Notre Dame Law Review

Volume 81 | Issue 1 Article 1

11-1-2005

Oh Lord, Please Don't Let Me Be Misunderstood: Rediscovering the Mathews v. Eldridge and Penn Central Frameworks

Gary Lawson

Katharine Ferguson

Gullermo A. Montero

ARTICLES

"OH LORD, PLEASE DON'T LET ME BE MISUNDERSTOOD!"[1]: REDISCOVERING THE *MATHEWS V. ELDRIDGE* AND *PENN CENTRAL* FRAMEWORKS

*Gary Lawson**
Katharine Ferguson†
Guillermo A. Montero‡

* Professor, Boston University School of Law. J.D. 1983, Yale Law School. I am grateful to the Abraham and Lillian Benton Fund for support.

This Article is the synthesis of three related projects: Professor Lawson's long-standing musings and recent research about the origins and nature of the *Mathews* and *Penn Central* frameworks; a seminar paper written by Katie Ferguson comparing and contrasting the three-factor tests that have come to be associated with *Mathews* and *Penn Central*; and a seminar paper written by Guillermo Montero that sought to reformulate and defend the *Penn Central* framework against some of the most extreme criticisms that have been brought against it. Although this Article addresses topics well beyond the scope of Mr. Montero's paper, Ms. Ferguson and I acknowledge that his paper was the true genesis of the enterprise. Almost certainly, this Article would not have been conceived without his effort.

† J.D. 2005, Boston University School of Law.

‡ Honors Attorney, United States Department of Justice, Environment & Natural Resources Division. J.D. 2004, Boston University School of Law. The views represented here are solely those of the authors, not of the Department of Justice or any other agency or institution.

1 THE ANIMALS, *Don't Let Me Be Misunderstood, on* ANIMAL TRACKS (Columbia Records 1965).

INTRODUCTION

One of the most perplexing questions in modern constitutional law is when, if ever, regulations of property that do not formally transfer title to the government result in the property being "taken for public use, without just compensation" in violation of the Fifth Amendment.[2] In 1978, in *Penn Central Transportation Co. v. City of New York*,[3] the Supreme Court set forth a framework for inquiry concerning such so-called regulatory takings that considers "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . . [and] the character of the governmental action."[4] A

2 U.S. CONST. amend. V. More precisely, the Fifth Amendment *confirms* and *clarifies* that the federal government may not take private property without just compensation. The basic prohibition against uncompensated federal takings is actually found in the so-called Necessary and Proper Clause—or the Sweeping Clause, as it was known to the founding generation—which permits Congress to authorize takings of private property if, but only if, such action is "necessary and proper for carrying into Execution" federal powers. *Id.* art. I, § 8, cl. 18. A taking without just compensation would not be "proper." The Sweeping Clause both authorizes and limits the exercise of a federal eminent domain power. *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 270 (1993); Gary Lawson & Guy Seidman, *Taking Notes: Subpoenas and Just Compensation*, 66 U. CHI. L. REV. 1081, 1086–87 (1999). The Fifth Amendment amplifies and emphasizes these limits on federal takings but does not create them.

For more than a century, of course, the federal courts have held that Section 1 of the Fourteenth Amendment imposes precisely the same limits on *state* takings of property as the Takings Clause and Sweeping Clause place on *federal* takings. *See* Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 239 (1897). In this Article, we accept that conclusion without endorsing it.

3 438 U.S. 104 (1978).

4 *Id.* at 124.

year later, in *Kaiser Aetna v. United States*,[5] the Court recast this framework into a three-factor analysis that distinctly considers "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action."[6]

Although the *Penn Central* formulation, as recast by *Kaiser Aetna*, has dominated discussion of takings law for a quarter of a century and continues to serve as the canonical standard for regulatory takings analysis,[7] virtually everyone agrees that it serves its function badly. Some writers may applaud the general pattern of results that emerges from the *Penn Central* framework, but the framework itself is almost universally decried as hopelessly vague, impossible to apply in a consistent fashion, and an invitation to judicial subjectivity.[8] This disdain for *Penn Central* unites the strangest of bedfellows: Gideon Kanner, a long-time champion of property rights, and John Echeverria, an equally dedicated champion of government regulation, have criticized the *Penn Central* framework in strikingly similar terms.[9] Professor

---

5 444 U.S. 164 (1979).

6 *Id.* at 175.

7 *See, e.g.*, Lingle v. Chevron U.S.A. Inc., 125 S. Ct. 2074, 2081–82 (2005); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321 (2002); *Looking Back on* Penn Central*: A Panel Discussion with the Supreme Court Litigators*, 15 FORDHAM ENVTL. L. REV. 287, 287 (2004) [hereinafter *Looking Back*] ("*Penn Central*... has become the lodestar of the Court's takings analysis. As people have found in recent years, woe to the advocate who stands before the Court and tries to suggest a departure from the *Penn Central* test." (quoting Richard Lazarus)).

8 For a compendium of jurisprudential criticisms of the *Penn Central* framework, see Gideon Kanner, *Making Laws and Sausages: A Quarter Century Retrospective on* Penn Central Transportatoin Co. v. City of New York, 13 WM. & MARY BILL RTS. J. 653, 664–66 (2005); Mark R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 97 n.2 (2002). *Penn Central*'s few defenders praise this very vagueness as an appropriate judicial response to the competing human values at stake in regulatory takings cases. *See* F. Patrick Hubbard, Palazzolo, Lucas *and* Penn Central*: The Need for Pragmatism, Symbolism, and Ad Hoc Balancing*, 80 NEB. L. REV. 465, 517–18 (2001); Poirier, *supra*, at 100–02.

9 *Compare* Gideon Kanner, *"Landmark Justice" or "Economic Lunacy"? A Quarter Century Retrospective on* Penn Central (decrying *Penn Central*'s "questionable provenance, destabilizing influence on the law, dubious status as precedent, and its substantive shortcomings"), *in* INVERSE CONDEMNATION AND RELATED GOVERNMENT LIABILITY 379, 381–82 (ALI-ABA Course of Study, Apr. 22–24, 2004), *available at* WL SJ052 ALI-ABA 379, *with* John D. Echeverria, *Is the* Penn Central *Three-Factor-Test Ready for History's Dustbin?*, 52 LAND USE L. & ZONING DIG. 3, 11 (2000) (declaring that the *Penn Central* framework "is not supported by current Supreme Court precedent, invites unprincipled judicial decision making, conflicts with the language and original understanding of the takings clause, would confer unjust windfalls in many cases, and

Echeverria has forcefully concluded that "[t]he time has come to deposit the three-factor test [from *Penn Central*] in history's dustbin."[10]

Two years before *Penn Central*, the Supreme Court decided another case involving a three-factor analysis that has generated similar, and similarly voluminous and vociferous, criticisms. In 1976, in *Mathews v. Eldridge*,[11] the Court set forth a three-factor framework for analyzing the constitutional adequacy of procedures under the Due Process Clauses of the Fifth and Fourteenth Amendments.[12] The due process inquiry, said the Court,

> generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[13]

This three-factor framework dominates procedural due process law in much the same way as, and to much the same extent that, the *Penn Central* three-factor framework dominates the regulatory takings inquiry. And the *Mathews* due process inquiry, like the *Penn Central* inquiry, is routinely assailed as unworkable, subjective, incomplete, and incapable of consistent application.[14] History's dustbin seems to beckon to *Mathews* as invitingly as it does to *Penn Central*.

We worry that the brooms may be coming out too quickly. In our view, many of the criticisms leveled at both *Penn Central* and *Mathews* are misdirected because they are based on profound misunderstandings of the purpose and scope of both opinions. It is embarrassingly easy to demonstrate that the frameworks of *Penn Central* and *Mathews* are dismal failures as tools for making or predicting judicial decisions. Factors can only determine or predict outcomes if they are commensurable, and the simple fact that neither *Penn Central* nor *Mathews* provides (or could ever have provided) a reliable method for rendering

---

creates seemingly insurmountable problems in terms of defining an appropriate remedy").

10 Echeverria, *supra* note 9, at 11; *see also* Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995, 995 (1997) (describing *Penn Central* as an "ill fitting piece[ ] left over from other puzzles long ago forgotten and now deserving abandonment").

11 424 U.S. 319 (1976).

12 U.S. CONST. amend. V; *id.* amend. XIV, § 1.

13 *Mathews*, 424 U.S. at 334–35.

14 *See infra* text accompanying notes 85–87.

commensurable and aggregating the various factors that they identify is enough to prove that those decisions cannot function well as decisionmaking mechanisms. But that does not make the frameworks failures in all possible respects. Frameworks can serve functions other than determining or predicting outcomes.

We do not believe that the Court in *Penn Central* and *Mathews*—and in terms of personnel it was the same Court in both cases—actually thought that it was providing a decisionmaking algorithm for either regulatory takings or due process problems. Rather, we believe that each opinion had the more modest, but nonetheless important, ambition of providing a *framework or structure for discussion* of the issues arising in takings and due process law.

In both takings law and due process law, as the doctrine in each area currently stands, the ultimate touchstone for inquiry is that most indefinable and context-sensitive of concepts: "fairness." There is no algorithm for determining fairness in either context, and it makes no sense to look for one. The most that one can do is to channel the fairness inquiry in a fashion that lends itself to the stylized arguments of an adversarial legal culture. Put simply, one needs to tell lawyers how to write briefs and to tell judges how to write opinions about "fair" treatment of property owners and "fair" procedures. A properly constructed framework—whether consisting of two factors, three factors, or more—can in principle serve that modest but significant function even if it is useless as a tool for making or predicting ultimate decisions.

We are confident that the *Penn Central* and *Mathews* Courts did not have any grander aspirations in mind for these frameworks than this conversation-shaping function. When viewed in that more limited fashion, both opinions make a good deal of doctrinal and jurisprudential sense. Moreover, once the functions of the respective frameworks are understood, it is possible to think about refashioning those frameworks in a way that better achieves their goals. Accordingly, we come neither to bury the *Penn Central* and *Mathews* frameworks nor to praise them, but to clarify them so that they may better serve their true jurisprudential aims.

In Part I, we begin with an analysis of *Mathews*. We situate the *Mathews* due process framework within the larger context of procedural due process law and show that the *Mathews* Court never intended its formulation to do anything other than provide a structure for argument. *Mathews* purported only to explain some of the considerations that had gone into previous judicial determinations concerning procedural fairness and to tell lawyers and judges what kind of language to use when crafting arguments. Indeed, the *Mathews* Court did not

even invent the *Mathews* three-factor framework. The framework was suggested by the Solicitor General's brief in the case on behalf of Secretary Mathews and was directly endorsed by the amicus brief filed on behalf of Eldridge. The *Mathews* framework was thus the creation of professional litigators who were simply trying to understand and express what the Court's prior decisions concerning fundamental procedural fairness required. We do not deny that the Court's formulation of these considerations in *Mathews* was in some respects infelicitous, nor do we deny that subsequent decisions, including subsequent Supreme Court decisions, have misapplied that framework by treating it as a decisionmaking device. But that is not a problem inherent in the *Mathews* framework, which can easily be recast to avoid further misapplications.

In Part II, we use insights drawn from our analysis of *Mathews* to show that the *Penn Central* takings framework serves the same conversation-structuring function as does the *Mathews* inquiry. Again, we do not deny that courts, including the Supreme Court, have often incorrectly treated the *Penn Central* framework as a decisionmaking device, but that is a misapplication of *Penn Central* rather than an inherent feature of the opinion's framework. We also note some intriguing similarities and differences between the *Mathews* and *Penn Central* frameworks that point the way to an appropriate reconstruction of each.

In Part III, we propose a modest reformulation of the *Penn Central* framework as it is currently employed. More precisely, we propose a restoration of the *Penn Central* framework to the form in which it was originally constructed in 1978. The framework that is now routinely attributed to *Penn Central* was not in fact the framework set forth in *Penn Central.* The modern framework comes from *Kaiser Aetna*'s recasting of the *Penn Central* analysis, and we regard that recasting as a giant step backwards in clarity. By splitting off "investment-backed expectations" as an analytical element distinct from the impact of a regulation on the claimant, *Kaiser Aetna* set the law on a path of confusion from which it has not yet recovered. To be sure, the opinion in *Penn Central* was written under serious time pressure[15] and therefore was not as crisp as it could have been about its aims and methods; it is no great surprise that *Penn Central* was subsequently misunderstood. But a return to the *Penn Central* framework as it was initially crafted is doctrinally more sensible than current law. We end with brief concluding remarks.

---

15 *See Looking Back*, *supra* note 7, at 301–02.

One should be very clear about the scope of this project. We emphatically *do not* maintain in this Article that either *Penn Central* or *Mathews* accurately reflects the original meaning of the relevant constitutional provisions or (to the extent that this is a separate inquiry) represents a normatively attractive resolution of the competing interests that operate in their respective domains. We have nothing to say here about criticisms of either doctrine that come from those directions. Our point is only that, *given* the basic contours of the modern doctrines governing regulatory takings and procedural due process, *Penn Central* and *Mathews* may deserve more respect than they usually get in the academy. As a *doctrinal* and *jurisprudential* matter, they simply are not as bad as many people seem to think.

I. REDISCOVERING *MATHEWS V. ELDRIDGE*

Mathews v. Eldridge[16] dominates modern procedural due process law. There are some instances in which due process cases are decided without reference to the *Mathews* framework,[17] but they are self-conscious exceptions to the general rule. Along with *Board of Regents of State Colleges v. Roth*,[18] *Mathews* is arguably one of the two most important procedural due process cases of the modern era.

Mathews, of course, was decided 185 years after ratification of the Fifth Amendment. Whatever *Mathews*'s contribution to the law may have been, the country got along without that contribution for quite some time. Thus, in order to understand *Mathews*'s proper place in the due process firmament, one must understand what happened during those 185 years before it was birthed—and in particular one must understand the unanswered questions about procedural due process law that faced the Supreme Court in 1976.

A. Some Procedural Fundamentals

The Due Process Clauses of the Fifth and Fourteenth Amendments forbid the federal and state governments, respectively, from depriving persons of life, liberty, or property "without due process of law."[19] When governmental deprivations occur, exactly what process of law is due, and from whom?

The Due Process Clauses are paradigmatically checks on executive and judicial conduct, as befitting their origins in Article 39 of the

16 424 U.S. 319.

17 *See, e.g.*, Dusenberry v. United States, 534 U.S. 161 (2002).

18 408 U.S. 564 (1972).

19 U.S. CONST. amend. V; *id.* amend. XIV, § 1.

Magna Carta.[20] The most important function of the Due Process Clauses is to codify the basic idea, known as the *principle of legality*, that executive and judicial deprivations are permissible only when authorized by positive law.[21] Legislatures are not a primary target of the principle of legality; indeed, it is legislative action that generally provides the necessary authorization for executive or judicial deprivations.

But the Due Process Clauses also regulate the procedural *forms* by which deprivations take place, even when those forms are prescribed by legislation. In *Murray's Lessee v. Hoboken Land & Improvement Co.*,[22] the Supreme Court's first decision involving the procedural reach of the Fifth Amendment's Due Process Clause, the Court declared that

> it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process "due process of law," by its mere will.[23]

Thus, if the legislature purported to authorize executive or judicial deprivations without, for example, notice to the affected party, the deprivation's legislative pedigree would not insulate the deprivation from a due process challenge.

So when are procedures—whether crafted by legislatures, executives, or courts—less than what is due? As the Court pointedly observed in *Murray's Lessee* in 1856, "[t]he constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process."[24] Thus, said the Court,

> we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.[25]

---

20 Article 39, the forerunner of the Due Process Clauses, declared in 1215 that "[n]o free man shall be arrested or imprisoned, or disseised or outlawed or exiled or in any way victimised, neither will we attack him or send anyone to attack him, except by the lawful judgment of his peers or by the law of the land." Magna Carta, *reprinted in* RALPH V. TURNER, MAGNA CARTA, app. at 231 (Harry Rothwell, Trans., 2003). The King, in other words, could not act against freemen without prior legal authorization.

21 *See* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 631–32 (3d ed. 2004).

22 59 U.S. (18 How.) 272 (1856).

23 *Id.* at 276.

24 *Id.*

25 *Id.*

Those "settled usages and modes of proceeding," or traditions, afford some clear answers to some easy cases. A criminal defendant can only be permanently deprived of life, liberty, or property after a full-dress trial, complete with a jury if the defendant so wishes.[26] The jury trial, with a neutral judge as the arbiter,[27] represents the highest form of procedural protection against governmental action recognized in the American legal system. At the other extreme, deprivations effected by legislation require only the procedures specified by the Constitution for valid legislative action, such as bicameralism and presentment[28] (or the equivalent formalities under any relevant state constitution); they do not require prior notice, opportunities for hearings, or other procedural devices familiar from the judicial or executive context. The process that is due for a deprivation depends to a considerable extent on the nature of the governmental body that is doing the depriving.

Reference to "settled usages and modes of proceeding," however, does not always provide an easy answer. What happens, for instance, when deprivations take the form neither of validly enacted legislation nor of formal judicial proceedings? Many deprivations occur through administrative actions, ranging from the arrest and detention of criminal suspects to the suspension of licenses to the seizure of property alleged to be contraband. If executive administrators step into the constitutional shoes of judges, they can only effect these deprivations through full-blown judicial trials. If they step into the constitutional shoes of legislators, they can proceed with no procedural formality whatsoever. If they step into the constitutional shoes of neither, then "settled usages and modes of proceeding" may be of little help in figuring out the requirements of due process.

At the beginning of the twentieth century, the Supreme Court rejected both the judicial and the legislative analogies for administrative deprivations. *Londoner v. City and County of Denver*[29] concerned a tax for local improvements assessed by the City of Denver against landowners who supposedly would benefit from the improvements.

---

26 U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI; Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2661 (2004) (Scalia, J., dissenting). For more than a century, this principle has not applied to so-called petty crimes, where the penalty involves fewer than six months imprisonment. *See* Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1971–72 (2004); Jeff E. Butler, Note, *Petty Offenses, Serious Consequences: Multiple Petty Offenses and the Sixth Amendment Right to Jury Trial*, 94 MICH. L. REV. 872 (1995).

27 *See* Tumey v. Ohio, 273 U.S. 510, 522–23 (1927).

28 *See* U.S. CONST. art. I, § 7, cls. 2–3.

29 210 U.S. 373 (1908).

Before the tax was finally assessed, the landowners were allowed to file written objections to the city council's proposed allocation of the costs among the various landowners but had no opportunity to appear in person before the city council.[30] Had the tax been imposed by the Colorado state legislature, there would have been no due process issue, as the Due Process Clauses impose no specific procedural requirements on legislatures. The state legislature could have assessed the tax without notice—and *a fortiori* without a hearing.[31] And had liability equivalent to the tax been the result of a judicial proceeding, the procedures afforded the landowners would obviously have been inadequate.

The Denver city council, however, was neither the state legislature nor a court; it was an administrative body exercising delegated authority from the state legislature. The Supreme Court held that, at least when a relatively small number of persons are affected,[32] such an administrative body does not stand in the place of the legislature for due process purposes,[33] nor does it have to provide all of the procedures required for lawful judicial action.[34] Instead, said the Court, a litigant in the position of the landowners "shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal."[35] The plaintiffs in *Londoner* were not entitled to anything resembling a formal adjudication under the Adminis-

30 *See id.* at 380–81. There were also a number of preliminary steps before the tax was assessed, including a resolution for the work proposed by the Board of Public Works and enactment of an ordinance authorizing the work. No procedures were constitutionally necessary for these preliminary steps because none of them resulted in a deprivation of life, liberty, or property. They were essential parts of a process that would ultimately lead to a deprivation (the tax), but only the deprivation itself constitutionally required procedures. *See id.* at 378–79.

31 *See* Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 709–10 (1884).

32 Seven years after the decision in *Londoner*, the Court held that administrative bodies do in fact step into the constitutional shoes of the legislature when they act in a broad, rule-like fashion. *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo., 239 U.S. 441, 445–46 (1915).

33 *See Londoner*, 210 U.S. at 385–86 ("But where the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing.").

34 *See id.* at 386 ("Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature.").

35 *Id.*

trative Procedure Act,[36] but they were entitled at least to some kind of informal give-and-take, including an opportunity to address the city council in person.[37]

Conspicuously absent from the opinion in *Londoner* was any explanation for *why* that particular procedural package, among the myriad procedural sets that one can imagine, was legally required. One can understand why the Court would not want to treat every administrative body as either a legislature or a court, which would set up a stark feast-or-famine dichotomy between no procedures and a full-dress trial,[38] but one then has to specify where in the vast range between those two poles the procedures in any given case must fall. *Londoner* simply announced its result without providing any principles or guidance for future determinations.

The late nineteenth-century cases that preceded *Londoner* had provided little more explanation for their decisions. One of the Court's earliest post-*Murray's Lessee* pronouncements on due process specifically declined to set forth any broad principles for determining adequate procedures in cases not clearly governed by tradition, on the ground that "there is wisdom, we think, in . . . the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require."[39] Shortly thereafter, the Court explained that "by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected."[40] Evidently, the Court was simply feeling its way in each case to whatever procedures seemed, taking all things into account, fair under the circumstances. Five years after *Londoner*, the Court expressly confirmed that the Due Process Clauses indeed forbid procedures that are "inadequate or manifestly unfair."[41]

Subsequent twentieth-century decisions did not clarify the appropriate standard for procedural adequacy—and indeed strongly rein-

36 *See* 5 U.S.C. §§ 556–557 (2000) (describing the trial-type procedures required for on-the-record federal administrative hearings).

37 Nearly three-quarters of a century later, this kind of informal hearing with an opportunity for face-to-face contact would come to be known as a "*Goss* hearing." *See* Goss v. Lopez, 419 U.S. 565 (1975).

38 Modern administrative law does, at least formally, set up this kind of dichotomy through the Administrative Procedure Act's stark distinction between formal and informal procedural modes. *See* LAWSON, *supra* note 21, at 196–98. Of course, the rise of hybrid rulemaking (and, to a lesser extent, hybrid adjudication) has narrowed somewhat the distance between formal and informal proceedings. *See id.* at 277.

39 Davidson v. City of New Orleans, 96 U.S. 97, 104 (1877).

40 Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 708 (1884).

41 Interstate Commerce Comm'n v. Louisville & Nashville R.R. Co., 227 U.S. 88, 91 (1913).

forced the idea that no such unitary standard is available because the touchstone of procedural adequacy is fairness to the affected parties, which necessarily requires a case-sensitive inquiry. In *Joint Anti-Fascist Refugee Committee v. McGrath*,[42] decided in 1951, a badly splintered five-Justice majority that produced five separate opinions held that the United States Attorney General had not been given power by executive order to designate organizations as Communist without a hearing. Justice Frankfurter penned a long, rambling, and ultimately very influential concurrence that discoursed at considerable length about procedural due process and the "deep-rooted demands of fair play"[43] that it embodies but which ultimately said little of substance about the mechanism through which one ought to resolve procedural disputes.[44] Justice Frankfurter, as with the Justices before him, strongly

42 341 U.S. 123 (1951).

43 *Id.* at 161 (Frankfurter, J., concurring).

44 *See, e.g., id.* at 162–63 (citations omitted).

> The requirement of "due process" is not a fair weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens. But "due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.
>
> . . . .
>
> It may fairly be said that, barring only occasional and temporary lapses, this Court has not sought unduly to confine those who have the responsibility of governing by giving the great concept of due process doctrinaire scope. The Court has responded to the infinite variety and perplexity of the tasks of government by recognizing that what is unfair in one situation may be fair in another. Whether the ex parte procedure to which the petitioners were subjected duly observed "the rudiments of fair play," cannot, therefore, be tested by mere generalities or sentiments abstractly appealing. The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and

resisted any attempt to reduce constitutional procedural adequacy to any set formula or predetermined criteria other than basic fairness.

Ten years later, in *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*,[45] the Court roundly declared that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation," so that "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the precise nature of the private interest that has been affected by the governmental action."[46] The case ultimately turned on whether the plaintiff had been deprived of a constitutionally protected interest at all, so there was no specific discussion of the particular procedures to which she might have been entitled.

In 1970, nearly a decade later, the Court in *Goldberg v. Kelly*[47] held for the first time that deprivation of certain governmental benefits—in this case a form of welfare benefits—had to be *preceded* by highly formalized procedures akin to a formal adjudication.[48] The Court's discussion ranged widely over the plaintiffs' need for continuing receipt of benefits,[49] the government's concerns about policing fraud in the program,[50] and the "capacities and circumstances of those who are to be heard,"[51] but the opinion did not provide any general principles to guide the process of formulating adequate procedures. Rather, *Goldberg*'s procedural mandate was tailored to the Court's perception of the abilities, limitations, and conditions of the terminated recipients, and the Court explicitly noted that "[t]he extent to which procedural due process must be afforded the recipient . . . depends upon whether the recipient's interest in avoiding . . . loss outweighs the governmental interest in summary adjudication."[52] As in *Londoner* more than sixty years before, the Court announced a result without providing much insight into the process by which that result was reached.

---

good accomplished—these are some of the considerations that must enter into the judicial judgment.

Id. (citations omitted).

45 367 U.S. 886 (1961).

46 *Id.* at 895.

47 397 U.S. 254 (1970).

48 *See id.* at 263–64.

49 *See id.* at 264.

50 *See id.* at 265–66.

51 *Id.* at 268–69.

52 *Id.* at 262–63.

Similar considerations were at work in 1972 in *Morrissey v. Brewer*.[53] After holding that parole revocations effected a deprivation of "liberty" within the meaning of the Due Process Clauses,[54] the Court set forth a detailed set of procedures that requires at least six elements for a constitutionally proper hearing.[55] But, as in *Goldberg*, although the Court's discussion of the requirements of due process was quite lengthy,[56] almost all of that discussion simply identified and described the particular procedures that were thought to be required in the case at hand. There was nothing to suggest that any set of general principles or considerations controlled the analysis.

The law of procedural due process thus entered the last quarter of the twentieth century in much the same way that it had left the last quarter of the nineteenth: "by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected."[57] The ultimate inquiry with respect to due process remained, as it had always been, a search for what procedures are fair under the circumstances of each particular case.

There are two very large potential problems with this legal formulation of the requirements of "due process of law": a problem of substance and a problem of form. Substantively, by its nature a "fairness" test for procedural adequacy is difficult to apply and spawns uncertainty. Small differences in facts, including differences in facts about the specific plaintiffs or defendants in particular cases, can make large differences in outcomes, so it is hard to project future decisions from past determinations. There is no way to address this problem, however, without changing the basic terms of the substantive inquiry. Once it is accepted that fairness determines procedural adequacy—and the Court has been very consistent about that conclusion for a century and a half—one simply has to live with a certain degree of unpredictability in those determinations.

---

53 408 U.S. 471 (1972).

54 *Id.* at 481–82.

55 *Id.* at 489 (finding that the minimum requirements of due process in this context "include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole").

56 *See id.* at 483–90.

57 Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 708 (1884).

The formal problem is more pertinent to our story. Assume that everyone understands and accepts that the constitutional due process inquiry focuses on fairness to the parties under the circumstances of each case. Everyone accordingly understands and accepts that application of this principle will be difficult and unpredictable. People still need to be able to formulate arguments. Lawyers have to be able to construct arguments about procedural fairness within the conventions of the adversarial legal system, and judges (and administrators) must be able to write opinions about due process problems that conform to professional norms. Even if the ultimate inquiry in the case involves nothing more substantial than an ultimately subjective, all-things-considered judgment about fairness, the expectations of the legal culture require that advocates and decisionmakers be able to express that judgment in some objectified manner. Due process law requires a common language by which legal actors can talk to each other about fairness.

That is where *Mathews v. Eldridge*[58] entered the scene.

B. The Lingua Franca *of Procedural Law*

George Eldridge was awarded Social Security disability benefits by a hearing examiner in Virginia on June 8, 1968.[59] Nearly four years later, the state agency that administered the Social Security disability program in Virginia determined that Eldridge had medically improved, was able to work, and was no longer entitled to disability benefits. The Federal Bureau of Disability Insurance of the Social Security Administration approved the state decision, and Eldridge's benefits ceased after July 1972.

The state review process involved notice to Eldridge, receipt and review of evidence of Eldridge's medical condition, and several opportunities for Eldridge to provide written material that he considered relevant to his case.[60] Eldridge challenged the constitutional adequacy of these procedures on the ground that, as with the plaintiffs in *Goldberg*, he should have been granted a full evidentiary hearing, com-

58 424 U.S. 319 (1976).

59 The district court opinion stated that benefits were awarded on June 2, 1968. Eldridge v. Weinberger, 361 F. Supp. 520, 521 (W.D. Va. 1973), *aff'd*, 493 F.2d. 1230 (4th Cir. 1974), *rev'd sub nom.* Mathews v. Eldridge, 424 U.S. 319. Eldridge's counsel alleged that the benefits were awarded on June 8, 1968. Brief for the Respondent at 2, *Mathews*, 424 U.S. 319 (No. 74-204), 1975 WL 173411. The Supreme Court deftly avoided the controversy over the correct date. *See Mathews*, 424 U.S. at 323 ("Respondent Eldridge was first awarded benefits in June 1968."). We assume (for no reason that we can defend) that Eldridge's counsel was correct.

60 *See Mathews*, 424 U.S. at 323–24.

plete with oral participation and cross-examination of witnesses, prior to the termination of his benefits.[61] The United States countered that Social Security disability benefits were different enough from benefits under the Aid to Families with Dependent Children program (AFDC) at issue in *Goldberg* (and the Old Age Assistance program at issue in a companion case to *Goldberg*[62]) to require different procedures for termination. In the district court, the government asserted three basic differences between Eldridge's situation and the situation of the plaintiffs in *Goldberg*: AFDC benefits are based on need while Social Security disability benefits are not, so that deprivation of the latter is less serious than deprivation of the former;[63] Social Security disability benefits decisions are based on objective medical evidence rather than the "'rumor and gossip'" that might form the basis for an adverse AFDC decision, so that oral hearings were therefore less useful in disability benefits cases;[64] and the massive Social Security disability system would be seriously disrupted if pre-termination hearings were generally required.[65]

The district court responded in detail to each of the government's proffered distinctions,[66] rejected all of them, and held that a pre-termination evidentiary hearing was constitutionally required. The Fourth Circuit Court of Appeals affirmed in a brief order that simply adopted the reasoning of the district court.[67] The United States sought certiorari, which the Supreme Court granted.

The Solicitor General's merits brief in the Supreme Court acknowledged that the ultimate due process inquiry focused on fairness:

---

61 Everyone agreed that Eldridge's benefits constituted "property" protected by the Fifth Amendment's Due Process Clause. *See id.* at 332.

62 *See* Wheeler v. Montgomery, 397 U.S. 280 (1970).

63 *Weinberger*, 361 F. Supp. at 523 ("It is argued that in the case of welfare recipients 'need' was the legal criterion for benefits . . . . By contrast, according to the Secretary, the legal criterion for Title II disability benefits is whether the beneficiary continues to be 'unable to engage in substantial gainful activity,' which obtains irrespective of need.").

64 *Id.* at 524 ("Defendant next argues that the nature of the evidence involved in the case of a disability recipient ('medical reports of highly probative value') justifies a different due process standard than in the case of welfare recipients where 'rumor and gossip' are more likely to form the basis of an adverse decision.").

65 *Id.* at 525 ("The Secretary's final argument in support of his position that a pre-termination hearing should not be required for disability recipients is that to require such hearings would result in vast disruption of the Social Security System.").

66 *See id.* at 523–27.

67 Eldridge v. Weinberger, 493 F.2d 1230 (4th Cir. 1974), *rev'd sub nom.* Mathews v. Eldridge, 424 U.S. 319 (1976).

> The procedures for terminating Social Security disability benefits provide an adequate and fair opportunity for a beneficiary to submit all relevant information necessary to enable the Social Security Administration to make an informed and reliable judgment whether the disability has ceased . . . . The procedures by which disability benefits are now terminated are fair and they work.[68]

The government also acknowledged the flexible and multifaceted character of the basic fairness inquiry.[69] But in order to structure the inquiry for purposes of legal argumentation, the government offered the following observation:

> The Court has identified three general interests that must be assessed in determining the constitutional sufficiency of procedures for denying or terminating constitutionally-protected interests. They are: first, the nature of the property (or liberty) interest of which a person is assertedly being deprived; second, the risk of an erroneous deprivation of such interest through the procedures used; and third, the administrative burdens and costs that particular procedural requirements would entail.[70]

The bulk of the government's argument elaborated upon the application of the specific interests identified in this passage to Eldridge's circumstances.

Five features of the government's proposed formulation of the due process inquiry are noteworthy. First, the above-quoted paragraph from the government's brief is the obvious source of the three-factor framework adopted by the Court in the *Mathews* opinion. The Supreme Court quite clearly did not invent the *Mathews v. Eldridge* three-factor analysis. The analysis was invented by attorneys in the Solicitor General's office and was then taken up by the Court.

Second, the government's brief gives every indication that it is simply trying to describe, in lawyerly language, the considerations that the Court's prior opinions had identified as relevant for assessing the ultimate fairness of procedures in a given context. Each of the factors is traced to a prior Court decision, and the more elaborate discussion that follows in the brief further tracks each factor through antecedent decisions.[71]

---

68 Brief for the Petitioner at 34–35, *Mathews*, 424 U.S. 319 (No. 74-204), 1975 WL 173410.

69 *Id.* at 35 (citing, inter alia, Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961)).

70 *Id.* at 35–36 (citations omitted).

71 *See id.* at 37–38 (describing cases that treated the importance of the private interest as relevant to the scope of required procedures); *id.* at 39–40 (describing cases that treated the risk of error as relevant to the scope of required procedures);

Third, the amicus brief of the AFL-CIO filed on behalf of Eldridge agreed entirely with the Solicitor General's account of the proper structure for due process inquiry:[72]

> The Secretary states that the interests to be assessed in determining when an evidentiary prior hearing is constitutionally required are:
>
> > First, the nature of the property . . . interest of which a person is assertedly being deprived . . . ; second, the risk of an erroneous deprivation of such interest through the procedures used . . . ; and third, the administrative burdens and costs that particular procedural requirement would entail.
>
> We agree. For, these are the very factors upon which the *Goldberg* Court predicated its conclusion that an evidentiary prior hearing is the pre-condition for a cut-off of welfare. . . .
>
> . . . .
>
> Thus the governing principles are well settled. The crux of the controversy here is whether the Secretary's soothing assurances that the "procedures now followed in terminating Social Security disability benefits are fair, and [that] they work," prove out, or whether his arguments are nothing more than a carefully contrived illusion designed to create the appearance of a system that comports with the Constitution.[73]

No one in *Mathews* argued that the Solicitor General had somehow misrepresented the applicable law or omitted any crucial factors from the analysis.

Fourth, the three factors identified as relevant by the Solicitor General tracked precisely the three considerations that the government believed supported its case in *Mathews.* As was made clear by the district court opinion in *Mathews,* the government sought to distinguish Eldridge's situation from that of the plaintiffs in *Goldberg* on the basis of the alleged lower value of the private interest at stake, the character of the evidence at issue in *Mathews,* and the disruption to the massive Social Security disability program that would result from

---

id. at 45–46 (describing cases that treated the consequences of procedural formality as relevant to the scope of required procedures).

72 The merits brief filed directly on behalf of Eldridge did not really have much of interest to say about the appropriate due process inquiry, either in general or in Eldridge's specific case. The brief was very short, poorly organized, and soft on substance. The AFL-CIO's brief was considerably more sophisticated, which is unsurprising considering the organization's repeat-player status in the Court. *See* Brief for the AFL-CIO as Amici Curiae Supporting Respondent, *Mathews,* 424 U.S. 319 (No. 74-204), 1975 WL 173413.

73 *Id.* at 5–6 (citations omitted).

excessive proceduralization. The government's articulation of the considerations relevant to the due process analysis in its brief in *Mathews* was clearly dictated by the government's specific litigating interest in that case. Put as simply as possible: the Solicitor General in *Mathews* was not trying to shape, or re-shape, due process law. He[74] was trying to win a case.

Fifth, the government identified "the risk of an erroneous deprivation of such interest through the procedures used" as the principle value of procedures because it thought that it could establish that oral hearings would contribute little to the accuracy of Social Security disability determinations, given the character of the evidence that is normally at issue in such cases. Put simply, the government emphasized decisional accuracy because it was confident that focus on decisional accuracy would lead to a favorable result on the specific facts of *Mathews*. As a more general proposition, reducing substantive error is obviously one important function, and perhaps even the primary function, of procedures. Whether it is the *sole* function of procedures probably is not something to which the Solicitor General's office devoted much thought.

The Supreme Court in *Mathews* adopted the government's argument almost *in toto*, both with respect to the appropriate framework for analysis and with respect to the particularized assessment of the factors in Eldridge's case. The crucial passage in which the Court accepted the government's three-factor framework reads in relevant part:

> In recent years this Court increasingly has had occasion to consider the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter. In only one case, *Goldberg v. Kelly*, has the Court held that a hearing closely approximating a judicial trial is necessary. In other cases requiring some type of pretermination hearing as a matter of constitutional right the Court has spoken sparingly about the requisite procedures. . . .
>
> These decisions underscore the truism that "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. More precisely, our prior decisions indi-

74 The Solicitor General at that time was Robert Bork, so the pronoun "he" is descriptive, not generic.

> cate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[75]

There is nothing in this passage that suggests that the Court had ambitions beyond those of the Solicitor General or the AFL-CIO. The parties were simply trying to find some framework with which to structure their arguments about the basic fairness of the procedures employed by the government. The Court accepted as settled law that basic fairness is the ultimate inquiry, that due process requires a particularized, case-specific inquiry into fairness, that private and public interests must be considered, and that past decisions establish that the three factors identified by the government "generally" are important to the ultimate inquiry. None of this should be remotely controversial. None of this suggests that the three articulated factors, which just happened to be the factors thought by the government to be most relevant to the disposition of Eldridge's case, are the only factors relevant to the basic fairness inquiry. None of this suggests that the three-part framework somehow displaces the ultimate inquiry into fairness rather than simply structuring that inquiry into language that lawyers and decisionmakers can employ.

If the *Mathews* decision accomplishes anything other than disposing of Eldridge's case on its facts, it merely sets out a framework in which legal actors can speak to each other about fairness. The language setting forth that framework is not meant to be exclusive; it is meant to be facilitative of clear analysis in a large run of cases. Properly employed, the *Mathews* factors can effectively serve that function of letting people talk about fairness in terms that lend themselves to adversarial legal argumentation, as all of the factors identified in *Mathews* are at least potentially relevant to an assessment of fair procedures. Anyone who tries to do more with the *Mathews* framework simply does not understand its origins or limitations.

---

75 *Mathews*, 424 U.S. at 333–35 (citations omitted).

C. *Misunderstanding* Mathews

Early Supreme Court decisions after *Mathews* (properly) identified the three-factor framework as merely a useful tool of analysis.[76] It did not take long, however, before the Court began describing, and using, the *Mathews* framework as a "test"—that is, as a tool for reaching decisions rather than simply for expressing in legal language the rationale for decisions reached through an assessment of basic fairness. By 1979, for example, the Court could say that "[t]he parties agree that our prior holdings have set out a *general approach for testing challenged state procedures* under a due process claim."[77] By 1981, the transformation of the *Mathews* formulation from a framework for discussion into a decisionmaking algorithm was complete. In a case involving the right to appointed counsel in a civil case, the Court explained:

> The case of *Mathews v. Eldridge* propounds three elements to be evaluated in deciding what due process requires . . . . We must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.[78]

Modern cases continue to treat the *Mathews v. Eldridge* three-factor formulation as a decisionmaking test,[79] as exemplified by the 2004 decision in *Hamdi v. Rumsfeld*,[80] in which the Court held that an American citizen held as an enemy combatant must be given "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker"[81]:

> The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not "deprived of life, liberty, or property, without due process of law," is the *test* that we articulated in *Mathews v. Eldridge*. *Mathews* dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the Government's asserted interest, "including the function involved" and the burdens the Government would face in providing greater process. The *Ma-*

76 *See, e.g.*, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 17 (1978); Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 848–49 (1977); Dixon v. Love, 431 U.S. 105, 112–13 (1977); Ingraham v. Wright, 430 U.S. 651, 675 (1977).

77 Parham v. J.R., 442 U.S. 584, 599 (1979) (emphasis added).

78 Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981) (citation omitted).

79 *See, e.g.*, City of Los Angeles v. David, 538 U.S. 715, 716–17 (2003).

80 124 S. Ct. 2633 (2004) (plurality opinion).

81 *Id.* at 2648.

> *thews* calculus then *contemplates a judicious balancing of those concerns,* through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute safeguards."[82]

Modern scholars likewise generally treat the *Mathews* framework as though it were an outcome-determinative test.[83] The Court also seems to have accepted the idea that the sole justification for procedures is "to minimize the risk of erroneous decisions,"[84] although there have been occasional dissenting voices on that score.[85]

Critics have, with considerable justification, roundly attacked the *Mathews* framework's efficacy as a decisionmaking tool. Some have pointed out that one can only weigh factors against each other if the factors are commensurable,[86] which the *Mathews* factors do not appear to be. As one critic has stated, "[t]his reliance upon 'weight,' which is a useful approach for dealing with bananas, leaves something to be desired where factors such as those in *Mathews* are concerned."[87] Others have criticized the narrow focus on decisional accuracy that the *Mathews* framework seems to require. Jerry Mashaw has famously argued that by identifying decisional accuracy as the holy grail of due process law, the *Mathews* formulation disregards the important value that individuals place on being heard: "a lack of personal participation causes alienation and a loss of that dignity and self-respect that

---

82 *Id.* at 2646 (emphasis added) (citations omitted).

83 *See, e.g.*, Emily Buss, *The Missed Opportunity in* Gault, 70 U. CHI. L. REV. 39, 47 n.37 (2003); Charles H. Koch, Jr., *A Community of Interest in the Due Process Calculus*, 37 HOUS. L. REV. 635, 641–42 (2000); Martin H. Redish & Eric J. Beste, *Personal Jurisdiction and the Global Resolution of Mass Tort Litigation: Defining the Constitutional Boundaries*, 28 U.C. DAVIS L. REV. 917, 950–51 (1995); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 253 (2004).

84 Addington v. Texas, 441 U.S. 418, 425 (1979); *see also* Greenholz v. Inmates of the Neb. Penal and Corr. Complex, 442 U.S. 1, 13 (1979) ("The function of legal process, as that concept is embodied in the Constitution, . . . is to minimize the risk of erroneous decisions.").

85 *See* Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); *Greenholz*, 442 U.S. at 34 (Marshall, J., dissenting in part) ("Finally, apart from avoiding the risk of actual error, this Court has stressed the importance of adopting procedures that preserve the appearance of fairness . . . .").

86 For general discussions of problems of commensurability in the law, see Matthew Adler, *Incommensurability and Cost-Benefit Analysis*, 146 U. PA. L. REV. 1371 (1998); Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53 (1992); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994).

87 Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1138 (1984).

society properly deems independently valuable."[88] Others have similarly criticized the *Mathews* framework as too narrowly focused on accuracy at the expense of other potential values.[89]

All of these criticisms of *Mathews* have merit, but none of the developments in the evolution of *Mathews* that spawned these criticisms were inevitable. *Mathews* does not have to be viewed as anything other than a potentially useful way of structuring dialogue about fairness, in which case criticisms of *Mathews* for failing to direct or predict decisions are misplaced. Nor must *Mathews* be construed to constrict the perceived value of procedures solely to their ability to reduce the risk of erroneous substantive decisions. One *could*, of course, independently reach the conclusion that procedures are only valuable for their role in reaching correct substantive outcomes, but nothing in *Mathews compels* that result. If *Mathews* is best viewed solely as a means for starting (not finishing) a stylized legal conversation about fairness, it should be judged on those terms.

Does the *Mathews* formulation do a serviceable job of providing a common frame of reference for legal argumentation? We think that it does. It would fail in that task if the factors that it identified were wildly inappropriate to the ultimate inquiry, which they clearly are not. It would also fail in that task if the factors themselves were so vague that they could not serve as a tool for communication. We do not see that problem either. *Mathews* has many critics, but we do not see the critics complaining that they do not know what the *Mathews* factors mean. Quite to the contrary, the critics know exactly what the *Mathews* factors are getting at and don't like it one bit. *Mathews* is a perfectly respectable jurisprudential and doctrinal vehicle for promoting adversarial dialogue about fairness.

The process by which *Mathews* was transformed from a device for facilitating discussion into an outcome-determinative test is to some extent understandable—formulations tend to take on lives of their own independently of their terms or justifications—but it is also regrettable. A great deal of scholarly and judicial time and energy has been spent on problems that need never have arisen. Nonetheless, the process has valuable lessons for understanding what has happened with the law of regulatory takings, to which we now turn.

---

88 Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 50 (1976).

89 *See, e.g.*, Cynthia Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189 (1991); Koch, *supra* note 83; Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 44 (1992); James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 801 (1995).

II. REDISCOVERING *PENN CENTRAL*

The development of the law of regulatory takings has some remarkable parallels to the development of the law of procedural due process. Both bodies of law are oriented around a search for fair treatment. Both require some kind of language in which lawyers and judges can construct arguments about fairness in legalistic fashion. And both have generated three-factor frameworks that have evolved well beyond their original functions and justifications. In this Part, we trace the evolution of the law of regulatory takings and relate it to our prior discussion of due process law. In the next Part, we try to reconstruct regulatory takings law in order better to serve its present doctrinal function.

A. Some Takings Fundamentals

The Fifth Amendment contains the injunction, "nor shall private property be taken for public use, without just compensation."[90] The Fourteenth Amendment has long been construed to contain a similar injunction.[91] Perhaps the most devilish problem arising under the Takings Clause has been determining when property has been "taken" in the constitutional sense.[92] If the government formally takes title to property through an official exercise of the eminent domain power, that is unquestionably a taking of property within the meaning of the Constitution. But what if the government occupies property without formally taking title? What if the government effectively destroys property and thus prevents the nominal owner from occupying it? What if the government authorizes someone other than the nominal owner to occupy property? What if the government controls the use of property rather than its occupancy? In sum, when, if ever, do gov-

90 U.S. CONST. amend. V.

91 *See* Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 239 (1897).

92 There are also serious issues about the meaning of "property" for purposes of the Takings Clause, *see, e.g.*, Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549 (2003) (describing a broad conception of protected property); Molly S. McUsic, *The Ghost of* Lochner*: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. REV. 605 (1996) (describing a narrow conception of protected property), about the requirement that takings occur only for a "public use," *see* James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, and about the meaning of "just compensation," *see* Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677 (2005). But we are concerned here solely with the problem of determining when property has been "taken" by governmental action.

ernment regulations that do not formally transfer title ever rise to the level of constitutional takings?

From the nineteenth century onward, courts have consistently assumed that some governmental actions other than formal transfers of title can amount to takings of property,[93] though fixing the contours of that doctrine has proven to be quite challenging. A good harbinger of modern problems arose in 1871 in *Pumpelly v. Green Bay Co.*[94] The defendant constructed a dam that effectively flooded a portion of the plaintiff's land, so that "it worked an almost complete destruction of the value of the land."[95] The defendant claimed that the dam was authorized by the State of Wisconsin pursuant to its power to improve navigation on local rivers. The statute authorizing construction of the dam made no provision for compensation to injured landowners. The question was whether the provision in the Wisconsin Constitution providing that "[t]he property of no person shall be taken for public use without just compensation therefor"[96] nonetheless required compensation to the plaintiff.

Formal title to the property was never transferred to the defendant or to the State of Wisconsin. The flooding left the plaintiff in technical possession of the property but destroyed any ability of the plaintiff to use the land productively. The defendant's argument was "that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation."[97] If a taking of property occurs only when title is formally transferred, the defendant was right.

The Court held that the effective destruction of the ability to use the land constituted a taking, though its reasoning was brief and conclusory:

> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government . . . , it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, be-

93 *See* Claeys, *supra* note 92; Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211.

94 80 U.S. (13 Wall.) 166 (1871).

95 *Id.* at 177.

96 WIS. CONST. art I, § 13.

97 *Pumpelly*, 80 U.S. at 177.

> cause, in the narrowest sense of that word, it is not *taken* for the public use.[98]

But once the word "taken" is understood to extend beyond actions that transfer title, the question becomes how far it extends. Does it extend only to extreme cases of total destruction of use and value, as in *Pumpelly*? Does it extend to every governmental action that reduces the value of someone's property? Is there some identifiable point in between these extremes at which destruction or regulation crosses over into a constructive taking of property? The *Pumpelly* Court fully recognized the nature of the problem that its holding generated:

> We are not unaware of the numerous cases in the State courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers, and other highways, for the public good, there is no redress; and we do not deny that the principle is a sound one, in its proper application, to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other State constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those States. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle. Beyond this we do not go, and this case calls us to go no further.[99]

And with that acknowledgment, modern law was set on a course from which it has not yet wavered. Once the word "taken," whether in the Fifth Amendment or the Wisconsin State Constitution (and the Court in *Pumpelly* clearly viewed those provisions as equivalent[100]), is held to include actions other than title transfers,[101] there needs to be some

---

98 *Id.* at 177–78.

99 *Id.* at 180–81.

100 *See id.* at 176–77.

101 Cases subsequent to *Pumpelly* made it very clear that title transfer was not essential to a taking. The Court extended *Pumpelly*'s holding concerning the flooding of lands to federal action, *see* United States v. Lynah, 188 U.S. 445, 470 (1903) ("While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested."), and further extended it to circumstances in which the flooding merely

mechanism for determining when those actions cross the line from incidental consequences of lawful government action to effective takings of property requiring compensation.

The Court most famously addressed this question in 1922 in *Pennsylvania Coal Co. v. Mahon.*[102] The plaintiff coal company in 1878 had conveyed away the surface rights to some of its coal mining lands but had expressly reserved the right to mine without regard to any damage to the surface. The Pennsylvania legislature in 1921, however, prohibited the mining of anthracite coal in a manner (with some exceptions) that would cause subsidence of a human habitation. The statute was challenged as an unconstitutional taking of the coal company's property,[103] though there was obviously no formal transfer of title of any property to the state or any other individual.

The Court held the statute unconstitutional, concluding that "[t]he 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."[104] As in *Pumpelly*, the reasoning was vague and somewhat conclusory. "Government hardly could go on," wrote the Court, "if to some extent values incident to property could not be diminished without paying for every such change in the general law."[105] Though not every loss in value or use rights attributable to governmental action is a taking, the Court recognized that the principle that property can be harmed without compensation "must have its limits."[106]

In defining those limits, the Court considered a number of factors. The Court stated that "[o]ne fact for consideration in determining such limits is *the extent of the diminution.* When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts."[107] The Court at several

---

reduced by half the value of the land but did not destroy it entirely; *see* United States v. Cress, 243 U.S. 316, 327–28 (1917). Later decisions swept in use regulations as well. *See* Chi., R.I. & Pac. Ry. Co. v. United States, 284 U.S. 80, 96 (1931) ("Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title.").

102 260 U.S. 393 (1922).

103 To be precise, the statute was challenged as a violation of the Contracts Clause and the Due Process Clause. It had already been established by 1922, however, that the Fourteenth Amendment's Due Process Clause effectively "incorporated" the Takings Clause of the Fifth Amendment.

104 *Mahon*, 260 U.S. at 415.

105 *Id.* at 413.

106 *Id.*

107 *Id.* (emphasis added).

points suggested that the *extent of the public interest* was relevant,[108] though it suggested elsewhere that even a strong public interest would not obviate the need for compensation.[109] A previous decision had approved a requirement that pillars of coal be left in the ground as support;[110] that decision was distinguished because it involved "a requirement for the safety of employees invited into the mine, and secured *an average reciprocity of advantage* that has been recognized as a justification of various laws."[111] In the end, the Court concluded that the inquiry is inescapably "a question of degree—and therefore cannot be disposed of by general propositions."[112]

The Court's early efforts to define the contours of takings doctrine look very much like the Court's early efforts to define what process is due. The Court was unable to identify a generally controlling set of principles. Rather, in each particular case, using all-things-considered reasoning, the Court appeared to be seeking the just or fair result.

This was confirmed in *Armstrong v. United States.*[113] Armstrong had provided materials to a shipbuilder who was constructing vessels for the United States, which resulted in some materialmen's liens for Armstrong under Maine law. The shipbuilder defaulted on its contracts with the United States, and the government subsequently took title to the uncompleted ships. Armstrong's materialmen's liens could not be enforced against the United States because of sovereign immunity. Armstrong accordingly claimed that its liens had been "taken" because its value had been destroyed. The Supreme Court agreed. After finding that Armstrong's liens were valid property interests because they had been created before the government held title to the vessels,[114] the Court held that destruction of the liens was a taking. The Court acknowledged, as it had in prior decisions, "the difficulty of trying to draw the line between what destructions of property by lawful governmental actions are compensable 'takings' and what destructions are 'consequential' and therefore not compensable."[115] As it had in *Pumpelly* and *Mahon,* the Court announced its result in conclusory fashion:

---

108 *Id.* at 413–14, 415.

109 *Id.* at 415–16.

110 *See* Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914).

111 *Mahon,* 260 U.S. at 415 (emphasis added).

112 *Id.* at 416.

113 364 U.S. 40 (1960).

114 *See id.* at 44–46.

115 *Id.* at 48.

> The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment "taking" and is not a mere "consequential incidence" of a valid regulatory measure. Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens, something that the Government could do because its property was not subject to suit, but which no private purchaser could have done. Since this acquisition was for a public use, however accomplished, whether with an intent and purpose of extinguishing the liens or not, the Government's action did destroy them and in the circumstances of this case did thereby take the property value of those liens within the meaning of the Fifth Amendment. Neither the boats' immunity, after being acquired by the Government, from enforcement of the liens nor the use of a contract to take title relieves the Government from its constitutional obligation to pay just compensation for the value of the liens the petitioners lost and of which loss the Government was the direct, positive beneficiary.[116]

The Court concluded with the oft-quoted observation that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar the Government from forcing some people alone to bear public burdens which, *in all fairness and justice*, should be borne by the public as a whole."[117]

The emphasis on "fairness and justice" reflects the approach taken in *Pumpelly* and *Mahon*. It also parallels the approach taken by the Court with respect to constitutionally required procedures under the Due Process Clauses. The due process inquiry, as we saw, is a search for fundamental fairness, with the Court unable, *because of the nature of the inquiry*, to formulate clear rules for general guidance in future cases. The Court's early efforts to define regulatory takings (that is, takings that do not transfer title to property) follow the same pattern: the Court was searching for fair results and was unable to identify general principles that would guide that inquiry in future cases. And as with the law of procedural due process, lawyers and decisionmakers considering regulatory takings problems need to have a common language with which they can construct legal arguments about the underlying inquiry.

---

116 *Id.* at 48–49.

117 *Id.* at 49 (emphasis added).

That is where *Penn Central Transportation Co. v. New York City*[118] entered the scene.

B. The Lingua Franca *of Takings Law*

In 1968, Penn Central was on the verge of bankruptcy. It owned Grand Central Terminal in New York City and entered into a long-term lease agreement that involved the construction of fifty-five stories of office space above the Terminal. The previous year, however, the Terminal had been declared a landmark under a New York City ordinance, which meant that new construction above the Terminal required approval by the City's Landmark Commission. The Commission refused to approve the plan (and gave every indication that it would refuse to approve just about any plan), and Penn Central asserted that the City had therefore taken the air space above its Terminal without just compensation.[119]

Penn Central won on its takings claim in the New York trial court but lost in the intermediate appellate division and, ultimately, in the New York Court of Appeals. In the Supreme Court, the brief for the appellee Landmark Commission contained the following observation:

> Where the land use regulation is within the police power, the validity of the regulation will depend on an examination and balancing of three elements: the importance of the regulation to the public good, the reasonableness with which the regulation attempts to achieve that good and whether the restriction on the parcel renders it economically unviable.[120]

The brief traced this three-factor framework to a prior decision.[121]

The argument for appellant Penn Central did not directly challenge this framework but instead concentrated its fire on the New York Court of Appeals' decision, which had relied on a novel theory that no one defended in the Supreme Court.[122] Penn Central treated the ultimate issue as a straightforward syllogism: air rights are property; New York deprived Penn Central of the use of its air rights; therefore, New York took Penn Central's property.

---

118 438 U.S. 104 (1978).

119 *Id.* at 115–20. Or, at least, that is what Penn Central argued in the Supreme Court. For a full account of the *Penn Central* litigation, see Kanner, *supra* note 8.

120 Brief for Appellee at 16, *Penn Cent.*, 438 U.S. 104 (No. 77-444), 1978 WL 206883.

121 *See* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594–96 (1962).

122 The New York Court of Appeals disallowed compensation for any component of property value that was attributable in some fashion to social factors rather than to individual investment. *See* Penn Cent. Transp. Co. v. New York City, 366 N.E.2d 1271, 1275–76 (N.Y. 1977), *aff'd*, 438 U.S. 104.

The Supreme Court upheld the City's landmark ordinance, in an opinion that shares many features with the opinion in *Mathews v. Eldridge*. As in *Mathews*, the Court began by observing that "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty"[123] and that the ultimate inquiry focuses on fairness and justice to the parties.[124] The Court frankly acknowledged that it had thus far "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons"[125] and that the outcome in a takings case "depends largely 'upon the particular circumstances [in that] case.'"[126]

As in *Mathews*, the Court in *Penn Central* then identified "several factors that have particular significance"[127] for making "these essentially ad hoc, factual inquiries"[128] concerning basic fairness. The Court explained:

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.[129]

The Court then devoted fourteen pages of the United States Reports to a detailed description and rejection of Penn Central's arguments.[130] The Court's discussion ranged widely over past precedents, the proper characterization of the property interest at stake, the role of expectations and diminishment of value in takings analysis, and the particularized effect of New York's landmark law on Penn Central's property. But the opinion did not give any indication that it viewed the paragraph quoted above as a test, much less an outcome-determi-

123 *Penn Central*, 438 U.S. at 123.

124 *See id.* (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

125 *Id.* at 124.

126 *Id.* (quoting United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958)).

127 *Id.*

128 *Id.*

129 *Id.* (citations omitted).

130 *See id.* at 124–37.

native test, for assessing regulatory takings. The structure of the Court's argument did not follow the analysis set forth in the quoted paragraph, nor did the Court specifically relate its subsequent detailed discussion to the factors mentioned in the paragraph. More pointedly, to the extent that the Court in *Penn Central* identified discrete factors for consideration, it identified two, rather than three, such factors: (1) the impact of the challenged regulation on the claimant, viewed in light of the claimant's investment-backed expectations and (2) the character of the governmental action, viewed in light of the principle that actions that closely resemble direct exercises of eminent domain are more likely to be compensable takings than are garden-variety land use regulations. Someone who knew nothing of modern takings law would be, to say the least, hard pressed to distill a discrete three-factor analysis from the opinion in *Penn Central*.

In sum, the reference in *Penn Central* to various factors appears to be nothing more than the Court's application of the analysis outlined in the appellee's brief—just as there was nothing in *Mathews* to suggest that the Court was doing anything other than incorporating the analysis of the government litigators into its opinion. There is no reason to think that the Court itself viewed *Penn Central* as a major analytic turning point in takings law.[131] Nor is there any reason to think that the Court in *Penn Central* thought that it was crafting a framework with three distinct factors. Two, perhaps, but certainly not three.

C. *Misunderstanding* Penn Central

As with *Mathews*, the Court's subsequent decisions did not immediately treat *Penn Central* as having set forth an outcome-determinative test for regulatory takings cases. In 1979 in *Andrus v. Allard*,[132] the Court's first major takings decision following *Penn Central*, the Court did not treat *Penn Central* as having set forth any kind of controlling analysis.[133] Later that term, the Court in *Kaiser Aetna v. United States*[134] repeated much of the discussion from *Penn Central* but distilled it into

131 The law clerks and lawyers who worked on the case confirm this impression. *See Looking Back*, *supra* note 7, at 305–06.

132 444 U.S. 51 (1979).

133 *See id.* at 65.

> *Penn Central Transportation Co. v. New York City* is our most recent exposition on the Takings Clause. That exposition need not be repeated at length here. Suffice it to say that government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*. "Government hardly could go on if to

the now familiar three-factor analysis that encompasses "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action."[135] Thus, it was *Kaiser Aetna* that first split the economic impact on the claimant apart from the claimant's investment-backed expectations, combined those elements with the character of the government action, and presented the three-part package as a distinct framework. What we know today as the *Penn Central* three-part framework is really the *Kaiser Aetna* three-part framework. In any event, *Kaiser Aetna* merely identified those three considerations as having "particular significance"[136]; it did not represent them as definitive.

Interestingly, the first use of the *Penn Central* formulation as a full-fledged test appears to have come in *Loretto v. Teleprompter Manhattan CATV Corp.*,[137] in which the Court relied on the "character of the governmental action" to establish that direct physical occupations of property by the government, either directly or through authorization to third parties, are takings regardless of any other considerations.[138] In the eyes of the Court, permanent physical occupations so closely resemble formal transfers of title that no further inquiry is necessary in order to establish a taking. Two years later, in *Ruckelshaus v. Monsanto Co.*,[139] the Court again focused on a single factor as determinative—in this case finding that Monsanto had no "reasonable investment-backed expectations" that certain information disclosed to the Environmental Protection Agency would be kept confidential.[140]

---

some extent values incident to property could not be diminished without paying for every such change in the general law."

The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of "'justice and fairness.'" There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate. Formulas and factors have been developed in a variety of settings. Resolution of each case, however, ultimately calls as much for the exercise of judgment as for the application of logic.

Id. (citations omitted).

134 444 U.S. 164 (1979).

135 *Id.* at 175.

136 *Id.*

137 458 U.S. 419 (1982).

138 *See id.* at 426 ("[W]hen the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, 'the character of the government action' not only is an important factor in resolving whether the action works a taking but also is determinative.").

139 467 U.S. 986 (1984).

140 *See id.* at 1005–07.

But these cases were exceptional and revolved around single considerations that dominated in particular circumstances.

As late as 1986, the Court cited the *Penn Central* factors merely as helpful tools of analysis that "*reinforce*[ ] our belief that the imposition of withdrawal liability [under the Multiemployer Pension Plan Amendments Act of 1980] does not constitute a compensable taking under the Fifth Amendment."[141] By 1987, however, for no reason that is readily apparent, the Court appears to have begun treating the *Penn Central* formulation as an outcome-determinative test even in circumstances in which a single factor is not dispositive.[142] That is largely where we have stood ever since and where we stand today. At this moment in time, the Supreme Court appears to have settled on a two-track process for identifying when property has been constitutionally taken. The first track concerns circumstances in which a taking will be found without elaborate inquiry into more than one factor. If the government, whether permanently or temporarily, physically occupies an owner's property or authorizes a third party physically to occupy an owner's property, the action is a taking within the meaning of the Constitution without further inquiry. Furthermore, if the government permanently denies an owner all economically viable use of his land, that is considered to be essentially a constructive occupation and is also a taking without further inquiry.[143] On the other hand, regulations that affect possession, use, and disposition rights but that do not fall within the narrow per se rules for physical or economic takings are analyzed under the multiple *Penn Central* factors to determine whether the Takings Clause has been triggered. That result was not foreordained by *Penn Central.* It is not clear that it was even foreshadowed by it.

It does not do justice to academic criticism of *Penn Central* to describe such criticism as a cottage industry. It is more like an industrial revolution. More than two decades ago, Carol Rose characterized regulatory takings law as a "muddle,"[144] and that characterization has acquired the status of conventional wisdom.[145] Attacks on *Penn Central,*

141 Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986).

142 *See* Bowen v. Gilliard, 483 U.S. 587, 606 (1987).

143 *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

144 Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle,* 57 S. CAL. L. REV. 561 (1984).

145 *See* Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence,* 114 YALE L.J. 203, 205 (2004) ("Conventional wisdom teaches that the Supreme Court's takings doctrine is a muddle.").

from every possible direction, would fill several very long footnotes.[146] Many of the criticisms of modern doctrine are substantive, urging either that the Court has overstated[147] or understated[148] the extent to which regulations should be regarded as takings. We do not deal with those substantive issues in this Article. For our purposes, we take the underlying substantive law, as it presently stands, as given and focus on *Penn Central* as a doctrinal tool. From that perspective, the criticisms of *Penn Central* that are relevant to our project are *jurisprudential* criticisms, of which there are plenty.

At the risk of oversimplifying a body of material too vast for synthesis, the jurisprudential criticisms of *Penn Central* tend to fall into two large categories. One set of criticisms focuses on the inadequacy of the *Penn Central* factors as tools for guiding or predicting decisions; the factors "are too general to provide much predictability."[149] This criticism is trivially true and simply requires us to keep focused on what the *Penn Central* framework can and cannot do. Obviously, the framework cannot dictate or predict outcomes, so people should stop trying to pretend that it can.

A second set of criticisms focuses internally on the factors themselves. Andrea Peterson has observed that the Court has "defined each factor in a variety of ways, without acknowledging the shifts in definition."[150] For example, in employing the "character of the governmental action" factor, the Court has in some cases considered the seriousness or invasiveness of the governmental action,[151] while in other cases the Court has instead focused on the strength of the gov-

146 For three relatively brief, but exemplary, footnotes, see Andrew S. Gold, *The Diminishing Equivalence Between Regulatory Takings and Physical Takings*, 107 DICK. L. REV. 571, 571 n.1 (2003); Poirier, *supra* note 8, at 97 n.2; Sterk, *supra* note 145, at 205 n.1.

147 *See, e.g.*, Eduardo Moisés Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182 (2004); William Michael Treanor, *The* Armstrong *Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151 (1997).

148 *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 94–95 (1985); Claeys, *supra* note 92, at 1669–70.

149 Poirier, *supra* note 8, at 99. For an especially forceful denunciation of the Court's approach viewed as a decisionmaking methodology, see Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort To Formulate Coherent Regulatory Takings Law?*, 30 URB. LAW. 307 (1998).

150 Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1301, 1317 (1989).

151 *See* Hodel v. Irving, 481 U.S. 704, 716–18 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); *see also* Peterson, *supra* note 150, at 1317–18.

ernment's justification for its action.[152] Similarly, with respect to the investment-backed expectations prong, the Court sometimes considers the foreseeability of the government's action, while at other times focuses exclusively on whether reasonable use of the property remains.[153] The Court also lacks consistency, it is argued, in its application of the economic impact factor. It is unclear whether the crux of the Court's inquiry focuses on the diminished value of the property or instead on whether the property has been denied all economically viable use.[154]

This set of criticisms goes to the heart of the ability of the *Penn Central* framework to perform any useful doctrinal or jurisprudential function. A framework cannot guide conversation if it is so poorly defined that it does not function as a common frame of reference. It is also quite different from the set of criticisms generally leveled at the *Mathews* framework. Unlike the *Mathews* critics, commentators on *Penn Central* seem largely unconcerned with the possibility that the Court left out important considerations.[155] Instead, they find themselves unable to identify what precisely it is that the Court considers relevant to a takings inquiry and frustrated in their attempts to understand subsequent applications of the factors. By contrast, commentators on *Mathews* have voiced few complaints about the meaning of the three factors in the *Mathews* framework.

This highlights an important difference in the way in which the *Mathews* and *Penn Central* frameworks are constructed. The *Mathews* framework contains relatively well understood factors, with an acknowledgment (at least in *Mathews* itself) that other unnamed factors might be relevant to a due process analysis. The framework, properly understood, invites consideration of factors beyond the framework itself. The *Penn Central* framework, by contrast, looks more like a framework where the factors identified are exhaustive but are general and abstract, without clearly marked boundaries on what may be considered. This distinction, characterized by the manner in which the Court has defined and limited the three factors in subsequent cases, may explain why the criticisms of the two frameworks have so sharply diverged.

---

152 *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485–93 (1987).

153 *See* Peterson, *supra* note 150, at 1320.

154 *See id.* at 1325.

155 *But see* Treanor, *supra* note 147, at 1169–72 (urging the Court to focus more precisely on harm to individual property owners rather than on harm to the property itself without regard to the circumstances of its owner).

With *Mathews*, courts and lawyers have little difficulty understanding and identifying the content of each factor. To be sure, commentators have plenty to say about the subjective nature of the *Mathews* framework and the unpredictable way that judges have applied the factors, but not much criticism has been leveled at the *content* of the existing factors. Instead, *Mathews*'s critics, who grasp the meaning of the existing factors, concern themselves with identifying the factors that the Supreme Court failed to mention and that lower courts have subsequently failed to consider. *Penn Central*'s perceived flaw, on the other hand, is that the Court failed to inject the factors with any meaningful content. With broad strokes, the Court painted a vague outline of the proper takings inquiry. The Court spoke of what is "reasonably necessary to the effectuation of a substantial public interest,"[156] "an unduly harsh impact upon the owner's use of the property,"[157] action that "so frustrate[s]" the owner's expectations as to amount to a taking,[158] and interests that are "sufficiently bound up" with reasonable expectations.[159] This language leaves the meaning of each factor up for grabs. The breadth of the language may explain why the *Penn Central* critics do not waste their breath commenting on the factors the Court might have excluded. The framework itself is so loosely defined that judges, when deciding a takings case, appear free to include whatever considerations they deem relevant under the auspices of whichever factor they so choose.

If the *Penn Central* framework is truly susceptible to this criticism, perhaps Professor Echeverria is right that it serves no useful purpose and should be discarded. If, however, it is possible to give meaningful content to the *Penn Central* framework, either by better understanding or by reconceptualizing what it seeks to do, the *Penn Central* framework might have some useful work to do. We think that the *Penn Central* framework can be made to serve a modest function akin to the function properly served by the *Mathews* framework. But it requires a "step backward in time and forward in intelligence."[160]

III. RECONSTRUCTING *PENN CENTRAL*

The Supreme Court has recently reaffirmed that the law of regulatory takings is fundamentally oriented around fairness to property

156 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978).

157 *Id.*

158 *Id.*

159 *Id.* at 125.

160 Antonin Scalia, Chairman's Message, *Rulemaking as Politics*, 34 ADMIN. L. REV., Summer 1982, at v, xi.

owners adversely affected by regulations.[161] The factors identified as relevant to the takings inquiry by *Penn Central* and subsequent decisions are the economic impact of the regulation on the property owner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the governmental action. In order to know whether those factors form a good basis for structuring conversations about ultimate fairness in the context of regulatory takings, and the extent to which the factors should be recast in some fashion to serve that function better, one must know to what those factors refer. Gaining such knowledge is no easy task. We think that it can be made a bit easier by focusing on the original purpose and meaning of *Penn Central.*

A. Three Factors in Search of Meaning and Relevance

1. Economic Impact

Justice Holmes in *Mahon* remarked that "if regulation goes too far it will be recognized as a taking."[162] The most obvious measure of how "far" regulation goes is the extent to which the regulation reduces the value of property. Accordingly, one of the factors identified by the *Penn Central* framework as relevant to the takings inquiry is "the economic impact of the regulation."[163] It is unclear, however, just how relevant this factor remains. In *Lucas v. South Carolina Coastal Council,*[164] the Supreme Court held that the deprivation of all economically viable use of land is a taking per se.[165] The Court also acknowledged that a partial deprivation of economic value might result in a taking under a *Penn Central* analysis.[166] Short of a total deprivation, however, the Court has not identified "a threshold of [economic] impact above which the finding of a taking would occur or below which the finding of a taking would be precluded."[167] Only one thing is certain: even very significant deprivations of economic value, without more, will fail to establish a taking.[168] This much is clear from

161 *See* Lingle v. Chevron U.S.A. Inc., 125 S. Ct. 2074, 2080 (2005).

162 Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

163 Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

164 505 U.S. 1003 (1992).

165 *See id.* at 1019.

166 *See id.* at 1019 n.8.

167 Echeverria, *supra* note 9, at 5.

168 *See* Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 645 (1993) (recognizing that "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking").

Penn Central, where the Court cited *Hadacheck v. Sebastian*[169] for the proposition that even an 87.5% diminution in property value did not require government compensation.[170] Thus, while in principle diminution in property value can support the finding of a taking, such diminution, without more, will not suffice to establish a taking unless the deprivation of value is absolute.[171]

Of course, a factor can be relevant without being decisive. It is not at all clear, however, the extent to which a nontotal diminution of value is even relevant to the takings inquiry under modern law. Certainly, there is no Supreme Court case to which one can point to establish that large but nonabsolute diminutions of value play an important role in the takings inquiry. Nor is it entirely clear from what perspective one is supposed to evaluate the economic impact, or the all-things-considered fairness, of a regulation. *Penn Central* referred specifically to "[t]he economic impact of the regulation *on the claimant*,"[172] while *Kaiser Aetna*'s reformulation of the factors referred only to the regulation's impact in the abstract.[173] If the loss to a particular claimant is the proper focus of inquiry, then the economic impact would not be measured solely by reference to the loss of value of the property but instead to the effect of that loss on a specific party. On that analysis, the status of a regulation as a taking *vel non* might depend on the overall circumstances of the claimant, including holdings that are not the subject of the regulation. Indeed, if the ultimate inquiry focuses on fairness, perhaps the process by which value is lost is as important as the monetary extent of the loss. Perhaps the relevant factor is not the economic impact of regulation on the claimant but the variance between that impact and the *anticipated* or *expected* impact of such regulations. In order to understand what the *Penn Central* framework means by the ambiguous term "economic impact," one must dig a bit deeper. And that leads directly to the second *Penn Central* factor.

2. Reasonable Investment-Backed Expectations

Penn Central clarified that the economic impact of a regulation should be understood in light of the regulation's effect on "distinct

169 239 U.S. 394 (1915).

170 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 131 (1978).

171 A number of states have adopted statutes that set a threshold of value destruction above which a taking is declared by law. *See* Treanor, *supra* note 147, at 1152.

172 *Penn Central*, 438 U.S. at 124 (emphasis added).

173 *See* Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

investment-backed expectations."[174] *Kaiser Aetna* formulated such expectations as a distinct element of the analysis. Far from clarifying the meaning of the economic impact factor, however, this element adds its own layer of confusion.

At one level, a focus on "investment-backed" expectations may support a reading of the *Penn Central* framework that directs attention to the circumstances of a particular claimant. What you are deemed to have lost may depend on what you put into the property and when. On the other hand, if one focuses on the word "reasonable" as an adjective to "investment-backed expectations," a word that was added by the *Kaiser Aetna* reformulation of the framework, then perhaps the inquiry is objective rather than focused on any particular owner. The problem of how one orients the *Penn Central* framework is posed, but not definitively answered, by reference to investment-backed expectations.

At another level, one must determine what aspects of the factual and legal background of a regulation appropriately shape the expectations with respect to property. There are two aspects of that background that are of obvious potential significance: the principles of nuisance and property law that pre-exist the regulation and the pre-existing regulatory regime.

a. The Background Principles of Nuisance and Property Law

The Fifth Amendment only prohibits takings of "property" without just compensation.[175] The government cannot take something that you never had in the first place. Accordingly, if a government regulation merely concretizes or reinforces limitations on rights that were already built into the concept of property, there can be no taking by definition because the property owner has not lost anything that he or she ever possessed. In order to determine whether the property owner has anything about which to complain, one must understand the "background" laws of property, such as the law of nuisance, that controlled uses of the owner's property even before the regulation took effect.

These background principles took center stage in *Lucas v. South Carolina Coastal Council*.[176] South Carolina prohibited all development on coastal land owned by Lucas,[177] ostensibly to preserve the

174 *Penn Central*, 438 U.S. at 124.

175 U.S. CONST. amend. V.

176 505 U.S. 1003 (1992).

177 S.C. CODE ANN. § 48-39-290(A) (West Supp. 2004).

state's coastline and promote tourism.[178] The Court held that if the action effectively destroyed all economic value of Lucas's property, then the action would be considered a taking without further inquiry,[179] *unless* an analysis of the owner's property right "shows that the proscribed use interests were not part of his title to begin with."[180] A regulation may, without requiring compensation, deprive an owner of all economically viable use of land when those limitations

> inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved . . . under the State's law of . . . nuisance . . . .[181]

Background principles are thus relevant for determining investment-backed expectations in two ways. First, insofar as a contemplated use of property is prohibited by the background principles of nuisance and property law, that contemplated use cannot be seen as having been within the landowner's reasonable expectations and its prohibition can never rise to the level of a constitutional taking. This much is clear from the Court's discussion in *Lucas* of a landowner's title and the rights it represents. Second, in determining the effect of background principles on the reasonable expectations of a property owner, courts may sometimes look to areas of law besides nuisance or property. A case in point is *Andrus v. Allard*.[182] In *Andrus*, the Supreme Court held that Congress could prohibit essentially all commercial traffic in eagle feathers, even eagle feathers that had been acquired before the regulations took effect.[183] The decision implied that Congress, under the Commerce Clause, or a state, under its traditional police power over commercial dealings, may render personal property worthless insofar as the property's only economic use is "sale or manufacture for sale."[184] This effectively decrees that a person's "investment-backed expectations" for purposes of the *Penn Central* framework are subject to a greater "implied limitation" when dealing with the sale of commercial items. The relevant "background principles" concerning the scope of property rights may include considerations of regulatory power, the character of the property involved, and

178 *Id.* § 48-39-250.

179 *See Lucas*, 505 U.S. at 1019.

180 *Id.* at 1027.

181 *Id.* at 1029.

182 444 U.S. 51 (1979).

183 *Id.* at 58.

184 *Lucas*, 505 U.S. at 1027–28.

the overall "historical compact recorded in the Takings Clause that has become part of our constitutional culture."[185]

b. The Existing Regulatory Framework

The *Lucas* opinion discussed the nuisance exception only in the context of a complete deprivation of economically viable use of property. Absent that circumstance, in the more ordinary case where economic value has been reduced but not eliminated, the expectations measured under the investment-backed expectations factor need not be grounded exclusively in the background principles of nuisance and property law. Put another way, *Lucas* does not by its terms, as part of an inquiry into investment-backed expectations, foreclose the consideration of regulations that do not form a part of property law's "background principles" in cases that do not involve total deprivations of beneficial use.

While the consideration of "background principles" is certainly relevant to a property owner's expectations, *Lucas* did not rule out the consideration of regulations that are not themselves "background principles" of state property law as part of the investment-backed expectations inquiry. One must also consider the effect on the reasonable expectations of property owners of existing land use regulations that do not merely "duplicate the result that could have been achieved . . . under the State's law of . . . nuisance."[186]

This problem of accounting for the "existing regulatory framework" has spurred its own controversy, which came to a head in *Palazzolo v. Rhode Island*.[187] The takings claimant in that case, acting as a corporation of which he was the sole shareholder, acquired three undeveloped adjoining parcels.[188] Twelve years after the date of the purchase, the State of Rhode Island promulgated regulations that designated a portion of the claimant's property a protected wetland.[189] Seven years after the effective date of those regulations, the claimant's corporation was dissolved and the title to the three parcels passed by operation of law to the claimant as sole shareholder.[190]

The Rhode Island Supreme Court held that the claimant was precluded from establishing a taking under either a *Lucas* theory based on the deprivation of all economically viable use or a partial taking

185 *Id.* at 1028.
186 *Id.* at 1029.
187 533 U.S. 606 (2001).
188 *Id.* at 613.
189 *Id.* at 614.
190 *Id.* at 613–14.

theory under *Penn Central* because he had acquired title to the parcels after the wetlands regulation at issue had been promulgated.[191] The Rhode Island court found that the transfer of title was fatal to the *Lucas* claim because the wetlands regulation had become a part of the background principles of property and nuisance law for purposes of the *Lucas* "nuisance exception."[192] Similarly, the court found that the transfer of title was fatal to the *Penn Central* claim because the wetlands regulation had colored the claimant's reasonable expectations by putting him on notice as to the restrictions operating on the parcels at the time title was acquired.[193]

The United States Supreme Court disagreed. Writing for the majority, Justice Kennedy held that "a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title."[194] Justice Kennedy reached a similar conclusion with regard to the *Penn Central* claim, finding that the claim was "not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction."[195]

But while this suffices to establish that notice or existence of pre-existing regulations does not categorically bar all future takings claims, it does not establish that notice or existence of pre-existing regulations is irrelevant for all takings purposes. Justice O'Connor, in particular, wrote a concurring opinion devoted to the proposition that the holding in *Palazzolo* "does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance."[196]

There is good reason to think that Justice O'Connor's view best represents controlling doctrine. For one thing, without her there was not a five-Justice majority for the essential holding in *Palazzolo.* For another thing, the majority opinion in *Tahoe-Sierra Preservation Council,*

---

191 *See* Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707, 715–17 (R.I. 2000), *rev'd sub nom.* Palazzolo v. Rhode Island, 533 U.S. 606.

192 *Id.*

193 *Id.* at 717.

194 *Palazzolo,* 533 U.S. at 629–30. Justice Kennedy explained that "[a] regulation or common-law rule cannot be a background principle for some owners but not for others." *Id.* at 630. Rather, "[t]he determination whether an existing, general law can limit all economic use of property must turn on objective factors." *Id.*

195 *Id.* at 630.

196 *Id.* at 633 (O'Connor, J., concurring).

Inc. v. Tahoe Regional Planning Agency[197] referred favorably (if abstractly) to this aspect of Justice O'Connor's concurrence in *Palazzolo*.[198] And finally, the Federal Circuit has reached conclusions compatible with Justice O'Connor's reasoning in *Commonwealth Edison Co. v. United States*[199] and *Rith Energy, Inc. v. United States*.[200] In *Commonwealth Edison*, the court acknowledged that "the state cannot defeat liability simply by showing that the current owner was aware of the regulatory restrictions at the time [ ] the property was purchased."[201] Citing Justice O'Connor's concurrence in *Palazzolo*, however, the court reaffirmed that "the regulatory environment at the time of the acquisition of the property remains both relevant and important in judging reasonable expectations."[202] Thus, while the court did not go so far as to find that a previously existing regulatory restriction was dispositive of the *Penn Central* claim, it nonetheless confirmed that the *Penn Central* analysis would be informed by the takings claimant's reasonable expectations, as colored by the existence of regulatory restrictions prior to the claimant's acquisition of the land at issue.

In *Rith Energy*, the Federal Circuit confirmed that the consideration of prior existing regulations was proper for purposes of an investment-backed expectations inquiry.[203] Again citing Justice O'Connor's concurrence in *Palazzolo* with approval, the Federal Circuit found that the notice provided by a prior existing regulation remains relevant to the investment-backed expectations analysis, which is in turn a "long-standing element of regulatory takings analysis" under *Penn Central*.[204]

To be sure, Justice Scalia, at least, does not believe that the regulatory background should count in either a total takings or a *Penn Central* inquiry,[205] but thus far he seems to be a minority of one. Ac-

197 535 U.S. 302 (2002).

198 *See id.* at 335–36.

199 271 F.3d 1327 (Fed. Cir. 2001).

200 270 F.3d 1347 (Fed. Cir. 2001).

201 *Commonwealth Edison*, 271 F.3d at 1350 n.22.

202 *Id.*

203 *Rith Energy*, 270 F.3d at 1350.

204 *Id.* at 1350–51.

205 For Justice Scalia's views in the partial takings context, see *Palazzolo v. Rhode Island*, 533 U.S. 606, 637 (2001) (Scalia, J., concurring).

> The "investment-backed expectations" that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional. Which is to say that a *Penn Central* taking, no less than a total taking, is not absolved by the transfer of title.

Id. (citation omitted). For his views in the total takings context, see *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987).

cordingly, the notice provided by the presence of a pre-existing regulation remains one of several factors that must be considered in determining whether a land use restriction has resulted in a taking under the Fifth Amendment, though *Palazzolo* makes clear that consideration of such regulations will not be determinative of a *Penn Central* claim.

3. The Character of the Government Action

The Court in *Penn Central* declared that the "character" of the government action was relevant to regulatory takings determinations.[206] The Court then said in the next sentence that a "'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[207] What did the Court have in mind by the "character" of the governmental action?

One suggestion is that the Court designed the "character" factor "to refer to the issue of whether a regulation results in a forced physical occupation of property."[208] Perhaps this is what the Court had in mind, though this is very hard to square with the statement in *Penn Central* that a taking can "more readily" be found in the case of a physical occupation, which certainly suggests that physical occupations do not exhaust the circumstances in which takings can be found. Moreover, the Court had made clear well before the *Penn Central* decision that a permanent physical occupation of property was considered a categorical taking without need for further analysis. If the "character" of the governmental action is to be part of an ad hoc factual inquiry, the Court must have had something else in mind.

Perhaps instead the Court meant for the "character" factor to include an inquiry into whether any public interest is served by the regulation.[209] The Takings Clause, however, presupposes that any governmental deprivation of a property interest will be made in the pursuit of a legitimate public purpose.[210] Otherwise, not even just

206 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

207 *Id.* (citation omitted).

208 Echeverria, *supra* note 9, at 5.

209 *See* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1176 (Fed. Cir. 1994); Echeverria, *supra* note 9, at 5.

210 *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (recognizing that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid" (quoting Thompson v. Consol. Gas Corp., 300 U.S. 55, 80 (1937))).

compensation would save the constitutionality of the regulation at fault for the deprivation. Thus, the "pursuit of public purpose" inquiry is relevant, not to whether the government action results in a compensable taking, but instead to whether the government can be altogether prohibited from promulgating a regulation or acquiring private property.

A third option is to say that the "character" factor invites consideration of the *extent* to which a challenged regulation actually serves the government interests sought to be advanced. This option is now foreclosed by the Court's decision in *Lingle v. Chevron U.S.A. Inc.*,[211] which categorically declares that asking "whether a regulation of private property is *effective* in achieving some legitimate public purpose. . . . has some logic in the context of a due process challenge . . . . [b]ut such a test is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment."[212]

The final, and only plausible, understanding of the "character" factor is that it is designed to evaluate the extent to which the government action resembles what has been uncontroversially understood to constitute a taking. This understanding makes good sense, as it is sensible to envision a continuum along which government actions at one end, such as permanent physical occupations, effect a taking per se because they closely resemble the formal exercise of the eminent domain power, whereas government actions at the other end, such as routine land use regulations, almost certainly would *not* effect a taking. The more closely that a regulatory measure resembles a paradigmatic taking, the more likely that a regulatory taking exists under the *Penn Central* framework. This is simple common sense, although it took the Court a quarter of a century to express it clearly.

B. Recapturing Penn Central

There is much ground for criticism of the *Penn Central* framework. The framework contains factors that are not well understood or well developed. Even if the only function of the framework is to structure discussion, it is questionable whether a framework as poorly defined as the *Penn Central* formulation appears to be can serve that function well.

We think that enough order can be brought to the chaos to allow the *Penn Central* framework to serve as a vehicle for formal legal discussions of fundamental fairness. The first step in the process is to recognize that the *Penn Central* three-factor framework actually started

211 125 S. Ct. 2074 (2005).
212 *Id.* at 2083–84.

life as a two-factor framework. It is worth recalling the central paragraph from *Penn Central*:

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.[213]

This formulation suggests two factors at work: (1) the extent of the harm suffered by the property owner *in view of* the owner's investment-backed expectations and (2) the character of the governmental action *in view of* the paradigmatic takings status of permanent physical invasions (or, perhaps even more paradigmatically, formal transfers of title). The subsequent decision in *Kaiser Aetna* split the first factor into two separate elements, but that was probably a step in the wrong direction. It is not clear what it means to look at investment-backed expectations divorced from the overall economic impact of the regulation on the claimant (or vice versa), and case law subsequent to *Kaiser Aetna* does not stand as a testament to the wisdom of *Kaiser Aetna*'s innovation. Instead, a dual focus on the harm to the claimant and the nature of the governmental action provides a basis for considering any matters that are plausibly relevant to an overall determination of the fairness of making a property owner bear the burden of a governmental regulation.

Put simply, we believe that much of the confusion concerning the meaning of the *Penn Central* framework has come from the unwise decision in *Kaiser Aetna* to separate the effect of the challenged regulation on the claimant from the claimant's investment-backed expectations. The result has been to render the economic effect on the claimant essentially irrelevant in all but the most extreme cases of total deprivation of beneficial use. It is hard to see any room in the existing doctrinal discussions for loss of value short of absolute loss, and that makes little sense if one is truly concerned about overall fairness. Instead, focus has shifted almost entirely to the element of investment-backed expectations, with chaos the predictable result until and unless a consensus can be reached—and none seems in view—about whether the proper focus of attention is the individual property

213 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (citations omitted).

owner or the property in the abstract. By returning to the original *Penn Central* formulation, attention will be recentered on the actual impact of the regulation, with the owner's expectations serving a qualifying function in that analysis.

We do not purport here to prescribe how that analysis should proceed. Is the doctrinally (or normatively) proper focus of inquiry on a particular property owner who is affected by governmental action or on the subject property in the abstract? In the first case, one might want to pay attention to the property owner's overall financial position and/or pay close attention to the state of the regulatory world when the owner acquired the property. In the second case, by contrast, where focus is on the affected property without regard to the contingencies of ownership, there is less cause for considering these particulars. We do not seek to resolve this dispute. Our point here is only that the *Penn Central* formulation, as originally constructed in *Penn Central*, provides a doctrinal vehicle through which these issues can be raised and debated and calls for consideration of matters that seem appropriate to an inquiry into fairness.

A second step in the process of clarifying the appropriate role of the *Penn Central* framework is to specify the domain in which it operates. There are certain governmental actions (other than direct title transfers) that the Court deems to be takings without further inquiry. These include permanent physical occupations and complete destruction of economic value of property. In these cases, according to the Court, no complex, multifaceted arguments about fairness need to be constructed because the outcome of the inquiry is foreordained. The scope of this doctrine can best be grasped if one characterizes takings claims as either *total* or *partial* takings. The concept of *total* takings is sometimes conflated with the less inclusive category of *physical* takings, perhaps because physical takings have historically been the most common form of total takings. But a total taking, in its broadest sense, occurs whenever a government action or regulation *fully* deprives the claimant of a fundamental property interest.

It is conventional wisdom among property scholars that there is no set of rights that fundamentally must be part of the concept of property. The dominant understanding is instead that property is, quite simply, a bundle of rights protected by the state and that any bundles put together by the state are equally deserving of the label "property"—if indeed the label "property" serves any useful analytic

function whatsoever.[214] A competing vision, however, maintains that there are certain basic features of property that form a cohesive, coherent core of the fundamental idea of property: the rights to possess, use, and dispose.[215] We do not intend here to plunge into this age-old dispute.[216] It is enough for our purposes to observe that the rights to possess, use, and dispose of property seem to play a central role in the law of regulatory takings. A total deprivation of any one of these three basic rights is enough to constitute a taking without further inquiry. Partial deprivations of these rights call forth the multifaceted *Penn Central* framework. Thus, in *Loretto*, the Court found a taking without elaborate analysis where a regulation totally deprived the plaintiff of the right exclusively to *possess* her land.[217] In *Lucas*, the Court found a taking without elaborate analysis where the regulation at issue totally deprived the plaintiff of the right to *use* his land in any economically meaningful sense of the term "use."[218] No case of which we are aware has yet involved a total deprivation of the right to *dispose* of property, but *Hodel v. Irving*,[219] which found a taking when the government deprived Native Americans of the right to pass property by will, suggests that a stronger interference with the right to dispose would likely constitute a taking per se.

These rules concerning per se takings fit elegantly into the *Penn Central* framework. If the impact on the claimant is the complete loss of one of the three bedrock characteristics of property, that impact, economic or otherwise, is so overwhelming that other considerations are simply swamped. In other words, there are certain impacts on private property owners that are so conceptually large that they consti-

214 For the classic expression of this position, see Thomas C. Grey, *The Disintegration of Property*, *in* XXII NOMOS: PROPERTY 69 (J. Roland Pennock & John W. Chapman eds., 1980).

215 *See* Richard A. Epstein, *Property and Necessity*, 13 HARV. J.L. & PUB. POL'Y 2 (1990).

216 The dispute may well reduce to the question whether property is pre-political or post-political, which goes back at least to Blackstone (pre-political) and Bentham (post-political), but that is a topic for another day. Professor Lawson, however, wishes gratuitously to express his disagreement with the conventional wisdom and his agreement with the Blackstone/Epstein position on this point.

217 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435–36 (1982).

218 *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015–18 (1992). David Lucas, of course, was permitted to "use" his land in a sense even under the strictest regulations imposed by South Carolina: he could walk on it, look at it, admire the wildlife, etc. But a complete or near-complete loss of economic value is a reasonable proxy for a complete or near-complete right to use the property, as the concept of "use" would be understood by most ordinary landowners.

219 481 U.S. 704 (1987).

tute a taking without further inquiry.[220] To be sure, the Court in *Loretto* seemed to find a taking per se, not because of the nature of the impact on the claimant, but because of the character of the government action—namely, that a permanent physical occupation looked very much like a transfer of title. But a better way to understand the concerns voiced by the Court in *Loretto* is to identify them as an especially severe impact on the claimant's right to possession rather than as a function of the kind of governmental action at issue.

Lingle provides a third step in a clarification of the *Penn Central* framework by resolving some confusion about the significance of the character of the governmental action. As *Lingle* holds, it is self-evidently relevant to a fairness inquiry whether the government is doing something that looks very much like an exercise of eminent domain under some other guise or is instead simply doing things that governments have long done without much question.

CONCLUSION

We do not maintain that even the most clearly articulated *Penn Central* framework will render the law of regulatory takings clear, or even comprehensible. It may well be that the entire enterprise is doomed to failure because there simply is no line to be drawn between formal exercises of eminent domain on the one hand and all regulations that affect economic value on the other. But American law has chosen to tread a middle ground for nearly one-and-one-half centuries. If one takes that choice as a jurisprudential given, and if all that one expects a framework to do in this context is to provide an opportunity to address issues rather than to resolve them (or to predict outcomes or tell courts how to reach those outcomes), a properly understood *Penn Central* framework does not fare so badly. For many

220 Of course, in order to determine whether the totality of a feature of property has been abrogated, one has to define the contours of that feature. This raises the well-known "denominator problem": when assessing the extent of the impact of a government regulation, what is the baseline ownership interest against which the impact should be measured? If a regulation deprives a landowner of all of the use of air rights above a certain level, is that a total taking of use rights, or does one measure the loss by reference to the rights of the landowner in the entire parcel of land, including surface and subsurface rights (or perhaps even against the rights of the landowner in all property that he or she owns, even if that property is not the direct subject of the challenged regulation)? This problem has bedeviled the Court, *see Lucas*, 505 U.S. at 1016 n.7, and we offer no solution to it here. The *Penn Central* framework raises the problem, provides a vehicle for its exploration, and accommodates any reasonable answer that one could provide. Frameworks are not supposed to do much more than that.

of the same reasons, the analysis in *Mathews* holds up under scrutiny better than many scholars credit. *Penn Central* and *Mathews* deserve another look before they are taken out with history's garbage.