The Ethics of Compensation: Takings, Utility, and Justice

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CONTENTS

I. Introduction ..................................................... 577
II. A Theoretical Overview .................................... 579
   A. Utilitarianism .................................... 579
   B. Contractarianism .................................. 584
III. Takings Analysis From an Ethical Perspective ............ 587
IV. Towards an Ethical Takings Doctrine—Two
    Approaches ............................................. 600
    A. Utilitarianism .................................... 600
    B. Contractarianism .................................. 604
V. Applying the Two Ethical Approaches to Recent Supreme
   Court Takings Cases .................................... 607
VI. Conclusion—Why the Ethical Approach Matters ........... 620

I

INTRODUCTION

The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.¹

Although a society is a cooperative venture for mutual advantage, it is typically marked by a conflict as well as by an identity of interests. . . . There is a conflict of interests since persons are not indifferent as to how the greater benefits produced by their collaboration are distributed, for in order to pursue their ends they each prefer a larger to a lesser share. A set of principles is required for choosing among the various social arrangements . . . and for underwriting an agreement on the proper distributive shares.²

The Fifth Amendment's takings clause has been the subject of an impressive amount of legal discussion, publication, and thought.\textsuperscript{3} Ever since Chief Justice Holmes raised the possibility of a regulatory taking of property in 1922,\textsuperscript{4} the troublesome "takings question" has persisted: when has government regulation "gone too far" and created a compensable claim? Courts and commentators have struggled to create a test that adequately answers the takings question, with largely unsatisfactory results. Their discussion of the takings clause has raised important issues, made critical distinctions, and sowed a fertile field of ideas for legal scholars. This discussion has not, however, led to a clear answer to the takings question, and nearly all analysts agree that takings law continues to be a highly confused area of judicial doctrine.\textsuperscript{5}

This Comment proposes a slightly different approach to the subject of takings law that stems from an analysis of ethics. Behind all the legal institutions, tests, and rhetoric, a fundamental question underlies the takings question: who should bear the burdens for society of certain public goods? The quotations that introduce this paper both echo this question. The first is from Justice Black, writing in \textit{Armstrong v. United States},\textsuperscript{6} a 1960s takings case that has been cited as an authority by many of his successors on the bench.\textsuperscript{7} The second is from Professor of Philosophy John Rawls, who is describing the reasons why society needs a theory of distributive justice such as the one he provides. The ideas of the two passages are strikingly similar, despite their separations in time (eleven years) and discipline (judge versus philosopher). Their similarity suggests a deeper connection between the takings doctrine and the ideas of distributive justice. The literature on takings law has failed to address satisfactorily this connection.

Through an analysis of the takings doctrine based on applied ethics, this Comment seeks to provide some theoretical clarity on this issue. It begins by contrasting the two ethical theories of contractari-

\textsuperscript{3} The Fifth Amendment to the U.S. Constitution includes the admonition that "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

\textsuperscript{4} Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). Holmes' decision is considered to be the first example of a taking that did not include a physical violation (trespass) or appropriation of physical property.

\textsuperscript{5} See, e.g., Andrea L. Peterson, \textit{The Takings Clause: In Search of Underlying Principles Part II - Takings as Intentional Deprivations of Property Without Moral Justification}, 78 CAL. L. REV. 53, 56 (1990) ("[T]he more effort the Court has devoted to the issue [of takings law], the more confused and complex its takings doctrine has become.").

\textsuperscript{6} 364 U.S. at 49.

\textsuperscript{7} William M. Treanor, \textit{The Original Understanding of the Takings Clause and the Political Process}, 95 COLUM. L. REV. 782, 877 (1995). Specifically, Treanor notes that Justices Rehnquist, Scalia, and Stevens have all followed Justice Black's approach in subsequent takings cases. \textit{Id.}
anism and utilitarianism as tools for subsequent analysis. After presenting the essentials of these philosophies, part II reviews a handful of prominent, modern takings theories as expressed in the academic literature. These theories are analyzed within the utilitarian and contractarian frameworks, frameworks of which many of the theories partake implicitly (and sometimes incorrectly) without open recognition or acknowledgment. The insights of part II lay the foundation for the next part of the paper, which presents a tentative statement of two different ethics-based approaches to the takings problem. Part III establishes that the utilitarian and contractarian theories produce fundamentally different approaches to the takings question. Part IV reviews a series of major Supreme Court cases in modern takings jurisprudence, and discusses them in light of the two ethical theories. In this review, the contrast of these two theories should provide some additional insight into the confusing history of conflicting tests and ad hoc results that characterizes this body of case law. This Comment concludes by discussing some reasons why an ethical approach to takings law is useful, and should be seriously considered as an explicit framework for future decisions and analysis.

II
A THEORETICAL OVERVIEW

Proponents of utilitarianism and contractarianism have engaged in an enduring historical feud. Although contractarianism and ideas of the social contract have a lengthy history in political philosophy, modern ethical thinkers have attempted to use them as a response to the challenge of utilitarianism—specifically utilitarianism as it was presented and refined in the 19th Century by philosophers in the classical liberal tradition such as Henry Sidgwick, Jeremy Bentham, and John Stuart Mill. Since contractarianism is, in part, a response to utilitarianism, this part presents the utilitarian case first.

A. Utilitarianism

Utilitarianism is an ethical theory loosely guided by the principle that the "ends justify the means." Henry Sidgwick defines it succinctly in his classic exposition *The Methods of Ethics*:

By Utilitarianism is here meant the ethical theory, that the conduct which, under any given circumstances, is objectively right, is that which will produce the greatest amount of happiness on the whole;

8. For a good collection of thoughts on this debate (and others) regarding utilitarianism, see UTILITARIANISM AND BEYOND (Amartya Sen & Bernard Williams eds., 1982).
that is, taking into account all whose happiness is affected by the conduct.\textsuperscript{9}

This definition is quite straightforward at first glance. The whole system of utilitarianism is based on an attitude of generalized benevolence or the disposition to seek happiness for the residents of the world.\textsuperscript{10} What could be more appealing than a code of ethics that insists the right action is the one that most increases (or least decreases) the amount of happiness in society? It is the power of this general question that gives the utilitarian argument its strength. Jeremy Bentham notes that while the principle of utility may be impossible to prove directly, there has never been a "human creature breathing, however stupid or perverse, who has not on many, perhaps on most occasions of his life, deferred to it."\textsuperscript{11}

A question immediately arises from the utilitarian statement: what is the definition of "happiness?" Different utilitarians have answered the question in different ways. Bentham was content to define happiness as "pleasure" or the "avoidance of pain."\textsuperscript{12} John Stuart Mill sought to expand this definition, arguing that within a theory of utilitarianism, "some kinds of pleasure are more desirable and more valuable than others."\textsuperscript{13} Thus, the aim of Mill's moral system is to create a set of lives "as rich as possible in enjoyments, both in point of quantity and quality."\textsuperscript{14} Modern utilitarian J.J.C. Smart argues that this distinction between Mill and Bentham may be explained by an innate human desire for more complex pleasures as part of the "superior intelligence" that has ensured our survival as a species so far.\textsuperscript{15} Regardless, Smart concludes that the conflict between the two ideals of happiness may often mean little in the real world—most higher pleasures are more fecund than simpler ones as "not only are they enjoyable in themselves but they are a means to further enjoyment."\textsuperscript{16} While the possibility for conflict between the two schools of utilitarianism is real, it is not likely in everyday life. As such, this Comment

\textsuperscript{9} Henry Sidgwick, The Methods of Ethics 411 (Macmillan and Co. 1907) (1981). Although Sidgwick presents the definition given here, he is echoing the writings of Bentham. See Jeremy Bentham, The Principles of Morals and Legislation (1988). "An action then may be said to be conformable to the principle of utility . . . when the tendency it has to augment the happiness of the community is greater than any it has to diminish it." Id. at 3.

\textsuperscript{10} J.J.C. Smart, An Outline of a System of Utilitarian Ethics, in Utilitarianism: For and Against 1, 7 (J.J.C. Smart & Bernard Williams eds., 1973). Smart is explicit about the connection between his arguments and Sidgwick's, stating that "[t]o some extent then, I shall be trying to present Sidgwick in a modern dress." Id.

\textsuperscript{11} Bentham, supra note 9, at 4.

\textsuperscript{12} Id. at 24, 29.

\textsuperscript{13} John Stuart Mill, Utilitarianism 12 (1957).

\textsuperscript{14} Id. at 16.

\textsuperscript{15} Smart, supra note 10, at 17.

\textsuperscript{16} Id. at 24.
THE ETHICS OF COMPENSATION

will follow Smart in discounting the problem, except when the purposes of the analysis explicitly require the distinction.\(^{17}\)

Utilitarians are divided on the question of how one maximizes happiness, however “happiness” is defined. A primary division relevant to the takings issue is that between “act” and “rule” utilitarianism. Act utilitarianism insists that the individual must attempt to maximize happiness through each separate action, considered on its own merits.\(^{18}\) This theory permits actors to violate age-old moral edicts such as “never break a promise” with ethical impunity, as long as the net benefit of the decision is to maximize total happiness. Rule utilitarians have attempted to avoid this consequence and preserve the strength of ideas such as promises by positing the idea that happiness is maximized when everyone follows certain rules \textit{all the time}, regardless of circumstances. This effort rings false with many theorists, however, as an unsuccessful attempt to have one’s cake and eat it too. Smart notes that when pressed, rule utilitarianism tends to collapse into act utilitarianism.\(^{19}\) If an actor is ultimately concerned with maximizing human happiness, “why then should he advocate abiding by a rule when he knows that it will not in the present case be most beneficial to abide by it?”\(^{20}\) Far better for people to obey the rule generally (perhaps as a time-saving device for routine situations) but not to be hog-tied into a decision that in certain cases would not maximize public benefit. Thus, Smart argues convincingly for act utilitarianism as the true expression of the principle of utility expressed by Sidgwick and others, and this Comment follows his approach by applying act utilitarianism to takings law.

The problem of considering the alternatives available to a decisionmaker and ranking them in some order of preference is another important issue for utilitarian theory. Some critics of utilitarianism scoff at the notion of a person’s ability to make such a quantification of future happiness resulting from an action.\(^{21}\) Smart replies to this complaint by noting that such quantification is unnecessary because all the utilitarian actor must do is rank the various choices before her in order and choose the most preferable.\(^{22}\) Of course, no actor is cer-

\(^{17}\) An additional question for utilitarians in the literature is not only \textit{what} is happiness but also \textit{whose} happiness are we maximizing? Does utilitarian theory include animals and other non-human life? The answers actually vary between theorists. Sidgwick is quite explicit in including all animals that can feel pleasure and pain in his moral system. See \textsc{Sidgwick, supra} note 9, at 414. However, for the purposes of this essay it will be assumed that we are speaking of a utilitarianism of human beings only unless otherwise noted.

\(^{18}\) Smart, \textit{supra} note 10, at 9.

\(^{19}\) \textit{Id.} at 11-12.

\(^{20}\) \textit{Id.} at 10.

\(^{21}\) \textit{Id.} at 37-38.

\(^{22}\) \textit{Id.} at 38.
tain of the consequences of a contemplated decision. Probability calculations therefore alter the preference ranking to accommodate this uncertainty. Again, this does not involve assigning absolute percentages of likelihood to each result, but rather making a rough estimate of probability sufficient to the task at hand. While this may seem an implausible process, it happens often in daily life. "If we are able to take account of probabilities in our ordinary prudential decisions," concludes Smart, "it seems idle to say that in the field of ethics . . . we cannot do the same thing, but must rely on some dogmatic morality." Thus, utilitarianism is an ethic of chance which requires a prediction of the "best bet" for our actions and then making a decision and seeing what comes of it.

Sometimes an actor makes the correct choice and maximizes the happiness that results. Other times, of course, an actor makes a mistake. Is this negative outcome an indicator of poor ethical choice and a morally "bad" decision? Bentham argues "that there is no such thing as any sort of motive that is in itself a bad one" because results of actions are what matters. Mill echoes this idea in arguing that "the motive has nothing to do with the morality of the action . . . . He who saves a fellow creature from drowning does what is morally right, whether his motive be duty or the hope of being paid for his trouble . . . ." Smart expands this distinction between actions and motives. Actions can be "right" or "wrong," depending exclusively on their outcomes. Motives can be "good" or "bad," depending on their propensity to "generally result in beneficent actions." Thus a good motive can lead to a wrong action, and a bad motive to a right action. Smart provides the following example: the desire to save a life that leads one to leap to the rescue of a drowning man is a good motive because it generally leads to positive outcomes. If the man rescued is Adolf Hitler, however, the action itself is wrong from the utilitarian perspective. These distinctions are especially important for the utilitarian operating in a largely non-utilitarian society, a situation that

23. Id.
24. Id.
25. Id. at 38-39.
26. Id. at 39-40.
27. Id. at 40; see also Amartya Sen, Inequality Reexamined 46-48 (1992) (discussing the power of incomplete, partial ordinal rankings in decisionmaking analysis).
28. Bentham, supra note 9, at 102 (emphasis omitted).
30. Smart, supra note 10, at 47.
31. Id. at 48.
32. Id.
33. Id. at 49.
34. Id.
35. Id. at 50.
THE ETHICS OF COMPENSATION

will be relevant to the discussion of takings cases. In some cases, for example, the utilitarian actor should praise certain rules that are arbitrary from her non-deontological moral perspective, but which lead to more positive outcomes than the likely alternatives in the event the rule breaks down.36

Finally, a distinction exists between average and total utility. Sidgwick argues for a theory of total utility in which the object is to maximize the sum of happiness in the world.37 Rawls' contractarian approach attributes a fair amount of importance to the distinction between these two types of theories with respect to his theory of justice.38 And in reality, most utilitarians seem to favor Sidgwick's idea of "the more the merrier." If we have a choice between one million and two million happy beings in the universe, why not have two?39 In any event, most practical cases will not see a difference in results from either variant of the basic theory, since "in most cases the most effective way to increase the total happiness is to increase the average happiness, and vice versa."40 This congruence may not hold for certain moral issues,41 but it should be adequate for a discussion of the takings question.

Therefore, a general theory of utilitarianism can be expressed as follows. Ethical actors should aim to maximize the total human happiness of the world through all of their decisions. Of course, no decision maker will know the outcomes of her actions in advance, and so she must rely on imperfect estimates of probable outcomes and the preference rankings that result. Motivations are of no importance to the utilitarian, except as a means of encouraging rules and behavior that will generally lead to more positive results. The ultimate object is to maximize happiness (or "human benefit") through every action to

36. Id. at 49-50. The rule, for example, that we should save drowning individuals is not always appropriate for a utilitarian (as in the Hitler example). However, if the choice is between having everyone follow the rule all the time, or having no one follow it at all, the utilitarian would choose the blind allegiance to the rule as the preferable option.

37. Sidgwick, supra note 9, at 415. Sidgwick concludes that if the average human life has a net positive level of happiness (which he thinks it does), then we should maximize population up to the point at which we have diminished our resources and therefore our quality of life enough that the marginal additional happiness of adding any more people would be zero. Id. at 415-16. In other words, we should produce human happiness "at the margin" rather than at the maximum average level. This thought anticipates some of the current debate over sustainable development and population growth using microeconomic concepts.

38. Rawls, supra note 2, at 183-185.
40. Id. at 28.
41. See, e.g., id. (suggesting that the utilitarian who values total happiness may have strong arguments in favor of birth control, but this utilitarian "will need more arguments to convince himself than [the utilitarian who values average happiness]").
the greatest extent possible. For the utilitarian, the principle of utility is the ultimate definition of the "good" to be sought by human society.

B. Contractarianism

Contractarian theory stands the priorities of utilitarianism on their collective heads. For Sidgwick and his followers, the definition of a right or just action is defined by the facility of that action towards achieving the "good" of a maximization of happiness. Contractarians seek to reverse these priorities. In their theory, "right" must limit what kinds of "goods" society should seek as its ends:

Hence . . . one does not take men's propensities and inclinations as given, whatever they are, and then seek the best way to fulfill them. Rather, their desires and aspirations are restricted from the outset by the principles of justice which specify the boundaries that men's systems of ends must respect. We can express this by saying that in justice as fairness the concept of right is prior to that of the good.42

John Rawls' work on the idea of "justice as fairness" provides the most famous and widely discussed modern example of a contractarian ethical theory. His explicit goal is to provide a "neo-Kantian" alternative to the ideas of utilitarianism.43 As such, his theory is well suited to serve as a model for the contractarian position summarized in the following part.

At the most basic level, Rawls has two major goals. First, he desires to explain the fundamental principles of justice that should serve as a basic structure for a just society.44 These principles are what should guide a just society in constructing laws and institutions at a greater level of detail. They should also serve as the ultimate source of dispute resolution in the event of disagreements over the specifics of these institutions.45 Second, he argues that these specific principles (and no others) are those that would be accepted under a specific set of conditions similar to the "state of nature" of other contractarian philosophers. Thus, the principles of justice are an example of pure procedural justice because whatever result is generated from the state of nature position contemplated by Rawls is by definition a true theory of justice.46

42. RAWLS, supra note 2, at 31 (emphasis added).
43. Id. at 3. "My guiding aim is to work out a theory of justice that is a viable alternative to these doctrines [of utilitarianism] which have long dominated our philosophical tradition." Id.
44. Id. at 7. Rawls explains that this structure is "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation." Id.
45. Id. (describing major institutions as "the political constitution and the principal economic and social arrangements").
46. Id. at 11-12. Rawls, however, does not bring up the idea of pure procedural justice explicitly until much later in his text. See id. at 85-87, 120.
Of course, Rawls goes quite a bit further in describing the state of nature than simply relying on a retread of Rousseau's ideas. For Rawls, the relevant state of nature is what he calls "the original position." The original position is a hypothetical meeting of representatives of all groups of future society (from all points in time). Their task is to agree upon the basic principles of justice for their society. In this task, the representatives are envisioned by Rawls as mutually disinterested individuals, making decisions for a society that will exist under moderate conditions of scarcity. Principles of justice must meet certain procedural qualifications, such as being general and universal, and should be self-supporting in that those who live by them should acquire a sense of justice through their enforcement.

Rawls also wants to maintain the fairness of his actors in the original position. To ensure this equilibrium, he insists that each member must not know the specifics of his or her role in the society to come. No one in the original position knows "his place in society, his class position or social status," nor his "natural assets and abilities [such as] his intelligence and strength." Nor do the decisionmakers know what their society will look like in particular (beyond the basics given above) nor even which society in time is theirs. In general, the actors "must not know the contingencies that set them in opposition." They must instead make their decisions behind the "veil of ignorance." This is Rawls' method of guaranteeing procedurally the justice of the outcomes of his process. If we accept that the process is just, we should accept that the principles so generated are just as well.

Rawls makes another important assumption in his discussion of primary goods. Rawls contends that certain goods will be desired by all members of society, regardless of their own distinct ends. These goods he calls "primary" because they are a means to any end an individual might have. Broadly speaking, he defines these goods as "rights and liberties, opportunities and powers, income and wealth." In asserting the existence of such goods, Rawls claims that he is making an argument supported for centuries by utilitarians and contractarians alike. Nevertheless, his analysis of the original position loses its force if one fails to acknowledge the existence of these universally desired "goods," so it is important to make them explicit. If nothing was considered as being a primary good—of value to all ra-

47. Id. at 118.
48. Id. at 128.
49. Id. at 130, 138.
50. Id. at 137.
51. Id.
52. Id.
53. Id. at 92.
54. Id.
tional actors—it would be impossible to talk meaningfully about principles of distributive justice to which all such rational actors would agree. There would be nothing to distribute that everyone wanted.

What is the product of this procedure of justice? Rawls describes two principles. The first is a principle of equal liberty: “each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.”55 The second is the “difference principle:” “social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage and (b) attached to positions and offices equally open to all.”56 The first principle is prior to the second. Basic liberties are not tradable or negotiable for changes in the economic distribution.57 This is a fundamental difference from utilitarianism. The second principle stems from a strong bias toward egalitarianism, but permits changes from an equal distribution as long as those changes benefit the worst-off group by maximizing their “share,” and as long as there is still equal access to various offices and positions in society. In the most fundamental sense, Rawls’ principles define “injustice” as “simply inequalities that are not to the benefit of all.”58 This idea will figure centrally in the application of his theory to takings law.

Rawls believes that the principle of equal liberty and the difference principle are at least plausible outcomes of the process of the original position.59 This alleged plausibility stems from a basic disposition towards equality modified by a reasonable acceptance of economic inequalities leading to Pareto-optimality for the worst-off.60 Rawls attempts to justify the choice of these principles under the original position by an appeal to the rational risk aversion of his decisionmakers. This risk aversion is connected to the idea of “maximin,” or maximizing the positive effects of the worst possible outcome as a logical strategy for decisionmakers in certain situations.61 The characteristics of a maximin situation include extreme uncertainty of out-

55. Id. at 60.
56. Id. Rawls refines the difference principle several times throughout his analysis, but none of these revisions change the basic accuracy of this initial definition. For this paper, his second definition may be equally relevant: “Social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.” Id. at 83 (emphasis added).
57. Id. at 61.
58. Id. at 62. Rawls notes that his definition is “extremely vague and requires interpretation.” Id. However, it is a principle of fundamental importance for the review of takings doctrine given in this article.
59. Id. at 152.
60. Id. at 150-52. Rawls does not justify the primacy of the equal liberty doctrine over the difference principle until much later in his work (section 39 and 82), and it will be accepted at face value here.
61. Id. at 153.
comes with a strong potential for negative results that are unacceptable or barely tolerable. Faced with a choice under these circumstances, a rational actor should choose to minimize her risks by selecting the option with the best possible "worst case" result. The original position, argues Rawls, is a classic example of when the maximin rule should be applied. It includes high stakes, not just for the representative, but also for his or her progeny. Reasonable forecasting of likely outcomes in terms of life situations or society structures is impossible due to the veil of ignorance. Given a ready alternative that avoids the risk of intolerable outcomes of indeterminate likelihood, it seems unwise, if not irrational, for the decision-makers to choose otherwise. In this instance, discretion is unquestionably the better part of valor.

Rawls intends his contractarian principles of justice as an explicit rejection of principles of utility. "A desirable feature of a conception of justice," he claims, "is that it should publicly express [people]'s respect for one another." His principles do this through their demands for equal liberty and maximum benefit for the least well-off. Rawls claims that utilitarianism lacks this respect by regarding persons as "means" to the greater good of society and by being "prepared to impose upon them lower prospects of life for the sake of the higher expectations of others." Utilitarianism thus fails to "take seriously the distinction between persons" because it is interested only in the greater good of society. Because of this failure, Rawls claims that utilitarianism would be unappealing to the decision-makers in the original position, and is therefore poorly qualified as a theory of justice.

III

TAKINGS ANALYSIS FROM AN ETHICAL PERSPECTIVE

This part reviews some of the academic literature on takings law of the modern era. The discussion demonstrates that utilitarianism and contractarianism are very relevant to the takings doctrine, but that legal academics have failed to resolve adequately this relation-

62. Id. at 169.
63. Id. at 155.
64. Id. at 156.
65. Id. at 179.
66. Id. at 180.
67. Id. at 27.
68. The authors and articles sampled have been selected both for their variety and for their high reputation within the field of legal scholarship. In all cases, they have been cited frequently by other academics and jurists alike on the takings issue. Indeed, most of them significantly cite each other as part of an ongoing dialogue regarding the topic. While the selection is not authoritative, and is certainly far from exhaustive, it does represent a reasonable cross-section of views.
ship. No author has presented an account of takings doctrine that satisfactorily considers the role of ethics in takings law. Frank Michelman's classic article, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, makes the best attempt to consider the ethical perspective, but even his work is lacking in some respects. In particular, he mistakenly concludes that contractarianism and utilitarianism lead to the same approaches and conclusions in takings cases. This Comment, in subsequent parts, will demonstrate, and elaborate on, the nature of this crucial mistake.

The writings of Joseph Sax serve as an ideal starting point. His seminal early article *Takings and the Police Power* is one of the most cited pieces in the field. In this article, Sax describes the rise of the Holmesian conception of a regulatory taking as distinct from the physical taking emphasis of early case law, and the resulting confusion from court decisions that still cite both precedents with authority. Sax then runs through some of the standard tests used by past and present courts to determine if a taking has occurred. These familiar tests include: the diminution of value of the property in question, the existence of a physical invasion of the property via government action, and the noxious use or nuisance idea. Sax notes that each test provides an intuitive answer to the question of compensation in some cases, but fails miserably in others.

A few simple examples demonstrate the problems with the familiar tests. With respect to the physical invasion test (in which any physical taking of a property is considered compensable), it is hard to explain why a street widening that removes a few square feet from a retail owner's parking lot is compensable while a traffic re-routing that significantly hurts his business is not. A diminution of value test (in which a "large" or total diminution is a taking while a "small" one is not) begs the question of what value is in the denominator of the testing party's equation. As Sax inquires, "[i]f the government floods eighty acres of a 640 acre farm, is that a total destruction of eighty acres, or a mere twelve and one half percent loss?" The nuisance or noxious use test states that any regulation of a property use that could

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69. 80 Harv. L. Rev. 1165 (1967).
71. *Id.* at 42.
72. *See id.* at 50-60.
74. *See id.* at 48-50.
75. *See id.* at 46-62.
77. Sax, *supra* note 70, at 60.
be defined under common law as a nuisance is not compensable. Sax rightly observes that this test breaks down in many cases in which there is no nuisance per se. Instead, there is simply a "problem of inconsistency between perfectly innocent and independently desirable uses." In other words, why is the brick factory operator any more guilty of causing a nuisance than the residents of the neighborhoods that have subsequently grown in around his site? Determining the agent causing the harm in this example and many others will be morally arbitrary, and thus lack the guidance we need for a test of compensability. In fact, in each case more than one legal observer has noted the weakness or inconsistency of the tests described above as a guide to takings decisions.

Sax proposed to replace this distasteful array of court doctrine with a single test:

[W]hen an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of government activity which enhances the economic value of some governmental enterprise, then the act is a taking and compensation is constitutionally required; but when the challenged act is an improvement of public condition through resolution of conflict within the private sector of the society, compensation is not constitutionally required.

His proposal is not based on the idea of determining fault within the conflict, but rather on determining the role the government will play in resolving it. In some cases, government is involved in regulatory conflict as an "enterpriser"—a separate entity seeking to maintain a distinct government operation for the common good. Examples of this include maintaining an army, building highways, operating public schools, and so forth. In other cases, government plays the role of mediator between two or more private parties in conflict. Examples

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79. Sax, supra note 70, at 49 (illustrating that the noxious use test is insufficient to explain, for example, nuisance abatement cases).

80. Id.

81. See Michelman, supra note 69, at 1184; Carol M. Rose, Mahon Reconstructed: Why the Takings Issue is Still a Muddle, 57 S. CAL. L. REV. 561, 562 (1984). Michelman is particularly emphatic, noting that each of the Court's "standard criteria" for takings cases is either "seriously misguided, ruinously incomplete, or uselessly overbroad." Michelman, supra note 69, at 1184.

82. Sax, supra note 70, at 67.

83. Id. at 62.

84. Id.

85. Id.

86. Id. at 62-63.
of this role include zoning actions, public safety rules, regulation of collective bargaining, and others. Sax posits that this distinction is the critical one for takings determinations. When the government inflicts economic loss through its role as an enterpriser, compensation is due. When an economic loss arises through government acting "merely in its arbitral capacity," however, no compensation is due for the loss, no matter how severe it is. No taking can result from government acting in the role of mediator rather than entrepreneur. Sax justifies this rule in broad terms as a protection against government tyranny and arbitrariness in its own resource acquisition actions—an unfairness that he claims does not exist in conflicts between different non-government property rights holders.

Sax revised his takings test in a second article published seven years later. He preserved the original test, but expanded the notion of the role of government as mediator to include cases of conflict between individual private rights and more diffuse public rights held by large portions of the population in different cases. Thus, the conflict between a strip mine operator's private property rights and the public rights of thousands of downstream users of the river he is polluting might be a legitimate conflict for government mediation, in which case no compensation will be due to the losers of the verdict. In this manner, Sax attempted to preserve the benefits of his earlier test, while removing the irrationality of current takings doctrine that requires compensation when the resolution to a conflict between private parties "imposes extreme economic harm on discrete users but not when analogous harm is placed on diffuse users." In effect, the revised test attempts to put certain public rights in common property such as clean air or water on equal footing with established private property rights. Why should we embrace a system in which "it is necessary for every property owner to have the opportunity to profit from the use of his land as he wishes, and at every given moment of time?"

87. Id. at 63.
88. See id. at 62 ("This analysis rests upon the distinction between the role of government as participant and the government as mediator in the process of competition among economic claims.").
89. Id. at 63.
90. Id.
91. Id. at 64-67.
93. Id. at 150-51, 159.
94. Id. at 159.
95. Id. at 172.
96. Id. at 181.
How does Sax’s theory of takings law fit into the ethical framework sketched out at the beginning of this essay? At first, Sax’s ideas seem contractarian in nature. His earlier article presents the enterpriser/mediator test in order to shift emphasis from the question of “how much may values be diminished” to the new question of “against what qualitative kinds of value-diminishing acts should existing values be insulated.” Such a de-emphasis of the quantitative measures of value sounds like a rejection of utilitarian maximization. Instead, Sax presents a qualitative test with the implication that certain redistributions of resources are prohibited without compensation regardless of the outcomes. Most government as enterpriser decisions should require compensation regardless of the consequences.

But there is more to the analysis. When presented in detail, Sax’s test contains utilitarian roots as well. He writes that:

[When the challenged act is an improvement of the public condition through resolution of conflict within the private sector of the society, compensation is not constitutionally required.]

This language sounds very much like an appeal to utility maximization as a guiding principle for settling conflicts within the private sector. Sax is largely justifying his government as enterpriser argument on contractarian grounds, and his government as mediator argument on a utilitarian basis. This is not always the case; in some instances the utilitarian argument even overflows into the contractarian approach. Regardless of the shifting perspective, Sax’s doctrine contains both utility theory and contractarian analysis at various times.

Considerations of utility also become a primary focus of Sax’s second takings article. Again, he starts with what sounds like a contractarian idea: that the regulation of spillover effects is permitted without compensation because each private party involved has “a priori, an equal right to be free of such burdens.” Yet Sax becomes very utilitarian in the later sections of his article with his desire to maximize positive ends regardless of means. For example, Sax imagines a method of deciding between competing property uses with spillover effects in which a rational single owner of the entire network

97. Sax, supra note 70, at 63-64.
98. Id. at 62-63.
99. Id. at 63.
100. Id. at 67 (emphasis added).
101. Sax discusses several examples at the end of his earlier article in which the government as enterpriser test indicates a taking when none should exist. Id. at 73-76. These examples include government taxation and criminal penalties, exceptions that show the enterpriser test is no magical formula for all situations, and that in some cases “we recognize a privilege to impose such deprivations in order to promote an important policy.” Id. at 75. The contractarian justification, then, is qualified by utilitarian concerns.
102. Sax, supra note 92, at 162.
of resources affected makes all decisions. This idea echoes the utilitarian concept of applying the decisionmaking process of a single rational actor to an entire society. The following example from Sax makes the existence of a utilitarian calculus explicit:

To return to the example of strip mining, if one could earn $500 by building residences on the lower land while leaving the coal land as a natural area, and only $100 by mining the coal on the higher land while making the lower land useless, one would obviously forego coal mining. *The fact that the land is held in separate ownerships ought to make no difference in determining appropriate use patterns, when desired uses with spillover effects are in conflict.*

One can almost hear the cheers of support from Bentham and the cries of dismay from Rawls while reading this passage. Sax maintains this utilitarian mode throughout the rest of his essay. In assigning costs for addressing public problems such as air pollution, he suggests forcing payment or loss on those who are most likely to respond to this penalty with a solution to the problem. Car companies are more likely to find ways to reduce air pollution than the dispersed group of car drivers; therefore, car companies should bear the financial burden of air pollution (in the form of clean air emission taxes or similar actions) rather than the general driving public. But the motivation for this solution is not equity or justice. It is simply an attempt to generate the most preferable end of cleaner air by "innovation-prodding" through focused cost-allocation. Sax's conclusion to the article nicely ties up his utilitarian conversion: "In short, rather than fumbling with doctrinal labels and legal accusations, we can put our energy into trying to determine what resolution of conflicting uses is likely to maximize total net benefits for us, and how we can best achieve that goal."

Sax's position immediately raises an objection in light of its utilitarian focus. If it is inappropriate or unethical for government to undertake an enterprise for public benefit at the expense of a few individuals, why is it appropriate or ethical for government to make a decision that benefits a few private groups at the expense of a few

103. *Id.* at 172.
104. See *Rawls, supra* note 2, at 27. ("This [utilitarian] view of social cooperation is the consequence of extending to society the principle of choice for one man, and then, to make this extension work, conflating all persons into one through the imaginative acts of the impartial sympathetic spectator.").
106. *Id.* at 182.
107. *Id.*
108. *Id.* at 183.
109. *Id.* at 186.
individuals? In other words, if one is trying to maximize net benefit in society through takings doctrine, why provide a contractarian protection of private property holders against the government's enterprising claims? Why not just mandate a maximization of public benefit in both cases and be done with it? Of course, Sax can also argue that his initial protection of private property rights against the government's enterprises is also justified on grounds of utility rather than deontological justice. However, his arguments do not present such a case, nor are they well suited to do so. Sax's takings doctrine is an amalgamation of contractarian and utilitarian ethics. His doctrine is weakened because these ethics do not blend together easily, if indeed they blend together at all.

Andrea Peterson moves the problem forward through a different, more recent review of takings case law. Peterson undertakes the exhaustive descriptive task of attempting to formulate a set of principles that explains the current Supreme Court takings case law. Her goal, unlike Sax's, is not to state what the Court's takings doctrine should be, but only to show how it might be more coherently stated as it currently stands. Peterson argues that the Court seeks to compensate whenever the government forces a citizen to give up her property, unless the government is trying with its actions to "prevent or punish wrongdoing by [the citizen]." But what is "wrongdoing?" Peterson intends a broad meaning of the term to cover acts as serious as a felony or as minor as a public nuisance. Beyond this statement, however, Peterson is not interested in further defining her term. "My thesis," she argues, "does not depend on establishing how judgments of wrongdoing are made," but rather on some sort of societal standard of wrongdoing that the Court can follow in its decisions. In this respect, Peterson explicitly rejects the assertions of Sax and others that there is no difference in moral culpability between the brick factory and the residents around it. Such an analysis "is inconsistent with ordinary perceptions of the world." In the eyes of the public, somebody is usually at fault, regardless of the mandates of the "Coasean" analysis of Sax and others.

110. This question (without the utilitarian overtones) is raised by Michelman, supra note 69, at 1201.
111. See supra note 97.
112. See supra note 5.
113. Id. at 59.
114. Id. at 89.
115. Id. at 90.
116. Id. at 91.
Peterson does present some principles of guidance for determining who is at fault in certain types of takings cases. For example, in a land use conflict she cites three ideas as guiding our sense of moral justification: old uses are favored over newer ones; uses generating lower levels of impact (or spill-over effects) are superior to uses with higher impacts; and general patterns of land use in the surrounding areas help establish the norm of acceptable conduct in that area.\(^\text{118}\) At a later point she mentions that promises by the government to property owners are not easily withdrawn without compensation. This phenomenon is again due to the weight that popular moral ideals give to the idea of keeping one's promises. If the government explicitly approves the right of a property owner to make a certain use of her property, it will be much harder to later restrict that use without compensation.\(^\text{119}\)

Armed with her moral principles, Peterson does an admirable job of explaining the vast majority of difficult takings decisions as based on the principle of moral justification.\(^\text{120}\) She has clearly hit on an important point when she notes that we should ask "why the government deprived A of her property, rather than . . . what the government did to A."\(^\text{121}\) Thus, it is easy to agree with Peterson when she concludes that on the face of their decisions, "the [Supreme Court] Justices evidently are deciding these cases according to their sense of when it is fair for the government to take something of economic value from a private party without paying for it."\(^\text{122}\) The result is a takings doctrine in which justices are to follow their moral intuitions and little more in deciding issues of compensation.\(^\text{123}\) With this conclusion, she is content to let the matter rest.

Peterson fails to define what is "fair," or where these "moral intuitions" originate in these cases, and this is problematic. Is the fact that most people hold a moral belief an adequate reason for judicial principles to follow that ideal? If Peterson is correct, and it really does not matter how moral judgments are made, then we are forced to accept

\(^{118}\) Peterson, supra note 5, at 102. For an interesting case that both defies and follows these principles, see Spur Industries v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972) (enjoining a cattle feeding operation as a nuisance, but requiring plaintiff real estate developer, who had purchased land neighboring the feedlot, to indemnify feedlot's cost of moving or shutting down).

\(^{119}\) Peterson, supra note 5, at 126.

\(^{120}\) Id. at 140-48. She has the hardest time explaining the physical invasion test as exemplified in cases such as Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). In fact, her principles force her to reject the verdict of the Court in this particular case as "wrongly decided." Id. at 146.

\(^{121}\) Id. at 155.

\(^{122}\) Id. at 162 (emphasis added).

\(^{123}\) Id. ("By following their moral intuitions, [the Justices] have produced results that can be explained in a coherent manner.").
that the Court is guided merely by intuition and common opinion regarding compensation law. Such a policy is dangerous and misguided. "Public morality" (if such a thing exists) is often rife with contradictions and confusion. Current attitudes towards sexual behavior or violence provide two examples.\textsuperscript{124} Even if a dominant and consistent moral code exists, the dangers of a tyranny of the majority within the general judicial expression of such a code would be severe. And takings law is often concerned with just such issues of majority relations to a small minority of property owners. Thus, it is unsettling to consider the descriptive claim that our judicial doctrine of takings is based on an idea of morality by general consensus. And it is unacceptable to make the normative claim (as Peterson appears to) that our doctrine \textit{should} be so derived.

Some academics have attempted to deal more explicitly with the fairness issue. In a pair of essays that posit a more basic approach to the takings issue,\textsuperscript{125} Carol Rose does not seek to suggest yet another set of takings principles, but rather "explores possible reasons for the elusiveness of the meaning of 'taking' in our law."\textsuperscript{126} Her initial inclination is to ask a fundamental question prior to the examination of any takings issue: "What are we trying to accomplish with a property regime?"\textsuperscript{127} The answer to this question will allow us to determine what a property right actually includes, and therefore which government actions we "deem to take property and why we so deem them."\textsuperscript{128} Without understanding why we have created a property regime, we can hardly expect to understand when we should compensate people for its violation.

Rose asserts that there are two purposes to the American scheme of private property, and that these purposes are often irreconcilable. One purpose of property is to enhance wealth, and therefore provide a guarantee that the fruits of one's labors in the Lockean/Madisonian tradition will lead to greater value for society as a whole.\textsuperscript{129} A second purpose involves a "civic conception of property as a means of developing character and promoting republican participation" in govern-

\begin{itemize}
  \item \textsuperscript{124} For example, "an eye for an eye" rivals its opposite "turning the other cheek" as two of the most referred to (and incompatible) epigrams regarding violence in public morality. Consider also mixed messages on proper sexual behavior for women through the mass media—an endless loop of the principle "being a sexual being is bad, except when it's good, except when it's bad, except . . . ."
  
  \item \textsuperscript{125} \textit{See} Rose, supra note 81; Carol M. Rose, \textit{Takings and the Practices of Property: Property as Wealth, Property as "Propriety," in Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership} 49 (1994).
  
  \item \textsuperscript{126} Rose, supra note 81, at 562.
  
  \item \textsuperscript{127} Rose, supra note 125, at 50.
  
  \item \textsuperscript{128} \textit{Id.}
  
  \item \textsuperscript{129} Rose, supra note 81, at 586-87.
\end{itemize}
ment. This ideal was embodied by Thomas Jefferson and members of the "Antifederalist" group in post-revolutionary America. Both of these traditions, Rose maintains, appear in the extremely confused takings case law.

For Rose, the takings conflict is not between different ethical theories, but rather between different historical accounts. In fact, she explicitly rejects the idea that a utilitarian-based theory of takings will lead to a different set of results than a contractarian-based theory. Under pressure, the justice principle simply collapses into the mandate for maximizing preference-satisfaction:

We could easily look at these justice or fairness considerations as elements in a unified overall design [in which] the property regime aims at encouraging investment and enterprise, and ultimately at getting more preferences satisfied, since the behavior that is encouraged creates a bigger bag of more valuable things.

Rose cites Frank Michelman as having first realized that considerations of utility and of fairness lead in the same direction. Michelman's previously cited review of the takings issue is one of the most thorough undertaken to date. It is also the most ethics-based study of the issue in the literature, focusing clearly and specifically on both utilitarian and contractarian doctrine as they apply to the takings issue. Michelman correctly frames the takings issue as one of distributive justice. He also notes that the current set of judicial rules for takings cases are ethically unsatisfying, while the only correct test for the issue is "the test of fairness: is it fair to effectuate this social measure without granting this claim to compensation for private loss thereby inflicted?" Thus, his purpose is to formulate such a test of fairness, bearing in mind the tenets of ethical theory as part of the solution.

Michelman's conclusion regarding an appropriate test of fairness comes in the following summary form. He begins with the notion that we cannot afford measures that provide less in benefits than they

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130. Id. at 593.
131. Id. at 590-593. In her later essay, Rose revisits this second notion of property as one of "propriety," i.e., something that is "needed to keep good order in the commonwealth or body politic." Rose, supra note 125, at 58.
132. Rose, supra note 125, at 65.
133. Id. at 65-66.
134. Id. at 65.
135. Id. at 65.
136. Id.
137. See, Michelman, supra note 69.
138. See id. at 1169 ("When a social decision to redirect economic resources entails painfully obvious opportunity costs, how shall these costs ultimately be distributed among all the members of society?").
139. Id. at 1171-72.
carry in costs. For society to do otherwise, he argues, would be to impoverish itself irrationally. But this statement implies that society should not enact any regulations that it is not willing to pay for in the form of adequate compensation. For the losers in any compensation question are as much a part of society as the winners, and if their loss outweighs the gains of the public so that compensation is undesirable, then there is no efficiency-based reason for making the change at all. Michelman is quick to note, however, that government does not exist for efficiency purposes alone. Government also has a redistributive function, which may in some cases be a direct aim of the legislation subject to a takings claim. If this is so, a takings claim could be avoided if and only if the redistribution is one that tends toward a more equal distribution of resources in society. However, Michelman thinks that in nearly all takings cases of the type heard in American courts, there is no possibility that these redistributive effects are intentionally promoting an equalization of resources. Thus, only a redistribution that is an accidental consequence of a government measure that claims an independent justification of efficiency is allowed to escape the requirement of compensation. All other government actions resulting in property value losses must be compensated.

Michelman defends this principle of just compensation first from a utilitarian perspective. Starting from a conception of property based on the ideas of David Hume, Michelman explains that “as long as individual possession continues to be the norm” in our society (rather than common property), “there is serious disvalue in the spectacle of any encroachment on possession by public authority which is suggestive of arbitrary exploitation of a few at the hands of the many.” This idea from Hume is expanded in the work of Bentham, whose views on private property are very conservative. Property for Bentham is first and foremost a “basis of expectations,” the continued perpetuation of which is of primary importance. Only through the security of a private property system can we raise the total wealth of society above a trivial level. The need for security is therefore the major utilitarian reason for a strong prejudice against any involuntary redistributions of wealth by the force of the government. However,

140. Id. at 1181.
141. Id. at 1182.
142. See id. (indicating that progressive income tax and social welfare programs are examples of this type of government action).
143. Id. at 1183.
144. Id. at 1210-11 (emphasis in original).
this utilitarian position does not require compensation in every case of violated expectations. Michelman notes, "we must remember that the utilitarian's solicitude for security is instrumental and subordinate to his goal of maximizing the output of satisfactions." In some cases, non-compensation will be justified as maximizing the greater good (perhaps because of the smallness of the damage and the high difficulty of calculating an appropriate amount of recompense). As a general rule, we should compensate on the utilitarian view only when not doing so would be critically demoralizing to people's expectations of security.

Where does such a utilitarian criterion lead? At this point, nowhere terribly useful. But in a subsequent section, Michelman expands his utilitarian calculus to include more details. Introducing the ideas of "efficiency gains," "demoralization costs," and "settlement costs," he generates a simple equation for determining the threshold of compensation. Roughly speaking, "efficiency gains" are the net gain of benefits over costs of a government action; "demoralization costs" are the amount of damage (measured in currency) done to current expectations of affected property owners and future losses of production due to the lower overall sense of "security;" and "settlement costs" are the time and effort necessary to reach compensation settlements with the affected parties. The political actor contemplating the measure must make two comparisons. First, she must decide if the efficiency gains of the measure are greater than either the demoralization or settlement costs. If not, she must reject the measure as inefficient. Second, she must compare the demoralization costs and the settlement costs, and choose to pay the lower amount. In the event that the settlement costs are the lower amount, a taking has occurred and compensation is due. Otherwise, there is no taking. It is this comparison between demoralization and settlement costs that is, according to Michelman, the ultimate form of a utilitarian takings test.

Finally, Michelman defends his theory from a contractarian perspective, arguing that the result is nearly the same as in the utilitarian case. Michelman claims that Rawls' basic principles of justice would mandate no efficiency-motivated actions that affect various personal liberties unequally unless compensation is paid to correct the inequalities. Deviations from this strict equality of full compensation would

\[146.\] Michelman, supra note 69, at 1213.
\[147.\] Id.
\[148.\] Id. at 1214.
\[149.\] Id. at 1215. The issue of how to measure such costs is, of course, an important one to which Michelman pays some attention. We shall pass over the issue here, however, as tangential to our concerns.
\[150.\] Id. at 1221. It is worth noting in passing that Michelman is basing his interpretation of Rawls on early essays by the philosopher, rather than on the finished book, A
be allowed if they were to the benefit of all parties involved. The comparison becomes whether policies to compensate or not to compensate will as a general rule minimize the risk of negative results for the individual affected. Various rule of compensation most reduces this risk is the mandated option under a contractarian scenario.

Michelman describes the risks before the individual in two ways. For strong compensation rules, the risk is that high settlement costs will reduce the number of efficient projects undertaken by government, and thereby reduce total social wealth. The risk for weaker compensation rules is that the individual may sustain concentrated losses from such projects that could otherwise have been avoided. Michelman concludes the contractarian dilemma on takings as follows:

A decision not to compensate is not unfair as long as the disappointed claimant ought to be able to appreciate how such decisions might fit into a consistent practice which holds forth a lesser long-run risk to people like him than would any consistent practice which is naturally suggested by the opposite decision.

But this approach is much the same as that posed by the utilitarian method. Risks are lowest when we compensate in the event of relatively low settlement costs and do not do so in cases where those costs are higher. Thus, the two approaches lead to very similar decision rules for compensation.

Both utilitarian and contractarian principles agree with Michelman’s conclusion that some short-term injustices of non-compensation are merited as unintended costs of greater efficiency—costs that will generally even out over the long run to an acceptable level of equality. There may be different justifications for this rule under different ethical standards, but the end result is essentially the same. Utilitarian views of compensation may part from contractarian views in a few cases, such as if individuals are more prone to demoralization than is rational, in which case utilitarians would dictate more compensation than contractarians. But in general, the two agree so much that Michelman merges them as parallel approaches of fairness for the rest of his essay. The contractarian theory appears on this account to pro-

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Theory of Justice, which was not published until 1971, nearly four years after Michelman’s article. The differences between the two sources appear, however, to be relatively minor, at least at this level of discussion.

151. Id. at 1222-23.
152. Id.
153. Id. at 1225. This language harkens back to Justice Holmes in Mahon, who spoke of an “average reciprocity of advantage” as justifying certain restrictions on private property that work to the benefit of all. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
vide no meaningful additional distinction from, or contrast to, the utilitarian perspective.

IV
TOWARDS AN ETHICAL TAKINGS DOCTRINE—TWO APPROACHES

Although Michelman's article constitutes the best discussion of the relevance of an ethical approach to the takings doctrine, he goes too far in concluding that utilitarianism and contractarianism almost always dictate the same results in takings cases. Despite the excellence of his analysis, a thorough and complete ethical approach must recognize that the two ethical theories often lead to different results. This part attempts to demonstrate where Michelman goes wrong and to create an alternative ethics-based approach that explains the significance of the disparity in results.

A. Utilitarianism

Michelman's formulation of a utilitarian test to answer the takings question is fundamentally sound. He correctly states that a utilitarian will fail to support any government action in which the efficiency gains are not greater than either the compensation or demoralization costs incurred. He is also correct in noting that the probabilities of these costs are an important part of the utilitarian calculus. Thus, for the utilitarian, the relevant question is whether the contemplated action is more likely to create higher settlement costs or higher demoralization costs. Compensation is due if the settlement costs are likely to be lower.

However, Michelman overestimates the frequency of compensation under this test. His argument stresses the high value of demoralization costs for utilitarians. In so doing, he relies heavily on Bentham's ideas regarding the importance of security in a system of private property. But this explanation is where Michelman's argument weakens. Although Bentham stressed the role of security in a private property system, he did not believe that this was the only important aspect of property. Instead, he stressed four roles of property in society: "Subsistence, Abundance, Equality, and Security."\(^{154}\) And while he stressed the role of security as primary, the importance of the other three was not negligible, and all four served ultimately to maximize utility in society. For example, Bentham argued that the government can regulate the distribution of property once its owner dies and "has left no consort, nor relation in the direct line, and has made no will."\(^{155}\) Michelman, of course, recognizes this subordination of secur-

155. Id. at 58.
ity to the higher ideal of utility maximization. But he seems to under-value the point by overemphasizing the importance of preserving owner expectations in his subsequent analysis of a utilitarian theory of takings.

Michelman notes that property owners deal with uncertainty every day in evaluating threats to the security of their belongings. Home owners have little trouble maintaining ownership of their residences despite the threat of fire or earthquake. Bicycle owners on a college campus maintain a viable system of private ownership despite the omnipresent threat of theft. Property owners of all types maintain useful (even flourishing) systems of property despite a wide variety of uncertain possible events that could leave them with dramatically less value in a few moments of time. Why is the risk of accidental (or even intentional) loss as a consequence of government action so much more threatening to the security of private property? Michelman’s answer is that there is a tacit assumption that the losses created by collective government action have “a special counterproductive potency beyond any which may be contained in other kinds of losses.”

The image created is one of property owners nervously on edge worrying about a systematic and strategic diminution of the value of their goods. The victimization of one owner may soon lead to an expanded attack on private property rights. This element of intent and the potential expansion of the threat are what differentiate the menace of a taking from the menace of, say, an earthquake. No one plans an earthquake, and one earthquake does not generally lead to another, larger one.

Although it verges on conflict with Michelman’s earlier point that only unintentional redistributions of wealth as a result of government action are acceptable without compensation, this argument has some persuasive power. But it is also guilty of the sin of over-generalization. In some cases, a government action has intended redistributive effects regardless of the rhetoric to the contrary. Yet in many cases, “takings” do not contain such a strategic element—they are truly the inadvertent removal of value from a parcel of private property. It is hard to maintain as strong a distinction between government actions and other “accidents” that reduce property values.

156. Michelman, supra note 69, at 1216-17.
157. Id. at 1216.
158. For example, if the government passes a law restricting some types of yard landscaping in order to prevent fire damage, the purpose is clearly to promote public safety rather than to redistribute wealth.
159. Expanding on this point, one could almost imagine a system of private insurance for inadvertent regulation losses much like fire or earthquake insurance. The difference would be that this insurance would be privately funded by those most at-risk, rather than paid for by the general populace through government compensation.
There is also a counter-argument—disregarded by Michelman—that says more government actions benefit property owners as a group than harm them. Examples of these so-called "givings" of value include road work, tree planting, park building, sewer creation, and many other actions that benefit the class of property owners far more than the rest of the public by increasing property values. This beneficent side of government action weakens further the argument that collective government action to take property values poses some special threat to the security of a property regime. The connection between certain government reductions in property value and high demoralization costs for property owners is tenuous and more complicated than Michelman argues.160

There is a second problem with Michelman’s reliance on Bentham’s idea of security in fashioning a utilitarian doctrine of takings. At a more fundamental level, Bentham’s two theories of property are not necessarily connected to utilitarianism. It is quite plausible to imagine a utilitarian ethic attached to a totally different system of property. Bentham’s argument for security is based on the separate line of thought that it is a guarantee of expectations which maximizes utility in society.161 This argument relies on certain premises that are not essential to a utilitarian theory of ethics as described by Bentham or anyone else.162 One could espouse a theory that a guarantee of basic rights to property (or "property for all") would maximize utility more than would a simple guarantee of historical property rights above all else.163 Michelman errs in concluding that because one utilitarian also espouses a certain theory of property, utilitarian ethical theory must also embrace that definition. This is simply not true, and the consequences are important for our discussion.

If utilitarians are less concerned with demoralization costs than Michelman believes, the results for takings analysis are obvious. As discussed above, the utilitarian test for a takings case is a comparison of the probability of higher demoralization or settlement costs. Holding settlement costs equal, the lower the demoralization costs, the less

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160. Of course, variations in local property tax levels may affect the impact of this "giving" of value. Nevertheless, the nature of demoralization costs remains complex.
162. One such (questionable) premise is that poverty is the natural condition of humanity, and that property is only responsible for raising the level of some people, not for lowering the levels of others. See id. at 52-53.
163. For an excellent discussion of this idea, see JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988). Waldron presents a strong case against historical entitlement and other theories of private property that lack a basic guarantee of some minimum level of property for all. Although he argues in the contractarian tradition, there is no formal reason why a utilitarian could not support his position as the best way to maximize satisfaction in society (based on the principle of diminished marginal utility for wealth accumulation, for example, as will be considered here).
likely compensation will be required. Michelman over-estimates the tendency of a utilitarian theory of takings to require compensation for affected property owners. In reality, there is less reason to fear the breakdown of private property or a loss of incentive to produce higher aggregate wealth for society than Michelman and Bentham fear. Part V makes this point even more evident.

Specific aspects of our current society also make this tendency of utilitarians not to compensate even stronger than it would be in an abstract world of utility maximization. At present, most people are not utilitarians and it would be hard to argue that the current distribution of goods is one that leads to the greatest total or average level of satisfaction in society. In reality, there is a strong tendency in the western, capitalist world towards a concentration of wealth in the hands of a relatively small minority of the populace. As a general rule, this wealth is more concentrated in the class of property owners likely to be affected by takings claims than within other groups. It is also plausible (although not indisputable) that there is a diminishing marginal value of wealth for individuals. Arguably, a dollar provides more happiness to a homeless woman than to a wealthy CEO of a Fortune 500 company. But if the current distribution is not a utility-maximizing one, and more equal distribution tends in general to improve total utility, then the utilitarian is going to be even more unlikely to support a claim for compensation in a takings case. Redistributing some wealth as an accidental benefit of a government regulation is better than keeping it in the hands of those who will gain less utility from it.

Of course, counter-examples exist in which a taking might deprive an impoverished land-owner of her last bit of wealth in the world. The utilitarian would likely reject such an uncompensated government action, since the net efficiency gain would be lower (or non-existent) and the demoralization costs would increase due to the increased "disutility" suffered by the taking victim. Furthermore, a cost to society exists any time the security of private property is threatened by uncompensated losses of value due to collective action. These damages to the overall security of a property system must also be included in the demoralization costs. But in many cases, the victim of a taking in today's society will be relatively better off than the large majority of citizens, and the threat to the overall security of our private property regime will be relatively slight. In the presence of this combination of factors leading to low demoralization costs, the utilita-

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164. See Rose, supra note 125, at 55 (discussing the supposition of a diminishing marginal utility of wealth).
rian will be more reluctant than ever to make a compensation payment that goes against the grain of the marginal value of wealth.

Michelman's analysis neglects two important points. A utilitarian approach to takings law is less concerned with the need for security of private property than Michelman suggests. In addition, a utilitarian would note the idea of diminishing marginal returns to wealth that says a dollar for the poor brings more utility to society than a dollar for the wealthy. Because he neglects these two points, Michelman over-estimates the demoralization costs in certain takings situations, implying a utilitarian tendency for compensation that is too strong.

B. Contractarianism

Michelman accurately notes that while Rawls is trying to set up principles of justice for society at a general level, the application of those rules to specific issues—such as the takings doctrine—is appropriate.\textsuperscript{165} He is essentially correct in his framing of the relationship between the two principles of justice as they apply to this issue. Michelman correctly states that deviations from the egalitarian distribution of goods will only be justified if the resulting inequality works out to the benefit of all involved. He errs, however, in stating that we may trade civil liberties as part of this redistribution of goods. Rawls is quite clear that the first principle of justice is superior to the second; political liberties may not be traded for improved distributions of wealth.\textsuperscript{166}

Thus, the first problem with Michelman's argument regarding the contractarian approach is that he over-emphasizes the power of the difference principle. A contractarian differs from a utilitarian because there are certain liberties in his system that cannot be given away regardless of the ultimate benefit. Michelman fails to acknowledge this central distinction between the two theories. An emphasis on the rights of the individual over the good of the whole society is crucial to the Rawls' philosophy of distributive justice because contractarianism tries to reject an alternative ethic that "fails to take seriously the difference between persons."\textsuperscript{167}

To formulate a Rawlsian approach to the takings clause, it is important to remember his contractarian roots. For Rawls, society simply constitutes a "cooperative venture for mutual advantage."\textsuperscript{168} Any arrangement to which all parties do not agree should not be included in a just state. This is the essence of the requirement for a unanimous agreement within the original position. Contractarianism requires a

\begin{itemize}
  \item \textsuperscript{165} Michelman, \textit{supra} note 69, at 1221.
  \item \textsuperscript{166} \textit{Id.} For a discussion of Rawls' theories, see \textit{supra} part II.B.
  \item \textsuperscript{167} \textit{See Rawls, supra} note 2, at 27.
  \item \textsuperscript{168} \textit{Id.} at 84.
\end{itemize}
protection of the minority that goes far beyond utilitarian principles. This is why inequalities in a contractarian state must be beneficial to all in order to be just.

To understand a contractarian view of the takings issue, one first must broadly imagine a contractarian society. With the principle of justice in full force, each member of society has the maximum amount of wealth permitted by the limitation of the maximin aspect of the difference principle. Any further inequalities would not benefit everyone. Rawls imagines a maintenance of the proper distribution of wealth via a "distribution branch" of government. The purpose of this branch is to "preserve an approximate justice in distributive shares by means of taxation and the necessary adjustments in the rights of property." Such adjustments are to be made through a system of progressive taxation as well as through restrictions on redistribution of wealth after death. For Rawls, this is the societal institution that best meets the mandates of the difference principle. Other branches of government exist, but their goal is not the redistribution of wealth.

In a perfectly just society, redistributions of wealth other than those performed by the distributive branch of government are to be avoided as unnecessary and unjust. Rawls confirms this view in his discussion of the "exchange branch," a hypothetical "fifth branch" of government. This fifth branch permits members of society to take on additional government actions without requiring those who do not favor those actions to pay for them. The four basic branches of government maintain the distribution and systems required by the two principles of justice. Their mandates cannot be avoided, since they accord with the agreed upon principles of the original position. The fifth branch exists only to create additional government actions that are not specifically required by the two principles. As such, only those members of society who desire the existence of such public goods should pay for them through this exchange branch. "A motion" in the exchange branch, "proposing a new public activity is required to contain one or more alternative arrangements for sharing the costs." The source of payment should not be, for example, revenue from the tax code of the distributive branch because taxes are primarily aimed at maintaining a just distribution of wealth.

In this discussion, the application to the takings doctrine should become clear. A contractarian society would consider most uncompensated takings unjust because they force an individual to bear the cost of a public good largely enjoyed by others. The only intentional redistributions of wealth permitted are those of the distributive

169. Id. at 277.
170. Id. at 282.
branch via taxation and inheritance laws. Those who prefer an additional public benefit through government action must find a way to pay for it themselves, via compensation or some other means not involving damage to unwilling private property owners. Rawls makes this point quite explicitly: "There is no more justification for using the state apparatus to compel some citizens to pay for unwanted benefits that others desire than there is to force them to reimburse others for their private expenses."^{171} In the contractarian world, uncompensated takings of any significance are simply not permitted.

The impact of a contractarian ethic on takings law is mitigated by the ethical ambiguities of the modern world. The problem of applying contractarian theory to an imperfect society is made more difficult by Rawls' failure to address the issue in any detail. He does assert that systems can be more or less just depending on the number of unjust rules within them.^{172} Justice is not simply a black and white issue but allows for shadings of gray. More important, Rawls also states that in many cases even unjust laws and institutions are better if they are consistently applied. "In this way," he writes, "those subject to them at least know what is demanded and they can try to protect themselves accordingly."^{173} In many cases, the Rawlsian tendency towards compensation will be borne out even outside of his ideal system of justice.

Michelman argues that a contractarian will decide to compensate for any taking unless he can dispassionately understand how not doing so would contribute to a better long-term benefit for everyone in society, including himself. He argues incorrectly that the results of this decision will closely parallel those of the utilitarian in a similar position. Actually, a contractarian will be much more disposed to protect the rights of the individual over the group than will a utilitarian. Any redistribution by force will be prohibited in situations that involve political liberties. The fair and systematic tax structure should redistribute income, and other redistributions should be resisted on principle as an inequality not beneficial to all. The arbitrariness and lack of consistency in takings redistributions would also be a cause for concern—in many cases, such inconsistency leads to even more injustice. Finally, Rawls notes the need for institutions of justice to be self-perpetuating in the sense that their enactment re-enforces the tenets of the principles agreed to in the original position. Compensation generally preserves a sense of justice among the minority affected, and so a strong presumption towards compensation in takings cases is more self-perpetuating than a willingness to foist the costs of the many onto the backs of the few. Arbitrary redistributions of income that fail to

171. Id. at 283.
172. Id. at 57.
173. Id. at 59.
obey the two principles of justice will soon threaten the support for those principles among the populace, as more and more people suffer the effects of inconsistent redistributions of wealth.

With its emphasis on the individual, the contractarian ethic implies a stronger tendency to compensate in takings cases than the utilitarian ethic, which is more concerned with the gains of society as a whole. The impact of this difference can best be demonstrated through a review of examples from takings case law, which throws the contrasts between the two approaches into sharper relief.

V
APPLYING THE TWO ETHICAL APPROACHES TO RECENT SUPREME COURT TAKINGS CASES

This part analyzes recent Supreme Court precedent on the takings doctrine, and discusses how the utilitarian and contractarian ethical theories might respond to the facts of each case. The ethics-based analysis of contemporary takings case law reveals three key points. First, the two ethical approaches take fundamentally different approaches to resolving each case, even when they agree on the appropriate outcome. More important, the two approaches disagree more often than not about whether compensation is required in a particular case, demonstrating the error of lumping both approaches into a single pursuit of "fairness." Finally, this review suggests that the Supreme Court is moving implicitly toward a more contractarian approach in deciding takings cases in the modern era.

Pennsylvania Coal v. Mahon\textsuperscript{174} started the modern takings doctrine controversy. This case involved the Kohler Act, a law passed by the Pennsylvania legislature prohibiting coal mining that caused a subsidence of the surface.\textsuperscript{175} The act was passed in response to problems caused by anthracite coal mining in the state.\textsuperscript{176} In some cases, the ground beneath homes and public roads sank several feet, causing severe damage.\textsuperscript{177} However, some private home owners, like the Mahons, had not acquired the rights to support for their land when they originally purchased lots from the coal company.\textsuperscript{178}

The Court held that the Kohler Act was a government regulation that had "gone too far," and therefore amounted to a compensable

\begin{thebibliography}{9}
\bibitem{174} 260 U.S. 393 (1922).
\bibitem{175} \textit{Id.} at 412.
\bibitem{176} Rose, \textit{supra} note 81, at 563.
\bibitem{177} \textit{See id.} at 578 n.96 (citing Brief for Defendants in Error at 7-8, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)).
\bibitem{178} \textit{Id.} at 564, 574.
\end{thebibliography}
taking of the coal company's property. In making this decision, the Court relied on the lack of true "public" benefit from the Kohler Act, and on the existence of a contract between the private homeowners and the coal company. The opinion concluded that "[s]o far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them of greater rights than they bought."

The Mahon Court utilized a contractarian framework in this case, with Holmes taking an anti-redistributive position by protecting the rights of the individual over the group. One could read the Kohler Act as an intentional attempt to redistribute land hidden behind the excuse of public safety. This aspect of the act implicates contractarianism's second principle of justice, which implies that intentional redistributions should only be enacted by the system of income taxes specifically designed to maintain the distribution mandated by the difference principle. Because this principle is violated when individuals buy the surface rights at a lower price and then have the government take the support rights without compensation later through an act of legislation, a contractarian would support the Mahon decision.

How would a utilitarian assess the situation? Under Michelman's approach, the pertinent comparison is between the demoralization costs of the Kohler Act and the settlement costs required by compensation for it. In this instance, the demoralization costs are fairly high. The facts indicate that the amount of coal required to maintain the surface integrity of the land was between one-quarter and one-half of all the coal in the mine. The demoralization costs for future productivity are also relatively high. The legitimate expectations of property owners will be more threatened by the prospect of not being able to rely on signed contracts than by most other government actions. In contrast, the settlement costs in this case are probably low because

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179. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414-16 (1922). ("The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").
180. Id. at 413, 416.
181. Id. at 416.
182. See Rose, supra note 81, at 581-87 (discussing the possibility of an anti-redistributive reading of Mahon).
183. See id. at 571-575 (discussing why safety purposes did not justify the Kohler Act).
184. Id. at 567 n.38.
they are cheap and easily calculated—valuing the remaining coal would not be a difficult exercise. Therefore, in this particular case, a utilitarian would probably agree with the decision by concluding that settlement costs were lower than demoralization costs, although this mode of reasoning is not at all evident in Holmes' opinion. The two ethical approaches would likely lead to the same result in this extreme case.

The post-Mahon Court was reluctant for many years to find further examples of regulatory takings. However, a recent line of cases has consistently restricted the power of the government to regulate without compensation. Loretto v. Teleprompter Manhattan CATV Corp. is the earliest of these cases. Loretto involved a conflict between a Manhattan landlord and a cable company that installed access lines across the roof and along the exterior wall of her building. The landlord brought suit, arguing that the New York State law requiring her to allow the cable company to install this cable on her property violated the takings clause.

The Court, in an opinion authored by Justice Marshall, agreed that this law resulted in an unconstitutional taking, and noted the cable company's physical invasion of a (small) portion of the landlord's building as justification. The court refused to weaken the bright-line physical invasion test because of the seriousness of such an invasion to private property interests.

The Court's reliance on historical property interests suggests a utilitarian approach, but a utilitarian would not support the Loretto result. Justice Marshall opined that, "few would disagree that if the State required landlords to permit third parties to install swimming pools on the landlords' rooftops for the convenience of the tenants, the requirement would be a taking." Yet the cable installations were not as big, nor as intrusive, as a swimming pool. They included 4"x4"x4" directional taps, two large silver boxes along the roof, and cables less than half an inch in diameter which run along the top and one side of the building in question. The utilitarian cares only about the utility calculus for this particular case—swimming pools are of little importance unless we are dealing with a law regarding mandatory aquatic opportunities for tenants. In this case, the demoralization costs of the regulation are minuscule. In contrast to the

185. Of course, there have been some exceptions to this rule. See, e.g., Armstrong v. United States, 364 U.S. 40 (1960) (finding a taking when government regulatory action rendered worthless the plaintiff's liens against a shipbuilder).
186. 458 U.S. 419 (1982).
187. Id. at 435-38.
188. Id. at 436.
189. Id. at 422.
swimming pool situation, how much damage can the mandatory addition of such an insignificant cable cause to the general security of our property system? Most owners will not ever see the offending installation. The value of the owner's property is certainly not reduced, and may in fact be *enhanced* by the addition of cable access, in which case a takings claim would be absurd under the utilitarian approach.\(^{190}\) Thus, a utilitarian ethic would reject the Court's holding in this case, as well as the rigorous adherence to the physical invasion test that supports its decision.

A contractarian's response to the takings question in this case is less straightforward. Extended access to cable TV is clearly not an issue of justice, if it is even a public good at all.\(^{191}\) Thus, contractarian principles dictate that the expenses of this effort should be borne by those who desire the action, not by apartment owners such as Ms. Loretto who are opposed to it. But here the unhappy apartment owners are not bearing any sizable portion of the costs of this collective action because their property has not lost any significant value due to the cable installation and may actually have increased in value. A contractarian ethic prohibits the unjustified *loss* of value for the property holder. But in this situation, those who desire the public good of cable TV are paying for the action. Thus, a contractarian would not support the *Loretto* decision because the cable-access law does not result in an offensive redistribution of wealth. *Loretto* demonstrates that while a bright-line physical invasion test may make the Court's job easier in deciding takings decisions, it does not make sense from either a contractarian or utilitarian ethical perspective.\(^ {192}\)

In *Nollan v. California Coastal Commission*, the Court addressed a conflict between an oceanfront property owner and the State of California.\(^ {193}\) The plaintiffs hoped to replace a decrepit bungalow on their property with a new three-bedroom house.\(^ {194}\) In order to do so,

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190. *See id.* at 452 (Blackmun, J., dissenting) (arguing that tenant access to cable television "likely increases both the building's resale value and its attractiveness on the rental market"). This point raises the interesting question that if compensation is truly required by the law, perhaps the actual amount of value lost would be negative; that is, the property would actually have gained in value. If this was so, would the landlord have to write the government a check for the amount of value added?

191. The Court of Appeals ruled that the spread of cable television, with its "important educational and community benefits," is a public good, and the Supreme Court saw no reason to question this result. *Id.* at 425.

192. Is such respect for the physical invasion tests required by respect for precedent in legal history, rather than ethical considerations? Obviously, consistency with past decisions has an important role in any judicial doctrine. Blackmun's dissent in *Loretto*, however, suggests that precedent need not bind the Court's hands in this instance: "[T]he Court has avoided per se takings rules resting on outmoded distinctions between physical and nonphysical intrusions." *Id.* at 447 (Blackmun, J., dissenting).


194. *Id.* at 828.
they were required by California law to obtain a coastal development permit from the California Coastal Commission. As a condition to the issuance of this permit, the Commission required the Nollans to grant a public easement across the shorefront of their property to provide access between two popular public beaches located on either side of their lot. The Nollans argued that this condition on their permit was an unconstitutional taking of their property. In a decision written by Justice Scalia, the Court agreed with the Nollans and found that the permit’s easement requirement was a compensable taking. “[I]f [California] wants an easement across the Nollans’ property,” declared the Court, “it must pay for it.” The Court stated that there must be an “essential nexus” between the condition required and the original purpose of the building restriction.

The decision implicitly relied on a contractarian conception of justice. A contractarian approach approves of public regulations that directly address conflicts between different individuals (in this case, between the Nollans’ desire for a new home and the public’s desire for an unspoiled view). The contractarian cannot approve of an attempt by the state to extract an easement or other concession from a property owner because of an unrelated conflict between land uses—such an action would be an example of an intentional attempt to redistribute wealth in a manner different from the approved methods of a just system.

The contested actions of the Coastal Commission do not represent a principle that would benefit property owners like the Nollans in the long run. If the purpose was to provide unimpeded beach access to all, the method of delivering such a benefit should be an easement against all coastal property owners at the same time, rather than singling out only those who need building permits. Lacking this general application, the Nollans would not rationally support the principle behind the permit requirement. But this is exactly what they would have to agree to in principle if this action were to avoid being a

195. Id.
196. Id.
197. Id. at 829.
198. Id. at 842.
199. Id. at 837.
200. Some might argue that the Nollans have not effectively “lost” any wealth at all in this instance—that their easement costs them nothing and gains them (when applied to other coastal property owners) the ability to walk the length of California’s beaches unimpeded. This argument is unpersuasive, however. The proposed easement would certainly lessen the sense of privacy enjoyed by the Nollans, both visually and auditorily. It might also lower the market value of their property to some degree (due to the loss of privacy, etc.). Both of these factors distinguish the case from the physical invasion in Loretto. Although some may prefer that the Nollans desire to give up this easement out of public-spirited good will, it is incorrect to argue that they are giving up nothing of any worth in so doing.
taking under a contractarian approach. The facts of Nollan demonstrate an attempt to redistribute resources by a state that has no other immediate means of financing its actions.

The utilitarian, however, would argue that no compensation is due under the facts of Nollan. The demoralization costs are relatively low in this situation. Development conditions such as those imposed on the Nollans would not significantly slow the production of wealth in society, and the creation of a narrow easement along the beachfront of their property would not profoundly affect their quality of life or the value of their property.\(^\text{201}\) The settlement costs are quite high in this case, since the outright purchase of beachfront property is expensive and funds for such purposes are hard for the government to procure. Without the permit exaction, the easement is unlikely to happen at all, so the likely absence of the easement must be calculated as part of the settlement costs. This is a classic example of a redistribution of resources from a relatively wealthy land-owner to the generally poorer users of public beaches, with a larger net benefit to society as a result. For all of these reasons, the utilitarian would argue that no compensable taking had occurred.\(^\text{202}\)

Another recent case, Lucas v. South Carolina Coastal Council,\(^\text{203}\) confirms that the contractarian and utilitarian approaches will often lead to different answers to a given takings question. Lucas involved a conflict between a land developer and a state agency similar to the California Coastal Commission. In 1986, Mr. Lucas purchased two lots on the Isle of Palms, a barrier island off the coast of Charleston, South Carolina. He intended to build single family houses on both lots, for eventual sale.\(^\text{204}\) This action was perfectly legal until the state passed the Beachfront Management Act in 1988, which flatly prohibited construction on waterfront land like the land owned by Mr. Lucas.\(^\text{205}\)

The Court, in an opinion authored by Justice Scalia, held that the government must compensate Lucas for the total taking of his property's value, unless his actions would be considered a nuisance under

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201. This is not to say that there is no negative impact on the Nollans at all, only that the impacts are not given great weight by the utilitarian analysis. See supra note 200.

202. For an example of this more utilitarian reasoning, see Justice Blackmun's dissent in Nollan v. California Coastal Comm'n, 483 U.S. 825, 865 (1987). Blackmun argued that "[t]he land-use problems this country faces require creative solutions. These are not advanced by an 'eye for an eye' mentality." Id. at 865 (Blackmun, J., dissenting).


204. Id. at 1006-07.

205. Id. at 1008-09. In 1990, the state legislature amended the Beachfront Management Act by adding an administrative review process for exceptions to this prohibition. Id. at 1042 (Blackmun, J., dissenting). Because Lucas had not pursued this administrative remedy, Justice Blackmun criticized the majority for reviewing this case. Id. at 1041-43 (Blackmun, J., dissenting).
common-law principles. The opinion surmised that “[w]hen . . . a regulation that declares ‘off limits’ all economically productive or beneficial uses of land goes beyond what the relevant background principles [regarding nuisance law] would dictate, compensation must be paid to sustain it.”206 As in *Mahon* and *Nollan*, the Court appealed to contractarian principles in its decision, albeit in a less direct fashion. Rather than a nexus between regulation and land use, as in *Nollan*, or the lack of public benefit altogether, as in *Mahon*, the critical factor in *Lucas* is the “totality” of the property’s lost value. The implied presumption for a contractarian is that there is no way an individual would agree to a total loss of his property value as part of some future general benefit he might incur from such a regulation. It is indeed hard to see how Lucas could take such a positive view of the actions of the South Carolina Coastal Commission. Not only did the Beachfront Management Act destroy essentially all of Lucas’ property value, it did so when his was one of only a few undeveloped tracts left on the coastline in question.207 The enactment of the restriction before any properties had been built might be at least theoretically justifiable without compensation under a contractarian analysis, since each owner could understand that the action was necessary to prevent greater harm via natural disaster to residents of the planned houses. The action in this case was not so well timed. In general, the total taking test supports the contractarian assertion that the role of the state is not to redistribute wealth intentionally for public goods in circumstances that do not support the maximin distribution required by the two fundamental principles of justice.

In *Lucas*, as in *Nollan*, the utilitarian would not agree with the decision, although it is a closer case. The demoralization costs are still relatively moderate in terms of a chilling effect on general feelings of security around private property holdings. There is no threat here to seize property without good reason. The main failing of the Beachfront Management Act may well be simply that it was not enacted soon enough. Most property owners do not face the competing interests for open space, public safety, and tourist attraction that Lucas had to confront.208 Therefore, the taking of his property threatened the security of only a small group of similar developers of beachfront property. On the other hand, the settlement costs are even higher than in *Nollan* because here the state would have to consider a need

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206. *Id.* at 1030.
207. *Id.* at 1008 (noting that “[Lucas’] intention with respect to the lots was to do what the owners of the immediately adjacent parcels had already done: erect single-family residences”).
208. *Id.* at 1021 n.10 (citing the legislature’s findings regarding the beach/dune system along the South Carolina coast).
to purchase what is very valuable property in full in order to meet the aims of the act. The likelihood of that happening is fairly small. Since the property owner is a relatively well-off developer of private lands, a utilitarian would also see a benefit in a more egalitarian redistribution of resources. The utilitarian would make a decision against compensation in this case on grounds very similar to those in Nollan.

The doctrine regarding nuisance uses of land adds a final twist to this case. That is, Scalia clearly excluded the regulation of such nuisances from compensation because the right to make a nuisance is not part of the "bundle of rights" held by the property owner in the first place. Neither the contractarian nor the utilitarian doctrine would disagree with this argument. A contractarian would agree that it is unreasonable for a property owner to expect to be able to enjoy his goods in a manner that significantly deteriorates the experience of those nearby. Such a principle is quite consistent with the egalitarian idea of the first principle of justice, in which each individual is to have the maximum liberty possible as long as everyone else has the same amount. A utilitarian would have no problem with a rule prohibiting takings claims for nuisances because the demoralization cost of such an action would be essentially zero, since the use would be something society would want to discourage in the first place.

The most recent case supporting the rights of individual property holders over the claims of collective government action is Dolan v. City of Tigard. Like Nollan, this case concerns the relationship between conditions placed on a building permit and the consequences of the actions being permitted. The City of Tigard required Dolan to provide an easement along the edge of her property for a flood plain and bicycle-pedestrian path before they would allow her to expand her store. Dolan alleged that the easement requirement was a compensable taking because it was insufficiently related to the impacts of her proposed expansion.

The Court, in an opinion written by Justice Rehnquist, agreed with the City that the exactions met the "essential nexus" test of Nollan. The Court decided in favor of the plaintiff, however, holding that compensation was still required because the exactions failed a second test of "rough proportionality" with the probable impacts of the development being regulated. The key factors in this decision are the requirement to dedicate the property in question to the City, rather than to simply leave it undeveloped as a floodplain, and the
unproven causal connection between the bicycle path and reduced traffic congestion in the downtown area.\textsuperscript{214}

The Court expanded its contractarian approach to takings cases in this decision. Just as it would be inappropriate to exact a concession from a landowner that was unrelated to the problems posed by their actions, so too would it be unjust to exact remedies that are disproportionate to the problems created. The individual should pay for her share of the additional costs created by her actions and no more. Thus, the Court decided that the City of Tigard did not have to acquire title and allow public access to the floodplain area when the City's only concern was the increased run-off from a newly paved parking lot, as simply preventing development of that land would have preserved the benefits of the floodplain. The creation of a public-access greenway is a public good, unrelated to the proposed store expansion, that must be funded by those who desire it. A public bike path should also be funded by the public because it is not sufficiently connected to the increased traffic problems caused by the larger store. The Court was clearly working within a contractarian framework in this case in defending the rights of property owners.

Once again, the utilitarian would take exception to the Court's decision. While the demoralization costs to Ms. Dolan of losing title to some floodplain property that she cannot develop anyway are fairly low, the settlement costs (including the likely possibility that without the required easement as a permit condition, no greenway will occur) are high. Property owners have dealt with regulations such as those imposed by the City of Tigard for decades with little impact on the overall integrity of our system of private property. From a utilitarian standpoint, \textit{Dolan} is another case of sacrificing the gains of the many for the benefit of a few to the overall detriment of public well-being. The utilitarian would argue that no compensation should be paid.

Not all modern takings cases have favored compensation for an alleged taking, however. \textit{Penn Central Transportation Co. v. New York City},\footnote{215} and \textit{Keystone Bituminous Coal Assn. v. DeBenedictis}\footnote{216} stand out as exceptions that are worth studying from the ethical perspective. In theory, we would expect the Court to take a more utilitarian approach when it rejects the arguments of the aggrieved property owners bringing suit. In practice, this expectation is borne out.

\textsuperscript{214} \textit{Id.} at 2320-22.
\textsuperscript{215} 438 U.S. 104 (1978).
\textsuperscript{216} 480 U.S. 470 (1987). There are certainly other cases. \textit{See}, \textit{e.g.}, \textit{Agins v. Tiburon}, 447 U.S. 255 (1980) (holding that zoning ordinances with density restrictions substantially advanced legitimate governmental goal of protecting against unnecessary urbanization, and therefore were not a taking).
Penn Central raised the question of "whether a city may . . . place restrictions on the development of individual historic landmarks . . . without effecting a ‘taking’ requiring the payment of ‘just compensation,’" \(^{217}\) In this instance, the plaintiff owned Grand Central Station, a newly designated New York City landmark.\(^{218}\) The city refused to permit the owners of Grand Central to build a fifty story office tower on top of the building, citing the landmark status of the train station.\(^{219}\) The Court rejected plaintiff's takings claim in this pre-Loretto case, noting that the landmark restrictions were "substantially related to the promotion of the general welfare," and that the owners retained "reasonable beneficial use of the landmark site" so as to avoid a need for compensation.\(^{220}\)

The majority opinion, authored by Justice Brennan, provides a two step process, each with utilitarian overtones. First, the Court rejected the plaintiff's arguments that the entire landmark program imposes restrictions requiring compensation to all affected owners of designated buildings.\(^{221}\) In so doing, the Court noted that both parties agreed on the worthiness of the goal of the landmark program, and rejected the plaintiff's assertion that the landmark designation was an unfair regulatory burden placed on a few hundred property owners. The Court's reply was distinctly utilitarian, largely ignoring the merits of the plaintiff's arguments in favor of the negative outcomes it would engender:

> Stated baldly, appellants' position appears to be that the only means of ensuring that selected owners are not singled out to endure financial hardship for no reason . . . is to hold that any restriction imposed on individual landmarks pursuant to the New York City scheme is a "taking" requiring the payment of "just compensation." Agreement with this argument would, of course, invalidate not just New York City's law, but all comparable landmark legislation in the Nation. We find no merit in it.\(^{222}\)

The Court refuted the claim against unfair treatment by noting that 400 other people were also affected, and that the public benefits of the landmark program far outweighed those individual costs. According to the Court, compensation would be very difficult to calculate and would ruin the entire program. In other words, the settlement costs were too high.

Second, the Court argued that in this particular case, the level of economic damage to the property owner was not so great as to require

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\(^{218}\) Id. at 115-16.
\(^{219}\) Id. at 117.
\(^{220}\) Id. at 138.
\(^{221}\) Id. at 131-32.
\(^{222}\) Id. at 131 (emphasis added).
compensation. Current uses of the terminal were still permitted, as was some potential future construction on a smaller scale than the proposed fifty story building. The transferable development rights accorded to the owners of the building under the landmark law were also of value. The demoralization costs of this action to the owners were relatively low, making a finding of compensation unjustified.

The Court's reasoning in *Penn Central* is quite utilitarian in its anti-taking stance. Of course, the Court failed to put its decision boldly in such terms, preferring to work with legal precedent and the facts at hand to arrive at its conclusion. Nevertheless, utilitarian reasoning is quite central to the decision handed down.

The contractarian reaction to this case is given succinctly by Rehnquist's dissent. Citing the passage from *Armstrong* that opens this paper, Justice Rehnquist attacked the landmark program as imposing "substantial cost" on the designated property owner, "with little or no offsetting benefit except for the honor of the designation." The landmark program was seen to be distinctly different from zoning, in that only a select few are asked to suffer the burden of a public good. Zoning affects all property owners, and often adds value to their properties through the "average reciprocity of advantage" discussed by Holmes in *Mahon*. In this instance, the landmark owner can be forced to forgo millions of dollars of loss in profits while his immediate neighbors suffer no such burden. While a rational actor owning such a landmark in this example might support such a law as in the best interests of society if she were to receive some compensation, it is hard to imagine her supporting the landmark law as it currently stands. For the property owner, such a law plainly fails to meet the previously not contractarian test of contributing to a better long-term benefit for everyone in society, including herself. The Penn Central corporation shareholders may well be better off having a New York City in which landmarks are generally protected, but it is hard to imagine that those benefits are stronger for them than the significant loss of income resulting from the prohibited development on

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223. *Id.* at 137 ("[N]othing the [Landmark] Commission has said or done suggests an intention to prohibit any construction above the Terminal.") (emphasis added).
224. *See, e.g., id.* at 124-25 (illustrating the decision's rather lengthy discussion of takings case law and precedent).
225. *Id.* at 139 (Rehnquist, J., dissenting).
226. *Id.* at 139-40 (Rehnquist, J., dissenting).
227. *Id.* at 140 (Rehnquist, J., dissenting) (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).
228. *Id.* at 140 (Rehnquist, J., dissenting).
229. *See supra* part II.B.
Like Justice Rehnquist, a contractarian could not approve of the decision in that case.

In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, the Court again considered the problem of land subsidence due to bituminous coal mining in the State of Pennsylvania. Once again, the state passed a law to prevent coal mining that creates subsidence below cemeteries, buildings of human habitation, and public structures. The law prevented such subsidence by requiring fifty percent of the coal below such structures to remain in the ground for support. Should subsidence occur, the mining company would be liable for all damages, regardless of prior contractual agreements regarding severed rights to the support or mineral estate in the land.

The Court, in a 5-4 decision authored by Justice Stevens, held that *Mahon* did not control and that the Subsidence Act did not create compensable taking situations. In distinguishing the two cases, the Court relied heavily on the public safety aspects of the current act that were missing from the Kohler Act considered in *Mahon*. According to the Court, the Kohler Act was a taking because it served primarily private, rather than public, interests and because it made it unprofitable to mine some coal deposits in the state. The Subsidence Act avoided the first problem by more clearly serving a public purpose—the prevention of subsidence damage and “conserving surface land areas” within the state. The Court argued that the act forced mine owners to pay for subsidence damages for strictly utilitarian reasons, writing that “the requirement that the mine operator assume the financial responsibility for the repair of damaged structures deters the operator from causing the damage at all—the Commonwealth’s main goal.” This reasoning echoes Sax’s utilitarian arguments in favor of placing the financial costs of air pollution on the auto industry, not out of fairness, but to spur a faster reduction of the problem. The Court further found that there was little evidence of actual financial damage to the plaintiffs resulting from the Subsidence Act. Thus, there was

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230. As Rehnquist forcefully noted, here, however, a multimillion dollar loss has been imposed on appellants; it is uniquely felt and is not offset by any benefits flowing from the preservation of some 400 other “landmarks” in New York City. Appellees have imposed a substantial cost on less than one-tenth of one percent of all the buildings in New York City for the general benefit of all its people.


232. See id. at 481-502.

233. See id. at 485-490.

234. Id. at 484.

235. Id. at 487.

236. Id.

237. Id. at 501 (“Petitioners may continue to mine coal profitably even if they may not destroy or damage surface structures at will in the process.”).
a "strong public interest" in avoiding the problem of subsidence that was best served by forcing mining companies to shoulder the burden of preventing such damage.238 This utilitarian reasoning distinguishes the case from *Mahon*, in which the public interest was weaker and the private damages were greater on the legal record presented. High settlement costs, in the form of continued subsidence problems, and low demoralization costs, in the form of small inconvenience to the coal companies, make the utilitarian answer clear in the *Keystone* decision.

The contractarian position is more difficult to discern. A contractarian would support compensation to the extent this case shares similarities with the *Mahon* precedent. The dissent in *Keystone* noted that the contracts selling the subsurface rights were held valid in *Mahon* and should be held valid in this case through a requirement of compensation.239 There are some differences between the two cases, however, that might give the contractarian pause. The first is the amount of time elapsed since the initial acquisition of subsurface rights by the mining companies. The vast majority of these rights were acquired in the period between 1890 and 1920.240 Interim changes in public surface use made the consequences of subsidence more devastating to a wider range of individuals, many of whom gained no benefit from the initial, lower-priced acquisition of the land. Relatives of the deceased buried in cemeteries threatened by subsidence, for example, gained nothing from the initial low-cost acquisition of the surface rights, yet stood to lose a great deal if the mining proceeded. Users of public buildings and bodies of water were in a similar category. Furthermore, the longer the mining companies refrained from mining in order to avoid subsidence, the more developed the areas above their subsurface rights became. *Keystone* thus presented a conflict involving thousands of innocent third parties, while *Mahon* involved a relatively simple conflict between a private homeowner and a private mining company. This difference is important to a contractarian, who wants to refrain from actions that are not to the benefit of everyone involved.

The key question for the contractarian becomes: "should the coal companies relinquish their subsurface rights without compensation in order to avoid significant public damage?" The answer is not obvious. It is possible that a coal company stock holder is better off in a world of lower profits in which sixty to ninety-year-old property claims are not permitted to wreak havoc in cemeteries and buildings alike; it is hard to imagine the coal company actually contemplating mining below certain high-density areas with full knowledge of the subsidence

238. Id. at 505.
239. Id. at 506-07, 520-21.
240. Id. at 478.
and damage that will likely result. Unlike the company in *Mahon*, the company in *Keystone* did not have the ability to simply serve notice on a few affected homeowners. Here, a contractarian might agree with the argument of the Court that "[t]he Subsidence Act is a prime example that ‘circumstances may so change in time . . . as to clothe with such a [public] interest what at other times . . . would be a matter of purely private concern.’"\(^{241}\)

The alternative argument, however, has persuasive power as well. Contracts should be honored, and the holders of those guarantees should have their rights respected, even if it means great expense for the majority in providing compensation. Ultimately, the conflict may turn on the importance of the public benefit being protected by the Subsidence Act. Is it a basic concern of justice, or simply an optional public good? If it is the former, compensation is not due. If it is the latter, a taking has occurred. The fundamental nature of the public interest being debated in *Keystone* is stronger and harder to dismiss as non-essential to the pursuit of justice than is the public interest involved in *Nollan* and *Dolan*. Extensive land subsidence would arguably have a significant impact on Rawls’ non-negotiable, equal fundamental liberties of each person. Examples of this negative impact include the hypothetical collapse of the government building in Harrisburg or the post office in a rural town. The contractarian might agree with the utilitarian in *Keystone* as well as in *Mahon*, concluding that compensation is due in *Mahon* but not in *Keystone*. The utilitarian and contractarian approaches to the *Keystone* facts, however, are not as obvious as in the other factual situations discussed in this part.

A review of Supreme Court precedent demonstrates—contrary to Michelman’s view—that an important distinction exists between utilitarian and contractarian approaches to takings law. In contrast to the utilitarian approach, the contractarian approach is more likely to support compensation when a takings claim is raised.

VI

CONCLUSION—WHY THE ETHICAL APPROACH MATTERS

The modern ethical dichotomy between contractarianism and utilitarianism has much explanatory power for some of the leading ideas and decisions in the takings law area. An understanding of the two theories reveals flaws or oversights in the arguments of academics Joseph Sax and Andrea Peterson. It also reveals an erroneous premise in the arguments of Carol Rose and Frank Michelman. The difficulty with these academic interpretations is that they have failed to recognize the centrality of ethical theory to the concept of fairness.

\(^{241}\) *Id.* at 488 (quoting Block v. Hirsh, 256 U.S. 135, 155 (1921)).
that is at the heart of the takings issue. Utilitarianism and contractarianism do not lead to the same ideas of fairness, and as the dominant ethical paradigms of the present day it is important to understand where they differ and where they agree. The court decisions reviewed here illustrate some of the differences and agreements between the two.

It is certainly an admirable goal to strive for a fair resolution to takings cases, even on a quasi-ad hoc basis as both Peterson and the Penn Central decision imply. The purpose of the takings clause is a fair distribution of economic burdens among the members of the public at large, but this requires a clear understanding of the meaning of the term "fair." Attempting to interpret the Supreme Court's takings decisions based on an undefined or ill-defined idea of fairness is bound to be unsatisfactory. The failure to clearly define what is fair allows uncertain, confusing, and sometimes nearly contradictory verdicts that follow certain bright-line tests without reference to the true purposes behind them. Michelman suggests that this allows the courts to mask the true determinations behind their ad hoc determinations of fairness:

We should not be surprised at the emergence of a number of partial, imperfect, or overbroad surrogate rules from among which judges may pick and choose in order to avoid explaining compensability decisions in terms by which a litigant is, in effect, simply told that his sensation of having been victimized is not justified.

This intentional arbitrariness does not serve the public well, despite its potential usefulness to the Supreme Court. A clearer guiding concept of fairness would help governments and private citizens alike avoid many costly takings conflicts by presenting ethically consistent rules that the public could use to anticipate whether a takings claim will succeed.

An example may make the point more clear. Imagine the Court explicitly announced that it was adopting a more contractarian ap-

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242. It might also be important to argue which ethical theory is preferable as an approach to takings law. This is an interesting and complicated question. Answering it would require taking a position on the philosophical clash between the two theories, as well as justifying that normative position in light of the consequences for takings law. Such an answer is beyond the scope of this effort, but merits further consideration. This Comment only attempts to show that the ethical approach does make a difference, that the difference is evident in the case law, and that it would be better and less confusing to be clear and consistent about the ethical approach taken regardless of which one is actually chosen.

243. See Peterson, supra note 5, at 162; Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) ("In engaging in these essentially ad hoc, factual inquiries [into takings claims], the Court's decisions have identified several factors that have particular significance.").

244. See supra note 1.

245. Michelman, supra note 69, at 1249.
proach in order to make better sense of the takings doctrine. Actors within the regulatory field would have a much clearer sense of which actions threaten the need for compensation and which do not. Opponents of the policy would have a much clearer sense of what the Court’s definition of fair actually is, which would lead to an improved level of public criticism and debate. At present, debate is relatively futile since the Court’s doctrine presents a moving target of judicial discretion as described by Michelman in the passage above. There is currently no clear or certain point of departure for the discussion. An ethical approach to takings law focuses the conflict on the definition of fairness, which is exactly where the debate should take place. All other arguments are simply preludes to, or diversions from, this fundamental point. Neither the public nor the legal community are well-served by such obfuscation.

This is not to argue, however, that the analyst must necessarily be in one ethical camp or the other in order to have a sensible position. As Smart concludes in his discussion of utilitarianism, “[i]t is quite conceivable that there is no possible ethical theory which will be conformable with all our attitudes.” Courts may attempt to “balance up” between the two theories as a means of creating a third, compromise approach to takings law. The key to such a compromise is an explicit recognition of our adherence to two or more ethical systems, as well as a recognition that conflicts between them may be hard to avoid. In some takings cases, a flat choice between a utilitarian outcome and a contractarian one may be all that is possible. In a perfectly just world, this conflict would not be a problem. But in an imperfect world such as ours, it is of vital importance to provide clear reasoning as we make the difficult choices before us. In the face of such moral uncertainty, an ethical approach to takings law matters a great deal.

246. Currently, takings rhetoric within the world of advocacy fails to acknowledge its ethical roots. For example, the environmentalist critique of suggested protections of property rights is firmly based in a utilitarian outlook, as demonstrated by a quote from a recent Sierra Club legislative update regarding a recent takings referendum in Washington: “[T]his radical measure would have forced taxpayers to pay well-monied corporations and developers whose land value decreased by any amount due to public protections insuring the health, safety, and environmental standards of the majority.” *Third State Strikes Out Takings Legislation*, SIERRA CLUB ACTION BULLETIN #137 (Sierra Club, San Francisco, Cal.) Nov. 27, 1995.

247. Smart, supra note 10, at 72.

248. For example, Smart asks, “How can we ‘balance’ a serious injustice, on the one hand, and hundreds of painful deaths, on the other hand?” *Id.* at 73.