
ARTICLES

THE CURIOUS INTERSECTION OF NUISANCE AND TAKINGS LAW

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Whenever the government operates a facility in a way that negatively affects the property interests of nearby owners, the question of whether it has effected a taking arises. This is especially the case in instances in which the government’s land use constitutes a nuisance. This Article explores the issue of when a nuisance ripens into a taking. The Article argues that when it is alleged that the government has effected a taking through its own land use, courts should employ a form of review that is more exacting than that applicable in regulatory takings cases but that falls short of the categorical rule applicable in physical invasion cases. In doing so, the Article focuses on both the magnitude of the harm, and the degree of its distribution among property owners, which accompanies intensive governmental land uses. The Article seeks to show how takings law can promote a greater degree of fairness

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when the government chooses sites for facilities that create significant negative externalities. The analysis will help property owners who have borne a disproportionate share of those externalities, including owners in poor and minority communities whose unequal treatment in this regard has given rise to the environmental justice movement.

INTRODUCTION

Commentators usually divide the world of takings law into two distinct categories.¹ The first concerns situations in which the government authorizes the physical appropriation or invasion of private property.² The second consists of regulations that seek to prevent a public harm, or promote a public good, by restricting the ability of property owners to do with their property what they want.³ There is a third category of takings cases that does not fit neatly into either of these categories; it consists of cases where the government (or a third party acting pursuant to explicit governmental authority) uses *its own property* in ways that interfere with the ability of other owners to use and enjoy their properties. The plaintiffs in these cases, in other words, allege that

¹ See, e.g., Carol Necole Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims After Property Transfers*, 36 CONN. L. REV. 7, 10-11 (2003); Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1985 (2005); Thomas E. Roberts, *An Analysis of Tahoe-Sierra and Its Help and Hindrance in Understanding the Concept of a Temporary Regulatory Taking*, 25 U. HAW. L. REV. 417, 424 (2003). But see Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277, 280-81 (2001) (arguing for a third category, derivative takings, which “resemble regulatory takings in that they reduce the value of property without physically appropriating it,” but “are distinct from regulatory takings in that they may arise as the result of a physical taking”). The Supreme Court also frequently distinguishes between regulatory and physical takings cases. See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 321 (2002) (“The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings.”); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982) (“More recent cases confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property.”).

² See, e.g., *Loretto*, 458 U.S. at 430 (holding that permanent occupation of land authorized by government constitutes a taking); *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951) (holding that government seizure of coal mine constitutes a taking); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 380-81 (1945) (holding that government occupation of private warehouse constitutes a taking).

³ See, e.g., *Tahoe-Sierra*, 535 U.S. at 302, 341-42 (affirming a lower court’s ruling that a thirty-two month building moratorium regulation did not constitute a per se taking); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992) (holding that a taking occurs when a development restriction denies an owner economically viable use of the land); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 133 (1978) (holding that landmark legislation does not constitute a taking).

the government effects a taking through its land use rather than through either its invasion or regulation of the land of others.

This third category of takings cases usually involves an allegation by the plaintiffs that the government has effected a taking by creating (or allowing others to create) a nuisance.⁴ The cases can arise in a broad range of circumstances, including instances when the government operates a landfill, a sewage treatment plant, or an airport.⁵ The plaintiffs in these cases frequently resort to takings law rather than to nuisance law because principles of sovereign immunity usually bar the application of the latter.⁶

It is fair to say that the two areas of property law most frequently criticized for their uncertainty, unpredictability, and general lack of doctrinal coherence

⁴ Almost thirty years ago, Professor William Stoebuck published what was then the definitive study of so-called “takings by nuisance” cases. WILLIAM B. STOEBUCK, *NONTRESPASSORY TAKINGS IN EMINENT DOMAIN* 158-66 (1977); *see also* William B. Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 *DICK. L. REV.* 207, 208-09 (1967) (“[The condemnation by nuisance doctrine] may be formulated as follows: governmental activity by an entity having the power of eminent domain, which activity would constitute a nuisance according to the law of torts, is a taking of property for public use, even though such activity may be authorized by legislation.”). The issue has not received much attention from commentators since, even though there have been many reported cases raising nuisance/takings claims. *See infra* Part IV.

⁵ *See* cases discussed *infra* Part IV.

⁶ *See* JULIUS L. SACKMAN, *NICHOLS ON EMINENT DOMAIN* § 28.02[6], at 28-58 (rev. ed. 2004) (observing that tort actions are often barred under the doctrine of sovereign immunity); STOEBUCK, *supra* note 4, at 164 (identifying governmental immunity as one reason for the utility of condemnation by nuisance instead of a tort nuisance theory); Saul Levmore, *Takings, Torts, and Special Interests*, 77 *VA. L. REV.* 1333, 1350 (1991) (observing that plaintiffs in airport cases prefer takings claims over nuisance claims, *inter alia*, because in bringing the latter they “would face a powerful sovereign immunity defense because the government can say that its offending actions were *discretionary*, involving the direction of takeoff and landing patterns and so forth”). The Federal Torts Claim Act waives the federal government’s sovereign immunity in torts cases under some circumstances, though not when the claim is based on the act or omission of a government employee exercising a discretionary function. 28 U.S.C. § 2680(a) (2000); *see also* Jed Michael Silversmith, *Takings, Torts & Turmoil: Reviewing the Authority Requirement of the Just Compensation Clause*, 19 *UCLA J. ENVTL. L. & POL’Y* 359, 364-65 (2001) (describing the Federal Tort Claims Act’s impact in the takings context).

In the nineteenth century, sovereign immunity frequently barred the recovery of damages directly from the state under just compensation provisions. Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 *VAND. L. REV.* 57, 72 (1999). Recovery, however, could usually be had from government representatives acting in their official capacities. *Id.* at 77-83. Then, “beginning in the 1920s and 1930s, many state courts began to hold that state just compensation provisions did abrogate state sovereign immunity.” *Id.* at 138-39.

are nuisance and takings law.⁷ These criticisms have been raised by commentators when discussing nuisance and takings law separately, so the critique would seem to be even more appropriate when the two areas intersect, as they do in what I have here identified as a third category of takings cases. This Article seeks to show that despite the seemingly ad hoc nature of nuisance and takings analyses, it is possible to provide guidance to courts when they seek to determine whether the government has effected a taking through its land use.⁸ As I hope to demonstrate, the question of when a nuisance ripens into a taking is both doctrinally fascinating and socially important.

I begin in Part I with a discussion of the few cases – all of them quite old – in which the Supreme Court discussed the issue of a government created or authorized nuisance from a takings perspective. The most important of these cases is *Richards v. Washington Terminal Co.*,⁹ in which the Court held that when the government (or a private party acting pursuant to explicit governmental authority) uses land in such a way so as to create a nuisance, the action rises to the level of a taking when the burden placed on the plaintiff is “peculiar and substantial.”¹⁰

⁷ On takings law, see Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 299-300 (1990) (characterizing takings jurisprudence as a “chameleon of ad hoc decisions that has bred considerable confusion”); John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1006 (2003) (“If there is a consensus today about regulatory takings law, it is that it is highly muddled.”); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles, Part I – A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299, 1304 (1989) (“[I]t is difficult to imagine a body of case law in greater doctrinal and conceptual disarray.”). For a collection of additional references regarding the confused nature of takings law, see Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 97 n.2 (2002). On nuisance law, William Prosser famously commented that “[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’” W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 616 (5th ed. 1984) [hereinafter PROSSER & KEETON]. Amusingly, one court has referred to the attempt to base a takings claim on a government-created nuisance as “hermaphroditic.” Fla. E. Coast Props., Inc. v. Metro. Dade County, 572 F.2d 1108, 1112 (5th Cir. 1978).

⁸ The question that I address in this Article, that is, when does the government effect a taking through a nuisance, should be distinguished from another issue that has received considerable attention from commentators, namely, whether the government effects a taking when it seeks to regulate nuisances. See, e.g., Robert L. Glicksman, *Making a Nuisance of Takings Law*, 3 WASH. U. J.L. & POL’Y 149, 164 (2000); Louise A. Halper, *Why The Nuisance Knot Can’t Undo the Takings Muddle*, 28 IND. L. REV. 329, 336-38 (1995); John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 29 (1993); Stewart E. Sterk, *The Inevitable Failure of Nuisance-Based Theories of the Takings Clause: A Reply to Professor Claeys*, 99 NW. U. L. REV. 231, 232-36 (2004).

⁹ 233 U.S. 546 (1914).

¹⁰ *Id.* at 557.

Under the holding and reasoning of *Richards*, the government will be able to avoid liability when it seeks to promote legitimate state interests through its own land use as long as the burden it imposes on owners is widely distributed.¹¹ Even if the government fails to so distribute, however, there will still be no constitutional obligation to compensate so long as the burden is not substantial.¹² In contrast, when the government singles out some owners and imposes a substantial burden on them not imposed on similarly situated owners, then considerations of fairness and justice require that it compensate affected owners.¹³

Although *Richards* was decided more than ninety years ago, and although the Court has not since elaborated on the “peculiar and substantial” standard in the context of nuisance/takings cases, I argue in Part II that the test is consistent with contemporary takings doctrine. The “peculiar and substantial” test focuses on what I call the verticality and the horizontality of the burden imposed on property owners by the state action subject to the takings claim. A burden’s verticality goes to its severity; its horizontality goes to the degree to which the burden is distributed among property owners. The vertical analysis, in other words, focuses on how any given owner is individually affected by the state action at issue. The horizontal analysis, on the other hand, focuses on how any given owner is burdened *relative to* other similarly situated landowners.¹⁴ The verticality and horizontality of the burden, both of which play crucial roles in the Court’s contemporary takings jurisprudence,¹⁵ are reflected in the *Richards* test. The “substantial” component of that test addresses the verticality of the burden, while the “peculiar” component addresses its horizontality.

In Part III, I argue that nuisance/takings cases merit a form of intermediate scrutiny, represented by the “peculiar and substantial” test, that lies between the categorical or per se rule that the Court has applied in physical invasion cases¹⁶ and the highly deferential ad hoc analysis called for by *Penn Central Transportation Co. v. New York City*.¹⁷ In doing so, I note that the

¹¹ See *infra* notes 60-65 and accompanying text.

¹² See *infra* notes 60-65 and accompanying text.

¹³ As I explain in *infra* Part IV.A, the fact that the government has created a nuisance should not be enough for there to be a finding that it has effected a taking.

¹⁴ Laurie Reynolds and I address questions related to the horizontality and verticality of the burden imposed by the government on property owners in takings cases in Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513, 1533 (2006).

¹⁵ See *infra* Part II.

¹⁶ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982) (applying a categorical or per se rule to permanent occupations of land authorized by government regardless of their extent or the public benefits that might flow from them).

¹⁷ 438 U.S. 104, 124 (1978) (“[W]e have frequently observed that whether a particular restriction will be rendered invalid by the government’s failure to pay for any losses

government in most nuisance/takings cases clearly acts in its enterprise, as opposed to its arbitral, capacity because the government in those cases allocates to itself resources such as air and water.¹⁸ This self-allocation of resources by the government raises efficiency and fairness concerns that justify greater judicial scrutiny.¹⁹ That scrutiny is also justified by the fact that the plaintiffs in most nuisance/takings cases have property-related expectations that are worthy of a great deal of constitutional respect because they seek to *continue* their current land uses without the government-created interference.²⁰ In contrast, most landowners in regulatory takings cases seek to *intensify* their land uses, making their expectations relatively less worthy of constitutional protection.²¹ In addition, the government's decisions in most nuisance/takings cases merit less deference than those in most regulatory takings cases because in the former, unlike in most of the latter, the government is not contending that the plaintiffs' land uses harm the public.²²

In Part IV, I explore some of the specific ways in which courts have approached nuisance/takings issues. I divide the cases into three categories. The first is comprised of opinions that collapse the nuisance analysis into the takings determination and, as such, end up being too protective of property owners.²³ The second category consists of decisions that equate nuisance/takings cases with regulatory takings cases and, in doing so, end up being too deferential to the government.²⁴ The third category is made up of opinions that, in my estimation, strike the appropriate balance between, on the one hand, making sure that landowners are not singled out to bear substantial burdens that are more fairly shared with others, and, on the other hand, not unduly interfering with the ability of the government to use its properties in order to effectively carry out its legitimate functions.²⁵

I end in Part V with a discussion of how takings law may be able to assist the environmental justice movement in the attainment of some of its goals. That movement has sought to address the fact that poor and minority communities frequently bear a disproportionate share of negative environmental effects created by industrial and other forms of intensive land uses.²⁶ It is in many ways understandable that the environmental justice

proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" (alteration in original) (quoting *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958))).

¹⁸ See *infra* notes 137-60 and accompanying text.

¹⁹ See *infra* notes 137-60 and accompanying text.

²⁰ See *infra* notes 161-68 and accompanying text.

²¹ See *infra* notes 161-68 and accompanying text.

²² See *infra* note 169 and accompanying text.

²³ See *infra* Part IV.A.

²⁴ See *infra* Part IV.B.

²⁵ See *infra* Part IV.C.

²⁶ See *infra* notes 288-94 and accompanying text.

movement, in pursuing litigation strategies, has relied primarily on civil rights law, both statutory and constitutional. There are, however, important advantages afforded by takings law over Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause, the two primary sources of law relied on by environmental justice advocates.²⁷ The first advantage is that the former, unlike the latter, does not require proof of discriminatory intent.²⁸ The second benefit is that the former, unlike the latter, explicitly calls for an assessment of the burdens created by the challenged state action in relationship to their benefits.²⁹ The greater the extent to which those burdens are concentrated on a small number of property owners, as well as the greater the extent to which the bulk of the benefits created by the state action are enjoyed by parties other than the burdened property owners, the more likely it is that the government has effected a taking.³⁰

Although the Takings Clause has not received much attention from civil rights advocates in the past, I believe that, going forward, such attention is merited, especially given the fact that while courts over the last few decades have been, on the whole, interpreting civil rights statutes narrowly,³¹ they have been, during that same time, again on the whole, more expansive in their interpretation of the Takings Clause.³²

My decision to engage in this project was driven by two considerations that frequently conflict. The first is the recognition that the government, as a land user, engages in many socially useful activities and that the law should be careful before too quickly imposing liability on the government, undermining its ability to carry out those functions. The second is the concern that the government, in carrying out some of its land use operations, may literally leave some individuals behind. When the government exercises its power of eminent domain, for example, to build a sewage treatment plant or to extend an airport runway, it compensates those whose properties it actually takes. My concern in this Article is with those who stay behind, that is, with those whose

²⁷ See *infra* notes 295-97 and accompanying text.

²⁸ See *infra* notes 296-302 and accompanying text.

²⁹ See *infra* notes 304-17 and accompanying text.

³⁰ See *infra* notes 304-17 and accompanying text.

³¹ See LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 126 (2001) (observing that courts have “significantly watered down civil rights laws in the past twenty years”).

³² See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (requiring a “rough proportionality” between impact of land development and government-imposed condition on that development); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992) (holding that legislative measures that are not part of background property and nuisance principles constitute takings when they deprive property of all economically viable use); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 834-37 (1987) (requiring an “essential nexus” between means and ends in exaction cases); *Preseault v. United States*, 100 F.3d 1525, 1552 (Fed. Cir. 1996) (holding that application to landowner of Rails-to-Trails Act, which allows for the conversion of former railroad easements into recreational easements, effected a taking).

properties are not close enough to the site in question to be included in the compensatory scheme arising from the exercise of the government's eminent domain power, but who are, at the same time, sufficiently close to the site to experience the worst of the externalities created by the governmental land use.³³

When the government purchases parcels of land for a particular land use, it makes an assessment that a certain number of lots (and no more) are necessary to achieve its operational goals. Takings law is not sufficiently precise to be able to tell us *ex ante* precisely where the proper boundary lies beyond which the government no longer has to purchase property. Takings law, however, can allow for a meaningful form of *ex post* judicial review of the chosen boundary so as to require the government, in at least some instances, to compensate nearby owners whose properties it decided not to take through the exercise of its eminent domain power.

I. THE SUPREME COURT'S (OLD) NUISANCE/TAKINGS CASES

The first time that the Supreme Court addressed the issue of a government created or authorized nuisance was in 1883, in the case of *Baltimore & Potomac Railroad Co. v. Fifth Baptist Church*.³⁴ The plaintiff in that case sued its neighbor for nuisance because the latter operated a locomotive repair facility that spewed smoke, cinders, and dust into the air, while producing loud noises and offensive smells.³⁵ The neighbor argued that it was immune from liability because it was authorized by Congress to operate a railroad (as well as

³³ Professors Bell and Parchomovsky raise some of the same concerns in their discussion of derivative takings that I do in this Article. See Bell & Parchomovsky, *supra* note 1, at 289-300. Those authors, however, are concerned with how to measure and administer damages once there has been a prior determination that a taking has occurred. *Id.* at 281-82. In this Article, I explore the antecedent question of how best to determine when the government has effected a taking through its land use.

³⁴ 108 U.S. 317 (1883). The Court, in the earlier case of *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 177-78 (1871), for the first time concluded that the government did not have to physically *appropriate* property in order to effect a taking. In *Pumpelly*, the State of Wisconsin authorized the construction of a dam, the operation of which flooded the plaintiff's property. *Id.* at 167. The Court, in determining whether a taking had occurred, placed considerable weight on the fact that the plaintiff's property was physically *invaded*. *Id.* at 181. As the Court put it, "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking." *Id.* As a result, *Pumpelly* is better thought of as a trespass/takings, rather than a nuisance/takings, case. On the distinction, see *infra* notes 74-78 and accompanying text. For other cases where the Court has addressed the issue of whether flooding effects a taking, see *United States v. Dickinson*, 331 U.S. 745, 749 (1947); *United States v. Cress*, 243 U.S. 316, 327-28 (1917); *United States v. Lynah*, 188 U.S. 445, 468-69 (1903).

³⁵ *Fifth Baptist Church*, 108 U.S. at 329.

related facilities such as locomotive repair shops).³⁶ The Court rejected the railroad's immunity argument by noting that the Congressional authority was accompanied by an "implied qualification" that the operation of the railroad would not unreasonably interfere with the property rights of others.³⁷ In doing so, the Court addressed two issues that remain relevant today. The first was that there could be no liability for consequential harms that result from the reasonable and expected use of a duly-authorized business such as a railroad.³⁸ The Court deemed such harms as *damnum absque injuria*, that is, a loss without legal injury.³⁹ There will always be, the Court reasoned, some inconveniences that result from living in a modern society with technology such as railroads.⁴⁰ In order for society to benefit fully from the advances offered by that technology, the inconveniences cannot be compensable.⁴¹

The Court also made a second point by distinguishing between injuries that result from the operation of the railroad that are shared by the community in general and a claim by a property owner of a "special inconvenience and discomfort not experienced by the public at large."⁴² The Court, in effect, distinguished between a public and a private nuisance. The fundamental distinction between the two is that the former affects the public generally while the latter impacts property owners in their use and enjoyment of land.⁴³ Although Congress could authorize (and immunize) acts which would

³⁶ *Id.* at 321, 330.

³⁷ *Id.* at 331 ("Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property."). The Court added that "[g]rants of privileges or powers to corporate bodies, like [the defendant], confer no license to use them in disregard of the private rights of others, and with immunity for their invasion." *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ As the Court put it, "[t]he private inconvenience in such case must be suffered for the public accommodation." *Id.*

⁴² *Id.* at 332.

⁴³ PROSSER & KEETON, *supra* note 7, § 86, at 618 (describing a public nuisance as affecting the rights of the community at large, whereas a private nuisance is a civil wrong that affects the individual); WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* § 7.2, at 417-18 (3d ed. 2000) (distinguishing a private nuisance, which affects a limited number of plaintiffs, from a public nuisance, which affects the public generally or a large component of the public). "The key element to a *public* nuisance claim, in contrast to a *private* nuisance claim, . . . is that the annoyance, inconvenience, or injury must be to a *public* right or interest (e.g., a public road or beach), not just a private one." Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L.Q.* 755, 771 (2001).

otherwise constitute a public nuisance, it could not do the same with acts that created a private nuisance.⁴⁴

The distinction between the harm arising from a public nuisance and that arising from a private nuisance goes to the issue of burden distribution. If the government (or, as in *Fifth Baptist Church*, a private party acting pursuant to explicit governmental authority) imposes harms as a result of a socially useful land use (such as the operation of a railroad) on large segments of the community, no liability will attach. The Court in *Fifth Baptist Church* concluded that the harms that resulted from the reasonable and normal operation of the railroad were not compensable because they were outweighed by the social utility of the railroad.⁴⁵ Congress has the authority to immunize acts that would otherwise constitute a nuisance as long as the harms are distributed widely throughout the community.⁴⁶ Congress, however, lacks the power to impose a significant (vertical) burden when that burden is not sufficiently distributed horizontally, that is, when it places the burden on only a handful of owners.⁴⁷

Although the Court in *Fifth Baptist Church* was clearly cognizant of the plaintiff's property rights,⁴⁸ it did not explicitly refer to the Takings Clause. The Court did so, however, thirty years later in *Richards v. Washington Terminal Co.*⁴⁹ *Richards* also involved a nuisance lawsuit brought by a property owner against a railroad whose operation was authorized by Congress and to which Congress had granted the power of eminent domain.⁵⁰ The plaintiff's property was near railroad tracks operated by the defendant; it was also next to the entrance of a railroad tunnel built and used by the defendant.⁵¹ As in *Fifth Baptist Church*, the Court in *Richards* distinguished between consequential damages that are the result of the reasonable and normal operation of the railroad, which are widely shared by the community, and those

⁴⁴ *Fifth Baptist Church*, 108 U.S. at 332. The Court, in the later case of *Richards v. Washington Terminal Co.*, 233 U.S. 546, 554 (1914), referred to government-authorized nuisances as "legalized nuisances." (For a discussion of *Richards*, see *infra* notes 49-65 and accompanying text.) See also *Transp. Co. v. Chicago*, 99 U.S. 635, 640 (1878) ("A legislature may and often does authorize and even direct acts to be done which are harmful to individuals, and which without the authority would be nuisances . . ."); cf. *Keokuk & Hamilton Bridge Co. v. United States*, 260 U.S. 125, 127 (1922) (holding that the government is not liable for "incidental damage which if inflicted by a private individual might be a tort").

⁴⁵ See *Fifth Baptist Church*, 108 U.S. at 331.

⁴⁶ See *id.* at 332.

⁴⁷ See *id.*

⁴⁸ See *id.* at 331 ("[T]he works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property.").

⁴⁹ 233 U.S. 546, 553 (1914).

⁵⁰ *Id.* at 551-52.

⁵¹ *Id.* at 548-49.

burdens that are endured by only a handful of property owners.⁵² As the Court put it:

Any diminution of the value of property not directly invaded nor peculiarly affected, but sharing in the common burden of incidental damages arising from the legalized nuisance, is . . . not . . . a “taking” within the constitutional provision. The immunity is limited to such damages as naturally and unavoidably result from the proper conduct of the road and are shared generally by property owners whose lands lie within range of the inconveniences necessarily incident to proximity to a railroad.⁵³

As a result, the fact that the locomotives which ran next to the plaintiff’s property emitted noise, gases, dust, dirt, and smoke did not impose liability on the defendant.⁵⁴ If railroads are to be held liable for damages that result from the reasonable and normal operation of their business, the Court noted, “the practical result would be to bring the operation of railroads to a standstill.”⁵⁵ The gases and smoke that wafted onto the plaintiff’s property as a result of the operation of the tunnel’s ventilation system, however, were a different matter altogether because they led to a “special and peculiar damage to the plaintiff.”⁵⁶ While the harm incurred by the plaintiff as a result of his close proximity to the tracks, in other words, was shared by the many owners who also owned property adjacent to the path of the railroad, the harm associated with the operation of the tunnel was special and peculiar to the plaintiff.⁵⁷ The Court concluded that “the acts of Congress in the light of the Fifth Amendment, [could not be construed to] authorize the imposition of so *direct and peculiar and substantial* a burden upon plaintiff’s property without compensation to him.”⁵⁸

The first part of the *Richards* test, which requires that the burden be direct, goes to issues of causation, which I do not address in this Article.⁵⁹ Instead, I

⁵² *Id.* at 553-54. As in *Fifth Baptist Church*, the *Richards* Court deemed the incidental damages to the plaintiff’s property to constitute *damnum absque injuria*. *Id.* at 551.

⁵³ *Id.* at 554.

⁵⁴ *Id.*

⁵⁵ *Id.* at 555.

⁵⁶ *Id.* at 557.

⁵⁷ *Id.*

⁵⁸ *Id.* (emphasis added).

⁵⁹ Causation can sometimes be an issue in nuisance/takings cases. At issue in *Hinojosa v. Department of Natural Resources*, 688 N.W.2d 550, 551 (Mich. Ct. App. 2004), for example, was whether the state’s failure to abate a fire-hazard nuisance could constitute a taking. The court held that it could not because “inaction and omissions by the state cannot be found to constitute a ‘taking.’” *Id.* at 557 (quoting *Att’y Gen. v. Ankersen*, 385 N.W.2d 658, 675 (Mich. Ct. App. 1986)). The same court reached a similar result in *Deisler v. City of Dearborn*, No. 192534, 1997 Mich. App. LEXIS 2788, at *9 (Mich. Ct. App. Apr. 8, 1997), holding that the government’s issuance of a permit allowing the construction of a

am interested in the second (peculiar) and third (substantial) parts of the test because the former addresses the burden's horizontality while the latter goes to the burden's verticality. By reason of the location of the plaintiff's property in *Richards*, namely, near the tunnel's entrance, he incurred a type of harm that was peculiar (or special) when compared to other property owners in the area.⁶⁰ The burden imposed by the railroad's operation of the tunnel, in other words, was not sufficiently distributed among property owners. In addition, the severity of the burden (as represented by the concentration of gases and smoke emitted by the tunnel's ventilation system) was substantial enough so as to constitute a taking even if the Congressional authorization had immunized the railroad from nuisance liability based on the tunnel-related harm.⁶¹

It is important to emphasize that *Richards* makes clear that not every government authorized nuisance will effect a taking. The legislature has the authority to immunize acts that would otherwise constitute a public nuisance.⁶² The legislature is also allowed to immunize acts, such as the operation of a railroad, which lead to levels of noise, vibrations, and smells that would constitute a private nuisance if engaged in by a private property owner acting without governmental authority.⁶³ As a result of this legislative authority, conduct that would otherwise be a public or private nuisance (or both) is instead deemed to be what the *Richards* Court referred to as a "legalized

carport that led to the flooding of the plaintiff's property was insufficient to support a takings claim. *See also* *Batten v. United States*, 306 F.2d 580, 585 (10th Cir. 1962) (concluding that a nuisance can rise to the level of a taking only if it is "intentionally directed to some particular property"); *Electro-Jet Tool & Mfg. Co. v. City of Albuquerque*, 845 P.2d 770, 773 (N.M. 1992) (holding that the harm upon which an inverse condemnation claim is based must be the result of a "deliberate taking or damaging of the property in order to accomplish the public purpose"); *City of Dallas v. Jennings*, 142 S.W.3d 310, 314 (Tex. 2004) (holding that a government may be liable for a taking only "if it (1) knows that a specific act is causing identifiable harm; or (2) knows that the specific property damage is substantially certain to result from an authorized government action"). *But see* *Harms v. City of Sibley*, 702 N.W.2d 91, 96-103 (Iowa 2005) (holding that a rezoning of property that allowed the construction of a cement ready-mix plant, which the plaintiff claimed constituted a nuisance, was subject to a takings analysis).

⁶⁰ *Richards*, 233 U.S. at 557.

⁶¹ *Id.*

⁶² *Id.*

⁶³ The Court noted that the legislature, under the Fifth Amendment, "may not confer immunity from action for a private nuisance of *such a character* as to amount in effect to a taking of private property for public use." *Id.* at 553 (emphasis added). For the Court, therefore, the "question remain[ed:] . . . What is to be deemed a private nuisance such as amounts to a taking of property?" *Id.* The *Richards* Court, then, unlike the *Fifth Baptist Church* Court, seemed willing to make distinctions *among* private nuisances. *See supra* notes 34-48 and accompanying text (discussing *Fifth Baptist Church*). Although the *Richards* court did not elaborate on the issue, I explain in Part IV.A why it is improper to conclude that the existence of a government-created nuisance automatically effects a taking.

nuisance.”⁶⁴ The government, however, cannot create or authorize a private nuisance that leads to a peculiar and substantial harm without compensating the affected owners.⁶⁵

Commentators writing on takings law today rarely pay attention to *Richards*. This is in many ways understandable, given that the case is more than ninety years old and that there have been many other important takings cases decided since.⁶⁶ Nevertheless, the takings analysis found in *Richards* holds up

⁶⁴ *Richards*, 233 U.S. at 554. The notion that the legislature has the authority to legalize at least some nuisances continues to be widely accepted. “Courts commonly refer to the persistent passing of trains on a railroad, or planes in the air, or vehicles on the road as ‘legalized nuisances.’ . . . [I]f such a legalized nuisance affects all in its vicinity in common, damages generally are not recoverable under just-compensation theory.” *Spiek v. Mich. Dep’t of Transp.*, 572 N.W.2d 201, 208 (Mich. 1998) (citing *Richards*, 233 U.S. at 552-54). See also CAL. CIV. CODE § 3482 (West 1997) (“Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.”).

The strong consensus among courts in the second half of the nineteenth century that property owners were not constitutionally entitled to compensation for the harms that resulted from the normal and reasonable operation of railroads led many states to amend their constitutions to require compensation when the government *damages* property without effecting a taking. See *Richards*, 233 U.S. at 554. For a list of the states that amended their constitutions in this way, see STOEBOCK, *supra* note 4, at 5 n.9. For the historical background of the amendments, see Brauneis, *supra* note 6, at 115-32. Professor Brauneis argues that the amendments played an important role in the transition between an understanding by state courts of just compensation clauses as provisions that only stripped legislatures of the power to enact certain measures to ones that provided property owners with a private right of action for damages. *Id.*

Interestingly, the question of whether the government has sufficiently distributed the burden nonetheless remains relevant in at least some jurisdictions that provide greater protection to property owners under state constitutional principles than that afforded under the Federal Constitution. See, e.g., *Felts v. Harris County*, 915 S.W.2d 482, 485 (Tex. 1996) (applying a “community damage rule” that requires a plaintiff to show that the damages to her property resulting from the challenged state action are not shared with the community as a whole).

⁶⁵ See *Richards*, 233 U.S. at 557. Not all nuisances will meet the peculiar and substantial standard. Some nuisances affect a large number of property owners, so that a plaintiff will not be able to show that the government impermissibly singled her out for the imposition of a burden not imposed on similarly situated owners. See *infra* notes 271-78 and accompanying text (discussing a Michigan case where the court held that no relief could be granted because the harm suffered was not “peculiar” within the meaning of *Richards*). In addition, although the *Richards* standard and nuisance doctrine both require that the interference with the use and enjoyment of property be “substantial,” I argue in Part IV that the degree of interference should be greater in takings cases than in nuisance cases. See *infra* notes 221-22 and accompanying text.

⁶⁶ See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992) (holding that a taking occurs when a regulation denies an owner of economically viable use of the land); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138 (1978) (holding that landmark legislation does not constitute a taking).

surprisingly well when viewed from the perspective of the Court's more recent takings cases. Those cases, as I explain in Part II, also address, in different ways, issues associated with the verticality and horizontality of the burden imposed by the government on property owners. *Richards*, in short, has aged well.

Before I explore the Court's more recent takings cases, however, it is necessary to analyze one additional older case, *United States v. Causby*,⁶⁷ for its possible relevance to the nuisance/takings issue.⁶⁸ The property owner in *Causby* lived and operated a chicken farm on land next to a runway leased by the government for use by military airplanes.⁶⁹ The airplanes in question flew only a few feet above the plaintiff's house, barn, and trees.⁷⁰ The noise from the low flying airplanes so frightened and upset the chickens that the owner was forced to shut down his business.⁷¹

The Court concluded that the airplane flights effected a taking.⁷² The Court's analysis was grounded in principles of both trespass and nuisance law.⁷³ The primary difference between a trespass claim and a nuisance action is that the former requires a physical invasion of property while the latter is a nontrespassory interference with the use and enjoyment of property.⁷⁴ The two areas of law are meant to protect two different interests in the owner's bundle of property rights: trespass law protects the owner's right to exclusive possession, while nuisance law protects her right to use and enjoy the property.⁷⁵

A second difference is that a trespass is actionable regardless of the degree or extent of the invasion,⁷⁶ while a nuisance requires that the interference be both unreasonable and substantial.⁷⁷ One consequence of this is that nuisance

⁶⁷ 328 U.S. 256 (1946).

⁶⁸ *Id.* at 265.

⁶⁹ *Id.* at 258.

⁷⁰ *Id.*

⁷¹ *Id.* at 259.

⁷² *Id.* at 261.

⁷³ See *infra* notes 79-81 and accompanying text.

⁷⁴ See *Bormann v. Kossuth County Bd. of Supervisors*, 584 N.W.2d 309, 315 (Iowa 1998) (“As distinguished from trespass, which is an actionable invasion of interests in the exclusive possession of land, a private nuisance is an actionable invasion of interests in the use and enjoyment of land. Trespass comprehends an actual physical invasion by tangible matter. An invasion which constitutes a nuisance is usually by intangible substances, such as noises or odors.” (quoting *Ryan v. City of Emmetsburg*, 4 N.W.2d 435, 438 (Iowa 1942))).

⁷⁵ See PROSSER & KEETON, *supra* note 7, § 87, at 622 (“The distinction . . . is that trespass is an invasion of the plaintiff's interest in the exclusive possession of his land, while nuisance is an interference with his use and enjoyment of it.” (footnote omitted)).

⁷⁶ See *id.*

⁷⁷ *Id.* § 88, at 629. Factors that go to the reasonableness of the defendant's activity in a nuisance action include its suitability to the area; its value to society; and whether it was

law allows for “balancing the gravity of the harm to the plaintiff against the social utility of the [defendant’s] conduct, in a way that [is] not . . . available if the trespass theory [is] used.”⁷⁸

The Court in *Causby* seemed to be primarily troubled by the fact that the government’s airplanes physically invaded the plaintiff’s property. Thus, for example, it spoke of the government’s actions as a form of appropriation no different than if it had used the property “for the runways themselves.”⁷⁹ As the Court explained, “the flight of the airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it.”⁸⁰ At other times, however, the Court seemed to view the case from a nuisance perspective, noting that the flights would not constitute “a taking, unless they are so low and so frequent so as to be a direct and immediate *interference with the enjoyment and use* of the land.”⁸¹

begun before the plaintiff’s current land use. RESTATEMENT (SECOND) OF TORTS §§ 826-831 (1979); *see also* PROSSER & KEETON, *supra* note 7, § 88, at 630; STOEBUCK & WHITMAN, *supra* note 43, § 7.2, at 415. As for factors that determine whether the interference with the plaintiff’s use and enjoyment is substantial, *see* PROSSER & KEETON, *supra* note 7, § 88, at 626-29.

⁷⁸ *Thornburg v. Port of Portland*, 376 P.2d 100, 107 (Or. 1962); *see also* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 751 (5th ed. 2002) (“[U]nless the plaintiff can show a physical invasion by a tangible thing (that is, a trespass), the defendant [in a nuisance case] can escape liability for intentional conduct on grounds of reasonableness or amount of harm that would be irrelevant if there has been a physical invasion by a tangible thing.”); Osborne M. Reynolds, Jr., *Distinguishing Trespass and Nuisance: A Journey Through a Shifting Borderland*, 44 OKLA. L. REV. 227, 239 (1991) (“Some balancing, of course, occurs in any case of possible equitable relief However, when the alleged tort is private nuisance, the balancing extends to the determination of whether that tort even exists – a balancing that has not normally occurred in the finding of a trespass.”).

⁷⁹ *United States v. Causby*, 328 U.S. 256, 262 (1946).

⁸⁰ *Id.* at 264. The Court in *Causby* did not directly address the degree to which the government distributed the harm. *See* Ball & Reynolds, *supra* note 14, at 1540. As for the verticality of the burden, the Court, in effect, required that the interference be substantial. *See* Silversmith, *supra* note 6, at 394.

⁸¹ *Causby*, 328 U.S. at 266 (emphasis added); *see also* *Thornburg*, 376 P.2d at 104 (observing that the *Causby* Court “used language appropriate to the law of trespass more or less interchangeably with language appropriate to the law of nuisance”). After *Causby*, some courts held that in order for an owner to have a viable takings claim based on the noise caused by airplanes, there must be a physical invasion of the owner’s property. *See, e.g.*, *Batten v. United States*, 306 F.2d 580, 584 (10th Cir. 1962); *Avery v. United States*, 330 F.2d 640, 645 (Ct. Cl. 1964); *Leavell v. United States*, 234 F. Supp. 734, 739 (E.D.S.C. 1964). Other courts disagreed, holding that a taking occurs if the interference is sufficiently substantial regardless of whether the planes actually fly above the plaintiff’s land. *See, e.g.*, *Argent v. United States*, 124 F.3d 1277, 1283-84 (Fed. Cir. 1997); *City of Jacksonville v. Schumann*, 167 So. 2d 95, 99-102 (Fla. Dist. Ct. App. 1964); *Alevizos v. Metro. Airports Comm’n*, 216 N.W.2d 651, 661-62 (Minn. 1974); *Henthorn v. Oklahoma City*, 453 P.2d 1013, 1015 (Okla. 1969); *Thornburg*, 376 P.2d at 106; *Martin v. Port of Seattle*, 391 P.2d

Causby would seem to be particularly useful, therefore, in cases where the takings claim is grounded in both trespass and nuisance law. Examples of such cases include ones that involve the physical invasion by objects of a sufficient weight and size (such as airplanes and projectiles) that also cause enough interference with the use and enjoyment of the property so as to amount, in effect, to both a trespass and a nuisance.⁸² My interest in this Article, however, is in what can be categorized as “pure” nuisance/takings cases where the harm is caused by conditions, such as noise, odors, and smoke, unaccompanied by the type of physical invasion present in *Causby*.⁸³

540, 543 (Wash. 1964); see also *Branning v. United States*, 654 F.2d 88, 99 (Ct. Cl. 1981) (holding that flights over private property can constitute a taking even if they are limited to heights that Congress has deemed to be navigable airspace).

⁸² In addition to *Causby*, see also *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 328-30 (1922) (finding that the government’s erection of a fort and firing of guns over the claimant’s land “constitute[d] an appropriation of property for which compensation should be made”). Takings cases that straddle the line between trespass and nuisance confirm the view that “[a]t some point the law of trespass shades into the law of nuisance.” STOEBUCK & WHITMAN, *supra* note 43, § 7.1, at 411-12; see also PROSSER & KEETON, *supra* note 7, § 87, at 622 (observing that “the line between trespass and nuisance has become wavering and uncertain”).

⁸³ It can be argued that there is also a type of physical invasion in many “pure” nuisance/takings. Examples include the travel of chemical and smoke particles from the defendant’s property onto the plaintiff’s land. See *Moon v. N. Idaho Farmers Ass’n*, 96 P.3d 637, 642 (Idaho 2004) (stating that a takings case involving thick smoke “could be said to lie in nuisance and in trespass”); *Md. Port Admin. v. QC Corp.*, 529 A.2d 829, 841 n.1 (Md. 1987) (McAuliffe, J., concurring) (disagreeing with the majority’s determination that chromium particles released into the air by the defendant did not amount to a physical invasion of the plaintiff’s property). However, “[i]nstrumentalities that can cause trespasses are generally objects . . . that have size and weight [such as airplanes and projectiles], whereas nuisances are generally caused by ‘nonphysical’ forces such as noise, odors, and vibrations.” STOEBUCK & WHITMAN, *supra* note 43, § 7.1, at 411-12.

Some have viewed *Richards* as a physical invasion case. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 51 (1985) (stating that *Richards* requires all nuisance cases be treated as physical invasions); see also *Thornburg*, 376 P.2d at 106 (citing *Richards* for the proposition that only those nuisances that can be characterized as a trespass constitute a taking). There is nothing in *Richards* to suggest, however, that the notion of a physical invasion (or a trespass) played a role in the Court’s analysis. The Court concluded that the harm resulting from the operation of the tunnel was compensable, while the harm resulting from the running of trains on the tracks outside of the tunnel was not, because only the former singled out the plaintiff for the imposition of a substantial burden. *Richards v. Wash. Terminal Co.*, 233 U.S. 546, 557 (1914). The Court did not distinguish between the two categories of harm based on the presence or absence of a physical invasion. In fact, the non-actionable harm emanating from the tracks outside of the tunnel included the effects of the dust and dirt produced by the train (as well as by smoke and gases), while the actionable harm emanating from the tunnel itself resulted from the effects of the smoke and gases only. *Id.* at 549. It would seem, therefore, that the non-

When the government physically invades property, the takings analysis is generally more straightforward because the Court has, for better or for worse, prioritized the right to exclude to such an extent that it has deemed any permanent physical invasion, no matter how minor, to constitute a taking.⁸⁴ The “pure” nuisance/takings cases are in many ways more interesting and challenging than cases such as *Causby*, which raise questions of both nuisance and trespass, because of the absence in the former of a physical invasion in the traditional sense. The justifications for a finding of a taking in those cases, therefore, must be based on notions apart from those found in trespass law and the right to exclude.

II. VERTICAL AND HORIZONTAL BURDENS

The principles behind the seemingly simple “peculiar and substantial” standard applied by the Court in *Richards* are reflected in the Court’s more contemporary (and admittedly more complex) takings jurisprudence. As I noted in the previous section, the peculiar and substantial test goes to what I call the verticality and horizontality of the burden imposed on property owners by the state action that is subject to a takings challenge.⁸⁵ As I illustrate in this section, the Court has focused extensively on questions related to both the verticality and horizontality of the burden in its more recent takings cases.

A. *Verticality of the Burden*

As is well-known, the era of regulatory takings began with Justice Holmes’s famous, if cryptic, opinion in *Pennsylvania Coal Co. v. Mahon*.⁸⁶ The test arising from that case, known as the diminution-in-value test, clearly focuses on the verticality or severity of the burden that the challenged regulation imposes on the owner. As Justice Holmes put it, when the regulation creates a diminution in value that “reaches a certain magnitude,” compensation must be paid.⁸⁷ Holmes concluded that the government effected a taking in *Mahon* because the regulation at issue, which required that coal companies leave sufficient amounts of the mineral underground so as to prevent the subsidence of the land above, deprived those companies of their valuable support estates.⁸⁸

compensable conduct entailed a more serious form of physical invasion (as represented by the dust and dirt particles) than did the compensable conduct.

⁸⁴ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982). The Court has noted that the right to exclude “has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.” *Id.* at 435 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979)).

⁸⁵ See *supra* Part I.

⁸⁶ 260 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.”).

⁸⁷ *Id.* at 413.

⁸⁸ See *id.* at 414-16 (“To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.”).

In its more recent takings cases, the Court has continued to focus on the severity of the regulation's impact on owners. In *Loretto v. Teleprompter Manhattan CATV Corp.*,⁸⁹ for example, the owner challenged a New York statute that required her to allow a television cable company to place certain equipment on her property.⁹⁰ The Court in *Loretto* emphasized that when the government occupies property (or requires that an owner allow a third party to occupy her property) in a permanent fashion, the vertical burden on the landowner is almost as severe as when the government physically appropriates property.⁹¹ The government, in permanent occupation cases, deprives the owner of the rights to possess, use, and sell the parts of the property that are occupied.⁹² The destruction of the right to possess, the Court added, means that the owner also loses the right to exclude.⁹³ As a result of the severe impact on the interests of property owners caused by a permanent physical occupation, the Court concluded that such an occupation constitutes a taking regardless of the extent of the occupation or the public benefits that might flow from it.⁹⁴

The Court also focused on the verticality of the burden in *Lucas v. South Carolina Coastal Council*.⁹⁵ A South Carolina statute, enacted after the plaintiff purchased the beachfront lots at issue in the case, prohibited the construction of permanent structures on undeveloped coastal properties in order to avoid the hazards associated with further beach erosion.⁹⁶ The Court, in holding that a regulation that deprives property of "all economically beneficial or productive use" constitutes a per se taking,⁹⁷ emphasized the magnitude of the burden placed on owners by regulations, such as South Carolina's, that prohibit development altogether.⁹⁸ The Court noted that the burden on the owner was "severe" and that the "total deprivation of beneficial

Under Pennsylvania law, the support estate is a property interest that is distinct from the surface and mining estates. *See id.* at 414.

⁸⁹ 458 U.S. 419 (1982).

⁹⁰ *Id.* at 423-24.

⁹¹ *Id.* at 435-36.

⁹² *Id.* The Court explained that although the owner retains the "bare legal right to dispose of the occupied space by transfer or sale," such a right lacks any real value given that "the purchaser will also be unable to make any use of the property." *Id.* at 436.

⁹³ *Id.*

⁹⁴ *Id.* at 436-37.

⁹⁵ 505 U.S. 1003 (1992).

⁹⁶ *Id.* at 1008-09.

⁹⁷ *Id.* at 1015.

⁹⁸ *Id.* at 1017 ("[W]hen no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life.'" (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978))).

use is, from the landowner's point of view, the equivalent of a physical appropriation."⁹⁹

The verticality of the burden is not only important in cases such as *Loretto* and *Lucas*, where the Court applied categorical rules, but is also crucial to the ad hoc analysis called for by *Penn Central Transportation Co. v. New York City*.¹⁰⁰ At issue in *Penn Central* was a landmark legislation, the application of which made it impossible for the owner of New York City's Grand Central Terminal to proceed with plans to build a skyscraper on top of the station.¹⁰¹ The inquiry regarding whether the legislation effected a taking, the Court noted, "may be narrowed to the question of the *severity of the impact* of the law on [the owner's] parcel, and its resolution in turn requires a careful assessment of the impact of the regulation on the Terminal site."¹⁰² The Court concluded that the government had not effected a taking because the owner's "distinct investment-backed expectations" were not interfered with, given that it could continue to operate the Terminal as it had for decades at a considerable profit.¹⁰³ The impact of the legislation on the owner's property interests, in other words, was not of a sufficient magnitude to merit the finding of a taking.¹⁰⁴

The requirement in *Richards*, then, that the burden on the property owner arising from the challenged state action be "substantial" is consistent with the Court's approach in takings cases that followed that decision. The *Richards* test focuses on the degree of the interference with the use and enjoyment of the plaintiff's property. That interference must be substantial before a taking can be found. As discussed in the next section, however, it must also be peculiar to the plaintiff.

B. *Horizontality of the Burden*

The Takings Clause is meant, in part, to distribute as broadly as possible the burdens imposed on owners by governmental actions. The Court made this point most succinctly and famously forty-five years ago in *Armstrong v. United States*,¹⁰⁵ where it noted that one of the primary purposes of the Clause

⁹⁹ *Id.* The Court added that "[a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029.

¹⁰⁰ 438 U.S. 104 (1978).

¹⁰¹ *Id.* at 115-19.

¹⁰² *Id.* at 136 (emphasis added).

¹⁰³ *See id.* at 136-37.

¹⁰⁴ *See id.*

¹⁰⁵ 364 U.S. 40 (1960).

is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁰⁶

The Court’s emphasis on the horizontality of the burden is, like its emphasis on the verticality of the burden, reflected in many of its contemporary takings cases. For example, although the Court in *Lucas v. South Carolina Coastal Council* was primarily troubled by the magnitude of the regulation’s burden,¹⁰⁷ the horizontality of the burden made it into the opinion in two ways. First, the Court noted that when “regulations . . . leave the owner of land without economically beneficial or productive options for its use, [they] carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.”¹⁰⁸ The Court suggested, in other words, that regulations which deprive owners of all economically viable use of their lands usually burden those owners in order to benefit others.¹⁰⁹ Second, the Court looked to the degree of burden distribution to determine whether the regulation in question was consistent with background property or nuisance common law principles, which would have exempted it from the application of the categorical takings rule.¹¹⁰ The fact that “other landowners, similarly situated, are permitted to continue the use denied to the claimant,” suggested that the regulation was not a

¹⁰⁶ *Id.* at 49. The Court frequently relies on the *Armstrong* principle in its takings decisions. *See, e.g.*, *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 304 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999); *E. Enters. v. Apfel*, 524 U.S. 498, 522 (1998); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1071 (1992); *Pennell v. City of San Jose*, 485 U.S. 1, 9 (1988); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 835-36 n.4 (1987); *Bowen v. Gilliard*, 483 U.S. 587, 608 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986); *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 (1980); *Penn Cent. Transp. Co.*, 438 U.S. at 123-24.

¹⁰⁷ *Lucas*, 505 U.S. at 1017; *see also supra* notes 95-99 and accompanying text.

¹⁰⁸ *Lucas*, 505 U.S. at 1018. The Court noted in its summary of the facts that the plaintiff intended to use his property “to do what the owners of the immediately adjacent parcels had already done: erect single-family residences.” *Id.* at 1008.

¹⁰⁹ *See id.* at 1018; Fee, *supra* note 7, at 1061 (arguing that “the *Lucas* rule works as an effective proxy for determining if some owners have been singled out to sacrifice property usage rights for the benefit of others”). Justice Stevens in his *Lucas* dissent “agree[d] that the risks [associated with being singled] out are of central concern in takings law,” but questioned the majority’s suggestion that there is a correlation between regulations that deprive owners of all economically viable uses of their properties and regulations that impermissibly single out some owners. *Lucas*, 505 U.S. at 1067 (Stevens, J., dissenting).

¹¹⁰ *Lucas*, 505 U.S. at 1030-31.

codification of common law principles but was instead a new type of land use restriction that required the government to compensate the owner.¹¹¹

The degree of burden distribution played an even more important role in *Penn Central Transportation Co. v. New York City*.¹¹² The property owner in *Penn Central* argued inter alia that the landmark legislation at issue constituted a taking because it imposed a unique and distinct burden on its property.¹¹³ As such, the owner contended, a landmark legislation is “different from zoning and historic-district legislation,” which apply to many owners throughout specifically delineated districts.¹¹⁴ The owner complained in essence that the government was singling it out and imposing a special and unique burden on it in order to benefit the rest of New York City’s residents.¹¹⁵

The Court rejected the owner’s argument by noting that there were over 400 different sites in the city that had been designated as landmarks.¹¹⁶ Thus, the Court concluded that the plaintiff was in fact not being unfairly singled out because the owners of those other landmarks were under the same obligations to protect the historical and aesthetic values of their properties.¹¹⁷ In addition, the city’s thirty-one historical districts applied similar restrictions to all properties within their borders.¹¹⁸ In the end, the Court believed that the wide distribution of the burden “to a large number of parcels in the city” provided the necessary “assurances against arbitrariness” on the part of the government.¹¹⁹

¹¹¹ *Id.* at 1031.

¹¹² 438 U.S. 104, 134-35 (1978).

¹¹³ *Id.* at 131.

¹¹⁴ *Id.*

¹¹⁵ *Id.* (“[A]ppellants argue that New York City’s regulation of individual landmarks . . . [applies] only to individuals who own selected properties.”).

¹¹⁶ *Id.* at 134.

¹¹⁷ *Id.* at 132-34.

¹¹⁸ *Id.* at 134.

¹¹⁹ *Id.* at 135 n.32. The Court acknowledged that such assurances are usually provided by the imposition of the same burden to an entire zoning area or district. *Id.* It concluded, however, that given the large number of parcels that were subject to the landmark legislation, the assurance against governmental arbitrariness was “comparable, if not identical.” *Id.*

Like the majority, Justice Rehnquist paid a great deal of attention in his dissent to the question of whether the landmark legislation sufficiently distributed the burden. In contrast to the majority, however, Justice Rehnquist concluded that the degree of burden distribution was patently insufficient. He noted, for example, that the government imposed the burden “on less than one one-tenth of one percent of the buildings in New York City for the general benefit of its people.” *Id.* at 147 (Rehnquist, J., dissenting). He added that if all city residents had to pay for the cost of preserving Grand Central station, the per capita charge would be only a few cents. *Id.* at 148-49. Emphasizing that the landmark preservation burden had not been sufficiently distributed, Justice Rehnquist concluded that the city’s

The issue of burden distribution also played an important role in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.¹²⁰ There, the plaintiffs argued that a thirty-two month moratorium prohibiting the development of hundreds of environmentally sensitive lots in the Lake Tahoe Basin deprived their properties of all economically viable use and thus constituted a per se taking under the rule announced in *Lucas v. South Carolina Coastal Council*.¹²¹

The Court disagreed, noting that *Lucas* involved a permanent deprivation of all economically viable use, while the Lake Tahoe regulation was only temporary.¹²² The Court did not stop there, however. It also emphasized the important role that a temporary moratorium can play in shaping the land use regulations that are ultimately adopted upon its expiration.¹²³ The Court reasoned that the wide distribution of the burden that accompanies a temporary moratorium helps assure that the government will not act arbitrarily by imposing burdens on only a few selected owners.¹²⁴ The Court noted that temporary moratoria that are applicable to many lots, unlike decisions regarding whether to issue “a permit for a single parcel,” give the government an opportunity to study, deliberate, and plan in a comprehensive fashion while affording affected owners and the public the opportunity to be heard.¹²⁵ As such, “with a temporary ban on development there is a lesser risk that individual landowners will be ‘singled out’ to bear a special burden that should be shared by the public as a whole.”¹²⁶

landmark scheme resulted in “precisely [the] sort of discrimination that the Fifth Amendment prohibits.” *Id.* at 149.

¹²⁰ 535 U.S. 302 (2002).

¹²¹ *Id.* at 302. For a discussion of *Lucas*, see *supra* notes 95-99 and accompanying text.

¹²² *Tahoe-Sierra*, 535 U.S. at 329-30.

¹²³ *Id.* at 337-40.

¹²⁴ *Id.* at 340-41.

¹²⁵ *Id.* at 340.

¹²⁶ *Id.* at 341 (citing *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 835 (1987)). At first, it may seem counterintuitive that the government may be able to escape takings liability simply by increasing the number of property owners who are negatively affected by its actions. As Laurie Reynolds and I have argued, however, when the government widely distributes land-related burdens, it frequently generates corresponding benefits for the affected properties. See Ball & Reynolds, *supra* note 14, at 1554-58. The greater the distribution of the burden, in other words, the more likely it is that the impacted owners will receive benefits that mitigate the severity of that burden. See *id.* Furthermore, from a democratic theory perspective, the greater the distribution of the burden, the more likely it is that the (larger number of) affected owners will be able to seek assistance from their elected representatives. In contrast, the democratic process is less likely to protect the interests of owners when only a few are burdened, further justifying a more active form of judicial intervention. See Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 308-14 (1990).

Finally, the Court addressed the issue of the horizontality (as well as the verticality) of the burden in its most recent regulatory takings decision, *Lingle v. Chevron U.S.A., Inc.*¹²⁷ The issue in *Lingle* was the continued relevance of the standard announced by the Court twenty-five years before in *Agins v. City of Tiburon* that a government regulation “effects a taking if [it] does not substantially advance legitimate state interests.”¹²⁸ The *Lingle* Court concluded that the *Agins* standard appropriately goes to the due process question of whether a governmental regulation is arbitrary or irrational.¹²⁹ The “substantially advances” inquiry, however, should play no role in the takings analysis because it goes to neither the severity of the burden nor the degree to which that burden is distributed among property owners. As the Court explained, “the ‘substantially advances’ inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners.”¹³⁰ The takings analysis, the Court added, demands an assessment of the actual burden imposed on the property owner and of whether considerations of “justice might require that the burden be spread among taxpayers through the payment of compensation.”¹³¹ The “substantially advances” inquiry, on the other hand, tells us nothing about the degree to which the regulation at issue singles out particular property owners. As the Court noted,

[t]he owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation. . . . Likewise, an ineffective regulation may not significantly burden property rights at all, and it may distribute any burden broadly and evenly among property owners.¹³²

Although the Court’s analysis regarding the degree of burden distribution in takings cases from *Penn Central* to *Lingle* is extensive and sophisticated, the crux of the issue was captured by the Court in *Richards* when it required that the harm that constitutes the basis for the takings claim be peculiar to the plaintiff.¹³³ Under *Richards*, if the government has broadly distributed the burden caused by its own land use (or that of a duly-authorized private party), the plaintiff will not be able to establish that the harm is peculiar to her and, as

¹²⁷ 544 U.S. 528 (2005).

¹²⁸ *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

¹²⁹ *Lingle*, 544 U.S. at 540-41.

¹³⁰ *Id.* at 542.

¹³¹ *Id.* at 543.

¹³² *Id.*

¹³³ See *supra* notes 49-65 and accompanying text (discussing *Richards v. Wash. Terminal Co.*, 233 U.S. 546 (1914)).

a result, the takings claim will fail.¹³⁴ In contrast, if the plaintiff can show that the government has singled her out by treating her differently from other similarly situated owners, then the burden imposed on her will be sufficiently “peculiar” so as to satisfy that element of the *Richards* standard.¹³⁵

The current focus in takings jurisprudence on both the severity of the burden and on the degree of its distribution is reflected (albeit in a pithy fashion) in the Court’s “peculiar and substantial” test announced almost one hundred years ago in *Richards*.¹³⁶ Despite the considerable time that has elapsed since the case was decided, the *Richards* test has continued relevance today because it is consistent with the Court’s more recent pronouncements on what type of analysis is required under the Takings Clause.

III. THE “PECULIAR AND SUBSTANTIAL” STANDARD AS INTERMEDIATE SCRUTINY

In a famous article written forty years ago, Professor Joseph Sax proposed that takings law distinguish between, on the one hand, instances in which the government acts in its enterprise capacity by acquiring resources for its own use, and, on the other, instances in which the government serves in an arbitral capacity by mediating disputes among property owners as to their consumption of resources.¹³⁷ The government, while serving in its enterprise capacity, acts as a competitor with private parties for resources.¹³⁸ In contrast, the government, while serving in its arbitral capacity, acts as a mediator resolving disputes between private parties regarding the allocation of resources.¹³⁹ Sax argued that takings should be found when the government, acting in its enterprise capacity, imposes economic losses on owners, while losses that result from the government’s exercise of its arbitral capacity should be deemed non-compensable.¹⁴⁰ He defended this position by arguing that the danger that the government will (1) discriminate against particular private owners;¹⁴¹ (2) act with excessive zeal;¹⁴² and (3) impose a wide range of risks on individual

¹³⁴ See *supra* notes 49-65 and accompanying text.

¹³⁵ See *supra* notes 49-65 and accompanying text.

¹³⁶ See *supra* notes 49-65 and accompanying text.

¹³⁷ Joseph L. Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36, 62-63 (1964).

¹³⁸ *Id.* at 62.

¹³⁹ *Id.* at 62-63.

¹⁴⁰ *Id.* at 63.

¹⁴¹ *Id.* at 64 (“[W]hen the government is engaged in resource acquisition for its own account . . . [i]t has the power to say what commodity is needed, at what location it is needed, in what amounts and at what times. . . . For these reasons the official procurement process often provides a particularly apt opportunity for rewarding the faithful or punishing the opposition.”).

¹⁴² *Id.* at 65 (remarking that the government, in its enterprise capacity, “acts as a judge in its own case,” and that the “restraint and detached reflection which one expects from a

owners¹⁴³ is considerably greater when the government is competing for resources with private owners than when it is merely arbitrating among competing private uses.

There are admittedly problems with Sax's categorical distinction between the government's exercise of its enterprise and arbitral capacities, starting with the difficulty of determining when exactly the government acts in one as opposed to the other capacity. It has been suggested, for example, that the government acts in both capacities when it demands exactions of owners.¹⁴⁴ It has also been suggested that it is not clear which capacity the government exercises when it imposes aesthetic requirements on property owners.¹⁴⁵ Sax himself later disowned the idea that the government always effects a taking when it acts in its enterprise capacity, presumably because the proposal called for an understanding of the Takings Clause that was more protective of private property interests than (the later) Sax thought prudent or necessary.¹⁴⁶

legislature presiding over a contest between two private interests" may be wanting when the government implements its own projects).

¹⁴³ *Id.* at 66 (giving examples of governmental land uses, such as the operation of dams and military bases, which expose nearby property owners to a greater risk of harm than do most land uses by private landowners).

¹⁴⁴ Stewart E. Sterk, Nollan, *Henry George, and Exactions*, 88 COLUM. L. REV. 1731, 1738 (1988) (stating that "the growth of exactions emphasizes . . . that government frequently acts in both an enterprise and an arbitral capacity simultaneously"). Exactions are conditions imposed by government when it approves a development proposal. *See generally* Ball & Reynolds, *supra* note 14.

¹⁴⁵ *See infra* note 158; *see also* Susan E. Looper-Friedman, *Constitutional Rights as Property?: The Supreme Court's Solution to the "Takings Issue,"* 15 COLUM. J. ENVT. L. 31, 46 (1990) (arguing that while "Sax's theory works well when considering regulations which fall clearly into one class of government activities or the other," it does not work so well when considering measures such as open space regulations); James Charles Smith, *Law, Beauty, and Human Stability: A Rose Is a Rose Is a Rose*, 78 CAL. L. REV. 787, 810 n.73 (1990) (reviewing JOHN J. COSTONIS, *ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE* (1989)) (noting that while the enterprise-arbitral distinction "may yield results at the ends of the spectrum . . . most types of aesthetic regulation . . . do not fall easily in one category or the other").

Sax acknowledged that the two governmental "functions are [not] so sharply distinct as to present a perfect theoretical dichotomy." Sax, *supra* note 137, at 63. He noted, for example, that the impact on owners was frequently the same, regardless of whether the government acts in its role as an enterprise or as a mediator. *Id.* And, in both instances, the government imposes burdens on owners in order to promote the public interest. *Id.* Nonetheless, Sax argued "that as a practical matter the distinction is real and clear enough to provide the basis for a workable rule of law." *Id.*

¹⁴⁶ *See* Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 150 n.5 (1971) ("I am compelled, however, to disown the view that whenever government can be said to be acquiring resources for its own account, compensation must be paid."). In this second article, Sax argued that a taking occurs whenever the government "discriminates

It is not necessary, however, to resuscitate in total Sax's categorical rule that the government *always* effects a taking when it acts in its enterprise capacity, in order to see that the distinction can be of assistance in better understanding what is at stake in nuisance/takings cases. As an initial matter, even if the distinction is not always obvious, it is clear that when the government exercises its power of eminent domain *in order to use the acquired land for one of its facilities*, it acts in its enterprise capacity. Once the land has been acquired, the operation of the facility also entails the exercise of the government's enterprise capacity. In operating the facility, the government engages in a process of self-allocation of resources rather than in the regulation of how others use resources. When the government, for example, operates a landfill or a sewage treatment plant that spews offensive smells into the air, it allocates the impacted air to itself. The government as a land user, in other words, assigns resources to itself – such as air and water – that are shared with other owners in order to further particular operational goals such as disposing of refuse and treating water. It seems clear that in doing so, the government is acting like an enterprise, competing with private owners for resources, rather than acting as an arbitrator mediating disputes among private owners as to their use of resources.

When the government competes for resources, it is more likely to overreach than when it arbitrates the use of resources by others. This is the case because there is an incentive in the former circumstance to acquire resources without having to pay for them. One of the most important goals of the Takings Clause is to deter this type of self-dealing on the part of the government.¹⁴⁷ This is important from both a fairness and an efficiency perspective. As to the former, the requirement that the government pay for resources owned by others avoids the situation in which a few are asked, in effect, to subsidize the benefits enjoyed by the many.¹⁴⁸ As to the latter, the requirement discourages the government's over-use of resources that could be put to better use by parties who are constrained by market forces.¹⁴⁹

among equally situated property owners or prevents property owners from making profitable uses that do not have spillover effects." *Id.* at 176 (footnote omitted).

¹⁴⁷ See, e.g., William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Law*, 17 J. LEGAL STUD. 269, 269-70 (1988) (arguing that the obligation to compensate serves, in part, the purpose of "disciplining the power of the state, which would otherwise overexpand unless made to pay for the resources that it consumes").

¹⁴⁸ See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

¹⁴⁹ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 58-64 (4th ed. 1992) (providing examples of inefficiencies arising from government takings that have no compensation requirement); see also DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY:*

All of these considerations are relatively straightforward when the resource in question is land. The government clearly cannot allocate to itself privately-owned land without paying for it. Professor Sax essentially argued (in the first article noted above) that all resources should be treated alike so that when the government allocates to itself *any* resource, it effects a taking.¹⁵⁰ It makes sense, however, to treat land differently from other resources (such as air and water) that are shared by several owners in any given area. When land is at issue, as when the government physically appropriates or permanently invades land, a categorical takings rule may be appropriate because of the severity of the burden imposed on the affected owners.¹⁵¹ In contrast, when shared resources are at issue, it does not make sense to apply a categorical rule because the government, as the owner of land, is entitled to its fair share of those resources. Furthermore, the government, because of its uniquely important functions and responsibilities, may be entitled to a greater share of those resources than private property owners before takings liability attaches.¹⁵² There is a point, however, at which the government's self-allocation of shared resources becomes a taking because it does so in a way

TAKINGS 42-43 (2002) (stating that if the government did not have to pay in order to acquire resources, it would not account for the opportunity costs that accompany its acquisitions).

¹⁵⁰ See Sax, *supra* note 137, at 63.

¹⁵¹ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 420 (1982); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (“A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government . . .”).

¹⁵² See *supra* notes 62-65 and accompanying text. Nuisance doctrine traditionally regulates the competition among owners for shared resources such as air and water. (That competition, of course, is also highly regulated through environmental protection legislation and regulations, but this Article is limited to the common law nuisance doctrine.) As a result, under that doctrine, when a property owner uses resources in such a way that it unreasonably and substantially interferes with the use and enjoyment of her neighbors' properties, the injured parties are entitled to a remedy. Property owners, in other words, have a reasonable expectation (as reflected in nuisance law principles) vis-à-vis their neighbors that the latter will not use resources in such a way so as to interfere with the former's use and enjoyment of their properties.

The doctrine of *damnum absque injuria* as applied to the government modifies those expectations. The Court in *Richards* made clear that the government is not liable for the consequential harms that accompany its proper exercise of authority, even when those harms are sufficient to establish the existence of a nuisance when they are created by a private party acting independent of governmental authority. See *supra* notes 52-65 and accompanying text; see also *Keokuk & Hamilton Bridge Co. v. United States*, 260 U.S. 125, 127 (1922) (holding that government is not liable for “incidental damage which if inflicted by a private individual might be a tort”). At the same time, the *Richards* Court ruled that the immunity afforded by the doctrine of *damnum absque injuria* is not boundless. When the government, through its land use, imposes a harm on a property owner that is sufficiently peculiar and substantial, it effects a taking. See *supra* notes 52-65 and accompanying text.

that singles out particular property owners and imposes on them a substantial burden not shared with others.¹⁵³

This singling out raises questions of fairness because a few are asked to confer benefits to the many.¹⁵⁴ It also raises efficiency concerns. If the government is not required to internalize at least some of the externalities associated with its land use, it will be free to ignore the costs of its operations borne by nearby property owners.¹⁵⁵ This leads “to inaccurate assessments of the cost effectiveness and desirability of government policies.”¹⁵⁶ The government should be forced “to bear the full cost of its actions [to] help[] ensure that [it] uses its eminent domain power only when doing so enhances social utility.”¹⁵⁷

The fact that the government in nuisance/takings cases clearly acts in its enterprise capacity, which raises questions of both fairness and efficiency, justifies, in part, the application of a more exacting form of judicial review than that applicable in regulatory takings cases.¹⁵⁸ The risk of governmental

¹⁵³ See *Richards v. Wash. Terminal Co.*, 233 U.S. 546, 557 (1914).

¹⁵⁴ See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (cautioning that compensation may be due when public benefits are had through the burdening of a few).

¹⁵⁵ See *supra* notes 147-49 and accompanying text.

¹⁵⁶ *Bell & Parchomovsky*, *supra* note 1, at 280.

¹⁵⁷ *Id.* at 282-83.

¹⁵⁸ I should make it clear that although I am arguing for a form of heightened scrutiny in nuisance/takings cases, I am not contending that such scrutiny is appropriate in *every* instance when the government acts in its enterprise capacity. I agree with the criticism, already noted, that it is frequently difficult to distinguish between instances when the government acts in its enterprise as opposed to its arbitral capacity. See *supra* notes 144-45 and accompanying text. The landmark legislation at issue in *Penn Central*, which restricted the ability of the owner to build on top of Grand Central Station, is a case in point. See *supra* notes 100-04, 112-19 and accompanying text. By restricting the ability of the owner to build on top of the train station, the government, it can be argued, was seeking to appropriate to itself valuable resources, either the air immediately above the station or even the aesthetic and historical value of the building. The legislation, however, can also be reasonably understood as an effort by the government to mediate between the interests of the station's owners and the interests of New Yorkers (including New Yorkers who owned land nearby) who would continue to benefit from the absence of a skyscraper on top of the famous station. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 115-18 (1978). This kind of ambiguity as to whether the government is acting in its enterprise or arbitral capacities (or both) is lacking in nuisance/takings cases because it is usually clear in those cases that the conduct in question involves the government's self-allocation of resources.

The ambiguity criticism has also been raised in the context of the governmental-proprietary distinction in sovereign immunity law. Under that distinction, states and municipalities can be immune from liability for torts arising from the carrying out of governmental functions, such as providing police and fire protection, but not for the operation of government property. See, e.g., *PROSSER & KEETON*, *supra* note 7, § 131, at 1053; see also *Peavler v. Bd. of Comm'rs*, 528 N.E.2d 40, 42-43 (Ind. 1988). The

overreaching is greater when the government competes for resources than when it serves as an arbitrator mediating among private uses of resources.¹⁵⁹ When the government acts in its enterprise capacity, it becomes a self-interested user of resources with an incentive to carry out its functions in ways that are as inexpensive as possible, even if that entails singling out some property owners and imposing on them substantial burdens not imposed on others.¹⁶⁰

distinction, however, has been criticized as unworkable and discarded by many jurisdictions. *See, e.g.*, PROSSER & KEETON, *supra* note 7, § 131, at 1053-54; *see also* Peavler, 528 N.E.2d at 42-43. The Supreme Court has also rejected similar distinctions for purposes of determining the scope of the federal government's sovereign immunity after the enactment of the Federal Torts Claim Act. *See* Berkovitz v. United States, 486 U.S. 531, 538-39 (1988) (“[W]e intend specifically to reject the Government’s argument . . . that [there can be no] liability for any and all acts arising out of the regulatory programs of federal agencies.”); *Indian Towing Co. v. United States*, 350 U.S. 61, 67-69 (1955) (“There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation.”); *cf. Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985) (rejecting the rule that “state immunity from federal regulation . . . turns on a judicial appraisal of whether a particular governmental function is ‘integral’ or ‘traditional’”).

Although there is, at first glance, a similarity between the governmental-proprietary distinction in the context of sovereign immunity and the enterprise-arbitral distinction that I am addressing in this Article, it is important to keep in mind that the doctrine of sovereign immunity, which is meant to shield the government from liability, raises different issues from those raised by constitutional provisions, such as the Takings Clause, that are meant to protect individuals from the overreaching by government. *See* Michael Wells & Walter Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073, 1113 (1980) (remarking that the distinction in the two different contexts “shares in fundamental respects little more than a label”). In fact, it is important to distinguish the role that the distinction plays even *within* the category of constitutional provisions aimed at protecting individuals from the state. In the First Amendment context, for example, courts have given the government more leeway when it serves as a procurer (or provider) of goods and services than when it regulates the general public. *See id.* at 1116-19 (discussing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)). It seems to me, however, that the *opposite* should apply in the context of the Takings Clause. It is more likely, in other words, that the government effects a taking when it seeks to obtain resources and services for its operations without paying full market value than when it seeks to regulate the general public.

¹⁵⁹ The Court has also applied intermediate scrutiny in exaction cases, in part because of the unique risks that the government in such instances will overreach. *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994) (requiring a “rough proportionality” between impact of land development and government-imposed condition on that development); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (requiring an “essential nexus” between means and ends in exaction cases).

¹⁶⁰ Professor James Krier has criticized the use of the private law model of nuisance doctrine to determine whether a regulatory taking has occurred. *See generally* James E. Krier, *The Regulation Machine*, 1 SUP. CT. ECON. REV. 1 (1982). Krier notes that in the nuisance context, the assumption is that the defendant was looking out for its best interests,

The enterprise/arbitral distinction is not the only justification for the application of a form of judicial review that is more searching than the deferential standard usually applied in regulatory takings cases under *Penn Central*.¹⁶¹ To understand why this is the case, it is necessary to further explore the differences between nuisance/takings cases and most regulatory takings cases.

The challenged regulation in *Penn Central* is typical of the type of state action that is at issue in regulatory takings cases. The government in *Penn Central* applied the landmark legislation in question to prevent the plaintiff's proposed *intensification* of its land use (i.e., the building of a skyscraper on top of Grand Central Station) in order to protect the community's interests in the station's aesthetic and historical value.¹⁶² *Penn Central* is one of many Supreme Court regulatory takings cases where the constitutional claim arose because the regulation at issue did not allow the plaintiff to intensify the use of the land in the way that the owner desired.¹⁶³

The Court in *Penn Central* made clear that there is a constitutionally significant distinction between (1) an owner's interest in continuing her present use, and (2) her interest in modifying that use in order to extract greater value from the property. The Court indicated that the owner of the train station enjoyed a constitutionally protected expectation in being able to continue to use its property in the same way that it had for decades at a reasonable level of return.¹⁶⁴ If the government had interfered with *that* expectation, then it would have been much more likely to have effected a taking.¹⁶⁵ Rather than interfering with the current use, however, the regulation at issue in *Penn Central* limited the ability of the owner to modify (or, more precisely, to

and thus that it "might have acted without regard to others." *Id.* at 25. The assumption, however, is the opposite when the government regulates land use. *Id.* This means that a certain amount of deference is owed to the government in the regulatory takings context that is not owed to the private actor in the nuisance context. *Id.* at 25-26. A similar argument can be made that more deference is owed to the government when it regulates private land use than when it is "looking out for its best interests" in operating its own facilities.

¹⁶¹ As is well-known, the Court in *Penn Central* provided the government with a great deal of deference, upholding its position that its interest in the aesthetic and historical value of the train station outweighed the plaintiff's property interests. *See Penn Cent. Transp. Co.*, 438 U.S. at 128-38.

¹⁶² *See id.* at 115-18.

¹⁶³ *See, e.g.,* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) (addressing a building moratorium); Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (addressing a wetlands regulation); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) (addressing the denial of a development proposal); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (addressing a development restriction).

¹⁶⁴ *See Penn Cent. Transp. Co.*, 438 U.S. at 149.

¹⁶⁵ *See id.* at 136 ("[T]he New York City law does not interfere in any way with the *present* uses of the Terminal.") (emphasis added).

intensify) the present use.¹⁶⁶ The expectations regarding modification of use in order to maximize profits, the Court concluded, are worthy of less constitutional protection than the expectations associated with the ability to continue the present use.¹⁶⁷

The plaintiffs in most nuisance/takings cases, unlike plaintiffs in most regulatory takings cases, do not seek to modify or intensify their current land uses. Instead, they seek to continue their present uses without the interference occasioned by the government's operations conducted on its properties. This suggests, following the reasoning of *Penn Central*, that the expectations of owners in nuisance/takings cases are worthy of greater constitutional respect than those of owners who seek to challenge the government's ability to prohibit or restrict their proposed *intensification* of land use.¹⁶⁸

¹⁶⁶ See *id.* at 136-37.

¹⁶⁷ See *id.* at 137. This distinction is also consistent with the well-established and constitutionally-based doctrine of non-conforming uses, which limits the power of the government to require a land owner to modify an already existing land use. DAVID L. CALLIES ET AL., *CASES AND MATERIALS ON LAND USE* 126-35 (4th ed. 2004).

I do not mean to suggest that the Court in *Penn Central* was indifferent to property interests that are related to efforts to further maximize profits. The Court, after all, made it clear that the government, in regulating land uses, must not interfere with the "reasonable investment-backed expectations" of owners. *Penn Cent. Transp. Co.*, 438 U.S. at 127. My point instead is that the government is more likely to effect a taking when it interferes with current reasonable land uses than when it makes it more difficult, in order to promote a public good or prevent a public harm, to intensify those uses.

¹⁶⁸ I am not suggesting that an owner who purchases property after the government has created a nuisance would be unable to succeed in a takings claim. The Supreme Court has held that a plaintiff is not prevented from bringing a regulatory takings claim simply because the regulation in question became effective before she became the owner of the property. See *Palazzolo*, 533 U.S. at 630. If a categorical rule regarding the timing of ownership in nuisance/taking cases were to be applied, it would raise similar concerns as those expressed by the Court in *Palazzolo* about limiting the ability of future generations to challenge government actions that impact the use and value of land. See *id.* at 627 ("Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.").

The question of when the plaintiff in a nuisance/takings case purchased her property in relation to when the government-created nuisance at issue began brings to mind the doctrine of "coming to the nuisance." Under that doctrine, "the courts have held that the residential landowner may not have relief if he knowingly came into the neighborhood reserved for industrial or agricultural endeavors and has been damaged thereby." *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700, 706-07 (Ariz. 1972). It may be that the "coming to the nuisance" doctrine should play the same role in takings law that it does in nuisance law, namely, as one factor among several in considering whether the defendant's conduct should give rise to liability. See PROSSER & KEETON, *supra* note 7, § 88, at 635; STOEUBUCK & WHITMAN, *supra* note 43, § 7.2, at 417. For an example of a case where the plaintiff's "coming to the nuisance" did not prevent either the nuisance or the takings claim from going forward, see *Hammond v. City of Warner Robins*, 482 S.E.2d 422, 430 (Ga. Ct. App. 1997).

In addition, the owners in nuisance/takings cases are not proposing to use their properties in ways that the government deems problematic. The government in those cases, in other words, is not seeking to regulate the owners' land use in order to protect the public from harm (however defined), which, of course, is precisely what the government seeks to do in most regulatory takings cases.¹⁶⁹ It seems reasonable to be more deferential to governmental decisions that are aimed at avoiding (what the government believes constitutes) public harm to be caused by the plaintiff's proposed use of the land (as is true of most regulatory takings cases) than in cases where the owner's use of the property poses no threat to the public (as is true of most nuisance/takings cases).

I suggest, then, that the level of judicial scrutiny that is applied in nuisance/takings cases should lie somewhere between the highly deferential ad hoc analysis usually applied by courts under *Penn Central* and the categorical rule applied to physical appropriation/invasion cases. The peculiar and substantial test applied by the Court in *Richards* offers an appealing middle ground between the deferential and categorical ends of the judicial review spectrum in takings law. Unlike in physical appropriation and permanent invasion cases, where the finding of a taking is automatic, the peculiar and substantial test requires a case-by-case analysis to determine whether the nuisance in question rises to the level of a taking. At the same time, however, the peculiar and substantial test is more exacting than the analysis usually conducted by courts under *Penn Central*.¹⁷⁰

More precisely, I believe that in order to satisfy the substantiality requirement, there must be a finding that the degree of interference created by the government's land use was greater than that required to find a private party liable for nuisance.¹⁷¹ There does not, however, have to be a finding that the plaintiff's property lost all or even most of its value as a result of the government's land use.¹⁷² In order to satisfy the peculiarity requirement, there must be a finding that the burden borne by the plaintiff as a result of the

¹⁶⁹ See cases cited *supra* note 163.

¹⁷⁰ I should make it clear that I am not necessarily arguing that *Penn Central* should be deemed inapplicable to nuisance/takings cases. One of the factors in the *Penn Central* takings analysis, after all, is "the character of the governmental action." *Penn Cent. Transp. Co.*, 438 U.S. at 124. This criterion, on its face, allows for consideration of the fact that the government in nuisance/takings cases acts in its enterprise capacity. Furthermore, as already noted, the Court in *Penn Central* was more willing to respect the expectations of owners based on current uses as opposed to future ones. See *supra* notes 164-67 and accompanying text. This factor allows for consideration of the fact that the plaintiffs in most nuisance/takings cases do not seek to change their current uses. Given that the *Penn Central* framework has been so closely associated with a deferential mode of judicial scrutiny, however, it is in my estimation advisable to dispense with it altogether in nuisance/takings cases.

¹⁷¹ See *infra* notes 221-22 and accompanying text.

¹⁷² See *infra* notes 240-48 and accompanying text.

government's land use is significantly greater than that borne by similarly situated owners.¹⁷³ In making these assessments, courts should keep in mind that the government has an incentive to only pay for the property that it actually takes through its eminent domain power in order to carry out its enterprise functions, leaving nearby property owners to bear the costs associated with the effects of those operations.¹⁷⁴

IV. GETTING THE "PECULIAR AND SUBSTANTIAL" STANDARD RIGHT

In order to further elaborate on the type of takings analysis that I believe is appropriate in nuisance/takings cases, I proceed in this section to discuss some of the specific ways in which courts have grappled with the issues raised by those cases. I divide the cases into three categories. The first is comprised of opinions that collapse the nuisance analysis into the takings determination and, as such, end up being too protective of property owners.¹⁷⁵ The second category consists of decisions that equate nuisance/takings cases with regulatory takings cases and, in doing so, end up being too deferential to the government.¹⁷⁶ The third category encompasses opinions that, in my estimation, strike the appropriate balance between, on the one hand, making sure that landowners are not singled out to bear substantial burdens that are more fairly shared with others, and, on the other hand, not unduly interfering with the ability of the government to use its land in ways that allow it to effectively carry out its legitimate functions.¹⁷⁷

Although the discussion in this section is framed by specific cases that grapple with the intersection of nuisance and takings law, it is not necessary to determine whether the government in those cases actually effected takings. Instead, I use the cases as vehicles for exploring the broader analytical and policy considerations that are at issue in nuisance/takings cases.¹⁷⁸

A. *Too Much Protection of Property Owners: Nuisance Equals a Taking*

If *Richards* is the Supreme Court's most important nuisance/takings opinion, the Oregon Supreme Court's ruling in *Thornburg v. Port of Portland*¹⁷⁹ is arguably the most important nuisance/takings decision issued by a state court. The plaintiffs in *Thornburg*, who lived near Portland's airport, brought an inverse condemnation action against the city based on the noise

¹⁷³ See *infra* notes 237-38, 268-70 and accompanying text.

¹⁷⁴ See *supra* notes 137-60 and accompanying text.

¹⁷⁵ See *infra* Part IV.A.

¹⁷⁶ See *infra* Part IV.B.

¹⁷⁷ See *infra* Part IV.C.

¹⁷⁸ Most of the opinions discussed in this section are state court cases in which the plaintiffs raised both federal and state constitutional arguments in presenting their takings claims. My focus here, however, is on federal constitutional issues.

¹⁷⁹ 376 P.2d 100, 110 (Or. 1962).

disturbance created by airplanes.¹⁸⁰ The city argued that there was no taking because there was no physical invasion of the plaintiffs' property, given that the planes in question either did not fly directly over their land or did so at altitudes high enough that they remained in the navigable airspace that is part of the public domain.¹⁸¹

The court rejected the notion that there had to be a physical invasion in order for the plaintiffs to succeed in their inverse condemnation claim.¹⁸² The court explained that if a noise can be a nuisance, and if a nuisance can give rise to an easement, and, finally, if a noise can effect a taking when planes are directly above the affected land, then a taking may occur as a matter of law even when the noise originates "from some direction other than the perpendicular."¹⁸³ The crucial question, the court added, is whether it is fair to require the government "to obtain more land so that the substantial burdens of the activity would fall upon public land, rather than upon that of involuntary contributors who happen to lie in the path of progress."¹⁸⁴

Thornburg is a leading nuisance/takings case because it rejects the view that a physical invasion is a necessary element of an inverse condemnation claim.¹⁸⁵ In fact, *Thornburg* has been quite influential in convincing other courts to focus on the degree of the interference with the owner's property interests rather than on the formalistic criterion of whether there has been a physical invasion.¹⁸⁶ *Thornburg* is considerably less helpful, however, in explaining how to determine when exactly a nuisance ripens into a taking. On that issue, the court stated that the traditional nuisance doctrine of weighing the

¹⁸⁰ *Id.* at 101. "Inverse condemnation is the popular description of an action brought against a governmental entity having the power of eminent domain to recover the value of property which has been appropriated in fact, but with no formal exercise of the power." *Martin v. Port of Seattle*, 391 P.2d 540, 542 n.1 (Wash. 1964) (citing *Thornburg*, 376 P.2d at 100).

¹⁸¹ *Thornburg*, 376 P.2d at 102.

¹⁸² *Id.* at 106.

¹⁸³ *Id.* The court also rejected the argument that there could be, as a matter of law, no takings for flights that remained in the navigable airspace that is part of the public domain. *See id.* at 110.

¹⁸⁴ *Id.* at 107.

¹⁸⁵ Interestingly, the *Thornburg* court did not rely on *Richards* to support its holding because it concluded, somewhat puzzlingly, that *Richards* is an example of a case where "only those portions of the invasion that could be severed from the whole and characterized as trespass could be considered in an action for damages." *Id.* at 106. As already noted, however, the Court in *Richards* did not rely on the invasive character of the railroad's activities. Instead, it focused on the degree of interference with the plaintiff's use and enjoyment of his land. As such, *Richards* is, at its core, a nuisance rather than a trespass case. *See supra* note 83.

¹⁸⁶ *See, e.g.,* *Branning v. United States*, 654 F.2d 88, 99 (Ct. Cl. 1981); *Biddle v. BAA Indianapolis, LLC*, 830 N.E.2d 76, 84 (Ind. Ct. App. 2005); *Alevizos v. Metro. Airports Comm'n*, 216 N.W.2d 651, 659 (Minn. 1974).

gravity of the harm to the plaintiff against the social utility of the defendant's conduct would prove quite helpful to the trier of fact.¹⁸⁷ The court added that a plaintiff would be able to recover if the government unreasonably interfered with the use of his property "in so substantial a way as to deprive him of the practical enjoyment of his land. This loss must then be translated factually by the jury into a reduction in the market value of the land."¹⁸⁸

The problem with the court's reasoning on this point is that it suggests that the existence of a nuisance by itself effects a taking. This is problematic because, as the Supreme Court recognized in *Richards*, the government, in order to be able to carry out its functions effectively, must be permitted to impose, without liability, certain harms on property owners that would be actionable if carried out by private parties pursuing private goals.¹⁸⁹ For example, if a private property owner in a residential area were to create the same level of noise emitted by large jets as they land in airports, she would very likely be liable for nuisance. It would not be possible, however, for governments to operate busy airports if they were held to the same standard of liability under the Takings Clause that private parties pursuing private interests are held to under nuisance doctrine.¹⁹⁰

The Oregon Supreme Court has not been alone in suggesting that a nuisance by itself effects a taking. The Georgia Supreme Court has done the same. In *Duffield v. DeKalb County*,¹⁹¹ the plaintiffs owned property across the river from a sewage treatment plant operated by the defendant county.¹⁹² The plaintiffs sued for nuisance and inverse condemnation because of the noxious odors emitted by the plant.¹⁹³ The court rejected the county's sovereign immunity defense by noting that the state constitution's takings clause

¹⁸⁷ *Thornburg*, 376 P.2d at 107.

¹⁸⁸ *Id.* at 110.

¹⁸⁹ See *supra* notes 49-65 and accompanying text.

¹⁹⁰ When the *Thornburg* case was subsequently tried, the jury ruled against the plaintiff. See *Thornburg v. Port of Portland (Thornburg II)*, 415 P.2d 750, 751 (Or. 1966). In *Thornburg II*, the Oregon Supreme Court reversed the verdict, concluding that the jury instructions had placed too much weight on the social utility of the defendant's land use. *Id.* at 752. The court then stated that the proper test to determine whether there is a taking is "whether the interference with use and enjoyment is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to support a conclusion that the interference has reduced the fair market value of the plaintiff's land by a sum certain in money." *Id.* Although the first part of this test is essentially the *Richards* standard, the second part suggests incorrectly that any reduction in fair market value as a result of the government's action constitutes a taking. See *id.* at 752-53 ("If the jury finds an interference with the plaintiff's use and enjoyment of his land, substantial enough to result in a loss of market value, there is a taking.").

¹⁹¹ 249 S.E.2d 235 (Ga. 1978).

¹⁹² *Id.* at 236.

¹⁹³ *Id.*

“provides for a waiver of sovereign immunity where a county creates a nuisance which amounts to an inverse condemnation.”¹⁹⁴

The *Duffield* court, like the *Thornburg* court, then proceeded to hold that a physical invasion is not a necessary element of an inverse condemnation claim.¹⁹⁵ But, like the *Thornburg* court, the Georgia court set a low threshold requirement for when a non-invasive interference ripens into a taking, stating that “an unlawful interference with the right of the owner to enjoy his possession” is sufficient to establish a taking.¹⁹⁶ The court made it clear that it was essentially collapsing the nuisance analysis into the takings determination when it concluded that “the owners have clearly stated a claim of inverse condemnation in alleging that the odors and noise from the county’s sewage plant have interfered with their right to use, enjoy, and dispose of their property.”¹⁹⁷ To establish the existence of a taking, in other words, it was enough to show that the government created a nuisance.¹⁹⁸

The collapsing of the nuisance claim into the takings claim was also apparent in the important case of *Bormann v. Kossuth County Board of Supervisors*,¹⁹⁹ where the Iowa Supreme Court upheld a facial takings challenge brought against a so-called “right to farm” law that immunized owners engaged in agricultural land uses from nuisance claims.²⁰⁰ The plaintiffs in *Bormann* owned property near 960 acres of farmland that was designated by the county as an agricultural area subject to immunity from nuisance lawsuits.²⁰¹ The plaintiffs claimed that the state statute granting that immunity constituted a taking under the federal and state constitutions.²⁰² The

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 237 (“[N]o physical invasion damaging to the property need be shown; only an unlawful interference with the right of the owner to enjoy his possession.”).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*; see also *Stoddard v. W. Carolina Reg’l Sewer Auth.*, 784 F.2d 1200, 1206 (4th Cir. 1986) (indicating that, under South Carolina law, a nuisance equals a taking); *Hammond v. City of Warner Robins*, 482 S.E.2d 422, 429 (Ga. Ct. App. 1997) (“Where a governmental entity causes damage to property in carrying out a governmental function, such invasion of an individual’s property interest would not only be a private nuisance but would also be an inverse condemnation of the property” (citing *Duffield*, 249 S.E.2d at 236)).

¹⁹⁹ 584 N.W.2d 309 (Iowa 1998).

²⁰⁰ *Id.* at 311. On right to farm laws, see generally Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right-to-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. REV. 87 (2006); Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95; Alexander A. Reinert, Note, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694 (1998); Lisa N. Thomas, Comment, *Forgiving Nuisance & Trespass: Is Oregon’s Right-to-Farm Law Constitutional?*, 16 J. ENVTL. L. & LITIG. 445 (2001).

²⁰¹ *Bormann*, 584 N.W.2d at 311-12.

²⁰² *Id.* at 313.

plaintiffs' challenge was a facial one because they did not allege that the owners of the 960 acres had created a nuisance.²⁰³

Given that *Bormann* involved a facial challenge, the court, in order to hold that the right to farm law constituted a taking, had to conclude that the taking was a per se one. A plaintiff, in a facial takings challenge, must show that the statute cannot be applied without effecting a taking.²⁰⁴ According to the Iowa court, *Richards*, which presented "a factual scenario close[] to the facts of this case,"²⁰⁵ supported the notion that there can be a per se taking in nuisance cases. The lesson to be learned from *Richards*, according to the *Bormann* court, is that "the state cannot regulate property so as to insulate the users from potential private nuisance claims without providing just compensation to persons injured by the nuisance."²⁰⁶

Richards, however, did not involve a *potential* nuisance claim; instead, it involved an actual nuisance lawsuit.²⁰⁷ Furthermore, *Richards* made clear that not all private nuisances rise to the level of a taking.²⁰⁸ For these reasons, the case does not support the application of a categorical rule.²⁰⁹ Instead, it requires an assessment of whether the burden imposed on any given property owner is sufficiently peculiar and substantial so as to effect a taking.²¹⁰ It is not possible to apply that standard without taking into account specific facts regarding both the verticality and horizontality of the burden imposed by the government on particular property owners.²¹¹

²⁰³ *Id.* (presenting "neither allegations nor proof of nuisance").

²⁰⁴ See *Hodel v. Va. Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 295 (1981) (stating that since facial challenges "present[] no concrete controversy[,] . . . the only issue . . . is whether the 'mere enactment' of the [legislation] constitutes a taking").

²⁰⁵ *Bormann*, 584 N.W.2d at 319.

²⁰⁶ *Id.* at 319-20.

²⁰⁷ See *supra* notes 49-65 and accompanying text.

²⁰⁸ See *supra* notes 49-65 and accompanying text (discussing legislature's power to immunize acts that would constitute a private nuisance if engaged in by a private property owner acting without governmental authority).

²⁰⁹ For a discussion of the role of categorical rules in takings law, see Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 617-22 (2004).

²¹⁰ See *supra* notes 49-65 and accompanying text.

²¹¹ The Court in *Bormann* concluded that the state, by enacting and implementing the right to farm law, was "acting in its enterprise capacity" and as a result, the plaintiffs' claim was "one of inverse condemnation." *Bormann*, 584 N.W.2d at 317. Although the Iowa court did not cite Professor Sax's article discussing the distinction between the government's enterprise and arbitral capacities, see *supra* notes 137-44 and accompanying text, it seems clear that it saw the exercise of the government's authority as falling under the former category rather than the latter. The opposite, however, seems correct. When the government enacts and enforces a right to farm law, it does not appropriate resources for itself or its agents. Instead, it is involved in a quintessential arbitral capacity by deciding that, in at least some areas of the state, agricultural land uses are to be preferred over, for

In the end, there are several problems with these cases' collapsing of the nuisance analysis into the takings determination. First, as already noted, it ignores the well-established notion that the government, because of its uniquely important functions and responsibilities, must have a greater ability than private land owners to interfere with the use and enjoyment of property before liability attaches.²¹² We as a society charge government with the duty to carry out certain functions (for example, the operating of landfills, sewage treatment plants, and airports) that are likely to impose some harms on nearby owners. If the government were liable under a takings theory to the same extent that a private owner would be liable under nuisance doctrine, it would present significant challenges to the government's ability to effectively carry out its functions. For this reason, it makes sense to require a greater magnitude of harm to make out a takings claim than a private nuisance claim.²¹³

The first problem that I have identified with the collapsing of the nuisance analysis into the takings determination could presumably be addressed by requiring a greater degree of harm to the property owner before there is a finding of a nuisance (and therefore of a taking) in order to account for the high degree of utility that usually accompanies governmental land uses. However, there is a second problem with such a collapsing that is not so easily

example, residential uses. In other words, the government, under the authority of right to farm laws, mediates disputes among property owners as to their use of resources; it does not allocate the resources to itself. This is quite different from the scenario in *Richards*, where the government granted the power of eminent domain to a railroad company for purposes of building the necessary infrastructure to operate trains. The government in *Richards* was more clearly acting in its enterprise capacity than it was in *Bormann*. See *supra* notes 49-65 and accompanying text; see also *Moon v. N. Idaho Farmers Ass'n*, 96 P.3d 637, 643 (Idaho 2004) (concluding that a takings challenge to a state statute that immunized grass farmers from takings liability set forth a regulatory taking rather than an inverse condemnation claim).

²¹² See *supra* notes 38-41, 49-65 and accompanying text. Related to this point is the objection that, to the extent a government-created nuisance by itself effects a taking, it undermines the rationale for protecting the government from liability under principles of sovereign immunity. See *DeKalb County v. Orwig*, 402 S.E.2d 513, 516 (Ga. 1991) (Weltner, J., dissenting) (criticizing the court for concluding that sovereign immunity shields a county from liability for a nuisance while allowing recovery for "that very same condition [under] the label 'inverse condemnation'").

²¹³ Professor Richard Epstein has disagreed with this view, arguing that if the government's action in question would amount to a tort if engaged in by a private party, then it effects a taking. EPSTEIN, *supra* note 83, at 35-39. The Supreme Court, however, long ago held that what would constitute a tort if engaged in by a private party does not by itself rise to the level of a taking. See *Sanguinetti v. United States*, 264 U.S. 146, 150 (1924); *Keokuk & Hamilton Bridge Co. v. United States*, 260 U.S. 125, 127 (1922). The impact of Epstein's "a tort equals a taking" theory may be limited, in the nuisance context, by his suggestion that an actionable nuisance must include a physical invasion of the plaintiff's property. See Richard Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 60-65 (1979).

resolved, namely, the fact that while takings law requires that the harm be peculiar to the plaintiff, nuisance law does not. The crux of the nuisance analysis entails the weighing of the harm to the plaintiff against the social utility of the defendant's conduct.²¹⁴ Such an analysis does not account for one of the primary goals of the Takings Clause, namely, to distribute the government-imposed burdens on property owners as broadly as possible.²¹⁵ In the nuisance context, the issue of whether the defendant's conduct affects one or many property owners is not factored into the question of whether the defendant is liable. An unreasonable and substantial interference with an owner's use and enjoyment of her property is actionable under a nuisance theory regardless of whether that interference also affects other owners.²¹⁶

The horizontal distribution of the burden is important in nuisance doctrine in distinguishing between a public and a private nuisance. If the conduct in question interferes with the interests of individuals as members of the larger community – as opposed to the interests of individuals as owners of particular parcels of land – then a public nuisance, rather than a private nuisance, has been created.²¹⁷ For purposes of determining whether a defendant should be liable for creating a private nuisance, however, it does not matter whether the defendant's conduct affects similarly situated owners in a similar way.²¹⁸ The wide distribution of the harm, in other words, would not undermine a nuisance claim, but it would a takings claim.²¹⁹ To put it another way, while the verticality and horizontality of the burden matters in determining whether there has been a taking, only the verticality of the burden is relevant in determining whether there has been a nuisance.²²⁰

²¹⁴ See RESTATEMENT (SECOND) OF TORTS § 826 (1979).

²¹⁵ See *supra* Part II.B.

²¹⁶ The Restatement of Torts does not mention the number of affected parties as relevant in determining either the reasonableness of the defendant's conduct or the substantiality of the interference with the plaintiff's use and enjoyment of the land. See RESTATEMENT (SECOND) OF TORTS §§ 821-827 (1979).

²¹⁷ See *supra* note 43 and accompanying text (distinguishing public and private nuisances).

²¹⁸ In a nuisance action, the degree of distribution of the harm may be relevant to questions of remedies. A wide distribution, for example, may expose the defendant to greater liability and may be a factor in determining whether monetary or injunctive relief is appropriate. Cf. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1119 (1972) (stating that when pollution injures a large number of parties, it increases transaction costs and exacerbates freeloader problems, making it less likely that the injured parties will be able to "buy out" the party responsible for the pollution). The degree of burden distribution, however, does not affect the *initial* question of whether the defendant's conduct rises to the level of a nuisance.

²¹⁹ See *supra* Part II.B.

²²⁰ There are also important remedial differences between a takings claim and a nuisance action. The plaintiff in a takings case is only entitled to compensation for the loss in the

The third problem with treating a nuisance as a per se taking is that a claim that is based on a violation of statutes or of common law principles (such as a nuisance claim) is fundamentally different from one that is based on a constitutional violation (such as a takings claim). It makes sense, when determining the degree of interference occasioned by the government's conduct required to impose liability, to demand greater interference when the claim is a constitutional one. The constitutional protections afforded to property owners through the Takings Clause should be viewed as minimum forms of protection. Nuisance law affords *additional* protections to property owners. As a result, it is reasonable to require a greater degree of intrusiveness on the part of the government before there is a finding that it violated the Constitution, as opposed to a finding that it violated statutory or common law-based nuisance principles.²²¹

For all of these reasons, courts should not collapse the nuisance analysis into the takings determination. Instead, they should apply a form of "nuisance plus" standard that requires that the degree of intrusiveness with the use and enjoyment of the plaintiff's property occasioned by the state action be greater to establish a taking than it is to show the existence of a nuisance.²²²

property's fair market value. *See, e.g.,* Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949); United States v. Miller, 317 U.S. 369, 374 (1943). A plaintiff in a nuisance case, on the other hand, may be entitled to an injunction. *See* PROSSER & KEETON, *supra* note 7, § 89, at 640-41. If an injunction is not requested, or if one is not deemed appropriate, a plaintiff in a nuisance action may nonetheless be entitled to not only damages that reflect the loss in fair market value, but also to damages that address additional harms such as the effects on the plaintiff's health caused by the defendant's conduct. *See id.* at 621; STOEBUCK & WHITMAN, *supra* note 43, § 7.2, at 416; *see also* Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168, 175 (Iowa 2004) (stating that the Takings Clause only requires compensation for diminution in value and does not require compensation "for any other damages traditionally allowed under a nuisance theory of recovery").

²²¹ *See* Palm v. United States, 835 F. Supp. 512, 516 (N.D. Cal. 1993) ("[A] taking often involves factual circumstances that would tend to indicate more extreme governmental intrusiveness, permanent infringement, or, even if temporary, an exercise of dominion and control over a private party's property interests; whereas nuisance and trespass generally seem less so."), *aff'd sub nom.* Bartleson v. United States, 96 F.3d 1270 (9th Cir. 1996); *see also* Moden v. United States, 60 Fed. Cl. 275, 282 (2004) (explaining that if the damage to the plaintiff's property "is merely an incidental or consequential injury stemming from the government's action, then the action constitutes a tort [rather than a taking]"); Mitchell v. Mills County, 673 F. Supp. 332, 336 n.5 (S.D. Iowa 1987) (noting that "a taking is generally more difficult to establish than a trespass or a nuisance"). I disagree, therefore, with the suggestion made by Professors Bell and Parchomovsky that the government may effect a taking even when the degree of interference is "too minor to support a nuisance claim." Bell & Parchomovsky, *supra* note 1, at 296.

²²² A complete takings analysis must also account for what is referred to as the "average reciprocity of advantage," that is, the benefits conferred on the plaintiff property owner by the state action subject to challenge. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). The plaintiffs in nuisance/takings cases, like other members of the community, do receive

B. *Not Enough Protection of Property Owners*

I have thus far discussed cases in which courts have been too protective of property owners by collapsing the nuisance analysis into the takings determination. Other courts have done the opposite by being insufficiently protective of property owners. The Oregon Court of Appeals' opinion in *Mark v. State Department of Fish and Wildlife*²²³ is an example of this. The plaintiffs in *Mark* owned property that was surrounded by a state wildlife area.²²⁴ For reasons that are not explained in the opinion, the section of the wildlife preserve near where the plaintiffs lived was a popular location for public nudists.²²⁵ The nudists numbered in the thousands every year and many of them were clearly visible from the plaintiffs' property.²²⁶ Some of the nudists even engaged in "a variety of sexual activity" that was observable from the plaintiffs' parcel.²²⁷ After failing to persuade the state to police the nudists, the plaintiffs sued, alleging that the state's failure to control the nudists created a public and a private nuisance that effected a taking.²²⁸

The court concluded that the plaintiffs alleged sufficient facts to make out both a public and a private nuisance claim.²²⁹ As to the former, it ruled that the plaintiffs alleged facts to establish that their injury was different in kind from that suffered by the public at large because of the proximity of their property to "the intrusive nudity and the sexual activity."²³⁰ The same facts, if proven, were also sufficient for the plaintiffs to make out a private nuisance claim, given the alleged interference with the use and enjoyment of their land caused by the nudists.²³¹ The plaintiffs' claim for damages based on the nuisances, however, was barred by the state's sovereign immunity.²³²

benefits from governmental land uses. Whether those benefits are enough to make constitutional what would otherwise be a taking will depend on a case-by-case analysis. On the principle of average reciprocity of advantage, see generally Ball & Reynolds, *supra* note 14, at 1554-59; Coletta, *supra* note 7; Lynda J. Oswald, *The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1449 (1997); Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. ENVT'L. L. & POL'Y 1 (2004).

²²³ 974 P.2d 716 (Or. Ct. App. 1999).

²²⁴ *Id.* at 717.

²²⁵ *Id.* at 717-18.

²²⁶ *Id.* at 718.

²²⁷ *Id.* at 720.

²²⁸ *Id.* at 717-18.

²²⁹ *Id.* at 722.

²³⁰ *Id.* at 720.

²³¹ *Id.*

²³² *Id.* at 724. Although the Court disallowed the plaintiffs' request for damages, it did give them the opportunity to pursue an injunction. *Id.* at 722.

The court of appeals then addressed the takings claim, beginning with the important case of *Thornburg v. Port of Portland*,²³³ discussed above. The court of appeals, however, gave *Thornburg* an entirely unsupportable reading, concluding that it had held that property owners cannot make out a nuisance-based takings claim unless they establish that their property retained no value and was unusable as a result of the government-created interference.²³⁴ As we have seen, however, *Thornburg* stands for the proposition that if the interference with the use and enjoyment of the plaintiff's property is enough to make out a nuisance claim, then it is also enough to support the finding of a taking.²³⁵ A plaintiff proceeding under a nuisance theory is not required to show that the defendant's activity has completely interfered with her use and enjoyment of the property. Nonetheless, the *Mark* court, ostensibly relying on *Thornburg*, denied the plaintiffs' takings claim because the property retained economic value as demonstrated by the fact that the plaintiffs were still using it.²³⁶

The *Mark* case presented the court with a missed opportunity to apply the "peculiar and substantial" standard set forth in *Richards*.²³⁷ It would seem that the plaintiffs in *Mark* would have been able to satisfy the "peculiar" component. Their property was surrounded by the wildlife area deemed attractive by the public nudists. It appears, therefore, that the government, by allowing the nudists to exhibit themselves, and to engage in sexual activity that was out in the open, imposed a peculiar or special burden on the plaintiffs.²³⁸ In fact, it does not appear from the facts as set forth in the opinion that any other properties were negatively impacted by the nudists' activities.

²³³ 376 P.2d 100 (Or. 1962); see also *supra* notes 187-90 and accompanying text.

²³⁴ *Mark*, 974 P.2d at 725.

²³⁵ See *supra* notes 187-90 and accompanying text.

²³⁶ *Mark*, 974 P.2d at 725.

²³⁷ The plaintiffs in *Mark* based their takings claim on both the federal and state constitutions. The court, however, refused to consider the federal claim because the plaintiffs did not assert that the result would be different under the Federal Constitution. *Id.* at 725 n.9. There is no requirement under *Richards* that a plaintiff show that the property was deprived of all beneficial or economic use in order to succeed with a nuisance/takings claim. See *Richards v. Wash. Terminal Co.*, 233 U.S. 546, 551 (1914) (stating that the compensable harm rendered the plaintiff's "house less habitable than otherwise it would be" without requiring that the house be rendered uninhabitable). To the extent, therefore, that courts hold that such a showing must be made under state constitutions, e.g., *Covington v. Jefferson County*, 53 P.3d 828, 832 (Idaho 2002); *Cae-Link Corp. v. Wash. Suburban Sanitary Comm'n*, 602 A.2d 239, 246 (Md. Ct. Spec. App. 1992); *Mark*, 974 P.2d at 725, it behooves plaintiffs in nuisance/takings cases to raise and fully explore the federal constitutional issues when litigating in state courts.

²³⁸ Although, as already noted, I do not in this Article address issues of causation, the state could have argued that its failure to abate the nuisance was not sufficient to subject its actions (or inactions) to a takings analysis. See sources cited *supra* note 59.

As to the “substantial” component of the *Richards* test, an assessment could have been made by the trier of fact as to whether the degree of interference was sufficiently substantial. That analysis would have been fact-specific and dependent on the frequency and proximity of the nudist and sexual activity that was observable from the plaintiffs’ property. It is impossible *ex ante* to determine precisely at what point the interference with the use and enjoyment of the property becomes sufficiently substantial so as to effect a taking. Nevertheless, it makes sense not to equate the mere existence of a nuisance with the presence of a taking.²³⁹ Such an approach, as already noted, simply collapses the nuisance analysis into the takings determination with problematic consequences.²⁴⁰ At the same time, however, owners such as the plaintiffs in *Mark* should not be required to demonstrate that their property lacked all economically viable use, as the Oregon Court of Appeals demanded. There is a difference, after all, between a *substantial* and a *complete* interference with the use and enjoyment of property. The magnitude of the harm required in a nuisance/takings case, then, should lie between that required to make out a nuisance claim and that which would deprive the owner of all economically viable use of the property.

The Idaho Supreme Court also recently took an exceedingly limited view of when a state-created nuisance effects a taking in *Covington v. Jefferson County*.²⁴¹ The defendant county in *Covington* operated a landfill on a portion of a gravel pit across the street from the plaintiffs’ home.²⁴² The plaintiffs, who purchased their property several years before the county began operating the landfill, alleged in their inverse condemnation claim that “flies, dust and disturbing odors . . . migrated” from the landfill onto their property and that, as a result, its value decreased by one-fourth.²⁴³ The Idaho Supreme Court affirmed the trial court’s granting of the defendant’s motion to dismiss.²⁴⁴ In addressing the federal takings claim, the court noted that the case did not involve an actual physical invasion of the plaintiffs’ property, and that therefore, the proper analysis was that applicable in regulatory takings cases.²⁴⁵ The court concluded that there was no regulatory taking because there was no complete deprivation of economically beneficial use under the categorical rule announced in *Lucas v. South Carolina Coastal Council*.²⁴⁶ In addition, the *Covington* court noted that a diminution in the value of the property is

²³⁹ See *supra* notes 49-65, 189-90 and accompanying text.

²⁴⁰ See *supra* Part IV.A.

²⁴¹ 53 P.3d 828 (Idaho 2002).

²⁴² *Id.* at 830.

²⁴³ *Id.* at 830, 832.

²⁴⁴ *Id.* at 833.

²⁴⁵ *Id.* at 832.

²⁴⁶ *Id.* at 832-33. For a discussion of *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), see *supra* notes 95-99 and accompanying text.

insufficient, by itself, to constitute a taking under the ad hoc analysis called for by *Penn Central*.²⁴⁷

The court's analysis in *Covington* was circumscribed by an understanding of takings law that is limited to only two categories of cases, namely, physical invasion and regulatory takings cases. Once the *Covington* court noted that there was no alleged physical invasion, it quickly concluded that there was no alternative but to apply the deferential review called for by *Penn Central*.²⁴⁸ The *Covington* case, however, presents us with a good illustration of why, as I explained in Part III, the intermediate scrutiny represented by the "peculiar and substantial" test is more appropriate in nuisance/takings cases than is the regulatory takings standard applied under *Penn Central*.²⁴⁹

First, it is clear that the government in *Covington*, through the operation of the landfill, was acting in its enterprise capacity. The government, in other words, was competing with other owners, including the plaintiffs, for air-related resources. As I argued in Part III, a more exacting form of judicial scrutiny is appropriate when the government self-allocates resources than when it arbitrates among private uses of resources, because there is a greater risk that it will overreach in the former situation by trying to acquire resources as cheaply as possible.²⁵⁰ When the government, as in *Covington*, decides where to place a landfill, and how to operate it, it does not act as an impartial arbitrator mediating among different possible uses of resources by private parties. Instead, it acts in its enterprise capacity as a self-interested user of resources with an incentive to situate and operate the landfill as inexpensively as possible, even if it means singling out some property owners and imposing on them a substantial burden.

Second, unlike in *Penn Central*, the plaintiffs in *Covington* were not seeking to modify or intensify their current land uses. Instead, they sought to continue their present uses without the interference occasioned by the alleged government-created nuisance.²⁵¹ This means that their expectations were worthy of greater constitutional respect than if they had sought, as did the plaintiff in *Penn Central*, to intensify their current land use to increase profits.²⁵²

²⁴⁷ *Covington*, 53 P.3d at 833. For a discussion of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), see *supra* notes 100-04 and accompanying text.

²⁴⁸ *Covington*, 53 P.3d at 832 ("In this case, there has been no actual physical invasion of [the] land, thus a regulatory taking is at issue."); see also *Pub. Serv. Co. v. Van Wyk*, 27 P.3d 377, 387 (Colo. 2001) (reasoning, under the Federal Constitution, that if there is no physical taking, the only other alternative form of analysis is provided by the doctrine of regulatory takings); *Harris v. Town of Lincoln*, 668 A.2d 321, 327 (R.I. 1995) (concluding that a non-regulatory takings claim requires a physical invasion of the plaintiff's property).

²⁴⁹ See *supra* notes 137-74 and accompanying text.

²⁵⁰ See *supra* notes 137-60 and accompanying text.

²⁵¹ See *Covington*, 53 P.3d at 830.

²⁵² See *supra* notes 161-68 and accompanying text.

Third, also unlike in *Penn Central*, the government in *Covington* did not allege that the plaintiffs were using (or proposing to use) their property in a way that would harm the public. The deference that may be appropriate in cases where the government concludes that an owner's current or proposed land use constitutes a public harm is absent in nuisance/takings cases such as *Covington*, where the plaintiffs' land use does not negatively affect the interests of others.²⁵³

When all of these factors are combined, it is apparent that the *Covington* court should have been more searching in its review of the governmental action, rather than concluding, under the deferential standard of *Penn Central*, that a diminution in value was insufficient to make out a takings claim. The case gave rise to multiple issues that, in totality, went beyond the question of whether there was a "mere" diminution in value of the plaintiffs' property. The case represents an instance where (1) the government, acting in its *enterprise* capacity, sought to interfere with (2) the plaintiffs' *continued* use of their property, a use that (3) the government did *not* allege constituted a *public harm*. As a result, the court should have proceeded to ask the crucial question of whether the plaintiffs were improperly singled out among similarly situated owners for the imposition of a substantial burden.

C. *Cases That Get It Right*

I have so far discussed cases in which I believe that courts have erred in either being too protective or insufficiently protective of property owners in nuisance/takings cases. I now shift to discuss a few cases where the courts have, in my estimation, applied the correct analysis. The Supreme Court of California dealt with a nuisance/takings case in *Varjabedian v. City of Madera*.²⁵⁴ The plaintiffs in *Varjabedian* already owned and operated an eighty acre vineyard when the defendant city began operating a sewage treatment plant 600 feet from their residence.²⁵⁵ The plant emitted strong "septic smells" that were blown onto the plaintiffs' property.²⁵⁶ The plaintiffs sued the city on nuisance and inverse condemnation grounds.²⁵⁷ The trial court dismissed the latter claim, but allowed the former to proceed to trial.²⁵⁸

²⁵³ See *supra* note 169 and accompanying text.

²⁵⁴ 572 P.2d 43 (Cal. 1977).

²⁵⁵ *Id.* at 46.

²⁵⁶ *Id.*

²⁵⁷ The plaintiffs also originally included two other claims, one for negligence and the other for the maintenance of a dangerous and defective condition. *Id.* The plaintiffs voluntarily dismissed these two causes of action when the case went to trial. *Id.*

²⁵⁸ *Id.*

The jury found in the plaintiff's favor, awarding \$32,000 for the loss in value of their real property.²⁵⁹

The city appealed the nuisance judgment against it, primarily relying on what it claimed were faulty jury instructions.²⁶⁰ The California Supreme Court upheld the nuisance judgment.²⁶¹ The plaintiffs cross-appealed the dismissal of their inverse condemnation claim.²⁶² The trial court had granted the city's motion to dismiss the takings claim because of the absence of a physical invasion.²⁶³ The state supreme court, however, relying on both California precedents and on *Richards*, rejected the notion that a physical invasion was a necessary element of an inverse condemnation claim.²⁶⁴

The court then proceeded to discuss two competing policy considerations. The first is the principle in takings law that burdens should be distributed as broadly as possible in order to pay for public improvements.²⁶⁵ The second is the practical consideration that "'compensation [not be] allowed too liberally [so as] to seriously impede, if not stop, beneficial public improvements because of the greatly increased cost.'"²⁶⁶

The court saw the *Richards* "peculiar and substantial" standard as properly balancing the two competing policy considerations. If a plaintiff can meet the *Richards* standard, then she will be able to show that she was unfairly singled out for the imposition of a significant burden that should have been shared more broadly.²⁶⁷ The fact, however, that a plaintiff must show that she was singled out before she can succeed in a nuisance/takings case, makes "the likelihood that compensation will impede necessary public construction . . .

²⁵⁹ The jury also awarded \$30,000 in special damages for the plaintiffs' loss of the loan used to "finance[] the purchase of the bulk of the vineyard." *Id.* at 46-47. In addition, \$11,000 in other damages were distributed among the plaintiffs. *Id.* at 47.

²⁶⁰ *See id.*

²⁶¹ *See id.* at 47-48 (asserting that "any error in the instruction in this case was not prejudicial to defendant").

²⁶² *Id.* at 46.

²⁶³ *Id.* at 50.

²⁶⁴ *Id.* at 50-52 ("In assessing whether plaintiffs' allegations may serve as a basis for inverse [condemnation] liability, we note that physical damage to property is not invariably a prerequisite to compensation.").

²⁶⁵ *Id.* at 50-51 (observing that one of the policies "'underlying the eminent domain provision . . . is to distribute throughout the community the loss inflicted upon the individual by the making of the public improvements'" (quoting *Albers v. County of Los Angeles*, 398 P.2d 129, 136 (Cal. 1965))).

²⁶⁶ *Id.* at 51 (quoting *Albers*, 398 P.2d at 136 (Cal. 1965)).

²⁶⁷ *Id.* at 52 ("If a plaintiff can establish that his property has suffered a 'direct and peculiar and substantial' burden as a result of recurring odors produced by a sewage facility – that he has, as in *Richards*, been in effect 'singled out' to suffer the detrimental environmental effects of the enterprise – then the policy favoring distribution of the resulting loss of market value is strong . . .").

. relatively slight.”²⁶⁸ The court concluded that the plaintiffs should have been given the opportunity to demonstrate that the harm that they experienced satisfied the *Richards* standard.²⁶⁹ In fact, the court noted that there was evidence introduced at “trial on the nuisance theory which tended to show that the stench of which the [plaintiffs] complain did not affect other surrounding properties.”²⁷⁰

In my estimation, the *Varjabedian* court got the analysis right. It did not, like the decisions discussed in Part IV.A., contend that the existence of a nuisance was enough for there to be a taking. The court correctly focused on the degree of burden distribution that accompanied the government’s use of its own land. At the same time, the court was unwilling to rule that the takings claim was barred by the fact that the plaintiffs’ property retained economic value (as the opinions discussed in Part IV.B held). Instead, the California court set a middle course, appropriately balancing the need to prevent the singling out of individual property owners against the danger that the government will not be allowed to pursue important functions, such as the operation of sewage treatment facilities, due to takings liability.

The Supreme Court of Michigan also struck the correct balance in the case of *Spiek v. Michigan Department of Transportation*.²⁷¹ Fifteen years after the plaintiffs purchased their home, the state opened a highway service drive that abutted the property and ran parallel to an interstate highway.²⁷² The plaintiffs sued the state for inverse condemnation, arguing that the traffic on the service

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 52 n.14. Following the reasoning of *Varjabedian*, a California court of appeal reversed the granting of the government’s motion for summary judgment in *Harding v. Department of Transportation*, 205 Cal. Rptr. 561, 566 (Cal. Ct. App. 1984), a case brought by owners whose property was adjacent to a state highway. The *Harding* court noted that when the state purchased the nearby right-of-way in order to build the highway, it imposed a peculiar harm on the plaintiffs because it led to the

raising [of] a 23-foot dirt embankment directly in front of [their] property. Plaintiffs’ complaint stated that the prevailing winds collect all of the flotsam of the freeway and deposit it on plaintiffs’ property, this being the first open area along the easterly side of the embankment, and that plaintiffs are subjected to dirt, dust, debris and noise, and have lost their access to air and light and view, all making their property virtually untenable.

Id. at 564. The court added that,

[t]he substantiality of the interference may be determined by use of modern measurement techniques as in airport noise cases or by testimony regarding the actual physical invasion of their property by dust and debris as in *Varjabedian*. Thus, compensation must be rationally related to the degree of harm suffered and will not be dependent upon an arbitrary standard that is tied to a physical appropriation or chance location of plaintiffs’ property.

Id. at 566.

²⁷¹ 572 N.W.2d 201 (Mich. 1998).

²⁷² *Id.* at 202.

drive interfered with the quiet use and enjoyment of their property.²⁷³ The state responded by contending that there was no taking because the harm suffered by the plaintiffs was consequential and shared by all property owners whose properties abut public highways.²⁷⁴

The state supreme court held that the plaintiffs' complaint failed to state a claim on which relief could be granted because their injuries were not peculiar within the meaning of *Richards*.²⁷⁵ In doing so, the court concluded that the intermediate appellate court had erred in holding that the appropriate comparison group under *Richards* was the "citizenry at large."²⁷⁶ The intermediate court, in other words, held that the plaintiffs could make out a takings claim if they could show that the state singled them out by imposing a burden not widely shared by the community at large. The state supreme court disagreed, noting that the crucial question under *Richards* is whether a plaintiff is injured in a unique or peculiar way when compared to "those property owners whose lands lie within the range of inconveniences necessarily incident to the operation" of the governmental function at issue.²⁷⁷ The appropriate reference point, then, is not the community at large, but is instead other similarly situated owners. Given that the plaintiffs had not shown that the harm to them was different from the harm experienced by many other owners whose properties abut public highways, their takings claim had to fail.²⁷⁸

²⁷³ *Id.* at 202-03.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 206.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 209. The court also noted that the plaintiffs had to show that the harm they experienced was different in kind from that suffered by other nearby property owners; a difference in the degree of the harm was not sufficient. *Id.* at 206. The court added that "a degree of harm threshold, as opposed to the well-established difference in kind threshold," is unworkable in the context of highway cases given that traffic patterns "may change over time because of factors unrelated to and out of the control of the state." *Id.* at 209. To hold that a difference in degree is sufficient to state a takings claim, the court added, would expose the state to endless litigation brought by owners with properties adjacent to public highways who felt aggrieved by increases in traffic. *Id.* at 209-10. This would significantly undermine the ability of the state to carry out the important function of providing for and maintaining public highways. *See id.* at 210. When the government broadly distributes burdens through the carrying out of its legitimate functions, the proper remedy lies with legislative and regulatory bodies as opposed to with the courts. *See id.*

It is not clear that a strict "difference in kind" requirement makes sense in every nuisance/takings case, especially given the heightened scrutiny that I have argued is appropriate in those cases. *See supra* Part III. If a strict requirement were applied, then plaintiffs in non-invasive airplane cases and in sewage plant cases, for example, would not be able to make out claims, regardless of the degree of the harm, because the harm would not be different in kind from that suffered by more distant neighbors who are impacted by more attenuated sounds and smells. A loud noise or a strong smell may impose a

The Court in *Spiek* struck an appropriate balance between protecting the property rights of owners and imposing a form of potential takings liability on the government that might impair its ability to carry out important functions. The Court of Appeals for the Federal Circuit did the same in *Argent v. United States*.²⁷⁹ The plaintiffs in *Argent* owned properties that surrounded an airfield used by Navy pilots to practice airplane landings.²⁸⁰ The training exercises simulated landings on an aircraft carrier at sea, with airplanes repeatedly landing and then taking off again without coming to a stop.²⁸¹ The owners sued the government, alleging that the noise and vibrations created by the hundreds of landings a week so interfered with the use and enjoyment of their properties that they effected a taking.²⁸² The Court of Federal Claims had granted summary judgment to the government because the Argents failed to allege that a substantial number of the flights directly invaded their properties at an altitude below the navigable airspace that is part of the public domain.²⁸³

The court of appeals, relying on *Richards*, rejected the notion that the plaintiffs' cause of action was limited to those flights that physically invaded their property.²⁸⁴ The crucial question for the court was whether the plaintiffs were complaining "only of noise resulting from normal aircraft operations, not passing directly overhead," or whether the harm was based on "a peculiarly burdensome pattern of activity, including both intrusive and non-intrusive

sufficiently peculiar harm on some owners who are close to the source, even if other owners, farther away, also experience some attenuated noises or smells. As one commentator, writing on the issue of highway noise and pollution, has noted:

"[N]ot all property owners share the burden . . . equally. Studies have shown that highway abutters suffer the annoyances of highways to a greater degree than that suffered by nonabutters. The intensity of highway noise varies from location to location, depending on a variety of factors, including the distance between the properties and the highway, the topography of the surrounding area, and the insulating effect of neighboring buildings."

Richard Kahn, Comment, *Inverse Condemnation and the Highway Cases: Compensation for Abutting Landowners*, 22 B.C. ENVTL. AFF. L. REV. 563, 587 (1995) (footnotes omitted).

²⁷⁹ 124 F.3d 1277 (Fed. Cir. 1997).

²⁸⁰ *Id.* at 1278.

²⁸¹ *Id.*

²⁸² *Id.* at 1279.

²⁸³ *Id.* at 1279-80. There were in fact three groups of plaintiffs seeking a finding of inverse condemnation. The trial court dismissed the first group for failing to establish that the aircraft frequently flew below 500 feet. The second group of plaintiffs' claims were time-barred under the applicable statute of limitations. The third group of plaintiffs' claims were dismissed because they had not owned the property at the time of the alleged taking. *Id.*

²⁸⁴ *Id.* at 1283-84 ("While physical invasion of private property remains an especially notorious category of takings, the law is flexible enough to recognize non-invasive Governmental action that nonetheless threatens to destroy the owner's enjoyment of his estate." (citation omitted)).

flights, that significantly impairs their use and enjoyment of their land.”²⁸⁵ The plaintiffs’ allegations of constant noise and disruption caused by the hundreds of training flights a week, if true, constituted “a peculiar burden imposed on [the plaintiffs] by the United States’ selection of a remote site for aircraft training operations.”²⁸⁶ The court then quoted from one of its earlier aircraft cases that emphasized the crucial role that burden distribution plays in the takings analysis. The government, the court noted,

“could have performed [the training] exercise elsewhere but selected airspace over plaintiff’s land for it because alternative locations were deemed even more objectionable. Thus, plaintiff was consciously singled out or selected to bear a burden which defendant also consciously elected not to impose on others, even others otherwise similarly situated.”²⁸⁷

The courts in *Varjabedian*, *Spiek*, and *Argent* properly focused on both the severity of the harm and the degree of distribution of that harm among property owners, in determining whether the government’s use of its land so interfered with the use and enjoyment of the plaintiffs’ properties so as to amount to a taking. By applying the “peculiar and substantial” standard, the three courts were able to balance the need to provide some meaningful protection to property owners negatively affected by the externalities created by governmental land uses, while at the same time avoiding the danger of unduly interfering with the ability of the government to carry out those functions effectively.

V. TAKINGS AND ENVIRONMENTAL JUSTICE

It is fairly well-established that low-income and minority communities bear a disproportionate share of the negative environmental effects created by industrial and other forms of intensive land uses.²⁸⁸ The environmental justice

²⁸⁵ *Id.* at 1284.

²⁸⁶ *Id.*

²⁸⁷ *Id.* (quoting *Branning v. United States*, 654 F.2d 88, 90 (Ct. Cl. 1981)); *see also* *Knight v. City of Billings*, 642 P.2d 141, 145 (Mont. 1982) (concluding that when the city widened a road by condemning properties on the east side of that road but not on the west side, it singled out the former for the imposition of a peculiar burden so as to amount to a taking).

²⁸⁸ *See, e.g.*, COLE & FOSTER, *supra* note 31, at 167-84 app. (listing studies that show disproportionate burden of pollution on poor and minority neighborhoods caused by toxic waste dumps, air pollution, lead, and pesticides); LESTER ET AL., ENVIRONMENTAL INJUSTICE IN THE UNITED STATES: MYTHS AND REALITIES 156 (2001) (reporting on a national study that found greater “incidences of environmental injustice for black and Hispanic Americans . . . at the state, county, and city levels”); Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 *ECOLOGY L.Q.* 1, 31-33 (1997) (finding that the percentage of African Americans or Latinos in a census tract is a significant predictor of whether there is a hazardous waste facility located in the tract); Alice Kaswan, *Distributive Justice and the Environment*, 81 *N.C. L.*

movement, a relatively recent movement that seeks to mesh the aspirations of the environmental movement with those of the civil rights movement,²⁸⁹ has worked assiduously over the last few decades to bring greater public attention to this issue.²⁹⁰ The movement has pursued several different strategies, from grassroots organizing to lobbying decision-makers at the local, state, and federal levels to litigating in the courts.²⁹¹ Although there have been some successes along the way,²⁹² the movement has faced considerable political and

REV. 1031, 1076 (2003) (“Notwithstanding [ongoing] disputes about methodology, the vast majority of the studies demonstrate some degree of inequity in the distribution of [Locally Unwanted Land Uses] on the basis of race and/or income, with race being the more frequently relevant factor.”).

The city of Camden, New Jersey, and in particular its Waterfront South neighborhood, is frequently used as the paradigmatic example of the consequences of environmental injustice. The vast majority of Waterfront South residents are people of color. Over 50% of them

live at or below the federal poverty level. While the City of Camden has a large African American (56.3%) and Hispanic (22%) population, the majority of residents of Camden County, as well as New Jersey as a whole, are White and more economically privileged. . . .

Predictably, most [Waterfront South] residents suffer from poor health. Asthma and other respiratory ailments are especially prevalent in the neighborhood. Cancer rates, particularly among African American residents, are many times higher in Waterfront South compared to the rest of Camden County and New Jersey, both being wealthier and whiter. The cancer rate for African-Americans in Camden (County) is 70% higher for men and 90% higher for women than that of the rest of the State. The rate of death from asthma for African Americans in Camden County is over three to six times higher than that for Whites. In addition, the self-reported asthma rate for Waterfront South residents is more than twice that of other parts of the county. As many as 61% of Waterfront South residents have persistent respiratory problems such as coughing and shortness of breath; 48% report experiencing chronic tightness in their chests.

Sheila Foster, *The Challenge of Environmental Justice*, 1 RUTGERS J.L. & URB. POL’Y 6, 9 (2004); see also Rachel D. Godsil, *Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism*, 53 EMORY L.J. 1807, 1823-32 (2004) (discussing the history of poverty, racism, and pollution in Camden).

²⁸⁹ See Foster, *supra* note 288, at 10-11 (discussing the influence of the civil rights movement and its leaders on the environmental justice movement).

²⁹⁰ See, e.g., Robert D. Bullard, *Introduction* to *THE QUEST FOR ENVIRONMENTAL JUSTICE* 1, 1-12 (Robert D. Bullard ed., 2005) (outlining some of the major issues and events in the movement); see also COLE & FOSTER, *supra* note 31, at 19-33 (discussing the history and foundation of the environmental justice movement, stating “[p]erhaps the most significant source feeding into today’s Environmental Justice Movement is the Civil Rights Movement of the 1950s, 1960s, and 1970s”).

²⁹¹ For a fascinating case study of the different strategies pursued by the environmental justice movement in Chester, Pennsylvania, see Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 811-26 (1998).

²⁹² One of the most important achievements of the movement was Executive Order 12898, signed by President Bill Clinton in 1994, calling on federal agencies to identify and

legal obstacles that have limited its ability to affect the siting of what have become known as Locally Unwanted Land Uses (“LULUs”) in already overburdened poor and minority communities.²⁹³ The obstacles are due, in part, to the multifaceted and complex reasons that account for why poor and minority communities bear a disproportionate burden of unwanted land uses. Those reasons include market-based forces that make inexpensive land in areas that are already heavily industrial particularly appealing for the siting of new LULUs, as well as the entrenched political and economic disempowerment of many of the affected communities.²⁹⁴

Although I cannot explore the many causes of and possible solutions to the issues raised by the environmental justice movement in this Article, I want to suggest that takings law can be helpful to the movement in achieving some of its litigation goals. My thoughts on this issue are preliminary, and will require further consideration and elaboration, either by myself or others. In fact, it seems to me that civil rights proponents may want to pay more attention to the Takings Clause at a time when courts generally seem more open to takings claims than to civil rights claims.²⁹⁵

At first glance, it may seem that Title VI of the Civil Rights Act of 1964 or the Equal Protection Clause of the U.S. Constitution would provide some relief to plaintiffs complaining about class and race-based discrimination in the government’s siting of LULUs. The problem, however, is that both of these equality-based claims require plaintiffs to establish discriminatory intent on the part of government officials, something which is difficult to do.²⁹⁶ In fact, one

address the negative environmental impact of their policies on poor and minority communities. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994); *see also* COLE & FOSTER, *supra* note 31, at 161-62; Robert D. Bullard, *Environmental Justice in the Twenty-First Century*, in *THE QUEST FOR ENVIRONMENTAL JUSTICE*, *supra* note 290, at 19, 21 (“The executive order calls for improved methodologies for assessing and mitigating impacts of proposed projects, for determining the anticipated health effects that will result . . . [and] for the collection of data on low-income and minority populations who may be disproportionately at risk to exposure . . .”).

²⁹³ *See* Foster, *supra* note 291, at 828-31.

²⁹⁴ As Professor Sheila Foster has noted, “[t]he combination of white flight and limited residential choices, likely due to a combination of poverty and housing discrimination, along with falling property values, has left poor people of color essentially trapped in environmentally subordinate neighborhoods. So long as the distribution of environmental hazards are produced, even in part, by a discriminatory social structure, environmental injustice exists.” *Id.* at 798. Foster adds that “[o]nly by understanding the system of social relations and structure in which environmental distributions take place can we begin to understand the phenomenon of environmental *injustice*, and what environmental *justice* would entail.” *Id.* at 807.

²⁹⁵ *See supra* notes 31-32 and accompanying text.

²⁹⁶ “Rarely is there evidence that a single bad actor – such as a company or the permitting agency – is intentionally targeting these communities for new polluting facilities solely because they are low-income minority communities.” Foster, *supra* note 288, at 9.

of the reasons why Title VI claims were until recently promising for plaintiffs in environmental justice cases was that it was possible to proceed with those claims by showing discriminatory effect or impact, independently of intent.²⁹⁷ That argument, however, ceased to be viable after the Supreme Court held in *Alexander v. Sandoval*²⁹⁸ that private individuals can only bring a claim under Title VI in cases of intentional discrimination.²⁹⁹ It is fair to say that *Sandoval*, a case that had nothing to do with environmental protection or

Many environmental justice cases have failed because of the inability of the plaintiffs to establish intentional discrimination. *See, e.g.*, *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144, 1150 (E.D. Va. 1991), *aff'd*, 977 F.2d 573 (4th Cir. 1992); *E. Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n*, 706 F. Supp. 880, 884 (M.D. Ga. 1989), *aff'd*, 896 F.2d 1264 (11th Cir. 1989); *Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. 673, 677 (S.D. Tex. 1979). *But see* *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 254 F. Supp. 2d 486, 496-99 (D.N.J. 2003) (concluding that plaintiffs established a claim of intentional discrimination under the Equal Protection Clause and Title VI).

The issue of intent has also played a role in the broader, theoretical debate regarding whether the unequal distribution of LULUs is unjust in the absence of intentional discrimination. Professor Lynn Blais, for example, has suggested that the unequal distribution is not necessarily unjust because it may reflect community preferences as reflected in the marketplace. Lynn E. Blais, *Environmental Racism Reconsidered*, 75 N.C. L. REV. 75, 80-83 (1996) (“[A] community decision to act as host for an environmentally sensitive land use, or a private determination to live near one, can be viewed as rational and informed, and the political and market determinations leading to the current distribution of environmentally sensitive land uses can be understood to accurately reflect rational and legitimate private preferences and collective judgments.”). Professor Alice Kaswan has responded by arguing that the distributive justice concerns remain, even in the absence of intentional discrimination, because “[e]conomic and political markets do not function to meet community preferences equally. In fact, the land use siting process and the dynamics of the housing market likely skew undesirable land uses toward poor and minority communities regardless of those communities’ preferences.” Kaswan, *supra* note 288, at 1038.

²⁹⁷ *See* *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 937 (3d Cir. 1997) (holding that “private plaintiffs may maintain an action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964”), *cert. granted*, 524 U.S. 915 (1998), *vacated as moot*, 524 U.S. 974 (1998); *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 145 F. Supp. 2d 446, 495 (D.N.J. 2001) (granting preliminary injunction and declaratory relief in Title VI disparate impact claim brought against state environmental agency for approving additional pollution-creating facility in poor and minority community).

²⁹⁸ 532 U.S. 275 (2001).

²⁹⁹ *Id.* at 293 (“Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602.”).

justice,³⁰⁰ has to some extent taken the air out of the environmental justice movement's litigation sails.³⁰¹

The first advantage, then, that the Takings Clause offers plaintiffs in environmental justice cases is that a takings claim, unlike a Title VI or Equal Protection claim, does not require plaintiffs to establish discriminatory intent. Takings law looks to the impact of the challenged governmental regulation or decision on the plaintiff's property interests. It does not require an inquiry into the government's motivations. Although it is helpful in a takings case to show that the government treated the plaintiff differently from other similarly situated owners,³⁰² discriminatory intent is not a required element of a takings claim.

The second advantage of a takings claim is that a crucial part of the analysis goes to what is often the crux of the environmental justice claim, namely, that the government is improperly burdening some individuals in order to benefit the rest of the community.³⁰³ Takings law, unlike Title VI or equal protection law, explicitly calls for an assessment of the burdens created by the challenged state action in relationship to their benefits. The greater the extent to which those burdens are concentrated on a small number of property owners, and the greater the extent to which those benefits are enjoyed by parties other than the

³⁰⁰ At issue in *Sandoval* was the Alabama Department of Public Safety's policy of administering driver's license examinations in English only. *Id.* at 279.

³⁰¹ Some plaintiffs in environmental justice cases have also attempted to employ the Fair Housing Act ("FHA") in seeking judicial relief. Unlike Title VI and equal protection claims, it is not necessary to show discriminatory intent to establish a violation of the FHA. *See, e.g.,* Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146-48 (3d Cir. 1977) ("Title VIII will undoubtedly appear as a more attractive route to nondiscriminatory housing, as litigants become increasingly aware that Title VIII rights may be enforced even without direct evidence of discriminatory intent."); *United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974) ("The plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated." (footnote omitted)). Environmental justice claims based on the FHA, however, have failed because courts have concluded that Congress intended the statute to protect individuals against discrimination in the *availability*, as opposed to the *habitability*, of property. *See Cox v. City of Dallas*, 430 F.3d 734, 741-43 (5th Cir. 2005) (alleging racial discrimination in city's failure to police the illegal dumping of waste in black neighborhoods); *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 192 (4th Cir. 1999) (alleging racial discrimination in the selection of highway route); *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984) (alleging racial discrimination in county's failure to care for its dilapidated properties in black neighborhoods). Courts, in other words, have deemed the negative impact caused by governmental action (or inaction) on the value of properties to be beyond the scope of the FHA. In contrast, of course, the negative impact on property values caused by governmental action goes to the crux of the takings analysis.

³⁰² *See Ball & Reynolds, supra* note 14, at 1533-35.

³⁰³ *See supra* note 106 and cases cited therein.

burdened property owners, the more likely it is that the government has effected a taking.³⁰⁴

As I have argued in this Article, the appropriate analysis in cases that seek to determine whether the government has effected a taking through its own land use is to inquire whether the government-caused interference with the plaintiffs' use and enjoyment of their properties is substantial and peculiar.³⁰⁵ As to the substantial part of the inquiry, a determination must be made regarding the magnitude of the interference with the plaintiffs' use and enjoyment of their lands. That magnitude should be more than what is required to make out a nuisance claim but does not have to rise to the level of depriving the properties of all or even most of their value.³⁰⁶ As to the peculiar part of the inquiry, a determination must be made regarding the degree of horizontal distribution of the burden, that is, the degree to which the burden that accompanies the government's land use has been distributed among similarly situated owners.³⁰⁷

It is important to identify which group of owners should constitute the similarly situated class that can serve as the basis of comparison in takings cases that are grounded in environmental justice concerns. In the nuisance/takings cases that I have discussed in this Article so far, the proper comparison group consists of nearby owners. Thus, if the plaintiff in a nuisance/takings case can establish that she was singled out for the imposition of a burden not imposed on neighboring properties, then she satisfies the peculiarity requirement.³⁰⁸ The comparison group in takings claims based on environmental justice concerns, however, should not be nearby owners. Instead, the comparison group should be owners in neighboring communities. This is so because the crux of the takings claim in environmental justice cases is that the government is singling out owners in the affected communities for the imposition of disproportionate burdens when compared to owners in neighboring communities. If the government, time and again, places LULUs in the same neighborhood, while consistently sparing nearby communities, that should be enough for an affected owner to meet the peculiarity requirement.

It could be argued, of course, that an owner who owns property near a governmental facility that creates significant negative externalities can always contend that she is being treated differently from owners in neighboring communities without similar facilities. What is different about environmental justice claims, when compared to the nuisance/takings claims that I have discussed in this Article so far, is that the former are based on the *cumulative* effects of government siting decisions.

³⁰⁴ See Ball & Reynolds, *supra* note 14, at 1533-35.

³⁰⁵ See *supra* Part III.

³⁰⁶ See *supra* Part IV.A-B.

³⁰⁷ See *supra* Part IV.

³⁰⁸ See *supra* notes 237-38, 268-69 and accompanying text.

It is appropriate for courts in takings cases, where the plaintiffs argue that the government has historically overburdened their communities with LULUs, to account for the cumulative effects of governmental land uses. I believe this is the case for at least two reasons. First, the very nature of the environmental justice claim is not that the government has singled out communities for the imposition of burdens arising out of an isolated facility; instead, it is alleged that the government has overburdened particular segments of the population through the operation (or licensing)³⁰⁹ of several LULUs.

Professors Gideon Parchomovsky and Peter Siegelman have recently noted the difference between isolated takings and “tipping” takings.³¹⁰ The latter category “encompasses . . . cases in which the government condemns multiple properties in a community, potentially making unsustainable the provision of community amenities and disrupting community life.”³¹¹ This is precisely what the environmental justice movement argues has occurred in places like Camden, New Jersey and Chester, Pennsylvania.³¹² It is not possible to assess accurately the impact of the governmental action on the interests of property owners in these areas by limiting the analysis to the effects of individual facilities. The real harm comes from the cumulative effects of the facilities in question.³¹³

Second, to the extent that the government is placing a disproportionate share of its LULUs in poor and minority communities, it suggests that the political process is insufficiently protecting the interests of those communities.³¹⁴ This

³⁰⁹ I acknowledge below that the takings issue may be more straightforward when the government operates *its own* facilities as opposed to when it authorizes private owners to operate their facilities. See *infra* notes 321-22 and accompanying text.

³¹⁰ Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CAL. L. REV. 75, 137 (2004) (setting forth the distinction between the two categories of takings).

³¹¹ *Id.* The authors also discuss a third takings category, that of clearings, which “covers instances in which communities are uprooted in their entirety.” *Id.* at 137-38.

³¹² See, e.g., Foster, *supra* note 291, at 779-85 (discussing Chester); Godsil, *supra* note 288, at 1822-32 (discussing Camden).

³¹³ Professor Sheila Foster has noted with concern the fact that permitting agencies have largely focused on whether the pollution created by the proposed facilities exceeds environmental laws and regulations and have ignored “the cumulative environmental burden already borne by [the affected] community.” Foster, *supra* note 288, at 15; see also Foster, *supra* note 291, at 786 (lamenting that “[i]n Pennsylvania, the siting process does not consider the cumulative impact of pre-existing facilities with the proposed facility, the disproportionate location of facilities in the host community, or the demographics of the targeted community”).

³¹⁴ In writing on issues associated with environmental injustice, Professor Foster has pointed out that “[s]egregated communities are not only geographically isolated, but socially and culturally isolated. This isolation, in turn, leads to economic and political marginalization. Accordingly, the political process rarely takes the concerns of such

failure of the democratic process justifies a more searching form of judicial review that looks to historical patterns in any given area to assess the constitutionality, from a takings perspective, of LULU siting decisions.³¹⁵ To the extent, therefore, that the government has historically placed more of its LULUs in certain neighborhoods or municipalities (that are primarily African American or Latino), while sparing nearby neighborhoods or municipalities (that are primarily white), that fact should be relevant in determining whether the government-created burdens are peculiar to the plaintiff property owners. As already noted, the plaintiffs in takings cases do not have to show discriminatory intent on the part of the government;³¹⁶ the disproportionate share of the burden, when compared to similarly situated owners, should be enough to establish that the government-created burden is peculiar to the plaintiffs.³¹⁷

Having raised some preliminary thoughts on how takings claims may be able to assist plaintiffs in environmental justice cases, I want to now address some of the possible limitations of those claims. The first important limitation

communities seriously, and decision-makers often ignore them altogether.” Foster, *supra* note 291, at 799-800 (footnote omitted).

³¹⁵ See Levmore, *supra* note 126, at 308-19 (proposing a descriptive and normative understanding of takings law that focuses on democratic process failures); Levmore, *supra* note 6, at 1344-45 (“[W]hen the government singles out a private party, in the sense that the government’s aims could have been achieved in many ways but the means chosen placed losses on an individual or on persons who are not part of an existing or easily organized political coalition, then we can expect to find a compensable taking.”); *id.* at 1348 (“Compensation for a governmental intervention will be required when a politically unprotected loser is singled out and when there is a close substitute in the form of a private purchase.”); see also Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 779 (1999) (arguing that “takings law can be designed with . . . an ‘equalizing tendency’” in order to “more vehemently protect the property interests of the poor and the weak” (footnote omitted)).

³¹⁶ See *supra* note 302 and accompanying text.

³¹⁷ Takings cases that raise environmental justice issues may involve many plaintiffs. It may therefore be objected that administrative difficulties associated with determining the amount of compensation in such cases makes the findings of takings impractical and inefficient. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1214-15 (1967) (describing the importance of settlement or administrative costs in determining whether the government has effected a taking). Bell and Parchomovsky, however, have argued that it is possible to address many of the administrability concerns in so-called derivative takings cases through a self-assessment mechanism that would allow owners to report damages, while at the same time permitting “the state [to] employ probabilistic audits and penalties of sufficient magnitude to deter false reporting.” Bell & Parchomovsky, *supra* note 1, at 281-82; see also Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 1000 (1999) (suggesting that when the existence of many burdened parties leads to high transaction costs, the government should be required to pay “deterrence damages” into a general fund without earmarking specific distributions).

is that takings law will not necessarily achieve what is the primary goal of communities that are already overburdened with LULUs, namely, keeping additional pollution-creating land uses out of their communities altogether. Even successful plaintiffs in takings cases, after all, are not entitled to injunctive relief; their only remedy is monetary compensation for their properties' loss in market value.³¹⁸

Even if takings law cannot by itself guarantee that additional LULUs will not be placed in already overburdened poor and minority communities, however, it may lead officials to site facilities in areas where they are less likely to expose the government to potential takings liability. If this occurs, then the application of the Takings Clause can serve as a market-correcting force with positive distributive outcomes.

³¹⁸ See, e.g., *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949); *United States v. Miller*, 317 U.S. 369, 374 (1943). Another remedial limitation is that the fair market value of the impacted properties in overburdened communities is already diminished as a result of both racial segregation in housing and the cumulative effects of the environmental harms created by the concentration of LULUs. For this reason, Rachel Godsil suggests that in cases where property owners can establish the existence of a LULU-related nuisance, the courts "should find an entitlement in the residents and pre-set a damages award at the replacement cost of each resident's home in a nearby nonsegregated community (a 'segregation multiplier'), and then allow the residents to choose either a property rule or a liability rule by majority vote." Godsil, *supra* note 288, at 1812. (It should be noted that the option available under nuisance law of choosing between an injunction and damages is not available under the Takings Clause. The latter only provides protection to owners through a liability rule (i.e., damages).)

Some commentators question whether accepting monetary compensation to remedy the harms created by environmental injustices is morally unacceptable because it encourages "pay[ing] those who are less fortunate to accept risks that others can afford to escape." ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 85 (2d ed. 1994); see also Daniel A. Farber, *Reassessing Boomer: Justice, Efficiency, and Nuisance Law*, in *PROPERTY LAW AND LEGAL EDUCATION* 7, 14 (Peter Hay & Michael H. Hoeflich eds., 1988) ("Damage awards may compensate for the victim's economic loss, but a liability rule slights the more fundamental injury to the victim's dignity as a member of the community."). Other commentators, however, have urged environmental justice proponents not to reject the possibility of monetary compensation, albeit in contexts other than takings. See Vicki Been, *Compensated Siting Proposals: Is It Time to Pay Attention?*, 21 *FORDHAM URB. L.J.* 787, 788 (1994) (encouraging "those interested in environmental justice to devote greater attention to compensation proposals, and to begin either to articulate an intellectually rigorous critique of the proposals or to develop a strategy for shaping a compensation practice that is beneficial to the movement's constituency"); Godsil, *supra* note 288, at 1876-77 (advocating a "Residents Choice Rule," which would give residents the ability to choose whether the benefits of a polluting company outweigh its costs, and contrasting this view with that of commentators, such as Farber, Michelman, and Ellickson, who argue "that favoring the polluters against residential communities is 'morally' unjust because it rewards polluters for 'invading the rights of its neighbors'").

One of the reasons why already overburdened poor and minority communities continue to be at the wrong end of siting decisions is that land values in those communities tend to be relatively low.³¹⁹ The potential exposure to takings liability in overburdened communities should make those communities less appealing to the government as potential locations for its facilities. This is because when the government sites one of its facilities in an already overburdened community, it may have to compensate not only the owners of properties actually taken through eminent domain, but also, under the takings analysis discussed above, the owners who are impacted by the cumulative effect of pollution-creating facilities in a peculiar and substantial way.³²⁰ At the very least, the successful application of takings law to protect the interests of property owners in communities that are already overburdened with LULUs will make it more expensive, and therefore less desirable, for the government to site facilities, time and again, in the same communities.

A second important limitation of raising takings claims in environmental justice cases relates to the fact that many of the facilities that have been the subject of complaints by the environmental justice movement are privately owned, and are, as a result, beyond the reach of the Takings Clause. Government agencies, however, do require private owners to go through an extensive permitting process before private facilities can become operational.³²¹ It is therefore possible to argue that the permitting process constitutes sufficient state action so as to make the decisions by governmental agencies that allow the siting of private facilities subject to judicial review under the Takings Clause.³²²

³¹⁹ See Foster, *supra* note 291, at 783-84.

³²⁰ See *supra* notes 305-17 and accompanying text.

³²¹ See Kaswan, *supra* note 288, at 1125-26 (outlining the permitting process and opportunity for public comment).

³²² See *Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. 673, 676 (S.D. Tex. 1979) (holding that issuance of permit by state agency allowing construction of solid waste facility constituted state action). In addition to the issue of state action, there is the question of whether the government, in permitting cases, has caused the harm that constitutes the basis for the takings claim. As I have already noted, I do not in this Article address issues of causation. See *supra* note 59 and accompanying text. It can be argued, however, that the governmental permitting process as it relates to the operation of a particular industrial facility is quite different from, for example, what the government does when it zones part of a municipality for industrial purposes. It is sometimes the case that a private nuisance created by a private property owner is actionable even though the land use in question complies with all applicable zoning ordinances. See, e.g., *Kozesnik v. Township of Montgomery*, 131 A.2d 1, 13 (N.J. 1957) (“[W]here a nuisance results, it is no defense that the zoning ordinance authorized the operation and hence judicial relief may be had.”). Zoning in such a way so as to prevent all private nuisances is impossible; the fact, therefore, that the land use which results in a nuisance is allowed under applicable zoning ordinances should not by itself be enough to impose takings liability on the government. It may be a different matter altogether, however, when the state action in question is not the enactment

A third limitation of takings claims is that the Takings Clause, by definition, only protects those with already-existing property interests. The goals of the environmental justice movement go beyond the protection of property interests, and cover the many harms, including those to health, safety, and general well-being, suffered by all individuals, property owners and non-owners alike, who must live in communities saturated with LULUs.³²³ Finally, and relatedly, takings claims, like all litigation claims, will only go so far in addressing the structural inequalities, both political and economic, that many in the environmental justice movement argue constitute the principal reasons for the overburdening of poor and minority communities with unwanted land uses.³²⁴ A great deal of attention will have to continue to be paid to the difficult work of grassroots activism and of pressuring government officials at the local, state, and federal levels to acknowledge and then remedy the intrinsic unfairness of continuing to choose already overburdened communities for the siting of additional LULUs.³²⁵

Despite these limitations, the Takings Clause can play a helpful role in the litigation-based strategies of the environmental justice movement. Although the application of takings law in this area does not offer a panacea, it does offer plaintiffs, as I have argued in this section, advantages over the equality-based claims grounded in either Title VI or the Equal Protection Clause. At the very least, takings claims should be added to the list of legal tools employed by environmental justice activists.

CONCLUSION

Although it has been clear for a long time that the government must compensate property owners when it exercises its power of eminent domain, it has been less clear when the government must also compensate nearby owners

of generalized zoning ordinances that apply to many owners but instead entails particularized decisions granting operational permits to individual land users.

Even when it is possible to bring the state's permitting process within the purview of takings review, I have to acknowledge that once the government is acting as a licensor of private land uses, as opposed to acting as a land user itself, the argument that I raised in Part III, namely, that the state action in nuisance/takings cases is more suspect because the government is acting in its enterprise (as opposed to its arbitral) capacity is not applicable. *See supra* notes 137-60 and accompanying text. This will make it easier, under the judicial review scheme proposed by this Article, for the government to defend itself in takings cases where a private party, merely licensed by the government, creates the nuisance at issue.

³²³ *See* Godsil, *supra* note 288, at 1822-38 (discussing Camden, N.J., as an example of a primarily minority community home to a disproportionate number of polluting facilities, and detailing the effect of such facilities on Camden's citizens).

³²⁴ *See, e.g.,* Foster, *supra* note 291, at 815-20 ("While legal action brings much-needed attention to environmental justice struggles, legal strategies rarely address what is, in essence, a larger political and structural problem.").

³²⁵ *See* COLE & FOSTER, *supra* note 31, at 151-65 (discussing the importance of grassroots activism for the environmental justice movement).

who are negatively affected by the operation of government facilities that result from the exercise of that power. Most of these cases have arisen in the context of governmental land uses that might constitute a nuisance. The constitutional issue then becomes: when does the nuisance ripen into a taking? This Article has argued that the correct approach to these cases is to focus on both the verticality (or substantiality) and the horizontality (or peculiarity) of the burden that accompanies governmental land uses. In assessing both of these factors, courts should apply a form of review that is more exacting than that applied in regulatory takings cases but one that falls short of the categorical rule applied in physical invasion cases.

Appropriately interpreted, the Takings Clause can serve as an important counterbalance to the incentives that sometimes lead the government to impose some of the significant burdens created by its more intensive land uses on a narrow segment of the community. To hold that the government can never be liable under the Takings Clause for the negative impact of its operations on nearby property owners would permit the government to shift some of the operations' costs onto a few, undermining considerations of both fairness and justice. At the same time, to hold that the government should be liable for every negative impact of its operations on nearby property owners would undermine the ability of the government to carry out its legitimate functions in an effective manner.

There is no simple, easy-to-apply standard that will allow courts to navigate between the two ends of the spectrum as represented, on the one hand, by a no liability rule, and, on the other, by a categorical liability rule. This Article, however, has attempted to show that there are coherent questions that can be asked by courts, such as whether the degree of the interference goes beyond that of a "mere" nuisance, and whether the plaintiff owners were burdened in ways that were peculiar to them when compared to similarly situated owners. The answers to these questions go a long way in helping clarify the seemingly ephemeral line between a nuisance and a taking.