A TAKING IS A TAKING IS A TAKING . . . AND JURIES KNOW ONE WHEN THEY SEE IT

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So, what's wrong with *Penn Central*?[1] How much time do you have? For something that the Supreme Court has retroactively referred to as its "polestar" in takings litigation, *Penn Central* has come in for more than what some might call its fair share of abuse.[2]

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

2. *See, e.g.*, Joseph L. Sax, *The Property Rights Sweepstakes: Has Anyone Held the Winning Ticket?*, 34 VT. L. REV. 157, 159 (2009) (stating that the *Penn Central* inquiry is an "open-ended, I-(hope)-I-know-it-when-I-see-it approach" to takings adjudication.); Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PA. ST. L. REV. 601, 602 (2014) ("The [*Penn Central*] doctrine has become a compilation of moving parts that are neither individually coherent nor collectively compatible."); Steven J. Eagle, *Property Rights and Takings Burdens*, 7 BRIGHAM-KANNER PROP. RTS. CONF. 199 (2018) (The *Penn Central* test is "generally deemed incoherent and chaotic."); Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 URB. L. 307 (1998) [hereinafter *Hunting the Snark*]; John D. Echeverria, *Is the* Penn Central *Three-Factor Test Ready for History's Dustbin?*, 52 LAND USE L. & ZONING DIG. 3, 7 (2000) ("The *Penn Central* test . . . is so vague and indeterminate that it invites unprincipled, subjective decision making by the courts); R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in* Penn Central, 38 ECOLOGY L.Q. 731, 732 (2011) ("a tenuous, ad hoc approach … routinely denounced as … unworkable, if not incomprehensible"); Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N. U. L. REV. 601, 603 (2015) ("Scholars have long derided the regulatory takings doctrine as incoherent and unpredictable."); David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and*

The phrase "fair share" doesn't quite cut it. More abuse is evidently needed so we can put an end to *Penn Central*'s dominance.[3]

To that end, many people have been proposing alternatives or changes to the *Penn Central* standard that might fix or replace it. I will be blunt. Ever the optimist, I trusted that the Supreme Court would eventually get its act together and provide a coherent takings jurisprudence.[4] At least it could make sense of *Penn Central*, which has been cited so often. I no longer think *Penn Central* can be saved. Our experience with it for the near half-century since the Supreme Court gave birth to it has shown clearly that the judiciary has made a hash of the process. Worse than that, jurists at the highest level seem proud of the fact that they have given the rest of us little direction by which to be guided. This is typical of the Court, which has stated: "we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking."[5] It is time to acknowledge that such pablum from our highest court is no longer acceptable.

My conclusion is that *Penn Central* needs to be excised from the takings liturgy. We need to hit the restart button.

As discussed hereafter, I have a couple of suggestions for the Court. Without getting too far ahead of myself, here is the most critical piece: Judges at all levels should stop trying to define the parameters of a taking. Whether a taking has occurred, i.e., whether government action has gone "too far", in the classic formulation of Justice Holmes,[6] is a *fact* question, not a legal one. It should be

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What State and Federal Courts Are Doing About It, 28 STETSON L. REV. 523, 574 (1999) (surveying inconsistent judicial approaches and concluding that "state (and some lower federal) courts are not hearing (or not wanting to hear) the U.S. Supreme Court").

On the other hand, if one searches hard enough, one can discover those who believe that vagueness is just peachy. *See, e.g.*, Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 94 (2002) (positing that "argument and practice within the vacuous framework they lay down, provide stability, coherence, and legitimacy for the ongoing social process of managing resources."). How a concededly "vacuous framework" yields "stability, coherence, and legitimacy" remains (at least to me) a mystery. For some possible insight (and a suggestion that it may have something to do with "progressives" seeking radical change to property law), see Michael M. Berger, *Protecting Property: A Tribute to Jim Burling*, 12 BRIGHAM-KANNER PROP. RTS. CONF. J. 21, 48 (2023) [hereinafter *Protecting Property*].

3. Anyone who has not done so should immediately read Gideon Kanner's classic work on *Penn Central* and how the decision came about. If you've read it before, read it again. *See generally* Gideon Kanner, *Making Laws And Sausages: A Quarter-Century Retrospective On* Penn Central Transportation Co. v. City Of New York, 13 WM. & MARY CIV. RTS. J. 679 (2005).

4. After all, it was starting from the bottom of a pretty deep hole. As Justice Stevens put it early in the modern takings era, "[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence." Nollan v. Cal. Coastal Comm'n., 483 U.S. 825, 866 (Stevens, J., dissenting). So, there was plenty of room for the Court to move in rationalizing this body of law.

5. Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).

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

decided the same way that fact questions have been decided in Anglo-American law for centuries. Judges need to back away from the details and let juries examine all the evidence and then decide whether the government's actions have taken property. That is the core issue, and it is an issue for the jury.

I. BACK TO BASICS[7]

The Constitution requires just compensation for all takings, regardless of their length or the manner of their instigation. Thus, the issue is neither whether the property was taken temporarily, nor the means by which it was taken, but whether it was taken at all. If the answer is "yes", compensation follows.

Justice Brennan put his finger squarely on the issue:

> The fact that a regulatory "taking" may be temporary, by virtue of the government's power to rescind or amend the regulation, does not make it any less of a constitutional "taking." Nothing in the Just Compensation Clause suggests that "takings" must be permanent and irrevocable. Nor does the temporary reversible quality of a regulatory "taking" render compensation for the time of the "taking" any less obligatory. This Court more than once has recognized that temporary reversible "takings" should be analyzed according to the same constitutional framework applied to permanent irreversible "takings."[8]

This section will analyze the nature of takings and show that the concept of "temporary" takings is doctrinally and constitutionally beside the point, as the government *always* has it within its power to make *any* taking "temporary" by returning what it took,[9] but this does not eliminate the need for compensation for the duration of the taking. The same is true for the mode of taking. At bottom, the issue is the negative impact of government action on the rights of private property owners. No more; but, surely, no less. If the impact of the government's action is severe, i.e., if it has gone "too far," then compensation is due. As the cases show, all sorts of government action, ranging from regulation to various kinds of physical

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7. This section builds on analysis appearing in Berger, *Protecting Property*, *supra* note 2.

8. San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 657 (1981) (Brennan, J., dissenting).

9. *See* Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 12 (1984) Court (explaining that the government may, if it chooses, abandon even a formal condemnation proceeding after trial).

invasion, have been held to be takings. And that should be the end of the question.

Overlaying this entire discussion is this central premise: the Bill of Rights was adopted to protect people against the government, not the other way round. No provision of the Bill of Rights protects the government against individuals. Thus, when presented with a choice of protecting citizens or protecting government, the choice is easy. The citizens should always win in such a tug-of-war. Thus, I opt for a broad conception of what constitutes a taking, as that is the way to provide the most protection to individuals and to most effectively carry out the goals of the Fifth Amendment.

A. All Takings Require Compensation

Aside from direct condemnations, there are two kinds of takings, labeled by the manner of their imposition. One is caused by direct physical invasion,[10] the other by regulation.[11] But, convenient as they may be for descriptive purposes, these labels are a constitutional irrelevancy; either form requires Fifth Amendment compensation.[12]

We will begin with an analysis of Justice Brennan's dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*.[13] The reason for that is simple. After the Supreme Court struggled in several opinions to find any common ground in defining the proper remedy for a regulatory taking, *San Diego Gas* shed some light. Albeit the light may have been flickering and uncertain, but it provided more certainty than we had had before. The reason for that lay in a strange sort of vote counting. Four justices believed that the case was not ripe for decision and voted to uphold the lower court's decision in favor of the government. In dissent, Justice Brennan urged that the decision was ripe and that the property owner ought to win. That position also had four votes. Justice Rehnquist filed a separate concurring opinion that agreed that the case was not ripe. Thus, he provided the fifth vote for the government. But he went further and said that if the case had been ripe, he would agree with Justice Brennan on the merits.[14] From that time on, the takings bar was holding its collective breath, waiting to see whether the five-Justice majority could find a case to attach to. But that gets ahead

10. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); United States v. Causby, 328 U.S. 256 (1946).

11. *See, e.g.*, First Eng. Evangelical Lutheran Church v. Cnty. of L.A., 482 U.S. 304 (1987); City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999).

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

13. *San Diego Gas*, 450 U.S. 621 (1981).

14. *Id.* at 633-34 (Rehnquist, J., concurring).

of the story. It also explains why a dissenting opinion could be deemed so important in the development of takings law. In his dissent in *San Diego Gas*, Justice Brennan expounded on what might be called a "unified field theory" of takings jurisprudence. His opinion drew upon all sorts of takings, without differentiation, to demonstrate the common constitutional thread uniting them all and stressed the "essential similarity of regulatory 'takings' and other 'takings.'"[15]

To illustrate the breadth of the takings concept, Brennan's analysis linked a permanent direct condemnation case[16] with flooding cases (both intended[17] and unintended[18]), a navigable servitude case,[19] an aircraft overflight case,[20] a mining regulation case,[21] and temporary direct condemnation cases,[22] among others.[23] In his pragmatic view, born of a bedrock belief in the Bill of Rights as the individual's shield against governmental overreaching,[24] all these impositions on private property owners were takings requiring compensation.[25] The broad range of causative actions serves to demonstrate that the bottom line in this constitutional analysis is not keyed to any specific kind of action. Government liability follows from the impact of its actions. The fact that some actions may have been for temporary periods of time merely affected the amount of compensation that would be due.[26] Later court decisions agree. As the Supreme Court put it in *Cedar Point Nursery v. Hassid*, "[t]he duration of an appropriation . . . bears only on the amount of compensation."[27]

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15. *Id.* at 651 (Brennan, J., dissenting).
16. Berman v. Parker, 348 U.S. 26 (1954).
17. United States v. Dickinson, 331 U.S. 745 (1947).
18. Pumpelly v. Green Bay Co., 80 U.S. 166 (1872).
19. Kaiser Aetna v. United States, 444 U.S. 164 (1979).
20. United States v. Causby, 328 U.S. 256 (1946).
21. Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).
22. Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. Gen. Motors Corp., 323 U.S. 373 (1945). These were cases where property was condemned for the duration of the war, but they were clearly compensable, resulting in these well-known decisions on compensability.
23. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 651-53, 656-60 (1981) (Brennan, J., dissenting).
24. *See* CHARLES M. HAAR & JEROLD S. KAYDEN, LANDMARK JUSTICE: THE INFLUENCE OF WILLIAM J. BRENNAN ON AMERICA'S COMMUNITIES (1989).
25. Justice Brennan's formulation recognizes that there are a "nearly infinite variety of ways in which government actions or regulations can affect property interests[.]" Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 31 (2012).
26. *Id.* at 658-60; Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1032-33 (1992) ("If this deprivation amounts to a taking, its limited duration will not bar constitutional relief.") (Kennedy, J., concurring).
27. Cedar Point Nursery v. Hassid, 141 S. Ct. 2066, 2074 (2021); *see also* Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573, 1583 (Fed. Cir. 1993) ("The limited duration of this taking is relevant to the issue of what compensation is just, and not to the issue of

The genius of this formulation is that it makes the law relatively straightforward to apply. When little or no damage is done, then landowners will either not file suit (this type of litigation is neither pleasant nor inexpensive)[28] or recover little or nothing after trial.[29] Legally, however, it recognizes a freeze on use for what it is: a taking for the duration of the freeze.

The language of the Fifth Amendment is clear and not to be tampered with. When government action interferes severely with the ability of private property owners to use their land in an economically productive fashion, then a taking occurs and compensation must be paid:

> The language of the Fifth Amendment prohibits the "tak[ing]" of private property for "public use" without payment of 'just compensation.' As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation, and "the self-executing character of the constitutional provision with respect to compensation," . . . is triggered. This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a "taking," compensation *must* be awarded.[30]

Six years later, the Supreme Court once again considered the regulatory takings remedy issue in *First English Evangelical Lutheran Church v. County of Los Angeles*.[31] By that time, Justice Rehnquist had become the Chief Justice, and he assigned the opinion to himself. As he had implicitly promised in his concurring

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whether a taking has occurred."); Hendler v. United States, 952 F.2d 1364, 1376 (Fed. Cir. 1991) ("[T]he fact that [the government's] action was finite went to the determination of compensation rather than to the question of whether a taking had occurred.").

28. The Supreme Court's own records reveal the lengths to which such litigation can go. *Tahoe-Sierra*, for example, was filed in 1984, and resulted in four separate trips to the Ninth Circuit before arriving at the Supreme Court in 2002. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302 (2002). *Del Monte Dunes* began its administrative proceedings in 1981 and its litigation in 1986 before concluding at the Supreme Court in 1999. City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999). It took the landowner in *Agins* 30 years to finally receive permission to build four homes on her 5-acre parcel. Agins v. City of Tiburon, 447 U.S. 255 (1980); *see also* Kanner, *Hunting the Snark*, *supra* note 2, at 340 n.127, 345 n.149.

29. As the Supreme Court recognized in *Kirby Forest Indus*., property owners are not likely to litigate unless the harm for which recompense is sought is substantial. Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 19 n.29 (1984). Nor are lawyers likely to get involved in *de minimis* matters on contingent fee agreements. *Id*.

30. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting) (emphasis in original) (citations omitted).

31. First Eng. Evangelical Lutheran Church v. Cnty. of L.A., 482 U.S. 304 (1987).

opinion in *San Diego Gas*, the Chief Justice wrote an opinion for the Court that adopted Justice Brennan's theory as its own.[32] The opinion analyzed and applied the same mix of takings cases—direct condemnations, along with a variety of physically invasive and regulatory inverse condemnations, both permanent and temporary[33]—and reached the same conclusion: all forms of taking require compensation under the Fifth Amendment. Indeed, the Supreme Court emphasized the similarity between direct condemnations for short periods and regulatory takings for similar time periods and concluded that the two are "not different in kind."[34]

In one of the first lower court applications of *First English*, the Eleventh Circuit Court of Appeals concluded that, "[i]n the case of a temporary regulatory taking, the landowner's loss takes the form of an injury to the property's potential for producing income or an expected profit."[35] That is an apt description of what happens in any takings case. Government action (either physical or regulatory) plainly takes the property's use and potential for whatever period of time a court cares to examine.

Lucas v. South Carolina Coastal Council[36] brought it all together.[37] That case involved South Carolina's effort to protect and preserve its shoreline. After all but two lots in an exclusive oceanfront residential subdivision were built upon, a new law prevented any further construction. The Supreme Court held that the owner of the last two vacant lots was entitled to compensation if the new law precluded all economically beneficial or productive use of his land.[38] The Court expressly reaffirmed Justice Brennan's *San Diego Gas* analysis that deprivation of economically productive use is, from the owner's viewpoint, the same as taking physical possession.[39] On remand, the South Carolina Supreme Court found a temporary taking as a matter of law and ordered compensation.[40]

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32. *First English* repeatedly cites Justice Brennan's *San Diego Gas* dissent as authoritative. *First Eng.*, 482 U.S. at 315, 316 n.9, 318.

33. *Id.* at 314-19.

34. *Id.* at 318.

35. Wheeler v. City of Pleasant Grove, 833 F.2d 267, 271 (11th Cir. 1987).

36. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

37. Even commentators who argued that *Lucas* established nothing new had to concede that it had synthesized and recompiled much of what had gone before. *E.g.*, Jerold S. Kayden, *The* Lucas *Case: Old Wine in Old Bottles*, 46 LAND USE L. & ZONING DIG. 9, 9 (1992).

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

39. *Id.* at 1017.

40. Lucas v. S.C. Coastal Council, 424 S.E.2d 484 (S.C. 1992). I note with some grim amusement that after fighting Mr. Lucas for years to prevent him from developing his land, once the state was forced to buy the lots from him, it put the lots on the market—for development. For a discussion of this disgraceful denouement, see GIDEON KANNER, *Not With a Bang, But a Giggle: The Settlement of the* Lucas *Case*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS 308 (David L. Callies ed., 1996).

The upshot of these cases is that all takings require compensation. There is no need for further analysis. The analysis has already been done by scholars of contrasting political and/or jurisprudential beliefs. From his vantage point on the liberal side of academia, Professor Laurence Tribe read this case law as meaning that ". . . forcing someone to stop doing things with his property—telling him 'you can keep it, but you can't use it'—is at times indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else."[41] Professor Richard Epstein, viewing things from the opposite end of the ideological spectrum, agrees: "What stamps a government action as a taking . . . is what it does to the property rights of each individual who is subject to its actions: nothing more or less is relevant."[42] Proceeding from the scholarly to the mundane, the idea that deprivation of the right to use property is a serious infringement of ownership may be found in even the most general of texts: ". . . if one is deprived of the use of his or her property, little but a barren title is left in his or her hands."[43]

B. A Seizure of the Right to Use Property—Even Temporarily—Requires Compensation

The Fifth Amendment's just compensation guarantee is concerned not with the niceties of legal form, but with the practical impact of government actions on the owners of private property.[44]

If a government agency were to condemn property temporarily for a passive use, as it does regularly (e.g., for a scenic easement), no one would seriously suggest that compensation should not be paid.[45] In like vein, when regulations have the same effect (of

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41. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 593 (2d ed. 1988).

42. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 94 (1985).

43. 63C AM. JUR. 2D, Property § 3 at 69 (1997).

44. *See* United States v. Dickinson, 331 U.S. 745, 748 (1947) ("Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.'"); Hughes v. Washington, 389 U.S. 290, 298 (1967) (Stewart, J., concurring) (emphasis added) ("the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*."); *see also* Davis v. George B. Newton Coal Co., 267 U.S. 292, 302 (1925) ("The taking was for a public use. The incantation pronounced at the time is not of controlling importance; our primary concern is with the accomplishment."); Yuba Goldfields, Inc. v. United States, 723 F.2d 884, 889 (Fed. Cir. 1983).

45. *See* the Court's discussion in First Eng. Evangelical Lutheran Church v. Cnty. of L.A., 482 U.S. 304, 318 (1987) (applying this direct condemnation concept to regulatory takings and showing the applicability to regulatory takings of the wartime condemnations of temporary use in *Kimball Laundry*. Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. Gen. Motors Corp., 323 U.S. 373 (1945).

denying owners the use of their land) through the nominal exercise of the police power, there is no functional difference between the two modes of government action.[46] Either way, the owners are deprived of the use and enjoyment of their property, and it is that deprivation, not the formal acquisition of title by the government, that is the mechanism of the taking.[47]

Justice Brennan's *San Diego Gas* analysis also showed that insofar as the applicability of the Just Compensation Clause is concerned, there is no constitutional content in the temporariness of a taking. He aptly concluded that *all* takings are, in reality, temporary, because the government can always revoke a regulation or cease a physical invasion or surrender possession.[48]

In *First English*, the Supreme Court directly faced the question of whether the length of time of a deprivation made any constitutional difference when determining whether a taking requires compensation. The three dissenters thought it did.[49] The other six, however, decided it did not.[50]

Shortly thereafter, the Court of Appeals for the Federal Circuit explained (through Judge Jay Plager, who spent his formative years as a property professor) why temporary takings are, from a jurisprudential standpoint, the same as permanent takings:

> Part of the difficulty here is the confusion that arises in the cases and commentaries over the use of the term "temporary taking." The argument in *Agins* [*v. City of Tiburon*], which was finally laid to rest in *First Lutheran Church*, was that a regulatory taking, unlike a physical taking, is by its nature "temporary." This is because the government, upon being told the regulation was overly intrusive and therefore a taking (by whatever test), could rescind or amend the regulation.
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> It is equally true, however, that the government when it has taken property by physical occupation could subsequently decide to return the property to its owner, or otherwise release its interest in the property. Yet no one would argue that that would somehow absolve the government of its liability for a taking during the time the property was denied to the property owner. All takings are "temporary," in the sense that the government can always

46. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting).

47. *Gen. Motors*, 323 U.S. at 378; Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 14 (1984); *see also* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 244 (1984).

48. *San Diego Gas & Elec. Co.*, 450 U.S. at 657, 659-66.

49. *First Eng.*, 482 U.S. at 322.

50. *Id.* at 318.

> change its mind at a later time, and this is true whether the property interest taken is a possessory estate for years or a fee simple acquired through condemnation, or an easement of use by virtue of a regulation.[51]

In a recent takings case, Chief Justice Roberts put it a bit more colloquially, if less elegantly, noting that, "[a] bank robber might give the loot back, but he still robbed the bank."[52] That would seem to have eliminated the conclusion in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* that "a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."[53] Recovery of value is simply the equivalent of a bank robber returning the loot. As Justice Scalia pointed out, the "malefactor [should not get] the benefit of its malefaction."[54] Two decades earlier, the Court had concluded simply that "[e]lemental notions of fairness dictate that one who causes a loss should bear the loss."[55]

Even decades earlier than that, the Supreme Court had noted the unfairness that can occur "when the Government does not take [a property owner's] entire interest, but by the form of its proceeding chops it into bits, of which it takes only what it wants, however few or minute, and leaves [the property owner] holding the remainder, which may be altogether useless to him . . ."[56] Indeed, as the Court concluded in *Lingle v. Chevron*, "total deprivation of beneficial use is, from the landowner's point of view, the *equivalent of a physical appropriation*."[57]

Thus, the real question is whether a taking has occurred, and that depends on the impact of the governmental action on the ability of the landowner to make economically productive use of the land. Justice Holmes put it quite directly more than a century ago, saying: "[T]he question is what has the owner lost[?]"[58] As the Federal Circuit Court of Appeals put it, "[n]othing in the language of the Fifth Amendment compels a court to find a taking only when the

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51. Hendler v. United States, 952 F.2d 1364, 1376 (Fed. Cir. 1991); *see* Agins v. City of Tiburon, 447 U.S. 255 (1980).

52. Knick v. Twp. of Scott, 139 S. Ct. 2162, 2172 (2019).

53. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 331-32.

54. Palazzolo v. Rhode Island, 533 U.S. 606, 636-37 (2001) (Scalia, J., concurring).

55. Owen v. Indep., 445 U.S. 622, 654 (1980).

56. United States v. Gen. Motors Corp., 323 U.S. 373, 382 (1945).

57. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539-40 (2005) (emphasis added) (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017 (1992)). Many decades earlier, the Court had concluded that "[c]onfiscation may result from a taking of the use of property without compensation as from the taking of the title." Chicago, Rock Island & Pac. Ry. Co. v. United States, 284 U.S. 80, 96 (1931).

58. Bos. Chamber of Com. v. Boston, 217 U.S. 189, 195 (1910).

Government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests."[59]

In *Lucas*, where the Court considered the Fifth Amendment implications of a South Carolina regulation that precluded all economically productive use of two subdivided residential parcels, the Court aptly noted "the practical equivalence in this setting of negative regulation and appropriation."[60]

In *City of Monterey v. Del Monte Dunes*, the Court upheld a jury's award of compensation for a temporary taking after a city repeatedly denied permission to develop houses on residentially zoned land.[61] Although the Court acknowledged that it had not provided a "definitive statement of the elements of a claim for a temporary regulatory taking,"[62] it upheld a judgment based on jury instructions drawn from cases dealing with permanent takings. In this more recent temporary taking case, the Court thereby reaffirmed the *San Diego Gas/First English* view that the essential underlying jurisprudence is the same for all takings.

The Supreme Court has frequently reverted to the property professors' "bundle of sticks" analogy in takings cases.[63] In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court concluded that even a miniscule physical taking required compensation because "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand."[64] There are no strands left for the owners to enjoy—unless one considers the joy of paying taxes a beneficial use of the land.[65]

Thus, neither the mode nor duration of a taking is of constitutional moment. If the facts show that it is a taking, then compensation is mandatory.

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59. Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1568 (Fed. Cir. 1994).

60. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019.

61. City of Monterey v. Del Monte Dunes, 526 U.S. 687, 721-23 (1999).

62. *Id.* at 704.

63. *E.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982); U.S. v. Sec. Indus. Bank, 459 U.S. 70, 76 (1982); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011 (1984); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992); Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001); Hodel v. Irving, 481 U.S. 704, 716 (1987); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987); Dolan v. Tigard, 512 U.S. 374, 393 (1994); Murr v. Wis., 137 S. Ct. 1933, 1952 (2017) (Roberts, C.J., dissenting); Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021); *see* Berger, *Protecting Property, supra* note 2.

64. *Loretto*, 458 U.S. 419, 435 (1982).

65. *Cf.* Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 232 (Ct. App. 1938) (confiscation would at least relieve the owners of their tax burdens).

II. THE SUPREME COURT HAS MADE A HASH OF DEFINING A "TAKING" UNDER THE FIFTH AMENDMENT

Sometimes concepts that should be simple are transmogrified into dense webs of uncertainty. Taking property is one of them. We are talking about rules that should be so basic that most children are able to understand them. Distinguishing between the concepts "mine" and "not mine" is something that is supposed to occur in the preschool years. But, sometimes some of us forget those early playground lessons. The concept is easy: if it is "mine," I get to play with it and you don't, unless I approve. Professor Donald Kochan has compared the traditional definitions of rights and duties devised by Professor Wesley Newcomb Hohfeld with basic precepts of child psychology and found much commonality:

> Sharing starts to seem more acceptable to a child when a child understands their reciprocal claims and obligations regarding owned things. In other words, we are more willing to share once we know three things: (1) we can get our things back; (2) we can set the terms and conditions of sharing; and (3) the sharee must accept the bitter with the sweet in sharing and abide by the owner's terms if the sharee wishes to have the benefit of using, possessing, or accessing the property of another. *We are more willing to share when there are strong property norms, backed by the confidence generated by strong property rights enforcement mechanisms*.[66]

The simplicity was explained in elegant fashion by Justice Brennan in his celebrated dissent in the *San Diego Gas* case, as shown above.[67] Justice Brennan's focus was not on the technicalities by which government action impacted property, but on the reality of what the government action had done to the property owner's ability to make rational use of the land. His focus was, as the Court's ought to be, on the impact to the owner:

From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it.[68]

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66. Donald J. Kochan, *I Share, Therefore It's Mine*, 51 U. RICH. L. REV. 909, 924 (2017) (emphasis added).

67. *See supra* note 30 and accompanying text; San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 652 (Brennan, J., dissenting).

68. *Id.* at 652-53.

Shortly thereafter, a majority of the Court adopted Justice Brennan's philosophy as the Court's holding in *First English*.[69] There, the Court plainly held that the Constitution protects private property from all sorts of takings. Period.[70]

And then it started to fall apart.

Don't take my word for it. Here is how the Supreme Court itself has evaluated its own performance:

> In Justice Holmes' well-known, if less than self-defining, formulation, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking."[71]
>
> The rub, of course, has been—and remains—how to discern how far is "too far."[72]
>
> [W]e have "generally eschewed" any set formula for determining how far is too far, choosing instead to engage in "essentially ad hoc factual inquiries."[73]
>
> Since [*Pennsylvania Coal v.*] *Mahon*, we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking.[74]
>
> Indeed, we still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings, preferring to examine "a number of factors" rather than a simple 'mathematically precise' formula.[75]
>
> Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings.[76]

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69. First Eng. Evangelical Lutheran Church v. Cnty. of L.A., 482 U.S. 304 (1987).

70. *Id.* at 318-19.

71. Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

72. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538 (2005). Having summarized it that way, *Lingle* described the *Penn Central* factors as "storied but cryptic." *Id*. at 537 (adding yet more unhelpful verbiage to the stew the Supreme Court was concocting).

73. Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 326 (2002) (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1005 (1992) which, in turn, quoted Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 124 (1978)).

74. *Palazzolo*, 533 U.S. at 617.

75. *Tahoe-Sierra*, 535 U.S. at 326.

76. *Id.* at 326 n. 23 (quoting with approval from *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring)).

With respect, that is no way to run a railroad. One would think that after continuously confessing its failure to provide anything approaching useful guidance, the Supreme Court would have taken one of those cases (or granted certiorari in any of the scores of similar cases that followed thereafter)[77] and provided the guidance that it had concededly refrained from doing. It is simply unacceptable for our highest court to repeatedly say the equivalent of: Sorry—we have no helpful hints on how to approach this fundamental Constitutional issue.[78]

Nearly 50 years down the road from *Penn Central*, and 100 years down the road from *Pennsylvania Coal v. Mahon*, it is time for less handwringing and a bit of concrete assistance. As Justice Robert Jackson apocryphally put it, "We are not final because we are infallible, but we are infallible only because we are final."[79]

"Infallible" is hardly the word one would choose to evaluate the Supreme Court's performance in this field. Professor Arvo Van Alstyne, described the pertinent decisional law as "largely characterized by confusing and incompatible results, often explained in conclusionary terminology, circular reasoning, and empty rhetoric."[80] Even the Supreme Court has been forced to recognize this and has had to overrule some of its key takings cases—cases that had been cited many thousands of times as expressing settled, bedrock law.[81]

However, because the Court is concededly "final," it is time for it, in the immortal words of W.C. Fields, to "take the bull by the tail and face the situation."[82]

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77. *See, e.g.*, Petition for a Writ of Certiorari at i-ii, Smyth v. Conservation Comm'n of Falmouth, 140 S. Ct. 667 (2019) (No. 19-223); Petition for a Writ of Certiorari at i, Charles A. Pratt Constr. Co. v. Cal. Coastal Comm'n, 555 U.S. 1171 (2009) (No. 08-668); *see also, e.g.*, Petition for a Writ of Certiorari at i, Colony Cove Props., LLC v. City of Carson, 139 S. Ct. 917 (2019) (No. 18573); Brief Amicus Curiae of Ctr. for Const. Juris. in Support of Petitioners, Kitsap All. of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 566 U.S. 904 (2012) (No. 11-457); Petition for a Writ of Certiorari at i, Rose Acre Farms, Inc. v. United States, 559 U.S. 935 (2010) (No. 09-342); Brief in Opposition at 8, Hsu v. Cnty. of Clark, 544 U.S. 1056 (2005) (No. 04-1282).

78. For additional shortcomings of the Supreme Court's application of *Penn Central*, see Berger, *Protecting Property*, *supra* note 2, at 31-35.

79. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring); *see* Ruth Bader Ginsburg, *Tribute to Chief Justice William Hubbs Rehnquist*, 74 GEO. WASH. L. REV. 869, 870 (2006).

80. Arvo Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 2 (1970).

81. *See, e.g.*, Williamson Cnty. Reg'l Plan. Agency v. Hamilton Bank, 473 U.S. 172 (1985), *overruled by* Knick v. Twp. of Scott, 139 U.S. 2162 (2019); Agins v. Tiburon, 447 U.S. 255 (1980), *abrogated by* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).

82. BRAINYQUOTE, https://www.brainyquote.com/quotes/w_c_fields_125388 (last visited Feb. 17, 2024).

III. *PENN CENTRAL* IS A FAILED "POLESTAR"

So, what would the Court see if it were to look directly into the hindquarters of the bull that it had by the tail? It would certainly not see a "polestar." Classically, the polestar was the brightest light in the northern sky, something that sailors in the world before electronics could use to find their way.[83] Whatever it is, *Penn Central* is no polestar. It concededly fails to provide the guidance that a polestar is supposed to furnish. People seeking to follow it as some sort of guide are more likely than not going to end up running aground (or falling off the edge, if you are a flat-earther). As noted hereafter, convincing a court that a taking has occurred under the *Penn Central* standard is difficult, at best. Indeed, most such cases end in government victories.[84]

Worse, the confusion almost seems to have been by design because the Court has acknowledged the problems and refused to address them.[85] Polestar? *Penn Central* has, in fact, become a laughingstock. That is why Justice Thomas concluded his recent dissent from denial of certiorari in a case that potentially provided the Supreme Court with a way out of the morass by saying:

> Our current regulatory takings jurisprudence leaves much to be desired . . . The current doctrine is so vague and indeterminate that it invites unprincipled, subjective decision making dependent upon the decisionmaker . . . A know-it-when-you-see-it test is no good if one court sees it and another does not. Next year will mark a century since [*Pennsylvania Coal Co. v.*] *Mahon,* during which this Court for the most part has refrained from providing definitive rules. It is time to give more than just some, but not too specific guidance.[86]

My opinion differs from Justice Thomas's in only one respect. The Court has had many opportunities to "make clear when [a

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83. *See* VOCABULARY.COM, https://www.vocabulary.com/dictionary/polestar (last visited Feb. 17, 2024).

84. Not all, to be sure, but most. *See infra* note 89, and accompanying text. It, of course, cannot explain all the losses, but I have suggested in the past that at least some are due to untutored plaintiffs' counsel simply thinking that a takings claim is a nifty idea and tacking it onto an otherwise ordinary complaint. To put it bluntly, those who don't know the field should stay out of it: "friends don't let friends file takings claims." *See* Michael M. Berger, *Strong and Informed Advocacy Can Shape the Law: A Personal Journey*, 4 BRIGHAM-KANNER PROP. RTS. CONF. J. 1, 2-3 (2015) (criticizing takings claims based on forcing exotic dancers to stay four feet away from customers, castrating dogs, precluding a murderer from collecting on his victim's life insurance policy, and the like).

85. *See supra* notes 71-76 and accompanying text.

86. Bridge Aina Le'a v. Haw. Land Use Comm'n., 141 S. Ct. 731, 731-32 (2021) (Thomas, J., dissenting) (citations omitted).

taking] occurs."[87] Having demonstrated that it is either incapable of providing that clarity or that it simply has no interest in doing so, it is time for the Court to step back. What it needs to do is to accept Justice Holmes's general conclusion that when government action goes "too far", it is a taking, and then turn the question of deciding whether specific action has failed that broad test up to a jury that is presented with all the evidence surrounding the situation. That is the core of our common law tradition, and it will work quite well in these specific circumstances. Factual decision by a jury is our polestar.

IV. STOP CHOPPING TAKINGS INTO PIECES AND PUTTING THEM INTO DIFFERENT BOXES

A serious part of the problem is the Supreme Court's love of pigeonholes, and its consequent insistence on placing different "kinds" of takings in different cubbies: regulatory takings, physical takings, permanent takings, temporary takings, trespassory takings, conditions, exactions, floodings, overflights, and so on. And then pretending that they are substantively different things. The truth is that the multiple little boxes into which the court segregates takings are a substantial part of the problem. A claim that government action fits in one box will likely be met with the defense (or worse, a holding by a court) that the action actually belongs in a different box and is subject to a different kind of analysis.[88]

The solution is clear: get rid of the boxes. Simplify the process. Treat all government impositions on property owners as potential takings and have a jury judge them by common sense standards. Only then will the promise of the Fifth Amendment to guarantee just compensation when property is taken for public use be fulfilled.[89] After all, the Fifth Amendment does not differentiate among different flavors of takings, providing compensation for some but not for others. Nor does it command any sort of Solomonic baby slicing. It simply says, ". . . nor shall private property be taken for

87. *Id.*

88. I am mindful of Yogi Berra's aphorism, "when you come to the fork in the road, take it." Edward H. Cooper et al., *The Jurisprudence of Yogi Berra*, 46 EMORY L.J. 697, 741 (1997). In our context, I take that to mean that trying to stuff your takings case into a specific cubby is an invitation to having some court at some point down the road (after the expenditure of a monarchical sum in time, effort, and cold cash) tell you that you chose the wrong box. Why should you have to choose at all when you come to that fork in the road? Why not just allege that a taking occurred, present all the evidence to the jury, and let the jury determine the rest?

89. I must confess that this is not my first rodeo. I have touched on this subject in the recent past and this paper builds on that earlier work. *See* Berger, *Protecting Property*, *supra* note 2, at 35-44; Michael M. Berger, *Whither Regulatory Takings?*, 51 URB. LAW. 171, 179-82 (2021).

public use without just compensation."[90] Period. The rest starts to look like Talmudic disputation.

Government need not be overly concerned that all sorts of minor infringements will be brought to court. Takings litigation is neither cheap nor easy. Only property owners with substantial losses and lawyers willing to invest their time and effort into extensive litigation will bring such cases to court.[91]

In a graphic moment, the Ninth Circuit Court of Appeals observed, "If we attempt to cut a condemnation proceeding into slices, it bleeds."[92] I have never been quite sure what the court had in mind when it penned those words, but I am happy to run with them here. One of the fundamental problems with takings law is the judiciary's penchant for slicing, dicing, and categorizing things. Too much blood. Not enough clarity.

V. LET JUDGES BE JUDGES AND JURIES BE JURIES

Speaking of boxes, here is a pair worth keeping separate: judges and juries. This brings us to the heart of my proposed solution. It may be a heretical thing to say, but judges do not have a monopoly on wisdom. A genius part of the common law system is the creation of the jury. When confronted with conflicting piles of evidence, the jury has been like a heat-seeking missile in determining where the truth lies.[93] More than that, as Thomas Jefferson put it, the jury trial represents "the only anchor, [as] yet imagined by man, by which a government can be held to the principles of its constitution."[94] Professor Akhil Amar summarized that "[n]o idea was more central to our Bill of Rights . . . than the idea of the jury."[95]

So, here is my thought: let the judges keep their hands off the factual question of whether a taking has occurred. Let us return to Justice Holmes's concept that a taking occurs when government action goes "too far." Then, rather than troubling the judiciary with

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90. U.S. CONST. amend. V.

91. For examinations of takings cases showing that only significant cases go to judgment, see, for example, Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of* Lucas*: Making or Breaking the Takings Claim*, 102 IOWA L. REV. 1847 (2016); Daniel R. Mandelker, *Litigating Land Use Cases in Federal Court: A Substantive Due Process Primer*, 55 REAL PROP., TR. & EST. L.J. 69, 96-97 (2020) ("a takings claim is almost impossible to win").

92. Phillips v. United States, 243 F.2d 1, 2 (9th Cir. 1957).

93. When I went to law school many decades ago, my contracts class was taught by a crusty old adjunct professor who was also a trial judge. His response to any issue that came up regarding the ultimate facts in a case was, "the jury always knows!"

94. Thomas Jefferson, *Letter from Thomas Jefferson to Thomas Paine*, July 11, 1789, https://fija.org/library-and-resources/library/historic/letter-jefferson-to-paine.html.

95. Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1169 (1995).

analyzing things like the *Penn Central* "factors" and trying to divine what the Supreme Court may have meant, let's do away with ambiguous legal "factors" and let the jury simply analyze the evidence and decide whether the government went "too far."[96]

Juries are fully capable of taking on this role, as the jury showed in *Del Monte Dunes*. That jury examined a fairly complex set of facts covering many years and various kinds of government actions and concluded that the constitutional line had been crossed. On review, both the Ninth Circuit and the Supreme Court approved its work.

The judiciary needs to streamline things and return to basics. As Justice Robert Jackson explained, it is never too late to "surrende[r] former views to a better considered position."[97] The judiciary also needs to back off a bit from getting its hands dirty with the facts and deciding the merits of takings cases. I suggest two changes. First, no more boxes. Put all challenges to governmental actions that (by whatever definition)[98] "take" private property in the single box marked "potential takings" and evaluate them on their merits. Second, back away and leave the evaluation of the underlying factual merits to the body best suited to such evaluations: the jury.[99] Give them their due. Many judges are fine at evaluating *legal* questions. That's what we were all taught how to do in law school. But the answer to the question of whether a specific action has "gone too far" and "taken" private property for public use is a quintessentially factual question.[100] The judicial system has spent centuries honing the jury as the ultimate fact finder.[101] More than that, judges often resent being asked to review

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96. I am pleased to see that judges have begun speaking out in favor of revitalizing the jury system. *See* Pierre Bergeron, *A Judge's Pitch to Revive the Jury Trial*, LAW360 (Mar. 7, 2024), https://www.law360.com/articles/1704879?scroll=1&related=1; William Young, *The Missing American Jury*, LAW360 (Mar. 7, 2024), https://www.law360.com/articles/865278?scroll=1&related=1.

97. McGrath v. Kristensen, 340 U.S. 162, 178 (1950) (Jackson, J., concurring).

98. And let's use all the definitions that have arisen so far and others that may arise in the future.

99. I have suggested elsewhere that deciding whether government action has gone "too far" is the kind of fact-finding best left to juries, not judges. I still believe that. *See* Berger, *Whither Regulatory Takings?*, *supra* note 89, at 197-201.

100. This may be the one thing that *Penn Central* got right: most cases need to be decided individually on their own facts. Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 124 (1978); *see also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); McDougal v. Cnty. of Imperial, 942 F.2d. 668, 680 (9th Cir. 1992). Whether something goes "too far" is generally a jury question. *See, e.g.,* Vulcan Materials Co. v. City of Tehuacana, 369 F.3d 882 (5th Cir. 2004); United N.Y. Sandy Hook Pilots Ass'n v. Rodermond Indus., Inc., 394 F.2d 65 (3d Cir. 1968); Green v. Sanitary Scale Co., 431 F.2d 371 (3d Cir. 1970); Pa. R. Co. v. Forstall, 159 F. 893 (2d Cir. 1908).

101. As Professor Gideon Kanner put it, "appellate courts . . . lack the time, the litigational tools, and the institutional competence to make them. The usual pattern in American law, therefore, is that ad hoc factual decisions are made by juries (duly instructed on the applicable law), or by judges acting as triers of fact." Kanner, *supra* note 3, at 726-27 (footnotes omitted).

land use planning issues.[102] As a matter of Seventh Amendment interpretation, the Supreme Court plainly held that juries are capable of deciding the supposedly "legal" question of whether a taking has occurred, rather than restricting them to the supposedly "factual" question of the quantum of compensation due.[103] Let the jury do its job.[104]

A final note about juries. Some will demur to this idea, in this context, on the ground that property owners in takings cases are not entitled to juries except to determine the amount of compensation after the court has determined that a taking occurred.

They would be wrong. The idea, although popular in some judicial circles, is contrary to *Del Monte Dunes* as well as the common law of England at the time the Bill of Rights was adopted.[105] In a nutshell, *Del Monte Dunes* (through both Justice Kennedy's majority opinion and Justice Scalia's concurring opinion) showed that the kind of litigation typified by takings cases would have been tried to an English jury in 1791, and such litigation continues to be tried to a jury in England today. The one thing that *Del Monte Dunes* got wrong was its conclusion that the English courts did not use juries in takings cases (called "compulsory purchase" over there). The British Court of Appeal case of *De Keyser's Royal Hotel v. The King*[106] discusses British legal history as far as trial by jury in compulsory purchase cases is concerned, and concludes that, as of 1708 (i.e., before our Revolution and adoption of the Bill of Rights), such cases were tried to juries. All parties to that case agreed.

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102. Hoehne v. Cnty. of San Benito, 870 F.2d 529, 532 (9th Cir. 1989) (not the "Grand Mufti" of land use litigation); Dodd v. Hood River Cnty., 136 F.3d 1219, 1230 (9th Cir. 1998); Murphy v. New Milford Zoning Comm'n, 402 F.3d 342 (2d Cir. 2005); River Park Inc. v. City of Highland Park, 23 F.3d 164, 165 (7th Cir. 1994); *see* Hynes v. Pasco Cnty., 801 F.2d 1269, 1270 (11th Cir. 1986) ("not . . . a zoning review board"); Polenze v. Parrott, 883 F.2d 551, 558 (7th Cir. 1989); Raskiewicz v. Town of New Bos., 754 F.2d 38, 44 (1st Cir. 1985); *see also* Vill. of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting) ("Our role is not and should not be to sit as a zoning board of appeals."). Refer also to the caustic commentary of Judge Posner in Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988) (stating that the case was "a garden-variety zoning dispute dressed up in the trappings of constitutional law."); *see generally* Steven J. Eagle, Penn Central *and Its Reluctant Muftis,* 66 BAYLOR L. REV. 1 (2014).

103. City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999).

104. I still bridle at the thought of what happened in *Bridge Aina Le'a v. State of Haw.*, where the jury found a taking and the trial judge upheld that finding and then the Court of Appeals re-weighed the evidence, re-evaluated the credibility of witnesses *whom it neither saw nor heard*, and concluded there was no taking at all. Bridge Aina Le'a v. State of Haw., 950 F.3d 610, 617, 630 (9th Cir. 2020). For fuller discussion, see Berger, *Whither Regulatory Takings?*. *supra* note 89.

105. *See* Gideon Kanner, *Our Eminent Right to a Jury Trial*, 49 URB. L. 607 (2017); Gideon Kanner, *Our Eminent Right to a Jury*, 3Y009 ALI-CLE 61 (2017) (Westlaw).

106. Att'y Gen. v. De Keyser's Royal Hotel [1919] 2 Ch. 197 (C.A.) 222.

VI. CONCLUSION

We need to stop kidding ourselves. *Penn Central* isn't working and it can't be fixed. The way to put all of us—judges, regulators, and property owners alike—out of the misery of trying to deal with it is for the Supreme Court to bite the bullet and eliminate it. It took hard looks at *Agins* and *Williamson County*, and substantially overruled them. It can do the same with *Penn Central*. The best way to fix the situation is to simply trust juries to do what they have historically done in all sorts of substantive fields: examine all the evidence and determine whether government action has gone so far as to have taken property in the constitutional sense.