Nos. 24-757, 24-754

**In The**
**Supreme Court of the United States**

THE GYM 24/7 FITNESS, LLC,
*Petitioner*,
v.
STATE OF MICHIGAN,
*Respondent*.

MOUNT CLEMENS RECREATIONAL BOWL, INC., ET AL.,
*Petitioners*,
v.
ELIZABETH HERTEL, ETC., ET AL.,
*Respondents*.

On Petitions for Writs of Certiorari
to the Michigan Court of Appeals

# Amici Curiae Brief of National Federation of Independent Business (NFIB) Small Business Legal Center, Inc. and Owners Counsel of America Supporting Petitioners

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## INTERESTS OF AMICI CURIAE

**The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center)** is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association, representing members' interests in Washington, D.C. and all 50 states. NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.[1]

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses. On property rights specifically, the NFIB Legal Center has been involved in many of this Court's recent cases, including *Sheetz v. County of El Dorado*, 601 U.S. 267 (2024); *Tyler v. Hennepin County,* 598 U.S. 631 (2023); *Sackett v. EPA*, 598 U.S. 651 (2023); *Wilkins v. United States*, 598 U.S. 152 (2023); *Pakdel v. San Francisco*, 594 U.S. 474 (2021); and *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021).

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[1] Pursuant to Rule 37.6, the NFIB Legal Center and Owners Counsel of America state that no counsel for any party has authored this brief in whole or in part and no person other than the amici has made any monetary contribution to this brief's preparation or submission. The parties were timely notified.

**Owners' Counsel of America (OCA)** is an invitation-only national network of the most experienced eminent domain and property rights attorneys. They have joined together to advance, preserve and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* James W. Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights (2d ed. 1998). As the lawyers on the front lines of property law and property rights, OCA brings unique perspective to this case. OCA is a non-profit 501(c)(6) organization sustained solely by its members. Only one member lawyer is admitted from each state. OCA seeks to use its members' combined knowledge and experience as a resource in the defense of private property ownership, and OCA member attorneys have been involved in landmark property law cases in nearly every jurisdiction nationwide. Additionally, OCA members and their firms have been counsel for a party or *amicus* in many of the property cases this Court has considered in the past forty years, including most recently *Sheetz v. County of El Dorado*, 601 U.S. 267 (2024); *Tyler v. Hennepin County,* 598 U.S. 631 (2023); *Sackett v. EPA*, 598 U.S. 651 (2023); *Wilkins v. United States*, 598 U.S. 152 (2023); *Pakdel v. San Francisco* 594 U.S. 474 (2021); and *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021). OCA members have also authored and edited treatises, books, and law review articles on property law and property rights.

## INTRODUCTION

The law regarding regulatory takings of property under the 5th Amendment is in disarray for one reason: the standards for determining when a taking has occurred remain obscure notwithstanding more than 40 years of litigation and multiple Court opinions.

Certiorari is needed to make intelligible the standard by which to determine whether government regulations have taken private property for public use under the 5th Amendment.

More than three decades ago, Justice Stevens complained:

> "Even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence." *Nollan v. Cal. Coastal Commn.*, 483 U.S. 825, 866 (1987) (dissenting opinion).

After 30 more years of litigation and numerous opinions from this Court, the situation has not improved, leading Justice Thomas to lament:

> "If there is no such thing as a regulatory taking, we should say so. And if there is, we should make clear when one occurs." *Bridge Aina Le'a v. Hawaii Land Use Commission*, 141 S.Ct. 731, 732 (2021) (Thomas, J, dissenting from denial of certiorari).

Rather than establishing clear bright-line rules, the Court has held that—for almost all cases—the required process to determine whether a regulation constitutes a taking of property is the "*ad hoc* factual" analysis described in *Penn Central Transp.*

*Co. v. City of New York*, 438 U.S. 104 (1978) although, as the Court conceded after the first 27 years of watching lower courts struggle to apply the *Penn Central* mode of analysis, "each [of the *Penn Central* factors] has given rise to vexing subsidiary questions . . . ." *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 539 (2005).

This case provides the Court with the opportunity to reexamine and revise the standards for 5th Amendment takings evaluation. Amici urge the Court to take the opportunity and rationalize this confused area of constitutional law.

In a nutshell, it is time for the Court to acknowledge that its "polestar" *Penn Central* case is fatally flawed.

## SUMMARY OF ARGUMENT

For the good of the judicial system, and the citizens who rely on it to protect their rights and resolve their disputes, this Court needs to do with *Penn Central* what it did with *Williamson County Reg. Plan. Agency v. Hamilton Bank*, 473 U.S. 172 (1985).

In *Williamson County*, the Court held that a regulatory taking case was not ripe for litigation in federal court until the property owner had first filed—and lost—the same case under parallel state law in state court. It took 34 years for the Court to acknowledge the harm done by the application of preclusion rules through *Williamson County* state court litigation, but the Court finally held in *Knick v. Township of Scott*, 588 U.S. 180, 203 (2019), in

unusually caustic language, that *Williamson County* was "not just wrong" but "exceptionally ill-founded" and "unworkable in practice."

The Court should similarly admit that *Penn Central* was wrong, and its test has led to chaos regarding regulatory takings.

In the 40-plus years that the courts have been deciding regulatory takings cases, they have failed to come up with a coherent legal standard. The hash that has become regulatory takings law serves no one, and the debris left behind creates only confusion. *Penn Central* is neither law nor helpful. It is no more than an aspirational hope that lower courts will evaluate each case on its own merits. That has allowed courts to do whatever they please. They are tethered to no actual rules or standards nor, as *Bridge Aina Le'a* showed, do the appellate courts even feel bound by the 7th Amendment's anti-reexamination rule regarding jury factual determinations.

It is time for the Court to retire the *Penn Central* confusion and focus the inquiry, as the Court attempted to do in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), on the impact of the questioned regulation on the property owner's ability to ***use*** the property and obtain a beneficial return on investment.

## ARGUMENT

### I
### There is Conflict and Confusion on How to Apply *Penn Central*—the Case This Court Calls its "Polestar" in this Field.

It would be easy to cite treatises and law review articles attesting to the absence of standards in regulatory takings law and the urgent need for guidance from this Court. (One need look no further than the Petition for Certiorari in this case for such a collection.)

Easy, but not necessary. The Court's own opinions make the point, and decisions like the one below show the need for pragmatic and comprehensive guidance. We can hardly improve on this Court's words to illustrate the problem. In essence, the Court has conceded that it has provided no guidance but continued in that manner anyway:

> "In Justice Holmes' well-known, if less than self-defining, formulation, 'while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking.'" *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).
>
> "The rub, of course, has been—and remains—how to discern how far is 'too far.'" *Lingle,* 544 U.S. at 538.
>
> "[W]e have 'generally eschewed' any set formula for determining how far is too far, choosing instead to engage in 'essentially

> ad hoc factual inquiries.'" *Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan. Agency*, 535 U.S. 302, 326 (2002) (quoting *Lucas*, 438 U.S. at 1015 which, in turn, quoted *Penn Central*, 438 U.S. at 124).
>
> "Since *Mahon*, we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking." *Palazzolo*, 533 U.S. at 617.
>
> "Indeed, we still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings, preferring to examine 'a number of factors' rather than a simple 'mathematically precise' formula." *Tahoe-Sierra*, 535 U.S. at 326.
>
> "Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings." *Tahoe-Sierra,* 535 U.S. at 326, n. 23 (quoting with approval from *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring)).

As the Court's words above recognized, the "rule" created in *Penn Central* provides little concrete guidance to either those judges who must apply it or the citizens who live under it. One would have hoped that four decades of litigation would have developed meaningful guidelines.

And, yet, we have none.[2] As Justice Thomas perfectly described the *Penn Central* test in his *Bridge Aina Le'a* dissent: "A know-it-when-you-see-it test is no good if one court sees it and another does not." 141 S.Ct. at 732. What, for example, can one make of the courts applying the identical Supreme Court precepts and concluding that a diminution in value of 83.4% is not sufficient to establish a taking while a diminution of 73.1% suffices? *Compare Bridge Aina Le'a, LLC v. Land Use Comm.*, 950 F.3d 610, 632 (9th Cir 2020) (83.4% diminution held no taking) *with Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 44 (1999) (73.1% diminution held a taking).

The blunt fact is that none of the Court's post-*Mahon* opinions—regardless of the author or the side of the philosophical/jurisprudential divide on which the author sat or whether the vote was close or unanimous—improved on the directness and simplicity of the Holmes formulation. That is what led Justice Thomas to say: "If there is no such thing as a regulatory taking, we should say so. And if there is, we should make clear when one occurs." *Aina Le'a*, 141 S. Ct. at 732 (Thomas, J., dissenting from denial of certiorari).

The Court should take this opportunity to provide significant clarity, or replace, the *Penn Central* regulatory takings test. Judges who apply the test sorely need this Court's guidance, and the individuals who can make no sense of the conflicting outcomes need clarity. "Rudimentary justice

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[2] *See generally* Michael M. Berger, *Whither Regulatory Takings?* 51 The Urban Lawyer 171 (2021).

requires that those subject to the law must have the means of knowing what it prescribes." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989).

If the Court continues to believe that the country is better off with no hard and fast rules in this context, then a better solution would be to allow all evidence bearing on the impact of the regulation to be admitted and then considered by a jury, which this Court has called "the bulwark of American liberties." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); *Chauffeurs, Teamsters, etc. v. Terry*, 494 U.S. 558, 565 (1990). The jury could decide whether the government had gone "too far." After all, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), the Court held that juries could decide liability in takings cases brought under 42 U.S.C. §1983. The same should hold for cases brought under the Constitution. (*See* Michael M. Berger, *A Taking is a Taking is a Taking and Juries Know One When They See It*, 39 J. Land Use & Envt'l L. 191, 207-09 (2024).)

## II
## The Playing Field Needs to be Levelled Because Application of the *Penn Central* Test Rarely Results in a Finding of a Taking.

The result of this Court's reluctance to provide guidance is chaos. A prominent text summed up this Court's regulatory takings decisions as belonging to "the gastronomic school of jurisprudence," that is, an area governed by gut feeling in the individual case. 1 Norman Williams, Jr. & John M. Taylor, American Land Planning Law 103 (2003 rev. ed.).

Indeed, scholars from across the ideological spectrum have criticized *Penn Central* because it offers no guidance to anyone.[3] Putting things in graphic perspective, Professor John Echeverria titled his classic article *Is the* Penn Central *Three Factor Test Ready for History's Dustbin?* 52 Land Use L. & Zon. Dig. 3 (2000).

The reason for Professor Echeverria's caustic title was his conclusion that property owners almost never win *Penn Central* cases and any rule that is so one-sided is plainly unworkable. *Id.* at 4.

That conclusion about *Penn Central* has been echoed by others. See (***all emphasis added***) Joseph William Singer, *Justifying Regulatory Takings*, 41 Ohio N.U.L. Rev. 601, 606 (2015) ("it is ***really hard to win*** a regulatory takings claim"); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 Yale L.J. 203, 227 (2004) ("***Whenever*** the Court conducts a *Penn Central* analysis of a state or local regulation, ***the regulation stands***"); Daniel R. Mandelker, *Litigating Land Use Cases in Federal Court:*

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[3] *See*, e.g., Joseph L. Sax, *The Property Rights Sweepstakes: Has Anyone Held the Winning Ticket?*, 34 Vt. L. Rev. 157, 159 (2009) (the *Penn Central* inquiry is an "open-ended, I-(hope)-I-know-it-when-I-see-it approach" to takings adjudication); Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 Penn. St. L. Rev. 601, 602 (2014) ("the [*Penn Central*] doctrine has become a compilation of moving parts that are neither individually coherent nor collectively compatible"); Echeverria, *Dustbin,* 52 Land Use L. & Zon. Dig. at 7 ("the *Penn Central* test . . . is so vague and indeterminate that it invites unprincipled, subjective decision making by the courts").

*A Substantive Due Process Primer*, 55 Real Prop., Trust & Estate L.J. 69, 96-97 (2020) ("a takings claim is ***almost impossible to win***"); Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or A One Strike Rule?* 22 Fed. Cir. B.J. 677 692 (2013) (***only 4 of 45*** cases studied resulted in the property owner prevailing); Mark W. Cordes, *Takings Jurisprudence as Three-Tiered Review*, 20 J. Nat. Resources & Envtl. L. 1, 35 (2006) ("the *Penn* Central factors have ***rarely*** resulted in takings being found").

It is not just practitioners, scholars, and academics that have noticed the uneven results of the *Penn Central* test. The uneven playing field of the *Penn Central* test's application has been recognized by judges too. *District Intown Properties Ltd. Partnership v. District of Columbia,* 198 F.3d 874, 886 (D.C. Cir. 1999) (Williams, J., concurring) ("***Few*** regulations will flunk this nearly ***vacuous*** test"). As Judge Bibas put it recently, "regulatory-takings doctrine is a mess." *Nekrilov v. City of Jersey City*, 45 F.4th 662, 681 (3d Cir. 2022) (concurring opinion). As the late Judge James Oakes of the Second Circuit put it, "[*Penn Central*] jurisprudence permits purely subjective results, with the conflicting precedents simply available as makeweights that may fit pre-existing value judgments . . . ." James L. Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 Wash. L. Rev. 583, 613 (1981).

It simply cannot be true that virtually no regulatory taking case has merit. The problem is with the way such regulations are evaluated. In sum, it is time for this Court to reconsider its

vague "polestar" *Penn Central* opinion and make the parameters clear to lower courts and litigants. The current judicial approach de facto transforms American common law—to borrow Justice Frankfurter's tart imagery—into the law of "a kadi sitting under a tree" and dispensing idiosyncratic justice by the seat of his pantaloons, "according to considerations of individual expediency". *Terminiello v. City of Chicago*, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting).

## III
## The Key to Property Ownership is the Right to Make Productive *Use*.

Regularly, since *Penn Central*, this Court has repeated that, if a regulation deprives property owners of the "economically viable use" or "economically beneficial or productive use" of their property, a taking has occurred. (The first formulation appeared in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); the latter refinement appeared in *Lucas*, 505 U.S. at 1015.)[4]

It should not require reference to a dictionary to conclude that "economically viable, beneficial, or productive use" means a use that is capable of producing a present (or at least foreseeable or

[4] This Court has repeated these terms almost as a mantra in virtually every regulatory taking case it has reviewed. *See, e.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 14 (1984).

potential) income.[5] A "use" that engenders a loss (or lacks the possibility of producing a gain) cannot be considered to be "economically viable, beneficial, or productive."[6] If anything, such a use is economically moribund.

The legal analysis in *Lucas* employs the term "use" (generally in conjunction with "economically beneficial" or "economically productive") 37 times.[7]

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[5] *See Kirby,* 467 U.S. at 14 ("curtailment" of the "ability to derive income"); *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 271 (11th Cir. 1987) ("potential for producing income or an expected profit"); *Nemmers v. City of Dubuque*, 764 F.2d 502, 504-05 (8th Cir. 1985) (return on investment); *Ranch 57 v. City of Yuma*, 731 P.2d 113, 122 (Ariz. 1986) ("a use is not reasonable unless the landowner can make it economically productive").

[6] *Bowles v. United States*, 31 Fed. Cl. 37, 48-49 (1994) (no economically viable use where carrying and operating costs associated with proposed use would result in economic loss); *Kempf v. City of Iowa City*, 402 N.W.2d 393, 398 (Iowa 1987) ("the cash flow income would not retire the debt"); *Wheeler v. City Pleasant Grove*, 833 F.2d 267, 271 (11th Cir. 1987) ("an injury to the property's potential for producing income or an expected profit").

[7] E.g., *Lucas*, 505 U.S. at 1016 ("economically viable use"); 1016, n. 6 ("economically viable use"; "economically beneficial use"); 1016, n. 7 ("economically feasible use"; "economically beneficial use"); 1017 ("beneficial use"; "productive or economically beneficial use"); 1018 ("economically beneficial uses"; "economically beneficial or productive options for its use"); 1019 ("developmental uses"; economically beneficial uses"; "economically idle"); 1019, n. 8 ("economically beneficial use"; "productive use"); 1027 ("economically beneficial use"); 1028 ("economically valuable use"); 1029 ("economically beneficial use"); 1030 ("economically productive or beneficial uses").

It does not equate a deprivation of ***use*** with elimination of ***value***. The Court understood the difference.

Indeed, this Court has repeatedly said that the proper analysis must include the ability to profit from the use. In *Penn Central*, for example, this Court emphasized that the regulations permitted Penn Central "not only to *profit* from the Terminal, but also to obtain a 'reasonable return' on its investment" (438 U.S. at 136; emphasis added), which is what saved the regulation from being a taking. In *Williamson County*, 473 U.S. at 186, this Court said that one indicator that a taking had occurred was if the regulation interfered with the owner's "investment-backed *profit* expectations." (Emphasis added.) In *Keystone*, 480 U.S. at 485, 496, the Court upheld Pennsylvania's coal mining restrictions because there was no indication that they inhibited the mine operators' ability to "profit" from their properties. And, in *Lucas* the Court approvingly quoted Lord Coke's famous observation, "for what is the land but the profits thereof[?]" 505 U.S. at 1017.

*Lucas* seemed clear in its conclusion that elimination of economically beneficial or productive ***use*** was the key to the takings issue. However, courts like those below have converted that standard into ***value***, rather than use. That allows them to hold that *any* residual value (or value that "returns" after the prohibition is lifted) eliminates the possibility of takings liability. Purporting to rely on *Tahoe Sierra*, the court below held that no categorical regulatory taking could occur because "[t]he property clearly still had value, even if no

revenue or profit was generated during the closure." App. 32a. Put bluntly, this is illogical.

First, if *Tahoe Sierra* means that no nonpermanent taking can rise to the level of a categorical taking because the economic value of the property returns at the conclusion of the taking, it is wrong and should be overruled or clarified as Petitioners suggest. As the *Tahoe Sierra* dissent recognized, this legal rule could allow the government to "repeatedly extend[] the 'temporary' prohibition" to avoid paying compensation. 535 U.S. at 347 (Rehnquist, C.J, dissenting, joined by Scalia and Thomas, JJ.). Such a distinction between permanent and temporary is indeed "tenuous" and ripe for abuse. *Id.*

Second, as the Michigan Supreme Court dissent recognized, this case is not *Tahoe Sierra*. That case involved a property development moratorium. 535 U.S. at 306. This case involves commercial businesses that survive on day-to-day and week-to-week revenue from being open and serving the community. It is one thing to say that a nonpermanent prohibition on developing land may not be a categorical taking, because the land and ownership interest in developing the land remains once the prohibition is lifted. It is entirely different to say that government action forcing commercial businesses to close for months on end is not a categorical taking because the land upon which the commercial business sits still holds some value. *See* App. 46a ("The property at issue in *Tahoe-Sierra* was land that had been subject to a development moratorium. Once the moratorium ended, the land could be developed. Here, by contrast, the effects of

the 'temporary' government actions might be severe and permanent for many businesses"); *see also* Jeffrey Manns, *Economic Liberty Takings*, 29 Geo. Mason L. Rev. 73, 142 (2021) ("[T]he context in *Tahoe-Sierra* is distinguishable from shutdowns. The developers in *Tahoe-Sierra* could resume plans for an undeveloped parcel once the moratorium was lifted, while during the pandemic, businesses had existing operations disrupted in many ways that may have short- and long-run financial effects. The severity and potentially lasting consequences of the 'temporary' shutdowns are very different than a temporal delay in development.").

Third, if upheld, this principle could allow the government to shut down a small business for years but avoid a categorical regulatory taking because "the property clearly still had value" upon reopening, "even if no revenue or profit was generated during the closure." Small businesses survive due to the revenue and profit from being open, not the inherent value of the land or property they hold. Some may not even own the land upon which they operate, instead paying rent to a landlord.

When it comes to commercial businesses, like gyms, bowling alleys, or restaurants, shutting them down does deprive them of "all economically beneficial uses" of their property. *Lucas*, 505 U.S. at 1019. As one commentator has suggested, applying the *Lucas* categorical takings approach is appropriate because "the shutdown orders that prevent business owners and customers from operating are constructively the equivalent of a physical taking for the duration of the regulation."

Manns, 29 Geo. Mason L. Rev. at 141. Thus, "[t]reating this type of temporary taking as a *per se* taking under the *Lucas* rule would better capture the impact on businesses that have no alternative way of operating during shutdowns." *Id.*

Whether a week or a year, small business cannot recover the lost profit from the time it was forced to close. Even short closures can have "severe and permanent" effects on businesses. App. 46a. And what about the gyms that couldn't survive the repeated extensions of the executive order shutting them down? *See* Kaitee Anderson Fernandez, *How Many Gyms Survived the Devastation that was 2020?* Health & Fitness Assn. (Aug 5, 2021), https://tinyurl.com/27sp68ct (noting nearly half of all industry jobs were lost, 22% of gyms closed, and the industry lost over $29 billion in revenue). What property value remained for them?

In sum, it is not the land, but instead, the ability to be open and serve the community that provides entities like gyms, bowling alleys, and restaurants an economically beneficial use of their property. That is the stick taken from their property rights bundle. As shown in the Petition for Certiorari, the Court needs to return its focus in regulatory takings cases to impact on use, rather than vague examinations of value. Only that return to basics will provide the protection of property owners intended by the 5th Amendment.

## IV
## Even Legitimate Government Actions Can Require Compensation When They Impress Private Property into Public Service.

The government defended itself below by claiming that its focus on protecting the public was legitimate. The question, however, is whether legitimacy should count for anything in this constitutional analysis? In a word, no. The Michigan courts allowed the third of the *Penn Central* factors (the character of the government action) to overwhelm the factors measuring economic impact on the property owner. That needs stern correction.

The decisions below proceed as though recognition of a legitimate governmental *goal* validates whatever *solution* is chosen. Not relevant. Determination of a legitimate governmental objective is the first, not the last, step. The law distinguishes between means and ends, and the means chosen to achieve the objective must survive Constitutional scrutiny the same as the ends.

Legitimate goals are constitutionally irrelevant, although they may be legally and morally necessary. For the proper exercise of any governmental power, the underpinning of such a beneficent purpose must exist. That much was settled no later than 1922, when this Court examined a statute designed to stop land subsidence caused by underground coal mining and concluded that the prerequisites for exercise of *both* police power *and* eminent domain were present:

> "We assume, *of course*, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume

> that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall."[8]

More recent authority echoes that conclusion: "the Takings Clause *presupposes* that the government has acted in pursuit of a valid public purpose." *Lingle*, 544 U.S. at 543 (emphasis added).

After determining that government action was done to achieve a legitimate goal, the means chosen must be constitutionally examined to ensure that private rights have not been violated. Governmental power is not permitted to run roughshod over the constitutionally protected rights of individuals. That is what the Court was talking about when it concluded in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County* that:

> "many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities and the Just Compensation Clause of the Fifth

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[8] *Pennsylvania Coal*, 260 U.S. at 416 (emphasis added). *See also Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1571 (Fed. Cir. 1994): "It is necessary that the Government act in a good cause, but it is not sufficient. The takings clause already assumes the Government is acting in the public interest . . . . ." More than that, it assumes that the Government is acting pursuant to lawful authority. If not, the action is *ultra vires* and void. Compare *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (unlawful wartime seizure voided) with *United States v. Peewee Coal Co.*, 341 U.S. 114 (1951) (compensation mandatory after lawful wartime seizure).

> Amendment is one of them." 482 U.S. 304, 321 (1987).

*Pennsylvania Coal* was merely one in a long line of decisions in which this Court—speaking through various voices along its ideological spectrum (*Pennsylvania Coal* having been authored for the Court by Justice Holmes)—explained to regulatory agencies that the general legal propriety of their actions and the need to pay compensation under the Fifth Amendment present different questions, and the need for the latter is not obviated by the legitimacy of the former.

The Michigan courts, however, seem not to have gotten the message. Evidently believing that the government was pursuing the public good, those courts granted summary judgment. Demonstrating the error of that theory, the dissenting opinion in *Pennsylvania Coal* had argued the same, saying that a "restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking."[9] Eight Justices rejected that proposition.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, New York's highest court upheld a statute as a valid police power exercise and dismissed an action seeking compensation. This Court reversed:

> "The Court of Appeals determined that § 828 serves [a] legitimate public purpose . . . and thus is within the State's police power. We have no reason to question that determination. *It is a separate question,*

[9] 260 U.S. at 417 (Brandeis, J. [Holmes' usual constitutional soulmate], dissenting).

> *however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid*."[10]

Similarly, in *Kaiser Aetna v. United States*, the Corps of Engineers decreed that a private marina be opened to public use without compensation. This Court reversed, explaining the relationship between justifiable regulatory actions and the just compensation guarantee:

> "In light of its expansive authority under the Commerce Clause, there is *no question* but that Congress *could* assure the public a free right of access to the Hawaii Kai Marina if it so chose. *Whether a statute or regulation that went so far amounted to a taking, however, is an entirely separate question*."[11]

Or, as the Court put it in *Nollan*:

> "That is simply an expression of the Commission's belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast. The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its 'comprehensive program,' if it wishes, by

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[10] 458 U.S. 419, 425 (1982) (Marshall, J.) (emphasis added).

[11] 444 U.S. 164, 174 (1979) (Rehnquist, J.) (emphasis added).

> using its power of eminent domain for this 'public purpose.'"[12]

That is why the Court concluded in *First English* that the Fifth Amendment was designed "to secure *compensation* in the event of *otherwise proper interference* amounting to a taking."[13] This bedrock principle of the law of constitutional remedies goes back to the unanimous decision in *Hurley v. Kincaid*,[14] where the Court held that the remedy for a taking resulting from valid governmental action is just compensation, not judicial second-guessing of governmental policies and decisions through disruptive injunctions.[15]

In a similar vein are cases like *Preseault v. I.C.C.*,[16] *Ruckelshaus v. Monsanto Co.*,[17] *Dames & Moore v. Regan*,[18] and the *Regional Rail Reorganization Act Cases*.[19] In each, the Court faced the claim that Congress, in pursuit of legitimate objectives, had taken private property without just

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[12] 483 U.S. at 841 (Scalia, J.).

[13] 482 U.S. at 315 (Rehnquist, C.J.) (first emphasis, the Court's; second emphasis added).

[14] 285 U.S. 95 (1932) (Brandeis, J.).

[15] Justice Brandeis' opinion for the Court in *Hurley* shows his acceptance of the Court's holding in *Mahon* that takings require compensation. Justice Brandeis had been the lone dissenter in the latter case, expressing the belief (abandoned in *Hurley*) that valid regulation does not require compensation.

[16] 494 U.S. 1 (1990) (Brennan, J.).

[17] 467 U.S. 986 (1984) (Blackmun, J.).

[18] 453 U.S. 654 (1981) (Rehnquist, J.).

[19] *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102 (1974) (Brennan, J.).

compensation. The goal in each was legitimate (respectively, the creation of recreational trails over abandoned railroad rights-of-way, obtaining expert input prior to licensing pesticides, dealing with compensation in the aftermath of the Iranian hostage crisis, and widespread railroad bankruptcy). Nonetheless, the Court did not permit those legitimate legislative goals to trump the constitutional need for compensation when private property was taken in the process. In each, the Court directed the property owners to the Court of Federal Claims[20] to determine whether these exercises of legislative power, *though substantively legitimate*, nonetheless required compensation.[21]

> "In such cases the characteristic feature is the defendant's use of *rightful* . . . regulatory rights to control and prevent exercise of [private] ownership rights the

[20] When litigation is brought in that court, the Court of Appeals for the Federal Circuit has consistently affirmed judgments making the United States liable for takings that precluded development to further proper environmental goals. *E.g.*, *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1991) (surface coal mining); *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994) (limestone mining); *Creppel v. United States*, 41 F.3d. 627 (Fed. Cir. 1994) (dredging and filling wetlands).

[21] To this end, the 5th Amendment's just compensation guarantee has been held self-executing. The availability of compensation validates and constitutionalizes the otherwise wrongful government action. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 714-15 (1999) (Kennedy, J.); *United States v. Clarke*, 445 U.S. 253, 257 (1980) (Rehnquist, J.).

> defendant is unwilling to purchase and pay for."[22]

In sum, for a taking to occur, it matters not whether the regulators acted in good or bad faith, or for good or bad reasons. What matters is the impact of their acts, not the purity *vel non* of their motives. Indeed, if their motives are benign—or done for the best of reasons—that only fortifies the need for compensation required by the Just Compensation guaranty.[23]

> "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."[24]

Thus, it is not enough to conclude that it is a good thing to protect the populace from disease. As a

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[22] *Florida Rock Indus., Inc. v. U.S.*, 791 F.2d 893, 899 (Fed. Cir. 1986) (quoting with approval; emphasis the Court's). *See also Whitney Benefits*, 926 F.2d at 1177; *Skaw v. United States*, 740 F.2d 932, 939 (Fed. Cir. 1984).

[23] *See Hughes v. State of Washington*, 389 U.S. 290, 298 (1967): "[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." (Stewart, J., concurring) (emphasis added).

[24] *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (footnote omitted). *See also Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

matter of Constitutional policy, severe invasions of protected property rights cannot occur unless compensation is paid. Such radical change cannot be accomplished with the stroke of a word processor. If Michigan believes that the idea is otherwise worthwhile then, as this Court put it in *Nollan*, "it must pay for it." 483 U.S. at 842.

## CONCLUSION

It should be apparent that this Court's desire to refrain from establishing overly firm rules has not served well. That desire leads to the other extreme and allows so much flexibility to lower courts that this constitutional field is left with no real standards at all. The result is a continuous roiling of the litigational waters, with a steady stream of academic criticism and certiorari petitions which should be unnecessary. Certiorari should be granted, the result overturned, and the law rationalized.

Respectfully Submitted,

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