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## Taking Back the Streets? How Street Art Ordinances Constitute Government Takings

Sheldon Evans

Washington University in St. Louis School of Law, sheldon.evans@wustl.edu

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# Taking Back the Streets? How Street Art Ordinances Constitute Government Takings

Sheldon A. Evans\*

*As street art continues to fuel a generation of counterculture and gains popularity in pop culture, laws enacted by local governments to curb this art form raise interesting constitutional issues surrounding the Fifth Amendment's Takings Clause. More and more cities across America are classifying street art and graffiti as public nuisances. Such municipalities impose their agenda on private property owners with street art ordinances. These laws allow the government to come onto private property to remove the street art; some laws go even further by requiring the property owner to remove the street art at his own cost. This Article attempts to make sense of the Takings Clause's tumultuous doctrines and their underlying principles in order to analyze this anti-street art campaign. In the process, this Article analyzes whether street art ordinances constitute takings under the Fifth Amendment due to their potential negative economic impact on property values and the temporary deprivation of essential property rights.*

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\* B.A., University of Southern California, 2008; J.D., University of Chicago, 2012.

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## INTRODUCTION

As a property owner, discovering graffiti on your property can be like discovering a latent liability or striking oil. Without your consent, some member of the counterculture has used your pristine building, wall, or other surface as a canvas to forward their artistic agenda. To add insult to injury, they have left you to clean up the mess. Further, the city in which you live has specific laws that require the following: either you paint over the graffiti at your own cost or give consent to city workers to do the same. As a property owner with legitimate interests in your property value, removal of such blight in the usual case could not come sooner. But what if this graffiti was more than the product of rival gangs marking their territory; what if it was more than artistic teenagers seeking a thrill; what if it was more than underground artists trying to make a name for themselves? What if, instead, it was the stencil of an unassum-

ing rat,<sup>1</sup> of two lovers,<sup>2</sup> or even a girl on a swing.<sup>3</sup> In that case, as this Article endeavors to demonstrate, everything changes due to the constitutional calculus and the economic rights of the property owner.

Street art, as such public displays of uncommissioned art are commonly referred to, is becoming more of a common social phenomena in urban centers. This is so much the case that many American cities have gone to extreme lengths to adopt strict laws and penalties to curb street artists. Such laws, however, not only seek to punish the artist but also the owner of the canvas; these street art ordinances impose stiff penalties on property owners who do not take appropriate steps to remove street art from their property. These laws affect property owners' rights to exclude others from the property, to benefit from improvements to their property, and to manage and enjoy their property as they see fit. The loss of such important property rights elicits interesting constitutional issues under the Fifth Amendment's Takings Clause.<sup>4</sup> After all, private ownership of property (and the rights that accompany such ownership) has been described from the beginning of the Union as among the most important and fundamental virtues necessary to build a free society.<sup>5</sup> Further, in a day and age when street art is

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<sup>1</sup> See Deborah Vankin, *Banksy's Haight Street Rat Scampers Down to U.S. Bank Tower in L.A.*, L.A. TIMES (Sept. 24, 2014, 4:42 PM), <http://www.latimes.com/entertainment/arts/culture/la-et-cm-banksy-haight-street-rat-us-bank-tower-los-angeles-20140924-story.html> (highlighting Banksy's rat stencil in Los Angeles).

<sup>2</sup> See *Banksy Artwork Saves Youth Club as it Sells for £400k*, TELEGRAPH (Aug. 27, 2014, 3:51 PM), <http://www.telegraph.co.uk/culture/art/11059481/Banksy-artwork-saves-youth-club-as-it-sells-for-400k.html> (highlighting Banksy stencil "Mobile Lovers").

<sup>3</sup> See Andrian Glick Kudler, *Some LA Street Art Worth \$650K, Some Worth Felony Charges*, CURBED LOS ANGELES (Apr. 9, 2014), [http://la.curbed.com/archives/2014/04/in\\_los\\_angeles\\_some\\_street\\_art\\_is\\_worth\\_650k\\_and\\_some\\_is\\_worth\\_felony\\_charges.php](http://la.curbed.com/archives/2014/04/in_los_angeles_some_street_art_is_worth_650k_and_some_is_worth_felony_charges.php) (highlighting Banksy stencil of a girl on a swing in a Los Angeles parking lot).

<sup>4</sup> See U.S. CONST. amend. V.

<sup>5</sup> See James W. Ely, Jr., "That due satisfaction may be made:" *the Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1, 1 (1992) ("[T]he notion that property ownership was essential for the enjoyment of liberty has long been a fundamental tenet of Anglo-American constitutional thought." (citing JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 27-33 (1986))); see also Cameron Madigan, *Taking for Any Purpose?*, 9 HASTINGS

enjoying immense popularity as an art form, the imposition of the state upon a property owner to remove street art can actually damage the value of his property.

This Article argues that such street art ordinances—without built-in judicial oversight or proper means of administrative challenges—should constitute a government taking pursuant to the Takings Clause. This Article forwards its argument in six parts. Part I introduces street art, its definition, and its culture. Upon investigation, it becomes apparent that this art form has gained traction in popular culture, which has created a market demand that can benefit property owners. Part II lays out the conflicting ideology of the rule of law in many major metropolitan areas, with a particular focus on Los Angeles’s anti-graffiti scheme. Many city governments across the United States continue to classify street art as a public nuisance that harms the community. After these ordinances are introduced, Part III continues by outlining the constitutional backdrop. Making sense of this body of law is no small feat, and this Article attempts to clarify conflicting doctrines by analyzing the Supreme Court’s underlying principles in applying the Takings Clause. Next, Part IV analyzes the constitutionality of street art ordinances and whether the forced removal of potentially valuable street art is an unconstitutional taking. Ultimately, this Article argues that street art ordinances can constitute unconstitutional takings, and proposes solutions to remedy this problem. This Article concludes with a brief summary of unconstitutional street art ordinances and the hope that legal scholarship will further explore this issue.

## I. THE STREET ART MOVEMENT — A COUNTER CULTURE

*If art is to nourish the roots of our culture, society must set the artist free to follow his vision wherever it takes him.*

-John Fitzgerald Kennedy<sup>6</sup>

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W.-NW J. ENVTL. L. & POL’Y 179 (2002–2003) (quoting John Adams: “Property must be secured or liberty cannot exist.” (citation omitted)).

<sup>6</sup> SIMON G. ANRINK, JOHN F. KENNEDY: THE MAN AND THE PRESIDENCY 105 (1987).

Philosophers have recognized the social impact of visual art for centuries.<sup>7</sup> Visual art shapes a new reality derived from the artist's perceptions, communicating to audiences through expressive functions and symbols.<sup>8</sup> In this way, art as a method of communication is somewhat innate and dates back to the beginning of humanity.<sup>9</sup> One could even say that street art was the first art form; for over 30,000 years, the human race has used walls of buildings, homes, caves, trees, and other mediums to communicate stories.<sup>10</sup> This is no surprise considering that the English word "graffiti" is derived from the Italian word "graffiare," meaning "'to scratch,' which refers to the earliest forms of graffiti etched into walls and trees."<sup>11</sup>

In order to further explore this topic in the present day, it is important to discern what the term "street art" means in culture, and also in the context of this Article. It can mean many different

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<sup>7</sup> Sheldon H. Nahmod, *Artistic Expression and the Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 WIS. L. REV. 221, 224 n.12 (1987) (citation omitted) ("Plato, for example, considered artists so powerful and influential that they were to be outlawed in his ideal Republic unless they served the state. His concern was their corrupting influence.").

<sup>8</sup> See *id.* at 223 (citing H. READ, *ICON AND IDEA* 105 (1955); H. READ, *ART AND ALIENATION* 162-64 (1967)).

<sup>9</sup> John McMillen & Rebecca Atkinson, *Artists and Athletes: Balancing the First Amendment and the Right of Publicity in Sport Celebrity Portraits*, 14 J. LEGAL ASPECTS SPORT 117, 118 (2004) ("Individual interpretive expression dates back to the beginning of human civilization to the Paleolithic, Mesolithic, and Neolithic time periods and has appeared in every culture since." (citing E.H. GOMBRICH, *THE STORY OF ART* 39-43 (16th ed. 1995))).

<sup>10</sup> Christian Ehret, *Mural Rights: Establishing Standing for Communities Under American Moral Rights Laws*, 10 PGH. J. TECH. L. & POL'Y 3 (2010) ("The origins of mural art have been traced back more than 30,000 years, evidenced by prehistoric images of animals found painted on the walls of the Chauvet Cave in Southern France. Throughout history, murals have been employed by man to tell stories and to convey artistic expression. The Ajanta Caves in Maharashtra, India, date back to the third century B.C. and contain intricate mural art depicting the Jataka stories. The San Bartolo murals in Guatemala were created in the first century B.C. and represent an important part of Mayan history.").

<sup>11</sup> Sarah Stephens, *Fun with Vandalism: The Illegal Street Art of Shepard Fairey and Banksy* 9 (2014) (published M.A. thesis, University of Cincinnati), available at [https://etd.ohiolink.edu/ap/10?0::NO:10:P10\\_ACCESSION\\_NUM:ucin1148076772#export-ris](https://etd.ohiolink.edu/ap/10?0::NO:10:P10_ACCESSION_NUM:ucin1148076772#export-ris); see also SCAPE MARTINEZ, *GRAFF: THE ART & TECHNIQUE OF GRAFFITI* 8 (2009); CARLO MCCORMICK, *The Writing on the Wall, in ART IN THE STREETS* 20 (Jeffrey Deitch et al., eds., 2011). Under this definition, graffiti cannot be a moral wrong because even God has participated in graffiti etching the Decalogue out of stone and writing the eerie prophecy on the wall of King Belshazzar's demise.

things to different people with different interests. The term is connected to the negative connotation that “graffiti” earned in society, where graffiti was commonly associated with gang tagging that marked territory.<sup>12</sup> Thus, even though many street artists use graffiti to paint their art, they would scoff at being lumped together with those who use graffiti to scribble gang signs and affiliations.<sup>13</sup> Nevertheless, exploring such debate is beyond the scope of this Article;<sup>14</sup> instead, the term “street art” will refer to any uncommissioned artwork, mural, or artistic writing, excluding gang tagging. The term includes artwork done using paint, graffiti, markers, stencils, stickers, tiles, adhesive, or other writing methods, all without the prior permission of the property owner.<sup>15</sup>

<sup>12</sup> Margaret L. Mettler, Comment, *Graffiti Museum: A First Amendment Argument for Protecting Uncommissioned Art on Private Property*, 111 MICH. L. REV. 249, 254 (2012) (citing CEDAR LEWISOHN, STREET ART: THE GRAFFITI REVOLUTION 18 (2008) (“One of the principle [sic] reasons for making a distinction between street art and graffiti writing is that graffiti has such a bad public reputation.”)).

<sup>13</sup> LEWISOHN, *supra* note 12, at 31 (“Tagging was invented in the mid-1960s . . . [The graffiti before 1965] had largely been gang-related and ha[d] its own history and traditions . . . [Gang graffiti] is separate from graffiti writing. After around 1970, we can clearly start to identify people doing graffiti writing as opposed to gang graffiti.”); Melissa L. Hughes, Street Art & Graffiti Art: Developing an Understanding 5–11 (2009) (published M.A. Ed. thesis, Georgia State University), available at [http://scholarworks.gsu.edu/art\\_design\\_theses/50/](http://scholarworks.gsu.edu/art_design_theses/50/) (exploring definitional differences between the terms “street art” and “graffiti art”); Michelle Bougdanos, *The Visual Rights Act and Its Application to Graffiti Murals: Whose Wall is it Anyway?*, 18 N.Y.L. SCH. J. HUM. RTS. 549, 558 (2002) (“Significantly, graffiti is no longer relegated to the streets. It appears in museums, art exhibitions, and in galleries. Graffiti is not just the scrawling of gang members but encompasses murals, fashion and has been the subject of several films.” (footnotes omitted)); Deborah Laverty, *Graffiti Art Preserves Jackson Legacy*, NW1 TIMES (June 4, 2011, 7:50 PM), available at [http://www.nwitimes.com/news/local/lake/gary/article\\_4cbcfa91-0037-5e5a-88fd-eceae228324.html](http://www.nwitimes.com/news/local/lake/gary/article_4cbcfa91-0037-5e5a-88fd-eceae228324.html) (quoting street artist Gerry Guevara as saying “[s]ome people confuse graffiti with gangs, but this is entirely different. We’re not claiming territory.”).

<sup>14</sup> See Mettler, *supra* note 12, at 254 n.36 (“Much scholarly literature is devoted to defining and distinguishing these categories.” (citing Marisa A. Gomez, Comment, *The Writing on Our Walls: Finding Solutions Through Distinguishing Graffiti Art from Graffiti Vandalism*, 26 U. MICH. J.L. REFORM 633, 644–51 (1993); Lori L. Hanesworth, *Are They Graffiti Artists or Vandals? Should They Be Able or Caned?: A Look at the Latest Legislative Attempts to Eradicate Graffiti*, 6 DEPAUL-LCA J. ART & ENT. L. 225, 226–27 (1996))).

<sup>15</sup> This definition borrows from Mettler, *supra* note 12, at 254, in order to explore the full range of problems and potential solutions in regards to the Takings Clause and property ownership; see also Henri Buenders, *The End of Arrogance, The Advent of Persuasion: Public Art in a Multicultural Society*, 51 SOC. ANALYSIS 42, 48 (2007) (“The term ‘public art’ properly refers to works of art in any media that [have] been planned and

The modern American street art movement<sup>16</sup> emerged in Philadelphia<sup>17</sup> and New York<sup>18</sup> in the 1960s and 70s promoting social commentary and democratization of art. While the cause of this street art boom can only be speculated, the counterculture movement that emerged in America during this time was likely a contributing factor.<sup>19</sup> It was an artistic expression that was not—and could not be—relegated to posh galleries and “high art” shows. Instead, it brought art to the everyman by displaying it in the most accessible medium possible: open, public space.<sup>20</sup> “The existence of such works allows artistic expression to leave the confines of the traditional gallery or museum and become accessible to everyone.”<sup>21</sup> From the beginning of the modern movement until now, pioneers<sup>22</sup> and contemporaries used their street art as a way of “initiating . . . political change by creating public awareness, providing a social critique, asserting a community’s identity, fostering team

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executed with the specific intention of being sited or staged in the public domain, usually outside and accessible to all.” (alteration in original) (footnote omitted)).

<sup>16</sup> While the modern movement took off in the 1960s and 70s, this was not the first emergence of American street art. See Bougdanos, *supra* note 13, at 558 (“The origins of American graffiti can be traced from colonial times through the present. One of the most famous and widespread examples of American graffiti was the Kilroy image that American soldiers drew on the walls of the cities they occupied during World War II.” (footnotes omitted)).

<sup>17</sup> See Mettler, *supra* note 12, at 252 (citing GREGORY J. SNYDER, *GRAFFITI LIVES: BEYOND THE TAG IN NEW YORK’S URBAN UNDERGROUND* 23 (2009)).

<sup>18</sup> See Stephens, *supra* note 11, at 8; Buenders, *supra* note 15, at 48.

<sup>19</sup> Buenders, *supra* note 15, at 44 (“Changes in social, political, and religious beliefs have, throughout history, always resulted in parallel changes in the production of public art . . .”).

<sup>20</sup> *Id.* at 48 (“Art had to be democratized and put on public display. This theory became practice in the 1970s, when the aim of art was both embellishment and giving meaning to the living environment of the ordinary citizen. Democratized art in a way became a state ideology in some countries, celebrating the welfare state and at the same time civilizing the people.”). This analysis reinforces the influence that many states saw in the social power of art. See *supra* note 7 and accompanying text. Ironically, the state has lost sight of this in the modern era, and instead argues that street art contributes to uncivilizing the masses. See *infra* Part II.

<sup>21</sup> Ehret, *supra* note 10, at 4.

<sup>22</sup> See Stephens, *supra* note 11, at 11 (identifying “Cornbread . . . , Top Cat, SuperKOOL, Priest 167, and Pistol 1” as pioneers of the early evolution of graffiti writing); see also Bougdanos, *supra* note 13, at 561 (describing street artist Keith Haring as an influential part of New York street art culture in the 1980s).



spirit, and sometimes encouraging action.”<sup>23</sup> Such visual images have been described as “catalyst[s]”<sup>24</sup> that “can evoke passionate responses,” especially in regard to political art.<sup>25</sup> Street art has also been described as a “complex composition of ideas incorporating dreams, ambitions, myths, and fears—the many nuances of the objective and subjective self as a public entity.”<sup>26</sup> Thus, these artists seek to enlighten and educate blighted communities. By doing so, they ironically do not see their illegal art as a contributing factor to the blight.<sup>27</sup> For some, the illegality of their craft is part of its allure and plays into their social commentary.<sup>28</sup> For their fans in the subculture, this same illegality seems to draw them in.<sup>29</sup>

Popular contemporary street artists who have risen to prominence in the subculture, including Shepard Fairey and Banksy, con-

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<sup>23</sup> Sabine Marschall, *A Critical Investigation into the Impact of Community Mural Art*, TRANSFORMATION 40, 60 (2004) (citing A.W. BARNETT, COMMUNITY MURALS — THE PEOPLE’S ART 15 (1984)).

<sup>24</sup> *Id.*

<sup>25</sup> K. Gelber, *Distracting The Masses: Art, Local Government And Freedom Of Political Speech In Australia*, 10 L. TEXT CULTURE 195, 195 (2005); see also Susan Bird, *Aesthetics, Authority and the Outlaw of the Street*, 3 J.L. & JUST. 1 (2009) (“I contend that graffiti arouses such a response because it changes the way we experience the city. It causes an interruption to a commercialized system of signs and codes. It offers a possibility of difference and exposes cracks in the ordered routine of everyday life. Street art conveys a lifestyle that baffles those driven by a world of economy. It takes inhabitants on a treasure hunt to unknown places where countless gifts of creative, unexpected inspiration lie in wait.”).

<sup>26</sup> Buenders, *supra* note 15, at 44 (citation omitted).

<sup>27</sup> See Laura Kaufman, *Vandal or Artist?*, L.A. TIMES: SAN DIEGO COUNTY ED., July 27, 1990, at F21B (The author interviewed Brett Cook, who uses unauthorized murals to convey messages to the community. Cook claimed he hoped to spread understanding and tolerance among blacks and other minority groups. He believed the importance of his message, portrayed in artistic themes, outweighed stigma of the illegal installment.).

<sup>28</sup> See Alfredo Aleman, *Graffiti Artists Look Toward Los Angeles River for a Canvas*, EGP (Aug. 13, 2009), <http://egpnews.com/?p=11988> (“‘This is the challenge, the more we say you shouldn’t do it, the more inviting it is for [graffiti artists] to do it,’ said a street artist known as Reyes, who believes much of graffiti’s thrill comes from its illegality.” (alteration in original)); see also *Sherwin-Williams Co. v. City and Cnty. of S.F.*, 857 F. Supp. 1355, 1361 (N.D. Cal. 1994) (“Indeed, many writers thrive on the push and pull with authorities that is inherent to graffiti writing.” (citations omitted)).

<sup>29</sup> See Anna Almendrala, *Street Art vs. Graffiti in Los Angeles*, HUFFINGTON POST (Feb. 2, 2011, 11:54 AM), [http://www.huffingtonpost.com/2011/02/02/los-angeles-street-art-vs-graffiti\\_n\\_816625.html?s233319&ttitle=Street\\_Art\\_Has](http://www.huffingtonpost.com/2011/02/02/los-angeles-street-art-vs-graffiti_n_816625.html?s233319&ttitle=Street_Art_Has) (describing street art fans as “enthralled with these artists who would risk violence, fines and imprisonment just to put up a piece of art”).

tinue this tradition today. Shepard Fairey originally rose to fame through his OBEY campaign, where he and his friends posted stickers across many major cities with a picture of the late Andre the Giant and the word “OBEY” emblazoned on the sticker.<sup>30</sup> The campaign started in 1989 as a joke and continues to this day.<sup>31</sup> It uses ridiculous imagery and messaging to elicit amusement and make people think about “the advertising and marketing that people ingest every day in our consumption-driven society.”<sup>32</sup> Thus, Fairey sees his work as an exercise in reclaiming public space for the public by satirizing the commercialization of public space.<sup>33</sup> Fairey is also no stranger to political satire, engaging in an artistic/advertising back-and-forth on a Rhode Island billboard during a political campaign.<sup>34</sup> Fairey’s work can be found in and “on” cities in the United States, Tokyo, Hong Kong, London, and Barcelona.<sup>35</sup>

Banksy, another popular street artist, is probably the most famous street artist alive. Banksy has been active for the past two decades,<sup>36</sup> leaving his work across Europe, the Middle East, and the United States. While Banksy shrouds his identity in mystery,<sup>37</sup> his art is ironically among the most well known in the world. Banksy’s influence and fame was most recently on display during his month-long visit to New York City, where he displayed a new piece of street art every day for thirty-one days.<sup>38</sup> Banksy’s fans and detractors<sup>39</sup> all flocked around the city in October 2013 on a “scav-

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<sup>30</sup> Stephens, *supra* note 11, at 21–22.

<sup>31</sup> *Id.* at 21.

<sup>32</sup> *Id.* at 26.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 25–26.

<sup>35</sup> *Id.* at 21.

<sup>36</sup> STEVE WRIGHT, RICHARD JONES & TREVOR WYATT, *BANKSY’S BRISTOL: HOME SWEET HOME* 32 (2007).

<sup>37</sup> Stephens, *supra* note 11, at 39–40 (describing two of Banksy’s “friends” that did not even know Banksy’s identity).

<sup>38</sup> See generally Roberta Smith, *Mystery Man, Painting the Town: Banksy Makes New York His Gallery for a Month*, N.Y. TIMES (Oct. 30, 2013), <http://www.nytimes.com/2013/10/31/arts/design/banksy-makes-new-york-his-gallery-for-a-month.html>; Cara Buckley, *Monthlong Chase Around New York City for Banksy’s Street Art*, N.Y. TIMES (Oct. 28, 2013), <http://www.nytimes.com/2013/10/29/nyregion/monthlong-chase-around-new-york-city-for-banksys-street-art.html>.

<sup>39</sup> See Buckley, *supra* note 38 (quoting Tiffon Mearns’ description of Banksy as “a fraud”).

enger hunt”<sup>40</sup> of sorts, trying to find Banksy’s works before they were stolen, defaced, covered up, or removed by property owners.<sup>41</sup> The irony of Banksy’s campaign against commercialization of public space is that he has risen to such fame that his work is worth hundreds of thousands of dollars.<sup>42</sup> Property owners are usually very happy to be gifted with Banksy’s illegal work on their wall or building.<sup>43</sup> This is because they know that a Banksy work will raise their property value and increase foot traffic in and around their businesses.<sup>44</sup> Many property owners put up plexiglass to ensure that others do not deface their new asset.<sup>45</sup> Property owners have also opted to remove the portion of the wall upon which the Banksy work is attached to sell the piece at high-end art galleries.<sup>46</sup>

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<sup>40</sup> See *BANKSY DOES NEW YORK* (HBO Documentary Films 2014) (chronicling all 31 days and quoting several people describing finding Banksy’s street art as a scavenger hunt).

<sup>41</sup> Several of the paintings were painted over by property owners, or if removable, were removed by the property owners. For example, Banksy’s writing on a door was promptly removed by property owners. His stencil on a metal gate was also sawed off with power tools and stored, and a new gate was put up. See *id.*

<sup>42</sup> Nishu Kakkar, *12 Most Expensive Banksy Art*, MOST EXPENSIVE JOURNAL, <http://most-expensive.com/banksy-art> (last visited May 11, 2015).

<sup>43</sup> See *BANKSY DOES NEW YORK*, *supra* note 40 (chronicling property owners thanking Banksy for leaving art on their property, and nearby property owners taking steps to protect the Banksy work).

<sup>44</sup> See, e.g., *Banksy Graffiti Doubles Derelict Pub’s Value*, TELEGRAPH (Dec. 2, 2008, 12:39 PM), <http://www.telegraph.co.uk/finance/personalfinance/houseprices/3541901/Banksy-graffiti-doubles-derelict-pubs-value.html> (“The Whitehouse pub was originally estimated by local estate agents to be worth some £495,000, but its value has now doubled to around £1 million, as art dealers scurry to get their hands on it.”); see also *Laughing All the Way to the Banksy*, SUN (Oct. 20, 2010), <http://www.thesun.co.uk/sol/homepage/features/3187949/Banksy-graffiti-can-push-up-property-price.html> (describing a Banksy mural raising the property value of a seaside hotel by £150,000); Mark Duell & Sam Creighton, *Banksy That Appeared On A House Overnight And Tripled Its Value! Graffiti Mural Featuring Spies In Trench Coats Is Painted On Wall Of Semi-Detached Home Near GCHQ*, DAILY MAIL (Apr. 13, 2014, 1:21 PM), <http://www.dailymail.co.uk/news/article-2603782/Banksy-art-work-showing-government-agents-spying-phone-box-appears-Cheltenham-house-near-GCHQ.html> (describing recent Banksy art as raising a home’s property value).

<sup>45</sup> See Buckley, *supra* note 38 (describing several property owners protecting Banksy pieces by putting sheets of glass over the work, or hiring security guards to watch over it. This is done for good reason, considering that within hours of being sited, a tagger defaced a Banksy image of geishas on a bridge).

<sup>46</sup> See Kudler, *supra* note 3 (describing how many property owners choose to remove the portion of their property, be it a wall, door, or gate, and sell it on the open market for an enormous profit).

Banksy's three-dimensional works are often stolen by the public and commodified in the same way.<sup>47</sup> Perhaps this too is part of Banksy's social commentary; in this light, property owners and the public add a "performance art" aspect to Banksy's work, showing the great lengths people are willing to go for a payday.

Despite the growing influence of street art as an accepted art form and the potential positive benefits that street art can bring to property values, local governments continue to stamp out this means of expression<sup>48</sup> by labeling it as vandalism in an effort to protect property rights.

## II. COUNTER TO THE COUNTERCULTURE – STREET ART ORDINANCES

*Graffiti is not art. It's just a senseless thing to do. The random tagging of someone's property without their permission, that's damage to property. That has nothing to do with art. It's a crime. It shouldn't happen.*

–Charles Williams, the current Streets and Sanitation Commissioner for the city of Chicago<sup>49</sup>

While street art continues to fuel a subculture and excite popular culture,<sup>50</sup> cities around the nation have met this popularity with hardline policies to protect their communities. For example, Los Angeles has codified one of the most anti-street art stances in order to "protect public and private property from acts of vandalism and

<sup>47</sup> Banksy's Sphinx sculpture was stolen by nearby business owners and given to a high-end art gallery in Southampton for sale. Banksy's "Banksy Balloons" were also attempted to be stolen when the culprits were caught by police. See BANKSY DOES NEW YORK, *supra* note 40.

<sup>48</sup> See generally Mettler, *supra* note 12 (arguing that street art is a means of expression, and as such, should enjoy First Amendment protection from government censorship).

<sup>49</sup> Ted Cox, *Graffiti Removal Speeds Up as New Reports Decline*, DNAINFO (Sept. 4, 2014, 10:56 AM), <http://www.dnainfo.com/chicago/20140904/downtown/graffiti-removal-speeds-up-as-new-reports-decline>.

<sup>50</sup> See, e.g., Andrew Russeth, *L.A. MOCA's Street-Art Show Sets Attendance Record*, N.Y. OBSERVER (Aug. 10, 2011), <http://www.observer.com/2011/08/l-a-mocas-street-art-show-setsattendance-record> (writing that the street art exhibition at Los Angeles's Museum of Contemporary Art, entitled "Art in the Streets," set attendance records for the museum, even surpassing its Andy Warhol retrospective in 2002).

defacement.”<sup>51</sup> These ordinances do not discriminate between art forms, treating gang tagging and street art as two types of the same social problem.<sup>52</sup> As a result, Los Angeles prohibits persons from marking<sup>53</sup> public or private property;<sup>54</sup> it also prohibits property owners and lessees to permit, allow, or otherwise commission graffiti works on their property.<sup>55</sup> The mere possession of aerosol graffiti and markers are prohibited within public facilities and parks.<sup>56</sup> Additionally, store owners that sell such art supplies must display the supplies in a way that requires employee assistance to facilitate customer access.<sup>57</sup> Violation of these laws carries civil penalties<sup>58</sup> of up to \$1,000 per violation.<sup>59</sup>

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<sup>51</sup> L.A., CAL., MUN. CODE ch. IV, art. 14, § 49.84.1(E) (2014).

<sup>52</sup> *See, e.g., id.* § 49.84.2(A), (E) read as follows:

(A) “Act of graffiti” means an act which causes any form of unauthorized inscription, word, figure or design to be marked, etched, scratched, drawn, sprayed, painted or otherwise affixed on any structural component of any building, structure or other facility or upon any other property, regardless of its content or nature and regardless of the nature of the material of that structural component or property.

...

(E) “Graffiti” means any form of unauthorized inscription, word, figure or design which is marked, etched, scratched, drawn, sprayed, painted or otherwise affixed to or on any surface of public or private property, including but not limited to, buildings, walls, signs, structures or places, or other surfaces, regardless of the nature of the material of that structural component.

*See also* Ted Cox, *Graffiti Fines More than Doubled by Chicago City Council Committee*, DNAINFO (July 24, 2014, 2:11 PM), <http://www.dnainfo.com/chicago/20140724/downtown/graffiti-fines-more-than-doubled-by-chicago-city-council-committee> (reporting that Chicago aldermen “said that gang graffiti and nongang related tagging were equal problems, although to varying extents in areas across the city”).

<sup>53</sup> L.A., CAL., MUN. CODE ch. IV, art. 14, § 49.84.3(A) (2014) (prohibiting “any person to write, paint, spray, chalk, etch, or otherwise apply graffiti”).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* § 49.84.3(B).

<sup>56</sup> *Id.* § 49.84.5(A).

<sup>57</sup> *Id.* § 49.84.4(A)–(B); *see also* S.F., CAL., POLICE CODE art. 42, § 4201 (2014).

<sup>58</sup> Some cities, such as New York, punish street art with misdemeanor and felony charges. *See* N.Y. PENAL LAW §§ 145.00, 145.05, 145.10, and 145.60 (McKinney 2014).

<sup>59</sup> L.A., CAL., MUN. CODE ch. IV, art. 14, § 49.84.12 (2014).

When these tools of deterrence do not prove effective,<sup>60</sup> the city can come onto private property, with the owner's consent,<sup>61</sup> and remove the street art at the city's expense.<sup>62</sup> Such consent, however, is merely a formality because the city can enter the property and commence removal of the street art regardless of the property owner's consent;<sup>63</sup> to add insult to injury, the city also reserves the right to charge the property owner for such nonconsensual removal.<sup>64</sup> The city can even charge the property owner with a misdemeanor and charge the owner \$1,000 every day he does not comply.<sup>65</sup> This scheme undoubtedly persuades many property owners to consent to the city's removal of street art solely to protect themselves from carrying the cost of removal.<sup>66</sup>

Los Angeles is only one of a growing number of major cities<sup>67</sup> and smaller communities<sup>68</sup> adopting such legislation.<sup>69</sup> These cities

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<sup>60</sup> At least one piece of data suggests that cracking down and increasing fines on graffiti vandalism has only a small effect on deterrence. *See Cox, supra* note 49 (reporting that doubling fines for graffiti vandalism in Chicago has resulted in "81,703 graffiti-removal requests through August this year [2014], down from 92,980 over the same time last year. At the same time, city crews have removed 82,858 pieces of graffiti through August this year, closer to the 91,821 removed at this time a year ago.").

<sup>61</sup> L.A., CAL., MUN. CODE ch. IV, art. 14, § 49.84.7(B)(4), (C) (2014).

<sup>62</sup> *Id.* § 49.84.7(A)-(B).

<sup>63</sup> *Id.* § 49.84.8(A). This section applies to vacant property. However, subsection (B), which applies to occupied property, also allows the City to enter the property to remove the street art regardless of the property owner's consent pursuant to section 91.8903.3.1 of the L.A. Municipal Code.

<sup>64</sup> *Id.* § 49.84.8(A).

<sup>65</sup> *Id.* § 49.84.12; *see also id.* § 49.84.10(A) (imposing administrative fines for noncompliance). Also of note is that this regulatory scheme has an administrative hearing process in which those found to be in violation of the ordinances can enjoy a hearing. *See id.* § 49.84.10(E).

<sup>66</sup> New York, on the other hand, requires its property owners to remove graffiti on their premises at their own cost and imposes penalties for noncompliance. *See N.Y.C., N.Y., ADMIN. CODE* § 10-117.3 (2014).

<sup>67</sup> *See, e.g., ATLANTA, GA., ORDINANCES* pt. II, ch. 74, art. V, § 74-174 (2014); *BOS., MASS., MUN. CODE* ch. XVI, § 16-8.5 (2013); *MIAMI, FLA., ORDINANCES* pt. II, ch. 37, §§ 37-2(f)-(g) (2014); *SAN DIEGO, CAL., MUN. CODE* ch. 5, art. 4, div. 4, §§ 54.0405(b)-.0407 (2014); *S.F., CAL., PUB. WORKS CODE* art. 23, § 1304(a) (2014); *N.Y.C., N.Y., ADMIN. CODE* §§ 10-117(a)-(d) (2014).

<sup>68</sup> *See, e.g., YPSILANTI, MICH., ORDINANCES* pt. II, ch. 42, art. II, § 42-46(c) (Supp. 2011); *In re Carney*, 621 Pa. 476, 482 (2013) (describing a local judge's participation in the Anti-Graffiti Task Force in the city of Erie, Pennsylvania).

<sup>69</sup> This Article does not seek to catalogue all local government ordinances relating to graffiti in this country. Such a catalogue of what may be hundreds of ordinances is outside

often rely on the same reasoning to justify their laws: street art is a public nuisance<sup>70</sup> because it lowers property values; it leads to violence, crime, and gang activity; and it creates fear and insecurity in the community.<sup>71</sup> However, emerging data is beginning to demonstrate how differently street art affects real estate values than does graffiti.

Regarding crime, while empirical data does support findings that the presence of graffiti has a snowball effect that raises crime rates,<sup>72</sup> it does not necessarily correlate to street art. Studies have shown that “disorderly physical surroundings,” such as graffiti, have a signaling effect that the neighborhood or environment is “poorly maintained.” These signals can be perceived as a welcome mat to criminals and increase the fear of crime.<sup>73</sup> At least some police officials, however, have the intellectual honesty to admit that gang tagging tends to incite more crime and violence than graffiti unrelated to gangs.<sup>74</sup> Additionally, many community organizations exist to protect commissioned street art because of its positive effects on their community; such organizations argue that the community should decide how to handle the art it harbors, not the government.<sup>75</sup>

Regarding property values, legislatures likely lump graffiti in with the effects of crime and social decay when linking street art to lower property values. In a national study commissioned by the

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the scope of this Article. Rather, this Article only seeks to offer the reader an introduction into this legislative landscape.

<sup>70</sup> See, e.g., L.A., CAL., MUN. CODE ch. IV, art. 14, § 49.84.6 (2014) (declaring that graffiti was considered a public nuisance).

<sup>71</sup> See, e.g., *id.* § 49.84.1; S.F., CAL., PUB. WORKS CODE art. 23 § 1303(a) (2014).

<sup>72</sup> Common sense might persuade people to reject the Broken Windows Theory, that increased crime and gang activity is what actually causes an increase in graffiti and street art, and not the other way around. *But see infra* note 73 and accompanying text.

<sup>73</sup> Ariane L. Bedimo-Rung, Ph.D., et al., *The Significance of Parks to Physical Activity and Public Health: A Conceptual Model*, 28 AM. J. PREVENTIVE MED. 159, 164 (2005); see also Kees Evert Keizer, *The Spreading of Disorder*, 322 SCIENCE 1681–85, no. 5908 (2008) (finding that an area with graffiti caused twice as many people to engage in littering or stealing when compared to behaviors in the same area without graffiti).

<sup>74</sup> See Cox, *supra* note 49 (reporting that Chicago Police Commander William Dunn generally stated “that gang graffiti was more likely to lead to street violence [than nongang related tagging], making its removal a necessity”).

<sup>75</sup> Bougdanos, *supra* note 13, at 549 (referring to the Social and Public Art Resource Center).

U.S. Department of Agriculture in 1992, researchers were unable to “compile any reliable data” that showed that graffiti directly related to a “decline in the value of real property.”<sup>76</sup> As has already been argued above, the work of famous street artists can actually raise property values.<sup>77</sup> Further, there is a growing trend in real estate of commissioned street art correlating to increased property values in major cities.<sup>78</sup>

The inconsistent reasoning of cities that have adopted anti-street art campaigns<sup>79</sup> leads one to believe that there must be another underlying reason for such a hard-lined stance: money. Painting over street art is quite costly; perhaps this is what really justifies street art ordinances in the eyes of the legislature. Major cities like Los Angeles<sup>80</sup> and Chicago<sup>81</sup> are hit the hardest, dedicating millions

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<sup>76</sup> HARRIET H. CHRISTENSEN ET AL., VANDALISM: RESEARCH, PREVENTION, AND SOCIAL POLICY 165 (1992) (finding that graffiti caused indirect costs of “decline in the value of real property in areas infested by graffiti.” However, the author admitted that he or she has “been unable to compile any reliable data for [these] indirect costs.”).

<sup>77</sup> See *supra* notes 43–47 and accompanying text. Former mayor of New York, Michael Bloomberg, disagrees, stating that Banksy and street art in general “does ruin people’s property.” See also John Swaine, *Banksy ‘Ruining People’s Property,’ Says Michael Bloomberg*, TELEGRAPH (Oct. 18, 2013, 6:13 PM), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/10389870/Banksy-ruining-peoples-property-says-Michael-Bloomberg.html>. However, Shepard Fairey actually denounces street art that lowers property value, and encourages other artists “to use public property, such as the sides of buildings, street signs, billboards, and poles, or private property, only when it has been abandoned or lies vacant.” Stephens, *supra* note 11, at 27.

<sup>78</sup> See, e.g., Snyder, *supra* note 17 (finding that illegal street art can contribute to gentrification and increase property values in places like SoHo, which have low instances of crime); see also Alanna Weismann, *Street Art Contributes to Property Values, Neighborhood Character in Chelsea*, MIDTOWN GAZETTE (Oct. 8, 2014, 4:03 PM), <http://themidtowngazette.com/2014/10/street-art-contributes-to-property-values-neighborhood-character-in-chelsea/> (finding that commissioned street art in the Manhattan neighborhood of Chelsea increases property values); Bill Kearney, *How Wynwood Earned Its Street Cred*, OCEAN DRIVE, <http://oceandrive.com/living/articles/how-graffiti-transformed-miamis-wynwood-neighborhood> (last visited May 11, 2015) (chronicling how legal street art contributed to climbing property values in a once abandoned industrial sector of Miami, FL).

<sup>79</sup> See, e.g., N.Y.C., N.Y., ADMIN. CODE § 10-117.1 (2014) (establishing an Anti-Graffiti Task Force in the city of New York).

<sup>80</sup> Editorial, *Cleaning Up Graffiti’s Act*, L.A. TIMES, Sept. 4, 2011, <http://articles.latimes.com/2011/sep/04/opinion/la-ed-graffiti-20110904> (“Los Angeles spent \$7.1 million last year cleaning graffiti.”).

<sup>81</sup> Hal Dardick & John Byrne, *Alderman: Helen Keller Could See Graffiti Cancer in Chicago*, CHI. TRIB. (July 24, 2014, 3:35 PM), <http://www.chicagotribune.com/news/>



of dollars each year to removing street art. Consequently, it should be no surprise why cities across the country consider street art a nuisance—after all, it is a “cancer”<sup>82</sup> that is costing them nearly \$12 billion every year to treat.<sup>83</sup>

The laws that many cities around the country have adopted send a clear signal that street art is not welcome. These cities even go so far as to categorize street art as a *per se* nuisance that justifies trespassing on private property and destroying a potentially valuable asset of the property owner. These types of laws<sup>84</sup> may “go too far”<sup>85</sup> to be deemed constitutional under existing Supreme Court precedent of the Takings Clause and its underlying principles.

### III. AN UNCERTAIN WORLD – TAKINGS CLAUSE JURISPRUDENCE

*Under our notions of what constitutes property, I have a real problem with the idea that a piece of property—which is ultimately what a work of art is—cannot be treated as other pieces of property by the owner of it. And that poses some serious constitutional problems.*<sup>86</sup>

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local/politics/chi-city-graffiti-crackdown-20140724-story.html (“This year, the city [of Chicago] is spending \$4.9 million on graffiti removal . . .”).

<sup>82</sup> See *id.* (quoting a Chicago Alderman describing street art as a cancer that even a blind person could recognize).

<sup>83</sup> Deborah Lamm Weisel, U.S. Dep’t of Justice, *Problem-Oriented Guides for Police Problem-Specific Guides Series No. 9, Graffiti 2* (Aug. 2004), <http://www.cops.usdoj.gov/pdf/e11011354.pdf> (“[A]n estimated \$12 billion a year is spent cleaning up graffiti in the United States.”).

<sup>84</sup> Consider also Los Angeles’s very strict sign regulations, which “essentially prohibit[] all murals, even those commissioned by property owners.” Mettler, *supra* note 12 (citing L.A., CAL., MUN. CODE ch. I, art. 4.4, § 14.4.4(B)(10)) (detailing Los Angeles’s sign regulations, which would apply to murals and other street art, unless they contained writing).

<sup>85</sup> See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

<sup>86</sup> Eric Felton, *New Law Gives Rights to Artists After Work is Sold*, WASH. TIMES, Dec. 7, 1990, at F2 (quoting lawyer). This particular critic is weary of artists having rights after they transfer ownership of their art to a buyer. This would restrict the buyer from using his art as he sees fit, and may result in a constitutional taking. See generally Chintan Amin, *Keep Your Filthy Hands Off My Painting! The Visual Artists Rights Act of 1990 and the Fifth Amendment Takings Clause*, 10 FLA. J. INT’L L. 315 (1997) (analyzing the Visual Rights Act of 1990 (“VARA”) under the Takings Clause). This logic is also uniquely applicable to the inquiry of this Article; even though the critic is not directly addressing a property

The rocky road that the Supreme Court has taken to understand the Fifth Amendment's Takings Clause is one that has inspired many constitutional scholars' study and has even caused many laypersons to doubt the Court's intentions.<sup>87</sup> The muddled<sup>88</sup> doctrines have created an uncertain landscape that has diminished predictability in governments' assertion of their eminent domain and police powers. Nevertheless, in order to appreciate the question posed in this Article and to find a solution, the difficult terrain of Takings Clause jurisprudence must be traversed.

Analysis of any legal authority should start with a plain reading of its text.<sup>89</sup> The Takings Clause states "nor shall private property be taken for public use, without just compensation."<sup>90</sup> "Thus,

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owner's right to control the uncommissioned art on his property, nonetheless a restriction on the property owner's right to do what he sees fit with his property does pose "constitutional problems" that this Article seeks to explore.

<sup>87</sup> Gideon Kanner, *Kelo v. New London: Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201 (2006) (describing a large number of Americans as "dismayed and angered" in the aftermath of *Kelo v. City of New London*, 544 U.S. 469 (2005), and that public opinion polls showed Americans' widespread opposition to the decision (citing Paul Shigley, *Backlash Threatens Redevelopment: Eminent Domain Ruling Sparks Legislation, Calls for Reform; State Legislation*, 20 CAL. PLAN. & DEV. REP. 1 (2005))).

<sup>88</sup> See Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CALIF. L. REV. 561, 562-63, 594-96 (1984) (characterizing Takings Clause doctrine as a "muddle"); see also *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2004) (describing takings jurisprudence as being unable to be "characterized as unified").

<sup>89</sup> Such analysis should not necessarily finish at its text. This is especially true for such a short and vague clause as the Takings Clause of which there is virtually no discussion in the Constitutional Convention debates. See LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* 423 (1st ed. 1968); Eben Moglin, *The Privilege in British North America: The Colonial Period to the Fifth Amendment*, in *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* 109, 138 (Helmholtz et al., eds., 1997) (describing that Framers did not engage in any floor debate when drafting or adopting the Fifth Amendment. Neither did the Amendment's drafter, James Madison, leave any thoughts or discourses on the matter.).

<sup>90</sup> U.S. CONST. amend. V. The full Amendment reads as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

government action that works a taking of property rights necessarily implicates the ‘constitutional obligation to pay just compensation.’”<sup>91</sup> This means that the Takings Clause is not meant to interfere with the government’s ability to take property, but rather to secure compensation for a property owner when their property is taken.<sup>92</sup>

Takings Clause doctrine is best understood as divided between three inquiries. First, there is the Takings Inquiry. This is the most doctrinally complex of the three, in which courts determine whether a taking has occurred.<sup>93</sup> Second is the Public Use Inquiry. After it has been established that a taking has occurred, the constitutionality of such a taking must meet the standard of being for a public use. Third is the Just Compensation Inquiry. This step determines the amount of compensation due to a property owner based on the valuation of his taken property.

#### A. *Takings Inquiry*

The obscure puzzle of the Takings Inquiry becomes more lucid when differentiating between two types of takings: physical takings and regulatory takings.<sup>94</sup> A physical taking is exactly as it sounds; it

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The placement of the Takings Clause in the Fifth Amendment is a curious decision of its drafter, James Madison. The Takings Clause seems out of place among what are understood as rights of criminal defendants. Perhaps the context of the Takings Clause is easiest explained by the preceding Due Process Clause, which protects against the deprivation of “life, liberty, or property”; understandably, the more specific deprivation of private property seems to flow naturally from the broader Due Process Clause.

<sup>91</sup> *First English Evangelical Lutheran Church v. Cnty. of L.A.*, 482 U.S. 304, 315 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

<sup>92</sup> James L. Huffman, *Dolan v. City of Tigard: Another Step in the Right Direction*, 25 ENVTL. L. 143, 145 n.18 (1995).

<sup>93</sup> Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CALIF. L. REV. 55, 56–57 (1990) (“One of the most intractable and significant problems facing the Supreme Court today is the task of determining when governmental action that causes economic injury to private parties constitutes a compensable “taking” under the Takings Clause of the fifth amendment.” Peterson describes “four different tests” that the Court has used in the Takings Inquiry, which I have outlined below).

<sup>94</sup> See *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992) (“Most of our cases interpreting the Clause fall within two distinct classes. Where the government authorizes a physical occupation of property (or actually takes title), . . . [and] where the government merely regulates the use of property . . .”); see also *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 323 (2002) (describing the “longstanding

generally applies to the government's exercise of eminent domain to take physical property.<sup>95</sup> However, physical takings can also apply to physical invasions of private property caused by government actors.<sup>96</sup> A regulatory taking is different insofar as the government does not take ownership or invade physical property, but instead exercises its police power to regulate how a property owner uses his property.<sup>97</sup>

In order to determine if a taking has occurred, different but related tests apply to each type of taking. As this Article explores below, there are identifiable underlying principles that bind these substantially different types of takings together. These underlying principles help inform the predictability of Takings Clause jurisprudence, which has sustained a history of doctrinal volatility.

The application of the Takings Clause was not always so difficult; since colonial times, the requirement of just compensation for a government taking was understood to only apply to physical takings of property that resulted from the state's exercise of its eminent domain power.<sup>98</sup> While this power was primarily used for the acquisition of real property for the building of public roads and governmental buildings, it was also used to acquire chattel property to contribute to building efforts or war efforts.<sup>99</sup> The Takings

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distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other" as being so distinct as to rely upon two separate lines of precedent); *S. Diego Gas & Elec. Co. v. City of S. Diego*, 450 U.S. 621, 649 n.15 (1981) (Brennan, J., dissenting) ("[T]he attempt to differentiate 'regulation' from 'taking' [has been characterized] as 'the most haunting jurisprudential problem in the field of contemporary land-use law . . . one that may be the lawyer's equivalent of the physicist's hunt for the quark.'" (quoting C. HAAR, *LAND-USE PLANNING* 766 (3d ed. 1976))).

<sup>95</sup> See *Yee*, 503 U.S. at 522.

<sup>96</sup> See, e.g., *United States v. Causby*, 328 U.S. 256 (1946).

<sup>97</sup> See *Yee*, 503 U.S. at 522.

<sup>98</sup> See generally Michael R. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 *SAN DIEGO L. REV.* 729 (2008) (arguing that the original Takings Clause as adopted in the Fifth Amendment does not support regulatory takings, but only physical takings. However, the adoption and incorporation of the Takings Clause through the Fourteenth Amendment expanded its application as applied to the states, allowing it to include regulatory takings.).

<sup>99</sup> Ely, *supra* note 5, at 4, 12-13 (1992) (noting that during colonial times, several states took land and supplies for building roads and bridges, and for taking supplies during the

Clause itself did not start to enjoy frequent considerations by the Court until the late 1800s; when it was interpreted, it applied to physical takings of real property.<sup>100</sup> Around the turn of the century, however, things began to change.

### 1. Regulatory Takings

Determining when a regulatory taking has occurred is an elusive inquiry because of the lack of practical rules. In the Court's attempt to determine when "a regulation goes too far"<sup>101</sup> so as to constitute a taking,<sup>102</sup> it has admitted that it has "eschewed any 'set formula' for determining how far is too far."<sup>103</sup> Instead, it relies on "*ad hoc*, factual inquiries" involving several factors.<sup>104</sup>

The dilemma began when the Court broadened the Takings Clause in the late 1800s in cases like *Chicago, Burlington and Quincy Railroad Co. v. Chicago*.<sup>105</sup> *Chicago* involved the city of Chicago

Revolutionary War; payment was required for these takings). *But see* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* 63–64 (1977); William M. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 *YALE L.J.* 694, 695 (1985) (arguing that the compensation principle goes against the common practice of the revolutionary time period, where colonial governments would take "without compensating the owner."); Maureen Struab Kordesh, "*I Will Build My House With Sticks*": *The Splintering of Property Interests Under the Fifth Amendment May Be Hazardous to Private Property*, 20 *HARV. ENVTL. L. REV.* 397, 409–11 (1996).

<sup>100</sup> See *Lucas v. S.C. Coast Council*, 505 U.S. 1003, 1014 (1992) ("Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, . . . or the functional equivalent of a 'practical ouster of [the owner's] possession.'" (alteration in original) (citations omitted)).

<sup>101</sup> *Mahon*, 260 U.S. at 415.

<sup>102</sup> See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2004) ("The rub, of course, has been—and remains—how to discern how far is 'too far.'").

<sup>103</sup> *Lucas*, 505 U.S. at 1015 (1992) ("In 70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far, preferring to 'engag[e] in . . . essentially ad hoc, factual inquiries.'" (alterations in original) (internal quotation marks omitted) (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978))); see also *Kaiser Aetna v. United States*, 444 U.S. 164, 174–75 (1979) (citation omitted); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) ("There is no set formula to determine where regulation ends and taking begins.").

<sup>104</sup> *Kaiser*, 444 U.S. at 175 (quoting *Penn Cent.*, 438 U.S. at 124).

<sup>105</sup> 166 U.S. 226 (1897).

condemning property to widen a street.<sup>106</sup> A jury decided the proper amount of just compensation to be paid to several property owners, yet only awarded Chicago, Burlington & Quincy Railroad Company one dollar for the City's taking of its right of way "to be used for the purposes of the proposed street."<sup>107</sup> Thus, the issue before the Court was that of just compensation due to the railroad company's diminished use of land, not the physical taking of land. The Court slightly departed from its physical taking application of the Takings Clause by finding that the railroad company was entitled to just compensation for the diminution in value of the land caused by the encumbrance of "a perpetual right in the public to use it for the purpose of a street."<sup>108</sup> The Court found that due process, as required by the Fourteenth Amendment, required just compensation for takings under the Constitution;<sup>109</sup> ultimately, the

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<sup>106</sup> *Id.* at 230.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 233.

<sup>109</sup> At least one scholar has suggested that *Chicago* should be categorized as a case that contributes to due process jurisprudence, not Takings Clause law. See Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle"*, 90 MINN. L. REV. 826, 843–52, 862–67 (2006). The research of this Article has reached a different conclusion, which is also consistent with reigning Supreme Court doctrine since *Penn Central*. While the Court employed the Due Process Clause of the Fourteenth Amendment to come to a decision in *Chicago*, this was merely the procedural vehicle that was used to apply the Fifth Amendment Takings Clause to the state of Illinois. This conclusion is supported by the Court's own statement:

Whatever may have been the power of the States on this subject prior to the adoption of the Fourteenth Amendment to the Constitution, it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the States cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner, . . . and that, without such compensation, . . . no matter under what form of procedure it is taken, would violate the provisions of the federal Constitution.

*Chicago*, 166 U.S. at 238–39 (quoting *Scott v. Toledo*, 36 F. 385, 395–96 (1888)). Consequently, *Chicago* is cited by most Supreme Court precedent on takings as the case that incorporated the Fifth Amendment Takings Clause into the Fourteenth Amendment Due Process Clause, making it applicable to the states. See, e.g., *Penn Cent.*, 438 U.S. at 122; *Dolan v. City of Tigard*, 512 U.S. 374, 383 (1994); *Palazzo v. R.I.*, 533 U.S. 606, 617 (2001); see also Rappaport, *supra* note 98, at 744 n.57 ("The incorporation of the Takings Clause is usually thought to have occurred in [*Chicago*]."). But see *Dolan*, 512 U.S. at 384 n.5, 404–05 (Stevens, J., dissenting) (arguing that *Chicago* is actually grounded in "substantive due process," rather than in the view that the Takings Clause of the Fifth

Court decided that the jury's verdict sufficiently awarded just compensation because the jury likely found that the railroad company's use of its railroad across the proposed street would not be damaged.<sup>110</sup>

While the fact pattern in *Chicago* is not completely analogous to modern regulatory takings,<sup>111</sup> it appears to be one of the first instances that the Court applied the Takings Clause to a government action that affected a property owner's use of his land.<sup>112</sup> The Court expanded on this logic in *Pennsylvania Coal Co. v. Mahon*,<sup>113</sup> which is seen by many as the genesis of regulatory takings.<sup>114</sup> In *Mahon*, the Pennsylvania legislature passed the Kohler Act, which changed the status quo of coal mining property rights in the state.<sup>115</sup> The Kohler Act significantly regulated the amount of coal that mining companies (who had subterranean property rights) could mine, and thus "destroy[ed] previously existing rights of property and contract."<sup>116</sup> In determining whether the law constituted a taking of the coal companies' property, the court considered "the extent of diminution. When it reaches a certain magnitude, in most if not all cases, there must be an exercise of eminent domain and

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Amendment was made applicable to the States by the Fourteenth Amendment. But there is no doubt that later cases have held that the Fourteenth Amendment does make the Takings Clause of the Fifth Amendment applicable to the States").

<sup>110</sup> *Chicago*, 166 U.S. at 242, 257–58.

<sup>111</sup> Modern regulatory takings are usually not related to corresponding physical takings of the government, as was the case in *Chicago*.

<sup>112</sup> This Article does not argue that *Chicago* is the genesis of regulatory takings, but merely that it represented a move in the Court's understanding of the Takings Clause in a broader light. In fact, the railroad company's loss of certain rights to exclude the public from traversing its property as part of a public street is more akin to a physical taking in which a government action diminishes the owner's right to exclude. See *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979).

<sup>113</sup> 260 U.S. 393 (1992).

<sup>114</sup> See Jeffrey A. Wilcox, *Taking Cover: Fifth Amendment Takings Jurisprudence as a Tool for Resolving Water Disputes in the American West*, 55 HASTINGS L.J. 477, 490 (2003) ("*Mahon* reflected the Court's first explicit recognition that though all regulation affects property rights, there is a point at which the Fifth Amendment Takings Clause is triggered despite the regulation being a legitimate exercise of police power"); Peter L. Henderer, *The Impact of Lucas v. South Carolina Coastal Council and the Logically Antecedent Question: A Practitioner's Guide to Fifth Amendment Takings of Wetlands*, 3 ENVTL. LAW. 407, 412–13 n.25 (1997).

<sup>115</sup> See *Mahon*, 260 U.S. at 412.

<sup>116</sup> *Id.* at 412.

compensation to sustain the act. So the question depends on the particular facts.”<sup>117</sup> Although the requisite amount of diminution was not fleshed out by the Court, it ultimately held that the Kohler Act was a taking that required just compensation because it “affect[ed] the mining of coal . . . where the right to mine such coal has been reserved.”<sup>118</sup> The Court saw this ruling as a necessary check on the police power of the state, which had the potential to be extended to such lengths to be a dangerous threat to private property.<sup>119</sup> Realizing the need to curb this danger to a free society,<sup>120</sup> the court handed down “[t]he general rule . . . that, while property may be regulated to a certain extent, if regulation *goes too far*, it will be recognized as a taking.”<sup>121</sup>

Unfortunately, determining when a “regulation goes too far” is not an easy task. *Penn Central Transportation Co. v. City of New York*<sup>122</sup> was one of the Court’s attempts to do just that. The Penn Central Transportation Company, which owned the iconic Grand Central Terminal in New York City, wanted to construct a multi-story office building on top of the famous train station;<sup>123</sup> however, because the terminal was deemed a “landmark” by the recently created New York Land Preservation Commission, Penn Central

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<sup>117</sup> *Id.* at 413; see also *Berman v. Parker*, 348 U.S. 26, 32 (1954).

<sup>118</sup> *Mahon*, 260 U.S. at 414.

<sup>119</sup> “The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation . . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more, until at last private property disappears.” *Id.* at 415. On the other hand, the Court also recognized that there was a spectrum of the use of police powers by stating that “[g]overnment could hardly go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation, and must yield to the police power.” *Id.* at 413. Thus, *Mahon* was probably the Court’s best attempt at the time to strike the right balance between protecting property rights, and allowing the government enough room to function efficiently.

<sup>120</sup> See Huffman, *supra* note 92, at 146 (“The takings clause exists, along with the rest of the Bill of Rights, because the constitutional framers understood the inevitability of the tyranny of the majority in an unlimited democracy.” (citing James Madison, THE FEDERALIST No. 10)).

<sup>121</sup> *Mahon*, 260 U.S. at 415 (emphasis added).

<sup>122</sup> 438 U.S. 104 (1978).

<sup>123</sup> *Id.* at 112.



had to have its plans approved.<sup>124</sup> When the Commission rejected its development plans, Penn Central sued arguing that the denial of building the office structure, which would potentially result in large lease revenues, was an unconstitutional taking of its right to develop its property.<sup>125</sup> The Court developed a three-factor test to analyze whether a regulatory scheme was a taking “by engaging in essentially *ad hoc*, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action.”<sup>126</sup> The Court ultimately found that New York City’s Landmarks Preservation Law did not amount to a regulatory taking because the restrictions did not “interfere in any way with the present use of the Terminal . . . . So the law does not interfere with what must be regarded as Penn Central’s primary expectation concerning the use of the parcel.”<sup>127</sup> Thus, Penn Central could still use the Terminal as it originally expected to in an economically beneficial way.<sup>128</sup> Such a result was not “of such a magnitude that ‘there must be an exercise of eminent domain and compensation to sustain [it].’”<sup>129</sup>

Next, the Court seemed to informally abandon the three *Penn Central* factors in *Agins v. City of Tiburon*,<sup>130</sup> in which the Court favored a revamped two-factor approach.<sup>131</sup> *Agins* involved a municipi-

<sup>124</sup> *Id.* at 117.

<sup>125</sup> *Penn Central* is the quintessential regulatory takings case: a government regulation has affected a property owner’s ability to use their land as they see fit, thus “taking” the owner’s property rights as well as economic benefit.

<sup>126</sup> *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (quoting *Penn Cent.*, 438 U.S. at 124).

<sup>127</sup> *Penn Cent.*, 438 U.S. at 136. The Court also reasoned that the petitioner in *Penn Central* still retained the value of its air rights for the airspace above the Terminal; however, this holding is less important to the crux of this Article.

<sup>128</sup> Thus, the Court’s logic in finding that there was no regulatory taking rested primarily on the “investment-backed expectation” prong. The three-part test was never meant to be a mechanical checklist of elements, but more of an inquiry of balancing, where the three factors are weighed to determine when a regulation or law “goes too far.” Because investment-backed expectations were not affected at all, this factor alone was able to tip the scale in the direction that the regulation did not constitute a taking.

<sup>129</sup> *Id.* at 136 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)) (alteration in original).

<sup>130</sup> 447 U.S. 255 (1980).

<sup>131</sup> *See Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 485 (1987) (“The two factors that the Court considered relevant, have become integral parts of our

pal zoning ordinance put into effect after petitioners had acquired five acres of land.<sup>132</sup> As a result of the ordinance that restricted use of the land to “one-family dwellings,” the petitioners were no longer able to develop the land and build more lucrative residences.<sup>133</sup> The Court dictated its two-part rule<sup>134</sup> for regulatory takings: a law “effects a taking if the ordinance does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land.”<sup>135</sup> Consequently, because the Court found that the zoning ordinance fulfilled the legitimate state goal of “discourage[ing] the ‘premature and unnecessary conversion of open-space land to urban uses,’ ”<sup>136</sup> the ordinance was not deemed a taking.

Notwithstanding the thick doctrinal conflict at the time, the Court did simplify the Takings Inquiry by establishing a *per se* rule in regulatory takings in *Lucas v. South Carolina Coast Council*.<sup>137</sup> The *per se* rule established in *Lucas* dictates that a taking will be found when a regulation calls upon an owner “to sacrifice *all* economically beneficial uses”<sup>138</sup> of his property.<sup>139</sup> Lucas, the petition-

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Takings Clause analysis. We have held that land use regulation can effect a taking if it ‘does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land.’ ” (quoting *Agins*, 447 U.S. at 260)).

<sup>132</sup> *Agins*, 447 U.S. at 257.

<sup>133</sup> *Id.* at 258. As a result, the petitioners “contended, the city had ‘completely destroyed the value of [appellants’] property for any purpose or use whatsoever . . . .” *Id.* (alterations in original) (citations omitted).

<sup>134</sup> Perhaps themselves realizing the tumultuousness of Takings Clause law as it then stood, the Court admitted that “no precise rule determines when property has been taken.” *Id.* at 260–61 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 164 (1979)).

<sup>135</sup> *Id.* at 260 (citing *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 138 (1978)). While these factors seem distinctly different from the three *Penn Central* factors, they should rather be understood as a modification. The first *Agins* factor—denial of economically viable use of land—is really a combination of the “economic impact” and “investment backed-expectation” factors in *Penn Central*. See *Keystone*, 480 U.S. at 485, 493 (citing the *Agins* and *Penn Central* as authority for the application of the two *Agins* factors, then analyzing the “Diminution of Value and Investment-Backed Expectations” as part of its two part *Agins* analysis, even though these factors more closely correspond with the factors in *Penn Central*). The second *Agins* factor—the substantial advancement of a legitimate state interest—is actually a modification of the “character of the government action” factor in *Penn Central*.

<sup>136</sup> *Id.* at 261 (quoting CAL. GOVT. CODE § 65561(b) (West Supp. 1979)).

<sup>137</sup> 505 U.S. 1003 (1992).

<sup>138</sup> *Id.* at 1019.

ing property owner, bought two residential lots on a South Carolina beach where he intended to build single family homes and render a substantial profit.<sup>140</sup> This investment was dashed when South Carolina enacted a law that prevented all development activities in “coastal zones” in order to prevent erosion of beachfront land.<sup>141</sup> Upon the finding that the law had rendered Lucas’s property valueless,<sup>142</sup> the Court found that a taking had occurred because Lucas’s investment-backed expectations to build single-family homes on his property had been destroyed.<sup>143</sup> Thus, the severity of the law’s economic impact and destruction of Lucas’s investment-backed expectations of the future use of his land led the Court to conclude that a taking had occurred.

This *per se* rule, however, most readily applied to laws that permanently robbed an owner of all economical use of his land. Additionally, a regulation that temporarily robbed a property owner of all economic value was also considered by the Court in *First English Evangelical Lutheran Church v. County of Los Angeles*.<sup>144</sup> In *First English*, Los Angeles County passed an interim ordinance that prevented development of land that had recently been devastated by flooding in the Angeles National Forest.<sup>145</sup> The First English Evangelical Lutheran Church challenged the ordinance; the Church

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<sup>139</sup> See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2004) (describing the *Lucas* rule as establishing “per se takings for Fifth Amendment purposes”). However, this understanding of *Lucas* may not be correct considering the following language of the Court: “Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.” *Lucas*, 505 U.S. at 1027. Thus, the Court is saying that even when a government action strips all economically beneficial use of land from its owner, it is still possible that such an action would not constitute a taking if the owner’s investment-backed expectations were not affected.

<sup>140</sup> *Lucas*, 505 U.S. at 1008.

<sup>141</sup> *Id.*

<sup>142</sup> The Court relied upon the state trial court’s determination that the land was “valueless.” *Id.* at 1006, 1009.

<sup>143</sup> *Id.* at 1027, 1031–32.

<sup>144</sup> 482 U.S. 304 (1987). Temporary takings had been considered before in Massachusetts during colonial times, “[w]here lawmakers required the payment of damages for an interim taking of land as part of a flood control project where temporary dams would be built to [f]acilitate the removal of obstructions.” Ely, *supra* note 5, at 13.

<sup>145</sup> *First English*, 482 U.S. at 307.

owned land in the area and lost several buildings to the flood.<sup>146</sup> Thus, the ordinance deprived them of the economic use of this land by precluding them from reconstructing the buildings and re-establish their activities there.<sup>147</sup> Because of the procedural posture of the case, the Takings Inquiry was not before the Court; instead, the Court assumed a taking had occurred and answered the Just Compensation Inquiry by stating that the “Just Compensation Clause requires the government to pay for ‘temporary’ regulatory takings.”<sup>148</sup>

*First English*, however, was largely abrogated when the Takings Inquiry was before the Court in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.<sup>149</sup> In *Tahoe*, a temporary moratorium was enacted on building and development on certain land surrounding Lake Tahoe in California and Nevada. The Court reasoned that such a temporary restriction merely caused a diminution in value, and could not render the estate valueless because the value would return once the restriction was lifted.<sup>150</sup> While the court still left open the possibility that a temporary regulatory taking could be a taking,<sup>151</sup> it is difficult to imagine one that is so invasive that it makes up for its own temporary nature.

In the years after *Lucas*, the Court has largely solved its doctrinal conflict<sup>152</sup> between *Penn Central* and *Agins*. While the *Agins* test has been cited multiple times in regulatory takings cases,<sup>153</sup> the court abrogated *Agins* in *Lingle v. Chevron U.S.A.*<sup>154</sup> *Lingle* clearly laid out the Court’s rule of law by stating that *Lucas* was a *per se*

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<sup>146</sup> *Id.* at 308.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 313 (footnote omitted).

<sup>149</sup> 535 U.S. 302 (2002).

<sup>150</sup> *Id.* at 332.

<sup>151</sup> *Id.* at 337 (“[W]e do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other.”).

<sup>152</sup> The conflict is only doctrinal, as the black letter law seemingly conflicts; in practice, the factors essentially lead to the same outcomes because of their similarities. *See supra* note 137.

<sup>153</sup> *See, e.g., Lucas v. S.C. Coastal Comm’n*, 505 U.S. 1003, 1016 (1992); *Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 834 (1987).

<sup>154</sup> 544 U.S. 528 (2004).

test that was determinative of the Takings Inquiry in regulatory takings;<sup>155</sup> when a case fell short of meeting the “sacrifice [of] *all* economically beneficial uses” articulated in *Lucas*, the *Penn Central* factors were the appropriate determinatives of the Takings Inquiry.<sup>156</sup>

## 2. Physical Takings

Physical takings represent the traditional view of takings as understood until the turn of the century.<sup>157</sup> The standard procedure for such a taking begins with the government’s commencement of condemnation proceedings; after such commencement, the government and property owner enter into negotiations, and sometimes litigate to decide the Just Compensation Inquiry. This usually provides a straightforward application of the law: “Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation.”<sup>158</sup> However, situations arise where the government believes its physical occupation or invasion does not constitute a taking, and the property owner must himself commence inverse condemnation proceedings to solve the Takings Inquiry.<sup>159</sup>

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<sup>155</sup> *Id.* at 538.

<sup>156</sup> *Id.* at 538–39 (“[R]egulatory takings challenges are governed by the standards set forth in *Penn Central* . . . .”); *see also* Ark. Game & Fish Comm’n v. United States, 133 S. Ct. 511, 518, 521 (2012). *See generally* Wilcox, *supra* note 114 (an example of pre-*Lingle* scholarship advocating for a return to the *Penn Central* factors to govern regulatory takings in light of the Court’s inconsistent precedent).

<sup>157</sup> *See* Rappaport, *supra* note 98, at 736 (citing Treanor, *supra* note 99, at 791 n.50) (arguing that the original application of state takings clauses at the time of the adoption of the Fifth Amendment “suggest that the Federal Takings Clause was understood as extending only to physical takings, since the state and federal clauses used similar language”).

<sup>158</sup> *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982)); *see also Penn Cent.*, 438 U.S. at 124 (“A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” (citation omitted)).

<sup>159</sup> *See generally, e.g., Ark. Game & Fish Comm’n*, 133 S. Ct. at 511; *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

For example, the government did not believe its actions constituted a taking in *Kaiser Aetna v. United States*.<sup>160</sup> In *Kaiser*, petitioners created a marina by dredging and filling a pond, thereby connecting it to a publicly owned bay and the Pacific Ocean.<sup>161</sup> As a result of this newly created marina's connection to publicly held waters, the government asserted that the public had a right to enter the waters of the marina because the connection of these waters made the once-private pond a "navigable water[] of the United States," to which citizens enjoy access.<sup>162</sup> The Court deemed such an action of the government as tantamount to a physical taking because "the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina."<sup>163</sup> Such an invasion, even though only amounting to an easement, nevertheless deprived the petitioning owners of one of the most fundamental rights of private property: the right to exclude.<sup>164</sup> Thus, the Court held that "even if the Government physically invades only an easement in property, it must nonetheless pay just compensation."<sup>165</sup>

The Court relied upon its logic in *Kaiser* when establishing a *per se* rule<sup>166</sup> for physical takings in *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>167</sup> *Loretto* involved a New York statute that required landowners to permit cable television companies to install its CATV cables and directional taps upon their property.<sup>168</sup> Even

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<sup>160</sup> 444 U.S. 164 (1979).

<sup>161</sup> *Id.* at 166–67.

<sup>162</sup> *Id.* at 168–69.

<sup>163</sup> *Id.* at 180.

<sup>164</sup> *See id.* at 180 n.11 ("As stated by Mr. Justice Brandeis, '[a]n essential element of individual property is the legal right to exclude others from enjoying it.'" (alteration in original) (quoting *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting))); *see also infra* Part II.A.3.b and accompanying notes.

<sup>165</sup> *Id.*; *see also* *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 841–42 (1987) (finding that the government's imposition of a permanent public easement across a private beach constituted a taking).

<sup>166</sup> *See* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2004) (describing the holding in *Loretto* as a precedent that established a *per se* taking rule).

<sup>167</sup> 458 U.S. 419 (1982).

<sup>168</sup> *Id.* at 421–22 ("[The cable company] installed a cable slightly less than one-half inch in diameter and of approximately 30 feet in length along the length of the building about 18 inches above the roof top, and directional taps, approximately 4 inches by 4 inches by 4 inches, on the front and rear of the roof. By June 8, 1970 the cable had been extended

though the installation of such discreet cables and equipment was minimal, the Court found that the law nonetheless constituted a taking because a government's imposition of a permanent occupation on a property owner's property effectively destroys the owner's right to "possess, use, and dispose of [the property]." <sup>169</sup> Therefore, no matter how small the physical invasion might be, such property rights of owners will always be affected, and consequently, always effect a taking.

Like in *Lucas*, an important part of the *Loretto per se* rule is the *permanent* physical occupation of property; temporary physical occupations or invasions "are subject to a more complex balancing process to determine whether they are a taking."<sup>170</sup> The Court clarified this when citing to *Pruneyard Shopping Center v. Robins*,<sup>171</sup> in which "the Court upheld a state constitutional requirement that shopping center owners permit individuals to exercise free speech and petition rights on their property, to which they had already invited the general public."<sup>172</sup> In its attempt to weigh appropriate factors, the Court noted that because the invasion of unwanted persons "was temporary and limited in nature, and since the owner had not exhibited an interest in excluding all persons from his property 'the fact that [the solicitors] may have 'physically invaded' [the owners'] property cannot be viewed as determinative.'" <sup>173</sup> Thus, *Pruneyard* was an example where the temporary abrogation of the right to exclude was a factor, but not dispositive when considering mitigating factors.

In no way did *Loretto* or *Pruneyard* foreclose on the possibility of temporary physical occupations or invasions being considered as takings; rather, the Court has a wealth of precedent from the World War II era that holds the exact opposite. During the war, the government temporarily condemned many properties, or otherwise temporarily commandeered factories to produce much needed

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another 4 to 6 feet and cable had been run from the directional taps to the adjoining building at 305 West 105th Street.").

<sup>169</sup> *Id.* at 435 (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)); see also *infra* Part II.A.3.b and accompanying notes.

<sup>170</sup> *Lingle*, 544 U.S. at 435 n.12.

<sup>171</sup> 447 U.S. 74 (1980).

<sup>172</sup> *Loretto*, 458 U.S. at 434.

<sup>173</sup> *Id.* (alterations in original) (quoting *Pruneyard*, 447 U.S. at 84) (footnote omitted).

supplies for the war.<sup>174</sup> This included the temporary seizure of storage warehouses,<sup>175</sup> a laundry facility,<sup>176</sup> and the take-over of a coal mine to prevent a national strike.<sup>177</sup> While these cases actually contemplated the government's control over a physical structure or operation on real property, the Court also found a taking when government military aircraft flew at low altitudes over a dwelling and chicken farm in *United States v. Causby*.<sup>178</sup> This case involved the military's temporary use of a nearby airport. The Court found a taking, even though there was no physical occupation; instead, there was merely an invasion of noise and light.<sup>179</sup> These indirect invasions caused the owners to give up their chicken business and heightened their anxiety.<sup>180</sup> In essence, the Court found that the low altitude fly-overs were tantamount to taking a fee interest easement of the land, even though "enjoyment and use of the land are not completely destroyed."<sup>181</sup>

Most recently, the Court revisited the principles of temporary physical takings in *Arkansas Game and Fish Commission v. United States*.<sup>182</sup> *Arkansas Game and Fish Commission* involved the United States Army Corps of Engineers' periodic deviation from their Water Control Manual, which governed seasonal water release rates from a dam they controlled in Arkansas.<sup>183</sup> From 1993 through 2000, the Corps released less water from the dam to accommodate farmers downstream, but in turn caused the loss of 18 million board feet of lumber due to flooding on the Arkansas Game and Fish Commission's wooded property.<sup>184</sup> Although the flooding would

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<sup>174</sup> See *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 519 (2012) (outlining World War II precedent on temporary takings).

<sup>175</sup> E.g., *United States v. Westinghouse Elec. & Mfg. Co.*, 339 U. S. 261, 267 (1950); *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

<sup>176</sup> *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949).

<sup>177</sup> *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951). *But see Nat'l Bd. of YMCA v. United States*, 395 U. S. 85, 93 (1969) (finding that the "temporary, unplanned occupation" of building by troops under exigent circumstances was not a taking).

<sup>178</sup> 328 U.S. 256 (1946).

<sup>179</sup> *Id.* at 259.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 262.

<sup>182</sup> 133 S. Ct. 511 (2012).

<sup>183</sup> *Id.* at 516.

<sup>184</sup> *Id.* at 516-17.



eventually recede each year, the Court found this temporary invasion of property caused by the Corps to be a taking to which just compensation was due.<sup>185</sup> After outlining extensive precedent on past flooding cases and several cases of temporary physical takings, the Court concluded that “government-induced flooding can constitute a taking of property, and because a taking need not be permanent to be compensable, our precedent indicates that government-induced flooding of limited duration may be compensable.”<sup>186</sup>

Doctrinally, the Court importantly clarified several relevant factors it considers in temporary physical takings cases, including the temporariness or permanence of the taking; whether “the invasion is intended or is the foreseeable result of . . . government action”; and the “severity of the interference.”<sup>187</sup> As hinted at in *Arkansas Game and Fish Commission*, these factors are highly analogous and track closely to the *Penn Central* factors applicable in regulatory takings.<sup>188</sup>

### 3. Underlying Principles

While the Court has attempted to clarify the Takings Inquiry in the past decade, the Court’s turbulent applications of these tests require a deeper inquiry into its reasoning and justifications for doing so. In many ways, the underlying principles that gird these differing factors are more useful to the student of Takings Clause law than the more elusive “black letter” of the law.<sup>189</sup>

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<sup>185</sup> *Id.* at 519.

<sup>186</sup> *Id.* *But see* *Sanguinetti v. United States*, 264 U. S. 146, 149 (1924) (finding that to be a taking, flooding must “constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property”).

<sup>187</sup> *Ark. Game & Fish Comm’n*, 133 S. Ct. at 519–20.

<sup>188</sup> “[A]side from the cases attended by [the *per se* rules of *Loretto* and *Lucas*], most takings claims turn on situation-specific factual inquiries.” *Id.* at 518 (citing *Penn Cent. Transp. Corp. v. City of New York*, 438 U.S. 104, 124 (1978)). This citation to *Penn Central* almost hints that its three factors are determinative of all takings outside of the *per se* rules, both physical and regulatory.

<sup>189</sup> Peterson, *supra* note 93, at 161–62 (arguing that the Court’s Takings Clause jurisprudence is not attributable to doctrine, but rather relies on their notions of fairness).

a) One Unfairly and Unjustly Bearing the Cost for the Community

One of the underlying principles of the Takings Clause “is to bar [the] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>190</sup> Thus, the difficulty has come in determining when the government’s imposition upon the property rights of an individual property owner is so unfair and unjust to validate the community’s compensation of that property owner.

This principle was expressly evoked<sup>191</sup> in *Agins*, and is partly responsible for guiding the Court to its holding. In *Agins*, the Court’s recognition that “[t]he determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.”<sup>192</sup> Consequently, because the zoning ordinance affected many property owners and did not single out the petitioner’s five acres of land, the petitioner was not asked to bear the burden of the exercise of state power on its own;<sup>193</sup> rather, the effects would naturally be spread out to the entire community.<sup>194</sup> Thus, compensating the owners of a taking was

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<sup>190</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); see also *Ely*, *supra* note 5, at 3 (“The rationale behind the takings clause was that the financial burden of public policy should not be unfairly placed on individual property owners but shared by the public as a whole.”).

<sup>191</sup> The term “expressly evoked” is quite intentional because this bedrock principle underlies all takings cases, even though it may not be mentioned. In fact, it is one of the principles of fairness and justice upon which the Takings Clause is predicated upon.

<sup>192</sup> *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), *abrogated by* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); see also *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1 (1984) (“The principle that underlies [protecting investment-backed expectations] is that, while most burdens consequent upon government action undertaken in the public interest must be borne by individual landowners as concomitants of the advantage of living and doing business in a civilized community, some are so substantial and unforeseeable, and can so easily be identified and redistributed, that “justice and fairness” require that they be borne by the public as a whole.” (internal quotation marks omitted)).

<sup>193</sup> *Agins*, 447 U.S. at 262.

<sup>194</sup> *But see Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 835 n.4 (1987) (“If the Nollans were being singled out to bear the burden of California’s attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State’s action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings

unnecessary to properly balance the government's need with the social and economic harm to the property owner.

This underlying principle was further explored by the Court in *Keystone Bituminous Coal Association v. DeBenedictis*,<sup>195</sup> in which the Court addressed another Pennsylvania law regulating coal mining,<sup>196</sup> the Subsidence Act.<sup>197</sup> The law empowered a state agency to prevent coal miners from removing more than 50% of coal from mines located beneath buildings in order to protect the public interest in having structural integrity of surface buildings.<sup>198</sup> Citing *Agins*, the Court recognized that a taking is usually found when the public should bear the burden of a governmental exercise of power, rather than a single property owner.<sup>199</sup> The Court found that determining when this threshold is crossed “‘necessarily requires a weighing of private and public interests.’”<sup>200</sup> The Court's conclusion that the Subsidence Act “plainly seeks to further” the public interest of enjoying structural integrity<sup>201</sup> was therefore enough to

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Clause 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 whole.”); *Berman v. Parker*, 348 U.S. 26, 35 (1954) (justifying a regulatory scheme targeting blight because no single property owner bore the burden of the scheme alone, but rather the entire community; “[i]f owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly”); *Penn Cent. Transp. Corp. v City of New York*, 438 U.S. 104, 134 (finding that the property owner alone was not burdened with the City's landmarks law, but rather that “all the structures contained in the 31 historical districts and over 400 individual landmarks” also bore the burden of the regulatory scheme).

<sup>195</sup> 480 U.S. 470 (1987).

<sup>196</sup> The Court recognized the similarities to *Mahon*, in which a taking was found to occur when the Kohler Act regulated subterranean coal mining rights. *Id.* at 473; *see also supra* notes 113–21 and accompanying text.

<sup>197</sup> Bituminous Mine Subsidence and Land Conservation Act, 52 PA. STAT. ANN. §§ 1406.1–.21 (West 2014).

<sup>198</sup> *Keystone*, 480 U.S. at 478–79.

<sup>199</sup> *Id.* at 492.

<sup>200</sup> *Id.*

<sup>201</sup> The Court likened this public interest to those of preventing public nuisances. There have been many cases where the Court has recognized that a taking does not occur when the state is using its police power to prevent a public nuisance that is injurious to the community. *See id.* at 489–91 (citing *Miller v. Schoene*, 276 U.S. 272, 280 (1926) (holding that the Takings Clause did not require the State of Virginia to compensate the owners of cedar trees when the state ordered them destroyed to prevent the spread of an agricultural disease to a nearby apple orchard under nuisance doctrine); *Euclid v. Amber*

outweigh the private economic interests of the coal companies, who were still able to make a profit<sup>202</sup> by mining coal.<sup>203</sup> Thus, this principle of fairly and justly distributing harm of government action to the community as a whole is an important undercurrent in Takings Clause doctrine.

#### b) Property as a Bundle of Rights

The next important undercurrent is the Court's recognition of the impact that takings have on depriving owners of meaningful sticks in their bundle of property rights. In *Andrus v. Allard*,<sup>204</sup> a law that prohibited the sale of eagle products was challenged by Native American artifact dealers who sold eagle feathers.<sup>205</sup> The law was not deemed a taking since "there was no physical invasion

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Realty Co., 272 U.S. 365, 387–88 (1926) (finding a zoning ordinance excluding industrial establishments was constitutional under a nuisance theory and the proper use of police power); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (finding no taking occurred when a town enacted an ordinance regulating dredging and pit excavation because it was a proper exercise of police power); *Mugler v. Kansas*, 123 U.S. 623, 665 (1887) (finding no taking when a state prohibited the manufacturing of liquor because it was a proper exercise of the police power to prevent the public nuisance of bars and places where intoxicating liquors are bought and sold); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (finding no taking occurred when a city enacted an ordinance preventing the operation of a brickyard due to noxious odors that constituted a public nuisance); *Reinman v. Little Rock*, 237 U.S. 171 (1915); *Powell v. Pennsylvania*, 127 U.S. 678 (1888) (finding no taking occurred when the government prohibited the manufacture of oleomargarine to protect "dairymen, and to prevent deception in sales of butter and cheese," despite the owner's allegation that "if prevented from continuing it, the value of his property employed therein would be entirely lost and he be deprived of the means of livelihood"); see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1023–26 (1992) (describing the Court's early precedent on "[h]armful or noxious use" analysis); *Bowditch v. Boston*, 101 U.S. 16, 18 (1879) (finding that it was lawful for the government to destroy property without compensation to the owner in order to prevent the spreading of a fire).

<sup>202</sup> *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, at 496 (1987) ("[P]etitioners have never claimed that their mining operations, or even any specific mines, have been unprofitable since the Subsidence Act was passed. Nor is there evidence that mining in any specific location affected by the 50% rule has been unprofitable.").

<sup>203</sup> The Court also found that the diminution of value of the coal companies' subterranean mining rights was not substantial enough to outweigh the public interests. This was another way this case was distinguished from *Mahon*, which made the mining of certain coal "commercially impracticable." *Id.* at 493.

<sup>204</sup> 444 U.S. 51 (1979).

<sup>205</sup> *Id.* at 54.

or restraint upon [eagle products]”<sup>206</sup> and it was “not clear that appellees will be unable to derive economic benefit from the artifacts.”<sup>207</sup> The Court seemed to reach this conclusion by relying on the logic that “where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.”<sup>208</sup> Thus, lack of any physical confiscation of the eagle feathers meant that the artifact dealers maintained their traditional property right to possess, transport, and gift the property,<sup>209</sup> but merely lost a strand of their property rights by not being able to dispose of their property as they saw fit.<sup>210</sup>

By contrast, the Court found a taking had occurred in *Hodel v. Irving*,<sup>211</sup> which considered the Indian Land Consolidation Act.<sup>212</sup> This Act sought to remedy a failed policy of the late 19th century to grant individual Indians ownership of parcels of communal Indian reservations.<sup>213</sup> Over several generations, the ownership of the parcels became so splintered among various heirs that the land could not be used beneficially.<sup>214</sup> Section 207 of the Act prohibited certain types of land with splintered ownership from passing to the next generation (further splintering ownership), instead passing the land ownership back to the tribe.<sup>215</sup> The Court found that the economic impacts were minimal, but not trivial.<sup>216</sup> The Court even

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<sup>206</sup> *Id.* at 65.

<sup>207</sup> *Id.* at 66. It is important to note that this is essentially a manifestation of the two *Agins* factors articulated in the Court’s next term.

<sup>208</sup> *Id.* at 66–67.

<sup>209</sup> *Id.* at 65–66 (finding that the deprivation of an important “strand” in the bundle of property rights of the coal companies did not constitute a taking); *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980) (finding no taking had occurred, in part, because “the ordinance did not extinguish a fundamental attribute of ownership” (quotation omitted)).

<sup>210</sup> Arguably, had the *Penn Central* test been applied, a different result would have been likely. The Court may have found a taking when considering that the law greatly impacted the economic market of selling eagle feathers and impacted the Native American artifact dealers’ bottom line; additionally, this effected the dealers’ investment-backed interests because the dealers had already acquired these feathers through likely monetary means with plans to acquire a return from the sale of such feathers for a profit.

<sup>211</sup> 481 U.S. 704 (1987).

<sup>212</sup> 25 U.S.C. § 2201–2221 (2012).

<sup>213</sup> *Hodel*, 481 U.S. at 706–08.

<sup>214</sup> *Id.* at 709.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 714–15.

stated that “[i]f we were to stop our analysis at this point, we might well find § 207 constitutional.”<sup>217</sup> However, the Court ultimately found a taking occurred because “the character of the Government regulation here is extraordinary.”<sup>218</sup> The government was depriving Native Americans “the right to pass on a certain type of property . . . to one’s heirs. In one form or another, the right to pass on property—to one’s family in particular—has been part of the Anglo-American legal system since feudal times.”<sup>219</sup> Such a deprivation of “one of the most essential sticks in the bundle of rights”<sup>220</sup> constituted a taking.<sup>221</sup> Interestingly, this “bundle of rights” principle as applied in *Hodel* appears to be related—and perhaps the underlying justification—for the *Penn Central* factor of the “character of the government action.”<sup>222</sup>

Yet, the property bundle undercurrent seems also closely related to the economic *Agins* and *Penn Central* factors according to the Court’s reasoning in *Lucas*.<sup>223</sup> As discussed earlier,<sup>224</sup> *Lucas* involved a law that prevented a property owner from capitalizing on his investment in undeveloped beachfront property. Based upon the finding that this law had rendered the property owner’s property valueless,<sup>225</sup> the Court found that a taking had occurred because the owner’s investment-backed expectations to build single-family homes on his property had been destroyed.<sup>226</sup> Thus, the right to improve one’s property, as was in contention in *Lucas*, was closely related to the owner’s investment-backed expectations that he

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<sup>217</sup> *Id.* at 716.

<sup>218</sup> *Id.* (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

<sup>219</sup> *Hodel*, 481 U.S. at 716 (citation omitted).

<sup>220</sup> *Id.* (citing *Kaiser*, 444 U.S. at 176).

<sup>221</sup> *Id.* at 718; *see also* *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831 (1987) (finding a taking when the government sought to require a permanent easement for the public across a property owner’s private beach because the Court has “repeatedly held that, as to property reserved by its owner for private use, ‘the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property.’” (alteration in original) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982))); *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994).

<sup>222</sup> *Penn Cent. Transp. Corp. v. City of New York*, 438 U.S. 104, 124 (1978).

<sup>223</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

<sup>224</sup> *See supra* notes 137–43 and accompanying text.

<sup>225</sup> The Court relied upon the state trial court’s determination that the land was “valueless.” *Lucas*, 505 U.S. at 1006, 1009.

<sup>226</sup> *Id.* at 1027, 1031–32.

could derive economic benefits from building homes on his two lots. The deprivation of this important property right, as well as the deprivation of all economic use of his land, led the Court to conclude that a taking had occurred. From the Court's own pen, it appears that assessing the loss of important property rights has guided Takings jurisprudence and should be considered as a guiding principle in the future.

c) Deference to the Legislature

The last underlying principle that this Article highlights is the self-imposed check upon the judiciary in giving deference to the judgment of the legislature in its exercise of police powers. This principle is rooted in the separation of powers ethic and recognizes that "the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . . The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."<sup>227</sup> Because legislatures are deemed to be a closer representation of the people's will, the courts are called upon to exercise minimal scrutiny of the legislature's designs.<sup>228</sup>

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<sup>227</sup> Berman v. Parker, 348 U.S. 26, 32 (1954).

<sup>228</sup> In this way, Takings cases are peculiar among other constitutional determinations. The First Amendment employs complex doctrinal tests to uphold or deny constitutionality in protecting the freedom of speech and freedom of religion. *See, e.g.*, Boos v. Berry, 485 U.S. 312 (1988); Virg. Pharmacy Bd. v. Virg. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976); Lemon v. Kurtzman, 403 U.S. 602 (1970). The Fourteenth Amendment also has different levels of scrutiny to determine constitutionality under the Equal Protection Clause. *Compare* Williamson v. Lee Optical, 348 U.S. 483 (1955) (applying the rational basis test), *with* United States v. Virginia, 518 U.S. 515 (1996) (applying intermediate scrutiny), *and* Loving v. Virginia, 388 U.S. 1 (1967) (applying strict scrutiny). These cases illustrate the judiciary's check upon the legislature, and the power of judicial review to protect the people's rights from a growing police state. Ironically, the Court does not employ such an important check upon the legislature in Takings cases, which protect what many founders thought to be the essential cornerstone of a free society: private ownership of property. *See supra* note 5 and accompanying text; *see also* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("When this seemingly absolute protection [from taking private property without just compensation] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more, until at last private property disappears.").

This principle of deference can be traced from *Mahon*<sup>229</sup> all the way to *Kelo v. City of New London*.<sup>230</sup> While this principle continues to govern in determining the Public Use Inquiry,<sup>231</sup> its influence in the Takings Inquiry has been slowly diminishing. For example, in *Dolan v. City of Tigard*,<sup>232</sup> Florence Dolan sought a permit from the city of Tigard to expand her plumbing, expand her electrical supply store, and pave her parking lot.<sup>233</sup> The City Planning Commission granted Dolan's permit, but only on the condition that Dolan dedicate a portion of her property to a city greenway system to assist with occasional flooding of a nearby creek; additionally, the Commission required Dolan to dedicate a portion of her land for use as a pedestrian/bicycle pathway.<sup>234</sup> The Court applied *Agins* to determine if the "land use regulation . . . 'substantially advance[d] legitimate state interests.'"<sup>235</sup> The Court found that the city had legitimate reasons for requiring the storm drainage system based on the concern for preventing flooding along a nearby creek. Also, the pathway for non-vehicular traffic was legitimate in an effort to cut down on vehicular traffic and make alternative transportation less burdensome.<sup>236</sup> However, the governmental action must bear a "rough proportionality" with accomplishing these legitimate state interests.<sup>237</sup> Thus, the city's regulation for apportioning part of Do-

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<sup>229</sup> "The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power." *Mahon*, 260 U.S. at 413.

<sup>230</sup> 545 U.S. 469, 480 (2005) (recognizing a "longstanding policy of deference to legislative judgments" in the field of "public use").

<sup>231</sup> *Id.*

<sup>232</sup> 512 U.S. 374 (1992).

<sup>233</sup> *Id.* at 379.

<sup>234</sup> *Id.* at 379-80.

<sup>235</sup> *Id.* at 385 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

<sup>236</sup> *Dolan*, 512 U.S. at 387-88.

<sup>237</sup> Cases like *Nollan* and *Dolan* started to give teeth to takings inquiries. The *Dolan* Court specifically recognized the similarities between the "rough proportionality" test and the "rational basis" test "which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment." The Court detracted from any theory that these were the same tests by specifically choosing different terms in order to dispel confusion. *See id.* at 391; *see also Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 n.3 (1987) (discrediting the idea that takings analysis is the same as that of equal protection and due process. "[T]here is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue



lan's property for a greenway was not roughly proportional because its interest of preventing flooding with a public greenway could be as easily accomplished with a private greenway owned by Dolan.<sup>238</sup> Further, the city's finding that building a pedestrian/bicycle path "could offset some of the traffic demand is a far cry from a finding that the bicycle pathway system will, or is likely to, offset some of the traffic demand."<sup>239</sup> Thus, in this unique case where the burden was put on the government to justify its action,<sup>240</sup> the city did not meet its burden of showing how its conditions for granting Dolan an expansion permit substantially advanced state interests.

*Dolan* relied heavily on another similar case that found a government taking: *Nollan v. California Coastal Commission*.<sup>241</sup> In *Nollan*, the California Coastal Commission agreed to grant the Nollans' building permit for their beachfront property on the condition that they allow a public easement across their private beach.<sup>242</sup> The Court acknowledged the deference paid to the legislature by stating that even though its cases had not "elaborated on the standards for determining what constitutes a 'legitimate state interest' . . . . They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements."<sup>243</sup> The Commission asserted its legitimate state interests as "protecting the public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches."<sup>244</sup> Yet, even when assuming these state interests were in fact legitimate, the Court found no logical connection, or "essential nexus," between conditioning the building permit upon these reasons. After all, if the Nollans built a house on the beachfront property, this would block the public's view of the

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the standards for takings challenges, due process challenges, and equal protection challenges are identical.").

<sup>238</sup> *Dolan*, 512 U.S. at 392-93.

<sup>239</sup> *Id.* at 395 (citation omitted).

<sup>240</sup> *See id.* at 391 n.8 (finding that in the rare cases where "the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city" (citing *Nollan*, 483 U.S. at 836)).

<sup>241</sup> 483 U.S. 825 (1987).

<sup>242</sup> *Id.* at 828.

<sup>243</sup> *Id.* at 834-35.

<sup>244</sup> *Id.* at 835.

beach from the street regardless of whether there was an easement on the beachside of the property.<sup>245</sup> For the same reason, an easement on the beachside of the property would not help congestion at beaches or the so-called “psychological barrier” that existed.<sup>246</sup> Both *Nollan* and *Dolan* finally began to establish teeth to the Takings Inquiry after giving the legislature<sup>247</sup> a pass for so long as to its occasional suspect reasoning for imposing regulations that affected property owners’ use of their property.<sup>248</sup> In this way, the principle of paying deference to the legislature was closely tied to the judicial check provided by scrutinizing whether the challenged government action substantially advanced a legitimate state interest under the *Agin*s factors.

This check on the legislature came to an end when the Court abrogated the “substantially advances a legitimate state interest” test in *Lingle*.<sup>249</sup> *Lingle* involved a limit in Hawaii on the rent oil companies could charge dealers leasing company-owned service stations as a response to the effects of market concentration on gasoline prices.<sup>250</sup> Chevron, one of the largest oil companies doing business in Hawaii, argued that the rent cap was a taking that required just compensation.<sup>251</sup> In an effort to “correct course,” the Court revoked the “substantially advances” *Agin*s factor because

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<sup>245</sup> *Id.* at 836–39.

<sup>246</sup> *Id.*

<sup>247</sup> Interestingly, however, both *Nollan* and *Dolan* factually involved scrutinizing adjudicative, not legislative, decisions. See *Horne v. United States Dep’t of Agric.*, 750 F.3d 1128, 1144 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 1039 (2015). In fact, many of the Court’s most important Takings Clause cases involve administrative agencies or actors of the executive implementing the laws that the legislature has enacted. This fact does nothing to unwind the underlying principle above, since the Court often looks past the action of the executive actor to the purpose of the legislative enactment. See, e.g., *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 412–13 (1922); *Berman v. Parker*, 348 U.S. 26, 28–33 (1954); *Horne*, 750 F.3d at 1133–34, 1144.

<sup>248</sup> See Wilcox, *supra* note 114, at 484 (arguing that *Nollan* was a turning point for the Court, establishing “that land use regulations and the judgment of . . . regulators would be given much less judicial deference”); see also James H. Freis, Jr. & Stefan V. Reyniak, *Putting Takings Back Into the Fifth Amendment: Land Use Planning After Dolan v. City of Tigard*, 21 COLUM. J. ENVTL. L. 103, 105 (1996); Danaya C. Wright, *Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court’s Fifth Amendment Takings Jurisprudence*, 26 COLUM. J. ENVTL. L. 399, 406 (2001).

<sup>249</sup> 544 U.S. 528 (2004).

<sup>250</sup> *Id.* at 533.

<sup>251</sup> *Id.*

the “inquiry reveals nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is distributed among property owners.”<sup>252</sup>

The Court also notably claimed that the abolition of the “substantially advances” test did not “disturb any of [its] prior holdings.”<sup>253</sup> Given the numerous applications of the *Agin*s factors, this statement seems dubious; however uncertain this statement’s truth is, it is nonetheless outside the scope of this Article. Noteworthy is the Court’s claim that the “substantially advances” test was never really a part of the undercurrent of its cases. By abolishing this test, the Court essentially plucked out the teeth of the Takings Inquiry by eliminating a court’s ability to scrutinize the motives of legislatures when enacting regulations or imposing takings. Thus, the Court’s acknowledgment that the “substantially advances” test has never dispositively decided any of its cases means that the opposite principle—the deference paid to legislatures—has been such an undercurrent to Takings Clause doctrine.

Thus, the three underlying principles laid out in this Article not only connect with several of the Court’s determinations of takings over the years, but they also connect with each other. As stated in *Lingle*, the *Penn Central* factors are really based on a regulation’s effect on property rights (“property bundle”) and its effects on the burden distributed to property owners. Lastly, *Lingle*’s abandonment of the “substantially advances” test practically gives more deference to legislative actions.

### B. *Public Use Inquiry*

The deference paid to legislatures is most powerfully felt in the Court’s determination of whether a taking is for “public use.” In fact, the Public Use Inquiry is almost inseparable from the Court’s deference to the legislature.

The Court’s most controversial Takings Clause cases have contested the interpretation of the term “public use.” The way the Takings Clause is framed, the drafters assumed that the govern-

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<sup>252</sup> *Id.* at 542.

<sup>253</sup> *Id.* at 545.

ment taking was being made for a public use<sup>254</sup> and that such a taking must be accompanied by just compensation. Thus, a constitutional taking must pass the bar of being for public use. This bar, however, is inordinately low. Public Use doctrine has become so broad in the past century, trusting legislatures with almost a blind faith, that it is hard to imagine a taking that could not fit this low standard.<sup>255</sup>

The Court started down this path as far back as *Mahon*,<sup>256</sup> and further matured the doctrine in *Berman v. Parker*<sup>257</sup> and *Hawaii Housing Authority v. Midkiff*.<sup>258</sup> In *Berman*, Congress's recently enacted District of Columbia Redevelopment Act was in question;<sup>259</sup> the Act permitted a public redevelopment agency to identify and

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<sup>254</sup> An odd interpretation would be one that suggested that takings for nonpublic uses would not be subject to just compensation. Since the type of taking is specifically qualified as one for public use, nonpublic use takings are not considered; thus, just compensation would not be a constitutional requirement. I have not seen such an interpretation forwarded in good conscious, wholly because such an interpretation is not intellectually or practically sustainable.

<sup>255</sup> See Madigan, *supra* note 5, at 181 (“In practice . . . judicial review has been so deferential that a finding of public use seems inevitable.” (citing Peter J. Kulick, Comment, *Rolling the Dice: Determining Public Use in Order to Effectuate a “Public-Private Taking”—A Proposal to Redefine “Public Use”*, 2000 L. REV. M.S.U.-D.C.L. 639, 655 (2000))).

<sup>256</sup> See *supra* note 93.

<sup>257</sup> 348 U.S. 26 (1954).

<sup>258</sup> 467 U.S. 229 (1984).

<sup>259</sup> It is ironic that *Berman*—an opinion that showed great trust in the government's motives regarding takings—was decided during a time period that the Warren Court handed down some of its most iconic anti-government decisions that illustrated a great distrust of government actors in civil rights and criminal law. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Brown v. Board of Education*, 347 U.S. 483 (1954); see also Cass R. Sunstein, *Justice Breyer's Democratic Pragmatism* 3–4 (John M. Olin Program in Law and Economics Working Paper No. 267, 2005) (“To many people, the idea of judicial deference to the elected branches lost much of its theoretical appeal in the 1950s and 1960s, when the Supreme Court, under the leadership of Chief Justice Earl Warren, was invalidating school segregation [*Brown v. Bd. of Educ.*], protecting freedom of speech [*Brandenburg v. Ohio*], striking down poll taxes [*Harper v. Bd. of Elections*], requiring a rule of one person, one vote [*Reynolds v. Sims*], and protecting accused criminals against police abuse [*Miranda v. Arizona*].”). Perhaps the Warren Court was more distrusting of the executive and its actors, but put more trust in legislatures that were seen as more representative of the people and more readily served their needs.

condemn blighted areas of Washington, D.C. and transfer the property to public agencies, redevelopment companies, individuals, or partnerships for redevelopment.<sup>260</sup> This Act was passed due to Congress's finding that blight was "injurious to the public health, safety, morals, and welfare."<sup>261</sup> The constitutionality of this plan was challenged on the basis that seizing land for the purposes of aesthetic beautification<sup>262</sup> did not meet the standard of public use. As the petitioners argued, condemning the land and giving it to private organizations would not subject the land to public use, but rather to private ownership.<sup>263</sup> The Court found that seizing property to combat blight was a public use because, as Congress had determined, it served to remedy injurious conditions to public health. Thus, the Court began its semantic campaign to redefine the term "public use" to instead mean "public purpose"<sup>264</sup> or "public benefit."<sup>265</sup> The Court expressed its great faith in the sanctity of legislatures to exercise the state's police power<sup>266</sup> as "the main guardian of the public needs," and that it was within the legislature's prerogative "to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced

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<sup>260</sup> See *Berman*, 348 U.S. at 28, 30.

<sup>261</sup> *Id.* at 28.

<sup>262</sup> *Berman* is an important case in clearly defining the power of "States and cities [to] enact land use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city." Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 129 (1978) (citing *N. Orleans v. Dukes*, 427 U.S. 297 (1976); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9-10 (1974); *Berman*, 348 U.S. at 33 (1954); *Welch v. Swasey*, 214 U.S. at 214 (1909)).

<sup>263</sup> *Berman*, 348 U.S. at 31.

<sup>264</sup> "The role of the judiciary in determining whether [the eminent domain] power is being exercised for a *public purpose* is an extremely narrow one." *Id.* at 32 (emphasis added) (citing *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925); *United States ex rel. TVA v. Welch*, 327 U.S. 546, 552 (1946)).

<sup>265</sup> *Kelo v. City of New London*, 544 U.S. 469, 490-91 (2005) (Kennedy, J., concurring) (using the term "public benefits" when commenting on the Court's application of a type of rational-basis review to ensure that public benefits are not merely pretextual means to satisfy the "Public Use Clause").

<sup>266</sup> "Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power, and do not delimit it." *Berman*, 348 U.S. at 32.

as well as carefully patrolled.”<sup>267</sup> After all, “[t]he values it represents are spiritual as well as physical, aesthetic as well as monetary.”<sup>268</sup>

The Court affirmed this “public benefit” interpretation of the Takings Clause in *Midkiff*, in which the Hawaii legislature sought to divide lands which were held by a few dozen private landowners.<sup>269</sup> As a result of the highly concentrated land holdings, the legislature found that the state’s fee simple real estate market was inflated, and the public welfare was being injured.<sup>270</sup> To remedy the issue, the legislature encouraged those renting land to petition the legislature; upon such petition, the legislature would condemn the land from the owner, and sell it to the lessee at a fair market price.<sup>271</sup> Relying greatly on *Berman*, the Court found that the legislature’s condemnation scheme was constitutional because it was being used for a public use. The Court found that the “‘public use’ requirement is . . . coterminous with the scope of a sovereign’s police powers.”<sup>272</sup> Thus, public use is as broad as the state’s police powers, which can be used to regulate nearly everything. While the Court noted that the public use requirement is a standard that governments must satisfy, it made clear that this standard only requires a legitimate rationale that will not be overturned “unless the use be palpably without reasonable foundation.”<sup>273</sup>

Things came to a boiling point when the Court found that condemning private property and selling it to a private corporation promising to redevelop the area, provide jobs, and improve the tax base was within the broad understanding of “public use.”<sup>274</sup> This was exactly the case in *Kelo*, in which the city of New London con-

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<sup>267</sup> *Id.* at 33.

<sup>268</sup> *Id.*

<sup>269</sup> *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 232 (1984). The Hawaii legislature’s actions were based on their finding that 47% of privately owned land was held by 72 landowners. Further, 40% of that land was owned by only 18 landowners. *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 233–34.

<sup>272</sup> *Id.* at 240.

<sup>273</sup> *Id.* at 241 (quoting *United States v. Gettysburg Electric R.R. Co.*, 160 U.S. 668, 680 (1896)); see also *id.* at 240 (“deference to the legislature’s ‘public use’ determination is required ‘until it is shown to involve an impossibility.’” (citing *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925))).

<sup>274</sup> See *Kelo v. City of New London*, 544 U.S. 469, 472 (2005).

demned the home of Susette Kelo, one of a few holdout property owners, in order to turn it over to Pfizer Corporation to build a new facility, among other things.<sup>275</sup> After exploring *Berman* and *Midkiff*,<sup>276</sup> the Court realized the following:

Our earliest cases in particular embodied a strong theme of federalism, emphasizing the “great respect” that we owe to state legislatures and state courts in discerning local public needs. For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.<sup>277</sup>

Thus, the legislature’s plan of condemning private property for the purpose of “economic rejuvenation is entitled to . . . deference.”<sup>278</sup> Of note, the dissenting Justices aptly warned that “all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process.”<sup>279</sup> Further, the dissenters argued that there was no longer any distinction between “private and public use of property” and that the words “for public use” had been practically deleted from the Takings Clause.<sup>280</sup>

### C. *Just Compensation Inquiry*

In contrast to the Public Use Inquiry, the Just Compensation Inquiry is the least controversial and consequently the least explored part of the Takings Clause. Generally, just compensation means “the fair market value of the property on the date it is appropriated. Under this standard, the owner is entitled to receive what a willing buyer would pay in cash to a willing seller at the time

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<sup>275</sup> *Id.* at 474–75.

<sup>276</sup> *Id.* at 480–82.

<sup>277</sup> *Id.* at 482–83.

<sup>278</sup> *Id.* at 483.

<sup>279</sup> *Id.* at 494 (O’Connor, J., dissenting).

<sup>280</sup> *Id.*

of the taking.”<sup>281</sup> In the case of regulatory takings, the diminution of the fair market value is the correct standard to apply.<sup>282</sup> Such a determination can be established by expert testimony from real estate appraisers at the condemnation hearing. Further, even though many property owners may attach a higher value to their property due to “relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs,” they are nonetheless not hurt on any constitutional basis when the government only pays the fair market value for a taking.<sup>283</sup>

However, even this seemingly straightforward valuation process can be complicated when considering temporary takings. As cited above,<sup>284</sup> *First English* was the Court’s first foray into this field.<sup>285</sup> Assuming that a taking had occurred, the Court found that just compensation was due even for a temporary regulatory taking.<sup>286</sup> This logic was based on the government being “required to pay compensation for leasehold interests of shorter duration than this. The value of a leasehold interest in property for a period of years may be substantial, and the burden on the property owner in extinguishing such an interest for a period of years may be great indeed.”<sup>287</sup> Later, *Tahoe* clarified the timing for such a leasehold interest, which would begin and end on the first and last day, respectively, that the restrictive regulatory scheme was effective over the petitioning owner.<sup>288</sup>

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<sup>281</sup> Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 10 (1984) (internal quotation marks omitted) (citing United States v. 564.54 Acres of Land, 441 U.S. 506, 511–13 (1979)).

<sup>282</sup> Furey v. City of Sacramento, 592 F. Supp. 463, 469 (E.D. Cal. 1984) (calculating the diminution in value by “compar[ing] the fair market value of the property immediately before the enactment of the challenged regulation with the fair market value of the property immediately thereafter”), *aff’d*, 780 F.2d 1148 (9th Cir. 1986); *see also* Deltona Corp. v. United States, 657 F.2d 1184, 1192 (Ct. Cl. 1981) (comparing the fair market value of the property after the regulation was enacted with the owner’s cost basis).

<sup>283</sup> Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988).

<sup>284</sup> *See supra* notes 144–48 and accompanying text.

<sup>285</sup> First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987).

<sup>286</sup> *Id.* at 313 (footnote omitted).

<sup>287</sup> *Id.* at 319 (citing United States v. Gen. Motors Corp., 323 U.S. 373, 379–84 (1945)).

<sup>288</sup> *Id.* at 328 (“[T]he government entity must pay just compensation for the period commencing on the date the regulation first effected the ‘taking,’ and ending on the date



#### IV. WHERE THE PAINT HITS THE CANVAS: ARE STREET ART ORDINANCES TAKINGS THAT REQUIRE JUST COMPENSATION?

While the Supreme Court has not exactly established a pristine model of predictability in Takings Clause analysis, it is unlikely that a Fifth Amendment challenge to any of the street art ordinances around the country could withstand doctrinal scrutiny. The Takings Inquiry, as determined by where the Court currently stands, would almost certainly be decided in the negative because the street art ordinances do not squarely fit within the necessary bounds of either a physical taking or regulatory taking. However, a better case may be made when applying the underlying principles of such doctrines.

As a preliminary matter, this Article assumes that property owners will only challenge street art ordinances with respect to valuable or expressive street art.<sup>289</sup> A city's efforts to remove gang graffiti, offensive tagging, or other valueless street art would not likely be contested by property owners who would rationally be concerned only with property values. Thus, in the smaller number of cases where street art is thought to have added value to a property, and a city attempts to impose compliance with street art ordinances, a property owner would be most likely to challenge said ordinances.

##### *A. Street Art Takings Under the Doctrinal Approach*

Courts would be hard-pressed to find that the street art ordinances constituted a physical taking under current doctrine. First,

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the government entity chooses to rescind or otherwise amend the regulation.”) (citing *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 658 (1981)); *see also* *MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 362–63 (1986).

<sup>289</sup> Street artists themselves would not have standing to challenge the ordinances as a taking because their property has not been affected. They effectively waive their rights to their work when they use a canvas that belongs to a property owner in which that property owner did not commission. Even in cases of commissioned street art, artists have very limited rights under the Visual Artists Rights Act of 1990 (“VARA”), 17 U.S.C. § 106A. *See generally* Amin, *supra* note 86, at 319–20 (even under the rights provided by VARA, in many instances commissioned street artists do not retain standing to challenge their art’s removal (discussing *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S.2d 813 (Sup. Ct. 1949))).

the government is not physically taking any part of an owner's property by asserting ownership of it themselves. Instead, it is asserting its regulatory police power to abate what it considers a public nuisance.<sup>290</sup> Thus, both before and after removal of the street art, the property owner retains title to the property. A novel argument could be made that the city's paint itself constitutes a permanent physical invasion of a portion of the property owners' property, evoking the *per se* rule of *Loretto*.<sup>291</sup> This seems unlikely. Paint used to cover street art is perceived as one-dimensional; it does not take up space, add volume, or add weight. While it has never been tested, *Loretto* reads as finding takings where there is some measurable change, however small, in the three-dimensional realm. Paint, while affecting color and the way a physical wall is perceived, does not impose any three-dimensional burden or occupation upon the property owner.<sup>292</sup> On the other hand, *Causby* stands for the proposition that government invasions need not even be physical to constitute a taking.<sup>293</sup> Mere light and sound invasions—while scientifically measurable—are not three-dimensional burdens physically occupying the property owner's land; yet, these light and sound invasions were still found to be a government taking worthy of just compensation.<sup>294</sup> However, the Court in *Causby* also relied upon the economic effects of the invasion to reach its decision; thus, the closing of the owner's chicken farm business—*as well as* the effect on the enjoyment of the property—were integral in the

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<sup>290</sup> L.A., CAL., MUN. CODE ch. IV, art. 14, § 49.84.6 (2014); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

<sup>291</sup> Such an argument could only be made when the government uses its own resources to remove the street art, such as it does in Los Angeles. *See* L.A., CAL., MUN. CODE ch. IV, art. 14, § 49.84.7(A) (2014). In contrast, the New York law requires property owners themselves to remove street art using their own resources; as a result, the property owner in New York, using his own paint to cover street art, could not assert such a *Loretto per se* argument because it is his own paint that occupies that portion of his property, not the government's paint. *See also* Amin, *supra* note 86 (arguing that forcing a property owner to live with a mural that he no longer wants on his property could be tantamount to a physical invasion because it robs him of an important property right).

<sup>292</sup> If street art ordinances, for example, allowed city workers to physically remove the portion of the wall containing the street art, in a similar way that Banksy beneficiaries do, such physical appropriation of that wall would constitute a taking in a way that mere paint never could. *See supra* note 46 and accompanying text.

<sup>293</sup> *United States v. Causby*, 328 U.S. 256, 266–67 (1946).

<sup>294</sup> *Id.*

Court's decision.<sup>295</sup> The street art ordinances, on the other hand, may in fact impose a government invasion, but its economic effect on the property owner's ability to do business is hardly affected at all; such a set of facts would not likely be enough to constitute a taking under the Court's current physical occupation or invasion jurisprudence. However, such a challenge to a court would be an interesting development in Takings Clause law and would have the potential of changing the landscape of street art ordinances around the country.

If a finding of a permanent physical taking is unlikely, a finding of a temporary physical taking would be even more improbable. Such a theory would posit that the temporary easement allowing city workers onto the property to remove the street art was tantamount to a taking. While the city of Los Angeles reserves the right to enter onto a property owner's property without prior consent,<sup>296</sup> such a temporary trespass<sup>297</sup> cannot be considered a physical taking under *Arkansas Game & Fish Commission*.<sup>298</sup> First, the extremely short timeframe of the suspension of the right to exclude cuts against finding a taking. The few hours it would take to remove the street art is almost inconsequential when compared to the several years found in most temporary takings cases.<sup>299</sup> Second, the invasion is likely foreseeable due to the existence of the ordinances themselves; thus, if a property owner finds himself the beneficiary of a work of street art, he could likely expect to be contacted by the proper authorities regarding its removal. Further, if he refused to give consent for the proper authorities to come onto the property to remove the street art, the temporary suspension of his right to exclude them would be predictable. Lastly, the severity of the invasion is relatively minor. Having one or a few city workers come on

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<sup>295</sup> *Id.* at 259.

<sup>296</sup> L.A., CAL., MUN. CODE ch. IV, art. 14, § 49.84.8(A), (B) (2014).

<sup>297</sup> At best, property owners could construe a city's action as a physical trespass on their property in order to gain access to the street art for removal. In many cases, this theory would be inapplicable because most street art is placed on outside walls accessible by public sidewalks. Thus, city workers could access the street art by the public sidewalk without ever trespassing on private property.

<sup>298</sup> 133 S. Ct. 511, 522–23 (2012).

<sup>299</sup> *See, e.g., supra* notes 174–79 and accompanying text.

to his property once<sup>300</sup> to remove street art is not deleterious to the property owner's ability to use or enjoy the property for any period of time.

Since the street art ordinances address a property owner's rights to how he uses and enjoys his property, the path of lesser resistance would be to show that the enforcement of the ordinances constituted a regulatory taking. Asserting *Lucas*'s *per se* rule of regulatory takings would be inappropriate because the street art ordinances do not deprive the property owner of *all* the economically beneficial uses of his land.<sup>301</sup> The ordinances only target specific portions of the property that are not in compliance and do not prevent business owners from conducting their business; neither would they interfere with lessor-lessee relationships while the ordinances are being enforced. Thus, even while either the property owner or city workers are removing street art on the property, business can go on as usual because of the noninvasive nature of the street art removal.

Getting no help from the *Lucas per se* rule, a regulatory taking challenge would have to rely on the *Penn Central* factors.<sup>302</sup> First, the nature of the government action is noninvasive and rather minimal, especially when comparing it to other regulatory schemes that have come before the Court.<sup>303</sup> However, while previous zoning laws and preservation efforts have prevented development of land, the street art ordinances go one step further by imposing harsh civil<sup>304</sup> and criminal penalties.<sup>305</sup> Second, the street art ordinances do not affect investment-backed expectations that the property owner

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<sup>300</sup> See *Ark. Game & Fish Comm'n*, 133 S. Ct. at 522–23 (“[W]hile a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [a taking].” (alterations in original) (quoting *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329–30 (1922))).

<sup>301</sup> See *Lucas v. S.C. Coastal Council*, 505 U.S. 1103, 1019 (1992); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538–39 (2004).

<sup>302</sup> *Lingle*, 544 U.S. at 539.

<sup>303</sup> See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 18–13 (1978) (requiring approval from the Landmarks Preservation Commission before altering any building deemed to be a landmark); *Andrus v. Allard*, 444 U.S. 51, 52–56 (1979) (prohibiting the sale of eagle feathers).

<sup>304</sup> L.A., CAL., MUN. CODE ch. IV, art. 14, § 49.84.12 (2014).

<sup>305</sup> See, e.g., N.Y. PENAL LAW §§ 145.00, 145.05, 145.10, and 145.60 (McKinney 2014) (imposing misdemeanor and felony criminal charges).

had when attaining title for the property. No property owner buys a piece of property with reasonable hopes of winning the real estate lottery by being gifted with a Banksy work or other valuable piece of art on the side of their building. Rather, the occurrences of valuable street art are quite random and are pleasant surprises to beneficiaries.<sup>306</sup> Third, and probably the most helpful, is the economic impact of the street art ordinances. As has been established, street art can substantially raise property values and gentrify communities.<sup>307</sup> Nevertheless, in both *Penn Central* and *Agins*, the Court did not find that laws restricting certain real estate development constituted regulatory takings, even though such restrictions on development cost the respective property owners potentially millions of dollars in expected revenue.<sup>308</sup> Thus, the portion of the street art ordinances that gives the government the affirmative right to remove street art seems less injurious economically to property owners than other laws that the Court rejected based on a regulatory takings argument.

Neither could petitioners of the ordinances rely on *Nollan* or *Dolan*, two cases that gave teeth in finding regulatory takings.<sup>309</sup> These cases dealt with the government's imposed requirement on a landowner to get building permits and the extent these requirements would advance a legitimate state interest. The ordinances, to an extent, do impose a similar type of regulatory extortion<sup>310</sup> by re-

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<sup>306</sup> See, e.g., *Banksy Artwork Saves Youth Club as it Sells for £400k*, TELEGRAPH (Aug. 27, 2014, 3:51 PM), <http://www.telegraph.co.uk/culture/art/11059481/Banksy-artwork-saves-youth-club-as-it-sells-for-400k.html> (describing a youth club thanking Banksy for leaving his piece "Mobile Lovers" on their property, which allowed them to sell the piece to get out of debt and continue operating). The occurrences of gang graffiti, on the other hand, are more predictable based on the neighborhood and corresponding gang territory; however, property owners would not likely challenge street art ordinances in efforts to remove gang graffiti, but only street art they found economically beneficial.

<sup>307</sup> See *supra* notes 43–47 and accompanying text.

<sup>308</sup> See *Penn Cent.*, 438 U.S. at 117; *Agins v. City of Tiburon*, 447 U.S. 255, 258 (1980).

<sup>309</sup> See *supra* notes 232–48 and accompanying text.

<sup>310</sup> See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (describing land use restriction as "an out-and-out plan of extortion" (citing *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14–15 (N.H. 1981)); see also Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 942 n.51 ("The unconstitutional conditions doctrine prohibits the government from conditioning the receipt of a public benefit, even a benefit to which the recipient is not entitled, upon the surrender of a constitutional right." (citations omitted))).

quiring property owners to allow government access to property to remove street art; in return, the property owners avoid penalties. However, unlike in *Nollan* and *Dolan*, Los Angeles and other cities<sup>311</sup> have relied on the widely asserted “Broken Windows Theory”<sup>312</sup> to serve as their legitimate state interest of which removal of street art is intimately related. Thus, when painting street art with such a broad brush, such a regulation would not be seen as arbitrary,<sup>313</sup> but would in most cases be considered as a reasonable way of reducing crime and gang activity.

Another aspect of the street art ordinances are the portions that restrict a property owner from developing his property by commissioning street art himself,<sup>314</sup> or from displaying aerosols or markers in their stores in a less restrictive way.<sup>315</sup> This is more akin to the traditional regulatory taking case because it would challenge a law that prevents property owners from affirmatively doing something with their property, such as selling chattels<sup>316</sup> or expanding their property.<sup>317</sup> At least one court has already contemplated and rejected these types of challenges, finding that the ordinance under attack was an appropriate exercise of the state’s police power and did not constitute a regulatory taking.<sup>318</sup>

<sup>311</sup> See, e.g., L.A., CAL., MUN. CODE ch. IV, art. 14, §§ 49.84.1(B)–(C) (2014); S.F., CAL., PUB. WORKS CODE art. 23, §§ 1301(a), (c) (2014).

<sup>312</sup> See Mettler, *supra* note 12, at 254 n.36 (describing the Broken Windows Theory as a “hypothesis [that] assumes that areas rife with indicia of urban disorder—shattered windows or prolific graffiti, for instance—invite crime by suggesting that no one cares to maintain order in those areas” (citing GREGORY J. SNYDER, *GRAFFITI LIVES: BEYOND THE TAG IN NEW YORK’S URBAN UNDERGROUND* 48 (2009))).

<sup>313</sup> See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7–8 (1974) (holding that economic and social legislation enacted by the legislature will be upheld if it is reasonable, not arbitrary, and bears a rational relationship to a permissible state objective); see also *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984) (deferring to the legislature’s “public use” purpose “until it is shown to involve an impossibility” (citing *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925))).

<sup>314</sup> L.A., CAL., MUN. CODE ch. IV, art. 14, § 49.84.3(B) (2014).

<sup>315</sup> *Id.* § 49.84.4(A).

<sup>316</sup> See, e.g., *Andrus v. Allard*, 444 U.S. 51, 54 (1979).

<sup>317</sup> See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 117 (1978); *Agins v. City of Tiburon*, 447 U.S. 255, 258 (1980); *Dolan v. City of Tigard*, 512 U.S. 374, 379 (1994); *Palazzolo v. Rhode Island*, 533 U.S. 606, 614–15 (2001).

<sup>318</sup> See, e.g., *Sherwin-Williams Co. v. City and Cnty. of S.F.*, 857 F. Supp. 1355, 1372 (N.D. Cal. 1994) (upholding a San Francisco ordinance requiring store owners to display spray paint and markers used in street art in a way that employee assistance is required to

*B. Street Art Takings Applying Underlying Principles*

A challenge to the street art ordinances does not seem to pass doctrinal muster in the Takings Inquiry, but the underlying principles of such doctrines seem to be more forgiving. Thus, if street art ordinances are not takings under current doctrine, should they be due to the application of underlying principles?

First, the application of the street art ordinances upon certain landowners who enjoy valuable pieces of street art on their property does seem to be singling out certain landowners to bear costs on behalf of the entire community. While these ordinances potentially apply to everyone, they are selectively applied to property owners who have street art on their property. In theory, the entire community is subject to the street art ordinances, similar to zoning ordinances in *Agins*<sup>319</sup> or city planning redevelopment projects in *Berman*.<sup>320</sup> However, unlike in those cases, not everyone in the community is practically subject to application of the street art ordinances on their property. This would be similar to an ordinance where cities reserved the right to plug up oil wells in the rare instance when a property owner found oil reserves underneath his property. Because of the rarity of this occurrence, most of the community would not realistically ever be subject to this ordinance; however, the few times that a property owner struck oil, the ordinance would be put into effect. This is tantamount to finding a valuable asset on your property that was not there before, such as a street artist potentially raising property value with a piece of street art. To impose the ordinance on a few property owners who now enjoy higher property values in order to combat valueless street art would be asking that property owner to suffer a diminution of value to his property in order to comply with the overall public benefit of a uniform city plan.<sup>321</sup>

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gain access to these products as a legitimate use of police power); *see also* Nat'l Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124, 1130 (7th Cir. 1995) (upholding Chicago ordinance prohibiting sale of "spray paint and jumbo indelible markers," but noting that the plaintiffs—store owners that sold these items—did not pursue a claim under the Takings Clause, which would be a business's remedy for "substantive protections").

<sup>319</sup> *Agins*, 447 U.S. at 257.

<sup>320</sup> *Berman v. Parker*, 348 U.S. 26, 28–30 (1954).

<sup>321</sup> This is not to say that all ordinances that seek to remedy nuisances when they arise constitute takings. Rather, this underlying principle points towards the type of

Second, several sticks of an owner's property rights bundle are disturbed by the street art ordinances. The ordinances strip the property owner's right to exclude, which is the most important property right of all.<sup>322</sup> The ordinances render a property owner powerless to exclude the government from trespassing on his property when they have deemed it necessary to abate a public nuisance, which ironically, may actually raise his property value and that of nearby neighbors.<sup>323</sup> Further, the property owner loses his right to dispose of his property, such as sell the property, as he sees fit.<sup>324</sup> By removing the street art, the city denies the property owner the chance to remove the piece from his wall physically and sell it for profit on the open market.<sup>325</sup> The loss of these sticks in the bundle of property rights is significant,<sup>326</sup> and further support finding a taking.

The third underlying principle, courts' deference to the legislature, is the only principle that appears to cut against finding a taking. As a common theme in Takings Clause law, courts have always afforded great deference to the legislature's prerogative in exercising eminent domain or adopting regulations that affect property rights.<sup>327</sup> Regarding street art ordinances, legislatures have declared street art to be a public nuisance primarily because it lowers property values, incites crime, and contributes to the insecurity of the

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government action that may constitute a taking, especially when considering the potential diminution of property value that would be suffered in the covering up of valuable street art.

<sup>322</sup> See *Kaiser Aetna v. United States*, 444 U.S. 164, 180 n.11 (1979).

<sup>323</sup> This does not ignore that in certain emergencies, government actors are allowed to trespass on and even damage private property without consent and without paying just compensation. See generally C. Wayne Owen Jr., *Everyone Benefits, Everyone Pays: Does the Fifth Amendment Mandate Compensation When Property is Damaged During the Course of Police Activities?*, 9 WM. & MARY BILL RTS. J. 277 (2000) (finding that current doctrine does not find a taking when law enforcement officers damage private property in the performance of their duties). However, abating nuisance is not such an emergency, and without an easement, consent is required to enter private property.

<sup>324</sup> See *Andrus v. Allard*, 444 U.S. 51, 66 (1979).

<sup>325</sup> See *supra* note 46 and accompanying text.

<sup>326</sup> While "the denial of one traditional property right does not always amount to a taking," *Andrus*, 444 U.S. at 65, the loss of multiple sticks in the bundle, including the right to exclude, weighs in favor of finding a taking. See *Kaiser Aetna*, 444 U.S. at 179-80.

<sup>327</sup> See *supra* Part II.A.3.c.



community.<sup>328</sup> As has been examined in Part II of this Article, these findings by the legislatures are questionable.<sup>329</sup> As noted above in Part IV, however, they are not arbitrary or impossible.<sup>330</sup> As such, courts will not approach the findings of the legislatures in imposing such laws.<sup>331</sup> Instead, courts are content with assuming the legislature's findings are correct.

### C. *Proposed Solutions to Street Art Takings*

The above analysis creates a conflict: while street art ordinances would not likely be deemed as a taking by courts applying modern Takings Clause doctrine, the underlying principles that gird those doctrines suggest that there is enough of a societal imbalance of harms and potential loss of property rights to justify a taking when valuable pieces of street art are removed. Even if the strength of such conflict is questioned, it seems an unjust outcome that property owners would be subject to a regulatory scheme that economically lowers the value of their property, even if it may be economically beneficial in other applications. It is true that many times, property owners are asked to sacrifice economic value and property rights for the good of the community,<sup>332</sup> but a regulation that attempts coercion that can potentially result in hundred thousand dollar losses seems like it should have some viable safeguards to protect against the occasional economic injustice and loss of important property rights.

This naturally leads into this Article's brief attempt to find solutions that can both protect the interests of legislatures seeking to exercise police powers to protect public health and welfare, and the interests of property owners who seek to maximize their property values and that of the community.

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<sup>328</sup> See *supra* notes 70–71 and accompanying text.

<sup>329</sup> See *supra* notes 74, 76 and accompanying text.

<sup>330</sup> See *supra* note 313 and accompanying text.

<sup>331</sup> See, e.g., Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); Berman v. Parker, 348 U.S. 26, 32 (1954).

<sup>332</sup> See *Mahon*, 260 U.S. at 413 (“Government could hardly go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power.”).

### 1. Higher Judicial Scrutiny

First, a judiciary that applied a lower standard of deference and a higher level of scrutiny to legislative action would raise legitimate questions about street art ordinances. The existing state of deference in Takings Clause law carries the risk that the taking itself, as well as the public benefit meant to accrue from the taking, are merely incidental benefits to a legislative body seeking to benefit itself or other private interests.<sup>333</sup> Thus, the lack of judicial oversight carries the danger of approving exercises of eminent domain and other takings that are a mere “ruse” of the legally sufficient reasons given by the legislature.<sup>334</sup> Given the heightening levels of corruption,<sup>335</sup> this raises serious concerns of private interests capturing the eminent domain power.<sup>336</sup> As new research arises that suggests certain types of street art can have positive effects on communities<sup>337</sup> and have a small impact on increasing crime,<sup>338</sup> perhaps such scrutiny would invalidate legislative prerogatives based on questionable data.

In an era when public approval ratings of legislatures are consistently at all-time lows<sup>339</sup> and when public officials are increasingly corrupt,<sup>340</sup> are the courts not justified in applying more scrutiny

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<sup>333</sup> See Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 544–45 (2006) (discussing the danger of the high level of deference afforded to legislatures when courts take on the Public Use Inquiry).

<sup>334</sup> See *id.* at 545 (citing James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 863).

<sup>335</sup> See *infra* note 340.

<sup>336</sup> See Cohen, *supra* note 333, at 547.

<sup>337</sup> See *supra* notes 43–47 and accompanying text. See also Madigan, *supra* note 5, at 192 (arguing that private capture of the eminent domain power meddles with the free market and diminishes economic efficiency (citing EDWIN MANSFIELD, MICROECONOMICS: THEORY/APPLICATION 277 (1997))).

<sup>338</sup> See *supra* note 4 and accompanying text.

<sup>339</sup> See David M. Konisky et al., *Public Approval of U.S. State Legislatures*, 37 LEGIS. STUD. Q. 99, 100 (2012) (finding that across all 50 states, the average approval rating of citizens' respective state legislatures was 35%). As of December 2014 and January 2015, Congress has an approval rating of 16%. David Sherfinski, *New Congress Has Approval Rating of 16 Percent: Poll*, WASH. TIMES (Jan. 14, 2015), available at <http://www.washingtontimes.com/news/2015/jan/14/new-congress-has-approval-rating-16-percent-poll/>.

<sup>340</sup> 60% of people in the United States believe that political corruption has increased in the two years prior to the study's release, with the legislature coming in as the second

to legislative decisions, especially decisions that may threaten one of the foundations of a free and democratic society.<sup>341</sup> While the Court is correct that it is ill suited as an institution to take on the role of legislatures in the takings context,<sup>342</sup> the judiciary has recognized the need to check the legislative branch in order to uphold the Constitution and repudiate injustice.<sup>343</sup> Thus, this is not an argument for the courts to distrust legislatures by default, but rather to couple a lower amount of deference with a higher level of scrutiny in Takings Clause jurisprudence.

Other scholars have advocated for different forms of heightened judicial scrutiny or otherwise higher burdens on the government in their effort to assert eminent domain actions. Cost-benefit analyses,<sup>344</sup> showings of maximization of benefit,<sup>345</sup> showings of necessity,<sup>346</sup> showings of future full public use of the condemned property,<sup>347</sup> strict scrutiny analysis,<sup>348</sup> and constitutional amendments<sup>349</sup> have all been previously suggested to add efficiency and fairness into Takings Clause jurisprudence. While these proposals all have shortcomings,<sup>350</sup> more judicial oversight of takings is generally welcome.

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most corrupt institution according to the poll. The study also points out that 5–10% of Americans admit to paying a bribe to a public official. *See generally Global Corruption Barometer 2013: Report*, TRANSPARENCY INT'L (2013), available at [http://issuu.com/transparencyinternational/docs/2013\\_globalcorruptionbarometer\\_en/?e=2496456/3903358](http://issuu.com/transparencyinternational/docs/2013_globalcorruptionbarometer_en/?e=2496456/3903358).

<sup>341</sup> *See supra* note 5 and accompanying text.

<sup>342</sup> *See supra* notes 228–29 and accompanying text.

<sup>343</sup> *See supra* note 227 and accompanying text.

<sup>344</sup> *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

<sup>345</sup> *See* Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 EVNTL. L. 1, 45–47 (1980).

<sup>346</sup> *See* Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 240 (1978).

<sup>347</sup> *See* RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 166–69 (1985) (proposing that eminent domain only be used when the benefits would accrue as "public goods" in which no one could be excluded from the benefit).

<sup>348</sup> *See* Stephen J. Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285 (2000).

<sup>349</sup> *See* Cohen, *supra* note 333, at 568.

<sup>350</sup> *See id.* at 555–58, 567–68.

Reinventing the wheel is outside the scope of this Article; instead, this Article only seeks to recognize the potential beneficial application of higher judicial scrutiny when applied to street art ordinances. This approach of applying some level of scrutiny has already been applied by Justice Kennedy, making the Public Use Inquiry tantamount to the Rational Basis Test used in 14th Amendment Equal Protection analysis.<sup>351</sup> While this is certainly a start, only stricter scrutiny would ensure the courts do not make the same mistakes of the past.

## 2. Expansion of Existing Administrative Challenges

Second, cities should expand already existing administrative challenges to violations of street art ordinances to accommodate inverse takings proceedings. This way, a property owner, at his own cost, could put on testimony from the community and from expert real estate appraisers on the increased value that certain pieces of street art have on his property. Such an increase in value should necessitate just compensation to the property owner, since the enforcement of street art ordinances would actually be diminishing the value of his property and the surrounding community by removing the valuable street art. While a challenger would be within his legal rights to seek an injunction to stop government actors from removing the street art, and could subsequently proceed with an inverse condemnation action in state or federal court, streamlining this process through already existing administrative hearings would likely be the most efficient use of judicial resources.

Allowing administrative challenges to city-wide regulatory aesthetic schemes, however, carries its own burden on the government; it prevents the very uniformity and city planning that the leg-

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<sup>351</sup> See *Kelo v. City of New London*, 544 U.S. 469, 490–91 (2005) (Kennedy, J., concurring) (“This Court has declared that a taking should be upheld as consistent with the Public Use Clause, as long as it is ‘rationally related to a conceivable public purpose. This deferential standard of review echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses.” (quotation and citations omitted)); see also Alan T. Ackerman, *The Interplay Between the Fourteenth Amendment’s Due Process Clause and the Fifth Amendment’s Takings Clause: Is the Supreme Court’s Test for “Public Use” Merely Rational Basis?*, <http://www.ackerman-ackerman.com/wp-content/uploads/sites/302/2014/02/Is-the-Supreme-Court%E2%80%99s-Test-for-%E2%80%9CPublic-Use%E2%80%9D-Merely-Rational-Basis.pdf>.

islature intended to create. If one or two property owners are allowed to hold-out, the entire scheme is put in jeopardy.<sup>352</sup> Nevertheless, such administrative costs are worth expending to protect private property values. In most cases, street art will not add value to property, and thus property owners will be hesitant to bear the costs of bringing an inverse condemnation claim. Thus, frivolous claims will be weeded out by the costs of litigation,<sup>353</sup> especially when considering the expense of hiring independent appraisers. These costs will increase the likelihood that only meritorious claims are filed and appropriately litigated with proper expert testimony to establish the effects that a piece of street art has on property values.<sup>354</sup>

Under such an administrative system, if factual findings are made that the street art indeed positively affects property values, the government would be required to commence a formal eminent domain action to assert the control necessary to remove the street art. Thus, the government's ability to take would not be restricted, but the government would be required to justly compensate the property owner for the tremendous diminution in value caused by the taking.<sup>355</sup> Even though this system would increase government costs in the rare occasion that street art raised property value, requiring just compensation is an important deterrent on the potentially tyrannical and disparate application of street art ordinances.<sup>356</sup> Thus, the property owner would receive the benefit of the

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<sup>352</sup> See *Berman v. Parker*, 348 U.S. 26, 34–35 (1954) (reasoning that a redevelopment plan aimed at removing blighted areas had to be instituted by exercising eminent domain over entire sections of communities, not just building by building; thus, one hold-out owner could potentially jeopardize the entire redevelopment scheme.).

<sup>353</sup> See Jennifer F. Reinganum & Louis L. Wilde, *Settlement, Litigation, and the Allocation of Litigation Costs*, 17 RAND. J. ECON. 557 (1986) (factoring in litigation costs as a major factor in deciding to litigate claims).

<sup>354</sup> See Henderer, *supra* note 114, at 409 n.2 (discussing the deterrent effect that litigation costs have on commencing inverse condemnation proceedings. “Due to the amount of time, money, and energy required to litigate a takings claim, many of the cases in the Takings Clause jurisprudence involve particularly valuable pieces of real property and parties with significant resources.”).

<sup>355</sup> See *supra* notes 110, 118, 150, and 282 and accompanying text.

<sup>356</sup> See James G. Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1278 (1985) (discussing the deterrent effect that the just compensation requirement of the Takings Clause has on a government body when deciding to institute a taking).

increase in his property value, and the government would also be able to maintain its police power to institute a uniform city-planning scheme that promotes public welfare.

#### CONCLUSION

This Article has attempted to make sense of two areas of study that present grey areas of understanding: the street art subculture and how the Takings Clause governs laws that seek to counter this subculture. While Takings Clause doctrine may not require just compensation for the removal of street art, this Article argues that underlying principles of such doctrine point in the direction for future change to accommodate such protection. This Article has offered a unique perspective of Takings Clause doctrine and attempts to point out novel applications and solutions that would push boundaries to both protect interests of city governments in protecting public welfare as well as protecting the economic rights of property owners seeking to maximize their property values. As the law continues to develop and street art continues to gain popularity, it will be interesting to see the discussion around these topics expand in courts and future scholarship.