

## UNPRINCIPLED PRINCIPLES: THE TAKINGS CLAUSE EXEMPLAR

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“THE TAKINGS CLAUSE IS NOT . . . QUIXOTIC.”  
JUSTICE ANTHONY KENNEDY<sup>1</sup>

## INTRODUCTION

Perhaps Justice Kennedy accurately defended the text of the Takings Clause, the words of which seem relatively straight-forward. Quixotic accurately describes, in the opinion of many, the search for understanding the Clause, at least as it applies to government action that does not include taking possession or title.<sup>2</sup> Some landowners challenging government regulation that controls property use certainly feel as though tilting at windmills would bring more success or satisfaction.<sup>3</sup> More than 30 years ago, the Supreme Court in *Penn Central Transportation Co. v. City of New York*,<sup>4</sup> with Justice Brennan authoring, reinvigorated the Takings Clause<sup>5</sup> as it related to claims that a regulation effectively takes property. Prior to *Penn Central*, Justice Oliver Wendell Holmes, Jr., in *Pennsylvania Coal Co. v. Mahon*<sup>6</sup> enunciated the “too far” standard,<sup>7</sup> which provided that a regulation, a statute, or other governmental rule that goes “too far” —i.e., that creates limits on the use of property that have virtually that same effect as condemning the property—effects a taking for which the property owner must be compensated. Justice Brennan, in *Penn Central*, sought to create what may be described as a substitute for the Holmes “too far test.” Perhaps Justice Brennan sought nothing more than “to give some content to”<sup>8</sup> Justice Holmes’ “too far” standard. However described, whatever its

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1. Palazzolo v. Rhode Island, 533 U.S. 606, 628 (2001). Justice Kennedy actually said, “not so quixotic.” He could have meant that the Takings Clause is not quixotic at all, or that it is just a little quixotic. This Article assumes he meant to say that the Takings Clause is not quixotic.

2. See, e.g., Susan Ayres, *The Rhetorics of Takings Cases: It’s Mine v. Let’s Share*, 5 NEV. L.J. 615, 635 (2005) (“Kennedy’s holding is arguably . . . ‘quixotic.’”).

3. See Stephen E. Abraham, *Windfalls or Windmills: The Right of a Property Owner to Challenge Land Use Regulations (A Call to Critically Reexamine the Meaning of Lucas)*, 13 J. LAND USE & ENVTL. L. 161, 164 (1997) (footnote omitted) (“[T]he Court must not stand by, tacitly encouraging the current assault on the Constitution, leaving property owners, much like Cervantes’ tragic hero, tilting at windmills in a futile struggle to preserve their diminishing property rights.”).

4. See generally *Penn Central v. City of New York*, 438 U.S. 104 (1978).

5. See, e.g., Douglas L. Grant, *ESA Reductions in Reclamation Water Contract Deliveries: A Fifth Amendment Taking of Property?*, 36 ENVTL. L. 1331, 1361 (2006) (“[T]he Court reviewed its regulatory takings cases in [*Penn Central*].”); Paul Boudreaux, *Understanding “Take” in the Endangered Species Act*, 34 ARIZ. ST. L.J. 733, 772 n.211 (2002). Paul Boudreaux referred to “the infamously vague ‘goes too far’ words.” *Id.* Indeed, in some sense, the Court in *Penn Central* invented the Takings Clause, inasmuch as it does not appear that the Court even used the term until the year after *Penn Central* in *Andrus v. Allard*, 444 U.S. 51 (1979), wherein it referred to *Penn Central* as “our most recent exposition on the Takings Clause.” *Id.* at 65.

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

7. Boudreaux, *supra* note 5, at 772 n.211 (referring to “the infamously vague ‘goes too far’ words written by Justice Holmes”).

8. Eduardo Moisés Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2194 (2004).

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relationship to the “too far” test, Brennan created for the Court and for lawyers, judges, governments, and property owners a complex system often referred to as the “famous Penn Central test.”<sup>9</sup>

In the 30 plus years since *Penn Central*, the Court has struggled to create a sense of coherence in its interpretation of the Takings Clause in general and the *Penn Central* test in particular. This Article seeks to determine whether use of foundational principles relied on by the Court provide guidance to understanding either Justice Holmes’ “too far” standard or the *Penn Central* test. In order to do so, this Article focuses first on the Court’s ad hoc factual approach to the Takings Clause. Next, the Article discusses the *Armstrong* Principle, which the Court uses, at least occasionally, to guide its Takings Clause jurisprudence. The *Armstrong* Principle and its related principles focus on the relationship between government and individual citizens. The Article demonstrates that the Takings Clause does not support the Court’s reliance on either the *Armstrong* principle or any of its related principles, and that consequently, as long as the Court relies on those principles, the Court will continue to tilt at windmills and will continue to do so in the dark. The Article concludes by suggesting a range of more apt principles, those related to the relationship between government and property, not the relationship between government and people or citizens.

## “AD HOC” APPROACH TO TAKINGS

*Ad Hoc Introduction*

As noted at the beginning of this Article, the Supreme Court claims that its Takings Clause jurisprudence “is not . . . quixotic,”<sup>10</sup> that it is not “illogical,”<sup>11</sup> and that it “is not standardless.”<sup>12</sup> Commentators (although

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9. Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455, 474 (2010). See also, e.g., Christopher Serkin, *Existing Uses and The Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1249 (2009) (describing “the ad hoc balancing test from Penn Central” as one of “two principal bases for takings liability . . . relevant to existing uses”); Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENVTL. L.J. 525, 528 (2009) (describing *Penn Central* as “the first contemporary regulatory takings decision”); Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 11 (2008) (describing *Penn Central* as a “modern reformulation of [takings] jurisprudence”).

10. *Palazzolo*, 533 U.S. at 628. Holly Doremus concluded that in *Palazzolo* and *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002), the Court “retreat[ed] from the quixotic search for *per se* rules” in its takings cases. See Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1, 9 (2003).

11. See *Palazzolo*, 533 U.S. at 628. But see Jeanne L. Schroeder, *Never Jam To-Day: On the Impossibility of Takings Jurisprudence*, 84 GEO. L.J. 1531, 1567 (1996) (describing “takings cases” as “illogical and ‘subjective’”); Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 14 n.57 (2000) (summarizing Frank Michelman, *Takings*, 88 COLUM. L. REV. 1600, 1628 (1988)).

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perhaps not all)<sup>13</sup> disagree, “call[ing] Takings Clause jurisprudence ‘famously incoherent’ and a ‘mess,’”<sup>14</sup> a “muddle”<sup>15</sup> (or “muddled”<sup>16</sup>), “confused,”<sup>17</sup> incomprehensible,<sup>18</sup> “standardless,”<sup>19</sup> and “unprincipled.”<sup>20</sup>

12. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). An interesting question to ask at this stage is whether the Court has stated as a matter of fact or held as a matter of law (or both) that Takings Clause jurisprudence is neither “quixotic,” “illogical,” or “standardless.” Are these statements, instead, to be perceived as a form of dicta? Just as interesting is the question as to whom the Court is addressing its statements. Is the Court trying to convince itself, the dissent, or the rest of the world of the truth or accuracy of its statements?

13. *See, e.g.*, John D. Echeverria & Thekla Hansen-Young, *The Track Record on Takings Legislation: Lessons from Democracy’s Laboratories*, 28 STAN. ENVTL. L.J. 439, 508 (2009) (“In fact, while constitutional takings doctrine is a matter of continuing debate, the U.S. Supreme Court has succeeded in recent years in bringing relative stability and predictability to this area of law.”).

14. Steven A. Haskins, *Closing the Dolan Deal—Bridging the Legislative/Adjudicative Divide*, 38 URB. LAW 487, 487 (2006) (footnotes omitted) (quoting Doremus, *supra* note 10, at 1-2 (“famously incoherent”) and Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 279 (1992) (“mess”).

15. Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 561 (1984). *See also* Peñalver, *supra* note 8, at 2186; Richard M. Frank, *Inverse Condemnation Litigation in the 1990’s—The Uncertain Legacy of the Supreme Court’s Lucas and Yee Decisions*, 43 WASH. U. J. URB. & CONTEMP. L. 85, 118 (1993) (“Takings jurisprudence was a muddle before the Supreme Court handed down Yee and Lucas, and a muddle it remains.”).

16. Michael B. Kent, Jr., *Theoretical Tension and Doctrinal Discord: Analyzing Development Impact Fees as Takings*, 51 WM. & MARY L. REV. 1833, 1841 (2010); Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1260 n.189 (2009); Daniel L. Siegel, *Exactions after Lingle: How Basing Nollan and Dolan on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 STAN ENVTL. L.J. 577, 579 (2009); Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 5-6 n.19 (2008); Christopher Supino, *The Police Power and “Public Use”: Balancing the Public Interest Against Private Rights Through Principled Constitutional Distinctions*, 110 W. VA. L. REV. 711, 714 (2008); Michael B. Kent, Jr., *Construing the Canon: An Exegesis of Regulatory Takings Jurisprudence After Lingle v. Chevron*, 16 N.Y.U. ENVTL. L. J. 63, 63 (2008); Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L.Q. 307, 371 (2007); Carlos A. Ball, *The Curious Intersection of Nuisance and Takings Law*, 86 B.U. L. REV. 819, 822 n.7 (2006); Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings “Muddle,”* 90 MINN. L. REV. 826, 883 (2006); Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 335 n.89 (2006).

17. Kent, *supra* note 16, at 1841. *See* Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 586 n.281 (2005) (citing, among others, Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 299-300 (1990) (takings jurisprudence is a “chameleon of ad hoc decisions that has bred considerable confusion . . .”)); Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 612 (2004); Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CAL. L. REV. 75, 133 n.239 (2004); Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 558 n.44 (2001).

18. *See, e.g.*, Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1, 61 (1996).

19.

Scholars have been trying to make sense of the Court’s endeavor for decades, but most concede that they are unable to do so. And it is getting worse. Attempts to draw bright lines where none will lie, and the imposition of categories whose boundaries cannot be justified, has rendered the topology of takings unnavigable. The increasingly frequent application of such a standardless standard calls into question the coherence of the doctrine and the legitimacy of the courts that apply it.

*Id.* (footnotes omitted).

20. *See, e.g.*, Mark Tunick, *Constitutional Protections of Private Property: Decoupling the Tak-*

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This Article may or may not prove whether “not illogical” or “famously incoherent” better describes the jurisprudence; however, jurisprudence premised on ad hoc factual inquiries by the highest court strongly suggests the irrelevance of rules, standards, or even guidelines.<sup>21</sup>

In reviewing Takings claims, the Court regularly refers to and relies on an ad hoc approach.<sup>22</sup> Under this approach, first announced in *Penn Central*<sup>23</sup> as an effort to “define ‘too far,’”<sup>24</sup> the Court claims for “itself”<sup>25</sup> the need or responsibility to engage in “ad hoc, factual inquiries.”<sup>26</sup> This ad hoc approach includes reviewing and considering “several factors to be

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*ings and Due Process Clauses*, 3 U. PA. J. CONST. L. 885, 887 (2001) (noting that “the Court [has] create[d] a takings jurisprudence that is unprincipled and ad hoc”); Mark W. Smith, *A Congressional Call to Arms: The Time has Come for Congress to Enforce the Fifth Amendment’s Takings Clause*, 49 OKLA. L. REV. 295, 308 (1996) (describing the judiciary as “bound by its . . . regulatory takings jurisprudence”).

21. See Heather Fisher Lindsay, *Balancing Community Needs Against Individual Desires*, 10 J. LAND USE & ENVTL. L. 371, 398 (1995), wherein the author predicts, “Devaluing the liberty to exploit associated with real property ownership will render categorical rules irrelevant to the takings inquiry.” Recently the Court has suggested primacy of “circumstances” over “rules.” See, e.g., James E. Holloway & Donald C. Guy, *Weighing the Need to Establish Regulatory Takings Doctrine to Justify Takings Standards of Review and Principles*, 34 WM. & MARY ENVTL. L. & POL’Y REV. 315, 349 n.189 (2010) (Justice Stevens has described the “ultimate constitutional question [a]s whether the concepts of ‘fairness and justice’ that underlie the Takings Clause will be better served by . . . categorical rules or by a[n] . . . inquiry into all the relevant circumstances”).

22. See, e.g., *Loretto*, 458 U.S. at 426 (quoting *Penn Central*, 438 U.S. at 124). See also *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 233 (2003); *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 322; *Palazzolo*, 533 U.S. at 633; *E. Enters. v. Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring in judgment and dissenting in part); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 176 (1998) (Souter, J., dissenting); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992); *id.* at 1071 (Stevens, J., dissenting); *Yee v. City of Escondido*, 503 U.S. 519, 529 (1992); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Davidson*, *supra* note 9, at 7 n.23; Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 335 n.89 (2006); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1680-81 (1988).

23. *Penn Central*, 438 U.S. at 124. See, e.g., Matthew C. Porterfield, *International Expropriation Rules and Federalism*, 23 STAN. ENVTL. L.J. 3, 9 (2004) (noting that the Court “first announced” its “ad hoc analysis” in *Penn Central*). See also Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 53, 57 n.7 (1990) (noting *Penn Central*’s “first announce[ment]” of the modern takings test).

24. *MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 349 (1986) (quoting *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson*, 473 U.S. 172, 199-200 (1985)).

25. See, e.g., Jane B. Baron, *Winding Toward the Heart of the Takings Muddle: Kelo, Lingle, and Public Discourse About Private Property*, 34 FORDHAM URB. L.J. 613, 635 (2007) (“The Court described itself as having engaged in . . . ‘ad hoc, factual inquiries.’”); Gideon Kanner, *Hunting the Snark, not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 URB. LAW 307, 310 (1998) (“[T]he Supreme Court overtly puts itself in the business of ‘engaging in essentially ad hoc factual inquiries.’”); John Martinez, *Taking Time Seriously: The Federal Constitutional Right to be Free from “Startling” State Court Overrulings*, 11 HARV. J.L. & PUB. POL’Y 297, 331 n.148 (1988).

26. *Penn Central*, 438 U.S. at 124. See Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L.Q. 307, 371 (2007) (“[T]he Court . . . speaks of the *Penn Central* test as ad hoc and case by case.”).

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considered when determining if a restriction on the use of private property will be found to be invalid for failure to pay just compensation.”<sup>27</sup>

The factors included: (1) the economic impact on the property owner; (2) the extent to which the regulation interfered with the property owner's distinct investment-backed expectations; and (3) the character of the government action. In a later case, the Supreme Court defined as a taking a “regulation [which] denies all economically beneficial or productive use of land.” A taking will not be found if such a regulation permits reasonable, beneficial use of the property.<sup>28</sup>

This listing of factors provides virtually no guidance as to which facts related to these factors might matter. Notwithstanding its listing of these factors, which the Court might have released to the lower courts in order for the lower courts to struggle to create order from these factors, the Court remains insistent on maintaining an ad hoc factual approach, an approach that suggests the uniqueness of each and every regulatory takings claim, and simultaneously suggests the inapplicability or irrelevance of rules, or even the factors to which the Court sometimes refers. The Court exacerbates this problem by advocating that it has final factual inquiry authority. Through this arrogation of the power to make its own ad hoc factual inquiry, the Court abdicates its “province and duty . . . to say what the law is.”<sup>29</sup>

#### *Rule Avoidance*

The Court eliminates any doubt as to its fidelity to an ad hoc approach, i.e., its rule avoidance, by recognizing quite simply, that it has been unable to develop “any set formula for determining” when the Takings Clause has been violated.<sup>30</sup> Further, the Court has announced, without equivocation, trepidation, or apology, that it will not create a formula, noting, “we have ‘generally eschewed’ any set formula for determining”<sup>31</sup>

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27. Stephen Durden, *Sign Amortization Laws: Insight into Precedent, Property, and Public Policy*, 35 CAP. U. L. REV. 891, 896 (2007).

28. *Id.* (citations omitted).

29. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (holding that the judiciary has the duty to interpret and declare the meaning of law).

30. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 326. *See also E. Enters.*, 524 U.S. at 523 (Takings Clause jurisprudence “does not lend itself to any set formula,” i.e., the Court was unable to create one); *Hodel v. Irving*, 481 U.S. 704, 714 (1987) (“unable” to develop formula); *Keystone Bituminous Coal Ass’n*, 480 U.S. at 495 (“unable”); *MacDonald, Sommer & Frates*, 477 U.S. at 348 (recognizing lack of formula); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (“unable”); *Loretto*, 458 U.S. at 426 (recognizing non-existence of set formula).

31. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 326 (quoting *Lucas*, 505 U.S. at 1015). Justice O’Connor, in her *Tahoe-Sierra* concurrence, emphasized that the Court began “eschew[ing] [a] set

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when a regulation violates the Takings Clause. More than a dozen times the Court has reiterated it is either unable<sup>32</sup> or worse, unwilling<sup>33</sup> to create a “set formula” to determine Takings Clause claims.

For example, in *Tahoe-Sierra*, the government-defendant sought a rule that a landowner-plaintiff has no takings claim where the landowner purchased property “with notice” of the offending regulation; the Court held, “A blanket rule . . . is too blunt an instrument.”<sup>34</sup> Perhaps in order to save litigants and lower courts from the evils of the fruit of knowledge (or perhaps, clarity or commitment), the Court “[r]esist[s] ‘the temptation to adopt what amount to per se rules in either direction,’”<sup>35</sup> regularly rejecting “categorical rules”<sup>36</sup> suggested by landowners and governments.

Consistent with its desire to “eschew” a set formula, the Court suggests or creates a rule and then ignores it. The best example of the Court shredding a blanket rule relates to government possession of property. In *Loretto*,<sup>37</sup> the Court found a taking where a government regulation required a building owner to permit cable access over the owner’s objection. The Court focused on the character of the government action, emphasizing a “rule:” “that a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine.”<sup>38</sup> Consequently, “[w]hen faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking.”<sup>39</sup> Restated, the Court

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formula” in *Penn Central*. Ann Oshiro, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency: A Significant Ripple in Takings Jurisprudence*, 41 HOUS. L. REV. 167, 188-89 (2004).

32. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 326 (“eschewed” formula); *Palazzolo*, 533 U.S. at 633 (“eschewed”); *Lucas*, 505 U.S. at 1015 (“eschewed”); *Bowen v. Gilliard*, 483 U.S. 587, 606 (1987) (“eschewed”); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986) (“eschewed”).

33. *Palazzolo*, 533 U.S. at 628. See also, Sandra L. Geiger, *An Alternative Legal Tool for Pursuing Environmental Justice: The Takings Clause*, 31 COLUM J.L. & SOC. PROBS. 201, 232 (1998) (“The Court has been unwilling to develop a set formula to determine whether “justice and fairness” require compensation under the Takings Clause.”).

34. *Palazzolo*, 533 U.S. at 628. But see William C. Leigh & Bruce W. Burton, *Predatory Governmental Zoning Practices and the Supreme Court’s New Takings Clause Formulation: Timing, Value, and R.I.B.E.*, 1993 B.Y.U. L. REV. 827, 841 (1993) (describing Scalia’s opinion in *Lucas* as creating a “blanket rule”).

35. See *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 321 (alteration in original). But see Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 51 (1992) (describing “regulatory takings law [as] an amalgam of per se rules and multi-factored balancing tests”).

36. See, e.g., *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 334 (“[T]he extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained.”). See also *Lucas*, 505 U.S. at 1071 (Stevens, J., dissenting).

37. *Loretto*, 458 U.S. at 425-26.

38. *Id.* at 432 (footnote omitted). See, e.g., Amnon Lehavi, *The Taking/Taxing Taxonomy*, 88 TEX. L. REV. 1235, 1246-47, 1280 (2010) (describing as a “per se rule” *Loretto*’s holding “that any type of permanent government invasion to land . . . violates constitutionally protected property rights”).

39. *Loretto*, 458 U.S. at 427 (footnote omitted). See also *id.* at 426 (“We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests

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“affirm[ed] the traditional rule that a permanent physical occupation of property is a taking.”<sup>40</sup> Before closing out its decision, the Court quoted with approval Professor Michelman’s statement: “The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, ‘regularly’ use, or ‘permanently’ occupy, space or a thing which theretofore was understood to be under private ownership.”<sup>41</sup> The *Loretto* decision undeviatingly followed Michelman’s explanation of the permanent occupation principle of the Takings Clause,<sup>42</sup> and the Court has continued to pay homage to the principle that the government takes property when a “regulation forces a property owner to submit to a permanent physical occupation.”<sup>43</sup>

At the same time, the Court has adopted a wildly different approach to Takings Claims based on a special class of permanent physical occupation—those occupations coerced from landowners during the permit process. A mere five years after *Loretto*, the Court in *Nollan v. California Coastal Commission*<sup>44</sup> paid homage to *Loretto*, then rejected *Loretto*’s unequivocal language. In *Nollan*, a government restriction required a “‘permanent physical occupation’” of plaintiff’s property,<sup>45</sup> and, yet, the Court held that the requirement at issue was not a per se taking.<sup>46</sup> Instead, the Court held that the “‘permanent physical occupation’” would not be a taking if the restriction were “‘reasonably necessary to the effectuation of a substantial government purpose.’”<sup>47</sup> As explained by the Court in *Dolan v.*

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that it may serve.”); *id.* at 430 n.7 (“Early commentators viewed a physical occupation of real property as the quintessential deprivation of property.”).

40. *Id.* at 441. *See, e.g.*, *New Cent. Coal Co. v. George’s Creek Coal & Iron Co.*, 37 Md. 537, 542 (1873) (“The ‘taking’ of the land prohibited by the Constitution, without previous compensation, is the permanent, physical occupation and appropriation of the land after confirmation.”); *Mugler v. Kansas*, 123 U.S. 623, 668 (1887) (alteration in original) (suggesting that a “permanent . . . physical invasion” “in effect required” the landowner to “devote[]” his property “to the use of the public, and, consequently, he was entitled to compensation.”).

41. *Loretto*, 458 U.S. at 427 n.5 (quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1184 (1967)).

42. Law review casenotes going back to at least 1917 have discussed various cases dealing with permanent occupations by government created events such as flooding. *See, e.g.*, Recent Case, *Eminent Domain—When Property is Taken—Damage to Land on Streams Tributary to Streams Improved*, 30 HARV. L. REV. 764, 764 (1917); Casenote, *Eminent Domain—Property Already Devoted to Public Use—Compensation to County for Flooding Public Road*, 27 YALE L.J. 1080, 1080-1081 (1918). *See also* Joseph M. Cokmack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221 *passim* (1931).

43. *See, e.g.*, *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S.Ct. 2592, 2601 (2010); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005); *Palazzolo*, 533 U.S. at 617; *E. Enters.*, 524 U.S. at 530; *Lucas*, 505 U.S. at 1015; *Yee*, 503 U.S. at 538.

44. *Nollan v. Ca. Coastal Comm’n*, 483 U.S. 825, 831-37 (1987).

45. *Id.* at 831-32.

46. *See id.* at 834.

47. *See id.* (quoting *Penn Central*, 438 U.S. at 127).



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*City of Tigard*,<sup>48</sup> decided few years after *Nollan*, the government may completely deprive a person of part of her or his property if the government can demonstrate the existence of an “‘essential nexus’ . . . between the ‘legitimate state interest’ and the permit condition” which deprives a property owner of property.<sup>49</sup> While *Dolan* modified *Nollan*, *Dolan* did not change the fact that the Court completely ignored its stated “rule that a permanent physical occupation of property is a taking.”<sup>50</sup> The Court could have held that the regulations requiring property for a permit took the property of *Nollan* and *Dolan*, but that the permit provided just compensation.<sup>51</sup> Instead, the Court ignored its blanket rule that government takes property when the government permanently occupies land.<sup>52</sup>

*Ruleless Ad Hoc Fact Finding*

The Court, then, begins its Takings Clause analysis (1) “eschew[ing] any set formula;”<sup>53</sup> and (2) asserting its reliance on “ad hoc, factual inquiries.”<sup>54</sup> (The Court concurrently claims that its inquiries are not “standardless.”<sup>55</sup>) If the Court’s rule avoidance strongly suggests the importance of

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48. See generally *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

49. See *id.* at 386.

50. *Loretto*, 458 U.S. at 441. The Court may have lost its way by forgetting Frank I. Michelman’s other iteration of the permanent occupation principle, “that when government in fact makes regular or permanent use of a thing which would be wrongful unless it had acquired title, it must pay that amount of compensation which acquisition of a title commensurate with its use would have cost it.” Michelman, *supra* note 41, at 1186.

51. Other options would be for the Court to hold that the government may not require waiver of both procedural due process and just compensation (including the procedural right to have a jury decide the compensation). “[T]he well-established ‘doctrine of “unconstitutional conditions”’ . . . prohibits requiring waivers of constitutional rights as a condition of government benefits.” Hans Bader, *Free Enterprise Fund v. PCAOB: Narrow Separation-of-Powers Ruling Illustrates that the Supreme Court is not “Pro-Business,”* 2010 CATO SUP. CT. REV. 269, 291 (2009/2010). While the Supreme Court in *Lingle* “descri[bes] . . . *Nollan/Dolan* as flowing from the doctrine of unconstitutional conditions,” Kent, *supra* note 16, at 1853 (emphasis added), the Court did not in any real sense review the entire loss of constitutional rights including the right to a trial pursuant to procedural due process to determine value of the property taken.

52. Danaya C. Wright, *Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court’s Fifth Amendment Takings Jurisprudence?*, 26 COLUM. J. ENVTL. L. 399, 419-20 (2001) (referring to the “*Nollan* exception” to the *Loretto* “per se takings” rule, where “the landowner’s use of the property contributes to the problem the exaction seeks to remedy.”).

53. See, e.g., *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 336 (internal quotation marks omitted); *Palazzolo*, 533 U.S. at 633 (O’Connor, J., concurring) (internal quotation marks omitted); *Lucas*, 505 U.S. at 1015 (internal quotation marks omitted); *Bowen*, 483 U.S. at 606; *Connolly*, 475 U.S. at 224.

54. See, e.g., *Brown*, 538 U.S. at 233; *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 322; *Palazzolo*, 533 U.S. at 633; *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720 (1999); *E. Enters.*, 524 U.S. at 523; *Lucas*, 505 U.S. at 1015; *Yee*, 503 U.S. at 529; *Bowen*, 483 U.S. at 606; *Hodel*, 481 U.S. at 714; *Keystone Bituminous Coal Ass’n*, 480 U.S. at 495; *MacDonald*, *Sommer & Frates*, 477 U.S. at 349; *Connolly*, 475 U.S. at 224; *Loretto*, 458 U.S. at 426; *Kaiser Aetna*, 444 U.S. at 175; *Penn Central*, 438 U.S. at 124.

55. See *Loretto*, 458 U.S. at 426. But see *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A., Cal.*, 482 U.S. 304, 340 n. 17 (1987) (Stevens, J., dissenting) (describing Takings

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facts, its embrace of an ad hoc factual inquiry approach suggests that the Court either engages in fact-finding akin to that engaged in by trial courts or that the Court has openly embraced “subatomic jurisprudence,” wherein the Court looks to find the tiniest matter that matters. Under either approach the Court effectively abdicates its “duty . . . to say what the law is.”<sup>56</sup>

## AD HOC FACTUAL INQUIRY AS ABDICATION OF SUPREME COURT DUTY

*Factual Inquiries as Fact Finding*

A factual inquiry, on its face, seems like fact-finding, i.e., an inquiry into the facts. This conclusion follows from discussion of “factual inquiry” in a variety of contexts. In interpreting the term “nonobviousness” in 35 U.S.C. § 103, the Supreme Court noted the need for “‘several basic factual inquiries’ [including] . . . (1) identifying the ‘scope and content of the prior art’; (2) determining the ‘differences between the prior art and the claims’; and (3) ascertaining ‘the level of ordinary skill in the pertinent art.’”<sup>57</sup> An equal protection analysis may include factual inquiry into “whether legislative line-drawing . . . was arbitrary in light of scientific evidence.”<sup>58</sup> In determining juror discrimination, “the ‘factual inquiry’ includ[es] [witnessing] the jurors’ demeanor and tone of voice.”<sup>59</sup> Most importantly, with regard to the Takings Clause, the factual inquiry includes “(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct, investment-backed expectations; and (3) the character of the government regulation.”<sup>60</sup>

A factual inquiry, then, could mean fact-finding, thereby suggesting that the Supreme Court has arrogated a power that belongs to trial courts. “[F]actfinding ‘is the basic responsibility of district [i.e., trial] courts, rather than appellate courts.’”<sup>61</sup> Put another way, “reviewing courts possess the final authority to review law for error, misapplication, and declaration, while trial courts engage in fact finding.”<sup>62</sup> “The duty of finding

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jurisprudence as standardless and more confusing than criminal procedures).

56. Obviously, this quote comes from *Marbury*, 5 U.S. at 177. For an outstanding overview of judicial review before *Marbury*, see generally William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005).

57. Christopher A. Cotropia, *Nonobviousness and the Federal Circuit: An Empirical Analysis of Recent Case Law*, 82 NOTRE DAME L. REV. 911, 916-17 (2007) (alteration in original) (footnote omitted).

58. Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1316 (2000).

59. *Tolbert v. Page*, 182 F.3d 677, 683 (1999).

60. *Outdoor Graphics, Inc. v. City of Burlington, Iowa*, 103 F.3d 690, 695 (8th Cir. 1996).

61. *Maine v. Taylor*, 477 U.S. 131, 144-45 (1986) (internal quotation marks omitted).

62. Bryan L. Adamson, *Federal Rule of Civil Procedure 52(A) as an Ideological Weapon?*, 34

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the facts is placed upon the trial court.”<sup>63</sup> Contrariwise, the “well-established role of appellate courts [is] to ‘say what the law is.’”<sup>64</sup> Saying what the law is does not include fact-finding or resolution of factual disputes.<sup>65</sup>

By “relying on *Penn Central* as its polestar[,]” the Supreme Court “insists” that the Court itself decides “the question whether a regulatory taking has occurred[,]” relying “not on the basis of articulated legal doctrine, but rather on an ad hoc, case-by-case basis.”<sup>66</sup> Gideon Kanner decries this approach, explaining that it “conflate[s] the roles of trial and appellate courts.”<sup>67</sup> Kanner expounds, saying, “[T]he Court [has] de facto appointed itself a super zoning board of sorts.”<sup>68</sup> For years, courts and commentators have discussed the idea that courts should not become super zoning boards.<sup>69</sup> Kanner adds to this by noting that the Supreme Court’s ad hoc/takings jurisprudence makes the Supreme Court the final super zoning board. The ad hoc/takings jurisprudence confounds and perplexes

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FLA. ST. U. L. REV. 1025, 1042 (2007).

63. *Wilson v. Merchs.’ Loan & Trust Co.*, 183 U.S. 121, 129 (1901) (quoting *Lehnen v. Dickson*, 148 U.S. 71, 77 (1893)).

64. Bryan Adamson, *Critical Error: Courts’ Refusal to Recognize Intentional Race Discrimination Findings as Constitutional Facts*, 28 YALE L. & POL’Y REV. 1, 17 (2009) (quoting *Marbury*, 5 U.S. at 177).

65. See, e.g., Paul Diller, *Habeas and (Non-)Delegation*, 77 U. CHI L. REV. 585, 610 (2010) (footnote omitted) (“Beyond being axiomatic in the American constitutional system that it is ‘the province and duty of the judicial department to say what the law is,’ the Court’s Article III jurisprudence has assumed that federal judges are best positioned to decide legal, as opposed to factual, questions.”); Timothy Zick, *Marbury Ascendent: The Rehnquist Court and the Power to “Say What the Law Is,”* 59 WASH. & LEE L. REV. 839, 898 n.379 (2002) (“For general discussions of the law/fact distinction, see Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985), who argues that federal appellate courts have a judicial duty to say what the law is but not to engage in constitutional fact review.”).

66. Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY BILL RTS. J. 679, 683 (2005).

67. *Id.* See also Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1671 n.362 (2003), which cites to and quotes from William C. Rooklidge & Matthew F. Weil, *Judicial Hyperactivity: The Federal Circuit’s Discomfort With Its Appellate Role*, 15 BERKELEY TECH. L.J. 725, 726 (2000) (“[T]he court from time to time appears to lose track of the important distinction between trial and appellate roles.”). *But see* Eric M. Freedman, *Milestones in Habeas Corpus: Part I Just Because John Marshall said It, Doesn’t Make It So: Ex Parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531, 572 n.129 (2000) (discussing the argument made in WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE* 30, 35-41 (1990), which “demonstrates, the concept of a strict separation of roles between trial courts (primarily fact-finders, tightly constricted in legal rulings) and appellate courts (primarily law-declarers, tightly constricted in factual review) is a modern one.”).

68. Kanner, *supra* note 66, at 687.

69. The Michigan Supreme Court used the term “super zoning board” as early as 1959 in *Cook v. Bandede*, 96 N.W.2d 743, 745 (Mich. 1959). Nearly 30 years later, the United States District Court for Rhode Island used the term in context of a takings case. *P.L.S. Partners, Women’s Med. Ctr. of R.I., Inc. v. City of Cranston*, 696 F. Supp. 788, 794 (D.R.I. 1988). See also Robert H. Freilich et al., *Regan’s Legacy: A Conservative Majority Rules on Civil Rights, Civil Liberties and State and Local Government Issues*, 21 URB. LAW. 633, 729 (1989) (tying substantive due process decisions in zoning cases to the reluctance of courts to become super zoning boards).

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the conflation of the roles of appellate and trial courts by making each court a super zoning board reviewed de novo by a higher ranked super zoning board. At best, the ad hoc fact-finding required by *Penn Central* creates difficulties in determining the role of courts. At worst, the doctrine inappropriately makes the Supreme Court the final fact-finder in regulatory takings cases, a fact-finder that reviews, on average, no more than one takings case per year, making review akin to a lightning strike.<sup>70</sup>

*Sub-atomic Jurisprudence: Finding the Smallest Matter that Matters*

With regard to the Takings Clause, as noted above, the Supreme Court has held that each case requires that it (the Supreme Court) must, or at least may, make the factual inquiry. With this approach, the Court abdicates its duty to say what the law is and instead creates for itself a duty to say what the result is. Ad hoc factual inquiry could, instead, refer to the traditional activity Article III courts engage in, i.e., applying the law to the facts.<sup>71</sup>

Of course, in any case, particularly one dealing with constitutional questions, the Court may decide the case on the narrowest possible grounds.<sup>72</sup> Justice Holmes once “declar[ed] that the Court . . . should decide constitutional cases on the narrowest possible grounds.”<sup>73</sup> Cass Sunstein and others extend Holmes’ approach urging that the “Court should generally resolve constitutional cases on the narrowest possible grounds, both in terms of the actual issues decided and the justification for the deci-

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70. The limits on the right to appeal to the Supreme Court, along with its ruleless approach to the Rule of Four grant of certiorari leads to the argument that the Supreme Court violates procedural due process by making itself the final fact-finder, but providing extremely limited and ruleless access also violates procedural due process. See, e.g., Richard M. Ré, *Can Congress Overturn Kennedy v. Louisiana?*, 33 HARV J.L. & PUB. POL’Y 1031, 1065 n.129 (2010), wherein Ré discussed the idea of “unconstitutional arbitrariness,” referencing “the maxim that ‘death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.’” (quoting *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring)).

71. John E. Noyes, *Judicial and Arbitral Proceedings and the Outer Limits of the Continental Shelf*, 42 VAND. J. TRANSNAT’L L. 1211, 1252 (2009) (“traditional judicial function of applying law to facts”).

72. See, e.g., John M.M. Greabe, *Mirabile Dictum!: The Case for “Unnecessary” Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 406 (1999) (footnote omitted) (“[F]undamental principles of judicial restraint counsel courts against reaching constitutional questions ‘in advance of the necessity of deciding them’ and in favor of deciding such questions on the narrowest possible grounds.”).

73. Adrian Vermeule, *Holmes on Emergencies*, 61 STAN. L. REV. 163, 177 (2008). The article cites to, and purports to quote from, *Liverpool, N.Y. & Phila. S. S. Co. v. Comm’rs of Emigration*, 113 U.S. 33, 38-39 (1885). This seems impossible in that the quote refers to Holmes approximately 15 years before Holmes joined the Supreme Court.

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sion.”<sup>74</sup> The Court often follows this “narrowest possible grounds” approach.<sup>75</sup>

At least part of the reason for the Court’s adherence to [narrowest possible grounds] . . . is its belief that wise and workable constitutional doctrine can develop only through an evolutionary, case-by-case process in which issues are sharply focused and “pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests.”<sup>76</sup>

Such noble words and laudable goals do not justify, however, the Supreme Court’s assertion that each and every case may require an ad hoc factual inquiry by the Supreme Court itself, nor do these goals justify the Court concluding that it will not make any rules.

The Court’s Takings Clause approach, akin to using fission to find the smallest particle of matter, suggests that every (and even any) factual distinction either matters, or may matter, i.e., makes, or may make, a constitutional difference. For more than 200 years, the Supreme Court has, under various circumstances, pondered the question whether one distinction or another makes a difference.<sup>77</sup> And for more than 100 years, commentators have questioned whether “the law is to revel in distinctions without differences.”<sup>78</sup> As to constitutional questions, commentators regularly ask whether a distinction “makes a constitutional difference.”<sup>79</sup> As recently explained, “[M]any distinctions . . . that one might draw are interesting but lack any grounding in the Constitution sufficient to make these differences constitutionally meaningful.”<sup>80</sup>

The Court’s ad hoc factual inquiry approach suggests that *any* factual distinction *could* make a constitutional difference. This approach could not be more vague for trial courts as a rule of law. The Court exacerbates it

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74. Mark A. Graber, *Rethinking Equal Protection in Dark Times*, 4 U. PA. J. CONST. L. 314, 327 (2002).

75. See, e.g., Ann MacLean Massie, *Regulating Choice: A Constitutional Law Response to Professor John A. Robertson’s Children of Choice*, 52 WASH. & LEE L. REV. 135, 144 (1995) (the Court “insists upon deciding any constitutional issue upon the narrowest possible grounds”).

76. *Id.* at 144-45 (quoting *United States v. Fruehauf*, 365 U.S. 146, 157 (1961)).

77. See, e.g., *United States v. Schooner Betsey & Charlotte*, 8 U.S. 443 (1808). See also *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 611 (1837) (Story, J., dissenting).

78. Francis R. Jones, *The Liability of the Maker of a Check After Certification*, 6 HARV. L. REV. 138, 148 (1892).

79. See, e.g., Walter Hellerstein, *Is ‘Internal Consistency’ Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138, 156 (1988).

80. Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1073 (2007).

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by stating that whatever the lower court does, the Supreme Court may still engage in its own ad hoc factual inquiry. The Court might as well have said, “We do not know how to define a Taking, but we know it when we see it.”<sup>81</sup> Under the legal standard, I-know-it-when-I-see-it, only the speaker, in this case the Supreme Court, sees and therefore knows what constitutes a taking.

Of course, a lower court cannot “see” what the Supreme Court sees, a lower court must guess what the Supreme Court might see, assuming the Supreme Court decides to take a look. Governments, and their lawyers, attempting to regulate, must attempt to guess what a lower court might see when that lower court attempts to guess what the Supreme Court might see, again, assuming the Supreme Court decides to look. Landowners, and their lawyers, then must explain to a lower court how the government guessed wrongly as to what the lower court should see when the lower court engages in its guessing. If Justice Kennedy was saying that Takings Clause jurisprudence is not rational enough to be quixotic, then his assertion seems justified.

Nestor M. Davidson attempts to give this ad hoc/no rules approach an honorable moniker, describing the Supreme Court’s *Penn Central* jurisprudence as “commit[ting] the Court . . . to unfolding the doctrine in a pragmatic common law manner.”<sup>82</sup> In the end, a study of the Court’s entire Takings Jurisprudence may support Davidson’s conclusion that the Court engages in “Common Law Constitutional Interpretation” of the sort urged by David Strauss.<sup>83</sup> This approach may even be the best approach.<sup>84</sup> By its words, however, the Court does not embrace a common law approach, an approach many might accept.<sup>85</sup> Instead, the Court uses the

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81. This harkens to Justice Potter Stewart’s “oft-quoted approach toward pornography.” Gregory S. Gordon, *Music and Genocide: Harmonizing Coherence, Freedom and Nonviolence in Incitement Law*, 50 SANTA CLARA L. REV. 607, 644 (2010) (citing to *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J. concurring)). The reference should be to “obscenity” not “pornography.” See, e.g., Laura Krugman Ray, *Laughter at the Court: The Supreme Court as a Source of Humor*, 79 S. CAL. L. REV. 1397, 1410 n.63 (2006), and Davidson, *supra* note 9, at 8 (footnote omitted), wherein Davidson suggests that “*Penn Central* does not quite amount to Justice Stewart’s famous I-know-it-when-I-see-it standard, but it certainly comes close.”

82. Davidson, *supra* note 9, at 7-8 (footnote omitted) (citing David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 884-86 (1996)).

83. Strauss, *supra* note 82, *passim*.

84. See *id. passim*.

85. See, e.g., Holning Lau, *Identity Scripts & Democratic Deliberation*, 94 MINN. L. REV. 897, 933 (2010), wherein Lau notes that he has “adopted a common law approach to constitutional interpretation”; Holning Lau, *Formalism: From Racial Integration to Same-Sex Marriage*, 59 HASTINGS L.J. 843, 852-57 (2008); see also John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 1954 (2009) (noting “scholars who interpret the Constitution along common law methods”). But see Andrew C. Spiropoulos, *Just Not Who We Are: A Critique of Common Law Constitutionalism*, 54 VILL. L. REV. 181, 243-44 (2009) (concluding that common law constitutionalism (1) is “destructive of the constitutional order;” (2) is “a fundamental source of the bitter politics of our society;” (3) “politicizes the judicial process;” and (4) causes “[m]uch of the harm to our law and society”); Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1482 (2007),

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words of an anarchical interpretational methodology, one that denies the existence of rules and asserts the power of judgment, for example, the Court has the final power to decide, that is to say, the Court has the final power to see, to final power to engage in ad hoc factual inquiries.

Even this approach might have some semblance of rationality if the Court at least proclaimed an effort to follow an overriding principle that could guide the Court in ferreting out facts that did or did not suggest a taking. While such a principle may not be exactly the same thing as a rule, it has some rule-like qualities. The Court has, although not in all cases, asserted the existence of a couple of Takings Clause principles. Unfortunately for the Court, it embraces a circular principle and a principle much broader than, therefore effectively unrelated to, the Takings Clause. Each principle allows the Court to roam unbounded in its ad hoc search for facts demonstrating a taking.

## MISTAKEN PHILOSOPHIC FOUNDATIONS OF TAKINGS JURISPRUDENCE

*Puppy Tail Jurisprudence*

In order to guide its ad hoc approach, one maxim, or principle, on which the Court relies, without apparent recognition of irony, is the Too Far Principle. In *Tahoe-Sierra*, Justice Stevens noted “Justice Holmes did not provide a standard for determining when a regulation goes ‘too far.’”<sup>86</sup> In *Lucas*, the Court suggested that “*Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going ‘too far’ for purposes of the Fifth Amendment.”<sup>87</sup> Despite the amorphous<sup>88</sup> nature of Too Far, the Court occasionally embraces it as a constitutional interpretational maxim.<sup>89</sup> Despite the inherent “vagueness”<sup>90</sup> of Too Far, the Court regularly relies on Too Far as a foundational general rule<sup>91</sup> of the Takings Clause.<sup>92</sup> Additionally, the Court has relied on Too Far to

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wherein he begins his discussion of the use of a common law approach to constitutional analysis with this: “A central claim of common law constitutionalism has been that precedent and tradition embody some form of latent wisdom.”

86. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 326.

87. *Lucas*, 505 U.S. at 1015.

88. See Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1212 (1996).

89. *Lucas*, 505 U.S. at 1014.

90. See, e.g., Vermeule, *supra* note 73, at 187; Peñalver, *supra* note 8, at 2194; Boudreaux, *supra* note 5, at 772 n.211.

91. See, e.g., *E. Enters.*, 524 U.S. at 540 (quoting from *Pa. Coal Co.*, 260 U.S. at 415).

92. See, e.g., *San Remo Hotel, L.P. v. City & Cnty. of S.F.*, 545 U.S. 323, 347 n.26 (2005); *Lingle*, 544 U.S. at 537-38; *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 324 n. 19, 326; *Palazzolo*, 533 U.S. at 622; *E. Enters.*, 524 U.S. at 540-541; *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 176 (1998) (Souter, J., dissenting); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 (1997); *Lucas*, 505 U.S. at 1014-15; *Yee*, 503 U.S. at 529; *Nollan*, 483 U.S. at 853; *First English Evangelical Lutheran Church of Glendale*, 482 U.S. at 316; *Keystone Bituminous Coal Ass'n*, 480 U.S. at 508

inform its Takings Clause/ripeness jurisprudence, explaining that the first “prudential hurdle[ ] to a regulatory takings claim brought against a state entity in federal court,” i.e., “that a plaintiff must demonstrate . . . recei[pt of] a ‘final decision regarding the application of the [challenged] regulations to the property at issue’ . . . follows from the principle that only a regulation that ‘goes too far’ results in a taking.”<sup>93</sup> The Court, then, regularly quotes from, and more important, often begins its analysis with the Too Far Principle.<sup>94</sup>

To recap, the Court “birthed” regulatory takings jurisprudence with the Too Far Test, set out by Justice Holmes in *Pennsylvania Coal*.<sup>95</sup> With *Penn Central*, the Court adopted the ad hoc factual inquiries standard for determining when a regulation goes too far.<sup>96</sup> In order to guide its ad hoc factual inquiry, the Court in *Lucas* returned to the Too Far Principle for interpretational guidance.<sup>97</sup> At least one commentator has suggested, Justice Holmes’s too far maxim inspires regulatory takings doctrine.<sup>98</sup> The Court then moved from Too Far to ad hoc and back to Too Far, leading to “confusing and incompatible results, often explained in conclusionary terminology, circular reasoning, and empty rhetoric.”<sup>99</sup>

While the Court may or may not regularly rely on the Too Far Principle in guiding its ad hoc factual inquiry, the fact that the Court has done so, suggests that the Court has used at least one completely inappropriate interpretational principle. The Too Far Principle cannot possibly guide the Court, or any other court, in its ad hoc factual inquiry related to whether a regulation has gone too far. A puppy or a kitten could not have more fun chasing its tail.

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(Rehnquist, C.J., dissenting).

93. *Suitum*, 520 U.S. at 733-34 (quoting *Williamson Cnty. Reg'l Planning Comm'n*, 473 U.S. at 186, 198). See also Donald J. Kochan, *Ripe Standing Vines and the Jurisprudential Tasting of Matured Legal Wines—and Law & Bananas: Property and Public Choice in the Permitting Process*, 24 *BYU J. PUB. L.* 49, 51 (2009) (“[M]any takings claims are blocked by the ripeness doctrine because ‘[a] court cannot determine whether a regulation has gone “too far” unless it knows how far the regulation goes.’”) (quoting *MacDonald, Sommer & Frates*, 477 U.S. at 348).

94. See William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 *GEO. L.J.* 813, 869 (1998).

95. See Kent Wetherell, Comment, *Private Property Rights Legislation: The “Midnight Version” and Beyond*, 22 *FLA. ST. U. L. REV.* 525, 528 (1994); see also David E. DeCosse, *Beyond Law and Economics: Theological Ethics and the Regulatory Takings Debate*, 23 *B.C. ENVTL. AFF. L. REV.* 829, 835 (1996).

96. See, e.g., Mark Fenster, *The Takings Clause, Version 2005: The Legal Process of Constitutional Property Rights*, 9 *U. PA. J. CONST. L.* 667, 674-75 (2007).

97. *Lucas*, 505 U.S. at 1014.

98. See Robert G. Dreher, *Lingle’s Legacy: Untangling Substantive Due Process from Takings Doctrine*, 30 *HARV. ENVTL. L. REV.* 371, 377 (2006).

99. Kanner, *supra* note 66, at 683 (quoting from Arvo Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 *S. CAL. L. REV.* 1, 2 (1970)).



*Armstrong Principle(s): Introduction*

In addition to using the Too Far Principle as a guide for its ad hoc factual inquiries, the Court uses a principle, the *Armstrong* Principle, perhaps to prove that its Takings jurisprudence is, well, principled. In *Armstrong*, Justice Black, writing for the Court stated, “The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>100</sup> In the sections that follow, this Article will demonstrate that the *Armstrong* Principle provides no more guidance than the Too Far Principle in the Court’s search for determining which ad hoc facts demonstrate that a regulation goes too far.

Facially, the Takings Clause refers to the power to “take” checked or balanced by the requirement to pay just compensation.<sup>101</sup> “The Takings Clause balances public needs against private, by permitting private property to be taken for a public purpose but then compensating the owner.”<sup>102</sup> Professor Mark Tunick, among others, argues that this formula should not apply to regulatory takings, indeed that the Takings Clause should not apply to regulatory takings, i.e., a circumstance where the landowner maintains ownership, albeit ownership restricted by a regulation.<sup>103</sup> With regard to a regulatory takings claim, the government regulates, but does not take possession of, or title to, property.<sup>104</sup> The compensation part of the Takings Clause applies when the regulation becomes “so onerous that its effect is tantamount to a direct appropriation or ouster.”<sup>105</sup>

A regulatory takings claim, for it to exist at all, requires the Court to recalibrate the balancing, which inherently occurs with possessory takings claims, i.e., eminent domain or inverse condemnation. First, the Court recognizes that “regulation—by definition—involves the adjustment of rights for the public good.”<sup>106</sup> The Court holds that the “Takings Clause . . . preserves governmental power to regulate” and balances that

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

101. See William Michael Treanor, *Supreme Neglect of Text and History*, 107 MICH. L. REV. 1059, 1067 (2009) (“A textualist approach to the Takings Clause” requires “the government . . . to pay the property owner when it physically ‘takes’ her property for a public use.”).

102. David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 233 (2003).

103. Mark Tunick, *Constitutional Protections of Private Property: Decoupling the Takings and Due Process Clauses*, 3 U. PA. J. CONST. L. 885, 886 (2001).

104. See, e.g., Kent, *supra* note 16, at 87. See generally Stephen M. Durden, *Animal Farm Jurisprudence: Hiding Personal Predilections Behind the ‘Plain Language’ of the Takings Clause*, 25 PACE ENVTL. L. REV. 355 (2008).

105. See, e.g., Jordan C. Kahn, *A Golden Opportunity for NAFTA*, 16 N.Y.U. ENVTL. L.J. 380, 410 (2008) (quoting *Lingle*, 544 U.S. at 537). See also Thomas W. Merrill, *Why Lingle is Half Right*, 11 VT. J. ENVTL. L. 421, 428-29 (2010).

106. *Andrus*, 444 U.S. at 65.

power against “the dictates of justice and fairness.”<sup>107</sup> In other words, the Court creates, or perhaps recognizes, another maxim for determining when a regulation goes too far, for guiding the Court as it engages in ad hoc factual inquires, the *Armstrong* Principle.

“[T]he Court referred for [the] first time to the ‘Armstrong principle’ of fairness” in *Tahoe-Sierra Preservation Council*.<sup>108</sup> Professor Glynn Lunney included the principle in “the ‘ritual litany’ employed in takings decisions.”<sup>109</sup> Carlos A. Ball and Laurie Reynolds concluded:

[T]he Armstrong principle, has been endorsed in almost every important takings opinion of the last thirty years, both by Justices who contended that the regulations before the Court amounted to takings, as well as by those who disagreed. In fact, it is fair to say that the Armstrong principle is one of the few concepts associated with takings law on which there seems to be a strong and ongoing agreement among members of the Court.<sup>110</sup>

While the Court did not use the term “*Armstrong* Principle” until *Tahoe-Sierra*, the *Armstrong* case itself dates back a half century.<sup>111</sup> The Court has applied the principle since, perhaps, 1946.<sup>112</sup> More than a dozen times since *Penn Central*, the Court has relied on the *Armstrong* Principle.<sup>113</sup> The Court often asserts the same idea with different phrases. For example, in *Yee v. Escondido*, the Court stated that with regard “to a regulatory taking argument . . . one factor a reviewing court would wish to consider i[s] . . . whether the ordinance unjustly imposes a burden on

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107. *Id.* (internal quotation marks omitted).

108. Steven J. Eagle, *Private Property, Development and Freedom: On Taking Our Own Advice*, 59 SMU L. REV. 345, 370 n.232 (2006) (citing to *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 321).

109. Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 249 n.34 (2007) (quoting William Michael Treanor, *The Armstrong Principle, The Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151, 1153 (1997)).

110. Carlos A Ball and Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1515, 1534 nn.103-104 (2006) (footnotes omitted).

111. *Armstrong*, 364 U.S. at 49.

112. See Craig R. Habicht, Note, *Dolan v. City of Tigard: Taking a Closer Look at Regulatory Takings*, 45 CATH. U. L. REV. 221, 270 n.217 (1995) (claiming that an example of the *Armstrong* principle in practice is *United States v. Causby*, 328 U.S. 256 (1946)).

113. *E.g.*, *Lingle*, 544 U.S. at 542 (“[T]he Takings Clause is meant ‘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.’”) (internal quotation marks omitted). See also, *e.g.*, *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 321, 332; *Palazzolo*, 533 U.S. at 618, 633 (O’Connor, J., concurring); *City of Monterey*, 526 U.S. at 702; *E. Enters.*, 524 U.S. at 522, 554 (Breyer, J., dissenting); *Dolan*, 512 U.S. at 384; *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 647 (1993); *Lucas*, 505 U.S. at 1071 (Stevens, J., dissenting); *Yee*, 503 U.S. at 523; *Pennell v. City of San Jose*, 485 U.S. 1, 9, 19, 22 (1988) (Scalia, J., concurring in part and dissenting in part); *Nollan*, 483 U.S. at 835 n.4; *Bowen*, 483 U.S. at 608; *First English Evangelical Lutheran Church of Glendale*, 482 U.S. at 319; *Penn Central*, 438 U.S. at 123-24, 140 (Rehnquist, J., dissenting).

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petitioners that should ‘be compensated by the government, rather than remain[ing] disproportionately concentrated on a few persons.’”<sup>114</sup> Similarly, the Court wrote that “the question whether a regulation of property amounts to a taking”<sup>115</sup> requires “determining when . . . economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”<sup>116</sup> In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, the Court described the *Armstrong* Principle as demonstrating that “in a general sense[,] concerns for proportionality animate the Takings Clause.”<sup>117</sup> While not specifically referring to *Armstrong*, the Court in *Tahoe-Sierra* suggested that Takings Clause requires compensation where “individual landowners [are] ‘singled out’ to bear a special burden that should be shared by the public as a whole.”<sup>118</sup> Similarly, the Court has held that under the Takings Clause the Court must “determin[e] when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”<sup>119</sup>

Commentators commonly support the Court’s use of the *Armstrong* Principle, describing the principle as “a central concern in the takings issue;”<sup>120</sup> as a “moral lesson;”<sup>121</sup> and as “[serving] as the basis for . . . regulatory takings jurisprudence.”<sup>122</sup> Other commentators argue that the *Armstrong* Principle “sets out a basic fairness rationale that helps explain the regulatory takings doctrine.”<sup>123</sup> Still others quote the *Armstrong* principle, or a version of it, in their explanation or discussion of the meaning of the Takings Clause.<sup>124</sup>

The *Armstrong* principle may be a “central concern,” or a “basis,” or a “rationale” for the Takings Clause. It may provide a moral lesson. Undeniably, the Court and commentators rely on it to discuss or explain the

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114. *Yee*, 503 U.S. at 531 (quoting *Penn Central*, 438 U.S. at 124).

115. *Hodel*, 481 U.S. at 713.

116. *Id.* at 714 (quoting *Kaiser Aetna*, 444 U.S. at 175).

117. *City of Monterey*, 526 U.S. at 702.

118. *See Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 341 (quoting *Nollan*, 483 U.S. at 835 n.4).

119. *See Penn Central*, 438 U.S. at 124 (noting that, while the Fifth Amendment requires fairness in bearing public burdens, the Court has been unable to find a “set formula” for determining what that balance may be.). *See also Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 336; *Palazzolo*, 533 U.S. at 633 (O’Connor, J., concurring); *E. Enters.*, 524 U.S. 523 (plurality opinion); *Yee*, 503 U.S. at 531; *Keystone Bituminous Coal Ass’n*, 480 U.S. at 495; *Kaiser Aetna*, 444 U.S. at 175.

120. Mark W. Cordes, *Agricultural Zoning: Impacts and Future Directions*, 22 N. ILL. U. L. REV. 419, 436 n.65 (2002) (Cordes notes that “[t]he Supreme Court itself has often emphasized the importance of fairness in its own takings analysis...” and this Article argues that the cornerstone of the *Armstrong* Principle is fairness.).

121. *See Kanner*, *supra* note 66, at 786 n.441.

122. Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. 899, 924 (2007).

123. Fenster, *supra* note 96, at 694.

124. *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, 439 (2007); Dreher, *supra* note 99, at 398.

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Takings Clause. As will be seen, the Court and commentators take one aspect of the *Armstrong* Principle and create a new principle.

*Armstrong Over-Principle: Fairness and Justice*

The *Armstrong* Principle describes a particular application of fairness and justice, to wit, the government should not force individuals to bear a burden that should be borne by society. The Court and commentators, apparently not satisfied with *Armstrong*'s particularized notion of fairness and justice, create from the *Armstrong* Principle an over-principle, simply "fairness and justice." By over-principle, the author suggests that the over-principle, fairness and justice, contains within it a variety of concepts or manifestations, including, most importantly, that "Government [not] forc[e] some people alone to bear public burdens which . . . should be borne by the public as a whole."<sup>125</sup> Commentators and the Court rely on the Takings Clause as a source of the *Armstrong* Principle, and then rely on the *Armstrong* Principle to create the broader (over) principle, often still referring to it as the *Armstrong* Principle.

The Court has stated, straightforwardly, "[T]he concepts of 'fairness and justice' . . . underlie the Takings Clause."<sup>126</sup> Similarly, in *Eastern Enterprises*, the Court concluded that an "evaluat[ion] [of] a regulation's constitutionality involves an examination of the 'justice and fairness' of the governmental action."<sup>127</sup> It follows that the Court uses fairness and justice as a foundational principle, as for example, in *Eastern Enterprises* where the Court noted that it had upheld a regulation in *Connolly v. Pension Benefit Guaranty Corporation*,<sup>128</sup> at least in part because the *Connolly* regulation imposed a "burden . . . neither unfair nor unjust."<sup>129</sup>

Mark W. Cordes agrees that the Court has stated that "the purpose of the takings clause . . . is to ensure 'fairness and justice' under the circumstances."<sup>130</sup> As recently explained by Donald C. Guy and James E. Holloway, "fairness and justice . . . taken together underpin the purpose of The Takings Clause."<sup>131</sup> John Dwight Ingram described the *Armstrong* principle as a "well-stated" version of "the basic principle of fairness" which "[f]ew would dispute . . . underl[ies] the Fifth Amendment."<sup>132</sup>

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125. *Armstrong*, 364 U.S. at 49.

126. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 334.

127. *E. Enters.*, 524 U.S. at 523 (quoting *Andrus*, 444 U.S. at 65).

128. *Connolly*, 475 U.S. at 211.

129. *E. Enters.*, 524 U.S. at 528.

130. See Cordes, *supra* note 120, at 434 n.59 (summarizing the holding in *Palazzolo*, 533 U. S. at 607).

131. Donald C. Guy & James E. Holloway, *The Climax of Takings Jurisprudence in the Rehnquist Court Era: Looking Back from Kelo, Chevron U.S.A. and San Remo Hotel at Standards of Review for Social and Economic Regulation*, 16 PENN ST. ENVTL. L. REV. 115, 185 (2007).

132. John Dwight Ingram, 18 UCLA J. ENVTL. L. & POL'Y 371, 375 n.29 (2000/2001).

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Finally, James E. Holloway and Donald C. Guy have argued not only that has the “Court . . . [has] relied on *Armstrong* to show the purpose of the Takings Clause” but also have argued that “*Armstrong* [can] serve a greater purpose,”<sup>133</sup> i.e., providing “a foundational but compelling means to conjoin various threads of takings standards and coalesce the morass of principles and precedents into a coherent, harmonious body of takings analytics and substance befitting Holmesian theory and analytics that underpin *Pennsylvania Coal*.”<sup>134</sup> Abraham Bell and Gideon Parchomovsky describe the “*Armstrong* rule” as “the essential fairness principle embodied in the Takings Clause.”<sup>135</sup> Many, then, agree that the Takings Clause has at its core the values of fairness and justice.<sup>136</sup>

In their recent article, James E. Holloway and David C. Guy, going beyond simply noting that the Supreme Court has “relied on [the fairness and justice doctrine of] *Armstrong* to show the purpose of the Takings Clause”<sup>137</sup> and going beyond agreeing with the Court that the Takings Clause provides for fairness and justice, urge that this “provision” “support[s] an underlying theoretical-analytical doctrine to justify standards of review and underpin takings principles.”<sup>138</sup> They argue that the *Armstrong* Principle “embodies the fairness, or equity, and justice, or process, of the Takings Clause”<sup>139</sup> and urge that the Court embrace the *Armstrong* Principle in order to “establish[] standards of review.”<sup>140</sup> Indeed, they conclude that “the *Armstrong* fairness and justice doctrine offers the best hope . . . to justify and fashion takings standards of review complementary to the pragmatic or ad hoc approach of *Penn Central* . . . [and] can justify, fashion, and coalesce takings principles to further the doctrine of *Pennsylvania Coal*.”<sup>141</sup>

The Court, then, embraces, at least occasionally, an *Armstrong* over-principle of Fairness and Justice and uses it for helping determine Takings Clause claims, for helping it determine when a regulation goes too far or violates the *Penn Central* standards. A number of commentators agree with this approach, including at least two, Holloway and Guy, who suggest that the Fairness and Justice Principle provides the basis for creating new “takings principles” to define “too far.”<sup>142</sup> In this case, the words of

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133. Holloway & Guy, *supra* note 21, at 316.

134. *Id.* at 336-337.

135. Bell & Parchomovsky, *supra* note 17, at 594.

136. See, e.g., Jeffrey M. Gaba, *Taking “Justice and Fairness” Seriously: Distributive Justice and the Takings Clause*, 40 CREIGHTON L. REV. 569, 590-91 (2007).

137. Holloway & Guy, *supra* note 21, at 315.

138. *Id.* at 347.

139. *Id.* at 332.

140. *Id.* at 349.

141. *Id.* at 374.

142. See *id. passim*.

the Takings Clause spawned Justice Black's *Armstrong* words, which spawned the Fairness and Justice Over-principle.

*Armstrong Over-principle: Distributive Justice*

Using other formulations, commentators consistently agree that the *Armstrong* Principle describes or depicts a Takings Clause primary purpose different from fairness and justice.<sup>143</sup> Many also agree with Holloway and Guy that the *Armstrong* Principle, at least their version, could guide the Court in creating a coherent doctrine.<sup>144</sup> They do not, however, agree with Holloway and Guy as to which *Armstrong* Principle the Court should use.

At it turns out, the *Armstrong* Principle supports, to some, the creation of a "disproportionate burden principle."<sup>145</sup> Justice Brennan, in his *Penn Central* prestidigitation, effectively pulled the disproportionate burden principle out of the *Armstrong* hat, writing that, "'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few person."<sup>146</sup> Occasionally, commentators cite to the *United States v. Locke*<sup>147</sup> version of the disproportionality principle, a case which clearly tied disproportionality to *Armstrong*, to wit:

As long as proper notice of these rules exists, and the burdens they impose are not so wholly disproportionate to the burdens other individuals face in a highly regulated society that some people are being forced "alone to bear public burdens which, in all fairness

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143. See, e.g., Casey Schach, *Stream Buffer Ordinances: Are Municipalities on the Brink of Protecting the Health of Streams or Opening the Floodgates of Takings Litigation?*, 40 URB. LAW. 73, 81 (2008) (quoting *Dolan*, 512 U.S. at 384, "[T]he principal purpose[] of the Takings Clause is to bar [the] Government from forcing some people alone to bear public burdens."); Alan Romero, *Reducing Just Compensation for Anticipated Condemnations*, 21 J. LAND USE & ENVTL. L. 153, 169 n.75 ("[o]ne of the principal purposes"); Donald J. Kochan, "Public Use" and the Independent Judiciary: *Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 64 (1998) ("principal purpose").

144. See, e.g., Gaba, *supra* note 136, *passim*.

145. Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. ENVTL. L. & POL'Y 1, 50 (2004). See also Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case*, 2002 CATO. SUP. CT. REV. 5, 25 (2001-2002) ("*Armstrong* principle of disproportionate impact"); Neal Stout, *Making Room at the Inn: Rent Control as a Regulatory Taking*, 38 WASH. U. J. URB. & CONTEMP. L. 305, 319 (1990) ("disproportionate burden' principle").

146. *Penn Central*, 438 U.S. at 124. While generally commentators give credit to *Armstrong* for the disproportionality principle, Brennan actually cites with "See," the case of *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). The failure to credit *Goldblatt* makes sense as it has nothing to do with disproportionality. See also *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 336; *Palazzolo*, 533 U.S. at 633 (O'Connor, J., Concurring); *E. Enters.*, 524 U.S. at 523.

147. *United States v. Locke*, 471 U.S. 84, 106 n.15 (1985).

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and justice, must be borne by the public as a whole,” . . . the burden imposed is a reasonable restriction on the property right.<sup>148</sup>

Under this version of the *Armstrong* principle, takings jurisprudence “establish[es] . . . standards of review and principles that ensure proportionality between government regulatory responses and the public burdens on landowners.”<sup>149</sup>

“Citing language from *Armstrong*, Dean Kmiec states that “[t]he straight forward purpose of the Takings Clause is to avoid the disproportionate placement of public burdens upon a single property owner.”<sup>150</sup> Scholars, when analyzing philosophical underpinnings of the Takings Clause, have long considered *Armstrong*’s disproportionate impact principle, sometimes suggesting that the principle has deeper roots.<sup>151</sup> Rather than rely on the “fairness and justice” words in Justice Black’s *Armstrong* opinion to create the Fairness and Justice Over-principle, some commentators use Black’s words to support their claim that Takings Clause analysis must rely on a “distributive justice”<sup>152</sup> principle. About fifteen years ago, Leigh Raymond discussed a similarity between the writings of philosopher John Rawls and Justice Black’s words in *Armstrong* and concluded, “Their similarity suggests a deeper connection between the takings doctrine and the ideas of distributive justice.”<sup>153</sup> At the time, she urged that “literature on takings law has failed to address satisfactorily the connection.”<sup>154</sup>

The discussion may not meet Raymond’s definition of “address satisfactorily,” but certainly a number of authors since then have discussed the idea of distributive justice.<sup>155</sup> Soon after Raymond compared Black to Rawls, Hanoch Dagan concluded that Black’s *Armstrong* words “place[d] the Aristotelian notion of distributive justice . . . at the heart of takings jurisprudence.”<sup>156</sup> The idea of the Takings Clause incorporating the idea of

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148. *Id.* (quoting *Armstrong*, 364 U.S. at 49). See also Suzanne S. Schmid, Case Comment, *Escheat of Indian Land as a Fifth Amendment Taking in Hodel v. Irving: A New Approach to Inheritance?*, 43 U. MIAMI L. REV. 739, 748 n.90 (1989).

149. Holloway & Guy, *supra* note 21, at 320-21.

150. See Gaba, *supra* note 136, at 584 n.52. For what it is worth, Gaba completely disagrees with Kmiec, finding that Kmiec’s use of *Armstrong* proportionality “seriously mischaracterizes the *Armstrong* principle of distributive justice.” *Id.* Put another way, two different *Armstrong* principles disagree with each other, at least in the view of one scholar.

151. See, e.g., R. S. Radford, *Regulatory Takings Law in the 1990’s: The Death of Rent Control?*, 21 SW. U. L. REV. 1019, 1070 (1992) (citing Michelman, *supra* note 41, at 1218-24). Ironically, Michelman neither cites to *Armstrong* nor references proportionality or disproportionality.

152. See, e.g., Leigh Raymond, *The Ethics of Compensation: Takings, Utility, and Justice*, 23 ECOLOGY L. Q. 577 *passim* (1996).

153. *Id.*

154. *Id.*

155. See, e.g., Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741 *passim* (1999); Glynn S. Lunney, Jr., *Takings, Efficiency, and Distributive Justice: A Response to Professor Dagan*, 99 MICH L. REV. 157 *passim* (2000); Gaba, *supra* note 136, *passim*.

156. Dagan, *supra* note 155, at 742-43.

distributive justice and Rawlsian principles may go back as far as Frank I. Michelman's 1967 law review article.<sup>157</sup> About a decade ago, Hanoch Dagan explained that takings literature included three main "approaches toward the relationship between takings law and distributive justice."<sup>158</sup>

Jeffrey M. Gaba, agreeing at least in part with Holloway and Guy, urges that the *Armstrong* Principle "may open the door to a judicial evaluation of philosophical concepts,"<sup>159</sup> suggesting that "most factors" in takings analysis used by the Court, "have a rough relevance to a consideration of fairness."<sup>160</sup> However, Gaba urges "focus[ing] on distributive justice" because "[a] sharper focus on the implication of these [*Penn Central* takings] factors to issues of distributive justice will . . . likely alter the way they are evaluated and suggest others that might be relevant."<sup>161</sup> Gaba has a few misgivings, expressing concern that reliance on "distributive justice" requires reliance "on the philosophical views of a narrow, unelected, and unaccountable group of judges."<sup>162</sup> He wonders "whether society would accept takings decisions premised on judicial views of distributive justice."<sup>163</sup>

These misgivings, however, do not cause Gaba (or others) to withdraw their suggestion that the Court use the *Armstrong* Distributive Justice Over-principle. Black's *Armstrong* words, then, become the source of a second over-principle, the Distributive Justice Over-principle. The Court occasionally uses this over-principle as a guide to interpreting the Takings Clause, and some commentators urge the Court to do so.

#### *Armstrong Over-principle: Anti-Singling Out*

Eric Kades, among others, describes yet another over-principle, the "anti-singling-out rationale," as being "at the core of the purpose of the Takings Clause."<sup>164</sup> Mark Fenster uses the term "reciprocity concept" urging that it parallels another *Armstrong* offshoot, the "equality norm."<sup>165</sup> He explains, "The reciprocity concept assumes that the Takings Clause represents a constitutional commitment to fairness, and that judicial review will intervene to protect those property owners who are subject to unjust

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157. See Gaba, *supra* note 136, at 590-91 (citing Michelman, *supra* note 41, at 1219). See also Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 394 (2000).

158. Dagan, *supra* note 155, at 802.

159. See Gaba, *supra* note 136, at 591.

160. *Id.* at 585.

161. *Id.*

162. *Id.* at 592.

163. *Id.*

164. Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and its Broader Application*, 97 NW. U. L. REV. 189, 208 (2002).

165. Fenster, *supra* note 9, at 558.



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treatment.”<sup>166</sup> According to Fenster, fairness and justice demand a reciprocity concept, a concept that “offers a relatively clear-cut means for courts to identify” an “illegitimate” regulation.<sup>167</sup> Fenster describes the “illegitimate regulation” thusly: (1) “it singles out the property owner for a burden,” and (2) it “fail[s] to offer [the property owner] future benefits through its application to other owners.”<sup>168</sup> Fenster then would use a “singling out test” to determine the legitimacy of a regulation. Others have equated singling out as a violation of the *Armstrong* principle.<sup>169</sup> While not referring to *Armstrong*, Professor Saul Levmore concluded that takings law should “requir[e]” compensation while government regulation “single[s] out” a “politically unprotected loser” and “when there is a close substitute in the form of a private purchase.”<sup>170</sup>

Professor Bradley C. Karkkainen recently urged the Court to “usefully interject, and for once take seriously, the *Armstrong* principle,” in particular, to “take seriously . . . a robust and operational version of the *Armstrong* ‘singling out’ principle as a judicial check on arbitrary exercises of state authority.”<sup>171</sup> Karkkainen urges that an anti-singling out principle (1) “has strong normative resonance;” (2) “has found echoes throughout the history of takings doctrine;” (3) has been advanced by such “scholars as William Fischel, Saul Levmore, Susan Rose-Ackerman, and Dan Farber . . . as the central problem of takings law; but (4) “is not adequately reflected at an operational level in contemporary takings doctrine.”<sup>172</sup>

Others to support the view that the *Armstrong* principle prohibits singling out include: (1) *Eduardo Moisés Peñalver*, who wrote that he understands takings to be “state actions that single out certain property holders for especially unfavorable treatment,”<sup>173</sup> and (2) Jan Goldman-Carter, who concluded, “The Framers of the Constitution were clearly concerned with the potential of the government—or factions thereof—to single out certain individuals arbitrarily to bear the load of the public enterprise through property confiscation.”<sup>174</sup>

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166. *Id.* at 559.

167. *See id.*

168. *Id.*

169. *See, e.g., Eagle, supra* note 122, at 917 (noting Professor Saul Levmore’s “decr[ying]” of “singling out”).

170. Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1348 (1991).

171. Karkkainen, *supra* note 16, at 912-13.

172. *Id.* at 909-10.

173. Peñalver, *supra* note 8, at 2221-22. In fairness, (fairness being a theme of *Armstrong* and this paper), Peñalver does not actually say he “understands.” Instead, he uses the passive voice, e.g., “The dominant understanding . . . is” and “Thus, . . . understood as.” In support, he refers to Stevens’ dissent in *Lucas*, 505 U.S. at 1071 (Stevens, J., dissenting). So, in the end, this author, not being directed to who is “understanding,” decided to declare it Peñalver’s.

174. Jan Goldman-Carter, *Protecting Wetlands and Reasonable Investment-Backed Expectations in the Wake of Lucas v. South Carolina Coastal Council*, 28 LAND & WATER L. REV. 425, 432 n.40

The Anti-Singling Out Over-principle has similarities to the Distributive Justice Over-principle, as well as the Fairness and Justice Over-principle. Indeed, Anti-Singling Out closely resembles the Distributive Justice Over-principle in that singling out a person to carry a burden may, unjustly, fail to distribute that burden. And one who argues that the Takings Clause should be governed by the Fairness and Justice Over-principle might suggest that those ideals prohibit singling out a person, suggesting that the Fairness and Justice Over-principle includes as a sub-principle, the Anti-Singling Out Over-principle. While this Article may (correctly or incorrectly) distinguish between the three over-principles, commentators who rely on the words of “singling out” or “anti-singling out” must see some difference between the other over-principles. They must expect at least some difference in understanding. Certainly, the use of different words suggests as much.

#### *Armstrong Over-Principle: Reciprocity*

Others have found (created? invented?) other *Armstrong* over-principles. In his dissent in *Penn Central*, then-Justice Rehnquist effectively equated the *Armstrong* Principle with “an average reciprocity of advantage,”<sup>175</sup> a phrase taken from *Pennsylvania Coal*.<sup>176</sup> Reciprocity of advantage, as explained by Rehnquist, means that “a taking does not take place if [a regulation] applies over a broad cross section of land . . . [so that] the burden is shared relatively evenly[,] and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another.”<sup>177</sup> Rehnquist noted that the Reciprocity Over-principle explained why a traditional zoning ordinance does not violate the Takings Clause.<sup>178</sup>

In the years since *Penn Central*, the Court or its members have relied on the Reciprocity Over-principle to support various conclusions. For example, in *Tahoe-Sierra*, the Court held that a moratorium on construction “secure[d] an ‘average reciprocity of advantage,’”<sup>179</sup> because a moratorium “protects the interests of all affected landowners.”<sup>180</sup> Dissenting in *Dolan*, Justice Stevens implied that granting a permit in exchange for an easement or burden on land, might equate to a reciprocity of advantage.<sup>181</sup> Justice Brennan similarly argued in *Nollan*, that the landowner received a

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(1993).

175. *Penn Central*, 438 U.S. at 140, 147 (Rehnquist, J., dissenting).

176. *Pa. Coal Co.*, 260 U.S. at 415.

177. *Penn Central*, 438 U.S. at 147 (Rehnquist, J., dissenting).

178. *Id.*

179. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 324 n.19.

180. *Id.* at 341.

181. *See Dolan*, 512 U.S. at 408-09 (Stevens, J., dissenting).

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reciprocal advantage when giving up an easement for a permit.<sup>182</sup> The Court in *Keystone Bituminous*<sup>183</sup> noted that the Reciprocity Over-principle explained why nuisance laws generally do not affect a taking.<sup>184</sup> While the dissent in *Keystone Bituminous* disagreed with the majority's application of the Reciprocity Over-principle, it agreed that the over-principle supports the conclusion that, in general, nuisance laws do not affect a taking.<sup>185</sup> In other words, the Court in *Keystone Bituminous*, while disagreeing in application, unanimously supported use of the Reciprocity Over-principle in determining the existence *vel non* of a taking.<sup>186</sup>

Perhaps not surprisingly, some commentators agree with the Court's use of the "generality/reciprocity factor" in Takings analysis.<sup>187</sup> "The generality/reciprocity factor deals with whether the regulation affects only one or a small number of people as opposed to a regulation that affects the population as a whole."<sup>188</sup> However explained or defined, the Reciprocity Over-principle gives the Court another "principle" with which to guide its Takings Clause decision-making.

*Armstrong Over-Principle: Equality*

Dagan uses a slightly different version of three principles that he then distinguishes with his fourth approach.<sup>189</sup> Libertarians, according to Dagan, advocated strict proportionality, whereas progressives sought to use distributive justice to limit takings claims, and others suggested that takings and distributive justice did not work well as applied to land use regulation.<sup>190</sup> Dagan offered his "fourth approach" suggesting that "[t]akings doctrine . . . openly address the distributive question with commitments to social responsibility and to equality."<sup>191</sup> Nestor M. Davidson argues that the "equality dimension . . . enjoys broad scholarly support."<sup>192</sup> Davidson

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182. See *Nollan*, 483 U.S. at 856 (Brennan, J., dissenting). See also Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1349 (2002).

183. *Keystone Bituminous Coal Ass'n*, 480 U.S. at 491.

184. *Id.* See also Susan E. Looper-Friedman, *Constitutional Rights as Property?: The Supreme Court's Solution to the "Takings Issue,"* 15 COLUM. J. ENVTL. L. 31, 47 (1990); Fenster, *supra* note 9, at 558 ("[T]he Court explicitly considered the reciprocity of Pennsylvania's legislation in *Keystone Bituminous*.").

185. *Id.* at 512-13 (Rehnquist, C.J., dissenting).

186. See generally *Lucas*, 505 U.S. at 1017-18 (noting the Court will apply the Reciprocity Principle, but finding that the Reciprocity Principle has no application in "the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.").

187. See, e.g., Kenneth Miller, *Penn Central for Tomorrow: Making Regulatory Takings Predictable*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10457, 10457 (2009).

188. *Id.* at 10464.

189. See Dagan, *supra* note 156 at 208.

190. See Dagan, *supra* note 156, at 802.

191. *Id.*

192. Davidson, *supra* note 9, at 3.

believes that “some scholars have argued that the equality dimension of regulatory takings deserves greater emphasis.”<sup>193</sup>

He suggests that what he calls “*Armstrong*’s rhetoric” provides the premise for the equality dimension.<sup>194</sup> Jan G. Laitos appears to agree, saying, “*Armstrong* explicitly endorse[s] the view that a regulation should not violate the equality principle inherent in ‘fairness’ by singling out certain property owners to bear the burden of achieving a greater good, instead of requiring that the public at large share the burden.”<sup>195</sup> Lawrence Berger urges that the “*Armstrong* Policy” “ha[s] an equal protection component.”<sup>196</sup> “[T]he *Armstrong* Principle,” writes Steven J. Eagle, requires “that a land use regulation that resulted in benefits to regulated landowners roughly equal to the burdens imposed on them did not violate the United States Constitution.”<sup>197</sup> Undeniably, many, but by no means all, commentators believe that the *Armstrong* Principle supports creation of an Equality Over-principle within Takings jurisprudence, or at least conclude that the Court has adopted such an Equality Over-principle.<sup>198</sup>

#### *Armstrong Principle(s): Misguiding Lights*

The process of rewriting the Takings Clause begins with words of the Clause, i.e., private property shall not be taken without payment of just compensation. These words, so sayeth Justice Black, create the *Armstrong* Principle that individuals should in fairness and justice bear a burden to be borne by society as a whole. Occasionally, the Court and commentators narrow the principle to state that the Takings Clause should be interpreted in light of its purpose, fairness and justice. Gaba,<sup>199</sup> as well as Holloway and Guy, clearly suggest such an approach.<sup>200</sup> As explained by Gaba, “[T]he traditional takings factors previously advanced by the Court can be seen in a new way if analyzed in light of principles of distributive jus-

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193. See *id.* at 4 n.13 and cases cited therein.

194. *Id.* at 26 (“Some commentators have . . . look[ed] to equality norms as a guarantee of substantive fairness, attempting to give content to the intuitions reflected in *Armstrong*’s rhetoric.”) (emphasis added).

195. Jan G. Laitos, *The New Retroactivity Standard*, 51 ALA. L. REV. 1123, 1137 (2000) (emphasis added).

196. See Lawrence Berger, *Public Use, Substantive Due Process and Takings—An Integration*, 74 NEB. L. REV. 843, 879 (1995).

197. Steven J. Eagle, Kelo, *Directed Growth, and Municipal Industrial Policy*, 17 SUP. CT. ECON. REV. 63, 75 (2009) (emphasis omitted).

198. If not clearly noted before, while many commentators refer to an equality principle, Nestor Davidson refers to an equality norm. See Davidson, *supra* note 9, at 2-4.

199. See Gaba, *supra* note 136, *passim*.

200. See also Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court*, 57 HASTINGS L.J. 759, 769 (2006); Melinda Harm Benson, *The Tulare Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 ENVTL. L. 551, 577 (2002).

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tice.”<sup>201</sup> Melinda Harm Benson agrees that “the Takings Clause is perhaps best understood in light of its guiding principle,” i.e., the *Armstrong* Principle.<sup>202</sup> Gaba, with reservations as to implementation, seems to find value in the approach discussed by Holloway and Guy, that the Court openly use fairness and justice as a background principle to all Takings Clause analysis.

The Court and commentators have created a number of principles that revolve, not around the text of the Takings Clause, but the text of the *Armstrong* Principle. These principles, or rather over-principles, include fairness and justice, distributive justice, anti-singling out, reciprocity, and equality. These principles have strong interrelationships and cannot be hermetically sealed from one another, but at the same time, they differ in connotation and denotation. The Court has referred to or used each of them. Each has its supporters among commentators. And other than the original *Armstrong* Principle, each has as its source the *Armstrong* Principle, and each, perhaps ironically, contains within it philosophical justification of the *Armstrong* Principle. No matter the disagreement as to wording of the appropriate over-principle, all commentators and the Court agree that the Court should use the particular favored principle or over-principle to guide its determination of “too far,” and to guide its application of the Penn Central ad hoc factors.

## UNPRINCIPLED PRINCIPLES

*“Too Far” from the Takings Clause*

In Takings Clause discussion and jurisprudence, commentators and the Court turn to Black’s phrasing in *Armstrong* for the basis of a principle, instead of using the language of the Takings Clause as a source of the principle. This exacerbates a foundational problem, either that the *Armstrong* phrasing creates the wrong Takings Clause principle or readers of the phrasing completely misunderstand the meaning. The result creates more mess and muddle with the Takings Clause. The idea of determining “too far” through ad hoc fact-finding requires guidance from principles, from somewhere. Implicitly or explicitly, many commentators and the Court agree. In the sections that follow, this Article demonstrates that neither the *Armstrong* Principle, as set forth by Justice Black,<sup>203</sup> nor any of its iterations, provide any more guidance than the Too Far Principle in the

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201. Gaba, *supra* note 136, at 571.

202. Benson, *supra* note 200, at 577.

203. *Armstrong*, 364 U.S. at 49 (“The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”).

Court's search for determining which ad hoc facts demonstrate that a regulation goes too far.

*Wrong Principle: Wrong Result*

Takings Clause jurisprudence may be “quixotic,”<sup>204</sup> “illogical,”<sup>205</sup> “standardless,”<sup>206</sup> “‘famously incoherent’ and a ‘mess,’”<sup>207</sup> a “muddle”<sup>208</sup> “confused,”<sup>209</sup> or “unprincipled,”<sup>210</sup> or all, or none of the above. The mess may relate, not to the concept of “too far” or ad hoc fact finding, but to the wrong choice of principles used to guide the Court. This Article takes the unremarkable position that the wrong principle leads, necessarily, to the wrong result, or at least to confused, or better, unprincipled results. As an exemplar, the Article considers whether the Takings Clause requires adherence to the *Armstrong Principle*, i.e., whether fairness and justice prohibit the government from requiring one person from bearing society's burden. More to the point, the Article questions whether the *Armstrong Principle* provides a reliable guide to understanding the Takings Clause.

Part of the *Armstrong Principle* concerns “fairness and justice.” Indeed, some have created a Fairness and Justice Principle from the earth of the *Armstrong Principle*. A close look at the Takings Clause shows, however, that fairness and justice relate to only one very particular version of fairness and justice: the requirement to pay compensation. The government, which takes possession of, or title to, someone else's property without the owner's voluntary consent, i.e., not through a good faith negotiation and sale, cannot claim fealty or allegiance to fairness or justice, just power. Fairness and justice have no relation to the “taking” part of the Takings Clause. The “taking” part of the clause relates solely to power.

The “just compensation” part of the Takings Clause arguably relates to fairness and justice, i.e., it seems fair and just to compensate a person for property taken. Indeed, the Supreme Court in *Kelo v. City of New*

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204. *But see Palazzolo*, 533 U.S. at 628 (arguing the opposite).

205. *See id.*

206. Blais, *supra* note 18, at 61. *But see Loretto*, 458 U.S. at 426 (arguing the opposite).

207. Haskins, *supra* note 14, at 487 (footnotes omitted) (citing Doremus, *supra* note 10, at 1-2 (“famously incoherent”) and Farber, *supra* note 14, at 279 (“mess”).

208. Rose, *supra* note 15, at 561. *See also* Peñalver, *supra* note 8, at 2186; Frank, *supra* note 15, at 118; Kent, *supra* note 16, at 1841; Siegel, *supra* note 16, at 579; Davidson, *supra* note 9, at 5, 6 n.19; Supino, *supra* note 16, at 714; Kent, *supra* note 16, at 63; Meltz, *supra* note 16, at 371; Karkainen, *supra* note 16, *passim*.

209. Kent, *supra* note 16, at 1841; Bell & Parchomovsky, *supra* note 17, at 586 n.281; Fenster, *supra* note 17, at 612; Parchomovsky & Siegelman, *supra* note 17, at 133 n.239; Bell & Parchomovsky, *supra* note 17, at 558 n.44.

210. *See, e.g.,* Tunick, *supra* note 20, at 887 (noting that “the Court [has] create[d] a takings jurisprudence that is unprincipled and ad hoc”); Smith, *supra* note 20, at 308 (describing the judiciary as “bound by its . . . regulatory takings jurisprudence.”).

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*London*<sup>211</sup> recently emphasized that approach, stating, “[T]he just compensation requirement spreads the cost of condemnations and thus ‘prevents the public from loading upon one individual more than his just share of the burdens of government.’”<sup>212</sup> So while it may be “that the Takings Clause was ‘designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole,’”<sup>213</sup> in this context justice and fairness mean no more than to pay a property owner market price in return for bowing to the government’s exercise of raw power of the sword.<sup>214</sup>

Others have read a different justice and fairness into the *Armstrong* Principle suggesting or implying a justice or fairness as to the propriety of the legislation or government action.<sup>215</sup> As explained by Robert H. Freilich, under Takings Clause analysis, “a regulation’s constitutionality is evaluated by examining the ‘justice and fairness’ of the governmental action.”<sup>216</sup> Ronald J. Krotoszynski, Jr., describes the Court’s use of “fairness and justice” as mimicking a due process analysis and recommends that the Court remove that type of argument from the Takings Clause and place it within the substantive due process.<sup>217</sup>

Professor Krotoszynski may have correctly placed fairness and justice within substantive due process. Undeniably, the Court and commentators have incorrectly ascribed it as substantive opposed to mere descriptive meaning of the Takings Clause. Indeed, it may be fair and just to require the government to pay for what it has taken, but the Takings Clause has no substantive limiting principle in the form of fairness and justice. Fairness and justice may require the government to compensate a person whose property has been taken, but fairness and justice do not in any way limit when the government may take property nor do fairness and justice in any way help demonstrate when property has been taken (a question that the court must answer in a regulatory takings case). The Takings Clause provides one limit as to when government may take property, to wit: “for public use.”

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211. *Kelo v. City of New London, Conn.*, 545 U.S. 469, 497 (2005).

212. *Id.* (citing *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) and *Armstrong*, 364 U.S. at 49).

213. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 321 (citing *Armstrong*, 364 U.S. at 49).

214. To be clear, once the government uses due process to condemn land, it may use the power of the sword to remove the former owner from the land, which property may have provided shelter and comfort to the owner.

215. See, e.g., Jan G. Laitos, *Takings and Causation*, 5 WM. & MARY BILL RTS. J. 359, 360-61 (1997).

216. Robert H. Freilich et al., *A Comprehensive Review of 1997-98 U.S. Supreme Court Cases and Important Legislation Affecting State and Local Government*, 30 URB. LAW. 785, 906 (1998).

217. See Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713, 719-20 (2002).

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The “public use” part of the Takings Clause may also demonstrate a sense of fairness and justice. Perhaps the Takings Clause justly and fairly limits taking power (eminent domain power) to times when the public needs to use the property. The Court, applying the fairness and justice principle, could have concluded that the government in fairness and justice should not take private property unless the government intends to put the property to government use.<sup>218</sup> Even if the public use part of the takings clause *describes* one version of fairness and justice, that part of the clause does not justify creating a fairness and justice principle to interpret the rest of the Takings Clause. Perhaps more important in the regulatory takings area is the assumption that the government is not using the property, but is merely regulating. So, to say that fairness and justice require that the government use property it “takes” provides no guidance in cases where the question is whether the government has taken property even though it is not purporting to use it. Again, describing the “public use” part of the Takings Clause as just and fair does not help the understanding of the rest of the Clause.

Exacerbating the creation of the fairness and justice principle out of the public use part of the Takings Clause is that the Court has now expanded public use to include any public purpose.<sup>219</sup> So, to the extent that fairness and justice *should* have limited taking power to public use, the Court has eliminated that possibility. Once the Court interprets the Takings Clause to permit the government to exercise its power whenever it has a public purpose, then fairness and justice exist when the government exercises its power for a public purpose. Certainly, that version of fairness and justice would permit any regulation of property. More disturbing, any government action would be fair and just as long as the government had a legitimate public purpose for its action.

All that can justly and fairly be concluded is that the Takings Clause, consistent with fairness and justice, prohibits the government from taking property except for public use.<sup>220</sup> Put another way, the Takings Clause prohibits the government from taking property for no reason at all. To the extent that prohibiting reasonless takings coincides with fairness and justice, the Takings Clause is founded on the principle of fairness and justice. To complete the circle, the justice and fairness principle of the Takings Clause prohibits reasonless confiscations of property.

On its face, the Clause requires that property not be confiscated unless the government intends to use the confiscated property. Of course, in *Kelo*

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218. This conclusion conflicts with the Court’s decision in *Kelo*, 545 U.S. 469.

219. See generally *Kelo*, 545 U.S. 469, for the Supreme Court’s most recent application of the public use doctrine.

220. See generally *id.*



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*v. City of New London*,<sup>221</sup> the Court “held in favor of a broader definition of ‘public use’ that covers takings for a ‘public purpose.’”<sup>222</sup> So a public use became any public purpose, a term with almost no limit on meaning.

By granting a meaning to public use as broad as public purpose, the Court invited the argument that the justice and fairness that underpin<sup>223</sup> the Takings Clause require, at a minimum, a regulation have a legitimate public purpose to be valid as against Takings Claim. The Court suggested as much in *Agins v. City of Tiburon*,<sup>224</sup> when it suggested that a taking occurs when a regulation fails to “substantially advance legitimate state interests.”<sup>225</sup> The suggestion made in *Agins*<sup>226</sup> comports with at least one aspect of the Takings Clause—that if the government takes property in order to use the property it must be for public use or public purpose.<sup>227</sup> For twenty-five years, the Court parroted<sup>228</sup> the *Agins* holding, or principle. So, for two and a half decades the court paid lip service to whether a regulation “substantially advanced legitimate state interests.”

A reader of the Court’s opinions during those twenty-five years that the Court parroted *Agins*, might have argued that the fairness and justice of the Takings Clause prohibited a regulation that affected property of the regulation did not substantially advance legitimate government interests. So perhaps in this sense, the Court would have been using, as a core principle, fairness and justice. The Court reversed itself in *Lingle*<sup>229</sup> turning the *Agins* oft-repeated<sup>230</sup> statement<sup>231</sup> into a jingle.<sup>232</sup>

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221. *Id.*

222. Troy A. Rule, *Shadows on the Cathedral: Solar Access Laws in a Different Light*, 2010 U. ILL. L. REV. 851, 871 (2010) (quoting *Kelo*, 545 U.S. at 480). See also Katherine R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595, 613 n.71 (2000) (wherein Professor Guzman describes *Berman v. Parker*, 348 U.S. 26, 32 (1954) as “asserting that public use exists if regulation has [an] ultimate ‘public purpose’”); Brent Nicholson & Sue Ann Mota, *From Public Use to Public Purpose: The Supreme Court Stretches the Takings Clause in Kelo v. City of New London*, 41 GONZ. L. REV. 81, 100 (2005-2006) (Nicholson and Mota conclude that the Court in *Kelo* transmuted the term “public use” into the broader term “public purpose.”).

223. See Holloway & Guy, *supra* note 21, at 347 (“[t]he provision of fairness and justice . . . underpin takings principles”); Guy & Holloway, *supra* note 131, at 185 (“[C]ondemnation collides with fairness and justice [which] taken together underpin . . . the Takings Clause.”); Shi-Ling Hsu, *On the Role of Cost-Benefit Analysis in Environmental Law: A Book Review of Frank Ackerman and Lisa Heinzerling’s Priceless: On Knowing the Price of Everything and the Value of Nothing*, 35 ENVTL. L. 135, 149 (2005) (“The underpinnings of regulatory takings jurisprudence sound in fairness considerations, not economic ones.”).

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

225. *Id.* at 260. See also Durden, *supra* note 27, at 915.

226. *Agins*, 447 U.S. at 260.

227. *Kelo*, 545 U.S. at 469.

228. Durden, *supra* note 27, at 915 (noting that the Court itself recognized that the *Agins* holding had become “ensconced in . . . takings jurisprudence”) (quoting *Lingle*, 544 U.S. at 532).

229. *Lingle*, 544 U.S. at 528.

230. See John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 19 n.109 (1993).

231. The author uses the anaphors word “statement” in order to avoid choosing between holding and dictum. Prior to 2005, a number of commentators referred to the *Agins* principle as its holding.

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In *Kelo*, then, the Court held that the Takings Clause provided little, but some substantive protection, i.e., the government could not exercise eminent domain without having some public purpose.<sup>233</sup> As noted before, in terms of the fairness and justice principle, this result suggests that fairness and justice require some public purpose before the government takes possession of land. The Court has now, however, rejected this principle within its regulatory takings jurisprudence, holding in *Lingle*, that in reviewing a takings claim the Court may not consider the legitimacy of the public purpose. In terms of the *Armstrong* Principle, the Court may not consider whether the government has a fair and just reason for enacting the regulation.

Of course, the *Armstrong* Principle, presumably based on “the overarching purpose of the Takings Clause,”<sup>234</sup> applies to regulatory takings but has no real application to eminent domain. The Supreme Court and

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*See, e.g.,* Steven J. Eagle, *Planning Moratoria and Regulatory Takings: The Supreme Court’s Fairness Mandate Benefits Landowners*, 31 FLA. ST. U. L. REV. 429, 483 n.375 (2004); Schwartz, *supra* note 145, at 16; John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1005 n.14 (2003). Others referred to the *Agins* statement as dicta or dictum. *See, e.g.,* Nathaniel S. Lawrence, *Regulatory Takings: Beyond the Balancing Test*, 20 URB. LAW. 389, 423 (1988); Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1, 14 n.72 (1995). *See also* Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379, 413 n.177 (2001) (noting that the U.S. Department of Justice began arguing that the *Agins* principle was dicta by at least 1999).

232. *See* Durden, *supra* note 27, at 915-16, wherein the author notes that when the Court regularly reuses a phrase or “principle” as it had significance, when it declares that principle to be dicta it reduces its words its preexisting words to the status of jingle-words that appeal to the reader, but have no substance. To the extent the Court seeks to avoid marginalization as “The Random Five” (as in “anything is possible with five votes,” Adam N. Steinman, *A Constitution for Judicial Lawmaking*, 65 U. PITT. L. REV. 545, 559 (2004)), the Court should not flippantly declare oft-repeated statements as dicta, particularly where others justifiably perceived the statements to be holdings. Furthermore, the *Lingle* court completely misperceives where public purpose or public use fit within the text of the Takings Clause. While it may be that arbitrary or capricious law is not a taking, even *Kelo* recognized that where the government condemns private property, it cannot do so for blatantly arbitrary or capricious reasons. So, too, while the *Agins* “substantially advance” principle may have been incorrectly used to suggest “no public purpose proves a taking,” the *Lingle* court could have corrected *Agins* by suggesting that where a regulation “takes” property, the court will declare the regulation void when it is not substantially related to a legitimate public purpose. In this way, regulatory takings would more closely parallel condemnation takings. The real point is that the Court does itself a grave disservice when it fails to provide “[c]andid and reasoned elaboration of the criteria for overruling precedents.” *See* Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 147 (1991). The Court does a far greater disservice to itself and society when declares a phrase to be dicta after having regularly treated it as precedent. Such an act delegitimizes the words of the Court and the Court itself.

233. *Kelo*, 545 U.S. at 469.

234. Richard A. Epstein, *How to Undermine Tax Increment Financing: The Lessons of City of Chicago v Prologis*, 77 U. CHI. L. REV. 121, 137 (2010). *See also* Ball & Reynolds, *supra* note 111, 1534 (“one of the primary purposes”); Eric R. Claeys, *The Penn Central Test and Tensions in Liberal Property Theory*, 30 HARV. ENVTL. L. REV. 339, 351-52 (2006) (“overriding purpose”); Stefan B. Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America*, 96 MICH. L. REV. 1910, 1935 n.108 (1998) (“purpose”).

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others have said that the *Armstrong* Principle describes the purpose behind eminent domain, but it does not modify the operation of eminent domain. As noted, the Takings Clause has two aspects of fairness and justice as applied to eminent domain, i.e., possessory taking of private property. First, the possession must be for a public use or, as interpreted by the Supreme Court, for a public purpose. Second, compensation must be paid when the government takes possession of the property.

As to regulatory takings, the Supreme Court has eliminated the first requirement of fairness—the need to demonstrate a public use or purpose for the regulation. Only the second aspect of fairness and justice remains, i.e., the requirement for compensation. Of course, paying compensation for taking property in a regulatory takings claim certainly comports with the same sense of fairness and justice *Armstrong* suggests exists with payment of compensation in an eminent domain “takings” case. In other words, the fairness and justice, to the extent they exist within the Takings Clause, simply require compensation *once* a taking has occurred. The fairness and justice of the Takings Clause provide no guidance as to *when* a taking has occurred. The Court’s muddle and mess of the Takings Clause relate, at least in part, to its use of a principle irrelevant to the question it asks, irrelevant to determining when a regulation has gone too far, irrelevant to guiding the Court in its ad hoc factual inquiries. The Court properly uses the *Armstrong* principle of fairness and justice only if it uses it to require compensation *when*, after making its ad hoc factual inquiry, the Court determines that a regulation has gone too far.

*Principle Upon Principle*

Justice Black, writing for the Court, created the most common iteration of Takings Clause fairness and justice in *Armstrong v. United States* when he wrote the Takings Clause’s “design[] . . . bar[s] 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.”<sup>235</sup> Justice Black, who often attacked substituting principle for text,<sup>236</sup> might find it ironic that the Court often substitutes his words for the words of the Takings Clause. For example, with regard to right to privacy jurisprudence, Justice Black warned that constitutional meaning may be “dramatically altered . . . by ‘substitut[ing] for the crucial word or words’ of various constitutional guarantees ‘another word.’”<sup>237</sup> According to Justice Black,

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235. *Armstrong*, 364 U.S. at 49.

236. See, e.g., Richard G. Wilkins & John Nielsen, *The Question Raised by Lawrence: Marriage, The Supreme Court and a Written Constitution*, 83 N.D. L. REV. 1393, 1399 (2007).

237. *Id.* at 1398-99 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965) (Black, J., dissenting)).

“substituting” the Court’s principles or words “for the specific words” of the Constitution “would make the Court ‘a continuously functioning constitutional convention.’”<sup>238</sup> Jerold H. Israel described Justice Black as “vigorous[ly] attack[ing] . . . the fundamental fairness doctrine . . . [as it] permitted the Court to ‘substitut[e] its own concepts of decency and fundamental justice for the language of the Bill of Rights.’”<sup>239</sup>

With no apparent recognition of irony, the Court and commentators have used Justice Black’s words to manifest a Takings Clause analysis that Justice Black feared in Due Process Clause analysis. As noted, some view *Armstrong* as imposing fairness and justice on the Takings Clause. For others, *Armstrong* suggests an equality principle. Still others use *Armstrong* to support, or at least see the Court as using *Armstrong* to support, an anti-singling out principle. Others use the *Armstrong* principle to support a second principle, often fairness and justice, e.g., equality or anti-singling out. Jan G. Laitos, relying on *Armstrong* and the philosopher Rawls, suggests that each endorses a view of “fairness” that contains within it an “equality principle” that prohibits “singling out.”<sup>240</sup> Others rely on “fairness” alone to justify an anti-singling out principle. Marc R. Poirier, calls singling out “a classic case of unfairness.”<sup>241</sup> Abraham Bell and Gideon Parchomovsky conclude, “Armstrong’s fairness criterion clearly militates against singling people out.”<sup>242</sup>

So, it may be that *Armstrong* demands (1) fairness, (2) a fairness which demands equality which prohibits singling out, (3) a fairness which prohibits singling out, (4) a fairness which demands equality. Instead, *Armstrong* may demand equality or prohibit singling out, without first demanding fairness. These over-principles sound in magnificent values, but those who create them do so by relying not on the Takings Clause, but by relying on a principle created from the Takings Clause. This approach does not turn a principle into a constitutional provision, as Black feared could happen, but it does follow a similar progression. This approach creates the risk that the relied upon principle moves even further from the core principle or principles of the Takings Clause. The further removed

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238. George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1501 (2005) (citing *Katz v. United States*, 389 U.S. 347, 373 (1967) (Black, J., dissenting)).

239. Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court’s Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 379 (2001) (citing *Adamson v. California*, 332 U.S. 46, 89 (1947)). See also Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L. J. 253, 287 (1982); Stephen M. Durden, *Plain Language Textualism: Some Personal Predilections are More Equal than Others*, 26 QUINNIPIAC L. REV. 337, 357-58 (2008); Ronald J. Krotoszynski, Jr., *Dumbo’s Feather: An Examination and Critique of the Supreme Court’s Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48 WM. & MARY L. REV. 923, 949-50 (2006).

240. Laitos, *supra* note 215, at 363.

241. Marc R. Poirier, *The NAFTA Chapter 11 Expropriation Debate Through the Eyes of a Property Theorist*, 33 ENVTL. L. 851, 905 n.256 (2003).

242. Bell & Parchomovsky, *supra* note 17, at 594.

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the principle, the less likely its guidance will lead to appropriate results. The broader the principle—and the over-principles exceed the breadth of the original *Armstrong* Principle—the less likely the principle will succeed in providing consistent results to an ad hoc application of facts or to an effort to determine when a law has gone “too far.”

*Summary of Armstrong’s Principle Failures*

Holloway and Guy, then, suggest using *Armstrong* to provide “standards of review and other takings principles”<sup>243</sup> designed to guide courts in determining when a regulation has gone “too far.”<sup>244</sup> Instead of the *Armstrong* principle lurking in the background, the principle would openly become the revised version of the Takings Clause. This may happen anyway. “Over time, with enough repetition, judicial pronouncements regarding the purpose or effects of a constitutional provision become *talismanic*, acquiring greater legal significance than the text of the provision itself.”<sup>245</sup> Certainly, nearly ten years ago, Edward J. Sullivan believed that the *Armstrong* principle had “become[ ] more deeply entrenched and more of a distraction from the original text in the First Amendment.”<sup>246</sup>

Whether the *Armstrong* principle has replaced the text of the Takings Clause through repetition, or whether the Court openly replaces it with an *Armstrong* gloss on the Takings Clause, the *Armstrong* principle fails to provide appropriate direction for understanding the Takings Clause and will lead to a continuation of the Takings Clause muddle. First, a review of the principle demonstrates its unreliability. Some describe it as a principle of distributive justice,<sup>247</sup> better suited to a due process clause analysis.<sup>248</sup> Others emphasize *Armstrong*’s equality principle,<sup>249</sup> a principle others argue the Equal Protection Clause “serve[s]” “best.”<sup>250</sup> Some see *Armstrong* as a guiding light to lead Takings Clause jurisprudence out of its “muddle.”<sup>251</sup> For example, Bradley C. Karkkainen would rely on the

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243. Holloway & Guy, *supra* note 21, at 375 (“Treated as such, *Armstrong* can determine, justify, and fashion badly needed proportionate standards of review.”).

244. See, e.g., Paul J. Boudreaux, *The Quintessential Best Case for “Takings” Compensation—A Pragmatic Approach to Identifying the Elements of Land-Use Regulations that Present the Best Case for Government Compensation*, 34 SAN DIEGO L. REV. 193, 205 (1997) (wherein Boudreaux describes the *Pennsylvania Coal* “‘goes too far’ language” as “the symbol for the difficulties inherent in developing a sound takings test”).

245. Edward J. Sullivan, *Return of the Platonic Guardians: Nollan and Dolan and the First Prong of Agins*, 34 URB. LAW. 39, 51 (2002).

246. *Id.* at 52.

247. See, e.g., Dagan, *supra* note 155, at 742.

248. See, e.g., Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 998 (2000).

249. See, e.g., Laitos, *supra* note 215, at 363.

250. Davidson, *supra* note 9, at 50.

251. See, e.g., Karkkainen, *supra* note 16, at 913.

“*Armstrong* ‘singling out’ principle” to “chart the path out of the takings muddle,”<sup>252</sup> while Holloway and Guy see *Armstrong*’s “fairness and justice” “principle”<sup>253</sup> as “a foundational but compelling means to conjoin . . . and coalesce . . . into a coherent, harmonious body of takings” jurisprudence.<sup>254</sup>

This paper does not attack a goal of “harmony,” and, after all, “[w]ho would advocate imposing unfair and unjust burdens?”<sup>255</sup> But Professor Barton H. Thompson Jr. missed the point of constitutional law when he asked the question, and more particularly as missed it as relates to the Takings Clause. The Constitution rarely, if ever, advocates for any type of legislation, as it does little more than prescribe or allocate power or restrict certain exercises of power. The more appropriate question concerns whether the Takings Clause in any way stands as protection against unfair and unjust governmental actions, particularly those that a property owner would argue imposes an unfair burden on a single parcel of land or class of singled-out parcels of land. As noted previously, the justices on the Supreme Court and commentators seem to be in agreement that the Takings Clause limits unfair laws, although they may not be in agreement as to the breadth of the fairness question.

The Court and the commentators have erred. The Court has invented a purpose behind the Takings Clause and used that invented purpose to provide a gloss for understanding the Takings Clause, doing so in a backwards and sometimes circular direction. They have looked at the umbrella purpose (or principle) that reasonably seems to cover the Takings Clause and then looked to what else the umbrella protects.

This article does not disagree with the conclusion that the Takings Clause provides a very concrete example to the principle articulated in *Armstrong*, that in fairness and justice no private property owner should be forced to shoulder an excessive burden. But the Takings Clause very narrowly applies that principle, as follows: The Takings Clause demands that *when* the government seeks to take property it must have a public use (or, perhaps purpose) for the property, and *if* the government takes property, it must pay just compensation.

*Armstrong*’s fairness and justice principle is a very broad umbrella principle, the smallest version of which appears to be distributive justice

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252. *Id.* at 913 (emphasis added).

253. See Treanor, *supra* note 109, at 1170. See also Danaya C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 ENVTL. L. 175, 243 (2004).

254. Holloway & Guy, *supra* note 21, at 336.

255. Barton H. Thompson Jr., *The Allure of Consequential Fit*, 51 ALA. L. REV. 1261, 1286 (2000). The easy answer to Thompson’s question is that the Constitution, in general, and the Equal Protection Clause, in particular (and countless other constitutional provisions) are needed because governments will impose, or will attempt to impose, unfair and unjust burdens. Rarely do governments openly state an intention of unfairness or inequity.

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or anti-singling out. Certainly, the Takings Clause may be consistent with the *Armstrong* Principles, e.g., equality, or fairness and justice. The umbrella principles, however, protect far, far more than government taking possession or title of property without paying compensation. They protect much more than the Takings Clause requires.

The Court and commentators muddle Takings Clause jurisprudence because they do not have an appropriate guide to the Takings Clause. It may be, as noted by a number of scholars,<sup>256</sup> that the Due Process Clause, particularly the substantive due process part, will guide the Court in determining when “in all fairness and justice” “the public as a whole” should bear “public burden[s]” which the government has “forc[ed] some people alone to bear.”<sup>257</sup> Similarly, the Equal Protection Clause may address the singling out referred to in one version of the *Armstrong* principle.<sup>258</sup> The *Armstrong* principles, however, create a false Takings Clause.

The misconstruction of *Armstrong* follows a path similar to the *Agins* fairness path. Courts and commentators looked inappropriately to the existence of a public purpose as a test for determining whether property had been taken. The Court in *Lingle* rejected that approach. Subsequently, at best one scholar has noted that the *Armstrong* fairness and justice test may effectively revive the *Agins* test. The two tests indeed take similar paths looking for red herring. *Agins* looks to the purpose of the law; *Armstrong*, or at least some versions of *Armstrong*, looks to the fairness of the law.

As noted in *Lingle*, proof that a law serves no public purpose has no relevance to whether the law takes property in any possible sense of the word. Similarly, unfair and unjust laws do not necessarily take property. Laws that single out a single property owner do not necessarily take property. For example, consider a law that requires people with beachfront homes to paint their homes white. A government might have great difficulty dreaming up a public purpose for requiring white beach front homes, and a court could easily find that the law singles out beach front home owners. That said, the owner of a blue, 5,000 square foot, ocean-front home will have some difficulty in demonstrating a taking of property, under any theory of taking (investment backed expectation in painting the house white?; valuation of zero?).

Consider another law related to beachfront homes. Suppose the government condemns all white beachfront homes *and* pays full, complete,

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256. See Krotoszynski, *supra* note 217, at 713. See also 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, 349 (2005-2006); Dreher, *supra* note 124, at 402.

257. See Laura S. Underkuffler, *Property as Constitutional Myth: Utilities and Dangers*, 92 CORNELL L. REV. 1239, 1246 n.42. Professor Underkuffler describes the *Armstrong* principle as “[t]he most famous invocation of justice in takings cases.” *Id.*

258. See Davidson, *supra* note 9, at 52.

and just compensation. The government cannot be accused, under the Takings Clause, of treating the white house people unfairly. By Takings Clause definition, when the government pays for taken property, the government has acted “fairly and justly.” The people whose property has been taken have no claim that society has asked them to shoulder a burden that should be borne by all, because society paid just compensation.

*Armstrong* red herrings confuse the issue: whether or not the government has taken property. None of the *Armstrong* red herring principles leads to an understanding of that portion of the Takings Clause. They use gobbledy-gook and obfuscatory words, words unrelated to the only issues in a regulatory takings case: whether the plaintiff has property that the government has taken. In a regulatory takings case, the government has not paid the plaintiff (presumably a property owner) just compensation (or likely any compensation), and the plaintiff claims entitlement to compensation. The question that the *Armstrong* red herring principles fail to ask is whether the landowner’s private property has been taken. Fairness, justice, reciprocity, and equality have no relevance to answering the two questions that must be answered.

#### APPROPRIATE PRINCIPLES: A PLURALISTIC APPROACH TO FINDING PRINCIPLES

As noted, *Armstrong* accurately states that the Takings Clause is consistent with an ideal or principle that one member of society should not bear a burden that should be borne by society as a whole. *Armstrong* and its progeny fail, in part, because they equate broad principles (which are consistent with the Takings Clause) with the purpose or purposes of the Takings Clause. The principle and the clause have consistency with one another, but that alone should not justify use of a principle. For example, the Takings Clause is also consistent with the principles: (1) that the government should not destroy any private right without payment of compensation; (2) that majoritarian government must be kept in check; or (3) that the inherent rights of individuals cannot be destroyed by the government without express constitutional permission. Making any of these consistent principles into umbrella purposes and then using that purpose to determine the validity of a regulatory takings claim would continue the Court’s muddling.

Inherently, *Armstrong* fails, in part, because it tries to accomplish too much. As with so many principles and purposes inferred from the Constitution’s text, the *Armstrong* principle uses a singularity approach rather than a pluralistic approach. The Takings Clause, for example, consists of a marriage of principles and an effort to create a singular principle necessarily fails. The search for a “principled” Takings Clause should recognize the pluralism.



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This section seeks to provide better, or at least narrower, principles—principles better used in conjunction rather than separately and distinctly. The correct principles of the Takings Clause could include:

- 1) Property pre-exists government;
- 2) Property pre-exists our government(s);
- 3) People pre-exist government;
- 4) Property has a meaning that pre-exists the Constitution;
- 5) Property and rights therein supersede government power;
- 6) Government power supersedes property and rights therein;
- 7) Even the most important of public uses of property, e.g., constructing a military base, does not justify taking of property without express permission of the Constitution;
- 8) Even the most important of public uses of property do not justify using private property without express constitutional permission;
- 9) Government may not *take* private property without recognition of the right to property;
- 10) Government may not *use* private property without recognition of the right to property.

Others could easily disagree with these principles. Still others may rephrase them. They derive, however, from the following reasoning.

The Constitution contains no definition of property. No other words in the Constitution suggest a meaning to the word, in the way some words suggests definitions of other words. For example, referring to legislative, executive, and judicial powers, the Constitution suggests a distinction between those powers and arguably suggests that added together, those three powers encompass all the sovereign powers. While the reference to “life, liberty, and property” suggests distinct meaning, the series of references does not really suggest some sense of meaning in the way that the reference to judicial, executive, and legislative “power” suggests at least some interrelationship. Property contains no similar relationship context.

The Constitution, more to the point of this Article, the Takings Clause, presumes the preexistence<sup>259</sup> of something it refers to as “property.” The Constitution does not purport to create property. The Preamble “ordain[s] and establish[es] this Constitution.” The Preamble, by its terms, suggests that the document known as “the Constitution” “creates” the Constitution, or at least documents the creation of the Constitution.<sup>260</sup> Article I clearly *creates* “a Congress.” Article II clearly *creates* the office of the “President.”<sup>261</sup> Contradistinctively, no words of the Constitution, in any sense, create property. The Constitution uses the word “property.” The Constitution certainly did not invent the word “property.” The word “property” predates the Constitution. The meaning of the word “property” predates the Constitution. Without the Constitution, property, particularly private property, *exists* and would exist. No grant or privilege or law of the United States creates “property.” “Property” does not owe its existence to the government any more than human beings (people) owe their physical existence or their rights to the government.<sup>262</sup> This Pre-Existence Principle provides part of the foundation to the Takings Clause.

The principle of pre-existence of “property” leads to the second Takings Clause principle, one regarding government power. From the power to wage war to the power to regulate commerce, these powers, which often require government use of property, cannot be exercised through taking property unless the government pays compensation. To suggest a specific example, the Constitution expressly authorizes the creation of post roads and post offices. In order to create post offices and post roads, the United States government needs land, needs to use land. Inasmuch as it did not have land for post roads or post offices at the founding, it would be required to acquire that land. Notwithstanding the very specific power

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259. Similarly, the Declaration of Independence presumes the pre-existence of “justice” (“administration of justice;” “native justice;” and “the voice of justice”); the right to engage in “trade” (“cutting off our trade in all parts of the world”); and, of course, “liberty” and “unalienable rights” (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”). The Articles of Confederation presume the pre-existence of “property” (“prevent removal of property imported” and “property of the United States”).

260. See U.S. CONST. art. I (“legislative Powers . . . shall be vested in a Congress . . . .”) Obviously, a prior Congress existed. See, e.g., Declaration of Independence and Articles of Confederation.

261. See U.S. CONST. art. II (“executive Power shall be vested in a President”).

262. In determining a principle behind the Takings Clause, reference to the Due Process Clause confirms part of this principle. The latter prohibits the government from depriving any person of property without due process. This could mean that the government has inherent power to deprive a person of property. Using that assumption, the Due Process Clause has one purpose of limiting government power and another purpose of declaring property (as well as life and liberty) to be specifically protected against government power. Alternatively, the Due Process Clause grants the government permission to deprive a person of property, a power that would not exist without the Due Process Clause, and, in the same “constitutional breath,” the Clause limits its grant of power to deprive, by requiring due process. For the purposes of this Article, either approach supports the principle that the Due Process Clause demonstrates that property creates a limit to government power.

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to acquire land, the Constitution declared that such acquisition power should be subject to, perhaps subservient to, private property, prohibiting taking without payment of just compensation. This discussion leads to another foundational principle: private property expressly limits government power.

Perhaps this search for appropriate principles has its own flaws. As this Article searched, however, it created a map for the reader to review and critique. This guide for finding (or perhaps creating) Takings Clause principles is inherently superior to the *Armstrong* Principle, because this guide will exist. The creator of the *Armstrong* Principle, Justice Black, provided no map, no explanation, simply a declaration of principle; a declaration inherently personal, because of a lack of explanation. As with so many who assert principles, Black did little more than suggest the principle. He noted a relationship between the Takings Clause and fairness and justice. The existence of a relationship between a principle and a clause or phrase of the constitutional text does not make the principle necessary to that phrase or clause, nor does a relationship demonstrate that the clause or phrase would flow from that principle, except, perhaps by relationship. Advocates of principles need to provide explanation for the creation of the principle, something this author has attempted to do.

## LESSONS LEARNED

In *Penn Central*, the Court revived the idea of regulatory takings. Looking back to *Pennsylvania Coal*, it suggested that Holmes' "too far" test provided too little guidance and invented the ad hoc factual inquiry test. The Court has exacerbated the problems inherent in such a test, by using inappropriate principles to guide its ad hoc factual inquiries. The Court has chased its tail by using the Too Far Principle to assist in its ad hoc factual inquiry, an inquiry the Court created to determine when a regulation has gone too far. This demonstrates one potential flaw with efforts to "neutral" principles, at least where the Court (or others) use a provision of the Constitution to create the principle and then use the principle as an interpretive tool of that self-same clause. Under this approach, the principle purpose of the speed limit is to keep drivers from driving at unsafe speeds. Using that principle to understand the speed limit, tickets should be given when drivers drive at unsafe speeds, not merely when they drive over, or even if they drive under, the speed limit.

## CONCLUSION

Justice Black argued that using principles instead of the language of the text may “make the Court ‘a continuously functioning constitutional convention.’”<sup>263</sup> Perhaps Justice Black would find that the Takings Clause jurisprudential mess<sup>264</sup> arises from using principles rather than text. Instead, the “mess” may arise from the circular approach to using principles. Alternatively, the mess may arise from using overly broad principles or from using principles that do not address the real concerns of a particular clause. The problem with principles is not that the Court uses them, but that the Court sometimes uses the wrong principles. Takings Clause principles should address the relationship between government and property, not government and people.

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263. Thomas, *supra* note 238, at 1501 (citing *Katz*, 389 U.S. at 373 (Black, J., dissenting)).

264. See D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 471 n.1 (2004) (citing James E. Krier, *The Takings-Puzzle Puzzle*, 38 WM. & MARY L. REV. 1143, 1143 (1997)); Peterson, *supra* note 23, at 56; Rose, *supra* note 15, at 563; William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995).