

## TAKING REGULATORY TAKINGS PERSONALLY: THE PERILS OF (MIS)REASONING BY ANALOGY

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In a troublesome area of the law, it is hard for a legal academic to resist the temptation to attempt to "enlighten" the judiciary. It has not been the author's practice to date, in ruminating on the profound puzzle of regulatory takings,<sup>1</sup> to instruct judges concerning the errors of their ways.<sup>2</sup> Because only an insider can be truly familiar with the nuances of a specific legal challenge and owing to a deep respect for the judicial craft, this writer has resisted the urge to preach. It has been a sufficiently provocative challenge to interpret the meanings and implications of decisions such as *Nollan v. California Coastal Commission*,<sup>3</sup> *First English Evangelical Lutheran Church v. County of Los Angeles*,<sup>4</sup> *Keystone Bituminous Coal Association v. DeBenedictis*,<sup>5</sup> *Lucas v. South Carolina Coastal Council*,<sup>6</sup> *Yee v. City of Escondido*<sup>7</sup> and *Dolan v. City of Tigard*.<sup>8</sup> However, given that

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1. Professor Rose has aptly labeled regulatory takings law a "muddle." See Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

2. See, e.g., Michael Allan Wolf, *Euclid at Threescore Years and Ten: Is This the Twilight of Environmental and Land-Use Regulation?*, 30 U. RICH. L. REV. 961 (1996); Michael Allan Wolf, *Fruits of the "Impenetrable Jungle": Navigating the Boundary Between Land-Use Planning and Environmental Law*, 50 J. URB. & CONTEMP. L. 5 (1996); Michael Allan Wolf, *Takings Term II: New Tools for Attacking and Defending Environmental and Land-Use Regulation*, 13 N. ILL. U. L. REV. 469 (1993).

3. 483 U.S. 825 (1987).

4. 482 U.S. 304 (1987).

5. 480 U.S. 470 (1987).

6. 505 U.S. 1003 (1992).

7. 503 U.S. 519 (1992).

our invitation on this occasion comes from members of the judiciary, it seems suitable, even obligatory, to wax pedantic and professorial over shortcomings in the Supreme Court's recent application of regulatory takings principles in disputes concerning personal property and private funds.

The special focus of this Article is on the unfortunate decision of four Justices in *Eastern Enterprises v. Apfel*<sup>9</sup> to apply the balancing test from *Penn Central Transportation Co. v. New York City*<sup>10</sup> and, for only the fourth time in two decades,<sup>11</sup> invalidate government action using that test. Yet the ultimate impact of the decision to apply real property takings law to alleged government confiscations of items of personal property and of money—as evidenced by cases such as *Phillips v. Washington Legal Foundation*<sup>12</sup> and by post-*Eastern Enterprises* challenges to retroactive environmental schemes such as the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”)<sup>13</sup>—could stray quite far from the area of employee benefit plans.<sup>14</sup>

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8. 512 U.S. 374 (1994).

9. 524 U.S. 498 (1998).

10. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978).

11. See *Babbitt v. Youpee*, 519 U.S. 234, 243 (1997); *Hodel v. Irving*, 481 U.S. 704, 713-14 (1987); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-64 (1980); cf. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1010-12 (1984) (recognizing the possibility of a taking under limited circumstances and using *Penn Central* test); *Kaiser Aetna v. United States*, 444 U.S. 164, 174-75 (1979) (citing, but not relying on, the *Penn Central* test in its finding that compensation for taking would be required).

12. 524 U.S. 156 (1998) (holding that interest earned on funds deposited in accounts related to the Texas Interest on Lawyers Trust Account (“IOLTA”) program is private property of the owner of deposited funds).

13. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1994 & Supp. III 1997); see *United States v. Olin Corp.*, 107 F.3d 1506, 1515 (11th Cir. 1997) (“[W]e find clear congressional intent favoring retroactive application of CERCLA's cleanup liability provisions.”). As of this writing, four federal district courts have turned back CERCLA challenges based on the *Eastern Enterprises* plurality's critical view of retroactivity. See *Franklin County Convention Facilities Auth. v. American Premier Underwriters, Inc.*, 61 F. Supp. 2d 740 (S.D. Ohio 1999); *Combined Properties/Greenbriar Ltd. Partnership v. Morrow*, 58 F. Supp. 2d 675 (E.D. Va. 1999); *United States v. Alcan Aluminum Corp.*, 49 F. Supp. 2d 96 (N.D.N.Y. 1999); *United States v. Vertac Chem. Corp.*, 33 F. Supp. 2d 769, 784-85 (E.D. Ark. 1998).

14. See *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998) (finding by a plurality that a federal statute effected an unconstitutional taking by requiring a former coal operator to provide, retroactively, health benefits for retired miners).

This Article includes four parts: (1) a defense of the real property/personal property distinction for a post-deconstructionist legal world,<sup>15</sup> (2) a review of difficulties common law courts have encountered when applying real property concepts to disputes over money and personalty,<sup>16</sup> (3) an exploration of the "rhetorical mismatch" typified by Justice Sandra Day O'Connor's opinion in *Eastern Enterprises*,<sup>17</sup> and (4) a respectful request for judges to resist the temptation to collapse categories and instead to maintain, or even erect, meaningful distinctions.<sup>18</sup>

### A. Distinctions that Matter

During the 1970s, while law and economics wove its spell among many legal scholars on the right, the critical legal studies ("CLS") movement captured the attention of many leftists in the legal academy.<sup>19</sup> Undoubtedly, legal historians one day will debate whether Karl Llewellyn<sup>20</sup> or Jacques Derrida<sup>21</sup> is the true

15. See *infra* text accompanying notes 19-46.

16. See *infra* text accompanying notes 47-75.

17. See *infra* text accompanying notes 76-110.

18. See *infra* text accompanying notes 111-19.

19. See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987):

Critical Legal Studies is not infrequently paired in observers' minds with Law and Economics, in part because both became prominent as academic movements at the elite law schools in the middle and late 1970s, in part because each represented an attack on the dominant law school stance. . . . Moreover, Law and Economics was frequently thought to represent not just a new *method* of thinking about legal issues but a *substantive* attack from the right on the consensus views of the propriety of mildly liberal political policy, while CLS was often seen as the attack from the left on these same policies.

*Id.* at 114.

20. See, e.g., WILLIAM W. FISCHER III ET AL., AMERICAN LEGAL REALISM 49 (William W. Fischer III et al. eds., 1993) ("Announcing 'Legal Realism' as the new movement in law properly fell to one of the Young Turks; and Llewellyn, who was later acknowledged the chief Realist, was as well-situated for the task as any."); see also Allan C. Hutchinson, *Introduction to CRITICAL LEGAL STUDIES* 6 (Allan C. Hutchinson ed., 1989) (footnote omitted) ("Is CLS realism rewarmed or realism rejected? It is both and neither."); KELMAN, *supra* note 19, at 12 ("CLS has often been seen as the latest attempt at deconstructive Realist critique, and it is plausible to view its emphasis on the indeterminacy of case results and the manipulability of precedent as a continuation of the Realist project.")

21. See, e.g., Jason E. Whitehead, *From Criticism to Critique: Preserving the Radical Potential of Critical Legal Studies Through a Reexamination of Frankfurt*

ideological godfather of the movement: It is undeniable that CLS adherents, like the former, are not shy about pointing out the political agendas of judicial lawmakers and, like the latter, explore multiple meanings hidden in ostensibly objective legal texts.<sup>22</sup> When viewed through the lenses of neo-legal realism and deconstruction, many age-old, common-law distinctions are suspect. Differences that had meaning to earlier generations of scholars and jurists—such as the distinction between public and private<sup>23</sup>—have been exposed as outcome-determinative devices designed to shield hidden biases and prejudices.<sup>24</sup>

Consider, for example, Duncan Kennedy's take on the issue:

[T]he edifice of categories is a social construction, carried on over centuries, which makes it possible to know much more than we could know if we had to reinvent our own abstractions in each generation. It is therefore a priceless acquisition. On the other hand, all such schemes are lies. They cabin and distort our immediate experience, and they do so systematically rather than ran-

*School Critical Theory*, 26 FLA. ST. U. L. REV. 701 (1999).

[T]he postmodern school explores legal indeterminacy and ideology to illustrate the failure of all totalizing rational thought and to show that no objectively correct legal or political results are possible. It draws its support from the theories of the decentered postmodern subject offered by Michel Foucault, Jacques Lacan, Jean-Francois Lyotard, Jacques Derrida, and others. This strand of CLS has been in vogue since at least the mid-1980s and is clearly on the rise.

*Id.* at 708 (footnotes omitted).

22. Hutchinson, *supra* note 20, at 4.

(The main target of CLS has been the crucial distinction between law and politics or, to be more precise, the alleged contrast between the open ideological nature of political debate and the bounded objectivity of legal reasoning. CLS rejects this axiomatic premise of traditional lawyering. . . . Beneath the patina of legalistic jargon, law and judicial decisionmaking are neither separate nor separable from disputes about the kind of world we want to live in. Legal reasoning consists of an endless and contradictory process of making, refining, reworking, collapsing, and rejecting doctrinal categories and distinctions. Doctrinal patterns can never be objectively justified and consist of a haphazard cluster of ad hoc and fragile compromises; legal doctrine is a small and unrepresentative sample of conflictual problems and their contingent solution. . . .).

23. See, e.g., Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PENN. L. REV. 1423 (1982); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PENN. L. REV. 1349 (1982).

24. For a recent example of a legal scholar skillfully exploding an historical legal distinction, in this case between city and suburb, see GERALD FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT WALLS* 97-99 (1999).

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The very existence of historically legitimated doctrinal categories gives the law student, the teacher, and the practitioner a false sense of the orderliness of legal thought, of our practices, and of our reasons for those practices. But the particular schemes adopted convey more particular falsehoods. . . . The segregation of real property law from the rest of contract and tort law tells us that both limitations on contractual freedom and instances of strict liability with respect to land are a historical anomaly. The distinction between public and private law replicates the hidden message of tort versus contract: that the state stands outside civil society and is not implicated in the hierarchical outcomes of private interaction.<sup>25</sup>

According to this view, lawyers and judges are all trapped in this categorical paradigm, for our attention is focused on including new situations in old categories, rather than on exploring and perhaps exploding the categories' meanings.

To Kennedy's colleague Morton Horwitz, the shift from categorical to balancing approaches typifies Twentieth-Century American jurisprudence:

Nineteenth-century legal thought was overwhelmingly dominated by categorical thinking—by clear, distinct, bright-line classifications of legal phenomena. Late-nineteenth-century legal reasoning brought categorical modes of thought to their highest fulfillment.

By contrast, in the twentieth century, the dominant conception of the arrangement of legal phenomena has been that of a continuum between contradictory policies or doctrines. Contemporary thinkers typically have been engaged in balancing conflicting policies and "drawing lines" somewhere between them. Nineteenth-century categorizing typically sought to demonstrate "differences of kind" among legal classifications; twentieth-century balancing tests deal only with "differences of degree."<sup>26</sup>

*Eastern Enterprises* is an extension, even an expansion, of the balancing that typifies so many regulatory takings challenges. Justice Oliver Wendell Holmes employed this judicial strategy in 1922's *Pennsylvania Coal Co. v. Mahon*,<sup>27</sup> and it received re-

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25. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, in *CRITICAL LEGAL STUDIES* 139, 142 (Alan C. Hutchinson ed., 1989).

26. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 17 (1992).

27. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("The general

newed strength fifty-six years later in Justice William Brennan's opinion in *Penn Central*.<sup>28</sup>

While the *Penn Central* multi-factor test contributed a new catch phrase to takings jargon—"interfere[nce] with distinct investment-backed expectations"<sup>29</sup>—the emphasis on property values was offset by the recognition that, at times, government "interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."<sup>30</sup> In fact, this two-part test (or, based on more recent Court opinions, three-part test<sup>31</sup>) combines the competing emphases offered in *Mahon* by Justice Holmes ("while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"<sup>32</sup>) and his displeased, dissenting, Progressive colleague Justice Louis D. Brandeis ("restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking"<sup>33</sup>).

It is not difficult to discern why the plaintiffs in *Eastern Enterprises*<sup>34</sup> and *United States v. Winstar Corp.*<sup>35</sup> invoked the

rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Contrast this approach with that taken in *Mugler v. Kansas*, 123 U.S. 623 (1887), a prototypical nineteenth-century, categorical case:

[T]he present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.

*Mugler*, 123 U.S. at 668-69.

See also HORWITZ, *supra* note 26, at 28-29 (discussing *Mugler*).

28. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978). The test is set out *infra*, at the text accompanying notes 83-86.

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

30. *Id.*

31. See *infra* notes 83-85 and accompanying text.

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

33. *Id.* at 417 (Brandeis, J., dissenting). I have noted elsewhere that the tension between these Progressive allies has remained in regulatory takings jurisprudence. See Wolf, *Takings Term II*, *supra* note 2, at 498-500 nn.160-66, 499 (Table II).

34. *Eastern Enters. v. Apfel*, 524 U.S. 498, 517 (1998) (asserting that "the Coal Act, either on its face or as applied, violates substantive due process and constitutes a taking of its property in violation of the Fifth Amendment").

35. 518 U.S. 839 (1996). The plaintiffs alleged in the trial court "that the exclusion under FIRREA [Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified as amended in scattered sections of

protections of the Takings Clause in their struggle against the federal government. In recent years, a majority of Justices—led by Justice Antonin Scalia in *Nollan*<sup>36</sup> and Chief Justice William Rehnquist in *Dolan*<sup>37</sup>—has identified its own distinction, this one between the minimal judicial scrutiny available in typical substantive due process and equal protection challenges<sup>38</sup> and the subtly heightened judicial role<sup>39</sup> (perhaps accompanied by burden shifts to the private side<sup>40</sup>) deemed appropriate in regulatory takings cases.<sup>41</sup>

While mindful of the critical legal scholars' admonitions concerning the employment of categories and distinctions, I still believe that the *Eastern Enterprises* plurality's failure to recognize genuine differences between real property takings and other alleged governmental confiscations cries out for correction. First, items of personalty, fungible goods and money typically do not share the important physical, economic, ecological, psychological and philosophical aspects of land—raw and developed.<sup>42</sup> Collec-

12 U.S.C., 18 U.S.C., and 31 U.S.C.)] of at least some of plaintiffs' supervisory goodwill is in violation of the parties' agreement, and constitutes a breach of contract and, in the alternative, a taking of plaintiffs' contract rights." *Winstar Corp. v. United States*, 21 Cl. Ct. 112, 114 (1990).

36. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

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

38. See, e.g., *Minnesota v. Clover Leaf Dairy Co.*, 449 U.S. 456, 466 (1981) (stating that "the Equal Protection Clause is satisfied by our conclusion that the Minnesota Legislature could rationally have decided that its ban on plastic nonreturnable milk jugs might foster greater use of environmentally desirable alternatives"); *Williamson v. Lee Optical Inc.*, 348 U.S. 483, 488 (1955) (noting that "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought").

39. See *Nollan*, 483 U.S. at 834 n.3 ("[O]ur opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different.").

40. See *Dolan*, 512 U.S. at 391 n.8 ("[T]he city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city.").

41. For a fuller discussion of this shift in scrutiny, see, e.g., Wolf, *Fruits of the "Impenetrable Jungle," supra* note 2, at 14-20.

42. The notion that land is unique is shared by observers from throughout the ideological spectrum. For example, Chief Judge Loren Smith, one of the most articulate and prominent defenders of private property rights, talks of

functional characteristics that make land ownership and its regulation a

tively, if not individually, these unique attributes of realty *on occasion* justify differential legal treatment. Second, the *Eastern Enterprises* holding comes on the heel of a bit of "re-categorization" by some of the private property guardians on the Court. The best example of this recent trend is, of course, Justice Scalia's identification of the total deprivation "category" in *Lucas*.<sup>43</sup> While the future might reveal this to be the genesis of a return to Nineteenth-Century modes of legal reasoning, we should view this development in a more synthetic fashion. Perhaps Twenty-First-Century jurisprudence—benefiting as it will from the revelations of critical scholars concerning the malleability of language, politics and theory—will be typified by the push-

unique problem. First, the law considers each parcel of land unique. Unlike money, or most personal property, it is not fungible. Its location can never be exactly duplicated, and each location has a unique value. Second, the owner of land rarely has the same degree of liquidity as the owner of personal property such as stocks, bonds, gold, or the like. If someone does something I object to near my land, I generally have to deal with that action, rather than shift my assets. Third, people have deep emotional attachments to land that they rarely have towards the other common types of wealth. Fourth, a piece of land is part of a community, always connected to other land, and existing in a matrix of roads, rivers, and the whole of civilized society.

Loren A. Smith, *The Morality of Regulation*, 22 WM. & MARY ENVTL. L. & POL'Y REV. 507, 518 (1998).

Defenders of environmental regulations, too, talk of land's special qualities. See, e.g., Joan L. McGregor, *Property Rights and Environmental Protection: Is This Land Made for You and Me?*, 31 ARIZ. ST. L. J. 391 (1999):

Once we recognize that our community extends to the future, that we are temporary users of the land and that others will use this land after us, it makes sense to talk about our responsibility to care for the land for their sake. Since land has this unique characteristic, it naturally follows that there are restrictions on it that are different from the restrictions on other kinds of property. If it can be established that land and natural resources are different from other kinds of property and that there are special obligations to future generations, then property will need to be reinterpreted within these constraints. There is nothing surprising about reinterpretations of property since attitudes about property and our conception of property are changing all the time.

*Id.* at 393.

Not all agree on this point, however. See, e.g., Robert J. Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law*, 25 B.C. ENVTL. AFF. L. REV. 347 (1998). "The belief that land is a unique type of property which mandates its unique treatment is anything but settled." *Id.* at 404 n.318 (citing Fred P. Bosselman, *Land as a Privileged Form of Property*, in TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN AND LUCAS* 29, 42 (David L. Callies ed., 1996)).

43. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).



pull of categories and balancing. Certainly the tension between modes of resolution that are categorical (such as the physical occupation and total takings situations encountered in *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>44</sup> and *Lucas*<sup>45</sup>) and noncategorical (such as the ad hoc, balancing test employed in *Penn Central*<sup>46</sup>) pervades current regulatory takings law.

### B. (Mis)Reasoning by Analogy

In the Anglo-American legal system, compensation for the affirmative taking of personal property by a sovereign is at least as old as Article 28 of the Magna Carta, which forbade Crown officials from taking "corn or other chattels of any man without immediate payment, unless the seller voluntarily consent[ed] to postponement of payment."<sup>47</sup> American courts have long applied eminent domain law to a wide range of property other than realty, including laundry trade routes<sup>48</sup> and a National Football League franchise.<sup>49</sup> This in itself is not problematic. What is troublesome, particularly in the regulatory takings context, is that courts have exported outcome-determinative tests and formulas developed in the real property context to inappropriate settings.

This phenomenon is not new in American property law, as evidenced by the conceptually awkward history of joint tenancy bank accounts and adverse possession of personal property. In both of these areas, as in other realms of private and public law, courts, when faced with a legal challenge that tests the limits of the legal status quo, have attempted to resolve such cases of first impression by employing the familiar device of reasoning by analogy.<sup>50</sup> Unfortunately, owing primarily to important differ-

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44. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) ("Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred.").

45. See *Lucas*, 505 U.S. at 1015 ("The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.").

46. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978).

47. MAGNA CARTA art. 28, translated in A.E. DICK HOWARD, MAGNA CARTA TEXT AND COMMENTARY 33-52 (1964).

48. See *Kimball Laundry v. United States*, 338 U.S. 1 (1949).

49. See *City of Oakland v. Oakland Raiders*, 646 P.2d 835 (Cal. 1982).

50. See, e.g., KENNETH J. VANDEVELDE, THINKING LIKE A LAWYER: AN INTRODUC-

ences between real and personal property, the analogy fails, and later courts, sometimes with legislative assistance or encouragement, have had to repair the damage by developing a new mode of analysis more suited to goods and money. This Article offers two examples to illustrate the point.

Joint tenancy with right of survivorship is one of the many elements of English real property law that made its way across the Atlantic.<sup>51</sup> Planted in New World soil, the concept took root in a variety of contexts, the most common of which is bank accounts.<sup>52</sup> Rather than relying solely on a modification of personal property law regarding gifts,<sup>53</sup> courts invoked the name and structure of joint tenancy in an effort to satisfy the desires of depositors interested in the seamless passage of money to the survivor between or among co-owners.<sup>54</sup> It soon became apparent, however, that the fungible nature of money and the ease with which one party could deplete the jointly held account to the detriment of co-owners<sup>55</sup> presented a dramatic contrast

TION TO LEGAL REASONING 86 (1996) ("The second form of reasoning through which lawyers apply law to facts is reasoning by analogy."); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 62-100 (1996) ("Analogical Reasoning").

51. See, e.g., II AMERICAN LAW ON PROPERTY § 6.1 (1952) (British origins of joint tenancy); 7 POWELL ON REAL PROPERTY ¶ 615[1] (1999) (British origins of joint tenancy); ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 5.3 (2d ed. 1993).

52. See, e.g., CUNNINGHAM ET AL., *supra* note 51, § 5.3, at 193-94 n.4. ("By the terms of the bank's signature card or its savings account book or certificate of deposit, the account is described as 'joint' or the co-creditors are described as 'joint tenants.'"); see also N. William Hines, *Personal Property Joint Tenancies: More Law, Fact, and Fancy*, 54 MINN. L. REV. 509 (1970):

The difficulty the courts have had with joint accounts can be traced primarily to the insistence on forcing an essentially novel ownership arrangement into the mold of an existing set of legal principles. The joint account is fundamentally neither a common law joint tenancy, an ordinary inter vivos gift, a trust nor a will, yet it partakes of the features of all of these.

53. Cf. RAY A. BROWN, BROWN ON PERSONAL PROPERTY § 8.3 (3d ed. 1975) ("Gifts of shares of stock, savings bank accounts, and life insurance contracts. . . .").

54. See, e.g., CUNNINGHAM ET AL., *supra* note 52, § 5.3, at 193-94. The right of survivorship is an incident of joint tenancy ownership by which "the last surviving joint tenant [becomes] the sole owner of the entire estate in severalty." *Id.* at 193. The rationale is that, when only one joint tenant remains alive, "his original interest in the entire estate [is] left as the only interest. . . ." *Id.* at 194.

55. See, e.g., *Lieberman v. Silverstein*, 393 So. 2d 565 (Fla. Dist. Ct. App. 1981) (involving a father who withdrew all of the funds from a joint savings accounts that he had set up with his daughter); *Kleinberg v. Heller*, 345 N.E.2d 592 (N.Y. 1976) (involving a niece who withdrew excess funds from a joint savings account set up by her elderly aunt).

with the real property situation, in which each party has the legal right to occupy the entire parcel.<sup>56</sup>

New York courts and legislators have been wrestling with the legacy of this misplaced analogy for decades, as illustrated by the following excerpt from a 1967 New York case, *In re Estate of Kramer*.<sup>57</sup>

Perhaps in no other area of the law governing distribution of a decedent's property has so much confusion arisen as in respect of the rules to apply to a joint bank account when one depositor has withdrawn funds without the consent of the other. . . . Some of the difficulty may be traced to the statutory conclusive presumption in the case of joint savings accounts (which was repealed by L.1964, ch. 157) and the unwillingness of the courts to apply that presumption to funds that had been withdrawn from the account during the lifetime of both depositors.<sup>58</sup>

The court identifies the culprit in the paragraph that follows:

Perhaps some of the difficulty also flows from the attempt to apply to such joint owners the same principles of law that govern joint tenants of realty. Differences in the form of the property create practical problems in relation to the one that could not conceivably arise in the other. . . . [I]t is often stated as an established rule that one who withdraws more than his moiety is liable to the other for the excess over his one-half share. Yet it is just as firmly established that the surviving depositor may recover from the estate of the deceased depositor the entire amount withdrawn from the joint account if he elects to hold the withdrawal as unauthorized.<sup>59</sup>

Given this judicial and legislative tinkering, particularly with laws designed to protect depository institutions from potential liability stemming from "excess" withdrawals,<sup>60</sup> the joint

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56. See CUNNINGHAM ET AL., *supra* note 52, § 5.3, at 194 (stating that joint tenants have "equal rights of possession and enjoyment").

57. 282 N.Y.S.2d 911 (N.Y. Surr. Ct. 1967).

58. *In re Estate of Kramer*, 282 N.Y.S.2d at 914 (citations omitted).

59. *Id.* at 915 (citations omitted); see also *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 349 (1998) (using "one Moiety" to mean "half"); *Moore v. Glotzbach*, 188 F. Supp. 267, 268 (E.D. Va. 1960) ("At common law spouses were considered as one person. They could not hold the estate by *moieties* as joint tenants or tenants in common—both were seized of the entirety. . . .") (emphasis added).

60. See, e.g., N.Y. [BANKING] LAW § 675 (McKinney 1999).

tenancy bank account now bears little resemblance to its older, real-property cousin. It probably would have been better for depositors, their lawyers, judges and lawmakers if the analogy had never taken hold.

The same can be said for another example of judicial "borrowing" from real property principles—adverse possession of personal property. The concept is deceptively simple (which probably explains its initial popularity): If one can acquire ownership of land and attachments by demonstrating actual, continuous, open and exclusive use for a period in excess of the statute of limitations for ejectment or actions for possession of real property,<sup>61</sup> why not allow the same relief for one who holds the personal property belonging to an equally neglectful owner?

The early history of adverse possession of personal property in America is tainted significantly, as the concept arose frequently in the context of slaveholders seeking to recover their human "property."<sup>62</sup> Today, the concept remains problematic, chiefly because it has been employed by possessors of stolen items of artistic, historical, and cultural significance.<sup>63</sup> As in the area of joint tenancy bank accounts, the pattern has been widespread acceptance of the analogy to real property and use of real property formulas and principles in the personal property context, followed by serious questioning and, ultimately, development of significant judicial and legislative modifications that reflect the meaningful distinctions between realty and personalty.

One late Twentieth-Century case that typifies the final

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61. See, e.g., CUNNINGHAM ET AL., *supra* note 52, § 11.7, at 808.

62. See, e.g., *Henderson v. First Nat'l Bank*, 494 S.W.2d 452 (Ark. 1973).

There is no dispute but that title to personal property can be acquired by adverse possession, nor is it disputed that the applicable statute of limitations is three years, i.e., adverse possession for more than that period of time would vest title in the adverse possessor. Only one Arkansas case on this point, involving a slave, was cited by the parties, but our research has resulted in revealing four cases relating to this question. All of these cases occurred prior to the Civil War and three of them also involved the ownership of slaves.

*Henderson*, 494 S.W.2d at 459.

63. See, e.g., *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, 917 F.2d 278 (7th Cir. 1990) (finding that the statute of limitations for replevin had not run against a church whose sixth-century mosaics in northern Cyprus had been stolen).

phase of this process is *O'Keeffe v. Snyder*.<sup>64</sup> The New Jersey Supreme Court found itself in a conceptual minefield in its attempt to determine the ownership of three paintings by the artist Georgia O'Keeffe.<sup>65</sup> Compounding the difficulty, this attempt took place after thirty-four years and at least two other "possessors" after the paintings allegedly were stolen. In its holding, the majority rejected the notion of adverse possession of chattels and adopted the discovery rule from tort law, making a clean break from the past.<sup>66</sup> The following excerpts reveal how the differences between realty and personalty cried out for differential treatment.

First, the court reviews the prevailing rule: "To establish title by adverse possession to chattels, the rule of law has been that the possession must be hostile, actual, visible, exclusive, and continuous."<sup>67</sup> Second, the court highlights difficulties encountered in applying that rule:

[T]here is an inherent problem with many kinds of personal property that will raise questions whether their possession has been open, visible, and notorious. In *Lesnevich [Joseph v. Lesnevich]*, 153 A.2d 349 (N.J. Super. Ct. App. Div. 1959), the court strained to conclude that in holding bonds as collateral, a credit company satisfied the requirement of open, visible, and notorious possession.<sup>68</sup>

Third, the opinion reviews some of the meaningful differences between realty and personalty:

Other problems with the requirement of visible, open, and notorious possession readily come to mind. For example, if jewelry is stolen from a municipality in one county in New Jersey, it is unlikely that the owner would learn that someone is openly wearing that jewelry in another county or even in the same municipality. Open and visible possession of personal property, such as

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64. 416 A.2d 862 (N.J. 1980).

65. See *O'Keeffe*, 416 A.2d at 867.

66. See *id.* at 872-73; see also W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 30, at 166-68 (5th ed. 1984) (stating that, by applying the discovery rule, "the statute [of limitations is tolled] until the plaintiff has in fact discovered that he has suffered injury, or by the exercise of reasonable diligence should have discovered it").

67. *O'Keeffe*, 416 A.2d at 870.

68. *Id.* at 871.

jewelry, may not be sufficient to put the original owner on actual or constructive notice of the identity of the possessor.

The problem is even more acute with works of art. Like many kinds of personal property, works of art are readily moved and easily concealed. O'Keeffe argues that nothing short of public display should be sufficient to alert the true owner and start the statute running.<sup>69</sup>

Fourth, the court introduces and justifies the new approach:

We are persuaded that the introduction of equitable considerations through the discovery rule provides a more satisfactory response than the doctrine of adverse possession. The discovery rule shifts the emphasis from the conduct of the possessor to the conduct of the owner. The focus of the inquiry will no longer be whether the possessor has met the tests of adverse possession, but whether the owner has acted with due diligence in pursuing his or her personal property.

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The discovery rule will fulfill the purposes of a statute of limitations and accord greater protection to the innocent owner of personal property whose goods are lost or stolen. Accordingly, we overrule *Redmond v. New Jersey Historical Society*, [28 A.2d 189 (N.J. 1942)], and *Joseph v. Lesnevich*, [153 A.2d 349 (N.J. Super. Ct. App. Div. 1959)], to the extent that they hold that the doctrine of adverse possession applies to chattels.<sup>70</sup>

Finally, the court leaves intact adverse possession as applied to realty:

The considerations are different with real estate, and there is no reason to disturb the application of the doctrine of adverse possession to real estate. Real estate is fixed and cannot be moved or concealed. The owner of real property knows or should know where his property is located and reasonably can be expected to be aware of open, notorious, visible, hostile, continuous acts of possession on it.<sup>71</sup>

*O'Keeffe* is by no means the only decision or authority that questions the real property approach to adverse possession of personalty.<sup>72</sup> Other examples of such tinkering include introducing the

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69. *Id.*

70. *Id.* at 872-73.

71. *Id.* at 873.

72. See, e.g., *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, 917

"demand and refusal" requirement<sup>73</sup> and questioning the practice of allowing adverse possessors to "tack" their period of possession onto the time of prior possessors.<sup>74</sup> Once again, as with joint tenancy bank accounts, the decision to collapse property categories into one analytical box has proven unworkable.<sup>75</sup>

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F.2d 278, 288-89 (7th Cir. 1990) (using a rule of discovery to resolve ownership of stolen mosaics); see also R.H. Helmholz, *Wrongful Possession of Chattels: Hornbook Law and Case Law*, 80 NW. U. L. REV. 1221 (1985-86).

73. See, e.g., *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1161 (2d Cir. 1982) (noting that "[u]nder New York law an innocent purchaser of stolen goods becomes a wrongdoer only after refusing the owner's demand for their return. Until the refusal the purchaser is considered to be in lawful possession."); see also Steven A. Bibas, Note, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2444-46 (1994).

74. Professor Ames's discussion of tacking in adverse possession involving personalty, though controversial, remains the classic text on the topic. See J. B. Ames, *The Disseisin of Chattels II*, 3 HARV. L. REV. 313, 322-26 (1890); see also Patty Gerstenblith, *The Adverse Possession of Personal Property*, 37 BUFF. L. REV. 119 (1988-89):

The ability of a possessor to add his or her time of possession to that of a prior possessor so that the total comprises the time period required for the running of the statute of limitations is known as "tacking" and is applied in the doctrine of adverse possession of real property. Its analogous application to the adverse possession of personal property has been largely accepted by the courts, although it has also been the topic of some scholarly debate.

Although tacking is almost universally accepted for adverse possession of real property, this has not been the case for personal property.

*Id.* at 145-46 (footnote omitted).

75. The pattern of (mis)reasoning by analogy described here haunts American commercial law as well, particularly in the area of commercial leasing. See Amelia H. Boss, *The History of Article 2A: A Lesson for Practitioner and Scholar Alike*, 39 ALA. L. REV. 575 (1988):

The law governing leases of personal property never achieved the sophistication characteristic of the law of realty leases. Personal property leases or "chattel" leases were relegated to the relatively obscure and ancient law of bailments, which in turn encompassed such divergent transactions as the pledge, the entrusting of goods to a carrier or a warehouse, gratuitous loans of chattels, and chattel leases. Although some forms of bailments eventually spun off into distinct transactions governed by separate bodies of law, personal property or chattel leases remained subject to the general law of bailments, complete with its Roman origins. Because of the limited precedential value of bailment law, courts were forced to resort to the common law of contracts, to analogize to the real property leasing rules, or to apply the rules of the Uniform Commercial Code (both those rules applicable to sales and those applicable to secured transactions), either outright or by analogy. The result of this *ad hoc* approach was far more than a lack of uniformity from state to state; the result was an inability to accurately predict the outcome of any particular leasing issue.

*Id.* at 578-79 (footnotes omitted) (emphasis added).

### C. Eastern Enterprises as Another Mismatch

Faced with an apparent confiscation of Eastern's funds by an Act of Congress,<sup>76</sup> four Justices of the Supreme Court turned to the Fifth Amendment's Takings Clause<sup>77</sup> to resolve the issue. Justice O'Connor's discussion begins with the acknowledgment that "[t]his case does not present the 'classic taking' in which the government directly appropriates private property for its own use"<sup>78</sup> and with the important qualification that "takings problems are more commonly presented when 'the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and goods of economic life to promote the common good.'"<sup>79</sup> It would have been better for the course of regulatory takings law if she and her colleagues had heeded these warning signs and proceeded down a different path.

While the plurality opinion cites a wide variety of takings cases,<sup>80</sup> Justice O'Connor relies primarily on the "ad hoc" factors derived from *Penn Central*<sup>81</sup> and filtered through the Court's opinion in *Kaiser Aetna*.<sup>82</sup> The following is an edited version of the original *Penn Central* formula that highlights the factual and conceptual distinctions between the cases cited by the *Penn Central* Court and a regulatory takings case involving

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See also William R. Theiss, *Security Aspects of Equipment Leasing*, 1962 U. ILL. L.F. 77. "A personal property lease is a legal misfit. The relationship of lessor and lessee is a real property concept producing legal consequences peculiarly inappropriate to problems involving personal property." *Id.* at 77.

76. See Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), 26 U.S.C. §§ 9701-9722 (1994 & Supp. III 1997), discussed in *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998).

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

78. *Eastern Enters.*, 524 U.S. at 522.

79. *Id.* (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (citation omitted)).

80. See, e.g., *Eastern Enters.*, 524 U.S. at 521-22 (citing *Babbitt v. Youpee*, 519 U.S. 234, 243-45 (1997); *id.* at 522 (citing *Penn Cent.*, 438 U.S. at 124); *id.* at 530 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982)); *Hodel v. Irving*, 481 U.S. 704, 716-18 (1987).

81. See *Penn Cent.*, 438 U.S. at 123-24.

82. See *Kaiser Aetna v. United States*, 444 U.S. 164, 174-75 (1979) (using a variation of the *Penn Central* test).



## funds or fungible goods:

The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] 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," *Armstrong v. United States*, 364 U.S. 40, 49 (1960) [(finding a taking when the *federal government took title* to boats on which plaintiffs had material liens)], this Court, quite simply, has been unable to develop any "set formula" for determining 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. See *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962) [(finding no taking when town regulated dredging and pit excavation on *real property*)]. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958) [(holding that a War Production Board order closing *gold mines* did not effect a taking)]; see *United States v. Caltex, Inc.*, 344 U.S. 149, 156 (1952) [(finding no taking in the army's destruction of *water-front terminal facilities* to prevent property from falling into enemy hands)].

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant<sup>83</sup> and, particularly, the extent to which the regulation has interfered with distinct<sup>84</sup> investment-backed expectations<sup>85</sup>

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83. This is the first factor, according to the *Eastern Enterprises* plurality. See *Eastern Enters.*, 524 U.S. at 523 ("We have identified several factors, however, that have particular significance: 'the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action.'").

84. The *Kaiser Aetna* Court says "reasonable," not "distinct." See *Kaiser Aetna*, 444 U.S. at 175. The plurality follows its lead.

85. Although this appears to be subsumed under the first factor, the plurality identifies this as the second factor, see *supra* note 83, evidently because of the way that the test was presented in *Kaiser Aetna*. See *Kaiser Aetna*, 444 U.S. at 175 (stating that there are several factors to consider when determining whether there is a regulatory taking: "the economic impact of the regulation, its interference with

are, of course, relevant considerations. See *Goldblatt v. Hempstead, supra*, 396 U.S. at 594 [(*real property* case already cited)]. So, too, is the character of the governmental action [(although, according to *Penn Central*, this appears to be the second factor, it is identified as the third by the plurality)]. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, see, e.g., *United States v. Causby*, 328 U.S. 256 (1946) [(finding that military flights over the *plaintiff's home and chicken farm* effected a taking)], than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.<sup>86</sup>

To apply the *Penn Central* test mechanically outside the real property "comfort zone" is a fundamentally flawed strategy. First, in a regulatory takings case involving real property, "economic impact" is measured, not by dollar value lost in the abstract, but by comparing the value of the property before and after regulation, considering the "parcel as a whole."<sup>87</sup> It is a dramatically different matter, however, when, as in *Eastern Enterprises*, fungible funds are the subject of the alleged taking. No comparison is warranted, and the result is that the Justices are quite impressed with the plaintiff's significant monetary loss.<sup>88</sup>

The "second"<sup>89</sup> factor, interference with investment-backed expectations, is equally problematic in the non-realty context. In the typical regulatory takings case, this language, particularly the adjective "investment-backed," serves as a warning to landowners and developers that they will not be allowed to bootstrap themselves into a taking by increasing the value of the realty despite, or in anticipation of, an otherwise valid regulation. When the subject matter of the alleged taking is money, howev-

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reasonable investment backed expectations, and the character of the governmental action. . . .").

86. *Penn Cent.*, 438 U.S. at 123-24.

87. *Id.* at 130-31 ("In deciding whether a particular governmental action has effected a taking, this Court focuses . . . both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. . . .").

88. See *Eastern Enters.*, 524 U.S. at 529 (stating that the plaintiff's loss would be "on the order of \$50 to \$100 million.>").

89. See *supra* notes 83-85 and accompanying text.

er, the "investment-backed" notion is typically irrelevant.<sup>90</sup> This leaves the *Eastern Enterprises* plurality free to invoke the muddled law of retroactivity<sup>91</sup> in order to explain the word "expectations."

Finally, Justice O'Connor uses the phrase "quite unusual" to characterize "the nature of the governmental action."<sup>92</sup> This short appraisal is in sharp contrast to the analysis called for by the original language from *Penn Central* that she quotes later in the opinion.<sup>93</sup> Indeed, a government-compelled, physical occupation—while easy to imagine for real property and some items of personal property—is almost an absurd notion when the subject is money.

Compounding the misreasoning by analogy problem is the fact that the *Penn Central* test is not the only regulatory takings formula that is an uncomfortable fit outside the real property context. The following quotations are distilled from regulatory takings cases decided by the United States Supreme Court over the past seven decades. Consider the dramatically different meanings evoked by the various italicized phrases when a dispute involves realty and discrete items of personalty, as opposed

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90. There may be a meaningful difference here between fungible goods and money. For example, consider a speculator in pharmaceuticals who purchased thousands of fenfluramine and dexfenfluramine pills (when the two drugs are taken together they are known as fen-phen). The purchase was made with the hope that, given the national obsession with weight-loss, the pharmaceuticals would increase in value significantly before they were sold. When the Food and Drug Administration ("FDA"), in September 1997, asked manufacturers of the two drugs to withdraw their products from the market voluntarily, this would have had a devastating effect on our speculator. See *FDA Announces Withdrawal Fenfluramine and Dexfenfluramine (Fen-Phen)* (visited Nov. 16, 1999) <<http://www.fda.gov/cder/news/phen/fenphenpr81597.htm>>. One might argue that this was an interference with investment-backed expectations, especially if the speculator could not find any buyers for the fen-phen. However, the public-nuisance-like motivation for the government's withdrawal decision would probably ultimately doom any regulatory takings challenge. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992) (noting, in a case involving regulation of land use, that "[a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership").

91. See *Eastern Enters.*, 524 U.S. at 536.

92. *Id.* at 501.

93. See *id.* at 522 (contrasting "physical invasion[s]" with "public program[s] adjusting the benefits and burdens of economic life") (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

to fungible goods and money:

Government hardly could go on if to some extent values *incident to property* could not be diminished without paying for every such change in the general law.<sup>94</sup>

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It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it *deprives the property of its most beneficial use* does not render it unconstitutional.<sup>95</sup>

\* \* \*

The regulations challenged here do not compel the surrender of the artifacts, and there is *no physical invasion or restraint upon them*. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the *destruction of one "strand" of the bundle is not a taking*, because the aggregate must be viewed in its entirety.<sup>96</sup>

\* \* \*

In this case, we hold that the "*right to exclude*," so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an *actual physical invasion* of the privately owned marina.<sup>97</sup>

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The application of a general zoning law *to particular property* effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner *economically viable use of his land*.<sup>98</sup>

94. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (emphasis added).

95. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962) (emphasis added).

96. *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (emphasis added).

97. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (emphasis added) (footnote omitted).

98. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (emphasis added) (cita-

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[W]e have long considered a *physical intrusion by government* to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a *permanent physical occupation*, a taking has occurred.<sup>99</sup>

\* \* \*

With respect to a trade secret, the *right to exclude others* is central to the very definition of the property interest.<sup>100</sup>

\* \* \*

[I]n practical terms, the support estate has value only insofar as it protects or enhances the value of the estate with which it is associated. *Its value is merely a part of the entire bundle of rights* possessed by the owner of either the coal or the surface. Because petitioners retain the right to mine virtually all of the coal in their mineral estates, the burden the Act places on the support estate does not constitute a taking.<sup>101</sup>

\* \* \*

[T]he regulation here amounts to *virtually the abrogation of the right to pass on a certain type of property*—the small undivided interest—to one's heirs. In one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times.<sup>102</sup>

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These cases reflect the fact that “temporary” takings which, as here, *deny a landowner all use of his property*, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.<sup>103</sup>

\* \* \*

We think a “*permanent physical occupation*” has occurred, for

tions omitted).

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

100. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984) (emphasis added).

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

102. *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (emphasis added).

103. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987) (emphasis added).

purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.<sup>104</sup>

\* \* \*

The Escondido rent control ordinance, even considered against the backdrop of California's Mobilehome Residency Law, does not authorize an *unwanted physical occupation of petitioners' property*. It is a regulation of petitioners' *use* of their property, and thus does not amount to a *per se* taking.<sup>105</sup>

\* \* \*

Where the State seeks to sustain regulation that *deprives land of all economically beneficial use*, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the *proscribed use interests were not part of his title* to begin with.<sup>106</sup>

Cases such as *Eastern Enterprises*, *Webb's Fabulous Pharmacies Inc. v. Beckwith*<sup>107</sup> and *Phillips v. Washington Legal Foundation*.<sup>108</sup> indicate that, when it comes to challenging allegedly confiscatory governmental practices, several Justices are at ease with collapsing categories and distinctions. This commentator believes that in doing so, the Court is following a regrettable pattern that troubles the joint tenancy and adverse possession fields. While the immediate goal might be tempting (allowing litigants to receive the heightened scrutiny and burden shifts provided by *Nollan* and *Dolan*), ultimately the Court will find itself enmeshed in a conceptual morass similar to that confronted by common-law courts, as represented by the decisions in

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104. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832 (1987) (emphasis added).

105. *Yee v. City of Escondido*, 503 U.S. 519, 532 (1992) (emphasis added).

106. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) (emphasis added).

107. 449 U.S. 155 (1980) (holding that a county's statutory claim to interest accrued on court interpleader funds effected a taking).

108. 524 U.S. 156 (1998) (holding that, under Texas law, interest accrued on funds deposited in IOLTA accounts is the private property of the owner of the funds).

*Kramer*<sup>109</sup> and *O'Keefe*.<sup>110</sup>

#### D. A Humble Invitation

The Supreme Court Justices have three advantages over the jurists in *Kramer* and *O'Keefe*. First, although Fifth Amendment, regulatory takings law is at least seventy-seven years old (if we identify *Mahon* as the parent), there is a manageable number of problematic (and hence correctable) cases involving the collapse of categories described in this Article. In other words, the problem identified in this Article has not, to borrow from Justice Holmes, "gone too far."

Second, there are at least two historically relevant and conceptually sound protections already available for parties caught in a confiscatory bind similar to that in *Eastern Enterprises*. Judges should remember the warning shot fired by the Justices in *Nectow v. City of Cambridge*,<sup>111</sup> a case decided merely two years after the Court, in *Euclid v. Ambler Realty Co.*,<sup>112</sup> provided constitutional protection for zoning in theory. In *Nectow*, the Court determined that the zoning as applied to the complainant amounted to an arbitrary, irrational and confiscatory abuse of the police power, thus depriving the landowner of property without due process.<sup>113</sup> Over the past two decades,

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109. *In re Estate of Kramer*, 282 N.Y.S.2d 911 (Sur. Ct. 1967).

110. *O'Keefe v. Snyder*, 416 A.2d 862 (N.J. 1980).

111. 277 U.S. 183 (1928).

112. 272 U.S. 365 (1926).

113. *See Nectow v. City of Cambridge*, 277 U.S. 183 (1928):

The attack upon the ordinance is that, as specifically applied to plaintiff in error, it deprived him of his property without due process of law in contravention of the Fourteenth Amendment.

\* \* \*

The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. Here, the express finding of the master . . . is that the health, safety, convenience and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question. . . . That the invasion of the property of plaintiff in error was serious and highly injurious is clearly established; and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be

we have seen increasing use of "rational basis with bite"<sup>114</sup> in equal protection cases such as *Town of Cleburne v. Cleburne Living Center*,<sup>115</sup> and in substantive due process cases.<sup>116</sup> Given this increased judicial oversight, there would appear to be no genuine need to increase the level of scrutiny in recognition of any fundamental right to own or use property. Judicial enforcement of the Contracts Clause<sup>117</sup> against offending governmental agencies can also provide the necessary protection for businesses caught in the tangle of misguided and confiscatory restrictions.<sup>118</sup>

sustained.

*Nectow*, 277 U.S. at 185, 188-89. (citation omitted).

114. See, e.g., Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 684 n.45 (1995) (noting that "Professor Gerald Gunther coined the phrase rationality review with 'bite' in an article reviewing the Court's 1971 Term") (citing Gerald Gunther, *Newer Equal Protection*, 86 HARV. L. REV. 1, 20-48 (1972)).

115. 473 U.S. 432, 449-50 (1985).

The question is whether it is rational to treat the mentally retarded differently. . . . At least this record does not clarify how . . . the characteristics of the intended occupants of the Featherston home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes.

116. See, e.g., *Walz v. Town of Smithtown*, 46 F.3d 162 (2d Cir.), cert. denied, 515 U.S. 1131 (1995) (involving homeowners who successfully argued that the denial of a street excavation permit to connect homes to a public water system was a substantive due process violation); *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 601 (3d Cir.), cert. denied, 516 U.S. 937 (1995) (holding that a landowner

states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached. Where the plaintiff so alleges, the plaintiff has, as a matter of law, impliedly established possession of a property interest worthy of substantive due process protection.)

(footnote omitted). For a case involving arbitrary and discriminatory local land-use regulation that should have been decided in favor of the developer on substantive due process grounds, see *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999) (holding that it was proper to submit questions regarding a regulatory taking to the jury; trial judge had decided a substantive due process claim in favor of city). The author is currently at work on an article proposing an alternative to "standardless" substantive due process of land-use and environmental regulation.

117. U.S. CONST. art. I, § 10, cl. 1. ("No state shall . . . pass any . . . law impairing the Obligation of Contracts, or grant any Title of Nobility.")

118. While the Contracts Clause does not have the same clout it did during the laissez-faire excesses of the late Nineteenth-Century, as Professors Nowak and Rotunda have noted, "speculation of the contract clause's complete demise, however, proved premature." JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 412 (5th ed. 1995); see *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).



Third, we must remember that, unlike the state law of real and personal property, federal constitutional law is, absent constitutional amendment, under the nearly exclusive control of the Justices. The Court therefore need not worry about their rulings being neutralized by legislation passed at the behest of interest groups that are displeased with judicial efforts to bring sense where confusion now reigns (such as the bankers and advocates of owners of stolen art who have clamored for legislative change in joint tenancy and adverse possession law.)<sup>119</sup>

So far, in cases such as *Eastern Enterprises* and *Phillips*, the Court has taken a few tentative steps down a road fraught with unnecessary confusion and tortured logic. If the goal is correcting costly and irrational government overreaching at the expense of private businesses, there are alternatives that are equally effective at chilling such misbehavior without the attendant jurisprudential muddle. This author respectfully invites the Justices to reconsider their (mis)reasoning by analogy to real property regulatory takings law. It is time to recognize that, at times, we need to hold in check the twentieth-century tendency to attack and collapse the distinctions and categories we have inherited as part of our common-law legacy. At this relatively early stage in the development of personal property regulatory takings jurisprudence, the Justices can make (or, rather, restore) a difference that matters.

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119. See, e.g., *supra* note 60; Bibas, *supra* note 73, at 2460 ("Congress should clean up the muddled state of the law by adopting a bright-line rule."); Stephanie Cuba, Note, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art*, 17 CARDOZO ARTS & ENT. L.J. 447, 450 (1999) ("This Note advocates that Congress suspend the statute of limitations for plaintiffs suing to reclaim possession of artwork that was looted by the Nazis.").

