doctrinal framework. This essay has tried to distill a coherent picture from what is, at best, an untidy set of doctrines. The exercise has involved some potentially controversial gap filling and reasoning by extension, as well as some departures from established doctrine. Nonetheless, by mapping out one view of the takings terrain, I hope to have both nailed down points of consensus and isolated remaining disagreements and ambiguities in a way that will advance efforts to understand and contribute to takings doctrine.

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175 We would need to know more about the ability of such parties to receive support from others interested in the case's outcome who will enjoy positive spillovers if it goes in the challenger's favor.

176 See Barros, *supra* note 2, at 909 (distinguishing this factual scenario from a case brought by parties to the state court litigation in which the judicial taking allegedly occurred); Bloom & Serkin, *supra* note 113, at 593–95 (discussing some complexities surrounding claims by those who were not parties to the original case).