THE SUPREME COURT'S REGULATORY TAKINGS DOCTRINE AND THE PERILS OF COMMON LAW CONSTITUTIONALISM

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I. INTRODUCTION

My objective in this lecture is to take seriously the observation that constitutional law in the United States, as expounded by its Supreme Court, bears far more resemblance to common law than to textual interpretation. We live under a written Constitution. But the main body of that Constitution, including the first ten amendments we call the Bill of Rights, is very old, having been adopted nearly 230 years ago. As time marches on, judicial interpretations of this venerable text have piled up. Constitutional disputes today are almost always resolved by the courts applying this growing body of precedent.[1] Constitutional law consists of interpretations of interpretations, and the norms that govern this process are largely those which govern the system of *stare decisis*, or following precedent. Constitutional theorists may engage in ever-more arcane disputes about whether the Constitution must be interpreted in accordance with its original intent or meaning, and if so, what this means. In the meantime, constitutional law—as practiced by the courts—continues to evolve in the fashion of a common law system.

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1. *See generally* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010). The observation is not new. *See* Glenn A. Phelps & John B. Gates, *The Myth of Jurisprudence: Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan*, 31 SANTA CLARA L. REV. 567, 596 (1991).

I will not discourse at large on this phenomenon but will examine one narrow but important body of constitutional law, which has come to be called regulatory takings law. This body of doctrine emerged in the twentieth century, but is built on an understanding that solidified in the late nineteenth. That understanding posits that there are two distinct ways in which the government can interfere with private property rights. One is called the police power; the other power of eminent domain. A critical difference between these two powers, which also was clarified in the nineteenth century, is that if the government is proceeding under the police power, it has no obligation to compensate owners for any loss in the value of their property.[2] In contrast, if the government is exercising the power of eminent domain, it must provide the owner just compensation for the value of the property taken.[3] Given this enormous disparity in consequences—zero compensation under the first power, fair compensation under the second—it became inevitable that the courts had to develop a doctrine for determining the line of division or boundary between the two powers. This doctrine has come to be called the regulatory takings doctrine. It asks when a government regulation, which the government claims is an exercise of the police power, has such a severe impact on a property owner that it is properly characterized as an exercise of the power of eminent domain, and hence requires that the government compensate the owner for the loss.

I doubt that any expert on regulatory takings would quarrel with the observation that the case law explicating this doctrine bears a strong resemblance to common law. Although there have been episodic pleas to consider the original understanding of the Takings Clause in this context,[4] they have largely fallen on deaf judicial ears. The most illuminating exchange occurred in *Lucas v. South Carolina Coastal Council* when Justice Blackmun, in dissent, accused Justice Scalia, writing for the majority, of ignoring the original understanding of the Takings Clause.[5] Justice Scalia, who was often identified as a strong proponent of originalism, responded that his approach was consistent with the "historical compact" associated with the Clause, by which he evidently meant, based on his citations, Supreme Court cases decided in last half of the twentieth century.[6] So even the staunchest judicial proponent of

2. Mugler v. Kansas, 123 U.S. 623, 668 (1887).
3. Monongahela Navigation Co. v. United States, 148 U.S. 312, 345 (1893).
4. *E.g.,* Murr v. Wisconsin, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting).
5. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1060 (1992) (Blackmun, J., dissenting).
6. *Id.* at 1028.

originalism engaged in common law constitutionalism, at least insofar as the regulatory takings doctrine is concerned.

Although confining the inquiry to regulatory takings law narrows the field of inquiry quite a bit, there are still a large number of decisions and issues to deal with. Consequently, I will reduce the inquiry even further, and concentrate on decisions that consider whether the economic loss or diminution in value suffered by the claimant warrants a finding that the regulation is a taking. This yields a significant but more manageable set of decisions.

In considering this reduced set of precedents, I will ask two questions. First, there are multiple models of what it means to develop legal doctrine in a common law fashion. I will ask which of these models best characterizes the way the Supreme Court has proceeded in fixing the relevance of diminution in value in regulatory takings jurisprudence. Second, common law decision making is often characterized as being path-dependent.[7] The initial decision sets courts down a particular path, and once precedent starts piling up, it becomes increasingly difficult to switch to a different path. This raises the question whether the decisional law dealing with diminution in value, as it has evolved, makes sense in determining the boundary between the police power and eminent domain, when we step back and consider paths not taken.

II. MODELS OF COMMON LAW CONSTITUTIONALISM

What exactly does it mean to say that a body of jurisprudence is a form of common law? At a minimum, it means two things. One is that the source of authority for any particular decision is primarily prior judicial decisions. Second, it means prior judicial decisions must generally be left undisturbed. Prior decisions must be allowed to stand (this is what *stare decisis* means—stand by things decided), unless there are very strong reasons for overruling them. The standard the Court has settled on is that it must follow its own precedent unless there is a "special justification" for overruling it. Recent empirical work indicates that the Court overrules only three to four percent of its decisions.[8]

If we take these two criteria as defining the range of common law decision making, then virtually all U.S. constitutional law must be classified as common law. As David Strauss has written:

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7. Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 622 (2001).

8. *See* Lee Epstein, William M. Landes & Adam Liptak, *The Decision to Depart (or Not) from Constitutional Precedent: An Empirical Study of the Roberts Court*, 90 N.Y.U. L. REV. 1115, 1159 (2015).

Pick up a Supreme Court opinion in a constitutional case, at random. Look at how the justices justify the result they reach. Here is a prediction: the text of the Constitution will play, at most, a ceremonial role. Most of the real work will be done by the Court's analysis of its previous decisions. The opinion may begin with a quotation from the text. "The Fourth Amendment provides…," the opinion might say. Then, having been dutifully acknowledged, the text bows out. The next line will begin with "We"—meaning the Supreme Court—"have interpreted the Amendment to require…." And there will follow a detailed, careful account of the Court's precedents.[9]

This characterization fully and accurately describes what we generally find in regulatory takings decisions.

Yet if U.S. constitutional law is a species of common law, this raises a further question. What exactly do we mean by common law in this context? At a minimum, as I have already suggested, it means that previous judicial decisions are the primary authority for subsequent decisions, and previous judicial decisions are rarely overruled. But within the space created by these defining criteria, there is significant room for variation. Our first task then is to identify some possible models of common law as applied to constitutional decision making. We can then ask which of these models has been adopted by the Supreme Court, at least in the context of considering the significance of diminution in value for regulatory takings purposes.

In order to reduce the potential variables to manageable proportions, it is necessary, once again, to simplify. I will consider three possible models, which I will call the Blackstonian model, the integrity model, and the Scrabble Board model.

The Blackstonian model is the one set forth by William Blackstone in his famous *Commentaries on the Laws of England*. There he wrote that the common law is derived from general customs of the realm which have been followed from time immemorial.[10] Under this model, the ultimate touchstone for the common law is custom. Previous judicial decisions must be followed because they are assumed to comport with custom; insofar as previous decisions do not conform to custom, they have no authority.[11]

The Blackstonian model of common law translates into a highly restrained conception of the judicial function. The judge, Blackstone

9. STRAUSS, *supra* note 1, at 31.
10. 1 WILLIAM BLACKSTONE, COMMENTARIES *67.
11. *Id.* at *68.

wrote, is "sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one."[12] The only exception, he wrote, is if the common law on a given subject is "manifestly absurd or unjust."[13] In such a circumstance, the judge will not declare that the common law is *bad* law; rather he will find that judges have *mistaken* the law; the prior precedent has erroneously determined "the established custom of the realm."[14] For Blackstone, in other words, the custom of the realm, which is the source of the common law, is assumed to have an objective existence independent of and binding on the judges who expound it. Judges themselves have no agency to "make law" through application of the common law method.

How might this translate to common law constitutionalism? Such law might be characterized as a gloss on the Constitution that replicates practices or conventions associated with particular provisions of the Constitution that have become settled over time. As the Court said in a recent decision, a customary meaning of the Constitution, if undisputed for many years, would be entitled "'to great regard in determining the true construction' of the constitutional provision."[15]

The Blackstonian model is not very receptive to change, but it does not rule it out. Change cannot occur because judges conclude that established practices and conventions are undesirable. It can occur only if practices and conventions change, to the point where the common law is no longer in sync with practices and conventions. If that happens, then the judge is warranted in declaring existing precedent mistaken, and adopting a new rule that conforms to present state of practice and convention.

A second model of the common law I call the integrity model. This is based on Ronald Dworkin's theory of law as integrity. Dworkin illustrated his theory with the metaphor of a chain novel, which seems particularly apt in considering the potential models of the common law.[16] A chain novel is one in which a group of authors get together and agree collectively to write a novel, with one author writing the first chapter, a second author the second chapter, a third author the third chapter, and so on until the last author writes the concluding chapter. The objective is to produce a novel that readers will think has been written by a single author. Thus, the first author

12. *Id.* at *69.
13. *Id.* at *70.
14. *Id.*
15. NLRB v. Canning, 134 S. Ct. 2550, 2573 (2014) (quoting The Pocket Veto Case, 279 U.S. 690 (1929).
16. RONALD DWORKIN, LAW'S EMPIRE 228–38 (1986).

will establish the setting and some of the characters, the second author is free to add new characters or plot lines but cannot ignore the elements set forth in the first chapter, and so forth. The material in the early chapters clearly constrains later authors. Still, each author exercises a degree of discretion in developing the themes, what happens to each character, and how the book ultimately ends.

At a more conceptual level, Dworkin characterized his theory of law in terms of two variables: fit and justification.[17] With respect to the common law, the requirement of *fit* means that each judge must rule in such a way as to take into account what all previous courts (at the same or higher level in the judicial hierarchy) have decided.[18] The decision need not replicate every detail of every precedent, but a decision will be "flawed if it leaves unexplained some major structural aspect" of prior decisions.[19] The requirement of *justification* means that the judge must adopt a theory that explains prior decisions and generates a result in the present case that is the "best, all things considered."[20] For Dworkin, "the best" meant a principle based on "political morality."

Dworkin was a bit unusual in that he believed that there is one right answer to questions of political morality. Most people today are less confident that questions of political morality have a single right answer; at least, they are likely to be somewhat skeptical that judges have the right answer to such questions.

Still, one can interpret Dworkin's theory in a way that imposes a significant degree of constraint on common law decision-making. The theory can be reformulated as stipulating that common law decisions must satisfy the requirement of fit, that is, they must explain all "major structural aspects" of past decisions.[21] And they must be principled, in the sense that they articulate some decisional rule that both accounts for the prior decisions and provides a foundation for ruling in the present and foreseeable future cases. This might be a principle of political morality, but it could also be a principle grounded in efficiency concerns or other considerations of social welfare. So understood, the requirement of principle is equivalent to the demand (often directed at lawyers just starting out) that one must articulate a "theory of the case," meaning an integrating idea that accounts for all major precedents and provides a rule of decision that supports the desired outcome in the immediate controversy.

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17. *Id.* at 239.
18. *Id.* at 228.
19. *Id.* at 230.
20. *Id.* at 231.
21. *Id.* at 230.

However it is cashed out, Dworkin's model of integrity implies a more creative role for the judge than the Blackstonian model. In Blackstone's view, the common law judge is forbidden to depart from settled practices and conventions. Under Dworkin's model, as long as the judge accounts for nearly all prior decisions, and articulates a principle that explains those decisions and provides a justification for reaching the outcome of the present controversy, the judge is free to make the law "the best" it can be. This opens up a much wider range of possibilities, including, potentially, outcomes that defy settled practices and conventions.

A third model is one offered by Justice Scalia in his Tanner Lectures at Princeton.[22] There he suggested that the common law is like a game of Scrabble.[23] As he put it, "[n]o rule of decision previously announced [can] be *erased*, but qualifications [can] be *added* to it."[24] The Scrabble Board model is similar to the other models of the common law in that the judge is constrained by what has been decided in the past. In particular, the judge cannot erase the blocks of letters that have been previously laid on the board. And it shares with Dworkin's model the understanding that the common law judge, once the constraint of fidelity to past decisions is satisfied, exercises a significant degree of discretion. In particular, the judge in a new round of play is free to link up new chains of letters to those previously laid down on the board.

Where the Scrabble Board model differs from the integrity model is in its understanding of how the judge exercises the discretion that remains once the requirement of adhering to prior decisions is satisfied. Dworkin envisions judges as being constrained by a requirement of engaging in principled decision-making. In contrast, the objective of the players in a Scrabble game, to put it bluntly, is to score the most points. This is clearly what Justice Scalia sought to convey by his metaphor. Subject to the constraint against overruling, he regarded the common law judge as one who seeks to resolve cases so as to maximize his or her personal policy preferences. Moreover, the judge's policy preferences need not conform to any overarching principle that brings coherence to the full range of decisions over time. The preferences may simply reflect the judge's desire to achieve certain outcomes that are more congenial to the judge.

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22. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997) [hereinafter Scalia, *Common-Law Courts*].

23. *Id.* at 8.

24. *Id.*

Scalia's image of the common law as a game of Scrabble thus presents a picture of the judge as an aggressive manipulator seeking to advance his or her policy preferences within the constraints of the rules of the common law game. The judge may not disturb previous moves by other judges already on the board. But otherwise the judge is expected to try to score as many points as possible by introducing new qualifications or branches that take off from what has been previously laid down. In other words, the judge, if he or she can garner the requisite support from other like-minded judges, is expected to adopt amendments to what has been decided in the past in an effort to advance his or her policy agenda.

III. THE DIMINUTION IN VALUE DECISIONS

I now turn now to the Supreme Court's decisions dealing with the relevance of diminution in value in resolving regulatory takings cases. These decisions, collectively, clearly conform to the minimal definition of constitutional common law. That is to say, the source of authority discussed in the decisions is almost exclusively prior Supreme Court decisions, and the Court has never expressly overruled any prior decision.[25] My first interest is in asking which of the three models of common law outlined above—the Blackstonian, integrity, and Scrabble Board models—conforms most closely to the mode of decision making we find in the Court's cases.

It will probably come as no surprise that the model that does the least work is the Blackstonian conception of common law. It is not completely absent, however. And I will note some cases where a Blackstonian perspective would have had a significant bearing on the outcome if it had been more forthrightly considered.

As to whether the cases fall more comfortably into the integrity model or the Scrabble Board model, the process of characterization is inevitably somewhat subjective. Readers who agree with a decision are apt to say it rests on the integrity model; those who disagree may say it is the product of personal policy preferences; conceivably it may be some of both. Nevertheless, I will do my best to offer defensible judgments, based on four considerations.

One factor I rely on is whether the author of the majority opinion endorses a result at odds with the author's more general voting pattern in takings cases. When the majority opinion reaches an

25. In *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), the Court disapproved a dictum that had been repeated in several earlier cases—namely that a regulation that fails to "substantially advance" a legitimate state interest will be regarded as a taking. But the Court had never adopted this notion as the *ratio decidendi* in any decision, so it was not necessary to disclaim any previous holdings. *Id.* at 540.

outcome that seems to run counter to the author's preferences, that seems to be a clear sign that something other than Scrabble Board precedentialism is at work. This is admittedly a weak factor, however, since it is entirely possible for the author of the majority opinion to write an opinion in the integrity mode that also conforms to the author's policy preferences.

A second factor goes back to fit—does the majority opinion ignore key precedents or re-characterize them in novel ways in order to support the result? Lapses in fit point toward the Scrabble Board.

A third factor is my assessment of whether the author of the principal opinion gives well-reasoned responses to objections raised by the dissent or the losing party. Well-reasoned responses point toward integrity; plunging ahead in the face of unrefuted objections suggests the Justice is playing Scrabble.

Finally, I consider whether the outcome in the case conforms to settled practice; in other words, could the decision be justified under a Blackstonian conception of the common law? I elevate this possibility to a signpost of integrity because conforming to the settled practice vindicates the expectations of the parties and their lawyers, which is always at least one reason (if not necessarily a decisive one) for reaching a particular a decision.

A. Pennsylvania Coal v. Mahon

The Takings Clause, of course, does not mention diminution in value. The phrase entered into takings jurisprudence in 1922 with *Pennsylvania Coal v. Mahon*–-the decision conventionally identified as having launched the regulatory takings doctrine.[26] The question was whether a Pennsylvania statute that required coal companies to leave pillars of coal in place to prevent subsidence of the surface above the mine was a taking of the companies' property.[27] Over the lone dissent of Justice Brandeis, the Court concluded that such a statute, if it was to be constitutional, required the exercise of eminent domain.[28]

Writing for the Court, Justice Oliver Wendell Holmes, Jr. disclaimed any "general propositions" defining the line between the police power and the power of eminent domain.[29] The distinction between these powers was a "question of degree."[30] The most widely

26. Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922). *See, e.g.,* Murr v. Wisconsin, 137 S. Ct. 1933, 1942 (2017).

27. *Pa. Coal Co.*, 260 U.S. at 394–95.

28. *Id.* at 416.

29. *Id.*

30. *Id.*

quoted line in the opinion is the following: "The general 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."[31] Many subsequent decisions and commentators have quoted the "goes too far" line, suggesting that regulatory takings controversies have an intuitive or I-know-it-when-I-see-it quality.

But *Penn Coal* was not all about intuition. While seemingly disclaiming general theory, Justice Holmes nevertheless identified several "fact[s] for consideration" in determining whether the line between the police power and eminent domain has been crossed.[32] The most important one, at least this is my reading, was that the Pennsylvania statute admittedly "destroy[ed] previously existing rights of property and contract."[33] Pennsylvania law allowed surface owners to disclaim the common law right of surface support from subterranean mining.[34] The Mahons' predecessor in title had done just this. In the context of the case, therefore, the Pennsylvania statute had the effect of reversing a waiver of rights to which the Mahons (or their predecessor) had expressly consented. To Justice Holmes and his colleagues, this undoubtedly looked like a government-mandated transfer of an established property right without compensation. Hence the need to proceed by eminent domain.

Holmes also distinguished cases that upheld, without any payment of compensation, statutes designed to eliminate a public nuisance.[35] And he distinguished an earlier decision that upheld a statute requiring mining companies to leave a wall of coal in place along the line of an adjacent mining property.[36] This was on the ground that such a wall at the edge of the mine reduced the risk of flooding to both mines, and thus provided an "average reciprocity of advantage" not present in the surface support case.[37]

Finally—and now I get to my theme—Justice Holmes mentioned that one fact always to be taken into consideration is "the extent of the diminution."[38] "When it reaches a certain magnitude," he wrote, "in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."[39] Seemingly applying this factor, he commented a few paragraphs later that in the present

31. *Id.* at 415.
32. *Id.* at 413.
33. *Id.*
34. *Id.* at 394–95.
35. *Id.* at 413–14.
36. *Id.* at 415.
37. *Id.*
38. *Id.* at 413.
39. *Id.*

case "the extent of the taking is great." As he explained: "It purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs."[40]

These comments, I submit, were ambiguous. In referring to the "extent of the diminution" and characterizing it as "great," Holmes could have been referring to the point that the regulation had the effect of transferring an established property right—the waiver of surface support—from A to B. Or, he could have been making a different point: that the loss in the value of the coal company's property caused by the regulation was large.

Whatever Holmes may have intended by these comments, Justice Brandeis, in dissent, clearly understood the majority to be saying that the regulation had caused a large diminution in the value of the coal company's property. Such a claim, Justice Brandeis thought, was clearly mistaken. As he wrote:

If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property. The rights of the owner as against the public are not increased by dividing the interests in his property into surface and subsoil. The sum of the rights in the parts can not be greater than the rights in the whole.[41]

Subsequent commentators, most notably Frank Michelman, would agree with Justice Brandeis that the majority had been referring to diminution in the value of the coal company's property, not the taking of a discrete property right.[42] Michelman also agreed with Brandeis that any inquiry into diminution in value raised a critical conceptual problem, which he labeled the numerator/denominator problem.[43] The numerator was what was taken away by the statute—in this case the right to mine the pillars of coal needed to support the surface. But in determining the degree to which this diminished the value of the property, it was necessary to identify the denominator to which the numerator would be compared in computing the fractional loss. If Holmes and the majority were referencing diminution in value, then the

40. *Id.* at 414.

41. *Id.* at 419 (Brandeis, J., dissenting).

42. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1190–93 (1967). Michelman observed in a footnote that the majority opinion in *Penn Coal* was ambiguous in this regard. *Id.* at 1190–91 n.53. In support of the proposition that diminution in value was an established factor in takings cases, he cited state court decisions addressing takings challenges to zoning decisions. *Id.* at 1190 n.52.

43. *Id.* at 1192.

statement that the diminution was "great" seemed to presuppose that the denominator was the pillars themselves. The denominator and the numerator would thus be the same, so the diminution in value would be 100%. Justice Brandeis, in contrast, wrote that the denominator was the "value of the whole property" of the coal company.[44] It was not clear exactly what he had in mind by the whole property. But it was clearly much more than the pillars of coal supporting the surface. So the denominator, on the Brandeis view, was large compared to the numerator, and the diminution something significantly less than 100%.

Penn Coal inaugurated the regulatory takings doctrine, but the decision was not perceived for many years as a leading case or as having laid down any general approach to the problem. For example, it was not cited in the Court's landmark decision upholding comprehensive urban zoning.[45] Nor was it cited in the Court's post-World War II decision finding that low level overflights by military airplanes could cause a taking.[46] Yet however ambiguously, it was the first case explicitly to inject diminution in value into regulatory takings jurisprudence.

I will not attempt to classify *Penn Coal* as a type of common law, since, at least with respect to the role of diminution in value, it was a case of first impression.[47]

B. Penn Central Transportation Company v. City of New York

Diminution in value made its next appearance many years later in *Penn Central Transportation Company v. New York*, the foundational decision of the modern regulatory takings era, decided in 1978.[48] The case involved a New York City historic preservation ordinance, as applied to Grand Central Station in Manhattan.[49] The preservation commission denied the railroad's request to build a modernist tower on top of the existing terminal building, on the ground that this would degrade the pleasing view of the terminal's original Beaux Arts façade.[50] Under the applicable zoning rules, the air rights above the terminal were eligible for development. The

44. *Pa. Coal Co.*, 260 U.S. at 419 (Brandeis, J., dissenting).
45. Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926).
46. United States v. Causby, 328 U.S. 256, 267 (1946).
47. The idea that if a regulation "goes too far" compensation must be paid was also advanced in Block v. Hirsch, 256 U.S. 135, 156 (1921) (Holmes, J.), but diminution in value was not specifically considered as a factor.
48. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 131 (1978).
49. *Id.* at 115.
50. *Id.* at 117–18.

railroad argued that the preservation order, in barring development of the air rights, was a taking.[51] In a divided decision, the Court held that the preservation decision was a police measure that did not require any payment of compensation.[52]

Although several decades had elapsed since the decision in *Penn Coal*, certain themes from the earlier decision were resurrected in *Penn Central*. One was the idea that there are no fixed principles dividing the police power from the power of eminent domain. As Justice Brennan's majority opinion put it, regulatory takings cases are resolved by engaging in "essentially ad hoc, factual inquiries[.]"[53] The Court also followed the earlier decision in positing that there are "several factors that have particular significance" in resolving these ad hoc disputes.[54] The factors it cited were significantly different from those debated by Justices Holmes and Brandeis in *Penn Coal*. Nevertheless, one factor arguably carried forward—if we accept the reading of *Penn Coal* adopted by Justice Brandeis and Professor Michelman—was the extent of the diminution in value caused by the regulation.

In discussing diminution in value, the Court observed that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[55] Instead, the majority cautioned, the focus must be on "the nature and extent of the interference with rights in the parcel as a whole[.]"[56] If these passages sound familiar, it was because they were a close paraphrase of the discussion of diminution in value put forward by Justice Brandeis's dissent in *Penn Coal*. Justice Brennan did not acknowledge that he was adopting the views of a previous dissenting opinion, and made no effort to explain why the position taken by the majority in *Penn Coal*—if indeed it had been the position of the majority—was mistaken. As to how much weight should be given to diminution in value and how much diminution would suggest that compensation might be required, Justice Brennan said only that diminution in property value, "standing alone," cannot establish a taking.[57] He also calculated that previous decisions had upheld regulations as noncompensable police power measures even though the diminution in value was alleged to be as high as 75 or even 87.5 percent.[58]

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51. *Id.* at 130.
52. *Id.* at 137.
53. *Id.* at 124.
54. *Id.*
55. *Id.* at 130.
56. *Id.* at 130–31.
57. *Id.* at 131.
58. *Id.*

Penn Central clearly qualifies as an exercise in common law constitutionalism. Justice Brennan's opinion cites a wide range of previous decisions; notwithstanding the possible tension with *Penn Coal* on diminution in value, he did not overrule any of them.

As to which model of common law comports most closely with the decision, it is impossible to characterize the decision as an exercise in Blackstonian common law. The Court did not refer to any established understanding about whether historic preservation laws are a permissible exercise of the police power as opposed to the power of eminent domain. No doubt this was because such laws were relatively new in 1978, and no clear tradition had emerged about how they should be classified.

As between the integrity and the Scrabble Board models, I lean toward the latter, certainly with regard to the diminution in value factor. There is a problem with fit, given that Justice Brennan did not attempt to square his treatment of the issue with that of *Penn Coal*. Instead, he allied the Court, without acknowledgment, with the approach urged in Justice Brandeis's dissent in the earlier case. And there is no clear principle in the opinion explaining why diminution in value does or does not matter, and if it matters, how much diminution is enough to trigger a potential constitutional concern. More generally, the Court's list of factors was incomplete. For example, the majority made no mention of whether the preservation law could be justified as a type of nuisance regulation—a factor considered important both before and after *Penn Central* (and highlighted by the dissent).[59] All in all, the decision appears to be an effort to exploit the common law method to reach a preferred result—upholding the preservation order without any payment of compensation. This is the hallmark of the Scrabble Board.

Although there is no indication that the majority intended the decision to serve as template for all regulatory takings decisions, *Penn Central* quickly assumed something akin to canonical status. Subsequent decisions interpreted *Penn Central* as prescribing three factors to consider in regulatory takings cases: (1) diminution in value; (2) interference with investment-backed expectations; and (3) the character of the government action, such as whether it entails an invasion of property or only a regulation of the use of property.[60] It was unclear whether these factors were to be "balanced" against each other, or whether all three had to point in the same direction

59. *Id.* at 144–45 (Rehnquist, J., dissenting); *see* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488 (1987).

60. *See, e.g.,* Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

to justify a finding of a regulatory taking.[61] Adding to uncertainty about the relevant doctrine, the Supreme Court reached mixed outcomes in cases immediately following *Penn Central*, often in ways that seem difficult to square with the three-factor test.[62]

C. Loretto v. Teleprompter Manhattan CATV Corp.

A mere four years after *Penn Central*, the Court endorsed a sharp departure from that decision's characterization of regulatory takings as "essentially ad hoc, factual inquiries" guided by a list of three factors.[63] The occasion was a seemingly trivial dispute between a landlord who owned a small apartment building in Manhattan and a local cable TV company.[64] The cable company, relying on a state statute and regulation, took the position it was entitled to install a cable on the roof of the apartment without the landlord's consent, in return for only nominal compensation.[65] The landlord insisted this was a taking, for which compensation had to be determined by a court.[66]

In a decision that surprised many commentators, the Supreme Court ruled that the controversy should not be resolved using the *Penn Central* framework.[67] Instead, the Court held that when the government takes action that results in a permanent physical occupation of land, the action is always, categorically, a taking requiring the payment of just compensation.[68] *Penn Central*'s multi-factorial approach was not overruled, but was characterized as the general rule, to which the categorical approach was a narrow exception.[69] Another awkwardness was that *Penn Central* had listed government invasion of the property as a factor under the ad hoc analysis.[70] *Loretto* limited this to temporary or intermittent

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61. *See* Adam R. Pomeroy, *Penn Central After 35 Years: A Three Part Balancing Test or a One Strike Rule?*, 22 FED. CIR. B. J. 677 (2013) (documenting continued confusion on this score).

62. Hodel v. Irving, 481 U.S. 704 (1987), is particularly difficult to square with the three factors. *Kaiser Aetna*, 444 U.S. 164 was also only loosely compatible with the framework. Andrus v. Allard, 444 U.S. 51 (1979), and Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980), each of which held the regulation was not a taking, seemed to conform more to the three-part test.

63. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (citing *Penn Cent.*, 438 U.S. at 124 (1978)).

64. *Id.* at 424.

65. *Id.* at 423–24.

66. *Id.* at 424.

67. *See id.* at 426.

68. *Id.* at 441.

69. *Id.* at 432, 441.

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

invasions.[71] When the government permanently occupies a portion of the owner's column of space, the Court held, the action should always be considered a taking.[72]

From the perspective of our theme, the interesting aspect of *Loretto* is that the cable installation caused little or no diminution in the value of the apartment building. Indeed, a plausible argument could be made that access to cable service *increased* the value of the rental units in the building. Thus, shortly after *Penn Central* said that diminution in value is always a factor, the Court held that a regulation can be a taking even if there is no diminution in value at all. If one thinks *Penn Central* was right that diminution in value is an important factor in identifying regulations that should be regarded as a taking, *Loretto* seems inexplicable.

Loretto, of course, was another exercise in common law constitutionalism. The basis for the new categorical rule was precedent, although this time the Court reached back further into the past and resuscitated a number of older cases involving permanent flooding of land, which, the Court said, had always resulted in the finding of a taking.[73] This use of the past, however, did not require overruling any prior decision; *Penn Central* was distinguished on the ground that no permanent occupation of the air rights was contemplated in that case.

Because *Loretto* broke sharply with *Penn Central*, it is tempting to characterize it as another exercise in Scrabble Board constitutionalism. But I think this is not correct. First, the majority opinion was authored by Justice Thurgood Marshall. Like his frequent ally Justice Brennan, Marshall more typically voted with the government rather than the property owner in regulatory takings cases.[74] So it is difficult to imagine that the author of the opinion was motivated by personal policy preferences in creating the new categorical rule.

Second, Justice Marshall took pains to articulate a general theory for determining when regulatory takings cases should be

71. *Loretto*, 458 U.S. at 434–35.

72. *Id.* at 441.

73. *Id.* at 427–34 (citing, inter alia, Pumpelly v. Green Bay Co., 13 Wall. (80 U.S.) 166 (1872); N. Transp. Co. v. Chi., 99 U.S. 635 (1879); United States v. Lynah, 188 U.S. 445 (1903); Bedford v. United States, 192 U.S. 217 (1904); United States v. Cress, 243 U.S. 316 (1917)).

74. The chart below tabulates the opinions of Justices Brennan and Marshall in twenty-eight takings cases adjudicated during their joint time on the bench. "Other" refers to when both Justices Brennan and Marshall did not think that the "takings" claim should be decided.

Both for Gov't	Both against Gov't	Brennan alone for Gov't	Marshall alone for Gov't	Other
19	4	1	1	3

assessed under the ad hoc approach, and when a categorical rule would apply. The theory was encapsulated in the familiar metaphor of property as a bundle of rights. Justice Marshall wrote that if the government takes a single strand from the bundle, the ad hoc approach applies.[75] In contrast, if the government "chops through the bundle, taking a slice of every strand," then the action is always a taking.[76] A permanent occupation, according to Justice Marshall, was a chop, not a pulling of a stick from the bundle.[77] Ergo, the categorical rule was required.

Third, the Court could have easily explained the decision by invoking the Blackstonian conception of the common law. Specifically, it has long been understood that when utility companies seek to extend wires across private property, such as telephone or electric lines, they must either purchase or condemn an easement to do so.[78] The regulation procured by cable companies in New York sought to bypass this settled rule, by giving cable companies what was effectively an easement to string wires on apartment houses without paying for it.[79] This would appear to be a straightforward attempt to achieve by police power regulation an outcome traditionally requiring the exercise of eminent domain. Presumably because counsel did not make this argument, the Court did not consider it.[80] But the fact that the decision could be justified under the Blackstonian conception of precedent reinforces my view that the decision was a principled one, and therefore comports with the integrity model of common law, as opposed to the Scrabble Board model.

After *Loretto* was decided, the Court initially rebuffed efforts to expand on the categorical beachhead established by the decision. The Court rejected the idea that a landlord suffers a permanent physical occupation when forced to renew a lease at a rent-controlled price.[81] And it rejected the claim that a utility company suffers a permanent physical occupation when forced to lease space on its utility poles at a controlled price.[82]

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75. *Loretto*, 458 U.S. at 435.

76. *Id.* at 435 (citing Andrus v. Allard, 444 U.S. 51 (1979)).

77. *Id.*

78. *See* 29A C.J.S. *Eminent Domain* § 34 (2018); 26 Am. Jur. 2D *Eminent Domain* § 295 (2018).

79. *Loretto*, 458 U.S. at 423–24.

80. Appellant Loretto briefly alluded to the fact that condemnation was an available option that telephone companies had used in the past. Reply Brief at 4, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (No. 81-244), 1982 WL 608698, at *5.

81. *See* Yee v. City of Escondido, 503 U.S. 519 (1992).

82. *See* FCC v. Fla. Power Corp., 480 U.S. 245 (1987).

The Court seemed well on its way to vindicating *Loretto*'s insistence that its categorical rule was "very narrow."[83]

D. Lucas v. South Carolina Coastal Council

A decade later, the Court established a second categorical exception to the ad hoc framework associated with *Penn Central*.[84] This time, rather than making diminution in value irrelevant, the Court elevated diminution in value to decisive status.

Lucas was a real estate developer who purchased two lots on a barrier island in South Carolina, intending to construct and sell houses on them.[85] Before he could commence building, South Carolina amended its coastal zone statute in such a way as to prohibit any construction on the lots.[86] When Lucas claimed a taking, the trial court found that the regulation rendered his lots "valueless."[87] The State Supreme Court, without questioning this finding, nevertheless upheld the regulation as an exercise in the police power, on the ground that it was designed to prevent a "serious public harm" in the form of beach erosion.[88]

Writing for the majority, Justice Scalia declared that the South Carolina statute, as applied to Lucas, was governed by a second categorical takings rule, this one for regulations that deny "all economically beneficial or productive use of land."[89] Lucas was thus entitled to just compensation, unless the South Carolina courts could show that the regulation produced a result similar to what would be obtained under the common law of nuisance.[90] The dissenting Justices objected to what they characterized as a novel and unwarranted exception to the general ad hoc approach of *Penn Central*.[91]

The key innovation of *Lucas* was the proposition that if the diminution in value is sufficiently severe, to the point that the land has no value at all, this will be treated as a taking without regard to the other *Penn Central* factors. In an important footnote, Justice Scalia recognized that the Court had provided little or no guidance as to how to identify the relevant denominator for purposes of

83. *Loretto*, 458 U.S. at 441.
84. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
85. *Id.* at 1006–07.
86. *Id.* at 1007.
87. *Id.*
88. *Id.* at 1010 (citing Lucas v. S.C. Coastal Council, 304 S.C. 376, 383 (1991)).
89. *Id.* at 1015–16.
90. *Id.* at 1031–32.
91. *See*, *e.g.*, *id.* at 1047–49 (Blackmun J., dissenting).

calculating diminution in value.[92] It was unnecessary to provide such guidance in the present case, he concluded, because Lucas had pleaded a fee simple in land, and the trial court had found the state statute left each of his lots "valueless."[93]

Lucas is clearly another example of constitutional common law. The question of how to assess regulations that deprive landowners of all economic value had not been resolved by previous decisions. Justice Scalia answered it by weaving together various statements found in earlier cases, which he synthesized into the new two-part decisional rule. No previous decision was overruled.

Although the matter is not free from doubt, I would categorize *Lucas*, like *Penn Central*, as a Scrabble Board decision, rather than one based on the integrity model. I say this because neither half of the new decisional rule enunciated by Justice Scalia reflects a satisfactory principle that synthesizes prior holdings. Although Justice Scalia listed a number of prior decisions which he characterized as having "found categorical treatment appropriate" where a regulation deprives the owner of all economic value, an examination of these decisions reveals that they contain, at most, fleeting dicta arguably supporting this idea.[94] The Court had never held that loss of all economic value automatically translates into takings liability.

The exception for nuisances was even more novel. Of course, a number of older decisions had held that nuisance-like activity was an appropriate target of regulation under the police power.[95] But no case had ever limited the line of decisions dealing with nuisance-

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92. *Id.* at 1016–17 n.7.

93. *Id.* at 1007.

94. *Id.* at 1015–16. Justice Scalia's citations all trace back to a single statement in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). There, in introducing the issue in the case—whether a general zoning ordinance was a taking—the Court stated: "[t]he 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." *Id.* (citations omitted). The Court proceeded to apply only the first prong of the statement in determining that no taking had taken place in *Agins*. In *Nollan v. Cal. Coastal Comm'n.*, 483 U.S. 825, 834 (1987), the Court quoted the statement from *Agins*, but likewise only discussed how the exaction at issue failed to substantially advance a legitimate state interest. In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987), the Court again quoted *Agins*, but showed there was significant value left in the petitioners' properties. The Court did not suggest that *Agins* had established a categorical rule. In *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 29596 (1981), the Court once again quoted from *Agins* and proceeded to show the legislation did not deny all beneficial use of coal-bearing lands. Again, the Court did not suggest that *Agins* had established any categorical rule. The heavy reliance on the second half of the sentence from *Agins* in *Lucas* is supremely ironic, given that the Court subsequently disapproved the first half of the sentence in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

95. Miller v. Schoene, 276 U.S. 272, 279–80 (1928); Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); Hadacheck v. Sebastian, 239 U.S. 394, 411 (1915); Mugler v. Kansas, 123 U.S. 623, 664–65 (1887).

like or noxious harms to conduct that would be deemed a nuisance under the common law. There was in fact authority to the contrary.[96]

More generally, *Lucas* has the feel of an "activist" decision, in the sense that it was pushing the envelope of regulatory takings law in the interest of expanding constitutional protection for property rights, one of Justice Scalia's preferred policy positions.[97] The Court could have easily avoided deciding the case by remanding for consideration of an amended version of the statute, which evidently would permit development.[98] The supposed finding that the regulation reduced the value of Lucas's investment to zero was highly implausible, and need not have been accepted uncritically.[99] And the majority offered no support for limiting its exception for nuisance-like harms to activity that would create liability under the common law, as opposed to positive regulation.[100]

Justice Blackmun in dissent accused the majority of "launch[ing] a missile to kill a mouse."[101] A more apt characterization might be that the missile was itself a mouse. Regulations that reduce the value of land to zero are rare.[102] Some years later, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, the Court refused to apply *Lucas* to moratoriums on development of land.[103] Combined with *Lucas*'s own exception for regulations that track the common law of nuisance, the set of cases governed by *Lucas*'s categorical rule has shrunk to rather mouse-like proportions.

E. Horne v. Department of Agriculture

Although initial efforts to expand *Loretto*'s categorical rule for permanent physical occupations were rebuffed, eventually the scope of the *Loretto*'s exception to *Penn Central* began to expand. A series

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96. *Miller*, 276 U.S. at 280 (1928) ("We need not weigh with nicety the question whether [the regulated conduct would be] a nuisance according to the common law.").

97. *See* J. Peter Byrne, *A Hobbesian Bundle of Lockean Sticks: The Property Rights Legacy of Justice Scalia*, 41 VT. L. REV. 733, 762 (2017).

98. *Lucas*, 505 U.S. at 1061 (Stevens J., dissenting).

99. *Id.* at 1043–45 (Blackmun J., dissenting).

100. *See id.* at 1035 (Kennedy J., concurring) ("In my view, reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society.").

101. *Id.* at 1036 (Blackmun J., dissenting).

102. *See* James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 87 (2016) (finding that only about 3.5 percent of reported regulatory takings cases involve plausible *Lucas* claims and that only about one-half of these claims are successful).

103. Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002).

of decisions dealing with exactions imposed as a condition of real estate development, which I will not discuss in detail here, extended the categorical rule from permanent occupations to public easements on land.[104] Then came the raisin case.[105]

The Agricultural Marketing Act, a vestige of the New Deal, is designed to raise prices for agricultural commodities by limiting their supply.[106] With respect to the raisin market, this was accomplished by requiring that a certain quantity of raisins be diverted into a reserve market, where they were disposed of in ways that did not compete with the commercial market.[107] When members of the Horne family, California raisin producers, were caught cheating on the scheme and assessed a large fine, they argued that the regulation requiring that they turn over a portion of their raisin crop to the reserve market was a taking of their property in raisins.[108]

When the case reached the Supreme Court, the primary issue was whether *Loretto*'s categorical rule for government occupations, adopted in the context of real property, should be extended to government appropriations of personal property.[109] Writing for the Court, Chief Justice Roberts began by asking whether the Takings Clause applies to personal as well as real property.[110] In an unusual departure from common law constitutionalism, he devoted three paragraphs to recapitulating "originalist" materials, which tended to support the understanding that the Takings Clause applies to personal property.[111] This, however, was something no one disputed. The issue was whether *Loretto*'s categorical rule, developed in the context of real property, should also apply to appropriations of personal property.[112] As to that question, the originalist materials shed no light, since the distinction between ad hoc and categorical rules emerged some 200 years after the Takings Clause was adopted.

As to the issue actually presented, the Chief Justice was inevitably forced to revert to common law constitutionalism. He summarized *Loretto*'s theory that permanent occupations chop

104. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013); Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).
105. Horne v. Dep't of Agric., 135 S. Ct. 2419 (2015).
106. *See id*. at 2424.
107. *Id.* (citing 7 CFR § 989.67(b)(5) (2015)).
108. *Id*. at 2424–25.
109. *Id*. at 2425.
110. *Id.*
111. *Id.* at 2426–28.
112. *Id*. at 2425.

through all sticks in in the bundle.[113] He then observed, without elaboration, that this reasoning is "equally applicable to a physical appropriation of personal property."[114] Other government arguments, such that the Hornes had availed themselves of the regulated raisin market, with full knowledge of the reserve requirement, were also rejected.[115]

Horne, like *Loretto*, is interesting from the perspective of diminution in value because it is quite likely that the government's "seizure" of the Hornes' raisins did not diminish the overall value of their raisin crop. As Justice Breyer elaborated in dissent, it is quite possible that the government regulation requiring the diversion of raisins to the reserve program increased the value of the raisins sold on the open market, offsetting the lost value of the reserve raisins, and thus leaving the Hornes and other growers better off overall. This, of course, was the precise purpose of the reserve program. Justice Breyer urged a remand to consider this possibility. The Chief Justice rejected the idea, primarily on the ground that the case, which was making its second appearance in the Supreme Court, had "gone on long enough."[116]

Notwithstanding Chief Justice Robert's brief excursion into originalism, *Horne* is no less an instance of common law constitutionalism than the other regulatory takings decisions we have been considering. Overall, I would categorize it as yet another exercise in Scrabble Board common law. The Chief Justice tended to respond to the government's arguments either with conclusory statements or with one-liners, such as characterizing the government argument that the Hornes could have diverted their grapes into unregulated markets as saying "Let them sell wine."[117] As several briefs pointed out, personal property is probably subject to government seizure more often than real property—in forfeiture proceedings, in enforcing trademark and food and drug laws, and in satisfying unpaid taxes and loans.[118] The majority made no effort to explain why these differences might render a categorical rule inappropriate.

Horne is also like *Loretto* in that a little Blackstonian common law would shed light on the controversy. In this case, however, customary practice would tend to support a result the opposite of the one reached by the Court. One Blackstonian argument would

113. *Id.* at 2428.
114. *Id.* at 2427.
115. *Id.* at 2430–31.
116. *Id.* at 2433.
117. *Id.* at 2430.
118. *See*, e.g., Brief for International Municipal Lawyers Association as Amicus Curiae Supporting Respondent, Horne v. United States Dep't of Agric., 135 S. Ct. 2419 (2015) (No. 14–275 2015), WL 1641123 at *16–17.

rest on the observation that agricultural price support programs have been around since the New Deal, and have never been thought to raise a regulatory takings issue. All these programs proceed by seeking to limit production of agricultural commodities, thereby raising prices paid to producers. At one point the Court acknowledged that the government could limit the number of acres that could be planted, and this would have to be assessed under the ad hoc standard of *Penn Central*.[119] But a government marketing order that limited the number of raisins that could be released into the commercial market, the Court insisted, was a categorical taking.[120] The only explanation for the difference, which the Court conceded would have "the same economic impact on a grower," was that the Constitution is concerned with "means as well as ends."[121] This was another one-liner, rather than a principled argument.

A second Blackstonian argument would analogize the case to a partial taking of property by eminent domain. It is well established that when the government condemns only part of a person's property, the compensation the owner receives for the part taken may be offset by an increase in the value of the property not taken.[122] This can happen, for example, when the government takes a portion of land to widen a road or highway, increasing the value of the remainder for commercial purposes. This was essentially what happened to the Hornes. The government took part of their raisin crop, but in determining the compensation to which they were entitled it was appropriate to consider the enhanced value of the part of the crop not taken.

The failure to consider the Blackstonian common law arguments may be a partial function of poor briefing by the defenders of the program. But the fact that the outcome coheres poorly with established practices and conventions reinforces my view that this was, again, Scrabble Board constitutionalism.

F. Murr v. Wisconsin

One of the curiosities of the Supreme Court's modern regulatory takings law is that, after fixing three relevant factors to apply in ad hoc cases in the wake of *Penn Central*, the Court for nearly 40 years

119. *Horne*, 135 S. Ct. at 2428, 2429.
120. *Id.* at 2428.
121. *Id.*
122. United States v. Miller, 317 U.S. 369, 376 (1943); Borough of Harvey Cedars v. Karan, 70 A.3d 524, 543 (N.J. 2013).

saw no need to revisit those factors.[123] Instead, the Court expended its energies on promulgating exceptions like *Loretto* and *Lucas* to the ad hoc framework. Lower courts were left to fend for themselves in attempting to resolve uncertainties about the factors, including diminution in value.[124]

In 2016, the Court finally agreed to hear a case presenting the central puzzle about diminution in value, namely, how to define the denominator.[125] The chosen vehicle, *Murr v. Wisconsin*, involved a family who had purchased two adjacent lots on the scenic St. Croix River.[126] Under local zoning regulations, they could only build one house on the combined lots.[127] The regulations contained an exception for lots of the same size as the Murrs' under separate ownership, which allowed a house to be built on each lot.[128] But the Murrs' only options were to build one house or sell the two lots to someone else who could build only one house.[129] The Murrs sued, contending that each of the two lots was a separate parcel, and the prohibition on building more than one house rendered one of the two lots valueless, triggering takings liability under the categorical rule recognized in *Lucas*.[130]

When the case reached the Supreme Court, the various parties offered three different solutions as to how to define the denominator. The Murrs argued that state law applied, and under state law each lot was a separate parcel.[131] The State of Wisconsin argued that state law applied, but the zoning regulation was part of state law and it required that the two lots be merged into a single parcel.[132] The county and the federal government, appearing as amicus curiae, argued that federal constitutional law applied, and under that law a balancing test should be used to identify the relevant parcel; under such a balancing test the two lots should be regarded as a single parcel.[133]

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123. Thomas W. Merrill, *The Character of the Governmental Action*, 36 VT. L. REV. 649, 651 (2012).

124. *Id.*

125. *See supra* notes 43–44 and accompanying text.

126. Murr v. Wisconsin, 137 S. Ct. 1933, 1940 (2017).

127. *Id.*

128. *Id.*

129. *Id.* at 1941.

130. *Id.*

131. Brief for Petitioner, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-204), 2016 WL 1459199 at *28.

132. Brief for Respondent, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-204), 2016 WL 3227033 at *3336.

133. Brief for the United States of America as Amicus Curiae Supporting Respondent, Murr v. Wisconsin., 137 S. Ct. 1933 (2017) (No. 15-204) 2016 WL 3398637 at *2527.

The Court postponed oral argument several times, evidently hoping that a replacement for Justice Scalia would be named to sit in the case. It finally gave up waiting, and eight Justices heard argument in March 2017, shortly before Justice Gorsuch was sworn in as Justice Scalia's replacement. Justice Kennedy got the assignment to write for a majority of 5. He agreed that the relevant parcel should be defined by federal constitutional law, and that a balancing test was appropriate for these purposes.[134] Applying such a test, he concluded that the two lots were a single parcel.[135] Thus there was no categorical taking under *Lucas*. Somewhat surprisingly, rather than remand for application of the *Penn Central* test, he applied the ad hoc test and held that there was no taking under that approach either.[136]

It would take us too far afield to delve into the merits of the Court's resolution of the contiguous lots question in *Murr*. The more immediate question is how to characterize the decision as a form of common law constitutionalism. On this score, I am inclined to classify it as an exercise in the integrity model, rather than the Scrabble Board idea.

One reason is that the majority opinion was authored by Justice Kennedy. Although he was something of a swing Justice in the regulatory takings area, as elsewhere in constitutional law, he was more closely associated with the conservative, pro-property rights bloc than with the liberal, pro-regulation bloc.[137] Thus, I am inclined to view his critical vote and opinion in *Murr* as more likely an effort at principled integration, rather than an effort to advance an agenda.

I also think the decision scores relatively high on the dimension of fit. Justice Kennedy patiently explained that diminution in value had unquestionably entered regulatory takings law, both under the ad hoc standard derived from *Penn Central*, and under the total takings categorical rule announced in *Lucas*.[138] He noted that the Court had come down squarely in support of the "whole parcel" conception of the denominator, and had admonished against conceptual severance by dividing the property into the part taken and the part remaining.[139] And he discussed the dangers of "gamesmanship," both on the part of owners by clever subdivision of

134. *Murr*, 137 S. Ct. at 1945.

135. *Id.* at 1948.

136. *Id.* at 1949.

137. *See* Horne v. Dep't of Agric., 135 S. Ct. 2419 (2015) (Kennedy, J. joins 5-4 majority opinion); Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013) (Kennedy, J. joins 5-4 majority opinion).

138. *Murr*, 137 S. Ct. at 194243.

139. *Id.* at 1944.

parcels into separate lots, and by the government through contentions that discrete holdings were appropriately aggregated into a single whole.[140] The one anomaly here was Justice Kennedy's willingness to define the relevant parcel as a matter of federal constitutional law, as opposed to state law. Admittedly, however, the respective role of federal constitutional law and state law in defining property for takings purposes has been subject to wavering treatment in prior cases.[141]

The principle Justice Kennedy adopted for knitting together previous holdings and resolving the definition of the denominator in *Murr*—a multifactorial balancing test—was not particularly elegant. Multi-factorial balancing tests are often a sign of intellectual weakness, or at least caution.[142] But it was a principle all the same.

Lastly, the Court adopted a distinctly Blackstonian element in support of its conclusion that a merger of the Murrs' two lots was permissible in defining the scope of their property rights. The Court observed that merger provisions like the one invoked in Wisconsin have a "long history" that originated "nearly a century ago."[143] The petitioners' insistence that the relevant parcel was conclusively established by the lot lines "ignores the well-settled reliance on the merger provision as a common means of balancing the legitimate goals of regulation with the reasonable expectations of landowners."[144] As previously suggested, I regard a congruence with settled custom and practice as an indicator that the integrity model is at work.[145]

IV. DOES IT MAKE SENSE?

The decision in *Murr*, even if we decide to call it an exercise in the integrity model, is nevertheless an appropriate occasion to step back and consider what we can learn more generally about common law constitutionalism by focusing on the regulatory takings doctrine.

As a minimum, there is no question that *Murr* adds new complexity to what had already become a baroque doctrine. The Court has produced a general approach to regulatory takings—the

140. *Id.* at 194647 (noting that the government can potentially escape all responsibility to justify regulation if it legislates strategically); *Id.* at 1948 (noting the ease in which landowners can unilaterally change their lot lines).

141. *See*, *e.g.*, Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 889 (2000).

142 *Cf.* Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985).

143. *Murr*, 137 S. Ct. at 1947.

144. *Id.*

145. *See supra* Sect. II.

Penn Central standard. This approach features multiple factors. Now one of those factors—diminution in value—has been supplemented with a preliminary inquiry composed of another test having multiple factors. Moreover, the general approach is subject to exceptions, some of which also have multiple factors, and there are exceptions to the exceptions.

Indeed, if one were to plot the Supreme Court's regulatory takings cases as a decision tree, they would look very much like a Scrabble Board. The main stem is the *Penn Central* decision. Then we see *Loretto* shooting off as a branch to one side. The *Loretto* branch eventually sprouts another branch (which I have not even considered) for exactions imposed as a condition of permitting development. More recently, the *Loretto* branch has given rise to the *Horne* extension for appropriations of personal property, which will inevitably give rise to new exceptions for fines, forfeitures, foreclosures, and the like. On the other side of the main stem, we see the *Lucas* branch, which created considerable hubbub until it was cut off by the exception recognized in *Tahoe-Sierra*. And both the main stem and the *Lucas* offshoot are now qualified by the *Murr* balancing test for identifying the relevant denominator. One need not be a devotee of Occam's Razor to think that this structure entails excessive complexity.

The ultimate source of the complexity is not difficult to identify. The decision tree looks like a Scrabble Board because the Court has too frequently indulged in Scrabble Board constitutionalism in regulatory takings cases. Doctrinally, the regulatory takings doctrine simply defines the boundary between the police power and the power of eminent domain.[146] But the location of that boundary is also a political question, in the sense that it bears importantly on how much the government will forebear from interfering with property rights. Those sympathetic with property rights—typically conservatives—will want to see relatively more government forbearance. Those sympathetic with public regulation designed to produce various public goods, such as historic preservation, environmental protection, or high prices for farmers –typically liberals—will want to see relatively less government forbearance. The Justices, being political appointees, divide along the same lines.[147] When the pro-property Justices gain the upper hand, they write decisions that cause the doctrine to lurch to the right. When the pro-regulation Justices prevail, the doctrine lurches back to the left.

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146. *See supra* Introduction.

147. *See generally*, Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301.

To be sure, the process of doctrinal proliferation is constrained by the dictates of the common law method. The rules of the game are recognized by the players to mean that all moves must be justified in terms of previous decisions, and previous decisions can rarely be overruled. But as the underlying conception of how judges should operate within these constraints has evolved from the Blackstonian model, to the integrity model, to the Scrabble Board model, the space available to make moves and countermoves has expanded. Thus, we get the lurches from left to right and back again, and the map of the doctrine looks like a Scrabble Board.

Would it be possible to do better? I think the answer is yes. If we go back to the basics, the function of the regulatory takings doctrine is to set the boundary between the police power and the power of eminent domain. In particular, the doctrine exists to prevent the government from evading the obligation to pay just compensation, by disguising what would ordinarily be an exercise in eminent domain as a police power regulation. The straightforward way to do this is to ask whether the rights the government obtains under a regulation correspond to a set of interests that would ordinarily be acquired by purchase or eminent domain.[148] Interestingly, the law of eminent domain has also developed through a process of common law constitutionalism.[149] But that process has been characterized by the Blackstonian and integrity models of common law decision making, not the Scrabble Board model.

The answer to the question whether the government acquires an interest that ordinarily would have to be purchased or acquired through eminent domain is empirical, not doctrinal. Eminent domain is used to acquire resources that are commonly acquired through consensual exchange, i.e., by purchase. Indeed, the government will ordinarily attempt to negotiate the purchase of particular resources and will turn to eminent domain only if it encounters holdout problems or demands for exorbitant payment. Eminent domain is thus used to acquire resources that are subject to voluntary exchange, but for reasons of site-dependency or other factors that confer localized monopoly power on the current owner, present an impediment to transfer at prices that would prevail in a competitive market.[150]

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148. *Cf.* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005) (positing that takings law should aim to identify regulatory actions "that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.").

149. See Thomas W. Merrill, *Anticipatory Remedies for Takings*, 128 HARV. L. REV. 1630, 1640–41 (2015) (noting that constitutional issues that arise in eminent domain actions are usually framed in terms of state constitutional law).

150. Thomas W. Merrill, *Economics of Public Use*, 72 CORNELL L. REV. 61, 75 (1986).

This line of reasoning yields a simple answer to the regulatory takings problem: a government regulation should be deemed a taking if the regulation compels the transfer of an interest that is commonly conveyed by purchase. Compensation must be paid when the government takes an exchangeable property right, otherwise not.[151] Whether an interest is an exchangeable right will likely vary from one place and time to another. Consequently, expert testimony may be needed to answer the question. The expert should be asked whether a private party, seeking to obtain the rights conferred by regulation, would be able to acquire those rights in the marketplace, and would be expected to engage in market exchange.[152] The injection of expert testimony would not be that disruptive. Expert testimony is already needed in order to determine the amount of just compensation that must be paid when the government engages in a taking.[153] In any event, the proposed approach would convert the regulatory takings question from an exercise in doctrinal elaboration into an empirical question to be resolved by the court with the assistance of expert testimony.

Where did regulatory takings doctrine go wrong? At the most general level, one way to approach the regulatory takings question is to ask: what has the government gained? The law of eminent domain, which has been elaborated through its own process of common law constitutionalism, has fairly consistently framed the question this way. The answer has been that the government must use eminent domain when it acquires a recognized interest in property, such as a fee simple, a leasehold, or an easement.[154] The relevant inquiries then become whether the condemnation is for a public use and what constitutes just compensation.[155]

In regulatory takings cases, in contrast, the Court has frequently been drawn to asking a different question: what did the claimant lose? Thus, the Court is fond of repeating the statement that the purpose of the regulatory takings doctrine is 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

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151. DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 77 (2002); *See* Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. 899, 942 (2007).

152. *Cf.* Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1340 (1991).

153. DANA & MERRILL, *supra* note 151, at 171.

154. *Id.* at 59 & notes 88–89.

155. The fact that eminent domain is used when the government gains a property right should not be confused with the general principle that the government must compensate the property owner for the value it has lost. *See, e.g.*, United States v. Causby, 328 U.S. 256, 261 (1946). What we are looking for is a principle that tells us *when* the government must compensate, not *how much* compensation it must pay once the obligation is incurred.

whole."[156] This way of framing the question assumes that the regulatory takings doctrine is about what the claimant has lost. In effect, the inquiry poses a question of distributive justice: Is the loss incurred by the claimant sufficiently severe that the government should provide compensation in order to even the score or make sure that the claimant only contributes a "just share" to the collective undertakings of society?

Unfortunately, however appealing distributive justice may be as an abstract ideal, it cannot be achieved by adjudicating individual claims brought under the Takings Clause. The problems are manifold and are well-rehearsed in the literature: (1) Distributive justice is not served by compensating people when they have used their property in a way that imposes harm on other people or property.[157] (2) Distributive justice is a function of givings as well as takings, but there is no general legal doctrine that allows courts to recapture windfall gains from individuals that in "all justice and fairness" should belong to the public.[158] (3) Distributive justice is in large measure a function of tax laws, which the Court agrees are not subject to challenge under the Takings Clause.[159] (4) From the perspective of distributive justice, courts should consider the ability of the owner to diversify or insure against the risk of a taking, but they do not.[160] (5) Even if every diminution in value caused by government action could be challenged under the regulatory takings doctrine, it would make no sense to do so if the costs of processing claims exceeds the impact of the regulation.[161] In short, since it is impossible to secure distributive justice under the Takings Clause, the question should not be posed in terms of what the property owner has lost. It would be better to harmonize the law of regulatory takings with the law of eminent domain, and ask what the government as gained.

The specific answer to where the Court went wrong goes back to *Penn Coal* where the regulatory takings doctrine got started. If we

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

157. *See, e.g.,* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 107–45 (1985).

158. *Armstrong,* 364 U.S. at 49. For discussion of the implications of the lack of any mechanism for the government to recover windfalls, *see* Abrahm Bell & Gideon Parchomovky, Givings, 111 Yale L. J. 547 (2001); Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 155861(1999); Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 619 (2014).

159. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 615 (2013).

160. *Cf.* Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 616 (1984) (suggesting that wealthy individuals and corporations can self-insure against government takings by diversifying their holdings).

161. Michelman *supra* note 42, at 1214–15; Carol Necole Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims after Property Transfers*, 36 CONN. L. REV. 7, 47 (2003) (noting that the notion of distributive justice requires society to provide a meaningful opportunity to challenge the regulation).

interpret Justice Holmes' opinion to mean that the government must proceed by eminent domain when it enacts a law that compels the transfer of an exchangeable property right—like the surface support right in Pennsylvania—then we are talking about what the government has gained. Had this reading prevailed, the doctrine would have proceeded down a path that would lead to the version of regulatory takings doctrine I have described.

If, instead, we interpret *Penn Coal* to mean that the government must proceed by eminent domain if a regulation "goes too far" in diminishing the value of property, then we have slipped into asking what the claimant has lost. Now we are headed down the path of thinking the regulatory takings doctrine is about distributive justice. But if we were really serious about distributive justice, the relevant question would compare the size of the loss to "the whole preexisting wealth or income of the complainant."[162] The Court has never been willing to expand the denominator this far; indeed, *Murr* includes language suggesting that this would be unconstitutional.[163] What gives? Perhaps the Court realizes that the regulatory takings inquiry, if it is to be manageable, must be limited to examining the effect of the regulation on some discrete interest in property.[164] But if this limitation is imperative, then the regulatory takings doctrine cannot serve as a general instrument of distributive justice.

In any event, as long as the Court persists in thinking that diminution in value is relevant to whether the government has committed a regulatory taking, it will be forced to continue developing ever-more elaborate federal constitutional tests for defining the denominator as something more than what has been lost but less than the preexisting wealth of the complainant. *Murr* suggests this means balancing tests piled on balancing tests, with all the mind-numbing complexity and the risk of double counting of factors this portends. Under the proposed alternative—asking whether the government has obtained an exchangeable right—diminution in value disappears, and with it, the need to define the denominator.

I should note that the proposed alternative—asking whether the government has gained an exchangeable property right—would be a far from trivial constitutional protection. It would effectively bar the government from engaging in expropriation or acts tantamount

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162. Michelman, *supra* note 42, at 1192.

163. Murr v. Wisconsin, 137 S. Ct. 1933, 1945 (2017) (worrying that if state law defines the denominator a state "might enact a law that consolidates nonadjacent property owned by a single person or entity in different parts of the State and then imposes development limits on the aggregate set.").

164. Eastern Enterprises v. Apfel, 524 U.S. 498 , 540 (1998) (Kennedy, J. concurring); *id*. at 554–56 (Breyer, J. dissenting) (concluding that Takings Clause only applies to "identified property interests"); Merrill, *supra* note 141, at 974–79 (similar).

to expropriation. Barring expropriation serves multiple overlapping constitutional ends, including foreclosing a particularly disruptive type of redistribution. The proposed alternative would greatly simplify regulatory takings inquiries and would produce results largely, but not entirely, congruent with existing law. It would eliminate regulatory takings challenges to general zoning laws, price controls and price supports, and environmental laws. These sorts of measures cannot be secured by consensual exchange. But with the rise of conservation and preservation easements, site-specific restrictions on development might be vulnerable to challenge. Such measures are today acquired in the form of conservation easements on a fairly widespread basis.[165] This evolution in property law might mean that the government cannot compel the imposition of site-specific restrictions on development without paying compensation.

V. CONCLUSION

Our excursion into regulatory takings law, with particular focus on diminution in value, presents one example of the potential costs of common law constitutionalism. Because we are talking about *constitutional* common law, modification or simplification of the Court's proliferating doctrine cannot be achieved by enacting ordinary legislation. We the People can revise regulatory taking doctrine only by constitutional amendment, which many now say is virtually impossible.[166] Scrabble Board constitutionalism thus has a locked in quality that makes it impervious to modification by the political branches.

Could the Court itself achieve a simplification of doctrine by wiping out some or all of the doctrine, and starting all over again? Presumably not, because this would violate the fundamental tenet of every system of *common law*, namely that previous decisions should only rarely be overruled. Re-winding the clock to 1922 and starting over again with a better interpretation of Justice Holmes' ambiguous opinion would require overruling *Penn Central* and *Lucas* and *Murr*, not to mention innumerable decisions that build on these precedents.

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165. Most conservation easements are acquired by donation but purchases and options to purchase such easements are also widely discussed. *See* Federico Cheever & Jessica Owley, *Enhancing Conservation Options: An Argument for Statutory Recognition of Options to Purchase Conservation Easements (OPCES),* 40 HARV. ENV. L. REV. 1 (2016).

166. *See* Thomas W. Merrill, *Interpreting an Unamendable Text*, 71 VAND. L. REV. 547, 549 n.3 (2018) (collecting views describing the "virtual impossibility" of amending the Constitution).

The best we can probably hope for is to persuade the Supreme Court to exercise restraint before constitutionalizing new areas of law. And when it does engage in common law constitutionalism, it would be greatly desirable for the Justices to swear off the Scrabble Board version of common-law making. The integrity model appears to be more constraining, and more likely to secure general assent from those who end up on the losing end of constitutional controversies. The Blackstonian model would be even better. There are hints of a Blackstonian revival in recent cases, including *Murr*. If we are condemned to live under a common law constitution, then perhaps we should seek to emulate the wisdom of the great expositor of the original common law, who insisted that precedent is binding only when it conforms to the custom of the realm.