Taking a Closer Look at Just Compensation: State Regulation of Groundwater Withdrawals as an Appropriate Use of their Police Powers

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* I would like to thank Professor Jonathan C. Carlson, Bryce Morgan, and the members of *The Journal of Corporation Law* for their time spent improving this Note. I would also like to thank my partner for the countless hours he spent patiently listening to me go on about water law.

I. INTRODUCTION

A conflict arises when the states' power to regulate pursuant to their police powers without providing compensation meets the demands of the Fifth Amendment as applied to the states through section five of the Fourteenth Amendment.[1] The Supreme Court has not articulated one single coherent takings theory but rather draws from several conflicting theories and applies them "somewhat haphazardly."[2] This Note does not offer to the Court a new and improved takings test that might resolve the inconsistencies in the test as currently applied.[3] Rather this Note seeks to elaborate on the arguments which may allow the Court to find—within some version of its current takings jurisprudence—that state regulation of groundwater is a permissible use of the states' police powers and therefore, no compensation is owed under the Fifth Amendment. Because groundwater rights have only recently become a hotly litigated issue, much of the Court's takings jurisprudence does not address groundwater specifically. This Note, therefore, will examine general takings jurisprudence as well as claims about surface water rights to assess how this legal regime might be applied to groundwater.

Part II provides a description of the status of groundwater rights in this country which has prompted states to enact new groundwater regulations and brought the takings issue to the attention of the courts. Part II also outlines the basics of the Court's takings jurisprudence, with an eye to its application to groundwater and water rights, and with an acknowledgement of the inconsistencies therein. Finally, Part II attempts to make sense of the Court's historical and contemporary understanding of the states' police powers.

Part III analyzes the various understandings of the Fifth Amendment takings clause that the Court has relied upon over the years. Part III offers an explanation of what is necessary to put a regulation within each understanding of the takings clause, as well as noting the shortfalls of each theory. Part III also provides examples of how groundwater rights regulations might be analyzed under each theory.

Finally, Part IV recommends the Court uphold state groundwater regulation as a permissible use of the states' police powers, regardless of which takings theory it applies. This result is most respectful of the respective role of the states and the federal judiciary. Part IV also discusses the implications for groundwater rights holders if the Court were to accept this recommendation.

II. BACKGROUND

A. Status of Contemporary Groundwater Ownership

Groundwater rights in the United States are increasingly ending up in the hands of corporations (for example, American Water owns 500 groundwater treatment plants and

1. *See* U.S. CONST. amend. V. (stating "nor shall private property be taken for public use, without just compensation"); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 36 n.6 (1964) (describing this conflict in the context of federal commerce clause powers).

2. Sax, *supra* note 1, at 46.

3. That venture has already been undertaken, with Joseph L. Sax suggesting a new three-pronged approach which asks: (1) "[D]oes this case raise the sort of issue with which the taking provision was designed to deal[?]" (2) "[I]s some privilege being invoked which must be recognized as an exception to the compensation rule[?]" (3) "[I]s the loss incurred here a consequence of resource acquisition by a governmental enterprise?" *Id.* at 76.

1000 groundwater wells,[4] and Aqua American has 30 groundwater wells in Illinois alone)[5] or individuals seeking to derive profit from the right.[6] As municipalities struggle to provide water and sanitation services to the public, the sale of their water rights to a corporation who assumes responsibility for water delivery and infrastructure maintenance becomes an attractive option.[7] Beyond the privatization of municipal water, bottled water consumption has risen, resulting in a growth in the bottled water industry and subsequent increases in withdrawals of groundwater.[8]

B. Management of Groundwater

1. Historical Regimes

Historically, groundwater management focused on maximum use and development, without much focus on conservation or the sustainability of withdrawals.[9] At common law, the states regulated groundwater through one of five different doctrines: (1) the doctrine of capture, (2) American reasonable use, (3) correlative rights, (4) Restatement (Second) of Torts Section 858, and (5) prior appropriation.[10] All of these systems recognize some kind of property interest in groundwater, and most of them are distinctly different than the common law doctrines for management of surface water.[11] This result flowed naturally from the lack of scientific knowledge about groundwater generally and the interconnected hydrology of groundwater and surface water more specifically.[12] Despite advances in

4. *2014 Annual Report*, AM. WATER, (AM. WATER VOORHEES, N.J.), 2014, at 4, http://nawc.org/uploads%5CWater%20Glossy%5C2014%5CAmerican%202014%20AR.pdf.

5. *Illinois Service Territory*, AQUA, https://www.aquaamerica.com/our-states/illinois.aspx (last visited Mar. 8, 2016).

6. *See* Kirsten Korosec, *T. Boone Pickens: A Water Baron for the 21st Century*, CBS MONEYWATCH (Mar. 29, 2010, 1:51 PM), http://www.cbsnews.com/news/t-boone-pickens-a-water-baron-for-the-21st-century/ ("[T. Boone Pickens'] company Mesa Water has been scooping up water rights in the Texas Panhandle for more than a decade."); Betsey Blaney, *T. Boone Pickens sells water rights to Texas for $103 million*, NEWSOK (June 24, 2011), newsok.com/article/3579874 ("Pickens and his Mesa Water Inc. sold the water rights . . . for $103 million.").

7. *See, e.g.*, Keila Szpaller, *Missoula fights back against sale of Mountain Water Co.*, MISSOULIAN (Sept. 20, 2014, 11:30 AM), http://missoulian.com/news/local/missoula-fights-back-against-sale-of-mountain-water-co/article_77dcd4aa-4010-11e4-998d-ff6fb98384c8.html (describing Mountain Water Co.'s attempt to sell Missoula's drinking water system to Algonquin Power and Utilities Corp. in the face of a pending (and ultimately successful) eminent domain claim by the city of Missoula); *see also* Lakis Polycarpou, *What Is the Benefit of Privatizing Water?*, COLUMBIA UNIVERSITY: BLOGS FROM THE EARTH INSTITUTE (Sept. 2, 2010, 10:30 AM), http://blogs.ei.columbia.edu/2010/09/02/what-is-the-benefit-of-privatizing-water/ (describing the effects of increasing privatization of previously public utilities).

8. Craig Anthony Arnold, *Water Privatization Trends in the United States: Human Rights, National Security, and Public Stewardship*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 785, 809 (2009).

9. Michele Engel, *Water Quality Control: The Reality of Priority in Utah Groundwater Management*, 1992 UTAH L. REV. 491, 495 (1992).

10. ROBERT W. ADLER ET AL., MODERN WATER LAW: PRIVATE PROPERTY, PUBLIC RIGHTS, AND ENVIRONMENTAL PROTECTIONS 178–79 (2006)

11. *Compare id.* at 23, 87 (describing the common law water management schemes of riparianism and prior appropriation), *with id.* at 178–79 (describing common law groundwater management schemes). The exception is prior appropriation which has been applied to both groundwater and surface water. Note though that not all states which employed prior appropriation to surface water withdrawals employed prior appropriation to groundwater withdrawals.

12. "[Groundwater] does not flow openly in the sight of the neighbouring [sic] proprietor . . . . [N]o

scientific knowledge, some states continue to employ common law doctrines to this day.[13]

2. Modern Permitting Systems and Associated Litigation

As early as 1890, recognizing the relative importance of groundwater,[14] states began shifting management of their groundwater (and surface water) over to permit-based systems.[15] Problems associated with the switch to permitting systems are not only a historical phenomenon but continue to this day, particularly as groundwater withdrawals intensify in response to recent droughts.[16] The proliferation of regulation over groundwater withdrawals, thought of by some as exclusively private property rights, has come into conflict with the emerging property-rights movement.[17] The property-rights movement views any regulation of any property right as a taking requiring compensation under the Fifth Amendment.[18] The judicial wing of this movement, christened the "Takings Project,"[19] has focused on bringing Fifth Amendment takings claims to challenge popularly enacted health, safety, and environmental legislation when it places any burden on development.[20] While this movement began with a focus on land-use disputes,[21] it has recently turned its attention to groundwater regulation.[22]

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proprietor knows what portion of water is taken from beneath his own soil . . . ." *See* Acton v. Blundell, 152 Eng. Rep. 1223, 1233 (Ex. Ch. 1843) (holding that a landowner whose neighbor ran his well dry through mining operations had no cause of action against the neighbor).

13. Until 2012, Texas still applied the rule of capture. Edwards Aquifer Auth. v. Day, 369 S.W.3d 814, 823 (Tex. 2012).

14. ADLER ET AL., *supra* note 10, at 173 ("[Groundwater] is widely available, is less vulnerable to environmental pollution, and is often suitable for drinking with minimal treatment.").

15. Of western states, only Colorado does not employ a permit system. Of eastern states, over half have introduced permitting systems. *Id.* at 232; *see also State Water Withdrawal Regulations*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Feb. 20, 2013), http://www.ncsl.org/research/environment-and-natural-resources/state-water-withdrawal-regulations.aspx (providing descriptions of surface and groundwater regulatory schemes from all 50 states).

16. *See, e.g.*, Melanie Mason, *California lawmakers considering historic shift in groundwater policy*, L.A. TIMES (Aug. 9, 2014, 7:07 PM), http://www.latimes.com/local/politics/la-me-pol-water-20140810-story.html (outlining California's current attempt to restructure groundwater management, the latest in a series of states to do so in response to recent pervasive droughts).

17. *See generally* Justice Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857 (2000) (giving a general background of the movement and discussing the movement's lack of understanding of the proper role of government). The modern property rights movement traces its origins to the mid-1980s when frustrated developers began challenging state regulations that limited their ability to develop their land. Steven J. Eagle, *The Birth of the Property Rights Movement*, POL'Y ANALYSIS, June 26, 2001, at 1–2 (2005), http://object.cato.org/sites/cato.org/files/pubs/pdf/pa404.pdf. The seminal case epitomizing the movement is *Lucas v. S.C. Coastal Council* in which Justice Scalia, writing for a five-justice majority and over a strong dissent, recognized that state regulations of land which deprive the owner of all economically beneficial use may constitute a taking under the Fifth Amendment. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

18. Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 511–12 (1998).

19. *Id.*

20. *Id.* at 512.

21. Joseph L. Sax, *Why America Has a Property Rights Movement*, 2005 U. ILL. L. REV. 513, 514–15 (2005).

22. *See generally* Edwards Aquifer Auth. v. Bragg, 421 S.W.3d 118 (Tex. App. 2013) (holding that the denial of a permit to withdraw groundwater amounted to a taking); Edwards Aquifer Auth. v. Day, 369 S.W.3d 814 (Tex. 2012) (holding that groundwater, like oil and gas, is owned in place).

C. The Takings Doctrine in the Context of Water Rights

The takings clause of the Fifth Amendment states: "nor shall private property be taken for public use, without just compensation."[23] Through the due process clause of the Fourteenth Amendment, this restriction has been extended to govern the activities of the states as well.[24] In takings litigation, as well as in water rights litigation, litigants recognize the government's right to take property for public use. The litigation, therefore, focuses not on whether the government can take the property but rather on if and how much compensation the government owes.[25] The Court has recognized three categories of takings: physical takings, regulatory takings, and categorical regulatory takings (also known as *Lucas* takings).[26] In the context of water rights litigation the latter two categories are of the most importance.[27]

1. Regulatory Takings

The Court first announced its regulatory takings analysis in 1922 in *Pennsylvania Coal Company v. Mahon*.[28] In 1978, the Court laid down the modern balancing test for regulatory takings claims in *Penn Central Transportation Company v. City of New York*.[29] The Court described the test as an "ad hoc, factual inquir[y]" which considers (1) "the character of the government['s] action," (2) "[t]he economic impact of the regulation on the" property owner, and (3) "the extent to which the regulation . . . interfere[s] with . . . [the property owner's reasonable] investment-backed expectations . . . ."[30]

2. Lucas *Takings*

In *Lucas v. South Carolina Coastal Council*, the Court articulated a new principle for a specific kind of regulatory taking.[31] Justice Scalia, writing for a majority of the Court, announced "a new per se rule that expanded the idea of a [regulatory] taking to require compensation for regulations that deny 'all economically beneficial or productive use of [their property].'"[32] While property rights activists viewed *Lucas* as heralding a new dawn of protection of property rights, that dawn never rose.[33] Shortly after its advent, the Court made clear the *Lucas* categorical takings rule is an extremely narrow exception.[34] The

23. U.S. CONST. amend. V.

24. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 481 n.10 (1987) ("This restriction is applied to the States through the Fourteenth Amendment.").

25. ADLER ET AL., *supra* note 10, at 730.

26. *Id.* at 730–31.

27. Physical takings involve the government physically invading some part of the property of a private landowner. *Id.* at 730. This kind of taking rarely occurs with water rights given the usufructuary rather than possessory nature of water rights.

28. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

29. Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 124 (1978).

30. *Id.*

31. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (describing times the Court has "found categorical treatment appropriate").

32. Michael C. Blumm & Lucas Ritchie, Lucas*'s Unlikely Legacy: The Rise of Background Principles as a Categorical Takings Defense*, 29 HARV. ENVTL. L. REV. 321, 324 (2005) (quoting *Lucas*, 505 U.S. at 1015).

33. *Id.* at 325.

34. *See* Palazolo v. R.I., 533 U.S. 606, 606–09 (2001) (holding that a reduction in value of a claimant's

exception is "limited to 'the extraordinary circumstance when no productive or economically beneficial use of land is permitted'. . . . Anything less than a 'complete elimination of value,' or a 'total loss' . . . would require the kind of analysis applied in *Penn Central*."[35]

D. Police Powers of the States

The states' police powers are an often invoked but ill-defined area of governmental power.[36] "Police powers" are commonly described as the states' power to regulate for the "health, safety, welfare, and morals of the people."[37] A narrow view of the police powers sees them as limited to the power to pass legislation "so clearly necessary to the safety, comfort, or well-being of society, or so imperatively required by public necessity. . . ."[38] As early as 1824, however, Justice Marshall articulated a broad definition of the police powers:

> [T]hat immense mass of legislation which embraces everything within the territory of a state not surrendered to a general government; all of which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass.[39]

This definition understands the police powers to encompass all the powers that remained with the states after the ratification of the Constitution.[40] Within the context of a takings claim, the police powers of the states and the public use requirement of the takings clause have been held to be coterminous.[41] This Note focuses on the police powers as a limit to a takings claim and not the intricacies and inconsistencies of the understanding of

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land from $3.15 million to $200,000 did not constitute a deprivation of all economically beneficial use).

35. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 330 (2002) (quoting *Lucas*, 505 U.S. at 1017, 1019–20 n.8).

36. *See* Berman v. Parker, 348 U.S. 26, 32 (1954) (noting about the police power: "[a]n attempt to define its reach or trace its outer limits is fruitless for each case must turn on its own facts").

37. *See, e.g.*, Glenn H. Reynolds & Dave B. Kopel, *The Evolving Police Power: Some Observation for a New Century*, 27 HASTINGS CONST. L.Q. 511, 511 (2000) ("[S]tates could regulate as they chose so long as they claimed to be working to promote the public safety, welfare, or morality."); David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. COLO. L. REV. 497, 544 (2004) ("[P]olice power regulations are valid if related to preserving or protecting the public health, safety, morals, or welfare."); Christopher Wolfe, *Moving Beyond Rhetoric*, 57 FLA. L. REV. 1065, 1075 (2005) ("[T]raditional police powers . . . extend to the protection of public health, safety, welfare, and morals . . . ."); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 560 (1991) ("The States' traditional police power is defined as the authority to provide for the public health, safety, and morals . . . ."); Mulger v. Kansas, 123 U.S. 623, 668 (1887) ("[T]he question now before us arises under . . . the police powers of the state, exerted for the protection of the health, morals, and safety of the people.").

38. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 340 n.2 (12th ed. O.W. Holmes Jr. ed., 1873) (1826).

39. Gibbons v. Ogden, 22 U.S. 1, 203 (1824).

40. *See* D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 475 (2004) (describing the broadest understanding, as explained as "residuary sovereignty" in THE FEDERALIST NO. 43, at 228 (James Madison) (George W. Carey & James McClellan eds., 2001)); Thurlow v. Com. of Mass., 46 U.S. 504, 583 (1847) ("But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions.").

41. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984).

states' police powers. For the purposes of this discussion, this Note takes the narrower view of police powers as being limited to regulating for the health, safety, welfare, and morals of the public, as opposed to all reserved powers.[42]

III. ANALYSIS

Two primary possible interpretations of the Court's regulatory takings jurisprudence and its interaction with the states' ability to exercise reserved police powers exist.[43] The first approach categorizes regulations as either providing a public good or preventing a public harm.[44] This approach allows uncompensated police power regulations to prevent a public harm (or "noxious use") but requires compensation as a taking when regulation provides a public good.[45] The second approach views police power regulations as only requiring compensation as a taking when all, or extremely close to all, economically beneficial use of the property is taken.[46] If any economically beneficial use remains, then the state owes no compensation.[47] In application, however, the Court applied this second test more permissively than the test may suggest, allowing regulation to stand even when arguably a total destruction in value occurred.[48]

A. Noxious Use Theory

The Harlan approach of delineating between providing a public good and preventing

42. Although this is the more narrow view, it still conceives the police power as a broad regulatory power. A state is within its police power regulation in "adopting ordinances to promote the public welfare, . . . provid[ing] for the safety and comfort of its inhabitants, and . . . declar[ing] and prevent[ing] nuisances." City of Cedar Falls v. Flett, 330 N.W.2d 251, 255 (Iowa 1983). It includes, for example, laws preventing the raising of specific stock animals within cities, *City of Chattanooga v. Norman*, 20 S.W. 417, 418 (Tenn. 1982), building regulations, *State* ex rel. *Walmar Inv. Co. v. Mueller*, 512 S.W.2d 180, 185 (Mo. Ct. App. 1974), and ordinances that require plumbing licenses, *City of Shreveport v. Restivo*, 491 So. 2d 377, 380 (La. 1986).

43. *See* Sax, *supra* note 1, at 38–43 (comparing Justice Harlan's approach which delineated innocent from noxious uses, and Justice Holmes' approach which focused on the extent of the economic harm to the property owner). A third historical takings theory can be called an "invasion theory." *Id.* at 46. This theory finds that a takings occurs only when the government action "invades" a property in a physical sense. *Id.* at 47–48. Because this theory is not a theory of a regulatory taking, but instead a theory of a physical taking, it will not be further discussed.

44. Talmadge, *supra* note 17, at 892.

45. *Id.*; *see also* Graham v. Estuary Props. Inc., 399 So. 2d 1374, 1376–78 (Fla. 1981) (holding a regulation that prevented a landowner from building a 26,500 unit development on the landowner's wetland property was a permissible use of the police power because it prevented the public harm of degradation of waters, adverse effect on commercial and sport fishing industry, and negative economic impact).

46. *See, e.g.*, Euclid v. Ambler Realty Co., 272 U.S. 365, 384–90 (1926) (finding a 75% reduction in value does not require compensation); Hadacheck v. Sebastian, 239 U.S. 394, 408–09 (1915) (finding a 90% reduction in value does not require compensation).

47. Barros, *supra* note 40, at 472–73 (stating the central holding in *Pa. Coal v. Mahon*, 260 U.S. 393 (1922), that exercises of the police power can be a taking, is "correct when an exercise of the police power renders the property . . . valueless, but not when the exercise . . . results in a . . . diminution of the property's value").

48. *See, e.g.*, Erie R.R. v. Bd. of Pub. Util. Comm'rs, 254 U.S. 394, 410–11 (1921) (upholding state safety regulations regarding railroad crossings that required a railroad to make an expenditure of over two million dollars when the company only had $100,000 available and would lose their property absent that expenditure: "That the States might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and . . . prospective bankruptcy . . . can [not] take away this fundamental right of the sovereign of the soil.").

a public harm (or noxious use) can be understood in two ways.[49] An earlier theory of the noxious use test found it appropriate to withhold compensation when the government regulation aimed to prevent a public harm (a use that was "noxious, or wrongful, or harmful in some sense").[50] This approach's failings became obvious over time.[51] As a result of these failings, a new understanding of the noxious use theory evolved which centered on the idea that an established property right can diminish in value only if the property owner caused the harm that created the necessity for the regulation ("creation of the harm" test).[52] The Court applied this theory in a series of cases relating to railroad crossings[53] and has received some scholarly support,[54] although it also has some failings.[55]

1. Preventing a Public Harm v. Providing a Public Good (Noxious Use Theory)

The approach of drawing a delineation between providing a public good and preventing a public harm was most popular in early Supreme Court regulatory takings jurisprudence,[56] although arguably not the most reasonable interpretation of the limitation of police powers.[57] This distinction analyzes state regulations as either invoking eminent domain, which states use to provide a public good and require compensation, or the police powers, which states use to prevent a public harm and does not require compensation.[58] The line between preventing a public harm and providing a public good remains unclear and has not been well defined by courts or scholars.[59] In general, preventing a public harm involves protecting the welfare of the public[60] and consists of preserving the status quo

49. *See* Sax, *supra* note 1, at 48 (differentiating the early noxious use approach and the modern "creation of the harm" approach).

50. *Id.*

51. *See id.* ("Of course it has long been obvious that all non-compensable uses could not be described in terms of moral obloquy such as might be appropriate for the regulation of prostitution or liquor."); *see also infra* note 64 (noting some of the failings of this test).

52. Sax, *supra* note 1, at 48.

53. *See, e.g.*, Atchison, T. & S. F. Ry. Co. v. Pub. Utils. Comm'n of Cal., 346 U.S. 346, 353 (1953) ("The presence of these tracks in the streets creates the burden of constructing grade separations in the interest of public safety. . . . Having brought about the problem, the railroads are in no positions to complain because [of] their share in the cost of . . . eviating it . . . ."); Mo. Pac. Ry. Co. v. City of Omaha, 235 U.S. 121, 129 (1914) ("Where a number of railroads have contributed to the condition which necessitates such improvement in the interest of public safety, it is not an unconstitutional exercise of authority, as this court has held, to require one of the companies interested to perform such work at its own expense.").

54. Sax, *supra* note 1, at 48 (citing Allison Dunham, Griggs v. Allegheny County *in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 75, 80 (1962)). This theory also has some shortcomings. *See infra* notes 72–74 and accompanying text (discussing the application to instances of "coming to the nuisance").

55. *See infra* notes 72–74 and accompanying text (discussing the application to instances of "coming to the nuisance").

56. *See, e.g.*, Mulger v. Kansas, 123 U.S. 623, 669 (1887) (finding police regulation prohibiting the manufacture of beer does not require compensation to brewers as a taking because the state government is free to prevent property owners from making a "noxious" use of their property).

57. *See* Barros, *supra* note 40, at 502–03 (arguing in *Mulger* the Court allows for a regulation of a use that is not intrinsically noxious which set the stage for a shift in the Court's understanding of the police powers beyond just preventing public harm).

58. *See id.* at 479–81 (discussing Chief Justice Shaw's attempt in *Commonwealth v. Alger*, 61 Mass. (7 Cush.)53 (1851), to draw a line between eminent domain and the police power).

59. Graham v. Estuary Props. Inc., 399 So. 2d 1374, 1382 (Fla. 1981).

60. *Id.* at 1381.

such that one member of the public cannot do damage to other members of the public.[61] Providing a public good, conversely, consists of requiring individuals to create a public benefit to improve the status quo.[62]

In this interpretation, police power functions exclusively to enforce the doctrine of *sic utere tuo ut alienum non laedas* which requires property owners to refrain from harming others as the only limit to use of property.[63] Police power regulations pursuant to this power to "prevent public harm" are not found to be a taking and will not require compensation to the property owner, even when the entire value of the property is taken.[64] This test, though usefully simple in application, falters when government regulations become more complex and nuanced—such as zoning laws and conservation policies.[65]

The Court favored this doctrine in early cases considering the police powers; however, many useful modern police power regulations could not survive a takings challenge under this test.[66] On the other hand, many state regulations of groundwater withdrawals could be upheld under this test. Groundwater withdrawals which deplete or threaten to deplete limited groundwater resources, cause the groundwater wells of other users to run dry, or negatively impact flows of hydrologically connected surface water, could constitute a noxious use of a groundwater withdrawal.[67] Taking this view, state regulation of groundwater functions to prevent the public harm caused by excessive groundwater withdrawals; therefore, they are not a taking.[68]

2. "Creation of the Harm" Theory

The creation of the harm test requires a causal connection between the regulated activity and the creation of the harm.[69] Proponents of this theory argue this test provides an objective rationale for invoking a taking, although they quickly note that test does not

61. *See id.* at 1382 (preventing a developer from polluting a bay is preventing a public harm).

62. *See id.* (requiring a developer to change their plans so that public waterways would be improved is beyond the police powers because it creates a public good).

63. *Sic utere tuo ut alienum non laedas* translates: "Use your own property in such a way that you do not injure other people's." *Sic utere tuo ut alienum non laedas*, OXFORD REFERENCE DICTIONARY: A DICTIONARY OF LAW (7th ed. 2014), http://www.oxfordreference.com/view/10.1093/acref/9780199551248.001.0001/acref-9780199551248-e-3646.

64. *See* Mulger v. Kan., 123 U.S. 623, 669 (1887) ("The power which the states have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.").

65. *See* Sax, *supra* note 1, at 40 ("As the scope of governmental regulations grew, however, the economic impact of government regulation undermined the rationality of Harlan's conceptual distinctions.").

66. *See* Barros, *supra* note 40, at 503 ("A takings challenge to a restriction on the size of wharves, a prohibition on the manufacture of liquor or a zoning regulation cannot simply be dismissed with a criticism of the property owner for engaging in a noxious use.").

67. *See* RAMÓN LLAMAS & EMILIO CUSTIDO, INTENSIVE USE OF GROUNDWATER: CHALLENGES AND OPPORTUNITIES 24–25 (2003) (describing the harmful effects of excessive groundwater withdrawals such as salt water intrusion, pollution, and loss of surface water flows).

68. *See, e.g.*, Hudson Cty. Water Co. v. McCarter, 209 U.S. 349, 356 (1908) (upholding New Jersey legislation that limited water rights holders' use to within state borders and finding that this legislation was within the state's police powers to protect the waterways of the state from damage).

69. Dunham, *supra* note 54, at 75.

have a rigid formula.[70] This test is easily and successfully applied in cases of safety legislation; for example, workmen's compensation can be justified on the grounds that employers create risk through "greed and heedlessness" and so must bear the burden of the costs of such heedlessness.[71]

This test does fail in certain applications—particularly in cases of people "coming to the nuisance."[72] The classic example of this is the zoning out of nuisances.[73] As illustrated in *Miller v. Schoene*, the Court required the plaintiff to bear the expense of removing his cedar-rust-infected cedar trees because they threatened the apple trees a neighbor planted.[74] The Court required the cedar tree owner to bear the cost in spite of his lack of culpability, demonstrating the "creation of the harm" test does not truly cover all situations in which the courts deny compensation.

Despite these failings, the test can be successfully applied in instances of groundwater regulations. For example, a law that limits the amount of withdrawals a groundwater rights holder may make is clearly within the parameters of laws that do not require compensation under the test. Excessive groundwater withdrawals "create the harm" through threats of salt water intrusion, the drying up of wells, or the loss of artesian pressure.

B. Diminution of Value Theory

The diminution of value theory of states' police powers actually encompasses two separate notions: (1) the idea that property rights can exist in any "legally acquired . . . economic value,"[75] and (2) that those values can be diminished by regulation, but not completely extinguished[76] or excessively diminished.[77] These two concepts both have implications for a state's ability to regulate groundwater without providing compensation. Under both notions, however, clear arguments exist that state groundwater regulations are an allowable exercise of the states' police powers. Although this theory of takings has not been the predominant theory historically relied upon by the Court, it cannot simply be written off because it is frequently invoked by the Court in modern cases.[78]

1. When Does a Property Right Exist?

The Court frequently finds that no property right exists in varieties of economic interests, despite the broad definition of a property right necessarily presumed for the application of the test.[79] For example, the Court has allowed legislatures to ban businesses

70. *Id.* (citing Justice Clark in Goldblatt v. Town of Hemstead, 369 U.S. 590, 594 (1962)).

71. Sax, *supra* note 1, at 48–49.

72. *Id.* at 49–50.

73. *Id.*

74. Miller v. Schoene, 276 U.S. 272, 277 (1928).

75. Sax, *supra* note 1, at 50.

76. *Id.*

77. *See id.* (noting that "excessive" is an imprecise term but clearly encompasses depriving a property of "all or substantially all its economic value").

78. *See id.* ("Emphasis on the diminution of value is probably the most popular current approach to the taking problem."); *see, e.g.*, Armstrong v. U.S., 364 U.S. 40, 48 (1960) ("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.'"). This understanding of the limits of police powers is similar to the *Lucas* takings analysis discussed *supra* Section II.C.2.

79. *See* Sax, *supra* note 1, at 51 ("The first complication is presented by the fact that we very often permit

that were lawful at the time they started but fell out of favor, became outlawed, and then became valueless to the owners without compensation being owed.[80] The Court's willingness to find that no property right exists suggests that the idea that a property right exists in all economic values is not one the Court is willing to follow to its full logical conclusion.

The nature of the property interest in water is especially susceptible to a finding that no compensable property right exists.[81] An owner's right in water has "less protection than most other property rights."[82] The Court has recognized that an absolute property right in water does not exist.[83] The primary feature of a water right interest is that the right is a usufructuary right, not a possessory right.[84] Additionally, the extent to which a person has a property right in groundwater varies from state to state, with states utilizing five different common law doctrines to determine what property rights in water exist.[85] This means that the nature, extent, and very existence of a property right to withdraw groundwater will change depending on what state a groundwater right holder is in. Finally, a water right is never considered to be an absolute right to a certain amount of water, no matter what groundwater management scheme a state employs.[86] Whether limited by reasonable uses, beneficial uses, or elements of tort liability, all groundwater right holders are subject to some limitations.[87] As a result of these particular features of groundwater rights, states exercise a high degree of control over water rights and groundwater rights, without the requirement of compensation.[88] This tends to suggest that in a takings analysis focusing on diminution of value of property, the Court could reasonably find that no compensable property right exists in groundwater withdrawals.[89]

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total destruction of established values . . . [we] simply say . . . that the interest affected was not property and thus not entitled to constitutional protection.").

80. *See id.* at 52 (giving examples of lotteries, manufacture of liquor and debt adjustment, and citing *Tyson & Bros. v. Banton*, 273 U.S. 418 (1927), *Mulger v. Kan.*, 123 U.S. 623 (1887), and *Ferguson v. Skrupa*, 372 U.S. 726 (1963)).

81. *See* Kathryn M. Casey, Comment, *Water in the West: Vested Water Rights Merit Protection under the Takings Clause*, 6 CHAP. L. REV. 305, 319 (2003) ("Unlike land, a person cannot 'own' water in its natural state. Instead, federal and state governments are required to regulate water and other natural resources to ensure that allocation and conservation of such is executed in the best interest of the public."). Even under prior appropriation, which is quite protective of property interests, the right is not a private ownership but rather a right to use, which is subject to limits such as beneficial use. *Id.* at 322.

82. Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257, 260 (1990).

83. *See* United States v. Willow River Power Co., 324 U.S. 499, 510 (1945) ("Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them.").

84. *See* Janis Snoey, Note, *Water, Property, and the Clean Water Act*, 78 WASH. L. REV. 335, 351 (2003) ("[A] water right is a usufructuary right, meaning that the holder does not own the water but possesses the right to use it. The water belongs to the public or the state.").

85. *See* ADLER ET AL., *supra* note 10, at 178 (explaining the five different common law approaches).

86. Snoey, *supra* note 84, at 352.

87. *Id.* Even the doctrine of capture—which is the most closely related management scheme to outright ownership—imposes some limits: liability for malicious withdrawals, liability for land subsidence, and exceptions for certain aquifers. ADLER ET AL., *supra* note 10, at 181–82.

88. *See* Sax, *supra* note 82, at 260–62 (describing the nature of the property right in water and giving examples of permissible state regulations of water).

89. *See, e.g.*, Hudson Cty. Water Co. v. McCarter, 209 U.S. 349, 356 (1908) (finding limitations on a water rights holder could be upheld either (a) as a police power regulation which diminished a property right in response to the state's great interest in water or (b) because no private property right existed in the water to the degree that

2. How Much Diminution Is Too Much?

In *Pennsylvania Coal Company v. Mahon*, Justice Holmes, a life-long critic of the prevent public harm/provide public good distinction,[90] articulated a new test for when an exercise of the state's police power constitutes a taking.[91] Justice Holmes found that when a taking occurs is a question of degree, but a state's regulation "goes too far" if it renders the property owner's interest completely valueless.[92] Justice Holmes' conception of the limits this places on states' police powers has strong parallels to the modern *Lucas* takings analysis.[93]

If a state passed a police power regulation that completely eliminated the ability of groundwater right holders to withdrawal, under this test, such limitation would exceed the states' police powers and would require compensation.[94] More typically, however, the groundwater regulations passed and challenged in court do not completely prohibit the groundwater right holder from withdrawing but simply curtail the groundwater right holder's withdrawals to a level that does not interfere with other users.[95] These regulations, which merely place limits on withdrawal volumes but do not completely prohibit withdrawals, would clearly survive scrutiny under the Holmes' conception of "rendering property entirely valueless" as the limit to police power regulations.

IV. RECOMMENDATIONS

The proper role of states in groundwater regulation has recently come before the courts.[96] A litigation campaign attempting to utilize the federal judiciary to promote property absolutism and strictly limit the government's ability to regulate property in any way has begun challenging these regulations through the court system.[97] These challenges cast the Fifth Amendment takings clause as conflicting with state police power regulations and require courts to more clearly define the outer limits of the state's police powers. The lack of clarity on this issue also creates a question for property owners who hold rights to property that might be subject to state regulation. Owners of groundwater rights in particular face uncertainty about the status of that right, pending some clear answers from

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the water rights holder alleged).

90. Barros, *supra* note 40, at 505.

91. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

92. *Id.* at 413–16.

93. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

94. *See, e.g.*, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 384, 397 (1926) (upholding a regulation that caused a 75% diminution in value); Hadacheck v. Sebastian, 239 U.S. 394, 405, 413 (1915) (upholding a regulation that caused an 87.5% loss in value).

95. For example, the Act challenged in *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012), does not prohibit groundwater withdrawals entirely but merely requires owners to obtain permits for some uses and gives preference to existing users and beneficial uses. *Id.* at 818–20. The regulation did not prohibit the users bringing the challenge from withdrawing entirely but simply limited them to fourteen acre-feet of water annually. *Id.* at 821.

96. *See* Edwards Aquifer Auth. v. Bragg, 421 S.W.3d 118, 146 (Tex. App. 2013) (holding that the denial of a permit to withdraw groundwater amounted to a taking); *Day*, 369 S.W.3d at 823 (holding that groundwater, like oil and gas, is owned in place).

97. *See* Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 510–12 (1998) ("What we found is a large and increasingly successful campaign by conservatives and libertarians to use the federal judiciary to achieve an anti-regulatory, anti-environmental agenda.").

the Court.

A. Recommendations to the Courts

Courts ought to find that state regulations of groundwater withdrawals which impair groundwater right holders' use but do not completely destroy the economic value of the interest, are regulations that are within the police powers of the state. They therefore are not subject to compensation under the Fifth Amendment. Almost all state groundwater regulations can be upheld while staying within the Court's existing takings theories. To hold otherwise would be a misunderstanding of the role of the police powers of the states, contrary to our federalism and a misapplication of the Court's takings jurisprudence.

Private property rights have been important in U.S. history and continue to have great importance today.[98] However, property absolutists who view any restraint on a property right as a violation of a constitutionally protected interest misunderstand the role state and local governments play in protecting community interests.[99] The Framers of the Constitution recognized that the states needed sufficient power to secure the life, liberty, and pursuit of happiness—rights viewed to be unalienable.[100] These powers guarantee to the states the power to regulate for the health, safety, welfare, and morality of their citizens, precisely when these regulations impinge upon the rights of property owners.[101]

When states duly enact police power regulations that reflect the desires of the local community to protect the interests of that community, it is not the role of the judiciary to second guess that legislation.[102] To constitutionalize the line between police power and property rights would drastically limit the power of local representative governments to respond to the interests of their local constituents. Regardless of the wisdom behind limiting the exercise of property rights in groundwater, it is the prerogative of state governments to enact laws that are, in the words of Justice Scalia, "stupid but constitutional."[103] Courts should find that it is not their role to invalidate state regulations on groundwater on constitutional grounds because these pieces of legislation are within a reasonable exercise of the states' police powers and, as such, do not require compensation under the Court's takings jurisprudence.

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98. *See* Casey, *supra* note 81, at 305–06 (discussing the role of property rights in the contemporary and historical United States).

99. *See* Talmadge, *supra* note 17, at 860 ("This concept of property is both dangerous and mythical; neither American heritage nor constitutional law lends support to an absolutist right to property free of consideration of the community's interests.").

100. *See id.* at 864 ("It is noteworthy Jefferson felt [one purpose of] governments [was to] 'secure' these fundamental rights. To secure life, liberty, and the pursuit of happiness, government plainly required sufficient authority to regulate the lives of the governed.").

101. *See* MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 115 (2005) ("American discussions often treat the police power mostly, if not merely, as a regulation of property."); ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS iii (Gerald N. Grob et al. eds., 2nd ed. 1976) (describing the police power as "the power of promoting the public welfare by restraining and regulating the use of liberty and property"); Sax, *supra* note 82, at 261 ("[N]o property right can be exempted from the full exercise of the police power.").

102. *See* Berman v. Parker, 348 U.S. 26, 32 (1954) ("Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian or public needs to be served by social legislation . . . .").

103. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), http://nymag.com/news/features/antonin-scalia-2013-10/.

Although the Court's takings jurisprudence has been far from clear, groundwater regulations should generally survive whichever permutation the Court applies.[104] A state regulation on groundwater—which deprives the right holder of all economically beneficial use of that property right—should be subject to compensation. However, this does not reflect the typical results of groundwater regulations. Most users will not have their use completely stripped away but rather will be temporarily impeded or restricted to a lesser quantity.[105] Regulations that merely restrict some use of the property owner to prevent a public harm[106] fall squarely within the states' police powers and not subject to compensation under the Court's regulatory takings analysis.[107]

States need freedom to function as laboratories of democracy. To unnecessarily constitutionalize the rights of groundwater holders against state regulation would severely curtail the ability of state legislatures to exercise their police powers. Whatever the relative merits of a restriction on the rights of a property owner, it is clearly within the power of the state to place a reasonable restriction on that right, in furtherance of health, safety, welfare, and morality.[108] When, as is the case with groundwater regulation, the regulation seeks to prevent a public harm and does not completely destroy the property owner's economic value in the property, the regulation does not require compensation under any reasonable reading of the Court's taking jurisprudence. Courts should stay true to this understanding and find these kinds of groundwater regulations are not a taking.

B. Recommendations to Prospective Groundwater Right Investors

The implications for groundwater rights holders of a finding that state groundwater regulations are within their police powers and not compensable under the Fifth Amendment are as clear as they are ominous. It is likely that state groundwater regulations will not completely destroy all economically beneficial use of vested groundwater rights (and if they do, they will be subject to the Fifth Amendment's compensation provision). However, investors in groundwater rights risk near total extinguishment of their investment.[109] Groundwater right holders may turn to state legislatures for relief and may successfully convince the legislature to modify administrative schemes to look more favorable on high volume withdrawals. What these groundwater rights holders should not expect, however, is to utilize the court system to have their withdrawal limitations compensated as a taking. The court system is not the appropriate avenue to challenge these regulations regardless of how states choose to resolve the public policy issue of appropriate regulation of groundwater.

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104. *See supra* Part III (describing the two primary interpretations of the Court's regulatory takings jurisprudence to date).

105. *See* Edwards Aquifer Auth. v. Day, 369 S.W.3d 814, 821 (Tex. 2012) (challenging a law that limited plaintiff's right to withdraw water to 14 acre-feet per year).

106. Depletion of aquifers, salt water intrusion, land subsidence, etc.

107. *See, e.g.*, Hudson Cty. Water Co. v. McCarter, 209 U.S. 349, 356 (1908) (holding that preventing water rights holders from taking water out of the state was a permissible use of the state's police power to prevent harm to the state's waterways).

108. *See supra* note 42 (giving examples of legislation that falls within the health, safety, welfare, and morality conception of police powers and stating this Note will accept the narrower conception of police powers as being limited to these health, safety, welfare, and morality purposes).

109. *See supra* note 94 (giving examples of cases where the Court upheld regulations that caused up to a nearly 90% loss in value).

States that adopt new groundwater management schemes that limit withdrawals may lose out on economic opportunities for their state. They may also sacrifice the opportunity to revamp their municipal water supplies through private investment.[110] This loss of economic potential highlights the potential naiveté of enacting such legislation, although it is the states' prerogative to do so.

V. CONCLUSION

Legislation that risks losing investment in groundwater may reflect a changing perception of the role of water in communities. Once viewed as a resource to be developed and applied to "beneficial uses" as aggressively as possible, groundwater has come under threat from excessive withdrawals and pollution. To respond to these threats, states have frequently elected to more closely regulate and limit withdrawals. Switching control from the whims of groundwater rights holders to governmental oversight reflects a fundamental change in the role of water in communities: from a valuable commodity to a public resource that must be protected. A calculated and coordinated litigation campaign referred to as the "takings project"[111] has sought to challenge groundwater regulations which place burdens on development in the court system, alleging these regulations effectuate a takings such that compensation is owed. This project misunderstands the Court's takings jurisprudence, as well as the role of the courts in striking down popularly enacted legislation. As discussed above, under the most common understandings of Supreme Court jurisprudence, these groundwater regulations can easily be upheld as appropriate uses of the states' police powers. Remedying the folly of groundwater withdrawal limitations, if done at all, ought not to be done through the courts.

110. *See supra* note 7 and accompanying text (describing the recent privatization trend in municipal water supplies).

111. *See supra* notes 19–20 and accompanying text (discussing the takings project).