The Meaning of "Taken for Public Use"

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Debate about the significance of the "public use" language in the Takings Clause generally assumes that the language is a limit on the power of eminent domain. This Essay argues that the language is better understood as an operative predicate that tells us what kinds of takings require the payment of compensation. The Supreme Court has come to recognize that all sorts of takings occur that do not require compensation, according to what the Court has characterized as "background principles of property law." The phrase "taken for public use" offers a more principled account of the subset of takings in which compensation is required: those in which property is taken to be used as a building block in a project that has been authorized by public authority. This understanding of "taken for public use" captures nearly all of the Court's background principles, and it describes both the dominant use of the Clause in regulating exercises of eminent domain as well as most of the cases in which the Court has required compensation for regulatory takings.

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Introduction

The two most discussed issues in the literature on government takings of property are (1) when the regulation of property becomes sufficiently intrusive to qualify as a "taking" and (2) whether there is a limit on explicit takings of property under the power of eminent domain on the ground that the taking is for a "private" purpose. A third issue, which is less discussed and has only recently drawn the attention of the Supreme Court, is why some actions by the government that would ordinarily be described as takings of private property do not require any payment of just compensation. This Article considers this third issue and argues that its correct resolution has important implications for the first two, including the private-purpose limitation on eminent domain at issue in *Kelo v. City of New London*.[1]

Given the express constitutional command that takings of private property for public use require the payment of just compensation,[2] it is a puzzle of considerable significance that some explicit takings of property by the government require the payment of just compensation, while others do not. The emerging approach of the Supreme Court is to presume that any appropriation of property authorized by the government is a taking, but that compensation is not required if one of a long list of "background principles" based on history and tradition indicates that an exception precludes the need for compensation.[3] A better approach, the Article argues, is to consider the implications of the language

1. 545 U.S. 469 (2005).

2. U.S. CONST. amend. V ("nor shall private property be taken for public use without just compensation"). The provision has been made applicable to actions by state governments, the conventional citation being *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 239 (1897).

3. Cedar Point Nursery v. Hassid, 594 U.S. 139, 158-60 (2021).

of the Takings Clause that says compensation is affirmatively required if the property is "taken for public use."[4] The dominant approach among commentators is to treat the reference to public use as an implied *limitation* on the power of eminent domain: namely, the power may not be used to condemn property for a "private" use. The Article argues that "taken for public use" actually tells us when compensation *is required*, without regard to whether the government is proceeding by a formal exercise of eminent domain or otherwise. In brief, compensation is required when private property is taken to be used as a building block in some project authorized by public authority. The proposed reading is consistent with practice when the government or an entity exercising delegated authority uses the power of eminent domain; it is also consistent with most Supreme Court decisions applying the regulatory-takings doctrine. The proposed reading of the phrase "taken for public use" solves the puzzle about the scope of the compensation requirement in a far more principled manner than does the emerging approach based on a laundry list of background principles.

One implication of this thesis, which is of direct relevance to this Symposium, is that there is no constitutionally mandated "enclave" that bars the use of eminent domain because the proposed purpose is determined by courts to be "private." History and tradition make clear that eminent domain is a sovereign power of government that is vested in the legislature. It is also clear that the power of eminent domain may be delegated, most commonly to subordinate units of government like municipalities but also to nongovernmental entities like common carriers and utilities. When the legislature determines that it is appropriate to delegate the power of eminent domain, it must do so expressly, for reasons that the legislature declares to be in the public interest. And when the legislature, or another entity exercising a delegated power of eminent domain, determines that private property must be "taken for public use," the condemning authority must pay just compensation equal to the value of the property that is taken. These are proper and well-established constitutional limits on the exercise of eminent domain. An additional limitation, which would invalidate the use of eminent domain for projects deemed by judges to be "private," has always been contested and rests ultimately on a libertarian vision of limited government. The widespread public backlash to the particular exercise of eminent domain in *Kelo* indicates that the political process is more than up to the task of prescribing additional limits on the use of eminent domain that "homevoters" find disturbing.[5]

4. U.S. CONST. amend. V.

5. *See* WILLAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS 4 (2005). Fischel develops the theory that the concentrated and nondiversified wealth that large numbers of Americans have in their homes explains the pervasive opposition to policies that threaten home values; the theory can also account for the widespread opposition to eminent domain when presented as a threat to take occupied homes, the dominant theme of public commentary about the *Kelo* case. *See also* Janice Nadler, Shari Seidman Diamond, & Matthew M. Patton, *Governmental Takings of Private Property*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 286, 286-309 (Nathaniel Persily, Jack Citrin, & Patrick J. Egan, eds., 2008) (presenting survey evidence that the public is overwhelmingly opposed to the use of eminent domain to take occupied homes).

I. The Rise of Background Principles

Perhaps the most important question posed by the Takings Clause—and similar constitutional provisions and settled practices in other countries—is why certain takings of property require compensation and others do not. A moment's reflection reveals that most "takings" by the government of interests that we think of as "private property" do not give rise to a duty of compensation. And yet there is no general understanding about what distinguishes takings that require compensation from those that do not.

Let me briefly enumerate some of the takings of property by the government or other state actors that do not by general consensus require the payment of compensation.

The largest category, in terms of the money involved, is taxes. The Supreme Court has on several occasions observed that "[e]xercises of the taxing power" do not give rise to a duty of compensation.[6] The only explanation it has given is that "the power of taxation should not be confused with the power of eminent domain."[7]

Another large category involves forced sales of property to recover unpaid debts, either owed to the government or another private party. Although the Court has suggested that the taking of a security interest designed to help assure the repayment of a debt can be a taking,[8] it has never held that a foreclosure action in which a debtor's property is seized and sold to repay a debt constitutes a compensable taking.

A third category of significance consists of torts committed by government agents that injure property. Although suits against the government sounding in tort were historically barred by sovereign immunity, this bar can be, and has been, waived by the adoption of torts claims acts.[9] Nevertheless, the Court recently clarified that "isolated" trespasses by government agents, if "not undertaken pursuant to a granted right of access," should continue to be adjudicated as torts, not as takings.[10]

It is also clear that government efforts to regulate or even destroy property deemed to generate a "noxious use" do not require compensation, something now

6. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); *see also* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 615 (2013) ("It is beyond dispute that 'taxes and user fees . . . are not takings.'" (quoting Brown v. Legal Found. of Wash., 538 U.S. 216, 243 n.2 (2003) (Scalia, J., dissenting)); *cf.* Sheetz v. El Dorado Cnty., 601 U.S. 267, 272 (2024) (holding that the imposition of a $23,000 charge for a building permit was subject to challenge under the Takings Clause as an exaction without commenting on whether the fee could be regarded as a tax).

7. *Koontz*, 570 U.S. at 617 (quoting Houck v. Little River Drainage Dist., 239 U.S. 254, 264 (1915)).

8. United States v. Sec. Indus. Bank, 459 U.S. 70, 77-78 (1982); Armstrong v. United States, 364 U.S. 40, 44-49 (1960).

9. *See e.g.*, Federal Torts Claims Act, 28 U.S.C. §§ 2671-2680 (2019). Most states have analogous provisions. The Act excludes liability in tort for any claim based on an act or omission of a federal employee carrying out a statute or regulation or performing a "discretionary function." *Id.* at § 2680(a). Claims that fall within the exception are not compensated in tort and would rarely be compensated as takings.

10. *Cedar Point Nursery*, 594 U.S. at 159.

commonly called the "nuisance exception."[11] Relatedly, government seizures of adulterated foodstuffs or illegal drugs are not compensable.[12]
Criminal and civil fines for violating the law are universally assumed to be immune from claims for compensation.

Civil forfeitures of property used in the commission of a crime are immune from takings liability, even if the owner who suffers the loss can be shown to have had no involvement in or knowledge of the criminal activity.[13]

Destructions of property to prevent the spread of fire or to keep valuable assets from falling into the hands of an enemy do not generate a right to compensation.[14] Relatedly, the so-called "fireman's rule" immunizes firefighters and police officers from liability when they enter property in response to an alarm and cause damage.[15] Likewise, property owners are not entitled to compensation when the police enter property pursuant to a warrant or reasonable cause and create damage.[16]

Entry of property under conditions of necessity is generally privileged.[17] Compensation may be required if the entry damages property, but evidently this is based on principles of restitution, and not because judicial enforcement of the privilege is regarded as a taking.[18]

Other exercises of government power, although they have not been officially labeled background principles of property, are routinely held not to be "takings" that require the payment of compensation. Zoning laws are a prominent example. Zoning restrictions can have a pronounced impact on the value of property, often in a disproportionate fashion. But ever since the landmark decision in *Euclid v. Ambler Realty Co.*,[19] owners adversely affected by zoning have been denied compensation for such losses. A similar story can be told about rent controls,[20] a wide variety of pre-market approval requirements for drugs and medical devices, pesticides, the construction of new buildings or renovations of existing ones, the issuance of new classes of securities, and so on and so forth.[21] The proponents of these types of regulation would gladly label them background principles in order to head off any perceived threat that they require the payment

11. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

12. North Am. Cold Storage Co. v. Chicago, 211 U.S. 306, 320-21 (1908) (upholding an order shutting down plaintiff's business until it turned over allegedly putrid chicken in its cold storage for destruction).

13. Bennis v. Michigan, 516 U.S. 442, 452 (1996).

14. Brian Angelo Lee, *Emergency Takings*, 114 MICH. L. REV. 391, 396-401 (2015).

15. RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 327 (12th ed. 2020).

16. *Cedar Point Nursery*, 594 U.S. at 159.

17. *Id.*

18. *See* Vincent v. Lake Erie Transp. Co., 124 N.W. 221, 222 (Minn. 1910).

19. 272 U.S. 365 (1926).

20. *See, e.g.*, Cmty. Hous. Improvement Program v. City of New York, 59 F.4th 540, 547 (2d Cir. 2023) (collecting cases).

21. *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1006-07 (1984) (holding that a pesticide manufacturer required to disclose trade-secret information as a condition of obtaining permission to market a pesticide had no claim for a taking when it was on notice that the regulator "was authorized to use and disclose any data turned over to it").

of compensation for the losses in value they create. And under the precedential approach currently favored by the Court, there is no sound reason why they should not be so regarded.[22]

The Supreme Court has never identified a general principle that would distinguish compensable takings of property from the long list of noncompensable takings. Instead, it has proceeded in what is essentially a taxonomic fashion, developing general tests for what constitutes a taking of property (either the ad hoc test of *Penn Central*[23] or the categorical rules for appropriations and total loss of value[24]), but then excluding from the compensation requirement a long list of circumstances that describe exceptions to the requirement. The doctrinal tests for identifying takings, however flawed, at least have the appearance of stating general principles. The unruly and apparently open-ended list of exceptions is largely untheorized and appears to be grounded only in precedent or convention.

The current framework for determining the scope of the compensation requirement originated in *Lucas v. South Carolina Coastal Council*.[25] The Court held that a regulation that deprives a landowner of "all economically beneficial or productive use of land" will always be regarded as a taking.[26] But the Court went on to recognize that no compensation is owed if the challenged regulation conforms to a "limitation" that "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[27] The primary "background principle" discussed by the Court in *Lucas* was for "a law or decree" that does "no more than duplicate the result that could have been achieved in the courts . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally."[28] The Court explained that "[t]he use of these properties for what are now expressly prohibited purposes was always unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit."[29] Although *Lucas* was primarily concerned with regulations that track nuisance law, a footnote suggested the possibility of other background principles, noting "litigation absolving the State (or private parties) of liability for the destruction of 'real and personal property, in cases of actual

22. The above list is hardly exhaustive. Other examples would include the doctrines of easements by implication and necessity, loss of property due to an application of the statute of frauds or the good faith purchaser doctrine, and (arguably) adverse possession. In each case property is transferred by operation of law from one party to another without compensation.

23. Penn Cent. Transp. Co., 438 U.S. 104, 124 (1978) (setting forth the "ad hoc" test for regulatory takings).

24. Horne v. Dept. of Agric., 576 U.S. 350, 357-58 (2015) (setting out the categorical rule for physical appropriations); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (setting out the categorical rule for total loss in value).

25. 505 U.S. at 1003.

26. *Id.* at 1019.

27. *Id.* at 1029.

28. *Id.*

29. *Id.* at 1030.

necessity, to prevent the spreading of a fire' or to forestall other grave threats to the lives and property of others."[30]

The commentary following *Lucas* focused mostly on the desirability of a categorical rule for regulations that deprive the owner of all "economically beneficial or productive use" of property. But a few commentators saw the discussion of "background principles of property law" as pointing to the possibility of a more robust defense against takings liability. They argued that the background principles should logically extend well beyond the common law of nuisance, and as such, the concept could be deployed to defeat a variety of claims for compensation based on the Takings Clause.[31] The Court, however, seemed more interested in expanding the categorical rules for identifying a "taking." For example, the Court later indicated that the creation of a public easement of access on private land should be regarded as a categorical taking,[32] and it held that the appropriation of raisins pursuant to a New Deal program designed prop up the price of agricultural commodities should be so regarded.[33]

The campaign to expand the categorical-takings rules reached its apogee (at least so far) in *Cedar Point Nursery v. Hassid*.[34] The Court held that a California regulation giving labor organizers an intermittent right to enter farms to organize migrant workers was a categorical taking, because it took the farm owners' "right to exclude" strangers from their property. The Court had taken the case based on the representation that the access regulation effectively conveyed an established property right—an easement in gross—to labor organizers. But the briefing in the case revealed that the access right did not exactly conform to the conception of an easement in gross under California law.[35] Undeterred, the Court forged ahead and posited that the "right to exclude others" should be considered a defining attribute of property for federal constitutional purposes.[36]

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30. *Id.* at 1029 n.16 (quoting Bowditch v. Boston, 101 U.S. 16, 18-19 (1880) and citing United States v. Pacific R.R., 120 U.S. 227, 238-39 (1887)).

31. *See, e.g.*, Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. CALIF. L. REV. 1, 6 (1996); Michael C. Blumm & Lucas Ritchie, Lucas*'s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENV'T L. REV. 321, 325-26 (2005); *see also* DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 110-20 (2002) (positing the existence of a number of categorical rules of non-liability).

32. Dolan v. City of Tigard, 512 U.S. 374, 396 (1994).

33. Horne v. Dept. of Agric., 576 U.S. 350, 361 (2015).

34. 594 U.S. 139 (2021).

35. *See id.* at 155 (conceding that "the regulation does not exact a true easement in gross under California law because the access right may not be transferred, does not burden any particular parcel of property, and may not be recorded"). *Compare* Brief of Respondents at 34, *Cedar Point Nursery*, 594 U.S. 139 (No. 20-107) ("It is doubtful, to say the least, that the . . . access regulation is properly analogized to an easement under California law."), *with* Reply Brief for Petitioners at 8, *Cedar Point Nursery,* 594 U.S. 139 (No. 20-107) ("Ultimately, however, what matters is not the label one uses but rather whether the right to exclude has been impinged in a way that amounts to more than a series of trespasses.").

36. *Cedar Point Nursery*, 594 U.S. at 155. In previous writing, I have argued that "the right to exclude" is, as an interpretive matter, the sine qua non of the interests identified as property. *See* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998). It does not necessarily follow, however, that this should be regarded as a federal definition of property for purposes of the Takings Clause. In numerous cases the Court has indicated that property for takings purposes should be determined by examining independent sources such as state law. *See e.g.*, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 707-08 (2010) (holding that there was no property right under state

Showered with counterexamples in which the right to exclude has been qualified in various contexts, the Court in *Cedar Point Nursery* felt obliged to sketch out an account of various exceptions in which compulsory access to property does not give rise to any right to compensation. In so doing, the Court expanded the list of "background principles" beyond the nuisance exception, listing, in addition, entries under conditions of necessity, entries to effect an arrest, and entries to engage in a search consistent with the Fourth Amendment.[37] The Court also observed that "isolated" trespasses by government agents are not compensable takings, and that state rules requiring the entry of unwanted persons into property otherwise open to the public do not give rise to a claim for compensation.[38] Finally, the Court opined that inspections of property conducted under "government health and safety inspection regimes" will generally not give rise to a claim for compensation because these are reasonable conditions imposed on the benefit of securing government permissions to engage in potentially risky enterprises.[39]

Commentators generally hostile to the Court's regulatory-takings doctrine have suggested that the much-expanded list of "background principles of property law" in *Cedar Point Nursery* means that the "categorical rules" for government takings have been greatly diluted.[40] As Dan Farber has written, the number of landowners who will be denied compensation, because of the expanded list of background conditions, "will likely exceed the number who win from the ruling in the relatively few cases dealing with physical intrusions."[41]

II. Can Background Principles Be Rationalized Under Intermediate-Level Generalizations?

One relatively modest way of bringing some coherence to the proliferating list of background principles would be to identify intermediate-level generalizations that reflect background principles sharing a family resemblance.

law to future accretions on riparian property); *Lucas*, 505 U.S. at 1030-31 (holding that state law governs whether the nuisance exception applies). For example, land beneath navigable waters may be protected by a navigation servitude that prohibits the creation of private property rights, without regard to whether someone exercises a right to exclude others from such land. *See, e.g.*, United States v. Cherokee Nation of Okla., 480 U.S. 700, 704 (1987).

37. *Cedar Point Nursery*, 594 U.S. at 159-62.

38. *Id.* at 156-57 (discussing PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980)).

39. *Id.*

40. *See, e.g.*, Lee Anne Fennell, *Escape Room: Implicit Takings After* Cedar Point Nursery, 17 DUKE J. CONST. L. & PUB. POL'Y 1,45-54 (2022) (arguing that *Cedar Point Nursery* creates a "selective scrutiny machine" that allows the Court to invalidate regulations that property owners dislike while upholding those they like); *see also* Michael C. Blumm & Rachel G. Wolfard, *Revisiting Background Principles in Takings Litigation*, 71 FLA. L. REV. 1165, 1183-1203 (2019) (listing a wide range of lower-court controversies as potential candidates for "background principles" exceptions to takings liability); John D. Echeverria, *What is a Physical Taking?*, 54 U.C. DAVIS L. REV. 731, 763-75 (2020) (listing multiple areas of the law in which the government authorizes the taking of property but no compensation is assumed to be required).

41. Daniel Farber, *The Illusions of Takings Law*, CTR. FOR PROGRESSIVE REFORM (July 1, 2021), https://progressivereform.org/cpr-blog/illusions-takings-law [https://perma.cc/5UH5-5UCC].

Some progress could be made in clarifying the doctrine along these lines—but only up to a point.

A. Harm Prevention

One fairly obvious generalization is that compensation is not required when the government takes property in order to eliminate or deter some harm to society. The nuisance exception clearly fits the bill here. If the government is acting to prevent a use of property that is threatening harm to others—such as shutting down a nuclear power plant on an earthquake fault line (cited by Justice Scalia in *Lucas*)[42]—no compensation is required. Presumably, older cases like *Mugler v. Kansas*,[43] authorizing the destruction of liquor stocks and distilleries without compensation, can be justified along the same lines, as well as decisions upholding the destruction of one species of plant to save another more valuable species of plant.[44] Similarly, the established understanding that the government can seize and destroy adulterated food and illegal drugs can be seen as a variation on the bad-prevention theme.[45] Likewise, the understanding that no compensation is required for civil and criminal fines for violating environmental, consumer-protection, and public-safety rules exemplifies this idea. Civil forfeitures often stray beyond the plausible realm of harm-prevention, but perhaps they too can be justified on deterrence grounds insofar as they caution property owners to be careful about who uses their houses or cars if there is any chance the property might be employed in criminal activity.

Other background principles that involve emergencies can also be seen as falling within the harm principle. Entries of property under conditions of necessity, the privilege of public officials to destroy personal property in combating fires or executing search warrants, the destruction of oil terminals about to fall into the hands of the enemy—all of these pockets of noncompensation involve circumstances in which quick action taking the property of some is necessary in order to prevent greater harm to others. Absent the imperative of quick action, some sort of exchange of rights might occur in which those faced with greater harm would be allowed to acquire the rights of those faced with lesser harm. But exigent circumstances make any voluntary exchange of rights impossible, which partially explains why these sorts of takings are not subject to the ordinary rule that compensation must be given when property is taken for public use.[46]

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42. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

43. 123 U.S. 623, 669 (1887).

44. Miller v. Schoene, 276 U.S. 272, 279 (1928).

45. *See* Omnia Com. Co. v. United States, 261 U.S. 502, 508-09 (1923) (noting that no compensation is afforded for the "destruction of diseased cattle, trees, etc., to prevent contagion").

46. Sometimes compensation in these emergency situations is required after the fact, either by common law, *see* Vincent v. Lake Erie Transp. Co., 124 N.W. 221, 222 (Minn. 1910), or by statute, *see* New York City Consolidation Act of 1882, N.Y. Laws ch. XI, tit. 2, § 450 (empowering New York City to destroy buildings to prevent the spread of a fire but enabling owners to recover damages as "in the case of land taken for public purposes"). But compensation is not required as a matter of constitutional right. Harm prevention is not the only reason why compensation after the fact is not constitutionally required.

B. Consent

Another intermediate-level generalization might be consent. The understanding that property subject to a mortgage or security interest can be seized and sold without compensation can be explained on this basis. If one borrows money to buy real or personal property and executes a security interest, a moderately well-informed borrower should know that failure to repay the loan may result in the property being taken without compensation. So, by executing the mortgage or the security interest, the borrower effectively consents to the possibility of an uncompensated taking.[47] A similar rationale could explain the practice of evicting tenants for nonpayment of rent or other material violations of the lease—which as far as I am aware has not yet made it on any list of background principles but would seem to fit the bill.[48] Consent also appears to be the justification for the Court's holding, reaffirmed in *Cedar Point*, that state laws requiring owners of property to admit unwanted demonstrators on their property are permissible if the property is otherwise open to the public.[49] Opening property to the public is apparently regarded as implied consent to opening to all. A similar theory of implied consent has been invoked by the Court in justifying all sorts of rent controls: by agreeing to lease their property, the owner has consented to whatever controls the local jurisdiction may come up with in the future, including allowing existing renters to specify who the next renter will be.[50]

C. Unrationalized Background Principles

Yet even if some order can be brought to the litany of background principles by grouping them into categories reflecting intermediate levels of generality, not every entry on the list of background principles can be rationalized under either the harm principle or the consent principle, so the approach remains deeply unsatisfying.

Other factors include a concern that mandatory compensation would discourage emergency responders from acting vigorously to prevent the spread of the harm, and that property owners receive implicit compensation ex ante in the form of lower insurance rates. *See* Thomas W. Merrill, *Property and Fire*, *in* WILDFIRE POLICY: LAW AND ECONOMICS PERSPECTIVES 32, 40-46 (Karen Bradshaw & Dean Lueck eds., 2012); Lee, *supra* note 14, at 410-11.

47. The consent theory, however, would have greater difficulty explaining foreclosure after a default on an involuntary lien. In *Tyler v. Hennepin County*, the Court held it was a taking of property for the county to retain funds from a tax-foreclosure sale in excess of the unpaid taxes. 598 U.S. 631, 639 (2023). The Court appeared to regard the county's practice as going beyond the bounds of reasonable consent, since it deviated from what is permitted in other jurisdictions. *See id.* at 642 (describing the practice as a "minority rule" that had been rejected by thirty-six states). This ignores the many warnings and opportunities to cure that the county provided, which presumably alerted the taxpayer and her family to the consequences of continued default.

48. *See* ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT 377-385 (1980) (discussing widespread use of leases and state statutes authorizing forfeiture of leases for nonpayment of rent).

49. *See* Cedar Point Nursery v. Hassid, 594 U.S. 139, 156-57 (2021) (discussing PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980)).

50. *See* Yee v. City of Escondido, 503 U.S. 519, 527-28 (1992).

The most glaring anomaly is the exception for taxes. The background principle that taxes are not takings cannot be explained on either harm-reduction or consent grounds. Taxes are sometimes imposed to deter harmful activity (e.g., pollution taxes), but more commonly fall on the wicked and the virtuous alike. And the obligation to pay taxes cannot be grounded in consent, unless one construes the failure to emigrate to another jurisdiction as implied consent to pay taxes. Perhaps the exclusion of taxes can be explained on the ground that the payment of taxes cannot be compensated, because this would reverse the tax and leave the government with no means of support. But the Court has not even endorsed this simple pragmatic argument for the most significant of the background principles.[51] And its decisions subjecting monetary exactions to scrutiny under the Takings Clause cry out for a better explanation of the tax exception.[52]

Another anomaly is the background principle for "isolated torts" committed by government actors.[53] Government torts clearly satisfy the harm principle. One cannot find that a government agent has committed a tort without also finding that the action has caused injury or harm. The problem is that compensation is not available under the Takings Clause, but only on a more qualified basis under the law of tort. The claimant must show a waiver of sovereign immunity, negligence, and causation before obtaining compensation for a tort, elements not required when the government proceeds by eminent domain. The differential treatment cries out for a principled justification, which neither the harm principle nor the consent principle provide.[54]

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51. Commentators have periodically questioned the broad exemption of taxes from takings liability, usually on the ground that highly disproportionate tax liabilities (either in terms of income taxed or benefits received from government) should be treated as takings. *See, e.g*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 295-303 (1985) (arguing progressive taxes should be regarded as takings); *cf.* Eduardo Moises Penalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2240-53 (2004) (arguing that the justifications for compensating for takings can be reconciled with the exception for taxes only by narrowing the scope of the Takings Clause); Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application*, 97 NW. U. L. REV. 189, 224-47 (2002) (proposing a "Continuous Burden Principle" by which a tax must not create discontinuities between the burden imposed on a taxpayer and the next-most-burdened taxpayer to be in accordance with the Takings Clause). With extremely rare exceptions, courts have stuck to the proposition that taxes are simply different from takings.

52. As explained *infra* at notes 105-107, the Court initially grounded the exactions cases on the unconstitutional-conditions doctrine, whereby the government demands that a party give up a constitutional right in order to obtain a government benefit. In *Koontz*, the Court made an effort to explain (unsuccessfully) why a cash exaction could be regarded as an unconstitutional condition. *See* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 615-19 (2013). In *Sheetz*, no effort was made by the Court to fit the cash exaction into the unconstitutional-conditions framework. Sheetz v. El Dorado Cnty., 601 U.S. 267, 275-76 (2024).

53. The Court in *Cedar Point Nursery* cited a hypothetical in *Hendler v. United States* about a truck driver parking on someone's vacant land to eat lunch, which would be a mere trespass. 594 U.S. at 159-60 (citing Hendler v. United States, 952 F.2d 1364, 1377 (Fed. Cir. 1991)). The actual issue in *Hendler* concerned the government's installation of monitoring wells on the plaintiffs' land, without their consent, which the Federal Circuit held to be a compensable taking. *Hendler*, 952 F.2d at 1367-70.

54. Epstein would treat government torts as takings, *see* EPSTEIN, *supra* note 51, at 35-56, but to date the courts have shown no interest in such a revision in understanding.

The implicit background principle that exempts zoning and rent-control laws from any claim for compensation is also problematic. The proponents of regulatory regimes like zoning, rent controls, pre-market approval requirements for marketing new drugs or securities, and so forth would likely seek to justify these measures under the harm principle. Indeed, the Supreme Court in *Euclid* upheld zoning laws as a kind of prophylaxis against future nuisances created by incompatible land uses.[55] But it is increasingly doubtful that zoning, not to mention rent controls, prevent more harm than they produce, given that these measures discourage investment in affordable housing.[56] What is clear is that such measures enjoy widespread popular support, because they are perceived as forestalling perceived risks to existing living arrangements.[57] As background principles, they appear to rest more on majoritarian distributional preferences than on the harm principle.

* * *

The attempt to rationalize the laundry list of background principles based on the avoidance of harm or implicit consent clearly falls short. The more we think of the compensation requirement as being subject to a large and potentially open-ended set of exceptions grounded in conventional practice, the more it seems as if the basic duty to provide just compensation is itself just one more conventional practice, subject to inevitable contraction as other background principles are identified.

III. Toward a More General Theory of Background Principles: Taken for Public Use

Is it possible to generate a more general theory that can account for most, if not all, of the background principles that are said to be exceptions to the compensation requirement? Yes it is. That theory, to state it in the language of constitutional law, is that compensation is required when the government takes private property *for a public use.* Put more concretely, compensation is required when the government compels the transfer of a specific asset for use as a building block in some publicly authorized project. I will call this the "taken for public use" principle or TFPU principle for short. Importantly, the TFPU principle is generated by asking when compensation *is required*, as opposed to the background principles, which ask when compensation is *not required*. Thus, it promises to replace a heterogeneous and ever-expanding list of exceptions from the compensation requirement with a unified principle that affirmatively tells us when compensation must be paid.

55. Euclid v. Ambler Realty Co., 272 U.S. 365, 387-88 (1926). The Court famously suggested that allowing apartment buildings to be constructed in areas developed as single-family residences could be regarded as a nuisance. *Id.* at 394.

56. *See* EDWARD GLAESER & JOSEPH GYOURKO, RETHINKING FEDERAL HOUSING POLICY: HOW TO MAKE HOUSING PLENTIFUL AND AFFORDABLE 58-87 (2008).

57. *See* Fischel, *supra* note 5, at 8-10 (explaining how home ownership generates NIMBYism).

The argument for the TFPU theory is not entirely new. Jed Rubenfeld argued many years ago that the phrase "for public use" tells us "which government takings, although otherwise constitutional, nonetheless require compensation."[58] As he further noted, the public use language tells us why the exercise of eminent domain—"[t]he most historically settled application" of the Takings Clause—routinely requires the payment of compensation; the simple reason is that the property has been conscripted for some publicly authorized use.[59] Another way of putting it is that the Takings Clause is about the forced transfer of specific assets in order to deploy those assets in a use which has been deemed to be for the public benefit or advantage. Rubenfeld advanced his argument for a different purpose: he wanted to show that forced redistribution of property—taking property from rich *A*'s and transferring it to poor *B*'s—is not precluded by the Takings Clause. The argument is adopted here as a proposed substitute for the long and ever-expanding list of "background principles" as a basis for determining the scope of the compensation requirement.

What is the affirmative case for the TFPU principle? We can start with the text of the Takings Clause, which says that just compensation must be paid when private property is "taken for public use."[60] There is, to be sure, a large literature on the implications of the word "public" in this phrase.[61] This literature proceeds on the assumption that the important contrast is between "public" and "private" takings. Takings must be for some public end or purpose, as opposed to a private one. An equally or more important word in the phrase is "use." The Takings Clause tells us that compensation is required when private property is taken for some "use" which, at least implicitly, is different from the "use" to which it is presently deployed. The Takings Clause is about compulsory transfers of assets in order to permit those assets to be used in a different project, as sanctioned by public authority. When the government forces a transfer of property in order to allow it to be used in a publicly authorized project, compensation is required. When the government takes property for some other reason, compensation is not required, at least not by the Constitution.

This reading is consistent with the grammatical structure of the Clause. As has long been observed, the words "for public use" are not prohibitory.[62] The Clause does not say "private property shall not be taken except for public use, nor without just compensation."[63] The words "for public use" are an *operative*

58. Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1079 (1993).

59. *Id.* at 1080-81.

60. *See* U.S. CONST. amend. V.

61. *See* ILYA SOMIN, THE GRASPING HAND: KELO V. CITY OF NEW LONDON & THE LIMITS OF EMINENT DOMAIN 35-72 (2015) (citing extensive commentary).

62. See Harvey v. Thomas, 10 Watts 63, 66-67 (Pa. 1840).

63. JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN, at ii (1st ed. 1888). Philip Nichols, in his treatise on eminent domain, acknowledged that "[a]s a matter of strict legal reasoning, this argument is difficult to answer." 1 PHILLIP NICHOLS, THE LAW OF EMINENT DOMAIN 120 (2d ed. 1917). He noted that every state had "impliedly" prohibited takings for a private purpose, *id.*, but he found that that public use was increasingly interpreted broadly to include condemnations "to enable individuals to cultivate their land or carry on business in a manner in which it could not otherwise be done, if their success will indirectly enhance the public welfare[,]" *id.* at 140.

predicate, in the sense that they tell us when just compensation is required. That, of course, is exactly what we are looking for: an operative predicate that describes when compensation is required, as opposed to when it is not.

The proposed reading does not disregard the word "public" in the Takings Clause. Specifically, the operative predicate—for public use—can and should be read to mean that the taking must have been authorized by the body primarily charged with the determination of public policy. And indeed, we find that the power of eminent domain has long been identified as being an inherent attribute of government sovereignty.[64] Like other attributes of sovereignty, its exercise lies with the legislature. To be sure, as with other attributes of legislative authority, the power of eminent domain can be delegated.[65] But without such a delegation, other actors—the executive, administrative agencies, and private entities including public utilities—have no inherent authority to direct the condemnation of property.[66]

These propositions have long been honored by both the federal and state courts. Cumulatively, they mean that the Takings Clause—and the many state constitutions that include nearly identical clauses—should be interpreted as containing their own nondelegation doctrine. This does not mean that the legislature must lay down an "intelligible principle" for every exercise of eminent domain.[67] More realistically, what it means is that any delegation of the power of eminent domain must be clearly authorized by the legislature, and if the delegation includes the power to subdelegate the power of eminent domain—for example, to a common carrier, utility, or economic development corporation—the power to make such subdelegations should also be clearly authorized.[68]

Aside from being consistent with the text, the proposed public-use principle is also consistent with the original understanding of the Takings Clause. We have virtually no direct evidence about what the framers of the Takings Clause thought it meant in 1791, when it was adopted as part of the Bill of Rights. There is no

64. As the Supreme Court noted in *Penneast Pipeline Co. v. New Jersey*, "the term 'eminent domain' appears to have been coined by Grotius," and Grotius identified the power as an attribute of sovereignty. 594 U.S. 482, 493 (2021). This was also the basis for the Court's recognition of a federal power of eminent domain in *Kohl v. United States*, 91 U.S. 367 (1876).

65. *Penneast*, 594 U.S. at 487.

66. For a parallel argument about the need for an express delegation of authority by the legislature in order to permit executive and judicial officers to act with the force law, see generally Thomas W. Merrill, *Rethinking Article I. Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004).

67. The use of the intelligible-principle doctrine for assessing delegations of Congress's general powers under Article I appears to be alive and well, notwithstanding the intimations in *Gundy v. United States*, 588 U.S. 128, 145-46 (2019), that the Court might consider restricting the doctrine. *See* Fed. Comms. Comm'n v. Consumers' Rsch., 145 S.Ct. 2482, 2496-97 (2025) (upholding, as consistent with the intelligible-principle doctrine, a delegation to the Federal Communications Commission, and a subdelegation to a non-governmental corporation, of authority to set universal service fees for communications carriers).

68. The traditional understanding in the law of eminent domain is thus congruent with the Supreme Court's recent requirement that novel and highly consequential exercises of power by administrative agencies require "clear authorization" from Congress. West Virginia v. EPA, 597 U.S. 697, 724, 732 (2022).

recorded discussion about the meaning of the Clause either in Congress or in the state ratifying sessions.[69] Absent any testimony from the founding generation, we are forced to examine "expected applications" of the compensation requirement in an attempt to draw inferences about original understanding.[70]

As Philip Nichols observed in his treatise on eminent domain:

> The taking of property for private use under the color of eminent domain was not a debated issue when the constitutions of the states were adopted. Eminent domain was employed without objection for purposes such as mills, private roads and the drainage of private lands, which now seem rather private than public, and the extension of the power to any uses directly or indirectly enuring to the public good was not one of the evils of which the colonists complained . . . . It is accordingly not surprising that the taking of property for a private use was not in terms expressly prohibited by any of the early constitutions.[71]

Although the colonists and the states in the early national period were indifferent to the public/private distinction, the practice of compensating owners for takings of property for uses deemed to be in the public interest became increasingly common. John Hart, in a thorough examination of colonial practices, notes a growing practice of paying compensation for laying out roads.[72] He also tells us: "[W]hen substantial parcels of land were taken for public facilities—courthouses, prisons, churches, fortifications—statutes normally specified that the landowner would receive compensation equivalent in value to the land taken."[73] Hart's account of colonial practices is augmented by the speculation of St. George Tucker, who wrote shortly after adoption of the Bill of Rights that the Takings Clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever."[74]

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69. Dana & Merrill, *supra* note 31, at 8-25.

70. See Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L. REV. 1183, 1190-1223 (2012) (distinguishing "expected applications" originalism and "semantic" originalism).

71. NICHOLS, *supra* note 63, at 118-19.

72. John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1283 (1996); *see also* William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 575-79 (1972) (reviewing English practices). It is true that in some of the colonies compensation was not given for taking undeveloped land for the construction of public roads. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860, at 63-66 (1977). But this is easily explained by the fact that such roads greatly increased the value of the land not taken, providing implicit-in-kind compensation to the owner. *See* Stoebuck, *supra*, at 583 ("In a time when unimproved land was generally of little worth, a new road would give more value than it took."); *see also* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 825 (1995) (explaining that, at the Founding, "in view of the community's need for cheap roads and the minimal burden imposed on an individual by building a road across that individual's unimproved property, no compensation would be paid").

73. Hart, *supra* note 72, at 1283.

74. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 305-06 (1803).

Note that the applications documented by Hart involve taking land from a private owner for use in a publicly authorized project, such as building a road or erecting a church. St. George Tucker's speculation about impressments during the revolutionary war involved the taking of personal property like foodstuffs from noncombatants for use of the American army. In that context, arguably no change in use of the property was immediately contemplated, but the taking was nevertheless for a publicly authorized project: winning the war. The common feature of both accounts is that compensation was required to redress a forced exchange of private property in order to achieve a public good or advantage.

Even more instructive is the historical tradition about when compensation must be paid for interference with private property. The history of the last 235 years, at both the state and federal level, reveals that the dominant circumstance in which compensation must be paid is when the government or its delegate uses the power of eminent domain to take private property for some publicly authorized project, most commonly for some infrastructural development. Private land is overwhelmingly the type of property taken.[75] The proposed public use is nearly always for the construction of roads, highways, canals, railroad lines, pipelines, electric transmission lines, harbors, airports, telephone or fiber-optic transmission lines.[76] The common theme is that property is taken in order to be redeployed in a project deemed to be in the public interest. This is not to say that compensation is required only when land is taken. There are scattered examples of the government taking ships or intellectual property rights for some type of public good or advantage.[77] And the targeted uses are not limited to infrastructure projects—stadiums and parking lots and urban redevelopment projects also make their appearance in the cases, although usually with some controversy. But the pattern holds: compensation is required when property is forcibly transferred in order to achieve some use deemed to be in the public good or advantage.

Finally, the public-use principle is consistent with the primary social-science explanation for why nearly all advanced economies have a legal institution that permits the compulsory acquisition of certain kinds of specific assets in return for the payment of compensation. The problem is that some assets enjoy a situational monopoly that creates a holdout power interfering with the

75. *See* Thomas W. Merrill, *The Economics of Public Use*, 72 CORN. L. REV. 61, 95-96 (1986) (reporting, based on a survey of 308 published appellate decisions, that 304 out of 308 cases involved takings of land).

76. *Cf. Eminent Domain: Information About Its Uses and Effect on Property Owners and Communities Is Limited*, U.S. GOV'T ACCOUNTABILITY OFF. 8 (2006), https://www.gao.gov/assets/gao-07-28.pdf [https://perma.cc/C5PQ-R3VX] (noting that common uses of eminent domain include "the building or expansion of roads and other transportation-related projects; construction of state and municipal facilities; and the elimination and prevention of blight"). For a survey of the use of eminent domain, see generally AM. BAR ASS'N, CONDEMNATION, ZONING & LAND USE COMM., THE LAW OF EMINENT DOMAIN: FIFTY-STATE SURVEY (William G. Blake ed., 2012).

77. *See e.g.*, Ruckleshaus v. Monstano Co., 467 U.S. 986, 1003-04 (1984) (discussing trade secrets); United States v. Russell, 80 U.S. 623, 629-30 (1871) (discussing steamboats).

assembly of the relevant inputs needed to complete a large-scale project.[78] The power of compulsory acquisition is used to complete the project—to acquire the necessary building blocks. The assets are acquired for public use, not for some other purpose.

The dominance of eminent domain in triggering a requirement of compensation does not mean that the Takings Clause is or should be limited to formal exercises in eminent domain. A constitutional requirement that compensation must be paid when property is taken for some public use needs to be backstopped by an anti-circumvention principle. And at least since *Pennsylvania Coal v. Mahon,* the risk of circumvention has been policed by the regulatory-takings doctrine.[79] The relevant concern is that the government will manipulate the police power in order to achieve a transfer of property for some public use without paying just compensation. Formulation of the correct anti-circumvention principle or set of principles is tricky and has consumed a significant amount of attention from the Supreme Court. Meanwhile, the great mass of eminent-domain cases where compensation is required for a taking for public use goes unremarked.

An important caveat here: Although compensation is presumptively required when property is taken for a public use, compensation can be denied when other requirements of the Takings Clause are not satisfied. Compensation is not required if the claimant's interest is not "private property,"[80] nor if the government's action does not constitute a "taking" of that interest,[81] nor if it is impossible to determine what would be "just compensation" using ordinary valuation techniques or if the claimant has received "implicit in kind" compensation for the taking.[82] The proposition advanced here is that even when all these additional necessary conditions are satisfied, compensation is required only if the government seeks to compel a transfer of property for a public use.

IV. Can the Public-Use Principle Account for the Background Principles?

The proof is in the pudding as they say, and here the pudding is the heterogeneous list of background principles said to constitute exceptions to a supposed general requirement that the government must pay compensation for

78. *See e.g.*, Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 558-60 (2009); Richard A. Posner, *The Supreme Court 2004 Term, Foreword: A Political Court*, 119 HARV. L. REV. 31, 83-94 (2005); Richard A. Epstein, *Holdouts, Externalities and the Single Owner: One More Tribute to Ronald Coase*, 36 J.L & ECON. 553 (1993); Merrill, *supra* note 75, at 74-81. For a skeptical take on the holdout rationale, see SOMIN, *supra* 61, at 90-99; Eric R. Claeys, *Land Assembly, Public Use, and Reciprocity of Advantage*, 43 YALE J. ON REGUL. 98, 104-05 (2025).

79. 260 U.S. 393, 414-16 (1922).

80. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 715 (2010).

81. Andrus v. Allard, 444 U.S. 51, 67-68 (1979) (holding that abrogation of the right to sell eagle feathers, but not of the right to possess, is not a taking).

82. *See* Thomas W. Merrill, *The Compensation Constraint and the Scope of the Takings Clause*, 96 NOTRE DAME L. REV. 1421, 1422-23 (2021) (discussing the constraints imposed by ordinary valuation techniques); EPSTEIN, *supra* note 51, at 195-215 (discussing implicit in-kind compensation).

taking property. Can the TFPU principle explain all or most of the background principles?

Let us begin with the family of background principles that tell us compensation is not required when the government is acting to prohibit or deter some kind of activity that is viewed as imposing a harm on society. Although the nuisance exception looms large here, it helps to begin with the simple case where the government seizes adulterated foods or illegal drugs. Here the government clearly "takes" private property. But it does not do so in order to use the property as an input in some publicly authorized project; the general practice is to destroy the seized material to make sure it does not enter the stream of commerce and harm the public. In the typical nuisance case, the government does not take the property in any literal sense; it issues an abatement order directing the owner to terminate the existing use, to protect the public from harm. Again, there is no purpose to conscript the property for use in a publicly authorized project. The imposition of criminal and civil fines to deter unwanted uses of property can also be easily explained. The money is not being extracted for use as an input in a public project; its extraction is designed to deter conduct deemed to be harmful to the public.[83]

Although Justice Scalia's opinion for the Court in *Lucas* reaffirmed the nuisance exception, he was otherwise skeptical of the harm principle, noting that "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder."[84] This bit of legal-realist skepticism was overstated.[85] Consider a pair of cases involving emergency action of the U.S. military in wartime. In *United States v. Russell*,[86] the Court held that the seizure of steamboats to transport goods for the Union army was a compensable taking. The taking of the boats was to secure an asset needed in pursuit of the war effort. By contrast, in *United States v. Caltex*,[87] the Court held that the destruction of an oil refinery in the path of the advancing Japanese army was not a compensable taking. Here the asset was taken (destroyed) to prevent the harm of its falling into the hands of the enemy. To be sure, there will be cases in which the proper characterization is debatable, such as the wetland-preservation orders cited by Justice Scalia in *Lucas*.[88] Are such orders designed to create a public good—habit for birds and filtration of water resources—or are they motivated the desire to prevent a bad—the loss of these same features? Unsurprisingly, the question has produced much litigation. But the presence of borderline cases does not

83. Civil forfeitures present a more complicated picture, touched on in Part V.

84. Lucas v. S.C. Coastal Council, 505 U.S. 1003,1024 (1992).

85. Indeed, his skepticism is contradicted by another passage in the opinion, where Justice Scalia observed that when a regulation leaves a property owner with no economically beneficial value there is "a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.* at 1018.

86. 80 U.S. 623, 629-30 (1871).

87. 344 U.S. 149, 155-56 (1952).

88. *Lucas*, 505 U.S. at 1024-25 (citing conflicting lower court decisions as to whether a regulation that bars the filling of wetlands requires the payment of just compensation).

defeat the proposition that the distinction is generally intuitive and underlies much of the structure of takings law.

The set of background principles often collected under the category of emergencies has a similar rationale under the TFPU principle. These exceptions do not entail the compelled transfer of property for use in some publicly authorized project. Instead, what unites them is a recognized need to avoid certain harms created by the ordinary rules of exclusion associated with private property. The ship in peril that ties up to a dock to avoid sinking, the destruction of a building in the path of a fire, the damage produced by firefighters and police in the exercise of their protective functions, the destruction of property about to be seized by the enemy—all of these examples of permissible takings without compensation reflect the need to interfere with existing property rights in order to avoid some greater harm. The ordinary prerogatives of ownership are suspended, but property is not taken for a public use.

With respect to the background principles I have collected under the heading of express or implied consent, the more extreme cases of foreclosure and eviction do not involve any taking in order to use the property in some publicly authorized project. The taking reflects a remedy of forfeiture, designed to enforce a contractual obligation. In the typical case, there is no change in the use of the property at all, the ownership simply changes from *A* to *B* pursuant to some breach committed by *B* that permits *A* to impose a forfeiture of the property. The other uses of implied consent to justify certain applications of public-accommodations laws or rent controls entail regulations of use (some undoubtedly misguided) that can be seen as applications of the convoluted jurisprudence of what constitutes a taking.

The background principle that distinguishes compensable takings from torts is readily explained by the TFPU principle: when a government agent commits a tort, there has been no authoritative determination by the legislature or an entity exercising a delegated power of eminent domain that private property should be taken for public use. From the perspective of takings liability, the agent's action is ultra vires. The government may waive sovereign immunity and subject itself to liability for such acts (subject to other limitations), but unauthorized violations of property rights by government agents are not takings.

How then do we explain the large exception for taxes? Here I think the key is that money is a unit of exchange. It is used to facilitate transactions in other things, but at least today money is not an asset having any intrinsic value that would warrant it being acquired for some public use.[89] Historically, of course, money typically had an intrinsic value, in the form of gold or silver coins or notes convertible into gold or silver.[90] But even then, its principal use was as a unit of exchange. It may even be that the critical step in making something like silver coins a unit of exchange is that the sovereign declares they must be used for the

89. *See, e.g.*, NIALL FERGUSON, THE ASCENT OF MONEY 29-31 (2008).
90. *See* JACK WEATHERFORD, THE HISTORY OF MONEY 118 (1997).

payment of taxes.[91] In any event, modern money is not used as a building block in any publicly authorized project. One does not use piles of dollar bills (not to mention digital entries in bank accounts) in constructing a highway or a building or a bridge.[92] The taking of money is thus not a taking of private property for public use, in the relevant sense.[93] The point is reinforced by the practical consideration that any rule making taxes a compensable taking would eliminate the government's ability to govern.

V. Objections and Rejoinders

What are the objections to the adoption of the public-use principle as an alternative basis for distinguishing between compensable and noncompensable takings of property?

One predictable objection is that the foregoing interpretation of "for public use" leaves us with no limit on the exercise of the power of eminent domain, other than the requirements of legislative authorization, express delegation, and the payment of just compensation. The objection is correct, although the ultimate issue here is whether a broad power of eminent domain—subject as always to legislative restrictions on its use as informed by public opinion—is a greater threat to the public welfare than a more restrictive power of eminent overseen by courts asked to distinguish between the "public" or "private" ends to which the power is deployed. If an additional limit on the use of eminent domain is needed, I would vote for the long line of Supreme Court decisions that have interpreted the limit supposedly reflected in the "public use" phrase to mean for the public good or advantage.[94] Notwithstanding the recurring efforts to convince the courts to adopt a narrower definition of "for public use," that quest has been unsuccessful. Here, as elsewhere, the Court has been unable to come up with a

91. *See* Lane County v. Oregon, 74 U.S. 71, 75 (1868) (noting that the federal and state governments have the power to declare which kinds of payment they will accept as legal tender for taxes, whether gold coins or paper money).

92. But see *Leonard v. Earle*, 279 U.S. 392, 398 (1929), which held that Maryland could constitutionally impose in-kind taxation on oyster farmers equal to 10% of the oyster shells they harvested. The state used the shells for replenishing Chesapeake Bay oyster beds. In *Horne*, the Court distinguished *Leonard* as a unique case since, under Maryland law, Maryland owned the oyster beds and thus the oyster farmers were simply returning the state's own property. Horne v. Dept. of Agric., 576 U.S. 350, 366 (2015). Under the TFPU analysis proposed in this Article, if the state took 10% of privately owned oyster shells to replenish public oyster beds, this would presumptively be a taking (subject to an offsetting benefits defense against requiring compensation, ignored in *Horne*). But if the state took 10% of raw oysters in order to sell them to support other government activities, this would presumptively be a tax, assuming the oysters were a fungible asset serving as a unit of exchange in the relevant community in lieu of cash.

93. The Court came close to recognizing the point in *Eastern Enterprises v. Apfel*, where five Justices (in concurring and dissenting opinions) concluded that the Takings Clause applies only to the taking of specific assets, not to the imposition of general liabilities by the government. 524 U.S. 498, 534-37, 543, 555 (1998).The distinction was obscured by the Court in *Koontz*, where the majority held that a general liability to pay money could be a taking if applied to a specific asset. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 613-14 (2013). This of course describes ordinary property taxes, which the Court implied could not be challenged as takings.

94. *See* Kelo v. City of New London, 545 U.S. 469, 479-80 (2005) (collecting cases).

defensible distinction between public and private.[95] Justice O'Connor's effort in her dissent in *Kelo* to confine "public purpose" takings to those that rectify some "precondemnation use of the targeted property [that inflicts] affirmative harm on society"[96] confuses the use of eminent domain to create public goods (where compensation is required) with the use of the police power to eliminate public bads (where it is not). Justice Thomas's effort in the same case to revive some mid-nineteenth-century state-court decisions that would limit eminent domain to government ownership or physical use by the public[97] would rule out any number of uses of eminent domain that would further the public interest—not just mixed-use development projects in older cities like New London, but also the use of eminent domain to straighten irregular property boundaries,[98] provide access to landlocked property,[99] or eliminate outmoded conservation easements or other covenants restricting the use of property.[100]

In any event, there is no contradiction between the interpretation of the public-use language advanced here and the recurrent plea that eminent domain may be used only for takings that satisfy some definition of what is "public." One can embrace the idea that compensation is required only for takings of property that serve as inputs into a project authorized by public authority and *also* embrace the view that eminent domain may only be used for some restrictive set of uses. The latter proposition I would regard as a form of constitutional common law, as opposed to constitutional interpretation.[101] More realistically

95. Consider the longstanding efforts to define "public rights" versus "private rights" for purposes of the authority of Article III federal courts. The most recent travesty is *Security & Exchange Commission v. Jarkesy*, which effectively adopts a version of "background principles of law" in defining the scope of public rights. 603 U.S. 109, 131 (2024). Unsurprisingly, the opinion for the Court in *Jarkesy* is written by the same Justice who authored *Cedar Point Nursery*—Chief Justice Roberts.

96. *Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting).

97. *Id.* at 508, 513-14 (Thomas, J., dissenting). It is unclear to me why contested mid-nineteenth-century state-court decisions urging that eminent domain be limited to public ownership and use-by-the-public are more probative of the meaning of the Takings Clause as incorporated into the Fourteenth Amendment than are the many decisions adopting the broad public-advantage interpretation both before and after 1791 and before and after 1868. As late as 1896, the Court denied that the Takings Clause, and in particular its "public use" language, applied to the states. *See* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158 (1896) ("There is no specific prohibition in the federal constitution which acts upon the states in regard to their taking private property for any but a public use. The fifth amendment, which provides, among other things, that such property shall not be taken for public use without just compensation, applies only to the federal government, as has many times been decided."). By the end of the nineteenth century, the broad meaning of public use was ascendant. *See generally*, Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States 1789-1910*, 33 J. ECON. HIST. 232 (1973) (overviewing the history of expropriation in the United States).

98. *See* United States v. 8.929 Acres of Land in Arlington Cnty., 36 F.4th 240, 256 (4th Cir. 2022) ("The Government wields broad authority when demarcating the boundary line for property in condemnation.").

99. Some twenty-two states and most civil-law countries have statutes that authorize takings of easements for access to landlocked property. YUN-CHIEN CHANG, PROPERTY LAW: COMPARATIVE, EMPIRICAL, AND ECONOMIC ANALYSES 235-37 (2023)

100. *But see* Daniels v. Area Plan Comm'n of Allen Cnty., 306 F.3d 445, 466-67 (7th Cir. 2002) (concluding that the government had "violated the public use requirement of the Takings Clause by vacating [a] restrictive covenant").

101. *See* Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452, 452-55 (2010) (distinguishing different types of constitutional law developed in a common-law fashion).

today, it should be regarded as a proposition of state constitutional law or interpretation, rather than federal constitutional law.[102] But if one wishes, the two propositions can co-exist without contradiction.

Another objection is that the TFPU interpretation advanced here is inconsistent with the Supreme Court's recognition that just compensation may be owed when the government destroys property as well as when it acquires property for some public project. For example, in *Pumpelly v. Green Bay Company,* the Supreme Court said it would be a "very curious and unsatisfactory result" if the government could subject private property to "total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use."[103]

But *Pumpelly* and decisions like it are fully consistent with the TFPU principle. *Pumpelly* involved a state statute that authorized the construction of a dam on a river, which caused a lake to rise to such a level that it inundated all of the plaintiff's land. The dam was a publicly authorized project to improve navigation on the river. The permanent flooding of the plaintiff's land was the immediate result of the construction of the dam. With adequate foresight, the plaintiff's land should have been condemned as a necessary input into the dam project.[104] Compensation was properly required once it became clear that the dam project had permanently flooded the land. *Pumpelly* is thus an application of the anti-circumvention principle, now called the regulatory-takings doctrine.

In fact, many, and perhaps most, conventional exercises in eminent domain entail the destruction of property as part of the completion of some publicly authorized project. When the government condemns houses to make way for a new highway, the houses are destroyed before the concrete is poured. The same is true when buildings are condemned to expand an airport runway, or even to clear an open path of glide for safe takeoffs and landings. And of course, the same thing happens when eminent domain is used for urban-renewal projects or "economic development," such as in the proposed New London project considered in *Kelo*.

A third objection might be that the public-use principle advanced here does not correspond to any recognized theory of why compensation is required for (some) takings of property. Various theories about this have been proposed: that compensation is required as a form of government insurance against unanticipated takings of property; that it is required in order to force the government to internalize the costs of regulations that diminish the value of

102. *See* Dana Berliner, *Looking Back Ten Years After Kelo*, 125 YALE L.J.F. 82, 89 (2015) (noting that post-*Kelo* reforms of eminent domain all occurred at the state level).

103. 80 U.S. 166, 178 (1871). The case involved the Takings Clause in the Wisconsin Constitution, but the Court treated the matter as involving general principles of constitutional law, including the U.S. Constitution. *Id.* at 176-77; *see also* Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 32 (2012) (explaining that, when government "effectually destroy[s] or impair[s]" property in the operation of a federal dam it may commit a taking (quoting *Pumpelly*, 80 U.S. at 181)).

104. *Cf.* United States v. Miller, 317 U.S. 369, 377 (1943) (noting that construction of a government reservoir that flooded railroad tracks required the exercise of eminent domain to acquire land for a substitute right-of-way for the railroad).

property; and that it is required to overcome certain political-process failures.[105] Each of these theories offers important insight into why compensation is sometimes required. Perhaps one can say that they are mutually supportive or present a situation of overlapping consensus. On the other hand, it is also clear that each of these theories is either overinclusive or underinclusive (or both) relative to the actual practice of when compensation is required and when it is not. The approach here has been to extract a theory based on the actual practice of paying compensation; condemnation of property using the power of eminent domain is the dominant practice, and regulatory-takings liability is a derivative (and much less consequential) practice grounded in anti-circumvention concerns.

If one insists on a more foundational justification for such an approach, it might be that it is necessary to preserve the "transaction structure" that tells us when property should be acquired by voluntary exchange and when it may be acquired by government compulsion.[106] Property can be taken for public use when one would ordinarily expect such property to be acquired by voluntary exchange, but for one reason or another, transaction costs make this infeasible. When such a condition is present, a public authority may authorize acquisition of the relevant property by compulsion—but only in return for just compensation. If the government could acquire resources that ordinarily can be obtained only through voluntary exchange by simply seizing them without paying compensation, this would create unacceptable pressure on the transaction structure. A similar justification applies for requiring compensation when property is seized or converted by tortfeasors, or taken without consent in the commission of a crime.[107]

VI. Some Potential Applications

Let me close with a couple of applications where the TFPU principle might result in an extension of existing law with respect to the requirement of just compensation.

A. Exactions of Money

When the Court initially extended the protection of the Takings Clause to land-use exactions, it did so by invoking the unconstitutional-conditions doctrine.[108] A property owner would apply for a permit to develop their property, and the government would respond by saying the permit would be granted only if the owner agreed to transfer some other interest in property (such as a public easement) to the government without any payment of compensation. The Court

105. For an overview, *see* Dana & Merrill, *supra* note 31, at 32-57.

106. On the concept of preserving the transaction structure, see Alan Klevorick, *On the Economic Theory of Crime*, 27 NOMOS 289, 302-03 (1985).

107. *See* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1890 (2007).

108. Dolan v. City of Tigard, 512 U.S. 374, 386-96 (1994) (relying on and clarifying Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987)).

reasoned that this sort of deal required the owner to give up a constitutional right—the right to just compensation for the taking of one property right—in return for receiving a discretionary permit to develop another property right. The Court did not ban such conditional bargains, but said that there had to be an "essential nexus" between the social costs of the proposed development and the property that the government demanded it be given without compensation;[109] moreover, the value of the property to be handed over without compensation had to have a "rough proportionality" to the projected social costs of the project.[110]

But does the unconstitutional-conditions framework hold up if the government conditions the right to develop property by demanding that the owner make a payment of cash in order to get the permit? One would think not, since (as elaborated above) the requirement to pay cash to the government, i.e., to pay a tax, is not regarded as a taking. If the demand for cash is not a taking, there is no unconstitutional taking of property that would trigger the application of the unconstitutional-conditions doctrine. Nevertheless, in *Koontz v. St. Johns River Water Management District*[111] and more recently in *Sheetz v. El Dorado County, California*,[112] the Court extended the "essential nexus" and "rough proportionality" tests to exactions of money. Is there any principled basis for this extension of the exactions doctrine independent of the unconstitutional-conditions framework?

The TFPU principle may point to a way out of this doctrinal dilemma. As we have seen, the TFPU principle broadly speaking requires that compensation be paid for takings that are designed to facilitate some publicly authorized project—it is designed to permit the creation of public goods. In contrast, takings of property designed to protect the public from harms are generally exempt from the compensation requirement. But another, perhaps more analytically justifiable way to distinguish between "harm-preventing" as opposed to "benefit-conferring" government action would be to apply the "essential nexus" and "rough proportionality" tests developed in the exactions cases. Regulations that pass the two-part test would be deemed to be "harm-preventing" and hence would not require compensation. Regulations that flunk the two-part test would be regarded as efforts to use the police power in order to evade the just-compensation requirement and would be deemed regulatory takings.

Here we see that the TFPU principle would not only provide a more secure conceptual basis for the exactions cases like *Koontz* and *Sheetz*, it might rationalize the two-part test in a way that would allow it to be used more generally to distinguish compensable from noncompenable takings. Consider, for example, the possible utility of the two-part test in determining whether historic-preservation ordinances or wetlands-preservation requirements should be regarded as police-power regulations or compensable takings. In effect, rather

109. *Nollan*, 483 U.S. at 837.
110. *Dolan*, 512 U.S. at 391.
111. 570 U.S. 595, 612 (2013).
112. 601 U.S. 267, 275-76 (2024).

than speculating about the proper application of the three-part test of *Penn Central*, with indeterminate weight given to each of the factors, courts would be asked to compare the public harm avoided by the regulation against the burden imposed on the property owner using the nexus and rough-proportionality tests.[113]

B. Civil Forfeitures

The Court has stated categorically that property seized pursuant to an otherwise procedurally valid civil-forfeiture action is immune from the compensation requirement.[114] Yet there are significant signs that a majority of the Justices may be open to reconsidering this. The particularly problematic use of civil forfeitures appears in the widespread practice of using civil-forfeiture proceedings to fund police departments.

In *Culley v. Marshall*, the Court recently held that personal property may be seized in a civil-forfeiture proceeding without a pre-deprivation hearing, as long as a reasonably prompt post-deprivation hearing is available.[115] Five Justices concurred or dissented, each voicing strong concerns about the use of civil forfeitures to take property such as cars that have been used, often without the owner's awareness, in some minor drug offense. As Justice Sotomayor put it, "law enforcement can seize cars, hold them indefinitely, and then rely on an owner's lack of resources to forfeit those cars to fund agency budgets, all without any initial check by a judge as to whether there is a basis hold the car in the first place."[116] It does not take great imagination to see this practice being challenged in future litigation as a taking "for public use"—the public use being the funding of the police department—without just compensation. The analogy to *Webb's Fabulous Pharmacies* would seem to be pretty direct.[117]

A holding that some civil forfeitures are takings—at least those motivated by a desire to provide funding or specific assets for the use of enforcement authorities—would raise a host of conundrums. An obvious problem would be how to distinguish among the inevitably mixed motives for instituting forfeiture proceedings; civil forfeitures serve as a deterrent against criminal activity in addition to providing a source of funding for the police department. Another

113. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 (1978) (holding that the historic-preservation ordinance at issue did not violate the Takings Clause without engaging in any comparison of the harm to the public from alteration of the facade of the building to the loss in development opportunities to the owner); Palazzo v. Rhode Island, 533 U.S. 606, 632 (2001) (declining to decide whether the harm to the public of filling the wetlands at issue was greater than the loss in development rights to the landowner, and remanding for assessment of the issue under the *Penn Central* test).

114. Bennis v. Michigan, 516 U.S. 442, 452-53 (1996).

115. 601 U.S. 337, 387 (2024).

116. *Id.* at 407-08 (Sotomayor, J., dissenting).

117. *See* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164-65 (1980) (holding that government taking of all interest earned on an interpleader fund deposited with the court in order to provide funding for the court system was a compensable taking).

complication is that the most common target of civil forfeiture is cash,[118] which raises again the difficulty of distinguishing compensable takings and taxation. But a collateral benefit of such litigation might be that it would force the Court to engage in a more general exploration of why some takings require the payment of just compensation when others do not. The answer lies in the TFPU principle. Compensation is required when the government forces a transfer of specific assets understood to be "private property" in order to redeploy those assets to a use deemed to be required by public authority. Eminent domain is the primary example, but perhaps other examples—like the use of civil forfeitures undertaken to fund police departments—might also qualify.

Conclusion

Clarifying the proper domain of the compensation requirement by calling attention to the TFPU principle would be an important advance over the current fashion of determining the scope of the compensation requirement by considering a long list of background principles of property law. Heightened attention to the operative predicate of "taken for public use" serves to reconcile much of the Court's recent regulatory-takings jurisprudence with first principles. Most prominently, the lion's share of regulations of the use of property designed to prevent harms to the public cannot be characterized as takings for public use. On the other hand, as we have seen, attention to the principle might point the way to a more expansive scope for the compensation requirement in other contexts where current doctrine turns a blind eye.

118. LISA KNEPPER, JENNIFER MCDONALD, KATHY SANCHEZ & ELYSE SMITH POHL, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 21 (3d ed. 2020) (finding that 70% of civil forfeitures are cash).