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THE EAGLE THEORY

THOMAS W. MERRILL*

ABSTRACT

This Article evaluates three interpretations of the Takings Clause capable of generating a regulatory takings doctrine. The first, the Epstein interpretation, puts primary emphasis on what it means to provide "just compensation" for takings; the second, the *Penn Central* interpretation, centers on what it means to "take" property; the third, which I call the Eagle theory, in honor of Steven Eagle, this year's Brigham-Kanner prize recipient, focuses on when the government has taken "private property." The Article argues that the Eagle theory has the most plausible basis in the original understanding of the Takings Clause, rests on a theory about the Clause that enjoys broad contemporary support, and is the most capable of generating predictable outcomes at a reasonable cost. The primary drawback of the Eagle theory is that it cannot serve as a general source of protection for property rights against arbitrary or oppressive government action. If adopted as the basis for the regulatory takings doctrine, therefore, the Eagle theory would have to be supplemented with a second source of constitutional protection for property, such as substantive due process. This, as it happens, is precisely what Steven Eagle has urged.

INTRODUCTION: THREE PATHS TO REGULATORY TAKINGS

There are three interpretations of the Takings Clause capable of generating a regulatory takings doctrine, that is, a doctrine that requires the payment of compensation to owners for certain types of regulations limiting their use of property. Each interpretation is facially consistent with the language of the Clause, which provides: "nor shall private property be taken for public use without just compensation."[1]

* Charles Evans Hughes Professor, Columbia Law School. Emilie Klovning provided excellent research assistance.

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

The first interpretation, which has been advanced with vigor by Richard Epstein, defines both "private property" and "taken" very broadly, and puts the operational weight on "just compensation."[2] On this reading, "private property" means every incident of property, every stick in the bundle.[3] "Taken" means not just seized or appropriated, but any kind of diminution in value of any incident of property.[4] The combination of these interpretations, without more, would effectively make any regulation that has any impact on the value of any incident of property a prima facie taking, which would be draconian in the extreme. Flexibility enters the picture via a creative interpretation of "just compensation." "Just compensation," according to Epstein, means zero compensation when the regulation in question is designed to rectify some previous action by the claimant that infringes the rights of others, such as committing a nuisance.[5] And "just compensation" includes "implicit in kind" compensation when the claimant obtains offsetting benefits from the regulation, as when uniform land use regulations increase the value of all properties that are burdened.[6]

The second path to regulatory takings is to pay relatively little attention to "private property" and "just compensation" and put operational weight on the word "taken." This is the approach the Supreme Court has effectively adopted, most notably in its foundational *Penn Central* decision[7] and in the major qualifications of that decision. The Court has largely ignored the words "private property" and "just compensation," but has given "taken" a broad, even creative interpretation, to include not just seizures and appropriations but also regulations that "go too far"[8] in upsetting the expectations of the owner. In pursuing this interpretive strategy, *Penn Central* listed three factors for consideration in determining whether a regulation should be deemed a taking. One is the extent to which the regulation diminishes the value of the property.[9] Another is the extent to

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

3. *Id.* at 57.

4. *Id.*

5. *Id.* at 198–99.

6. *Id.* at 196.

7. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

8. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

9. *Id.* at 124.

which the regulation interferes with distinct investment-backed expectations about the use of the property.[10] The third is whether the regulation entails a physical invasion of the property or merely affects the use of the property by the owner.[11] This ad hoc structure has been qualified by categorical rules for permanent occupations and for regulations that deprive the owner of all value in the property.[12] In practice, the Court's approach has meant that only the most extreme regulations of the use of property are regarded as takings.[13]

The third path to regulatory takings is to adopt a literal construction of "taken" and a conventional understanding of "just compensation" and to put operational weight on "private property." I will call this the "Eagle theory," since our honoree Steven Eagle has advanced this conception of regulatory takings on several occasions.[14] It is also an approach I briefly set forth in a chapter in my book on *Takings* coauthored with David Dana and have occasionally discussed in other pieces.[15] Basically, the idea is that a regulation should be deemed a taking when the government acquires, through the regulation, a set of interests that a private party would ordinarily have to acquire either by purchase or by exercising a delegated power of eminent domain. The work here is done by asking whether the regulation has appropriated "private property" without paying just compensation. "Private property" is the operative provision, rather than "taken" or "just compensation."

The first thing to note about these three interpretations is that each is facially consistent with the language of the Takings Clause.

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10. *Id.*

11. *Id.*

12. *E.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (deprivation of all value); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (permanent occupation).

13. *See* James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 66–68 (2016).

14. STEVEN J. EAGLE, REGULATORY TAKINGS §§ 7-7(e)(5), 7-8, 7-17 (4th ed. 2009) [hereinafter EAGLE, REGULATORY TAKINGS]; Steven J. Eagle, *Property Rights and Takings Burdens*, 7 BRIGHAM-KANNER PROP. RTS. CONF. J. 199, 247 (2018); Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. 899, 901 (2007) [hereinafter Eagle, *Property Tests*].

15. DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS ch. IV (2002); Thomas W. Merrill, *The Supreme Court's Regulatory Takings Doctrine and the Perils of Common Law Constitutionalism*, 34 J. LAND USE & ENVTL. L. 1, 29–32 (2018) [hereinafter Merrill, *Perils*]; Thomas W. Merrill, *Why* Lingle *Is Half Right*, 11 VT. J. ENVTL. L. 421, 425–28 (2010) [hereinafter Merrill, *Why* Lingle *Is Half Right*]; Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 974–78 (2000) [hereinafter Merrill, *Landscape*].

Insofar as we are concerned about fidelity to the constitutional text, the result is a tie. The theories differ in that each adopts an expansive or creative interpretation of some terms or phrases in the Clause and a strict or narrow interpretation of others. Epstein offers an expansive interpretation of "property" and "taken" and a more creative interpretation of "just compensation" that limits the requirement of monetary compensation in many cases. The Supreme Court has implicitly adopted a narrow interpretation of "private property" and "just compensation," and has offered an expansive interpretation of "taken." The Eagle theory advances a conventional interpretation of "taken" and "just compensation," and a broader interpretation of "private property," although not as broad as the one Epstein proposes. Since each theory draws upon an understanding of the words that is plausible, it is not possible to endorse one and condemn the others on the basis of the text. If we are to do a comparative evaluation of the rival interpretations, it is necessary to turn to other considerations.

I. ORIGINAL UNDERSTANDING

One obvious basis for assessment is to ask which of the three approaches is most congruent, not just with the words of the Takings Clause, but with its original understanding or purpose. This is a perilous enterprise, since there is very little evidence as to what the framing generation thought the Clause would do or accomplish.

This is a capsule history of what is known about the origins of the Takings Clause.[16] The States that ratified the original Constitution proposed over 80 amendments as potential candidates for inclusion in what became known as the Bill of Rights. The Takings Clause was not among them. The Clause was added to the list of proposed rights by James Madison, who took the lead in shepherding the Bill of Rights through Congress. To be sure, the idea that there is a right to compensation when the government takes property for a public use was not new. The practice in England, and increasingly in the colonies, was to provide compensation for compulsory acquisitions of land for public projects like roads and sewers.[17] Two states had included a

16. The following draws on DANA & MERRILL, *supra* note 15, at 9–16.

17. For example, Blackstone observed the established practice of compensating for compulsory takings of property in his widely read commentaries. 1 WILLIAM BLACKSTONE,

provision requiring compensation for takings in their state constitutions before the Bill of Rights was adopted, and a similar clause had been included in the Northwest Territories Ordinance.[18] But when Madison acted these constitutional provisions were relatively new, and no published decisions had been rendered interpreting them.

Although the initiative for adding the Takings Clause to the Bill of Rights was Madison's, there is no recorded evidence of any disagreement about its inclusion. Madison's proposed text was modified somewhat by the Select Committee of the House, for unexplained reasons. The House then approved the Clause as part of the proposed package of rights, with no recorded debate about its inclusion. The Senate also approved the Clause, but since it did not keep a journal at the time, we do not know if there was any discussion about it. Twelve amendments were sent to the then-fourteen States. Ten of the proposed amendments were ratified, including what became the Fifth, with its Takings Clause. There is also no recorded debate about the Clause in any of the legislatures ratifying the Bill of Rights.

The closest thing to a contemporaneous comment about the Takings Clause is a brief observation by St. George Tucker, in an appendix to his edition of *Blackstone's Commentaries* that was most likely written shortly after ratification, almost certainly before 1795.[19] He said the Clause was probably added "to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever."[20] Assuming this speculation was correct, at least as a partial account of the purpose of the Takings Clause, it establishes that the Clause would apply to more than formal exercises of what would come to be called

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COMMENTARIES *135. For the emergence of the compensation convention in England, see William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 575–79 (1972). Some colonies did not compensate for taking rural land for road construction, but this is easily explained by a presumption that the landowner obtained offsetting benefits exceeding the value of undeveloped rural land. *Id.* at 582–83.

18. William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 701–08 (1985).

19. 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (St. George Tucker ed, Lawbook Exchange 1996) (1803) [hereinafter TUCKER'S BLACKSTONE].

20. *Id.* at 305–06.

eminent domain.[21] But Tucker's speculation does not suggest the Clause would apply to more than direct appropriations or seizures of private property.

Given that we know very little about the purpose or expected applications of the Clause, we should concentrate on what the text says in conjunction with settled propositions about property rights at the time the Bill of Rights was ratified in 1791. One thing we know, due to the researches of John Hart and William Treanor, is that the framing generation was familiar with some relatively aggressive regulations of the use of property and that colonial governments did not generally provide compensation when they adopted these regulations.[22] For example, some jurisdictions required landowners to drain swamps on their property, on pain of forfeiture if they failed to do so.[23] Of course, it was not anticipated that the new federal government would have any authority to adopt such regulations. But the new government clearly had the power to interfere with property in certain contexts, such as provisioning the military and providing for the construction of post roads.[24] Given the equanimity with which the proposed Takings Clause was greeted—and, perhaps more tellingly, given the widespread inclusion of virtually identical clauses in state constitutions adopted after the ratification of the Bill of Rights[25]—the safe conclusion is that the Takings Clause was not understood to reflect any change in the legal status quo. That status quo included an increasingly widespread understanding that compensation should be given for compulsory acquisitions of private property by the government for public uses, but not for regulations of the use of property.

In short, the limited evidence about the origins of the Takings Clause reveals nothing that would suggest a specific intention on

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21. The term "eminent domain" did not enter into legal usage in the United States until after the adoption of the Constitution and the Bill of Rights, the most notable point of entry being Chancellor James Kent's influential opinion in Gardner v. Trustees of Newburgh, 2 Johns. Ch. 162, 166 (N.Y. Ch. 1816) (using the phrase and citing to the works of Grotius, Pufendorf, and Bynkershoeck).

22. *See* John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1259–81 (1996); Treanor, *supra* note 18.

23. Hart, *supra* note 22, at 1257.

24. U.S. CONST. art. I, § 8, cl. 7, 16.

25. The federal Takings Clause did not originally apply to the states. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833). But most states, in emulation of the federal Constitution, soon adopted similar clauses in their respective state constitutions. *See* Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1229–30 (1996).

the part of the Framers to adopt a regulatory takings doctrine. This has been seized upon by the opponents of regulatory takings as a reason to repudiate or at least limit the doctrine.[26] But even Michael Rappaport, who styles himself "a friend of both economic liberty and originalism," has ruefully concluded that "on the available evidence, the original meaning of the Fifth Amendment does not cover regulatory takings."[27]

Does this mean that it is not possible, consistent with originalist premises, to interpret the Takings Clause as justifying a regulatory takings doctrine? Rappaport's specific suggestion for avoiding this conclusion warrants a brief discussion. He argues that although the Framers did not contemplate a regulatory takings doctrine in 1791, it is possible that such a doctrine was understood to be incorporated in the Fourteenth Amendment, adopted in 1868.[28] If true, this would mean, on originalist grounds, that the federal government is not constrained by a regulatory takings doctrine, but the states are.

There are two difficulties with this argument. First, the Supreme Court, in considering incorporation, has come to the view that the original provisions of the Bill of Rights and the versions incorporated in the Fourteenth Amendment must be given the same meaning.[29] This would seem to preclude a two-tier protection against uncompensated takings, with regulatory takings covered by the incorporated provision but not by the original Takings Clause. Second, in deciding which provisions of the Bill of Rights should be incorporated in the Fourteenth Amendment, the Court has said that this turns on whether the provision in question is a fundamental right "necessary to our system of ordered liberty."[30] This in turn requires an historical inquiry into whether the right was considered fundamental both in 1791, when the Bill of Rights was adopted, and in 1868, when the Fourteenth Amendment was adopted.[31]

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26. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1059–60 (1982) (Blackmun, J., dissenting).

27. Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, But the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729, 731 (2008).

28. *Id.* at 749.

29. McDonald v. City of Chicago, 561 U.S. 742, 765–66 (2010).

30. *Id.* at 778.

31. *Id.* at 767–77.

Rappaport's own assessment of the evidence is that the Framers did not regard protection against regulatory takings as a fundamental right in 1791. The evidence as of 1868 is admittedly more mixed. As of that date, there were virtually no judicial decisions construing the Takings Clause of the Fifth Amendment. Nor was there any settled practice about the scope of the Clause. When the federal government needed to exercise the power of eminent domain, it called upon the states to do so.[32] Still, a number of state courts began to struggle with the line between compensable takings and non-compensable regulations in the antebellum period, and some of these decisions extended the obligation to compensate to what we would today call regulatory takings.[33] They did not attribute any obligation to compensate to an understanding of the federal Takings Clause. The dominant theme of these decisions, as documented by Eric Claeys, was that compensation for interference with certain uses of property was required as a matter of natural right.[34] To the extent that legal sources were cited for this conclusion, the decisions referred variously to Blackstone, the common law, the Contracts Clause, various state constitutional provisions such as law of the land or due process clauses, and—occasionally—to state takings clauses.[35] So, the problem of regulatory takings had raised its head in the state courts. But it would be a stretch to conclude from this "chaotic collage" of decisions[36] that a right to compensation for regulatory takings had come to be recognized as a fundamental right, such that it was understood to be an incorporated into the Fourteenth Amendment.

What are the implications of this generally negative conclusion about the original understanding of the Takings Clause (in either its original or incorporated form) for the modern regulatory takings doctrine? Epstein seeks to avoid the implications of this history by making a move that has become familiar in recent constitutional theory—he seeks to identify the original understanding of the Clause at a very high level of generality, one sufficiently abstract to support

32. *See* William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1762–91 (2013).

33. *See generally* Kobach, *supra* note 25, at 1229–34.

34. Eric Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1574–1604 (2003). *See also* J. A. C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 71–81 (1931).

35. Kobach, *supra* note 25, at 1229–34, 1238 n.130.

36. *Id.* at 1233.

the idea of regulatory takings.[37] In particular, he argues that the Clause embodies a commitment by the framing generation to a Lockean philosophy that would preclude any effort by government to alter the distribution of wealth. The Epstein version of the Framers' aspirations gains some support from the research of Jennifer Nedelsky, which shows that members of the framing generation strongly venerated property and (some of them anyway, namely James Madison) were fearful about the prospect of future majorities undermining the security of property through aggressive measures of redistribution.[38] But originalism, if it is to be meaningful, must remain faithful not just to the presumed ends that motivated the Framers, but also to the means they selected for realizing those ends. There is no evidence that the founding generation thought the Takings Clause would be the vehicle for reigning in future democratic efforts to level the distribution of property. The limited powers of the federal government and the checks and balances embedded in the new Constitution were the first line of defense against this. The Contracts Clause and the Due Process Clause of the Fifth Amendment (and later the Fourteenth)—understood to mean that one could not be deprived of property without a judicial trial—were a second line of defense.[39] This is more or less how things played out up through the end of the nineteenth century. The federal government remained small and the states were held in check by the Contracts Clause and, later, by what came to be called substantive due process. The Takings Clause was largely a no-show.

For different reasons, the modern Supreme Court's vision of the Takings Clause as a complex structure of per se rules and a three-part ad hoc balancing test that applies to both the federal government

37. Epstein in this respect anticipates constitutional theories like that of Jack Balkin. *See, e.g.*, JACK BALKIN, LIVING ORIGINALISM 6–7 (2011) (arguing that originalism does not require adherence to the "original expected application" of broad constitutional principles but instead requires us to "apply them to our own circumstances in our own time.").

38. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 27–28, 204–05 (1990).

39. The Contracts Clause was the most frequently litigated federal constitutional provision limiting the powers of the states prior to the adoption of the Fourteenth Amendment. *See* BENJAMIN FLETCHER WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION xii, 92, 95 (1938). On the understanding that the due process clauses meant that one could not be deprived of life, liberty, or property without a judicial trial, *see* Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT. 339 (1987).

and the states also bears no resemblance to the likely understanding of the framing generation. The Court's doctrine is a quintessential version of common-law constitutionalism, cobbled together from notions about the police power that originated under the Contracts Clause and the Commerce Clause and ideas about the importance of preventing interference with vested rights drawn from substantive due process.[40]

The Eagle theory, or at least my understanding of it, probably comes the closest to an interpretation that can be squared with the original understanding. Start with twin assumptions that were widely shared at the time of the Founding. One is that seizures of property for a public use require the payment of just compensation. This seems like the minimal understanding that can be extracted directly from the language of the Takings Clause, read in light of the widespread practice of compensating for forced acquisitions of property by the government. The other is that measures that could be characterized as a form of public nuisance regulation do not require any payment of compensation.[41] Public nuisance law had been around since the fifteenth century, and had never been thought to require compensation. A central problem created by these twin understandings is that they create an incentive for the government to characterize appropriations of property that should require compensation as a type of public nuisance regulation, or as it came to be called, a police power measure.[42] This is because the government will always be tempted to avoid paying for public projects if this will incur the displeasure of taxpayers or limit what the government can otherwise do with its finite resources. The need to prevent evasion of the compensation requirement provides the nub of the Eagle theory: if the government is acquiring for public use what can fairly be characterized as "private property," then it must pay just compensation, regardless of how the government labels the proceeding.

There is, I hasten to acknowledge, no evidence that any of the Framers foresaw the potential conflict created by the overlap between

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40. *See* Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle"*, 90 MINN. L. REV. 826, 831 (2006) ("[T]he *Penn Central* Court attempted to weave a unified takings doctrine out of a pastiche of Fourteenth Amendment substantive due process and Fifth Amendment Takings Clause precedents.").

41. DANA & MERRILL, *supra* note 15, at 15–19.

42. *See, e.g.*, Steven J. Eagle, *A Prospective Look at Property Rights and Environmental Regulation*, 20 GEO. MASON L. REV. 725, 752 (2013).

the just compensation requirement and the police power and the dramatic difference in the consequences of proceeding under one power rather than the other—compensation required by takings of property for public use, no compensation required by the police power. But that is not surprising. The notion that compensation was required for takings as a matter of constitutional right was new, and the potential conflict between this understanding and the long-standing understanding that public nuisances can be abated without compensation had not yet emerged in any concrete setting. Nevertheless, had the Framers' attention been drawn to the potential conflict, it is hard to imagine they would want the legislature to have unreviewable discretion to decide which power it was exercising. They would have wanted the courts to develop some kind of doctrine to prevent the government from denying any obligation to compensate when it is in fact engaged in something that is the functional equivalent of eminent domain. This much, in fact, can be inferred from St. George Tucker's comment about the likely purpose of the Takings Clause.[43] Impressment of supplies by military units on the move is not a formal exercise of eminent domain—it is a straightforward seizure of assets by an agency of the government, albeit one for a public use.

In sum, although the evidence is admittedly scant, I would submit that the Eagle theory scores higher on the scale of original understanding or purpose than its two rivals. The argument is a simple one: the framing generation would not want a right established by the Constitution to be easily evaded or circumvented through a manipulation of labels. Thus, they would have endorsed the idea of regulatory takings, understood to be an anti-evasion or anti-circumvention doctrine.

II. CONTEMPORARY ACCEPTABILITY

Another ground for assessing the three paths to a regulatory takings doctrine is to ask which interpretation is most likely to receive general assent today, at least within the larger legal community, which of course includes judges. As is the case with other constitutional doctrines, the legal community is divided today about the appropriate scope of the regulatory takings doctrine. Those who favor

43. *See* TUCKER'S BLACKSTONE, *supra* note 19.

broad protection of the environment and aggressive land-use controls worry that the regulatory takings doctrine will unduly inhibit such measures.[44] They tend to favor repudiation of the doctrine, limiting the Takings Clause to explicit appropriations or seizures of property for public uses, or at least confining the doctrine to the *Penn Central* ad hoc standard, which rarely results in a finding of takings liability.[45] Those who are skeptical about big government, and worry about the potential of regulation to favor special interests or simply to sap economic growth, tend to favor some device for "internalizing" the costs of regulation to the government.[46] A broad regulatory takings doctrine is often touted as something that would do the trick.[47]

The three interpretations of the Clause outlined above tend to line up with these broader preferences about the scope of government. Each interpretation is associated with a legal/political theory, which can be ranked from extremely bold to highly modest. Unsurprisingly, the modest theory is the one most likely to achieve broad assent within the legal community.

Epstein's path to the regulatory takings doctrine is based on a very aggressive legal/political theory, namely, that the Constitution is designed to prevent deliberate redistribution of wealth by legislatures.[48] Whether this was the shared view at the time of the framing of the Takings Clause is debatable at best. The theory, or something like it, had a following in the late nineteenth century, for example in the scholarship of Christopher Tiedeman.[49] But it would be an

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44. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1075–76 (1992) (Stevens, J., dissenting). *See also, e.g.*, John D. Echeverria, Koontz*: The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 2–3 (2014).

45. For those favoring repudiation, *see, e.g.*, William Michael Treanor, *Keynote Address: Litigating Takings Challenges to Land Use and Environmental Regulations*, 36 VT. L. REV. 503, 504 (2012); William Michael Treanor, *Take-ings*, 45 SAN DIEGO L. REV. 633 (2008). For those favoring limiting the doctrine to the *Penn Central* ad hoc standard, *see, e.g.*, *Lucas*, 505 U.S. at 1047 (Blackmun, J., dissenting).

46. *See* DANA & MERRILL*, supra* note 15, at 41–46 (discussing the fiscal illusion theory for compensation).

47. *See, e.g.*, Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 999 (1999).

48. *See* EPSTEIN, *supra* note 2, at 295–303. *See generally* Thomas W. Merrill, *Rent Seeking and the Compensation Principle,* 80 NW. U. L. REV. 1561 (1987).

49. CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES 4 (1886). *See generally* Louise A. Halper, *Christopher G. Tiedeman, 'Laissez-Faire Constitutionalism' and the Dilemmas of Small-Scale Property in the Gilded Age*, 51 OHIO ST. L.J. 1349, 1352–54 (1990).

understatement to say that it is controversial today. Government at all levels engages in various programs of wealth redistribution, sometimes to benefit the poor, sometimes the rich. The dominant political trope today, at least on the left, is to demand more redistribution, in the direction from rich to poor. So, Epstein scores poorly on the dimension of reflecting a theory likely to elicit the consent of the contemporary legal community.

The theory that animates the Supreme Court's path to the regulatory takings doctrine is more difficult to discern, since the Court speaks through different voices in different opinions. I would contend, however, that the dominant theme that underlies the Court's jurisprudence is the importance of respecting people's reasonable expectations about the permitted uses of their property. This is reflected in the Court's fondness for quoting the line from *Armstrong v. United States* that the government should not force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[50] It is a central theme of the Court's foundational decision, *Penn Central*, which concluded that the historical preservation order attached to Penn Station in New York did not "interfere in any way with the present uses of the Terminal" nor did it deprive the owner of an adequate return on original investment.[51] The theme is echoed in subsequent decisions, including those that carve out exceptions to *Penn Central* such as *Loretto* and *Lucas*. *Loretto* says that permanent invasions are uniquely unsettling to the expectations of owners about their ability to control what happens on their land.[52] *Lucas* says that the "historical compact" which underlies the Takings Clause is the ability to make some productive use of the land.[53] Most recently in *Murr v. Wisconsin*, the Court said that the dimensions of a parcel of land, for regulatory takings purposes, should be based on the owner's reasonable expectations about the scope of the parcel.[54]

I suspect the Court's invocation of protecting reasonable expectations about property would garner significant support in an opinion poll. This no doubt explains why the Court has gravitated to this

50. Armstrong v. United States, 364 U.S. 40, 49 (1960).
51. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 136 (1978).
52. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432 (1982).
53. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028 (1992).
54. Murr v. Wisconsin, 137 S. Ct. 1933, 1938 (2017).

notion. In this sense the Court's theory, stated in the abstract, enjoys more consensual support than does Epstein's. Yet the Court's *Penn Central* doctrine is employed to protect reasonable expectations on a very limited basis. Reasonable expectations are protected only if embodied in discrete assets; extreme or retroactive liabilities not attached to specific assets, including retroactive taxes, are not covered by the Takings Clause.[55] Reasonable expectations are largely protected if a regulation interferes with existing uses, but not if it interferes with prospective uses.[56] Sometimes compensation is denied if the owner is on notice that the property is subject to regulation, thus defeating any claim of expectations;[57] on other occasions, compensation is ordered even if the owner is on notice, often for years, that a costly regulation applies to the property, making it unlikely that there is any disappointed expectation at all.[58] So the Court's approach invokes a theory with broad appeal, but its decisions fail to conform consistently to what the theory seems to demand.

The Eagle theory, it seems to me, scores the best in terms of reflecting a theory likely to achieve widespread assent in the legal community. The Eagle theory is very modest. As noted above, it is a simple anti-circumvention theory. Everyone agrees that the Takings Clause requires the government to pay just compensation when it explicitly condemns property using the power of eminent domain or

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55. Eastern Enters. v. Apfel, 524 U.S. 498, 539–40 (1998) (Kennedy, J. concurring in part and dissenting in part); *id.* at 554 (Breyer, J. dissenting) (general liabilities not covered); Koontz v. St. John's River Water Mgmt., 570 U.S. 595, 615 (2013) (reaffirming that taxes are not covered).

56. The greater solicitude for developed relative to undeveloped property is reflected most prominently in the exception to zoning laws for nonconforming uses. *See* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS 197–209 (3d ed. 2005). Developed property, on this understanding, must be exempt from zoning measures that would require termination of an existing use, or at least must be allowed a period of amortization before being downzoned. Undeveloped property is immediately subject to restrictive regulations. The distinction has been developed primarily by state courts and grows out of nineteenth century doctrine protecting "vested rights." A number of Supreme Court decisions, including *Penn Central*, indirectly reflect it. *See Penn Cent. Transp. Co.*, 438 U.S. at 136–37 (noting that the historic preservation order did not interfere with the railroad's existing uses of the terminal but only prevented exploitation of air rights which had not been developed).

57. *E.g.*, Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 227 (1987); Ruckelshaus v. Monsanto Co., 497 U.S. 986, 1006 (1984).

58. Compare *Ruckelshaus*, 497 U.S. 986 (notice of regulation defeats expectations), *with* Horne v. U.S. Dep't of Agric., 135 S. Ct. 2419 (2015) (notice of regulation not relevant), *and* Palazzollo v. Rhode Island, 533 U.S. 606 (2001) (notice relevant but not conclusive as to owner expectations).

engages in deliberate expropriation to acquire property for a public use. But everyone also agrees that no compensation is required when the government uses its police power to eliminate nuisances or other widespread social harms. These shared understandings create a sharp discontinuity depending on which power the government is asserting. The regulatory takings doctrine, on this theory, is the rubric that courts use to prevent circumventions of the compensation requirement associated with takings of property for a public use. The justification for the doctrine is the need to maintain good faith observance of an acknowledged constitutional command.

I would note in this connection that the decision conventionally identified as launching the regulatory takings doctrine (at least as a matter of federal constitutional law) rests in significant part on the anti-circumvention theory. As Justice Holmes wrote for eight Justices in *Pennsylvania Coal Co. v. Mahon* (only Justice Brandeis dissented):

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone.[59]

As he elaborated a few paragraphs later:

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without just compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.[60]

These are clear invocations of the anti-circumvention idea, although not expressed in those terms. Although *Penn Coal* is frequently cited for other propositions, the decision rests in significant part on the

59. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).
60. *Id.* at 415 (citation omitted).

idea that an express requirement of constitutional law cannot be evaded by the expansive interpretation of another government power that effectively nullifies it. The common-sense appeal of this proposition may explain why the decision was nearly unanimous, and why it continues to be invoked (although not for its precise holding) today.

There is more. Another theme of *Penn Coal* is that the Pennsylvania anti-subsidence statute required the payment of compensation because it had the effect of "taking"—literally—a discrete form of private property. Under Pennsylvania law, the right of surface support could be waived as part of a conveyance of the subsurface mineral estate. And a predecessor of the Mahons had executed just such a waiver. The Kohler Act, which required that surface support be maintained for persons like the Mahons, thus had the effect of nullifying a previous waiver of surface support. In arguing the case, the Coal Company cleverly described the right of surface support as a "third estate" recognized by Pennsylvania law, along with the right to the surface and the right to the subsurface minerals.[61] This made it sound like a free-standing property right—one which had been forcibly transferred from the Coal Company to the Mahons by the legislature. As Holmes put it, "[a]s applied to this case the statute is admitted to destroy previously existing rights of property and contract."[62] On this reading of *Penn Coal*, the decision not only justifies the regulatory takings doctrine as an anti-circumvention measure, it implements that rationale by asking whether the government's exercise of the police power has taken "private property." In other words, the Court's foundational regulatory takings decision rests on the Eagle theory.

III. PREDICTABILITY AND LITIGATION COSTS

A third basis for assessing the competing theories is whether they are likely to reach relatively predictable outcomes and, relatedly, how expensive they are to litigate. Epstein's theory fares reasonably well under this criterion, since every regulation that affects the value of any incident of property is prima facie a taking. All the action occurs in asking whether the regulation is designed to rectify a previous

61. Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 214 n.50 (2004); Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 CAL. L. REV. 561, 563 (1984).

62. *Pa. Coal*, 260 U.S. at 413.

invasion of rights by the property owner, such as the commission of a nuisance, or whether the property owner obtains implicit in-kind compensation from having the regulation imposed on others. The latter inquiry in particular would generate conflicting answers, but at least attention would be focused on two discrete variables.

The Supreme Court's approach to regulatory takings is notorious for its complexity and unpredictability. It has been described by innumerable commentators as a muddle, a mess, convoluted, incoherent, and so forth. The recent decision in *Murr v. Wisconsin* requires that courts use a balancing test to determine the scope of the parcel subject to regulation, which is then factored into a determination of diminution in value, which is in turn one of three factors to weigh in deciding whether the regulation is a taking—unless an exception applies for permanent occupations, complete deprivations in value, or disproportionate exactions. As one commentator exclaimed, the Court in *Murr* turned a muddle into a "mudslide."[63] The cost of litigation is magnified by the requirement that property owners exhaust their remedies with local regulators, at least to the point where the regulation is deemed final.[64] Regulatory takings litigation drags on interminably, and the low success rate undoubtedly discourages potential claimants from persevering through multiple rounds of litigation.

Whether the Eagle theory would generate predictable outcomes depends critically on how one defines the "private property" that is protected by the Clause. "Private property" could refer to well established bundles of rights, like the fee simple, the life estate, the lease, the trust, and so forth. Or it could refer to every incident associated with property, like the right to exclude, the right to use, and the right to transfer. Steven Eagle has suggested that property, for the

63. Nicole Stelle Garnett, *From a Muddle to a Mudslide:* Murr v. Wisconsin, 2017 CATO SUP. CT. REV. 131. *See also* Maureen Brady, Penn Central *Squared: What the Many Factors of* Murr v. Wisconsin *Mean for Property Federalism,* 166 U. PA. L. REV. ONLINE 53 (2017); Thomas W. Merrill, *Choice of Law in Takings Cases*, 8 BRIGHAM-KANNER PROP. RTS. J. 45, 59 (2019) (describing *Murr* as a "bouillabaisse put together from the catch of the day").

64. *See* Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186–94 (1985). A second exhaustion requirement imposed by *Williamson County*—that the claimant seek compensation from the state before turning to a federal court—was overturned in *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167–68 (2019). But many questions remain about other defenses to federal court litigation, such as abstention and state sovereign immunity, which were not considered in *Knick*. *See* Thomas W. Merrill, *Anticipatory Remedies for Takings*, 128 HARV. L. REV. 1630 (2015) (discussing the discretionary nature of declaratory relief and sovereign immunity barriers).

purpose of a takings analysis, should be defined by what he calls the "commercial unit test."[65] As he writes:

> The . . . standard . . . is based on the idea of the "commercial unit," as [introduced into commercial law] by the Uniform Commercial Code. The commercial unit "[m]eans such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use." Under this standard, an owner could claim a taking of a particular property interest, but would have the burden of demonstrating that the interest asserted is one actually recognized as traded in a market in the community in which it is located.
>
> The commercial unit allows for the "partial" taking without allowing the property owner the possibility to custom-tailor as the requisite bundle of rights that constitutes the property exactly what the government diminished. If an owner alleges that the loss of the use of 50 acres out of 500 constitutes a taking, he might have an easy time establishing that there is a ready market for 50 acres in the vicinity. If he alleges that a restriction destroys the right to use 50 acres for the painting of landscape portraits, he is entitled to establish that there is a market for such rights in the area, which promises to be a more difficult endeavor.[66]

I think this is right. The way I have put it in previous writing is that property in this context means a discrete asset, as to which the owner has a general right to exclude others, which is exchangeable on a stand-alone basis.[67]

The rationale for limiting private property for takings purposes to packages of rights that are "tradeable in the local market," as Eagle puts it, or "exchangeable on a stand-alone basis," in my formulation, follows directly from the theoretical foundation of the regulatory takings doctrine as an anti-evasion or anti-circumvention measure. What we are looking for is government action that requires the payment of just compensation, as all agree the Constitution requires when the government exercises—or should exercise—the power of

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65. EAGLE, REGULATORY TAKINGS, *supra* note 14, at § 7-7(e)(5); Eagle, *Property Tests*, *supra* note 14, at 941. *See also* Brief for Reason Foundation as Amicus Curiae in Support of Petitioners, Murr v. Wisconsin, 137 S. Ct. 1933 (2017).

66. EAGLE, REGULATORY TAKINGS, *supra* note 14, at § 7-7(e)(5); *see also* Eagle, *Property Tests*, *supra* note 14, at 941.

67. DANA & MERRILL, *supra* note 15, at 68–81; Merrill, *Landscape*, *supra* note 15.

eminent domain. The question then becomes, when does the government see fit to exercise the power of eminent domain? The answer, which is abundantly clear from long experience, is that the government resorts to eminent domain when it needs to acquire a configuration of assets that is tradeable or exchangeable in the market, but which for one reason or another cannot be acquired by the government at a price approaching what would ordinarily be its market value.[68] In other words, the government would ordinarily purchase the configuration of assets but finds it cannot do so at what it regards as a reasonable price. Typically, this will be because the property has some monopoly power because of its location, which allows the existing owner to hold out for a price in excess of what would otherwise be its market value. Less commonly, it might be because the government has an urgent need for the property that precludes going through the process of ordinary negotiation of a sale (St. George Tucker's military impressment example).[69] In short, eminent domain is used to acquire assets that are tradeable in the local market, or exchangeable on a stand-alone basis.[70] Since the regulatory takings doctrine functions to prevent the government from characterizing what should be exercises in eminent domain as police measures, regulatory takings should be limited to regulations in which the government acquires a tradeable or exchangeable asset.

The tradeable or exchangeable asset definition of private property has the further benefit of avoiding the "positivist trap" associated with adopting state law as the source for identifying the property protected by the Takings Clause.[71] The trap is created by the possibility that state law defines all property as being qualified by the police power, and the police power is so broadly defined that any conceivable regulation is automatically upheld as a legitimate qualification of property.[72] The Eagle theory avoids this trap because, without regard to whether the regulation is justified by the police power, if

68. *See generally* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1968) (presenting a survey of eminent domain decisions showing that nearly all involve acquiring assets with some kind of holdout power).

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

70. *See* Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1340–41 (1991) ("The predictive rule for takings law [is] that compensation will be required when the intervention is readily seen as a substitute for a private purchase.").

71. *See generally* Merrill, *Landscape*, *supra* note 15, at 922–26.

72. *See* Karkkainen, *supra* note 40, at 838–44 (discussing nineteenth-century cases that presuppose the police power to be a general background principle qualifying all property rights).

the regulation has the effect of transferring an asset that is traded or exchanged on a stand-alone basis, the government must use the power of eminent domain to compel a transfer of that asset or otherwise pay just compensation. Private property, at least for takings purposes, is defined by the behavior of nongovernmental actors in the market. State law and state law conceptions of the police power will surely enter into the behavior of market actors. But these mysteries need not be plumbed in order to decide whether a regulatory taking has occurred.

A final benefit of the tradeable or exchangeable asset definition of private property is that it synchronizes the scope of the Takings Clause with the established methods for determining just compensation. The measure of just compensation is market value, and market value is obviously much more easy to determine when the government has taken an interest that is bought and sold in the market. Under either the Epstein theory or the Supreme Court's approach certain government regulations can be found to "take" incidents of property for which there is no market, creating a conundrum for how to determine just compensation.

One implication of this definition of private property, which is only implicit in Eagle's writing, is that the question whether the government has taken private property is one of fact, as opposed to a doctrinal analysis. In clear cases, the court can perhaps take judicial notice of whether the particular bundle of rights acquired by regulation is one that is tradeable or exchangeable on a stand-alone basis. In contested cases, however, the court should entertain expert testimony on this question. Accordingly, the answer might vary from one time and place to another. Thus, the regulatory takings doctrine would have an evolutionary quality but would evolve along with changes in the relevant property market, not with changes in legal doctrine or conceptual understanding.

A few examples may be helpful in clarifying how private property would be identified under a market-based test. Consider, first, a system of government rent controls—a central target of Epstein and others who advocate an aggressive regulatory takings doctrine. Individual tenants, of course, can and do negotiate for limits on future rent increases. But they do so as part of a long-term lease. Restrictions on future rent increases are not bought and sold on a stand-alone basis independent of a package of lease provisions. Thus,

government rent controls cannot be regarded as an attempt to use the police power to procure a type of property that is traded or exchanged in the relevant market on a stand-alone basis. Under the Eagle theory, rent controls are an easy case for no takings liability; this conforms to the consistent pattern of results reached by the Supreme Court over time.[73]

As another example, consider a typical exclusionary zoning regime, such as one that imposes a large minimum acreage requirement on construction of new single family homes—or alternatively, an inclusionary zoning regime that limits lot sizes or mandates the construction of multi-unit housing. Developers of course are generally free to specify the size of the lots they prefer to sell within a new development. But restrictions on lot sizes, large or small, are not transacted on a stand-alone basis. In an unregulated market for new development, they appear as part of a package of land use provisions adopted by developers in an effort to attract buyers. Under the Eagle theory, exclusionary or inclusionary zoning does not give rise to takings liability. This is again consistent with the outcomes generally reached by courts.[74]

The implications of the Eagle theory do not point uniformly to a minimalist conception of the scope of the regulatory takings doctrine. Consider another *bête noire* of the Epstein movement—government regulations that forbid filling a wetland on real property, such as under the dredge and fill regulations implementing the Clean Water Act.[75] At the time of the Founding and for many generations thereafter, such regulations would not be regarded as takings. Several colonial-era governments mandated the filling of wetlands (called swamps back then), and the federal government actively encouraged such behavior through various Swamp Land Acts in the mid-nineteenth century.[76] There was no indication that the right to fill or not to fill was exchanged on a stand-alone basis independent of larger transactions in undeveloped land. Flash forward to the present day

73. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005); Yee v. City of Escondido, 503 U.S. 519 (1992); Pennell v. City of San Jose, 485 U.S. 1 (1988); Block v. Hirsch, 256 U.S. 135 (1921).

74. *See, e.g.*, Murr v. Wisconsin, 137 S. Ct 1933 (2017); Euclid v. Amber Realty Co., 272 U.S. 365 (1926).

75. Federal Water Pollution Control Act, § 404, 33 U.S.C. § 1344.

76. Swamp Land Act of 1849, 9 Stat. 352; Swamp Land Act of 1850, 9 Stat. 519; Swamp Land Act of 1860, 12 Stat. 3. The Acts conveyed unclaimed federal land to the states on condition that the lands be drained.

and the answer may be different. Today, conservation easements have been widely recognized in legislation, and are gifted or in some cases purchased on a stand-alone basis as a type of easement in gross.[77] In many communities, this may include easements designed to preserve wetlands. In other words, property law has evolved in many places to include stand-alone transactions designed to prohibit the filling of wetlands via the conveyance of an easement in gross. In such a community, a regulation that prohibits the filling of wetlands should be regarded as a forced exchange of private property without compensation. Alternatively, if the community does not recognize conservation easements, or if it does but they have never been used to preserve wetlands, the regulation would not acquire property and hence would not be a regulatory taking. Since conservation easements are a relatively new form of property in the longer historical scheme of things, this approach also reveals that the property-based approach to regulatory takings has a dynamic aspect to it—it changes over time as the type of assets subject to exchange change.[78]

Whether the Eagle theory would result in more predictable regulatory takings decisions, and hence would reduce litigation costs, is necessarily somewhat speculative. One reason to think it would is that the Eagle theory usually generates results congruent with the ones the courts have reached, despite the fact that the courts currently rely on a more convoluted analysis. Under the Eagle theory, rent controls and zoning restrictions would be easily excluded from takings liability—just as the courts have eventually decided, after much litigation. Wetland regulations have had a mixed reception in the courts, and their status for takings purposes has not been conclusively resolved by the Supreme Court.[79] The need to call on

77. *See generally* Symposium, *Perpetual Conservation Easements in the 21st Century*, 2013 UTAH L. REV. 1.

78. As this example suggests, the historic preservation order at issue in *Penn Central* might be deemed a taking under the Eagle theory if historic preservation easements have been recognized and are traded or exchanged in the market on a stand-alone basis.

79. In a recent decision, the Court implicitly assumed that a government demand for a conservation easement would be a taking. *See* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2600 (2013). The conservation district in that case initially demanded that Koontz create a conservation easement on a portion of his land as a condition of receiving a permit to develop. The Court concluded that this triggered the unconstitutional conditions doctrine, *id.*, which in turn presupposes that a stand-alone requirement to create a conservation easement would be a categorical taking. (The Court went on to conclude that when the district, in the alternative, demanded that Koontz turn over money to enhance other government

expert witnesses in close cases would add a cost not required under current doctrine. But if expert testimony on the nature of property markets were substituted for legal briefing on the proper interpretation of *Penn Central* and its qualifications, the result might be a net savings. In any event, expert testimony is routinely called upon in eminent domain cases on the measure of just compensation, so using experts in regulatory takings cases would not be greatly alien or out of place.

IV. OTHER ABUSES OF GOVERNMENT POWER

A final metric for assessing the three pathways is to ask which provides the most effective basis for correcting a range of abuses of government power that affect property owners. To this point, the general pattern of analysis has been that the Eagle theory dominates both the Epstein and the *Penn Central* approaches. A significant reason for this is its modesty. It is basically designed to prevent the government from evading its responsibility to compensate when it seizes property in a manner that ordinarily would require use of the power of eminent domain. This feature enhances its appeal when assessed on originalist, contemporary acceptability, predictability, and litigation expense grounds. But its very modesty also sharply limits its coverage, certainly relative to the Epstein approach, but also as compared to the *Penn Central* doctrine. Epstein's approach can be used to attack virtually anything a property owner might dislike, from progressive taxes to rent controls to restrictive zoning. It promises omnibus protection for property owners. The *Penn Central* approach, although unpredictable, expensive, and relatively toothless in practice, is sufficiently ambiguous that it could conceivably be used to reign in particularly extreme government measures.

The Eagle theory, precisely because of its modesty, would provide no redress for many types of government action that adversely affect the value of particular items of property. Consider one example, taken from some early nineteenth-century natural justice cases.[80] Suppose, as occasionally happened, that the government modifies a waterway

property, this too triggered the doctrine. As discussed below, this is tantamount to a rule of substantive due process, because a demand for money, standing alone, would not be a taking.)

80. *See* Kobach, *supra* note 25, at 1250.

or a highway in such a way that a landowner is deprived of all access to the outside world. If the project does not touch the landowner's property, this cannot be characterized as a physical taking. But it unquestionably impairs the use of the land and therefore also its value. Under the Epstein theory, or even under *Penn Central*, this might be held to be a taking. But it is impossible to regard it as a regulatory taking under the Eagle theory. Impairment of access is not traded or exchanged in any known property market. Obtaining access, yes—this is an easement. But giving up access is not something that any property owner would knowingly sell on a stand-alone basis. So embracing the Eagle theory would prevent courts from redressing this kind of abuse under the regulatory takings doctrine.

As Steven Eagle has recognized, a more compact but theoretically sound regulatory takings doctrine would therefore have to be supplemented by something like substantive due process in order to provide effective protection for property in contexts where the regulatory takings doctrine would no longer apply.[81] This, of course, runs headlong into the shibboleth, propagated by the likes of Justice Scalia and Judge Frank Easterbrook, that there is no such thing as substantive due process.[82] This selective commitment to constitutional purity has not stopped the Court from recognizing substantive due process limits in a variety of contexts, including, of course, reproductive rights and rights of privacy more generally.[83] Public opinion will not allow the Court to retreat from these holdings. So, some version of substantive due process is here to stay. It is also worth noting that substantive due process has been invoked in some contexts that involve the protection of property, such as setting limits on punitive damage awards.[84] So it is not inconceivable that the Court, in some future incarnation, would embrace both halves of the Eagle theory: a compressed but more easily justified and applied regulatory takings doctrine, combined with enhanced but still restrained substantive due process protection for property against

81. *See* Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 1008–26 (2000); Eagle, *Property Tests*, *supra* note 14, at 954–57.

82. *See* ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 24–25 (Amy Gutmann ed., 1997); Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 125.

83. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

84. *E.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

oppressive government action in contexts outside the domain of regulatory takings.

The probability of this happening, admittedly, is not great. A key decision here is *Lingle v. Chevron U.S.A. Inc.*, in which the Court discussed the difference between regulatory takings and substantive due process.[85] At issue was a bit of dicta in numerous Supreme Court opinions suggesting that a regulation that fails to "substantially advance legitimate state interests" would be a taking requiring the payment of compensation.[86] The Court's repetition of this dicta fooled the Ninth Circuit into thinking that failure to "substantially advance" was a distinct categorical test for identifying regulatory takings. *Lingle* repudiated this notion, largely on the ground that failure to substantially advance a legitimate interest looks to the rationality of the means chosen by the government to achieve an end, which the Court labeled a due process concept. Regulatory takings law, Justice O'Connor wrote for the unanimous Court, focuses on the distributional consequences of a government regulation, in particular whether the regulation is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[87]

One could imagine that the *Lingle* decision—with its recognition that regulatory takings are the "functional equivalent" of seizures that ordinarily require the exercise of eminent domain and that substantive due process is a distinct basis for challenging regulations—might lead the Court to embrace something like the Eagle theory. But other aspects of the decision indicate that this is unlikely. One was the Court's reaffirmation of *Penn Central* as the foundational test for identifying regulatory takings (subject to exceptions, etc.). This was ironic, since one of *Penn Central*'s critical "factors" is whether a regulation interferes with "distinct investment-backed expectations." This was lifted from substantive due process jurisprudence (namely, the special solicitude for "vested rights").[88] If, as *Lingle* seemed to suggest, all vestiges of substantive due process need to be rooted out of regulatory takings law, then *Penn Central* needs to be rooted out too. But in contrast to the "substantially advances" dicta—which had

85. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).
86. *Id.* at 531 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).
87. *Id.* at 539.
88. Merrill, *Why* Lingle *Is Half Right*, *supra* note 15, at 432.

never been applied as the *ratio decidendi* for a Supreme Court decision—*Penn Central* has been invoked on several occasions by the Court as a framework for deciding a regulatory takings challenge and has been repeatedly characterized as the "general" test. It evidently has too much gravitational force to be overruled.

Another aspect of *Lingle* that makes it unlikely that it would lead to the Eagle theory is that it provides little reason to think that the Court would embrace substantive due process as a significant source of restraint on regulations of property. The Court could have signaled some doubt about the merits of the rent control measure at issue in *Lingle*, which was basically special interest legislation for a narrow category of retail gasoline stations in Hawaii, but it studiously avoided doing so. Justice Kennedy penned a short concurring opinion, emphasizing that due process review should be taken seriously as an alternative to regulatory takings.[89] But no other Justice joined him. Justices Scalia and Thomas, both on record as doubting the legitimacy of substantive due process, remained silent. This suggests that they or like-minded successors are unlikely to join a future decision invalidating a regulation of property under substantive due process.

A different path of future evolution is suggested by the more recent decision in *Koontz v. St. Johns River Water Management District*.[90] This path is to expand some of the exceptions to *Penn Central* to the point where they become indistinguishable from substantive due process review. *Koontz* involved the constitutionality of a money exaction imposed on a developer as a condition of permitting new development. The Court in previous decisions had created an exception to *Penn Central* for exactions, based on the unconstitutional conditions doctrine.[91] The idea was that if a local government demands that a developer turn over property (such as an easement) as a condition for obtaining a development permit, and the property could not otherwise be taken by the government without paying just compensation, this is an unconstitutional condition unless the value of the property demanded has an essential nexus and is roughly

89. *Lingle*, 544 U.S. at 548 (Kennedy, J. concurring).

90. 133 S. Ct. 2586 (2013).

91. *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (requiring rough proportionality between the value of the property exacted and the social costs of the proposed development); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 836–37 (1987) (requiring an essential nexus between the exaction and the government objective in regulating).

proportionate in value to the social costs associated with the development. *Koontz* extended the doctrine to exactions in the form of cash when the dollar amount is disproportionate to the social costs of the permitted development. Put aside the question of whether it is analytically correct to say that a government demand for cash can ever violate the Takings Clause—a question hotly debated in the Justices' warring opinions in *Koontz*.[92] The bottom line is that *Koontz* establishes a form of substantive due process in all but name. After *Koontz*, lower courts will be permitted to review under a kind of intermediate standard of scrutiny whether the quantum of cash demanded has a sufficient nexus and proportionality to the government's stated reasons for restricting development. In other words, courts can engage in a robust review of the rationality of the means chosen to advance a stated government end—exactly what was ruled out for regulatory takings purposes in *Lingle*. The Court insisted its decision was a natural extension of the unconstitutional conditions theory, with the consequence that its mandate is limited to exactions. The deeper significance is that the Court is eager to expand the existing regulatory takings framework, with its foundation in *Penn Central*, even to the point of replicating substantive due process, but is allergic to expressly invoking substantive due process as a ground for doing so.

CONCLUSION

The Eagle theory presents us with a trade-off. Adopt the theory, and you get a more secure foundation for the regulatory takings doctrine. Carping about the lack of an originalist foundation for the doctrine, about the threat it poses to environmental and land use controls, and about the complexity and unpredictability of the doctrine, would significantly decline. But, the cost would be a significantly reduced domain for the doctrine. Wetland regulations and historic preservation orders might be covered, but rent controls and restrictive zoning would not be. For the friends of property rights—of whom Steven Eagle is one, as am I—this means that the benefits of adopting a property-based conception of the regulatory takings doctrine could be achieved only at a significant cost. The cost would be mitigated only

92. *Compare Koontz*, 133 S. Ct. at 2598–602 (Alito, J., writing for the majority) *with id.* at 2605–09 (Kagan, J., dissenting).

if the Court were willing to embrace a more robust version of substantive due process, keyed to the protection of reliance interests in property. Whether such a double move on the part of the Court is possible, given the path-dependent nature of constitutional precedent, is doubtful. The regulatory takings doctrine, like many other pockets of constitutional law, is likely to remain a casualty of a constitutional system based on precedent, which cannot be revised very often without calling into question the legitimacy of the very enterprise.[93]

93. *See* Merrill, *Perils, supra* note 15.