

“NOTHING NEW UNDER THE SUN”: A
CENTENNIAL RETROSPECTIVE OF
PENNSYLVANIA COAL CO. V. MAHON

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INTRODUCTION

Contemporary debates about constitutional property rights center largely on the scope and meaning of the Fifth Amendment’s Takings Clause.¹

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1. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

The application of that clause to police power regulations affecting private property, in particular, has proved the source for much discussion and confusion. Commentators frequently describe the Supreme Court's takings jurisprudence as "confused,"² "unworkable,"³ "messy,"⁴ and "incoherent."⁵ Members of the Court, while typically more charitable in their language, have provided similar critiques.⁶ Conventional wisdom, in short, views takings law as a "muddle."⁷

Neither the "muddle" nor the issues creating it are of recent vintage, however. They derive, to varying degrees, from *Pennsylvania Coal Co. v. Mahon*, which many consider to be the genesis of the Court's takings doctrine.⁸ Decided just over one hundred years ago, *Mahon* has famously been called "both the most important and most mysterious writing in takings."⁹ Revisiting *Mahon* on its centennial anniversary facilitates a more informed understanding of the current questions involving constitutional property and fosters a deeper appreciation of the problems inherent in takings jurisprudence.

To that end, this article seeks to shed light on contemporary issues by offering a retrospective of *Mahon*. Section I discusses the context and background of the case, showing how the litigation developed from the unique economic circumstances and legal rules that developed around the coal mining industry in Pennsylvania. Section II describes in detail the Supreme Court opinions in the case, focusing both on the majority opinion of Justice Oliver Wendell Holmes and the dissenting opinion of Justice Louis D. Brandeis. Section III explains how both of the opinions in *Mahon* have contributed to the takings "muddle," tracing subsequent developments in the

2. D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of Lingle v. Chevron and the Separation of Takings and Substantive Due Process*, 69 ALB. L. REV. 343, 343 (2005).

3. J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 102 (1995).

4. Peter M. Gerhart, *The Social Costs of Regulatory Takings*, 70 MERCER L. REV. 479, 482 (2019).

5. Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1, 1 (2003).

6. See, e.g., *Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n*, 141 S. Ct. 731, 731 (2021) (Thomas, J., dissenting from denial of cert.) ("Our current regulatory takings jurisprudence leaves much to be desired"); *E. Enters. v. Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring in part) ("[I]t is fair to say [our regulatory takings jurisprudence] has proved difficult to explain in theory and to implement in practice"); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting) ("Even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence").

7. The use of the term "muddle" to describe takings doctrine is ubiquitous. See, e.g., Louise A. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 IND. L. REV. 329 (1995); Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle"*, 90 MINN. L. REV. 826 (2006); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

8. See, e.g., *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017) (stating that *Mahon* "initiated this Court's regulatory takings jurisprudence").

9. BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 156 (1977).

law of regulatory takings and demonstrating *Mahon*'s influence on those developments. Section IV offers two reasons for embracing the "muddle," showing how both *Mahon* and its progeny support complementary visions of property and government and serve a significant anti-evasion function.

I. CONTEXT AND BACKGROUND

To evaluate *Mahon* and its impact on constitutional development, it helps to know something about the context in which the case arose. Whatever meaning the case has for contemporary debates, it did not emanate from philosophic discourses about the nature of property, the proper role of government, or the development of constitutional doctrine. It was first and foremost a dispute between two parties involving specific and practical questions concerning their respective properties and the rights and obligations flowing therefrom. And those questions surfaced in the particular economic and legal settings associated with Pennsylvania coal mining.

A. Mining and Subsidence

By the time the *Mahon* litigation commenced, Pennsylvania already had a long history with coal. The earliest record of its appearance in the state occurred on a map made around 1752, while the earliest record of coal mining dates to 1761.¹⁰ Blacksmiths used anthracite coal (which lay at the heart of the dispute in *Mahon*) as early as 1769,¹¹ with commercial production beginning around 1807.¹² The opening of canals in the 1820s and 1830s allowed producers to transport their coal to larger markets, resulting in a rapid and lengthy expansion of mining activity that reached its peak during the First World War.¹³ By 1918, the industry's "greatest year," 330,000 miners produced 277,000,000 tons of coal worth \$705,000,000.¹⁴

As these numbers suggest, coal mining was an important economic force. The vast majority of anthracite coal mined in the United States came from Pennsylvania,¹⁵ and the region around Scranton (where the Mahons

10. WILLIAM E. EDMUNDS, *COAL IN PENNSYLVANIA* 1–2 (2d ed. 2002).

11. *Id.* at 2.

12. David A. Latzko, *Coal Mining and Regional Economic Development in Pennsylvania, 1810-1980* at 3 (2011) (unpublished manuscript) (available at <http://www.personal.psu.edu/~dxl31/research/articles/coal.pdf>).

13. *Id.* at 3–4.

14. EDMUNDS, *supra* note 10, at 2. In 2022 dollars, the worth of the coal produced during this peak year would amount to approximately \$14,000,000,000. *Compare* Inflation Calculator, Savings.org (Nov. 6, 2022), <https://www.saving.org/inflation/inflation.php?amount=1&year=1918>, *with* Inflation Calculator, U.S. Inflation Calculator (Nov. 6, 2022), <https://www.usinflationcalculator.com/>.

15. Latzko, *supra* note 12, at 8.

lived¹⁶) was an especially significant producer.¹⁷ Mining “had a long-lived, positive impact on the economic development” of the state’s coal-producing regions,¹⁸ and it appears that real estate transactions in the state quickly adapted to that economic reality. To maximize the use of their land while retaining access to the lucrative subterranean resource, grantors frequently conveyed surface rights separately from the valuable minerals underneath.¹⁹

In addition to its economic benefits, however, mining also exacted a toll on both those who did the work and the land where that work occurred. Mine accidents²⁰ and labor unrest²¹ received the most attention, but a growing concern by the early twentieth century was subsidence of the surface land under which the mines were located.²² A 1916 study by two engineers at the University of Illinois devoted particular attention to Scranton, where extensive mining²³ had resulted in subsidence “in many parts of the city.”²⁴ Although the danger was not widespread,²⁵ subsidence had caused “serious damage to a school building” in August 1909, just prior to the beginning of

16. Joshua Ulan Galperin, *Pennsylvania Gas: Trusts, Takings, and Judicial Temperaments*, 4 OIL & GAS NAT. RES. & ENERGY L. J. 531, 535 (2018).

17. *See id.* at 534 (describing Scranton as a “one-time epicenter of anthracite coal mining”). By way of example, in 1896, the two anthracite inspection districts covering Lackawanna County, where Scranton is located, produced a combined 12,123,116 tons of coal. *See* REPORTS OF THE INSPECTORS OF COAL MINES OF PENNSYLVANIA, 1896, at 1, 43 (1897).

18. Latzko, *supra* note 12, at 15.

19. *See* Galperin, *supra* note 16, at 533 (quoting Pennsylvania government notice warning that “[o]ver one million homes in [the state] sit on top of abandoned mines”).

20. Again, by way of example, the two districts covering Lackawanna County experienced 385 mine accidents in 1896, of which 90 resulted in fatalities. *See* REPORTS OF THE INSPECTORS OF COAL MINES OF PENNSYLVANIA, *supra* note 17.

21. *See* WILLIAM A. FISCHER, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 25 (1995) (discussing strikes at mines).

22. *See* L.E. YOUNG & H.H. STORK, SUBSIDENCE RESULTING FROM MINING 5 (Univ. of Ill. Eng’g Experiment Station Bull. No. 91, Aug. 1916) (indicating that subsidence had already “attracted widespread” attention and predicting “increasing interest” in the subject).

23. *See id.* at 29 (indicating that seventy-five years of mining activity under the city had produced a total of 177,000,000 tons of coal).

24. *Id.*

25. *See id.* (noting that “not more than 15 per cent of the area of the city was threatened”). William Fischer echoed this conclusion based on his study many decades later, describing the damage from subsidence as “episodic and limited.” FISCHER, *supra* note 21, at 26. These conclusions stand in stark contrast to the picture portrayed by the city’s lawyers, who likened Scranton to “a second Verdun, her buildings razed to the ground by shots from below” and her citizens “swallowed up in sudden yawning chasms, blown up by gas explosions or asphyxiated in their sleep.” *See* Lawrence M. Friedman, *A Search For Seizure: Pennsylvania Coal Co. v. Mahon In Context*, 4 LAW & HIST. REV. 1, 22 (1986) (quoting Brief on Behalf of the City of Scranton, Intervenor at 6, Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922)).

the academic year.²⁶ The incident “galvanized local citizens”²⁷ and made subsidence “a major political issue in Pennsylvania.”²⁸

B. Legal Changes

At the same time the subsidence issue took hold of public and political consciousness, it also caught the attention of the Pennsylvania judiciary. The state supreme court had already established that the severance of surface rights and mineral rights created two legally distinct estates in land.²⁹ So, too, had that court defined the basic relationship between the two estates. Although they remained legally separate, the mineral estate had an obligation to provide subjacent support for the surface estate unless the parties agreed otherwise.³⁰ While state and local officials studied and debated the subsidence problem,³¹ the Pennsylvania court issued several decisions clarifying the nature of this support obligation.

In *Penman v. Jones*, for example, the court addressed a series of transactions in which the same grantor conveyed the surface estate to one party—via a deed that expressly excepted any right to support—and subsequently conveyed the mineral estate to a different party—via a deed that made no mention of support.³² A majority of the justices held that these transactions vested the surface estate in the first grantee, the mineral estate in the second grantee, and left the support obligation with the grantor. “The right to remove the coal without liability for injury to the surface,” the majority explained, “was something [the grantor] could retain or dispose of, as it saw fit.”³³

Penman made plain that the support obligation could be held independently of either the surface or mineral estates.³⁴ A unanimous court reaffirmed this understanding three years later in *Charnetski v. Miner’s Mill Coal Mining Co.*, this time explicitly placing support on equal footing with the surface and the minerals. “[T]hree *estates* may exist in land—the surface, the coal, and the right of support,” explained the court, and each of these “may be vested in different persons at the same time.”³⁵

The consequences of treating the support obligation as a “third estate” were made evident in *Commonwealth v. Clearview Coal Co.*, a case

26. YOUNG & STORK, *supra* note 22, at 29; *see also* FISCHER, *supra* note 21, at 27.

27. FISCHER, *supra* note 21, at 27.

28. Friedman, *supra* note 25, at 3.

29. *See, e.g.*, Del. & Hudson Canal Co. v. Hughes, 38 A. 568, 569 (Pa. 1897).

30. *See* Jones v. Wagner, 66 Pa. 429, 434–35 (1870) (making mineral estate “subservient to the surface to the extent of sufficient support to sustain the latter”).

31. *See* YOUNG & STORK, *supra* note 22, at 29–30 (discussing municipal and state investigative commissions); FISCHER, *supra* note 21, at 29–32 (discussing legislative proposals and negotiated agreements related to subsidence).

32. 100 A. 1043, 1044 (Pa. 1917).

33. *Id.* at 1046.

34. *Id.*

35. 113 A. 683, 684 (Pa. 1921) (emphasis added).

involving yet another school in Scranton built atop a coal mine. Because the coal company owned both the mineral and support estates, the court held that it could mine irrespective of the school's need for support.³⁶ To hold otherwise and force the company to leave coal for surface reinforcement, the court indicated, would effectively divest the support estate and constitute an uncompensated taking.³⁷ Accordingly, a surface owner who did not also own the support estate could not obtain an injunction to prevent mining, even if subsidence would result.³⁸

These rules and relationships all changed when the Pennsylvania General Assembly provided a legislative response to the subsidence problem in 1921.³⁹ Known as the Kohler Act, the new statute generally prohibited the mining of anthracite coal in ways that would cause subsidence of most surface uses.⁴⁰ The Act contained an exception where both the surface and mineral estates were owned by the same party,⁴¹ but otherwise, the Act expressly authorized the state courts to enforce it via injunctive relief.⁴² As the Pennsylvania Supreme Court later recognized, the changes worked by the Kohler Act "effectively overruled" the state's common law relative to subjacent support.⁴³

C. The Dispute

By 1921, two contrary rules pertained to the subsidence question in Pennsylvania: a judicial rule that required support only when the owner of the surface also held the support estate and a legislative rule that generally mandated support regardless of who owned the support estate. Those rules were set on a collision course when, in September of that year, the Pennsylvania Coal Company notified the Mahons that it intended to mine underneath their house.⁴⁴

Like much of the land around Scranton, the parcel on which the home sat suffered from divided ownership. Originally owned entirely by Pennsylvania Coal, the surface and mineral estates had been severed pursuant to an 1878 conveyance between the company and one of its executives.⁴⁵ The terms of the grant gave the executive only the surface rights to the parcel, while reserving to the company the right to remove all subsurface minerals.⁴⁶

36. Commonwealth *ex rel.* Keator v. Clearview Coal Co., 100 A. 820, 820 (Pa. 1917).

37. *Id.* at 820.

38. *Id.*

39. 1921 Pa. Laws 1198 (codified at 52 PA. CONS. STAT. §§ 661-671).

40. 1921 Pa. Laws 1198, § 1. The protected surface uses included churches, schools, hospitals, theatres, hotels, railroad stations, streets, roads, bridges, public utility facilities and rights-of-way, factories, stores, cemeteries, and dwellings. *Id.*

41. 1921 Pa. Laws 1198, § 6.

42. 1921 Pa. Laws 1198, § 8.

43. Mahon v. Pa. Coal Co., 118 A. 491, 500 (1922).

44. Rose, *supra* note 7, at 564.

45. *Id.*; FISCHER, *supra* note 21, at 18.

46. Rose, *supra* note 7, at 564.

The grant further provided that the company would not bear liability for "any injury or damage that may occur by reason of mining and removing said minerals,"⁴⁷ thus vesting the support estate in the company, as well. The executive subsequently constructed a house on the surface, which later passed to his daughter and son-in-law, Margaret and H.J. Mahon.⁴⁸

Upon receiving notice of the coal company's intention to mine the parcel, the Mahons filed suit. Invoking the support mandates of the Kohler Act, the Mahons sought an injunction to prevent the company from mining in such a way as to cause subsidence of the surface.⁴⁹ In response, the company pointed to the language of the 1878 grant and, relying on the common law of property established by the courts, argued that the Kohler Act, if enforced, would take their property without compensation.⁵⁰

II. THE OPINIONS

After working its way through the Pennsylvania courts, the case reached the United States Supreme Court in the fall of 1922. In a 7-1 decision,⁵¹ the Court found in favor of the coal company. Because the Kohler Act admittedly "destroy[ed] previously existing rights in property and contract," the question was "whether the police power [could] be stretched so far."⁵² The Court held that it could not.

A. Justice Holmes's Majority Opinion

Writing for the majority, Justice Holmes analyzed this question by applying a balancing test.⁵³ On the one hand, he noted, property rights are neither absolute nor sacrosanct; they are held "under an implied limitation"

47. See *id.* at 564 n.19 (quoting deed).

48. See *id.* at 564; see also William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813, 818 (1998).

49. *Mahon v. Pa. Coal Co.*, 118 A. 491, 492 (1922).

50. Rose, *supra* note 7, at 564.

51. Only eight justices participated in the case. Justice Day resigned the day before *Mahon* was argued, and his seat remained unfilled until January 1923, after the decision had been released. See Robert Brauneis, *The Foundation of Our Regulatory Takings Jurisprudence: The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon*, 106 YALE L.J. 613, 620 n.29 (1996).

52. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

53. That Holmes employed some sort of balancing test enjoys widespread agreement. See, e.g., Evan B. Brandes, *Legal Theory and Property Jurisprudence of Oliver Wendell Holmes, Jr., and Louis D. Brandeis: An Analysis of Pennsylvania Coal Company v. Mahon*, 38 CREIGHTON L. REV. 1179, 1184 (2005); Richard A. Epstein, *Pennsylvania Coal v. Mahon: The Erratic Takings Jurisprudence of Justice Holmes*, 86 GEO. L.J. 875, 896 (1998); Karkkainen, *supra* note 7, at 870; Treanor, *supra* note 48, at 868; see also Brauneis, *supra* note 51, at 617 n.17 (1996) (citing scholarly understandings of *Mahon* as employing balancing); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1625 (2003) (indicating that "*Mahon* is now described as the first case to describe regulatory takings law in terms of utilitarian interest balancing").

and must, at times, “yield to the police power.”⁵⁴ “Government hardly could go on,” he explained, “if to some extent values incident to property could not be diminished without paying for every such change in the general law.”⁵⁵ On the other hand, this limitation on property rights must also have limits; otherwise constitutional guarantees become meaningless.⁵⁶ If mere invocation of the police power immunizes all government action from the requirement to compensate for property taken, “the natural tendency . . . is to extend the [police power] more and more until at last private property disappears.”⁵⁷ Thus, “while property may be regulated to a certain extent, if regulation goes too far it will be a taking.”⁵⁸

As many commentators have noted, Holmes did not provide much guidance for determining exactly when a regulation might go “too far.”⁵⁹ He called the question, as he frequently did,⁶⁰ one “of degree” that “cannot be disposed of by general propositions.”⁶¹ Even so, his opinion seemed to juxtapose two broad concerns against each other: “[t]he extent of the public interest” protected by the Kohler Act and “the extent of the taking” occasioned by the Kohler Act.⁶²

1. “*The Extent of the Public Interest*”

With regard to the public interest, Holmes seemed unsure of his own mind. He began by saying the case involved “a single private house,”⁶³ suggesting there might be no public interest at all. In the very next sentence, however, he conceded that subsidence even of private structures might trigger a valid public response.⁶⁴ All the same, “the public interest does not warrant much of this kind of interference”; even if subsidence damaged other

54. *Mahon*, 260 U.S. at 413.

55. *Id.*

56. *See id.* (stating that unfettered government power would mean constitutional guarantees “are gone”).

57. *Id.* at 415.

58. *Id.*

59. *See, e.g.,* Brandes, *supra* note 53, at 1193; Epstein, *supra* note 53, at 892–93; Michael B. Kent, Jr., *Viewing the Supreme Court’s Exaction Cases Through the Prism of Anti-Evasion*, 87 U. COLO. L. REV. 827, 853 (2016); E.F. Roberts, *Mining with Mr. Justice Holmes*, 39 VAND. L. REV. 287, 296 (1986); Rose, *supra* note 7, at 597.

60. *See* Epstein, *supra* note 53, at 888 (criticizing Holmes’s jurisprudence as “shrug[ing] off hard choices with the observation that ‘every hard question is a matter of degree’”); William Michael Treanor, *Understanding Mahon In Historical Context*, 86 GEO. L.J. 933, 941 (1998) (characterizing Holmes’s opinions as frequently invoking “the principle that everything is a question of degree”).

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

62. *Id.* at 413–14. While Holmes more or less discussed these ideas in order, his opinion lacks a precise structure and sometimes flows back and forth between the public and private interests involved.

63. *Id.* at 413.

64. *See id.* (“No doubt there is a public interest even in this”).

houses, that damage would remain individualized rather than common.⁶⁵ For this reason, Holmes rejected the notion that the subsidence of private residences like that owned by the Mahons could qualify as a public nuisance.⁶⁶

Holmes likewise thought little of the Kohler Act as a public safety measure. Such a purpose was belied, he thought, by the statute's inapplicability where the surface and mineral estates were owned by the same party.⁶⁷ Moreover, in something that looked more like heightened scrutiny⁶⁸ than the deference he famously championed in *Lochner v. New York*,⁶⁹ Holmes concluded that safety "could be provided for by notice" that mining operations below the surface were about to commence.⁷⁰

This is not to suggest, however, that Holmes discerned *no* public purpose underlying the Kohler Act. After all, the statute did more than mandate support for privately-owned structures; it applied equally to surfaces used for public buildings, streets, and public utility facilities.⁷¹ Damage to such uses ostensibly triggers the public welfare even if similar damage to private uses does not.⁷² Toward the end of his opinion, Holmes seemed to concede that the legislation reflected "a strong public desire to improve the public condition."⁷³ Moreover, he concluded with the explicit assumption that "the statute was passed upon the conviction that an exigency exist[s] that would warrant . . . the exercise of eminent domain,"⁷⁴ which must, of course, be founded on some public use or purpose. Ultimately, the question was not whether a legitimate public purpose sustained the legal changes made by the Kohler Act. The question was whether, in light of the public interest, the cost of those changes could be placed on the coal company alone.⁷⁵

65. *Id.*

66. *Id.*

67. *Id.* at 414.

68. See Claeys, *supra* note 53, at 1620 (suggesting that Holmes "applied principles of intermediate scrutiny").

69. See 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (arguing that mere judicial "agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law").

70. *Mahon*, 260 U.S. at 414.

71. 1921 Pa. Laws 1198, § 1.

72. Early drafts of Holmes's opinion made an explicit distinction between the statute's applicability to private surface uses and public ones, characterizing the latter as being "of immediate public interest." See Joseph F. DiMento, *Mining the Archives of Pennsylvania Coal: Heaps of Constitutional Mischief*, 11 J. LEGAL HIST. 396, 406 (1990) (quoting first draft of opinion). A letter from Chief Justice Taft, dated nine days before the release of the decision, apparently influenced Holmes to jettison any formal distinction and (in Holmes's words) "smash the whole Act." *Id.* at 406–08 (quoting letter from Oliver W. Holmes to William H. Taft (Dec. 2, 1922)).

73. See *Mahon*, 260 U.S. at 416.

74. *Id.*

75. *Id.*

2. “The Extent of the Taking”

For Holmes, the other side of the evaluation compelled a negative answer to that question. Whatever public interests were served by the Kohler Act, Holmes declared, “the extent of the taking is great.”⁷⁶ But here, too, the opinion manifested a lack of precision. On the one hand, Holmes pointed to the statute’s effect on the unique status of the support obligation under Pennsylvania common law. The legislation essentially “abolish[ed] what is recognized in Pennsylvania as an estate in land.”⁷⁷ Put differently, the Kohler Act functioned as a *de facto* appropriation,⁷⁸ effectively transferring title of the support estate from the coal company to some other party. In the case of private surface owners like the Mahons, the statute simply failed to “disclose a public interest sufficient to warrant so extensive” a consequence.⁷⁹ But even in the case of public buildings and streets, where public purposes were more discernible, the effect of the statute was to give the public a free estate that it had been too “short sighted” to acquire.⁸⁰ The government surely could remedy this shortsightedness after the fact, but it could not do so “without compensation” any more than it could have acquired the support estate for free in the first place.⁸¹

In addition to this focus on the support estate, however, Holmes also suggested that the regulation may have gone “too far” in its effects on the coal company’s mineral estate.⁸² “One fact for consideration” in determining the extent of the taking, he indicated, was “the extent of the diminution” resulting from the regulation.⁸³ “[T]he right to coal consists in the right to mine it,”⁸⁴ he continued, and “[w]hat makes the right to mine coal valuable is that it can be exercised with profit.”⁸⁵ By requiring the coal company to provide support where the surface owners had relinquished that right, Holmes seemed to say, the Kohler Act not only destroyed the company’s support estate but diminished the value of its mineral estate as well.

At this point Holmes had to confront the Court’s prior decision in *Plymouth Coal Co. v. Pennsylvania*,⁸⁶ which had upheld another Pennsylvania support statute eight years earlier. The statute in *Plymouth Coal* had required mineral owners to leave pillars of coal in place along the

76. *Id.* at 414.

77. *Id.*

78. *See id.* (“To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it”).

79. *Id.*

80. *Id.* at 415.

81. *Id.*

82. *Id.* at 413.

83. *Id.*

84. *Id.* at 414 (quoting *Commonwealth ex rel. Keator v. Clearview Coal Co.*, 100 A. 820, 820 (Pa. 1917)).

85. *Id.*

86. *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914).

boundaries of adjacent mines to keep workers safe in the event one mine became abandoned and allowed to fill with water.⁸⁷ Unlike the Kohler Act, Holmes intimated, the prior statute clearly had a specific safety purpose—i.e., to protect “employees invited into the mine.”⁸⁸ In addition, the prior statute “secured an average reciprocity of advantage” between mine owners by burdening and benefiting each of them in like fashion.⁸⁹

No such reciprocity resulted from the Kohler Act. As indicated, Holmes viewed the statute as a means by which the government sought to burden only mine owners for the benefit of other interests. “So far as private persons or communities have seen fit to take the risk of acquiring only surface rights,” Holmes said in closing, “we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.”⁹⁰ And the mere invocation of the police power did not alter that conclusion. “[A] strong public desire to improve the public condition,” Holmes explained, “is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”⁹¹

B. Justice Brandeis’s Dissenting Opinion

Justice Brandeis alone dissented.⁹² He began his analysis, like Justice Holmes, by noting that rights in land are “not absolute.”⁹³ The law, of course, forbids uses that would “create a public nuisance.”⁹⁴ But Brandeis went farther: Even uses that were “once harmless, may, owing to changed conditions, seriously threaten the public welfare.”⁹⁵ When that happens, the legislature may use the police power to prohibit them as well, and it may do so without providing compensation.⁹⁶

1. “Lawfully Imposed”

With this foundation laid, Brandeis’s evaluation of the Kohler Act essentially proceeded along two main lines.⁹⁷ First, a regulation of property must “be lawfully imposed,” meaning that it must both advance a public purpose and utilize an appropriate means of achieving that purpose.⁹⁸ In

87. *Id.* at 540.

88. *Mahon*, 260 U.S. at 415.

89. *Id.*

90. *Id.* at 416.

91. *Id.*

92. *See id.* at 416 (Brandeis, J., dissenting).

93. *Id.* at 417.

94. *Id.*

95. *Id.*

96. *Id.*

97. What follows is my systemization of Justice Brandeis’s opinion. Like that of Justice Holmes, his opinion lacks a well-defined structure. *See id.* at 417–20.

98. *Id.* at 417–18.

Brandeis's estimation, the Kohler Act easily satisfied the purpose requirement.⁹⁹ "A prohibition of mining which causes subsidence of [public] structures and facilities," he stated, "is obviously enacted for a public purpose."¹⁰⁰ But he intimated that was no less true as the statute applied to private structures like the Mahons' residence. The state had sufficient "power to take appropriate measures to guard the safety of all who may be within its jurisdiction."¹⁰¹

Similarly, Brandeis had no trouble assessing the means employed by the statute. "[T]o keep coal in place is surely an appropriate means of preventing subsidence of the surface; and ordinarily it is the only available means," he explained.¹⁰² Nor did he think excepting from this requirement situations where the same person owned both the mineral and surface estates undermined the statute's purpose.¹⁰³ In such a situation, "self-interest would ordinarily prevent mining to such an extent as to cause a subsidence," so that the legislature was perfectly justified in deeming "[a] statutory restriction unnecessary for the public safety under such conditions."¹⁰⁴ Put differently, the exception showed that the legislature, "estimating the degrees of danger,"¹⁰⁵ was tailoring its remedy to the real problem.¹⁰⁶

Brandeis also flatly rejected the notion, advanced by Holmes, that notice constituted a more suitable means of promoting safety. Notice would do little to protect those traversing public streets or utilizing other public facilities, he argued.¹⁰⁷ But more significantly, the legislature had broad leeway in choosing the means used to advance its purpose, and the court should defer to that choice. "May we say that notice would afford adequate protection," Brandeis asked rhetorically, "where the Legislature . . . [with] greater knowledge of local conditions, [has] declared, in effect, that it would not?"¹⁰⁸

2. "Not a Taking"

The second line of inquiry addressed by Justice Brandeis was whether the Kohler Act triggered the constitutional requirement to pay just compensation. Again, the answer was easy and derived from the statute's general legitimacy. A "restriction imposed to protect the public health, safety

99. *Id.* at 422.

100. *Id.*

101. *Id.* at 420.

102. *Id.* at 418.

103. *Id.* at 419–20.

104. *Id.* at 420.

105. *Id.*

106. See Epstein, *supra* note 53, at 896 (arguing "that removing these cases of unified ownership . . . improve[d] the fit between the law and the problem it was designed to address . . .").

107. *Mahon*, 260 U.S. at 422 (Brandeis, J., dissenting).

108. *Id.* at 420.

or morals from dangers threatened is not a taking," he declared categorically.¹⁰⁹ The Kohler Act merely prohibited "a noxious use," leaving "[t]he property so restricted . . . in the possession of its owner."¹¹⁰ And that was true even though the restriction may deprive the owner "of the only use to which the property can then be profitably put."¹¹¹ "If public safety is imperiled," he explained, "surely neither grant, nor contract, can prevail against the exercise of the police power."¹¹²

Unfortunately, Brandeis did no better than Holmes in specifying precisely what "grant" (or property) he had in mind in making these pronouncements. Although he acknowledged in passing the argument that the statute "abolishe[d] a valuable estate hitherto secured by contract,"¹¹³ he did not seem to view the relevant property to be the support estate alone. In response to Holmes's concern about diminution in value, Brandeis pointed out that "values are relative."¹¹⁴ "If we are to consider the value of the coal kept in place by the restriction," he admonished, "we should compare it with the value of all other parts of the land."¹¹⁵ Thus, for Brandeis, the support estate could not be viewed in isolation; any evaluation of diminution should also consider the value of the mineral estate retained by the coal company and perhaps even the surface estate (owned by the Mahons), as well. "The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil," Brandeis stated, noting that the "sum of the rights in the parts cannot be greater than the rights in the whole."¹¹⁶

Finally, Brandeis disagreed that "reciprocity of advantage" had any bearing on the compensation issue. "Reciprocity of advantage is an important consideration, and may even be an essential, where the State's power is exercised for the purpose of conferring benefits upon the property of a neighborhood," he argued.¹¹⁷ The Kohler Act did no such thing. Its design was "to protect the public from detriment and danger," and consideration of reciprocal benefits had no place in evaluating a regulation of that sort, "unless it be the advantage of living and doing business in a civilized community."¹¹⁸ In short, because the Kohler Act constituted a legitimate exercise of the police power to prevent the use of land in a way that endangered the public, it categorically was not a taking of private property and, therefore, did not trigger the government's obligation to provide just compensation.

109. *Id.* at 417.

110. *Id.*

111. *Id.* at 418.

112. *Id.* at 420.

113. *Id.*

114. *Id.* at 419.

115. *Id.*

116. *Id.*

117. *Id.* at 422.

118. *Id.*

III. MAHON AND THE “MUDDLE”

Today, *Mahon* is considered “a minor classic.”¹¹⁹ It pitted against one another “two of the greatest jurists of the twentieth century,”¹²⁰ both of whom were progressive icons.¹²¹ It fascinates and befuddles commentators.¹²² It is heralded as producing, for good or ill, a sea change in the constitutional protection of property rights.¹²³

But it took time for that reputation to develop. Although *Mahon* received some early treatment in lower court opinions¹²⁴ and secondary sources,¹²⁵ majority opinions of the Court cited the case only eight times between 1922 and 1935.¹²⁶ Of these, only two invoked *Mahon* for the proposition that a regulation could effect a taking that required compensation.¹²⁷ No majority opinion referenced *Mahon* again until 1958,¹²⁸ and only a handful more cited *Mahon* over the ensuing twenty years.¹²⁹

119. Friedman, *supra* note 25, at 5.

120. Brandes, *supra* note 53, at 1179.

121. See Brauneis, *supra* note 51, at 682 (describing Holmes as “canonized by the Progressives”); Lee J. Strang & Bryce G. Poole, *The Historical (In)accuracy of the Brandeis Dichotomy: An Assessment of the Two-Tiered Standard of Stare Decisis for Supreme Court Precedents*, 86 N.C. L. REV. 969, 980 (2008) (noting that scholars have “lionized Louis Brandeis as a hero of the Progressive movement”).

122. See Claeys, *supra* note 53, at 1626 (noting that “[m]uch ink has been spilt trying to decipher Justice Holmes’s explanation” in *Mahon*); see also D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIA. L. REV. 471, 500 n.146 (2004) (indicating that “a reference to all of the theories put forward to explain [*Mahon*] would amount to a bibliography of regulatory takings literature”).

123. See, e.g., *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005) (describing *Mahon* as a “watershed decision”); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (stating that *Mahon* “recognized” applicability of Fifth Amendment’s “constitutional limits” to “government’s power to redefine” property rights); see also *Dolan v. City of Tigard*, 512 U.S. 374, 406 (1994) (Stevens, J., dissenting) (stating that *Mahon* “charted a significant new course”).

124. See Brauneis, *supra* note 51, at 665 n.238 (listing number of citations to *Mahon* by state courts and lower federal courts).

125. See *id.* at 667 n.246 (citing student case comments discussing *Mahon*); Treanor, *supra* note 48, at 861–62, 864 (discussing secondary sources that mentioned *Mahon*).

126. See *Panhandle E. Pipe Line Co. v. State Highway Comm’n*, 294 U.S. 613, 621 (1935); *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405, 415 n.7 (1935); *Del., Lackawanna & W.R.R. Co. v. Town of Morristown*, 276 U.S. 182, 193 (1928); *Tyson & Bro.-United Theatre Ticket Offs. v. Banton*, 273 U.S. 418, 438 (1927); *Weaver v. Palmer Bros. Co.*, 270 U.S. 402, 410 (1926); *Charles Wolff Packing Co. v. Ct. of Indus. Rels.*, 262 U.S. 522, 542 (1923); *Adkins v. Children’s Hosp.*, 261 U.S. 525, 552 (1923); *Omnia Com. Co. v. United States*, 261 U.S. 502, 508 (1923).

127. *Panhandle E. Pipe Line Co.*, 294 U.S. at 618, 621–22; *Morristown*, 276 U.S. at 193.

128. See *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

129. See *Jankovich v. Ind. Toll Rd. Comm’n*, 379 U.S. 487, 490 (1965); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962); *Armstrong v. United States*, 364 U.S. 40, 48 (1960).

In 1978—more than a half century after it was decided—the Court finally lifted *Mahon* to its current position of prominence, describing it as “the leading case for the proposition that a state statute that substantially furthers important public policies may [nonetheless] amount to a ‘taking.’”¹³⁰ Ever since, the Court has treated *Mahon* as the cornerstone of its regulatory takings jurisprudence¹³¹ and allowed it to influence the development of takings doctrine.¹³² Indeed, as this Section demonstrates, the famous “muddle” of regulatory takings owes much of its existence to *Mahon* and the Court’s attempts to navigate the differing visions and unanswered questions contained in Justice Holmes’s and Justice Brandeis’s opinions.

A. Regulatory Taking?

Mahon’s largest contribution to the “muddle” is also its most fundamental. Although the modern Court describes *Mahon* as its first regulatory takings decision, it is not at all clear that the 1922 Court understood the case in the same way. While Justice Holmes certainly invoked the Fifth Amendment,¹³³ he also cited the Fourteenth Amendment¹³⁴ and made specific mention of “the contract and due process clauses.”¹³⁵ Of course, by this time, the Court had already declared just compensation to be a component of both equal protection and substantive due process,¹³⁶ so these varied references aren’t entirely surprising. But they do leave to interpretation the specific constitutional guarantee violated by the Kohler Act. For his part, Justice Brandeis seemed to treat the case as about substantive due process from start to finish. He mentioned only the

130. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978).

131. See, e.g., Murr v. Wisconsin, 137 S. Ct. 1933, 1942 (2017) (stating that *Mahon* “initiated this Court’s regulatory takings jurisprudence”); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 720 (1999) (placing *Mahon* at “inception of our regulatory takings doctrine”).

132. See, e.g., Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021) (stating that *Mahon*’s “framework now applies to use restrictions as varied as zoning ordinances, orders barring the mining of gold, and regulations prohibiting the sale of eagle feathers”) (internal citations omitted).

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

134. *Id.*

135. *Id.* at 413.

136. See, e.g., Chi., Burlington & Quincy R.R. Co. v. Chicago 166 U.S. 226, 235 (1897) (describing payment of just compensation as “an essential element of due process of law” under Fourteenth Amendment); Reagan v. Farmers’ Loan & Tr. Co., 154 U.S. 362, 399 (1894) (suggesting just compensation was part of “the equal protection of the laws, which by the Fourteenth Amendment, no State can deny to the individual”). The modern Court has frequently cited *Chicago, Burlington & Quincy* for the proposition that the Fourteenth Amendment incorporates the Takings Clause. See, e.g., Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 536 (2005); Dolan v. City of Tigard, 512 U.S. 374, 383–84 (1994); Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 481 n.10 (1987); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 122 (1978). For disagreement with this incorporation theory, see Karkkainen, *supra* note 7, at 876–82.

Fourteenth Amendment,¹³⁷ framed the principal question as concerning the Kohler Act's legitimacy,¹³⁸ and employed a means-end test to answer it.¹³⁹

All this has led some commentators to reject the description of *Mahon* as establishing a doctrine of regulatory takings at all. It was, they insist, just another run-of-the-mill due process case of the *Lochner* era.¹⁴⁰ Still others, while rejecting its similarity to *Lochner*, concede that "*Mahon* is technically a substantive due process case"¹⁴¹ and, properly understood, fits into Holmes's typically deferential review of economic regulation.¹⁴² In either case, the frequent goal is to delegitimize or limit the scope of the Court's takings doctrine.¹⁴³

To the extent that substantive due process focuses on the legitimacy and effectiveness of a regulation, these commentators are in some measure clearly correct. *Mahon* itself stated that the Kohler Act could not "be sustained as an exercise of the police power,"¹⁴⁴ in part because the majority deemed it insufficiently related to a worthy public interest.¹⁴⁵ As noted earlier, Holmes second-guessed not only the legislature's public safety purpose but also the means it used to achieve that purpose.¹⁴⁶ The Court's subsequent takings decisions often repeated this kind of thinking. In 1978, for example, the Court suggested that a regulation might amount to a taking "if not reasonably necessary to the effectuation of a substantial public purpose."¹⁴⁷ From 1980 until 2005, the Court frequently hinted that the

137. *Mahon*, 260 U.S. at 417 (Brandeis, J., dissenting).

138. *See id.* ("Are we justified in declaring that the Legislature of Pennsylvania has, in restricting the right to mine anthracite, exercised this power so arbitrarily as to violate the Fourteenth Amendment?").

139. *See id.* at 418.

140. *See, e.g.,* Brauneis, *supra* note 51, at 666 (arguing that *Mahon* was initially viewed as neither a takings case nor "a seminal case," but merely "as one [due process decision] among many that incrementally established the limits of the police power"); Karkkainen, *supra* note 7, at 862 (stating that *Mahon* "was unremarkable when it was decided and was uniformly recognized [prior to 1978] as a rather ordinary substantive due process case"); *see also* Dolan, 512 U.S. at 406–07 (Stevens, J., dissenting) (characterizing Holmes's discussion as having "an obvious kinship with the line of substantive due process cases that *Lochner* exemplified).

141. Treanor, *supra* note 48, at 856.

142. *Id.* at 857–58.

143. *See, e.g.,* Edwin L. Rubin, *The Mistaken Idea of General Regulatory Takings*, 2019 MICH. ST. L. REV. 225, 230 (2019) (arguing that regulatory takings doctrine initiated by *Mahon* is premised "on the now repudiated right to economic due process" and should be abolished); Treanor, *supra* note 48, at 867 (arguing that "proper understanding of *Mahon*" would lead "to a different result in the cases at the heart of the Court's takings revival").

144. *Mahon*, 260 U.S. at 414.

145. *Id.* at 414–15.

146. For this reason, I agree with other commentators that Holmes's opinion in *Mahon* "is not as deferential as Treanor believes." Robert Brauneis, *Treanor's Mahon*, 86 GEO. L.J. 907, 921 (1998); *see also* Claeys, *supra* note 53, at 1620 (describing *Mahon* as applying "principles of intermediate scrutiny"); Epstein, *supra* note 53, at 896, 900 (contrasting deference shown by Holmes and Brandeis on issues of safety and reciprocity).

147. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978).

takings inquiry might turn on whether the challenged regulation “substantially advance[d] legitimate state interests.”¹⁴⁸

When used deferentially, these formulae largely mirrored Brandeis’s analysis in *Mahon*—i.e., a regulation that advances a public interest simply is not a taking.¹⁴⁹ A striking example of just how similar this approach could be to that used by Brandeis appeared in *Keystone Bituminous Coal Ass’n v. DeBenedictis*, where the Court upheld a later Pennsylvania subsidence statute, at least in part, because the legislature explicitly was “acting to protect the public interest” from “activity akin to a public nuisance.”¹⁵⁰

At the same time, the conflation of due process concepts with takings law could be used “to demand heightened means-end[] review of virtually any regulation of private property,” resulting in courts “substitut[ing] their predictive judgments for those of elected legislators and expert agencies.”¹⁵¹ For this reason, in 2005, the Court explicitly abandoned the “substantially advances” formula and attempted to make a clear distinction between the due process and takings inquiries.¹⁵² The former “probes the regulation’s underlying validity,”¹⁵³ explained the Court, while the latter focuses on “the magnitude or character of the burden a particular regulation imposes upon private property rights.”¹⁵⁴

B. Purpose and Effects

This distinction between validity and burden leads naturally to a consideration of the proper role that purpose and effects should play in takings analysis. Here, too, the Court’s decisions have sent mixed signals, with some emphasizing purpose, others balancing purpose and effects, and still others giving effects a clearly prominent position. Like the conflation of due process and takings, these varying statements and their resulting uncertainties can be traced back to the differing approaches in *Mahon*.

As noted, some of the Court’s language can be read to give legislative purpose a central place in the analysis. Regulations designed to curb harmful land uses seldom effect a taking, the Court has explained,

148. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), *abrogated by* *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *see also* *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 334 (2002); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704-05 (1999); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 485 (1987); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985).

149. *See, e.g., Agins*, 447 U.S. at 261–62 (concluding there was no taking because challenged “zoning ordinances substantially advance[d] legitimate governmental goals”).

150. *Keystone Bituminous Coal Ass’n*, 480 U.S. at 488. The Court indicated it did not need to rely on this public purpose alone, however, because the coal company “also failed to make a [sufficient] showing of diminution of value.” *Id.* at 492–93.

151. *Lingle*, 544 U.S. at 544.

152. *Id.* at 548.

153. *Id.* at 543.

154. *Id.* at 542.

because “the public interest in preventing activities similar to public nuisances is a substantial one.”¹⁵⁵ In like fashion, a taking will not “readily be found” when an interference with private property “arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”¹⁵⁶ As recently as 2017, the Court blanketly declared “that reasonable land-use regulations do not work a taking.”¹⁵⁷ Like Justice Brandeis, these pronouncements suggest that, at least in certain cases, legislative purpose alone may determine whether compensation is required.

Legislative purpose also looms large in the Court’s decisions addressing land use exactions, which condition development approval on an owner’s dedication of land or money for public improvements.¹⁵⁸ Such conditions are constitutional, the Court has held, so long as the government can prove that the condition: (1) advances some public interest that would warrant denial of the proposed development;¹⁵⁹ and (2) is roughly proportional to the impact the proposed development will have on that public interest.¹⁶⁰ If the government fails as to either requirement, the condition violates the Takings Clause, even where the landowner refuses to yield and no property changes hands.¹⁶¹ Although more burdensome to the government than the language quoted above or the analysis used by Brandeis in *Mahon*, this standard similarly can be read to make legislative purpose the touchstone of whether a taking has occurred.¹⁶²

For the most part, however, the Court has tended to follow Justice Holmes in balancing legislative purpose against a regulation’s impact on property owners. The Court repeatedly has emphasized that the Takings Clause “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.”¹⁶³ For this reason, the determination of a taking “necessarily requires a weighing of private and public interests.”¹⁶⁴ And, like Holmes, the Court has typically eschewed reliance on “general

155. *Keystone Bituminous Coal Ass’n*, 480 U.S. at 492.

156. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

157. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1947 (2017).

158. *See Kent*, *supra* note 59, at 830 (describing land use exactions).

159. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

160. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

161. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606–08 (2013).

162. *See, e.g.*, Alan Romero, *Two Constitutional Theories For Invalidating Extortionate Exactions*, 78 NEB. L. REV. 348, 350 (1999) (arguing that an “unrelated or disproportionate exaction” based on an “illegitimate” purpose “to obtain some property interest from the owner, rather than to harmonize public and private interests by mitigating the negative effects of the requested land use” makes the restriction a taking).

163. *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *accord Murr v. Wisconsin*, 137 S. Ct. 1933, 1950 (2017); *Dolan*, 512 U.S. at 384; *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978).

164. *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980).

propositions.¹⁶⁵ The Court's opinions repeatedly champion the need for "flexibility,"¹⁶⁶ a "careful examination and weighing of all the relevant circumstances,"¹⁶⁷ and "the exercise of judgment as [much as] the application of logic."¹⁶⁸ The necessary weighing of interests proceeds not according to "set formula"¹⁶⁹ or "definitive rules"¹⁷⁰ but "essentially ad hoc, factual inquiries."¹⁷¹

In most cases, the Court has indicated, these inquiries should consider three factors "that have particular significance": (1) "the economic impact of the regulation"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action."¹⁷² The resemblance of these factors to Holmes's approach in *Mahon* is obvious. The first two seem directly related to his concerns about "the extent of the taking" and diminution in value.¹⁷³ The third factor, while not as clearly delineated, can be read to emphasize the government's interest in regulating.¹⁷⁴ If that reading is correct, then like Holmes, this approach takes legislative purpose into account while simultaneously acknowledging that even a valid purpose will not categorically prevent a regulation from going "too far."

But the Court hasn't been content with this balancing act in all circumstances. Where a regulation requires an owner to suffer a physical invasion of property, for example, the Court has held that "a *per se* taking" occurs¹⁷⁵ "without regard to the public interests that [the regulation] may serve."¹⁷⁶ In like fashion, a regulation that denies all economically beneficial use of property typically effects a taking "without case-specific inquiry into

165. Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

166. *Murr*, 137 S. Ct. at 1943.

167. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 322 (2002) (internal quotations omitted).

168. *Andrus v. Allard*, 444 U.S. 51, 65 (1979).

169. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

170. *Murr*, 137 S. Ct. at 1942.

171. *Penn Cent.*, 438 U.S. at 124.

172. *Id.*; see also *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (describing these factors as "generally applied" in cases of use restrictions); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538–39 (2005) (indicating these factors govern regulatory takings challenges "[o]utside [of] two relatively narrow categories" and "the special context of land-use exactions").

173. See, e.g., *Penn Cent.*, 438 U.S. at 127 (calling *Mahon* "the leading case" for the idea that regulatory interference with economic expectations may amount to taking).

174. See, e.g., Christopher T. Goodin, *The Role and Content of the Character of the Governmental Action Factor in a Partial Regulatory Takings Analysis*, 29 U. HAW. L. REV. 437, 441–42 (2007); Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENVTL. L. J. 525, 553–54 (2009); Michael Lewyn, *Character Counts: The "Character of the Government Action" in Regulatory Takings Actions*, 40 SETON HALL L. REV. 597, 606–09 (2010).

175. *Cedar Point*, 141 S. Ct. at 2072.

176. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

the public interest advanced in support of the restraint.”¹⁷⁷ Not only do these rules turn entirely on the offending regulation’s effects,¹⁷⁸ they strikingly reject the balancing urged by Holmes and resemble in nature (though not in emphasis or result) the categorical treatment employed by Brandeis.

In addition to carving out these specific effects-oriented categories, the Court also has employed language questioning the relevance of legislative purpose more generally. Recall, for example, the distinction Brandeis drew between regulations that prevent harm and those that confer benefits.¹⁷⁹ The Court has since described that distinction as unhelpful because the difference between harm-prevention and benefit-conferral is “often in the eye of the beholder.”¹⁸⁰ “A given restraint will be seen as mitigating ‘harm’ to the adjacent parcels or securing a ‘benefit’ for them,” the Court continued, “depending upon the observer’s evaluation of the relative importance of the use that the restraint favors.”¹⁸¹ Every regulation can thus be framed as serving some harm-prevention purpose, and allowing such justifications to determine whether a taking has occurred would effectively amount “to a test of whether the legislature has a stupid staff.”¹⁸²

Finally, as noted in the previous section, the Court has attempted to separate its takings jurisprudence from inquiries into the validity of the regulation being challenged. Questions about purpose are relevant to a regulation’s constitutionality, the Court observed, because “a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause.”¹⁸³ But that concern “is 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.”¹⁸⁴ These statements strongly indicate that, contrary to some of the Court’s other pronouncements, the purpose underlying a challenged regulation should have no bearing on the takings inquiry at all. Instead, the determination of a taking should depend entirely on the nature and distribution of the burdens resulting from a challenged regulation.¹⁸⁵

177. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

178. *See, e.g., Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005) (describing these tests as focusing on “severity of the burden that government imposes upon private property rights”).

179. *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting) (contrasting takings exercised to protect the public from danger, which should not include a consideration of reciprocity of advantage, with takings meant only to confer public benefit, which should require such a consideration).

180. *Lucas*, 505 U.S. at 1024.

181. *Id.* at 1025.

182. *Id.* at 1025–26 n.12.

183. *Lingle*, 544 U.S. at 542.

184. *Id.* at 543.

185. *Id.*

C. Diminution and Reciprocity

Despite language in some opinions tending to accentuate legislative purpose, the bulk of the Court's decisions give a regulation's effects a significant role in takings analysis. Whether those effects are balanced against the public interest or evaluated exclusively of that interest, the determination of a taking more often than not considers how a regulatory measure impacts private property.¹⁸⁶ Moreover, the Court's decisions show quite clearly that the most important effects are the extents to which a challenged regulation diminishes property values and results in an average reciprocity of advantage between property owners. Both concepts, of course, flow directly from *Mahon*. Indeed, perhaps with regard to no other issues has the debate between Justice Holmes and Justice Brandeis been more influential and resulted in so much ambiguity.

1. *Diminution in Value*

Start with diminution in value. As discussed earlier, Holmes clearly found diminution relevant, but he failed to explain how much diminution he would require before a regulation went "too far." By characterizing the coal company's support estate as completely abolished,¹⁸⁷ he can be read to say that only a total devaluation triggers the compensation requirement. By also discussing the mineral estate,¹⁸⁸ he can simultaneously be read to suggest some lesser degree of diminution (because that estate clearly retained some value despite the Kohler Act's provisions). Brandeis, by contrast, indicated that even total diminution would not turn an otherwise valid regulation into a taking.¹⁸⁹ But if diminution did matter, he suggested that the calculation should include not only the support and mineral estates but the surface estate, as well.¹⁹⁰ He failed to explain, however, why the value of some other property (the surface estate) should lessen the impact of the regulation on the coal company's interests.

These issues have plagued the Court's takings jurisprudence ever since. Like Holmes, the Court has repeatedly stated that a regulation's economic impact typically matters to the takings inquiry,¹⁹¹ but it has never

186. *See id.* at 539 (explaining that the "severity of burden that government imposes upon private property rights" is "a common touchstone" in most of the Court's takings decisions).

187. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922).

188. *Id.* at 414–15.

189. *See id.* at 418 (Brandeis, J., dissenting) (suggesting a "[r]estriction upon use does not become inappropriate as a means [even if] it deprives the owner of the only use to which the property can then be profitably put").

190. *Id.* at 419.

191. *See, e.g., Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021); *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942–43 (2017); *Lingle*, 544 U.S. at 538–39; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Penn Cent. Transp. Co. v.*

articulated precisely how much impact is necessary for a taking to be found.¹⁹² A total diminution—i.e., one that renders the relevant property productively valueless—clearly suffices,¹⁹³ but beyond that, the Court’s decisions are no more certain than Holmes. Some have found takings based on the imposition of potentially “substantial” financial burdens,¹⁹⁴ but those cases have also involved “extraordinary” or “unusual” regulatory methods—like abrogating the right to leave property to one’s heirs¹⁹⁵ or retroactively singling out parties to bear burdens unrelated to injuries they caused.¹⁹⁶ The general tenor of the Court’s decisions is that, without more, even significant economic burdens may not be enough to effect a taking.¹⁹⁷

Not only has the Court failed to say how much diminution is required, but it has used imprecise (and sometimes conflicting) language in answering the question, “how much of what?” Here, for the most part, the Court has followed Brandeis in refusing to calculate diminution based on the individual rights and interests affected by a regulation. “At least where an owner possesses a full ‘bundle’ of property rights,” the Court has indicated, “the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.”¹⁹⁸ In like manner, the Court has frequently admonished that a regulation’s economic impact must be measured against the “parcel as a whole” rather than against “discrete segments.”¹⁹⁹

At the same time, the Court has admitted its own “discomfort with the logic of this rule.”²⁰⁰ In *Lucas v. South Carolina Coastal Commission*, for example, the Court questioned whether a hypothetical restriction requiring 90% of a rural tract to remain undeveloped should be analyzed “as one in

City of New York, 438 U.S. 104, 124 (1978).

192. One of the Court’s most recent takings decisions reiterates the longstanding precedent that “if a regulation goes too far it will be recognized as a taking.” *Cedar Point*, 141 S. Ct. at 2072 (citing *Mahon*, 260 U.S. at 415). The Court has yet to clarify the bounds of “too far” in the context of regulatory takings.

193. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

194. See, e.g., *E. Enters. v. Apfel*, 524 U.S. 498, 529 (1998); *Hodel v. Irving*, 481 U.S. 704, 714 (1987).

195. *Hodel*, 481 U.S. at 716, 718.

196. *Apfel*, 524 U.S. at 537.

197. See, e.g., *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (concluding that denial of the “most profitable use” did not constitute a taking because “loss of future profits [alone] provides a slender reed upon which to rest a takings claim”); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 131 (1978) (citing approvingly cases that upheld regulations causing diminution of 75% and 87.5%); see also Mark W. Cordes, *The Fairness Dimension in Takings Jurisprudence*, 20 KAN. J. L. & PUB. POL’Y 1, 16 (2010) (“[T]he big picture balance drawn by the Supreme Court and lower courts is quite clear: significant economic impact can be imposed on landowners without constituting a regulatory taking.”).

198. *Andrus*, 444 U.S. at 65–66.

199. *Penn Cent.*, 438 U.S. at 130–131; *accord* *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 331 (2002); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987).

200. *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001).

which the owner has been deprived of all economic beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole."²⁰¹ The Court refused to answer the question, however,²⁰² casting doubt on the continued vitality of the "parcel as a whole" doctrine articulated in other opinions.

Finally, even if one accepts the "parcel as a whole" doctrine as established law, the rhetorical force of the rule is greater than its precision.²⁰³ Simply saying that economic impact is measured against the whole parcel does "little to define the contours of that whole parcel in any particular case."²⁰⁴ Suppose, for example, an owner has purchased several adjacent lots—which are so delineated by state law and the deeds granting the interests therein—for use in a single enterprise. Further suppose that only one of the lots is affected by the challenged regulation. Should the "whole parcel" include only the individual lot affected (which legally qualifies as its own separate estate) or all of the lots combined (which together form the basis of the owner's investment and value)?

One answer, of course, is to look at how the law of the relevant state treats the issue.²⁰⁵ After all, the Court has frequently maintained that state law defines property interests for purposes of takings analysis.²⁰⁶ But the Court has not followed this approach for determining the "parcel as a whole." In *Keystone Bituminous Coal*, for example, the Court rejected the notion that the support estate under Pennsylvania law could be evaluated apart from the mineral or surface estates with which it is associated.²⁰⁷ In this seeming reversal of *Mahon*, the Court suggested that the property at issue should be defined by the "practical terms" of its use rather than the formal niceties of state property law.²⁰⁸ More recently, the Court has "expressed caution" about making "property rights under the Takings Clause coextensive with those under state law."²⁰⁹ State law is but one factor in determining the relevant parcel; it must be evaluated alongside other considerations, like "the physical characteristics of the landowner's property" and "the effect of burdened land on the value of other holdings."²¹⁰

201. *Lucas v. S.C. Coastal Comm'n*, 505 U.S. 1003, 1016 n.7 (1992).

202. *Id.* at 1016–17.

203. Here, I paraphrase Justice Scalia's statement in *Lucas* regarding the Court's categorical rule for total economic deprivations. *See id.* (noting that "rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision").

204. *Giovanella v. Conservation Comm'n of Ashland*, 857 N.E.2d 451, 456 (Mass. 2006).

205. *See, e.g., Murr v. Wisconsin*, 137 S. Ct. 1933, 1953 (2017) (Roberts, C.J., dissenting).

206. *See, e.g., Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702, 707 (2010); *Lucas*, 505 U.S. at 1030; *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984).

207. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 501 (1987).

208. *Id.*

209. *Murr*, 137 S. Ct. at 1944.

210. *Id.* at 1945–46.

Whatever its merits or shortcomings, this balancing test does almost nothing to clarify the outstanding questions about diminution in value that have plagued takings doctrine since *Mahon*. To the contrary, as one commentator put it, this latest twist simply “adds new complexity to what had already become a baroque doctrine.”²¹¹

2. *Reciprocity of Advantage*

Consider next *Mahon*'s references to “an average reciprocity of advantage.” Holmes used this concept to distinguish the Kohler Act from a support statute previously upheld by the Court,²¹² suggesting that the presence of reciprocity might defeat a takings challenge. Brandeis indicated that reciprocity mattered only where a regulatory program was designed to confer benefits; it had no relevance to regulations like the Kohler Act, which was designed to prevent a harm.²¹³ Neither opinion, however, conclusively defined the term or outlined its precise role in the takings question. As with diminution, this lack of clarity has hounded takings doctrine and led to varying understandings of the “reciprocity” idea.²¹⁴

Some commentators have understood reciprocity to refer to an in-kind benefit received by property owners that offsets the burdens imposed on them by a specific regulation.²¹⁵ The uses of the phrase in *Mahon* lend support to this understanding. Holmes intimated that the earlier statute in *Plymouth Coal* secured a reciprocity of advantage because its requirement that adjacent mines support each other provided mutual benefits to the mine owners along with its mutual burdens.²¹⁶ Brandeis suggested a similar offsetting mutuality in his examples of benefit-conferral measures to which he thought reciprocity applied. He first cited prior decisions upholding special assessments levied against properties located in areas served by

211. Thomas W. Merrill, *The Supreme Court's Regulatory Takings Doctrine and the Perils of Common Law Constitutionalism*, 34 J. LAND USE & ENVTL. L. 1, 26 (2018).

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

213. *Id.* at 422 (Brandeis, J., dissenting).

214. See William W. Wade & Robert L. Bunting, *Average Reciprocity of Advantage: “Magic Words” or Economic Reality—Lessons From Palazzolo*, 39 URB. LAW. 319, 319 (2007) (describing “average reciprocity of advantage” as “vexing” phrase “without a settled definition”); see also Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 301 (1990) (noting that “average reciprocity of advantage” is “subject to a wide range of definitions”).

215. See Steven J. Eagle, *Penn Central and Its Reluctant Muftis*, 66 BAYLOR L. REV. 1, 53–54 (2014); see also Epstein, *supra* note 53, at 900; Lynda J. Oswald, *The Role of the “Harm/Benefit” and “Average Reciprocity of Advantage” Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1449, 1489 (1997); Frank R. Strong, *On Placing Property Due Process Center Stage in Takings Jurisprudence*, 49 OHIO ST. L. J. 591, 617 (1988); William W. Wade, *Misconstruing Size of Economic Impacts as the Determinant of Penn Central Test Does Not Invoke Average Reciprocity of Advantage*, 21 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 197, 208 (2015).

216. *Mahon*, 260 U.S. at 415.

drainage or irrigation projects.²¹⁷ Such schemes were constitutional, the Court had proclaimed, because the common burdens imposed by the assessments resulted in common benefits to all the parcels in question.²¹⁸

Brandeis also cited *Jackman v. Rosenbaum Co.*, a case decided just weeks prior to *Mahon*, in which Holmes had first used the reciprocity formulation.²¹⁹ Upholding a Pennsylvania statute allowing landowners to build party walls alongside neighboring structures, Holmes indicated that “the power of the State to impose burdens upon property or cut down its value in various ways without compensation” had “been held warranted in some cases by what we may call the average reciprocity of advantage.”²²⁰ Although Holmes did not elaborate the point, such a statute can easily be understood, like the support provision in *Plymouth Coal*, as providing mutual burdens and benefits to both neighboring landowners.²²¹

Relying on these examples, some have understood “reciprocity of advantage” to require “benefits to regulated landowners roughly equal to the burdens imposed on them.”²²² Holmes himself rejected the need for exact offsets,²²³ but a proportionality requirement makes sense. Where the benefits received from a regulation approximate the burdens imposed, the Takings Clause is not offended because the benefits amount to a form of in-kind compensation.²²⁴ The modern Court expressed a similar idea in a decision addressing a federal statute that required small fractional shares of Native American reservation lands to escheat to the tribe rather than pass by devise or intestacy.²²⁵ The Court indicated that the statute produced “something of an ‘average reciprocity of advantage,’ to the extent that owners of escheatable interests maintain a nexus to the Tribe.”²²⁶ Because consolidation of tribal lands benefitted the tribe, members of the tribe burdened by the escheat requirement would simultaneously “benefit from the escheat of others’ fractional interests.”²²⁷

217. *Id.* at 422 (Brandeis, J., dissenting) (citing *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896) and *Wurts v. Hoagland*, 114 U.S. 606 (1885)).

218. *See Fallbrook Irrigation Dist.*, 164 U.S. at 163–64; *Wurts*, 114 U.S. at 614–15.

219. *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 30 (1922). In a letter to British political scientist Harold Laski, Holmes indicated that he “coined the formula ‘average reciprocity of advantage’” in *Jackman*. *See DiMento, supra* note 72, at 414 (quoting Letter from Oliver W. Holmes to Harold J. Laski (Dec. 22, 1922)).

220. *Jackman*, 260 U.S. at 30.

221. *See, e.g., Wade & Bunting, supra* note 214, at 327 (indicating that both *Plymouth Coal* and *Jackman* involved “mutual boundary walls that enhanced safety and provided other specific services” to parcels regulated).

222. Oswald, *supra* note 215, at 1489.

223. *See Jackman*, 260 U.S. at 30 (stating that “the advantages may not be equal in [a] particular case”).

224. Eagle, *supra* note 215, at 53–54; Epstein, *supra* note 53, at 900.

225. *Hodel v. Irving*, 481 U.S. 704, 717–718 (1987).

226. *Id.* at 715.

227. *Id.* at 716.

Most of the Court's takings decisions, however, reveal a much broader understanding of "average reciprocity of advantage." Burdened property owners have been said to benefit from the regulations imposed on them because such regulations improve "the quality of life in the city as a whole,"²²⁸ preserve the "public weal,"²²⁹ and (quoting from Brandeis's *Mahon* dissent) "secure 'the advantage of living and doing business in a civilized community.'"²³⁰ This approach to reciprocity views property regulation "as part of the burden of common citizenship"²³¹ from which flow general advantages to "all . . . citizens and all structures."²³² In this telling, reciprocity is nothing more than public purpose repackaged and, in keeping with Brandeis, shields the government from compensation so long as a challenged regulation reasonably promotes some legitimate public interest.²³³

Which view of reciprocity one chooses has substantial consequences for takings analysis. A framework that views "implicit in-kind compensation [as] an essential portion of the overall constitutional scheme"²³⁴ will place more limits on government than a rule deeming reciprocity "to be met . . . in any case where the land use restrictions affirmatively enhance a community's welfare."²³⁵ No less than the unanswered questions about diminution in value, these differing views of reciprocity have contributed to the "muddle" of takings doctrine, and both views find their root in *Mahon*.

IV. EMBRACING THE "MUDDLE"

As the preceding Section demonstrates, much of the "muddle" of regulatory takings jurisprudence can be traced to the Court's reliance on *Mahon* as the cornerstone for its takings doctrine. On matters as fundamental as whether regulatory takings even exist to specific issues about the meaning of particular analytical components, *Mahon* created more questions than it answered, many of which the Court has since struggled to resolve. In a recent dissent, Justice Thomas candidly admitted the problem: "Next year will mark a century since *Mahon*, during which this Court for the most part has

228. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 134–35 (1978).

229. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 (1987).

230. *Andrus v. Allard*, 444 U.S. 51, 67 (1979) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting)).

231. *Keystone Bituminous Coal Ass'n*, 480 U.S. at 491 (quoting *Kimball Laundry Co. v. U.S.*, 338 U.S. 1, 5 (1949)) (internal quotations omitted).

232. *Penn Cent.*, 438 U.S. at 134–35.

233. See, e.g., Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. ENVTL. L. & POL'Y 1, 5 (2003) (arguing that "where regulation does not effect a categorical taking, the courts should defer to the legislative judgment that regulation effects an average reciprocity of advantage"); Oswald, *supra* note 215, at 1489 (arguing that this understanding of reciprocity "has become a method for simply rubberstamping legislative acts").

234. Epstein, *supra* note 53, at 900.

235. Coletta, *supra* note 214, at 303.

refrained from providing definitive rules.”²³⁶ “It is time,” he continued, “to give more than just some, but not too specific, guidance.”²³⁷

There are several reasons, however, why providing definitive rules has proved so difficult. First are the opinions in *Mahon* itself. As demonstrated, neither Justice Holmes nor Justice Brandeis explained his reasoning with precision. Both opinions employed ill-defined phrases and half-explained concepts that have made their way into takings law. This seems especially true of Holmes’s majority opinion, the initial draft of which appears to have been written rather hastily²³⁸ and underwent only three revisions.²³⁹ Boiled down to its essence, Holmes’s opinion can more or less be condensed to his frustratingly elusive statement that regulations sometimes go “too far.”²⁴⁰ This statement, more than any other, fulfilled his primary purpose “to show that there is *some* limit to police power.”²⁴¹

But the difficulties do not spring entirely from the language and reasoning used in the *Mahon* opinions. After all, to the extent that Holmes and Brandeis used elusive phrasing or incomplete rationales, the Court has had ample time to find remedies. Moreover, haste and imprecision alone cannot account for why the Court has sometimes mimicked Brandeis, the lone dissenter in *Mahon*, rather than Holmes, who wrote for a substantial majority. Something else must be at work.

In this Section, I seek to offer two suggestions about what that “something else” might comprise. First, the opinions in *Mahon* offer complementary visions about the interplay between property rights and government action. These visions predate *Mahon* and continue to the present day. To the extent that regulatory takings doctrine encompasses both visions, it will always remain complex. Second, Holmes’s opinion in *Mahon* shows that regulatory takings law serves an anti-evasion function. This function, which the Court has consistently embraced, counsels against the creation of hard-edged rules and, instead, favors the kind of malleability for which takings law is so infamous.

236. *Bridge Aina Le’a, LLC v. Haw. Land Use Comm’n*, 141 S. Ct. 731, 732 (2021) (Thomas, J., dissenting from denial of cert.) (internal quotations and citations omitted).

237. *Id.*

238. See DiMento, *supra* note 72, at 405 (stating that Holmes “apparently did not agonize over his first draft”); Treanor, *supra* note 60, at 937 (describing *Mahon* as “[w]ritten with characteristic Holmesian haste”). DiMento indicates “that Holmes was often in a rush to circulate his opinions” and notes that Brandeis criticized Holmes for the speed with which he finished assignments. DiMento, *supra* note 72, at 417.

239. See DiMento, *supra* note 72, at 405–08 (discussing Holmes’s drafts in *Mahon*).

240. See *id.* at 420 (“[I]t is the most general statement, that on regulation going ‘too far,’ which fits most comfortably into the most well-developed Holmes position on limitations of the police power.”).

241. FISCHER, *supra* note 21, at 21.

A. Complementary Visions

Numerous scholars have recognized two influential traditions in American thinking about property and government—classical liberalism and civic republicanism—that date from the earliest days of the nation.²⁴² Both traditions are evident in *Mahon* and have accordingly affected the Court's takings doctrine. Moreover, inasmuch as these traditions emphasize different goals of government, as well as different roles that property plays in relation to those goals, it is hardly surprising that takings law seems "muddled." It is, in many ways, the uneasy synthesis of two distinctive outlooks.

While there is not room to discuss these two traditions in depth, a basic distinction between them concerns "their conceptions of the nature of rights and the role of property in the polity."²⁴³ Classical liberalism "emphasizes limited government, checks and balances, and strong protection of individual rights."²⁴⁴ The primary purpose of government is to protect those rights, one of the chief of which is the right to acquire and hold property.²⁴⁵ Civic republicanism, by contrast, views "the end of the state as the promotion of the common good and of virtue,"²⁴⁶ which sometimes requires the subordination of individual rights to the general welfare.²⁴⁷ Property is important here, as well, because it helps foster the autonomy and independence needed for an individual to participate fully in the political process.²⁴⁸ But there are times when individual property rights must yield to the good of the community at large.²⁴⁹

Based on their divergent perspectives, classical liberalism and civic republicanism view the relationship between government and private property differently. For liberalism, the chief concern is that the government will fail adequately to protect—or worse, will actively exploit—property.²⁵⁰ For republicanism, the central problem is to ensure that property does not

242. See, e.g., Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1621 (2008) (noting influence in American political thought of both "classical liberal view of property" and "civic-republican conceptions of property"); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 823 (1995) (stating that "there is now a near consensus that both republican and liberal ideas powerfully influenced American politics during the 1780s and 1790s").

243. Treanor, *supra* note 242, at 820–21.

244. Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2391 (2006).

245. See Michael B. Kent, Jr., *From "Preferred Position" To "Poor Relation": History, Wilkie v. Robbins, and the Status of Property Rights Under the Takings Clause*, 39 N.M. L. REV. 89, 96 (2009) (discussing Lockean liberalism).

246. Treanor, *supra* note 242, at 821.

247. See Kent, *supra* note 245, at 97 (discussing civic republicanism).

248. See *id.*

249. See *id.*

250. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1692 (1988).

hinder virtuous self-government.²⁵¹ Both visions are embodied in the Takings Clause. By its terms, the Clause allows the government to take private property for public use, and to that extent, it envisions that the rights held by individual property owners must give way to the general welfare.²⁵² At the same time, the Clause mandates the payment of compensation to the owner whose property has been surrendered, thus protecting that owner's rights through a system of remuneration.²⁵³

Given that the Takings Clause itself encompasses both a liberal and republican vision, it is no surprise that regulatory takings jurisprudence does the same. Indeed, both visions can be found in *Mahon*. As noted earlier, both Justice Holmes and Justice Brandeis began their opinions with statements reflecting the republican notion that private property must at times yield to the common good.²⁵⁴ Republican ideas can likewise be seen in Brandeis's emphasis on legislative purpose,²⁵⁵ his intimation that even substantial diminution in value will not amount to a taking,²⁵⁶ and his suggestion that reciprocity of advantage might be satisfied by "living and doing business in a civilized community."²⁵⁷ As demonstrated, the Court has echoed each of these sentiments repeatedly in the years since *Mahon*.

At the same time, Holmes's majority opinion reflects liberalism's concerns about governmental overreach and exploitation. He explained his insistence that even a legitimate use of the police power might go "too far"—a concept that lies at the very heart of regulatory takings doctrine—in precisely these terms. If the police power were held blanketly to qualify property rights in all circumstances, he explained, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappears."²⁵⁸ His emphasis on effects—especially diminution in value²⁵⁹ and in-kind reciprocation²⁶⁰—equally suggest a more individualistic than communitarian focus when it comes to evaluating a government's regulation of property. Again, the Court's subsequent decisions have repeated each of these ideas in varying ways.

251. *Id.*

252. Michael B. Kent, Jr. & Lance McMillian, *The World of Deadwood: Property Rights and the Search for Human Identity*, 20 S. CAL. INTERDISC. L.J. 489, 533 (2011).

253. *Id.*

254. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (recognizing that property must at times "yield to the police power"); *id.* at 417 (Brandeis, J., dissenting) (stating that property rights are "not absolute" and may be prohibited if they "threaten the public welfare").

255. *Id.* at 417 (Brandeis, J., dissenting) (stating that "restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking").

256. *Id.* at 418 (stating that a valid restriction does not become inappropriate even if "it deprives the owner of the only use to which the property can then be profitably put").

257. *Id.* at 422.

258. *Id.* at 415.

259. *Id.* at 414 ("To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.").

260. *Id.* at 415 (distinguishing Kohler Act from statute upheld in *Plymouth Coal*).

These complementary visions of property and government help explain why takings law seems so “muddled.” As Carol Rose explained almost four decades ago:

Takings jurisprudence uses two quite divergent vocabularies, each reflecting one of two divergent concepts of property. The takings dilemma is thus not simply a confusion over legal terms, to be solved by adopting scientific policy. [Rather,] the takings dilemma is a legal manifestation of a much deeper cultural and political argument about the civic nature of what Holmes would have called the “human animal.”²⁶¹

Inasmuch as both visions have long been a part of American thinking, and because both “have considerable commonsense appeal,”²⁶² it seems quite unlikely that definitive resolution will occur any time soon.

B. Anti-Evasion Function

In addition to the complementary visions it embodies, regulatory takings doctrine remains “muddled” because of the function it was designed to serve. In short, the various rules that make up the Court’s takings jurisprudence serve as an elaborate anti-evasion doctrine (“AED”).²⁶³ As Brannon Denning and I have explained, AEDs are a type of decision rule employed by the Court to minimize enforcement gaps left open by its previous decision rules,²⁶⁴ and they tend to emerge within a general pattern. First, the Court implements some constitutional principle through a decision rule that typically takes the form of an *ex ante* rule and often tracks the principle itself.²⁶⁵ Second, those actors intended to be bound by the initial rule develop ways to evade its strictures, characteristically via efforts that look like formal compliance but that substantively violate the principle at issue.²⁶⁶ Third, when these efforts at evasion are subsequently challenged, the Court then supplements the initial rule with another one—typically taking the form of an *ex post* standard—meant to restrain the evasive conduct.²⁶⁷

The Court’s takings jurisprudence largely follows this pattern.²⁶⁸ The text of the Takings Clause reads like an *ex ante* rule, requiring just

261. Rose, *supra* note 7, at 596.

262. *Id.*

263. Brannon P. Denning & Michael B. Kent, Jr., *Anti-Evasion Doctrines in Constitutional Law*, 2012 UTAH L. REV. 1773, 1795 (2012).

264. *Id.* at 1779.

265. *Id.* at 1793.

266. *Id.* at 1827.

267. *Id.* at 1793, 1827.

268. See generally Kent, *supra* note 59, at 852–57 (demonstrating how regulatory takings fits within AED model).

compensation anytime the government takes private property.²⁶⁹ Early decisions implemented this principle in similarly rule-like terms,²⁷⁰ with some applying it “only to a direct appropriation, and not to consequential injuries [to property] resulting from the exercise of lawful power.”²⁷¹ But a rule that formally limits the right to compensation in this manner runs the risk of government evasion. Rather than purchase an easement for a public right-of-way, for example, the government can accomplish the same purpose by adopting a regulation requiring certain parcels be open to public access.²⁷² In this way, the government might effectively obtain its easement while avoiding its obligation to compensate the landowner because, formally, no appropriation has occurred.

This risk of governmental evasion through use of the police power seems to have animated Holmes in *Mahon*. Even assuming, as he did, that some public “exigency” underlay the Kohler Act,²⁷³ the state could not skirt the Constitution’s compensation requirement simply by regulating the support estate out of existence. It could not, in other words, take “a shorter cut than the constitutional way of paying for the change.”²⁷⁴ Under Brandeis’s view, where a legitimate public purpose always insulates the government from paying for a regulation’s effects, the temptation to regulate rather than appropriate would be immense, regardless of the circumstances. In the words of E.F. Roberts, such a rule transforms the police power into “a universal solvent” because it “is free: no money need be paid and no taxes need be assessed.”²⁷⁵ The incentive created by this approach, as Holmes recognized, would be the extension of regulation “until at last private property disappears.”²⁷⁶

The Court’s modern jurisprudence adopts this same anti-evasion view of regulatory takings. The Court has characterized its principal takings tests—whether balancing or categorical—as designed “to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property.”²⁷⁷ Put differently, the aim is “to make sure the government provides compensation not only for the *direct* appropriation of private property but also for its *indirect* appropriation

269. See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

270. See, e.g., *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 336 (1893) (“[I]f Congress wishes to take private property . . . it must either agree upon the price with the owner, or in condemnation pay just compensation therefor”).

271. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1871).

272. Cf. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2069 (2021) (addressing state regulation granting labor organizations access to employers’ property to solicit union support); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 827 (1987) (addressing redevelopment approval conditioned on landowners’ granting of public easement).

273. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

274. *Id.*

275. Roberts, *supra* note 59, at 293.

276. *Mahon*, 260 U.S. at 415.

277. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005).

via regulation that produces the same results.”²⁷⁸ The two-part test for land use exactions similarly has an anti-evasion focus, which seeks to ensure conditions imposed on projected land uses are genuine and “not simply attempts to obtain [desired interests] without paying for them.”²⁷⁹

The central message in all these contexts is that formalistic distinctions between appropriation and regulation offer insufficient protection for the constitutional guarantee of just compensation. As I have articulated elsewhere, “[a] decision rule that cuts so precisely is too easily manipulated and leaves an enforcement gap that government officials can exploit to disregard the right at issue.”²⁸⁰ Starting with *Mahon*, the Court has “signaled that it would close that gap by treating regulation and appropriation the same way in cases where they produced the same effects.”²⁸¹ And it seems repeatedly to have made the judgment that definitive rules and bright-line clarity disserves that function. Amorphous standards indicating that regulations might go “too far,” without conclusively or comprehensively explaining when that might occur, better perform this function because they make “the consequences of [government] conduct less certain.”²⁸² As frustrating as it is to scholars, lawyers, and judges, the “muddle” of regulatory takings doctrine is, to some extent, a necessary byproduct of its intended function.

CONCLUSION

The “muddle” of takings jurisprudence leaves a host of questions about the interplay between government regulation and private property rights unanswered. Disagreement abounds on issues as wide-ranging as the legitimacy of the Court’s takings doctrine, the distinction between takings and substantive due process, the respective weight to be given to a regulation’s purposes and effects, the appropriate tests to be utilized in determining a taking, and the meaning of entrenched concepts like “diminution in value” and “average reciprocity of advantage.” Commentators and judges alike lament the lack of clarity and seeming difficulty of application.

A study of *Mahon*, however, reveals that present-day debates about these issues are nothing new. Rather, they are the lineage of *Mahon* itself, born from the differing views, as well as the uncertainties, contained in the opinions of Justice Holmes and Justice Brandeis. Those differences and uncertainties, in turn, reflect more fundamental reasons why the “muddle”

278. Kent, *supra* note 59, at 854.

279. *Id.* at 855; *see also* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 622 (2013) (Kagan, J., dissenting) (explaining that exactions cases “prevent the government from exploiting the landowner’s permit application to evade the constitutional obligation to pay for the property”).

280. Kent, *supra* note 59, at 853.

281. *Id.* at 853–54.

282. *Id.* at 854.

seems so intractable. First, takings law reflects an enduring struggle between complementary visions concerning property rights and governmental action, both of which inform and enrich American thinking relative to these subjects. Second, takings law serves an important anti-evasion function that would be hindered by resort to bright-line rules and categorical explanations.

For all its aggravations and difficulties, the “muddle” has existed from the beginning and will likely continue into the future. *Mahon* shows us that today’s issues were the issues of yesterday, and in one form or another, will almost certainly be the issues of tomorrow. In the story of regulatory takings, at least, “there is nothing new under the sun.”²⁸³

283. *Ecclesiastes* 1:9.