I agree with Professor Peñalver's criticisms of modern American takings doctrine. The doctrine is incoherent and the cases conflict. The balancing test of *Penn Central Transportation Co. v. New York City*¹ is not helpful—it is ad hoc and may be meaningless. It is also unhelpful to ask to what extent regulation destroys the economic value of property, and misleading to try to identify a particular property right as essential and therefore sacrosanct. Indeed, Professor Peñalver's main point is correct. It does not make sense to distinguish takings of land from takings of personal property. My disagreement is that I see more hope than Professor Peñalver in one of the five theoretical approaches he discusses: the one he calls the Thomistic-Aristotelian natural law theory. This theory is not only the oldest of the five, but may be the lineal ancestor of the takings provision of the Fifth Amendment.

In the sixteenth and seventeenth centuries, a group of continental jurists known as the "late scholastics," self-consciously tried to synthesize the Aristotelian moral theory of Thomas Aquinas with the law of their times, mostly Roman in origin. Few people today are familiar even with the leaders of this group: Domingo de Soto (1494-1560), Luis de Molina (1535-1600), Leonard Lessius (1554-1623) and Francisco Suarez (1548-1617). Yet, as I have described elsewhere, these scholars were the first to give private law a theory and a systematic doctrinal structure.² Before they wrote, the Roman law in force in much of Europe had neither. For

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all their subtlety, neither the Romans nor the medieval professors of Roman law were theorists. In contrast, the late scholastics tried to explain Roman law by philosophical principles. Their work deeply influenced the seventeenth century founders of the northern natural law school of thought, Hugo Grotius (1583-1645) and Samuel Pufendorf (1632-94) who adopted many of the late scholastics’ conclusions and disseminated them through northern Europe, paradoxically, at the very time that Aristotelian and Thomistic philosophy was falling out of fashion.

One of conclusions of Grotius and Pufendorf and the late scholastics was that the state could not take private property, even for a public purpose, without paying the owner just compensation. Although these writers did not work out all the implications of this principle, we can better understand the principle by examining how it fits into their larger theory of justice.

Professor Peñalver is correct that this larger theory of justice rests on the idea that human actions and institutions should foster human flourishing. As Professor Peñalver observes, the Aristotelian approach to law rests on the idea “that human actions and institutions should seek to foster ‘human flourishing.’” To flourish means to live a life in which one’s distinctively human capacities are realized to the greatest extent possible. As Peñalver notes, “[a]ctions or institutions that are utterly inconsistent with human flourishing violate the natural law.”

External things are valuable to the extent they contribute to such a life. Consequently, the state has an obligation to do distributive justice: to see that, so far as feasible, each citizen has the resources that such a life requires. Peñalver observes, citing Finnis and Aquinas, that “Aquinas’s theory of property rights endorses an active role for the state in ensuring a just distribution of property, even if that means taking property from those with more and giving it to those with less.”

Though his description of the premises of the writers of the Aristotelian tradition is correct, Professor Peñalver does not describe the implications of those premises in the same way as writers in the

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3. The Roman lawyers were interested in finding concepts and rules to explain the how legal controversies ought to be decided. Medieval lawyers were interested in logically reconciling the Roman texts. Neither were interested in trying to define the concepts they were using, explaining their logical relationship to each other, and showing how one could then logically arrive at consistent doctrine.


5. Id. at 276.

6. Id.

7. Peñalver, supra note 5, at 278 (citing John Finnis, Natural Law and Natural Rights 195 (1980) and Thomas Aquinas, Summa Theologiae II-II, Q. 66, a. 7).
TAKINGS: WHAT DOES MATTER?

Aristotelian tradition. Peñalver argues that in the Thomistic tradition, natural law would likely govern questions of takings only at the margins. He suggests that a natural law approach would protect an individual's property in so far as necessary to promote human flourishing, but not to the extent that the natural law approach prohibited forcible governmental redistribution to provide for the necessities of other citizens. With these relatively broad parameters, Peñalver claims that most takings questions following the Thomistic tradition would be answered variously according to a community's choice of positive law.

As noted earlier, writers in the Aristotelian tradition did think that the state could redistribute resources among its citizens to ensure a greater measure of distributive justice—indeed, the state could do so to promote human flourishing. Nevertheless, these early writers did not believe the state should consider what particular resources, beyond those necessary for survival, a particular citizen needed in order to flourish. Nor did they believe "questions concerning when the government must compensate for takings of property to be primarily a question for positive law." According to the Aristotelian tradition, the state had to answer such questions, with rare exceptions, as a matter of natural law, that is, as a matter of commutative and distributive, justice.

Let us take these propositions in turn, and then see how they can help us understand the law of takings as it is today. Although the aim of distributive justice is that each person should be able to acquire the external things that he needs to live the life he should, as Grotius pointed out, the state cannot simply allocate to each person the external things that the state thinks, or the individual thinks, that he needs. That arrangement would work, as Grotius and Lessius noted, in a society like a family or a monastery where there are few people and they are on good terms. Writers in the Aristotelian tradition conceived of distributive justice as ensuring that each person has a fair share of wealth. By wealth, they meant roughly what we would call purchasing power. A fair share,
they acknowledged, will be understood differently in differently constituted societies. In a society ruled by the virtuous—an aristocracy—"fair share" means that wealth should ideally be divided in proportion to individual human virtue. In a democracy, each person should ideally have the same share.14 Writers in this tradition emphasized that such principles are ideals. A democracy should not confiscate the wealth of rich people, virtuous or otherwise, and divide it up.15 We can see one reason why it should not if we consider Aristotle's objections—which Aquinas shared—to Plato's proposal to abolish private property. Do so, Aristotle said, and there will be endless quarrels, and people will have no incentive to work or to take care of property.16 If such evils are to be prevented, an ideal distribution of wealth can only be approximated.

Distributive justice, then, aims at securing each citizen a fair share of wealth in the sense of purchasing power. Commutative justice, in contrast, preserves the share that belongs to each—if one person deprives another of resources, commutative justice requires that he make compensation for that deprivation.17 It followed that the state had no more right to deprive a citizen of his resources without compensation than any ordinary citizen. Lessius explained that even if an act is done

by a public personage or the governor of the country . . . acting for the public good, equity will not permit that harm done for the sake of the public good be borne by a few private persons but it must be distributed in a fair proportion among all. Otherwise there is a violation of distributive justice which, just as it prescribes that common benefits be distributed in a certain proportion among individuals, so also the burdens and harm which are imposed or introduced on account of the common good. Just as the good that is intended is common, so, indeed, the harm ought to be common. Accordingly compensation ought to be made for harm of such a nature suffered for the common good. . . .18

For example, the state should pay compensation to people whose crops are trampled in the course of hunting down noxious animals, or whom the state deprives of buildings they own, or whose land it takes for a public street or to build a fortress.19 It is true, as Professor Peñalver notes, that Suarez believed that in special cases, custom could provide

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15. Aristotle, *Politics* in *BASIC WORKS OF ARISTOTLE V. 5 1304b; V. 9 1310b; VI.3 1318a 25-26; VI.5 1319b · 1320a* (R. McKeon ed., 1941).
16. *Id.* II.v; AQUINAS, *supra* note 7, at II-II, Q. 66, a. 2. [15]
19. *Id.*
that an owner bought his property subject to the right of the state to take it without paying.\textsuperscript{20} In such a case, the owner would presumably have bought his property at a reduced price knowing of the custom. But that was an exception to the rule and a matter of positive law. Suarez believed that "by the \textit{ius gentium}"—the law recognized by all peoples on the basis of reason—"no one can be deprived of his possessions even for the sake of public utility without payment of their price."\textsuperscript{21}

Like many other conclusions of the late scholastics, the principle that an owner could not be deprived of his property without compensation was accepted by Hugo Grotius\textsuperscript{22} and Samuel Pufendorf.\textsuperscript{23} Their works were classics, widely known in colonial America and cited "in pamphlet after pamphlet" on the rights of the colonists in the years before the Revolution.\textsuperscript{24} They were surely familiar to James Madison who moved to amend the draft of the Bill of Rights to include a takings clause,\textsuperscript{25} as well as his colleagues who incorporated such a clause with a change of wording in what is now the Fifth Amendment. It is interesting that in 1987, the Ninth Circuit Court of Appeal cited Grotius, Pufendorf, and Madison as authorities on the meaning of the Takings Clause.\textsuperscript{26}

Grotius wrote before the rise of modern critical philosophy had brought Aristotelian philosophy into disfavor. Pufendorf and the drafters of the Bill of Rights wrote afterward. It is not clear to what extent, if at all, they were even familiar with the ideas which had originally inspired late scholastics and were, I believe, familiar to Grotius.\textsuperscript{27} Nevertheless, I think we can learn a good deal by looking at the older Aristotelian ideas of human flourishing and distributive and commutative justice on which the late scholastics based their conclusion. These writers do not tell us

\begin{footnotes}
\item[20] See Peñalver, supra note 5, at 278; as Peñalver points out, Suarez makes this statement in \textsc{Franciscus Suarez, Tractatus de legibus ac deo legislatore} lib. 7, cap. 4, no. 6 (1612).
\item[21] Suarez, supra note 20.
\item[22] Grotius, supra note 12, at II.xiv.8.1.
\item[23] \textsc{Samuel Pufendorf, De iure naturae et gentium libri octo} VIII.v.7 (1688).
\item[25] Amendments offered in Congress by James Madison, June 8, 1789, in 1 \textsc{Annals of Congress} 434 (Joseph Gales, ed. 1789).
\item[26] \textit{Midkiff v. Tom}, 702 F.2d 788, 790 (9th Cir. 1981). This case was reversed in \textit{Hawaii Housing Authority v. Midkiff}, 467 U.S. 229 (1984). The Ninth Circuit had struck down a Hawaiian statute requiring large landowners to break up their estates. They did so in response to a legislative finding that while forty-nine percent of the state's land was government owned, another forty-seven percent was in the hands of private landowners. The United States Supreme Court reversed, holding that there was no violation of the Takings Clause. It seems to me that the Ninth Circuit would have reached the same conclusion if it had been guided by the late scholastic ideas from which Grotius, Pufendorf, and, indirectly, Madison had borrowed. As mentioned, one of these ideas was distributive justice: to avoid any group of citizens accumulating more that its just share.
\item[27] Gordley, supra note 2, at 121-25.
\end{footnotes}
how to deal with all the problems that have faced our courts. Nevertheless, their larger framework explains why they might have found these problems less intractable than we do.

Since Pufendorf and the drafters of the Bill of Rights believed that the ultimate purpose of property rights was to promote human flourishing, they presumably would not have a problem if the state banned activities or uses of property that, in its judgment, undermined that end. When prohibition laws were enacted in the United States, plaintiffs claimed that these laws deprived them of property in stocks of alcohol on hand at the time the regulations were enacted. These claims were rejected in *Ruppert v. Caffey* and *Everard's Breweries v. Day,*

![Image](image-url)
even though, as Professor Peñalver notes, these laws "surely deprived the dealers of all economically beneficial uses of existing stocks of alcohol." I don't think many writers in the Aristotelian tradition would have believed that the consumption of alcohol, in itself, is objectionable. Nevertheless, suppose an activity were, in their judgment, incompatible with human flourishing and yet tolerated by law: for example, the brothels which were licensed in many cities in their time. I doubt if they would think the owners had to be compensated if the state changed the law and closed the brothels. The owners were engaged in an activity in which they should not ever have engaged because it is incompatible with living a decent human life.

One difference, then, is that because the ultimate purpose of property rights was to promote human flourishing, there was a limit to what sort of property rights the state was bound to respect. Another difference was that, for writers in the Aristotelian tradition, commutative justice required not simply that both parties consent to a contract, but that the contract be a fair one. There are American cases in which a person acquired property rights in such a way as to endanger the person from whom he acquired them. The most famous are the subsurface mining cases in which coal companies bought the right to take coal from beneath someone else's land even at the risk of undermining surface structures. Laws were then passed that the coal companies could not mine in a way that would endanger or disturb the surface owner. In 1922, in *Pennsylvania Coal Co. v. Mahon,* the Supreme Court held that such a law constituted a taking. In 1987, *Keystone Bituminous Coal Co. Ass'n v. DeBenedictis,* the Supreme Court held it did not. The Keystone Court tried to distinguish *Pennsylvania Coal Co.* on the grounds that, in *Keystone,* the harm to the surface owners was harm to the

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28. 251 U.S. 264 (1920).
29. 265 U.S. 545 (1924).
30. Peñalver, supra note 5, at 236.
31. 260 U.S. 393 (1922).
“environment,” and that, since half the coal could still be taken, there was a partial rather than a total loss of property value. I think a more plausible explanation is that between 1922 and 1987, legal thinking had changed in the United States in a direction in which writers in the Aristotelian tradition would have approved. When someone makes a deal which endangers himself or his property, two suspicions arise. One is that the deal is not really to his own benefit, whatever he may have thought given his financial difficulties at the time. The other suspicion is that the deal was not a fair one: he agreed because he was in financial difficulties or did not understand the risks. Consequently, he may not have been adequately compensated for bearing these risks. As the twentieth century wore on, courts and legislators became more willing to regard these suspicions as grounds for legal intervention as shown by the enactment of safety regulations and the acceptance of the doctrine of unconscionability. In Aristotelian terms, the courts and legislators were more willing to take into account whether a deal contributed to human flourishing and whether it violated commutative justice. In either case, the Aristotelian writers would have seen an instance of wrongdoing by the individual trying to benefit from the deals, not a right to compensation. By the same argument, a California court was correct to allow the state to prevent building a children’s camp on land threatened by flood. The court could rightly believe that the danger of drowning threatened human flourishing more than healthy summer exercise in that particular spot contributed to it, or that fees charged would not be adequate compensation for assuming such a risk and would therefore be unconscionable.

Other American legislation has prohibited activities that are injurious to others’ health or to the use of their land. In Hadacheck v. Sebastian, a Los Angeles ordinance prohibiting the manufacture of bricks within the city limits forced the owner of a brick factory to close his business. In Reinman v. Little Rock, the plaintiffs had to close the livery stable they had operated for many years when a municipal ordinance prohibited such businesses within a specified geographic area. In Miller v. Schoene, the owners of cedar trees affected by cedar rust were forced to destroy the trees lest they infect apple trees. In all these cases, courts upheld the law or ordinance. Most significantly, in Village of Euclid v.

33. Id. at 481-93.
35. 239 U.S. 394 (1915).
37. 276 U.S. 272 (1928).
Ambler Realty Co., the Supreme Court held it was not a taking to zone land so that one land use would not interfere with another.\textsuperscript{38}

In \textit{Euclid}, the Court upheld zoning laws by drawing an analogy to the law of nuisance. The law of nuisance—as we call it—is ancient. In Roman law, the owner of a cheese shop was not allowed to smoke his cheese so as to irritate those who lived upstairs.\textsuperscript{39} In contrast, a downstairs proprietor could operate an ordinary hearth for purposes of heating and cooking.\textsuperscript{40} Unfortunately, to my knowledge, writers in the Aristotelian tradition never expressly applied their theory of commutative justice to the problem raised by the cheese shop. I have argued elsewhere, however, that one can best explain what we call the law of nuisance in terms of commutative justice.\textsuperscript{41} If that is so, we can explain in Aristotelian terms why the American cases, cited above, correctly held that the state need not always pay compensation for a taking of property.

In the fourteenth century, the great medieval jurist Bartolus of Saxoferrato distinguished the cheese shop from the hearth by pointing out that the cheese shop is not a typical use of property, and that the amount of smoke it produces is greater than that of the hearth.\textsuperscript{42} Modern American, German, Swiss and French law have arrived, independently I believe, at a similar solution: A is not liable if her interference with B is normal given the use of land typical in the area; if it is abnormal and grave, either A must stop, or, if her activity is sufficiently valuable, she may continue but she must compensate B.\textsuperscript{43} I believe this solution can be explained in terms of the Aristotelian idea of commutative justice. In the following pages, I sketch my reasons for thinking so.

Imagine a community in which everyone is doing the same thing: for example, a rural community in which every farmer raises animals. The smell of each farmer's animals bothers his neighbors, and in this sense, imposes a cost on them. Nevertheless, because each is deriving the same benefit for himself by imposing the same cost on others, no one is a net gainer or loser. Now suppose a cement factory moves in and produces far more stench than the animals do. The company now derives a benefit

\textsuperscript{38} 272 U.S. 365 (1926).
\textsuperscript{39} \textit{JUSTINIAN, OMNI NOSTRI SACRATISSIMI PRINCIPIS JUSTINIANI IURIS ENUCLEATI EX OMNI VETERE IURE COLLECTI DIGESTORUM SEU PANDECTARII, DIG. 8.5.8.5.}
\textsuperscript{40} \textit{Id. at DIG. 8.5.8.6.}
\textsuperscript{42} \textit{BARTOLUS DE SAXOFERRATO, COMMENTARIA CORPUS IURIS CIVILIS} to DIG. 8.5.8.5 (1615).
\textsuperscript{43} \textit{CIVIL CODE} (Bürgerlichesgesetzbuch) § 906 (F.R.G.). Restatement (Second) of Torts § 831 (1965). Although the rule that one can sometimes continue her use but have to pay compensation was not traditional, it has been adopted in some jurisdictions. \textit{E.g.}, Boomer \textit{v. Atlantic Cement Co.}, 257 N.E.2d 870 (N.Y. 1970). \textit{CIVIL CODE} (Zivilgesetzbuch) § 684 (Switz.); \textit{CIVIL CODE} (Codice civile) § 844 (Italy). On French law, see \textit{FRANÇOIS TERRÉ & PHILIPPE SIMLER, DROIT CIVIL LES BIENS} § 309 (5th ed., 1998).
from producing and selling cement which its neighbors do not share, and it does so by interfering with them in a way that they do not interfere with it. In this sense, the cement company has gained at their expense. As a matter of commutative justice, it should not be allowed to do so.

That example may seem artificially easy because if none of the farmers buys the company's cement, its activity does not benefit any of them. But suppose it did. The argument still holds as long as everyone is not benefited and harmed in the same proportion. Suppose a railroad spur is built into the rural locality with a station and large livestock pens, and the noise of the trains and livestock awaiting shipment bothers the farmers who live near the tracks. The railroad gains, as do all the farmers who can now ship their produce, but the gain is secured at a disproportionate expense to those who live nearby. Thus, some people gain at the expense of others. As a matter of commutative justice, the railroad should pay compensation. It will then adjust its fares to recover the amount it has paid. In the end, all the farmers will pay for the disturbance in proportion to the use they make of the railroad.

Elsewhere, I have explained why I find that solution more credible than others. If I am right, then there should be no difficulty explaining why the courts were right about the brickyard in Hadacheck, the livery stable in Reinman, the infected trees in Miller, and the zoning laws in Euclid. In all these cases, as with nuisance, the plaintiff was using his land so as to obtain a benefit in which others did not proportionally share by imposing a cost on them which they did not impose on him. The law on takings was preventing a violation of commutative justice.

If this reasoning is correct, we can also see a better way to analyze takings problems than by asking whether the owner has been deprived of a right basic or inherent in property, or one that renders his property valueless, or one that requires him to submit to a permanent physical intrusion.

In Andrus v. Allard, the court upheld environmental regulations intended to prevent the killing of eagles by prohibiting the sale of eagle parts despite the complaints of owners of Native American artifacts containing eagle feathers that their property had been taken. If the test were whether the owner was deprived of a right inherent in property, then we would reach the strange conclusion that the right to sell is not such a right. If the test is whether the owner was deprived of the economic value of his property, then it seems that he was unless one accepts the Court's fanciful argument that he could still charge people to

44. See Gordley, supra note 41.
46. Disingenuously, Justice Brennan terms this right “one strand” in the bundle that constitutes property rights. Id. at 65-66.
come and see artifacts that he could not sell.\textsuperscript{47} A better explanation is that simply by trading in such artifacts, and thereby facilitating poaching, the \textit{Andrus} owners were inflicting a cost on others for which they paid no compensation in order to gain a benefit for themselves in which others did not proportionately share.

Conversely, I believe the Court was wrong to find there was a taking in \textit{Hodel v. Irving}.\textsuperscript{48} There, the Court struck down a statute that prevented Native American owners of small fractional interests in land from passing them on at their death. The problem had arisen because, in the late nineteenth century, Congress had allocated communal reservation land to individual Native Americans to encourage them to assimilate. To prevent “improvident disposition” to white settlers, the owners were not allowed to alienate these lands, and so, over time, the rights to them became divided among an increasingly large number of heirs. In some cases, small parcels were owned by hundreds of people. The cost of administering the shares often exceeded the income derived from them. The Court held that the law constituted a taking because it deprived the owners of a basic or inherent right of property.\textsuperscript{49} It is odd to think, however, that the right to pass property upon one’s death is basic even though, according to \textit{Andrus}, the right to sell it is not. Justice O’Connor came closer to the truth when she noted that the law did promote the interest of the tribe’s members because there would be an “average reciprocity of advantage.”\textsuperscript{50} If my commutative approach is correct, the state can without compensation compel all members of a class to relinquish a right when, on average and in general, the members of the class will gain more through others’ relinquishment of rights than they lose by relinquishing their own, and no one gains markedly at another’s expense. That is just what happens in zoning or nuisance. And commutative justice is not violated.

By this approach, whether \textit{Lucas v. South Carolina Coastal Council}\textsuperscript{51} was correct depends on which of two different rationales actually underlies the rule that prevented the plaintiff from building on his property. Those who defended the rule said that building would cause erosion, and thereby, presumably, damage neighboring property and the environment.\textsuperscript{52} If so, the plaintiff would be obtaining a benefit for himself by imposing a cost on others for which he was not willing to pay and a prohibition would not necessarily require compensation. Others said the goal of the prohibition was to preserve the beauty of the neighborhood

\begin{itemize}
    \item \textsuperscript{47} As Justice Brennan suggests. \textit{Id.} at 66.
    \item \textsuperscript{48} 481 U.S. 704 (1987).
    \item \textsuperscript{49} \textit{Id.} at 716.
    \item \textsuperscript{50} \textit{Id.} at 715.
    \item \textsuperscript{51} 505 U.S. 1003 (1992).
    \item \textsuperscript{52} \textit{Id.} at 1010.
\end{itemize}
and hence serve such goals as the promotion of tourism. That might indeed be a cost to others of building on plaintiff's land, but it sounds like the same cost that everyone else in the neighborhood had imposed by building their own homes. If so, the owner was being deprived of an advantage others had obtained and was being forced to bear a cost in which they did not share—it would be like zoning his land "public park." Commutative justice would be violated, and the prohibition would constitute a taking.

Unfortunately, the court did not concern itself with the extent to which the prohibition was based on either consideration. It found there was a taking because the prohibition rendered the owner's land valueless. That, of course, is unlikely. But it should also be irrelevant. Suppose the only possible use of land was one which would benefit the owner but harm everyone in the vicinity: a noisy gravel pit, a smelly land fill, a breeding ground for tarantulas that could be sold to etymologists. The law of nuisance would protect the neighbors either by an injunction or an award of damages. If we are right, the reason is that, otherwise, there would be a violation of commutative justice.

Just as the test for determining when a taking should be compensated for should not be whether the plaintiff was deprived of an inherent right of property or of the economic value of his property, similarly, it should not be that he has to suffer a permanent occupation of his property. Most of the time, if he must, he will suffer harm, and the harm should be paid for. But he need not. In Loretto v. Teleprompter Manhattan CATV Corp., the Court held that regulations that result in the permanent physical occupation of one's property always constitute a taking. There, the property owner successfully contested a regulation that allowed the local cable franchise to install equipment on her property. So far as one can tell, the presence of the cable imposed no cost on her at all. What should matter, if the Aristotelian approach is correct, is whether she was asked to assume a cost for the benefit of others. If not, there was no violation of commutative justice. As Hugo Grotius pointed out in the seventeenth century, the owner of property could not complain of an injustice if another's use of his property did not interfere with him in any way. He called this the right of innocent use.

Finally, we can see that if the commutative justice approach we have taken is correct, so is Professor Peñalver's main point: it should not matter if we are concerned with land or personal property. As we have

53. Id.
54. Id. at 1015, 1027.
55. 458 U.S. 419 (1982).
56. Id. at 441.
57. GROTIIUS, supra note 12, at II.ii.11.
seen, the same analysis that applies to brick factories and livery stables should apply to alcohol and eagle feathers.

Professor Peñaalver encourages us to look forward beyond our current solutions and our conflicting cases. But to do so it may be best to look backward to the theories of the jurists who first formulated the principle against uncompensated takings that we are trying to interpret.