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RESPONSIBILITY, CAUSATION, AND
THE HARM-BENEFIT LINE IN
TAKINGS JURISPRUDENCE

GLYNN S. LUNNEY, JR.*

INTRODUCTION

As one of the guarantees provided in the Bill of Rights, the Fifth Amendment's Compensation Clause restricts government's otherwise largely plenary power over privately-held property rights. While the Compensation Clause does not directly limit government's ability to change, modify, or even eliminate existing privately-held property rights, in certain instances it circumscribes government's ability to force individual property owners to bear the cost of such government-imposed changes. Specifically, for those government-imposed property redistributions found to be "takings" within the meaning of the Compensation Clause, the Fifth Amendment requires

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1. The Compensation Clause of the Fifth Amendment, also known as the Takings Clause, provides: "Nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.


4. Like Professors Epstein and Levmore, and the early Court, I define "taking" broadly to include any intentional government action that redistributes a pre-existing property right. See Richard A. Epstein, Takings, Private Property and the Power of Eminent Domain 57-104 (1985) [hereinafter Epstein, Takings]; Saul Levmore, Just Compensation and Just Politics, 22 Conn. L. Rev. 285, 291-92 (1990); Glynn S. Lunney, Jr., A Critical Reexamination of the Takings Jurisprudence, 90 Mich. L. Rev. 1892, 1903 (1992) ("To use the common metaphor, the early Court protected each 'strand' in the bundle of ownership rights individually."). Whenever the government intentionally changes, limits, or modifies any one of the bundle of property rights that the law has previously recognized as belonging to the property holder, the government has redistributed property and the compensation question arises. Given this definition of "taking," taxation programs, environmental regulations, workplace safety rules, as well as more traditional land-use regulations, would all implicate the protection the Compensation Clause affords private property. Not all such redistributions, however, would require compensation; the task is one of separating those redistributions that warrant just compensation from those that do not.
federal and state governments to compensate the property holder for the taking, and thereby shifts the cost of the taking from the property owner to the government and taxpayers generally. If, on the other hand, the change does not amount to a “taking,” the Fifth Amendment will not require compensation, and will permit government to force the individual property owners to bear the burden of the cost of the government-imposed rights change.

In deciding whether to label any given government-imposed rights change a “taking,” courts applying the Compensation Clause face one central question: who should bear the cost of the government’s action? While a number of commentators, myself included, have suggested tests for resolving this question, this Article will focus on the

5. While the Fifth Amendment does not apply directly to the states, see Barron v. Mayor of Baltimore, 32 U.S. 243, 247 (1833), the Court has applied the compensation requirement to the states as part of the Due Process language of the Fourteenth Amendment. See Missouri Pac. Ry. v. State of Nebraska, 164 U.S. 403, 417 (1896); Reagan v. Farmers’ Loan & Trust Co., 154 U.S. 362, 399, 412 (1894); Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co., 142 U.S. 254, 276 (1891).

6. Alternatively, the government can rescind its action once a court has determined that the action amounts to a taking. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2901 n.17 (1992). However, even if the government rescinds its action, the government must provide just compensation to cover the period during which the taking was in effect. See First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 319, 321 (1987); see also Lucas, 112 S. Ct. at 2901 n.17.

7. Even if the Fifth Amendment, or the corresponding state constitutional provision, does not require compensation, a government may nevertheless choose to provide compensation for political reasons. See, e.g., United States v. Butler, 297 U.S. 1 (1936) (recognizing state authority to provide extensive subsidies to farmers in return for limits on agricultural production); see also Donald G. Hagman, Compensable Regulations, in Windfalls for Wipeouts 256, 266-67 (Donald G. Hagman & Dean J. Mischynski eds., 1978); Barton H. Thompson, Jr., A Comment on Economic Analysis and Just Compensation, 12 Int’l Rev. L. & Econ. 141, 141 (1992). That the government should, on occasion, choose to provide compensation beyond that constitutionally required does not suggest, however, that enforcement of the constitutional provision is unnecessary, any more than Congress’s enactment of Title VII or the Civil Rights Act of 1866 suggests that enforcement of the Equal Protection Clause is unnecessary.

8. See Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (“The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than the single owner, must bear the burden of an exercise of state power in the public interest.”); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) (“[T]he question at bottom is upon whom the loss of the changes desired should fall.”).

9. See Lunney, supra note 4, at 1954-55, 1965 (find a taking if government action deprives the very few of an existing property right for the benefit of the very many); see also Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 Harv. L. Rev. 1165, 1215, 1223-24 (1967) (find a taking only if demoralization costs in the absence of compensation exceed settlement costs); Joseph L. Sax, Takings and the Police Power, 74 Yale L.J. 36, 62-63 (1964) (find a taking if government is acting as enterprise, but not if government is acting as arbitrator) [hereinafter Sax, Police Power]; Robert J. Kratovil & Frank J. Harrison, Jr., Eminent Domain—Policy & Concept, 42 Cal. L. Rev. 596, 609 (1954) (find a taking when private losses outweigh public benefit); Margaret J. Radin,
so-called “harm-benefit” line as a means of separating those government actions requiring compensation from those that do not. As an answer to the central question of takings jurisprudence, the harm-benefit line suggests that the person who caused the problem should bear the cost of remedying it. As a result, if an individual exercises his or her property rights in a manner that is harmful, he or she should be responsible for remedying that harm. If government acts to prevent\(^1\) that harm by prohibiting a certain land-use, courts should not require compensation. But for the government action, the individual would have caused the feared harm. Therefore, forcing him or her to bear the cost of remediying or preventing the harm is just. On the other hand, if the individual has not caused the problem, he or she should not be responsible for remediying it. If government attempts to force the individual to solve such a problem, through a police power regulation or otherwise, then government is attempting to press private property into public service, and courts should require compensation.

While the harm-benefit line has an impressive pedigree,\(^\text{11}\) it requires a court to discern whether any given government action should properly be characterized as preventing a harm or extracting a benefit.\(^\text{12}\) Distinguishing harm prevention from benefit extraction has proven a central difficulty with the test. In the absence of some accepted standard of proper conduct, a court or legislature can describe any particular government-imposed rights change equally well as either harm prevention or benefit extraction.\(^\text{13}\) Despite this difficulty, the intuitive attraction of the harm-benefit line remains. It seems to provide a relatively clear, and superficially attractive, answer to the question of who should bear the cost of the rights change.

Although the Supreme Court has on occasion tried to distance itself from the harm-benefit line, and even to repudiate it altogether,\(^\text{14}\) the harm-benefit distinction has continued to play an important role in

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\(^1\) See Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987).

\(^\text{10}\) As a general standard, the government action must be substantially related to preventing the harm. See Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987).


\(^\text{12}\) See Lunney, supra note 4, at 1933-34, 1960-61; Michelman, supra note 9, at 1199-1201; Sax, supra note 9, at 48-49.

\(^\text{13}\) See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2897-98 (1992); Lunney, supra note 4, at 1933-34.

the Court's takings jurisprudence. Indeed, in its most recent takings decision, *Dolan v. City of Tigard*, the Court adopted a rule implicitly reflecting the principle of responsibility that the harm-benefit line embodies: government may condition a land-use permit so as to limit or remedy a harm to which the permitted activity would otherwise contribute, but the condition may require the landowner to solve only that portion of the harm that his or her permitted activity was reasonably likely to cause. Moreover, even in those cases in which the Court has expressly repudiated the harm-benefit line, the Court has implicitly, and perhaps unconsciously, framed the issues in terms of harm prevention and benefit extraction.

For whatever reason—perhaps because it seems a natural way of viewing the situation, perhaps because it embodies a seemingly just principle of responsibility, or perhaps because it is a convenient way to narrow the literal language of the Compensation Clause—the harm-benefit line has continued to play an important role in separating property rights redistributions that require compensation from those that do not. Yet, the notion of causation that the harm-benefit

15. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488-93 (1987). Even those commentators who would significantly expand the scope of the compensation requirement usually retain an exception that would deny compensation in those cases in which the taking was the only way to prevent a harmful exercise of property rights. See *Epstein, Takings*, supra note 4, at 199; *Levmore, supra* note 4, at 305-19; see also *Joseph L. Sax, Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 169 (1971) [hereinafter Sax, Private Rights].


17. See id. at 2319 (adopting rough proportionality test).

18. See *Lucas*, 112 S. Ct. at 2894-95 (“On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use . . . 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.”); see also id. at 2895 (noting the “equivalence in this setting of negative regulation and appropriation”).

19. If the words “private property” in the Just Compensation Clause refer not to the physical thing owned, but to the legal relationships associated with the thing's ownership, as they do, United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945), and if the word “taken” encompasses not only “acquisition” of property by the government, but also destruction of property, as it does, id., then every time government acts to limit, modify, or eliminate an existing property right, it has literally taken property. *Bruce A. Ackerman, Private Property and the Constitution* 27-28 (1977).

20. See *Kmiec*, supra note 11, at 1632-33; Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles; Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 53, 60, 85-93 (1990). I recognize that Professor Peterson considers her “punish or prevent wrongdoing” principle to be different from a “prevention of harm” rationale. See Peterson, *supra*, at 106-10. However, her conclusion on this issue is the result of her odd definition of “harm.” The courts have never defined “harm” for these purposes in terms of the ordinary observer's view of harm. Instead, “harm” as used in the harm-benefit line has always encompassed an implicit consideration of whether one party's actions interfere with another's legal rights. See infra text accompanying notes 47-93.
The harm-benefit line reflects is false. The line implicitly suggests that the misuse of the property rights at issue is the sole cause of the harm. Because the use of property rights caused the harm, government can, without providing compensation, limit or even eliminate those property rights to prevent the harm that would otherwise result.\footnote{Pennell v. City of San Jose, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part) (noting that land-use restrictions do not require compensation if "there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy").}

However, even if a property holder is threatening to exercise her property rights in a manner causing cognizable "harm,"\footnote{Not all things that an ordinary observer might consider harmful constitute "harm" within the meaning of the harm-benefit line. See supra note 20; see also infra text accompanying notes 47-95.} there is never a case in which the only way to prevent the threatened harm is to prohibit the undesirable exercise of the property rights at issue.\footnote{Thus, those commentators who have suggested that government may limit property rights without compensation when that is the only way to achieve the government's social goals have provided tests that are unworkable. See, e.g., Sax, supra note 15, at 169; cf. Saul Levmore, Takings, Torts, and Special Interests, 77 VA. L. REV. 1333, 1345 (1991) (compensation should be required only if "the government's aims could have been achieved in many ways but the means chosen place[s] losses" on a distinct minority).} By providing for the forced sale of each and every privately-held property right, the Compensation Clause ensures that government may always prevent a threatened harm by purchasing the property rights at issue.\footnote{This is not to say that the Compensation Clause requires government to purchase the property rights, rather than prohibit their exercise, in every case, or even in most cases. Cf. Andrus v. Allard, 444 U.S. 51, 65 (1979) (Compensation Clause does not "compel the government to regulate by purchase"). Rather, the point is that the alternative of purchasing the rights is present in every case.} Because government or even other private individuals could have preemptively purchased the property rights and thereby prevented the threatened harm, their failure to act is also a factual cause of the threatened harm.\footnote{Cf. R.H. Coase, The Problem of Social Cost, 3 J. L. & ECON. 1, 2 (1960) ("The traditional approach has tended to obscure the nature of the choice that has to be made. The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A.").} Because both parties are but-for causes of the harm, one cannot determine who should be responsible for remediating or preventing the harm based upon a purely factual determination of causation.

The issue, then, is not which of them caused the harm as a factual matter, but which of them should bear the cost of remedying the harm they jointly caused.\footnote{In his second article on the takings issue, Professor Sax describes the takings issue as one of joint causation as well. See Sax, supra note 15, at 152-55. However, that article is focused on Professor Coase's traditional joint-causation model in which the presence of two inconsistent land uses jointly cause the problem. My joint causa-} Yet, because the harm-benefit line embodies a
principle of responsibility based solely on identifying the factual cause of a problem, the harm-benefit line cannot assign responsibility as between two parties who jointly cause any given harm.

This analysis suggests that the harm-benefit line reflects a pre-Coasean view of causation, and as a result, cannot adequately address the question of who should pay, which lies at the center of the takings debate. However, before we reject the line for reflecting a pre-Coasean view of causation, its continuing influence suggests the possibility of an as-yet unarticulated rationale that would support the line in a post-Coasean world. In an attempt to discover such a rationale, this Article will examine the parallel expression of responsibility found in tort law's "misfeasance-nonfeasance" line.  

Also known as the "failure to rescue" doctrine, tort law's misfeasance-nonfeasance line posits the general rule that a person is liable for acting negligently, but is not, absent special circumstances, liable for failing to act, even if that failure is negligent. Tort law's misfeasance-nonfeasance line appears to share a common focus with the harm-benefit line of takings jurisprudence. Both assign responsibility for the harm to the acting party. Due to this common focus, justifications for tort law's misfeasance-nonfeasance line may also provide support for the harm-benefit line in takings jurisprudence.

A critical examination of the reasons offered in support of tort law's misfeasance-nonfeasance line reveals, however, that the reasons that support it do not support takings jurisprudence's harm-benefit line.

27. The phrase "pre-Coasean" denotes a view of causation that fails to incorporate or consider Professor Coase's joint causation analysis. As an example to illustrate the difference between a pre- and post-Coasean view of causation, we can consider Professor Coase's example of a polluting factory which emits smoke that has harmful effects on those occupying neighboring properties. See Coase, supra, note 25 at 1-2. Under a pre-Coasean view of causation, an observer would say that the factory caused the harm and should be responsible for remedying it. See id. Under a post-Coasean view, the observer would recognize that the harmful effects of the smoke are jointly caused, by the factory emitting the smoke, and by the presence of the neighbors in a place where they will be adversely affected by the smoke. See id. at 2.


29. See, e.g., Lacey v. United States, 98 F. Supp. 219, 219 (D. Mass. 1951) ("It is well settled common law that a mere bystander incurs no liability where he fails to take any action, however negligently or even intentionally, to rescue another in distress."); Buch v. Amory Mfg. Co., 44 A. 809, 810 (N.H. 1897) ("Suppose A, standing close by a railroad, sees a two year old babe on the track and a car approaching. He can easily rescue the child with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury, or indictable under the statute for its death."); see also Restatement (Second) of Torts § 314 (1965); 3 Fowler V. Harper et al., The Law of Torts § 18.6, at 718-19 (2d ed. 1986); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 56, at 375-76 (5th ed. 1984).
To the extent it can be justified, tort law's misfeasance-nonfeasance line appears to be justified almost entirely on jurisprudential grounds. A universal duty to rescue would be too difficult to enforce consistently and correctly because of difficulties in identifying who could have and should have, but did not, rescue. The very fact that the individual failed to act creates three distinct jurisprudential difficulties: (1) it makes the individual difficult to identify initially; (2) it makes his or her behavior hard to distinguish from the many others who could have acted, but did not; and (3) it makes judging the propriety of her behavior difficult. These jurisprudential concerns also explain our common-sense tendency to focus on actors, rather than people who fail to act, in identifying who should be held responsible for a particular undesirable result. By acting, an individual draws our attention, distinguishes himself or herself from everyone else, and invites more ready scrutiny of the propriety of his or her actions.

These jurisprudential concerns would also arise were we to require, in the takings context, concerned individuals to purchase property rights preemptively to prevent another's misuse of those rights. Again, identifying those individuals who could have acted, but did not, would prove difficult. Moreover, even if we could identify one or two such "potential preventers," we would have trouble readily distinguishing their omissions from those of the many others who could have acted, but did not. We would also have trouble determining whether any given potential preventer could have prevented the harm at a lower cost and should therefore properly bear the cost of preventing the harm. Therefore, the jurisprudential concerns that support tort law's misfeasance-nonfeasance line also justify distinguishing between the culpability of the property owner who caused the harm by acting, and the culpability of the potential preventer who caused the harm by failing to act.

30. Some commentators have suggested that tort law's action-inaction line cannot be justified and have argued for its abolition. See, e.g., Leslie Bender, A Lawyer's Primer on Feminist Theory and Tort, 38 J. LEGAL EDUC. 3 (1988); Steven J. Heyman, Foundations of the Duty to Rescue, 47 VAND. L. REV. 673 (1994); Ernest J. Weinrib, The Case for a Duty to Rescue, 90 YALE L.J. 247 (1980). While I do not necessarily agree with the positions taken by these commentators, as I believe jurisprudential reasons alone justify the action-inaction line, I will not critique their arguments in this Article. If they are correct and no reasons adequately support the action-inaction line, then presumably the rationales offered to support the action-inaction line would also not justify retaining the harm-benefit line in takings jurisprudence. It is possible, of course, that some of the theories these commentators use to critique the failure to rescue doctrine might support a very different scope to the compensation requirement than the one I will advocate in this Article. But, as these commentators have not, as yet, attempted to apply their analysis directly to the takings issue, I will not presume to suggest how they would apply their theories to the issue. Instead, I will leave that discussion for another day.

31. See infra text accompanying notes 339-53.

32. The process of identifying who should bear the responsibility for a particular result and of providing a convincing explanation for that result are both costs associ-
However, the choice in takings jurisprudence is not between imposing the cost of the desired rights change on either the property holder or a random bystander, but between imposing the cost on the property holder or the regulating government. In choosing between the property holder and the regulating government as the party to bear the cost of the rights change, the jurisprudential concerns reflected in tort law's misfeasance-nonfeasance line do not apply. The regulating government can be readily identified, and the duty to act can be consistently and correctly enforced against the regulating government. As a result, the jurisprudential concerns that support tort law's misfeasance-nonfeasance line do not support a preference for finding the individual property rights holder, rather than the regulating government, responsible for bearing the cost of the rights change.

Given that neither the traditional causation rationale offered to support the harm-benefit line, nor the justifications that support tort law's misfeasance-nonfeasance line can support application of takings jurisprudence's harm-benefit line, the harm-benefit line should play no role in identifying compensable takings. Assigning responsibility for an undesirable result in tort law or in everyday life, which ensures a means by which we can readily and persuasively identify a responsible party, may justify our natural and unconscious preference for focusing on those who act, rather than on those who fail to act. It cannot, however, justify such a preference in takings jurisprudence because we can readily identify an alternative responsible party, the regulating government. Because of the ease of identifying an alternative responsible party, the only real question should be whether society can achieve any given desired rights change less expensively through a forced sale and purchase of the rights, or by imposing an uncompensated restriction on the property rights at issue.

Abandoning the harm-benefit line will not prove easy, however. Given its pervasive influence on the formal doctrine and, more importantly, on our unconscious framing of the issues, abandoning the harm-benefit line will require a fundamental change in our approach to the takings issue. Instead of asking about the character of the government action, or about a particular individual's role in creating the harm, courts should focus on whether government has: (i) changed or restricted property rights that are (ii) of significant value only to a

33. See infra text accompanying notes 366-96.
34. See GUIDO CALABRESI, THE COSTS OF ACCIDENTS 26-31, 134-37 (1970) (articulating the least cost avoider rule); cf. Coase, supra note 25, at 30-39 (suggesting that we should assign responsibility for solving the harm to party who could do so at the least cost).
very few to benefit the very many. If such singling out has occurred, then a court should find the government action to be a taking and give the government the option of either rescinding its action or paying just compensation. If such singling out has not occurred, then a court should allow the government to impose the rights change without compensating the adversely affected property holders.

I. THE HARM-BENEFIT LINE: ORIGINS, EVOLUTION, AND RATIONALE

In evaluating the harm-benefit line, this Article will begin with a brief review of the origins and evolution of the doctrine, culminating with an examination of three cases that attempt to define the role the line should play in defining the scope of government power over privately-held property rights today.

A. Origins: The Police Power and the Fourteenth Amendment

Most courts and commentators today trace the advent of the harm-benefit line to Justice Harlan's 1887 opinion in *Mugler v. Kansas.* In adjudicating a constitutional challenge to a Kansas prohibition statute, the *Mugler* Court established two propositions that have provided the foundations for the harm-benefit line. First, the Court declared that police power regulations "[are] not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate" individual owners for the pecuniary losses they may sustain as a result of such regulations. Building upon this position, the Court in later opinions would declare that "the enforcement of uncompensated obedience to a legitimate regulation established under the police power is not a taking of property without compensation . . . in the sense of the Fourteenth Amendment."

35. Even if the government rescinds the action, the Compensation Clause may require compensation for the period during which the taking is in effect. See supra note 6.
36. 123 U.S. 623 (1887). See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488-89 (1987) (relying on pre-1897 cases, such as *Mugler*, to define scope of Takings Clause); Sax, supra note 9, at 38. Relying on the *Mugler* and other pre-1897 decisions as takings cases seems at least a little bit odd, given that these very same courts and commentators invariably identify Justice Harlan's 1897 opinion in *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897), as the point at which the Court incorporated the Compensation Clause into the Due Process Clause of the Fourteenth Amendment. See *Keystone*, 480 U.S. at 481 n.10; Sax, supra note 9, at 36 n.2.
Second, the Court reasoned that the Kansas statute was a noncompensable police power regulation, rather than a compensable taking, because it merely prohibited a use of property that the legislature had determined "to be injurious to the health, morals, or safety of the community." Unlike the government action in *Pumpelly v. Green Bay Co.*, the Kansas statute did not require Mugler's property "to be devoted to the use of the public." That is, it did "not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it." In contrast to the government action in *Pumpelly*, which took "unoffending property ... away from an innocent owner," the Kansas statute only abated a nuisance. As a result, the Kansas statute was a noncompensable police power regulation, while the physical invasion in *Pumpelly* was a compensable taking.

From these two propositions came the basic elements of the harm-benefit line. Legitimate police power regulations do not require compensation, while takings pursuant to the power of eminent domain do require compensation. Moreover, government action that simply prohibits an undesirable use of property is a legitimate police power regulation, and as a result, any pecuniary loss resulting from such regulation will not require compensation.

If, on the other hand, a

40. 80 U.S. (13 Wall.) 166 (1871). In *Pumpelly*, the state built a dam, and the water backed up and flooded part of Pumpelly's land. *Id.* at 171.
42. *Id.* at 669. The statute did change what uses would be considered lawful. Nevertheless, adopting the reasoning from earlier Contract Clause cases, the Court asserted that, by making a previously lawful use unlawful, the State of Kansas came under no obligation to property holders adversely affected by the change because the state had never promised these property holders that the law on this issue would remain the same. *Id.* The Court's response is, at best, inadequate as the Compensation Clause itself places limits on the government's ability to change property rights. As a result, limits on government action under the Compensation Clause, unlike those imposed by the Contract Clause, require no additional or specific promise from the government. *See also infra* text accompanying notes 203-209.
44. *Id.*
government is not simply prohibiting an undesirable use, but is instead effectively requiring private property to be devoted to a public use, the government must rescind its actions or provide just compensation to those whose property has been taken. The harm-benefit line developed as a shorthand way of referring to this underlying doctrine: if the government is preventing a harm, no compensation is required; if the government is extracting a benefit, compensation will be required.

B. Early Application: Defining Cognizable “Harm” and the Limits of the Police Power

Taken literally, Justice Harlan’s language in Mugler would seem to suggest that pecuniary losses caused by a police power regulation, no matter how serious, are not compensable absent appropriation or taking): Chicago & A.R.R. v. Tranbarger, 238 U.S. 67 (1915) (requiring railroad to share cost of grade improvements not a taking); Reinman v. City of Little Rock, 237 U.S. 171 (1914) (prohibiting operation of stable not a taking); Eberle v. Michigan, 232 U.S. 700 (1915) (prohibiting the manufacture of liquor not a taking); Atlantic Coast Line R.R. v. City of Goldsboro, 232 U.S. 548 (1914) (limiting time during which a switching yard within a city can be used and requiring railroad to change track grade to match street grade not a taking); Chicago, M. & St. P. Ry. v. City of Minneapolis, 232 U.S. 430 (1914) (requiring railroad to build and pay for bridge over a recreational canal added by the city not a taking); Laurel Hill Cemetery v. City & County of San Francisco, 216 U.S. 358 (1910) (prohibiting operation of unlicensed cemetery not a taking); Welch v. Swasey, 214 U.S. 91 (1909) (imposing height restrictions on buildings not a taking); Gardner v. Michigan, 199 U.S. 325 (1905) (requiring garbage to be turned over to designated collecting agent not a taking); California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905) (same); Lawton v. Steele, 152 U.S. 133, 139-49 (1894) (act authorizing seizure and destruction of nets maintained in violation of the fish and game laws of the state not a taking); Mugler v. Kansas, 123 U.S. 623 (1887); see also Fertilizing Co. v. Hyde Park, 97 U.S. 659, 667-70 (1878) (finding that government action did not violate Contracts Clause because government implicitly retained power to prohibit manure treating plant if necessary to preserve public health, safety, or morals); Beer Co. v. Massachusetts, 97 U.S. 25, 32-33 (1878) (finding that government action did not violate Contracts Clause because government implicitly retained power to prohibit manufacture and sale of alcohol if necessary to preserve public health, safety, or morals).


47. See Freund, supra note 11, at 546-47 ("It may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful. . . . From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not.").
physical invasion by the government. Yet, despite the language’s literal reach, the Court in the late nineteenth and early twentieth century consistently imposed limits on both the scope of the police power and on the sort of “harm” that would permit an uncompensated change in an individual’s property rights.

For instance, the police power authorized state action whenever the legislature believed action was reasonably necessary “to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare.” Yet, the police power did not authorize government regulation of “purely private” rights, even if necessary to achieve a legitimate police power objective. As a result, despite an exceedingly broad definition of the permissible means and ends encompassed by the police power, a regulation that affected purely private rights would not survive a takings challenge. The Court also did not intend the “harm” prevention language of Mugler to encompass every government action that prevented an undesired or unpleasant result. Because the harm prevention rationale originated in the principle sic utere tuo, ut alienum non laedas, “harm” within the

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49. See, e.g., Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); Missouri Pac. Ry. v. Nebraska, 164 U.S. 403, 416-17 (1896); see also Lunney, supra note 4, at 1896-1920, 1934 n.193.

50. Mayor of New York v. Miln, 36 U.S. 102, 139 (January 1837 Term).

51. Munn v. Illinois, 94 U.S. 113, 133-34 (1877); German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 406 (1914); see also Lunney, supra note 4, at 1906-09.

52. See Mayor of New York v. Miln, 36 U.S. 102, 139-40 (January 1837 Term) (Police power encompasses “every law . . . which concern[s] the welfare of the whole people of a state, or any individual within it; whether it related to their rights or their duties; whether it respected them as men, or as citizens of the state in their public or private relations; whether it related to the rights of persons or of property, of the whole people of a state or of any individual within it . . . ”); see also Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 531 (1917) (The Court “will interfere with the action of [the local legislative] authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare.”); Chicago, B. & Q.R.R. v. Illinois ex rel. Drainage Comm’rs, 200 U.S. 561, 592 (1906) (“We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, public morals or the public safety.”).


meaning of the harm-benefit line referred not to injury to another, or harm in its ordinary sense, but injury to another's legal rights.\textsuperscript{55}

These two issues, the scope of the police power and the nature of the harm required to satisfy the harm-benefit line, were not unrelated. Rather, the question whether a property right was "purely private," and hence beyond the reach of a state's police power, turned on whether the existence or exercise of a private right interfered with, or frustrated, the rights of another.\textsuperscript{56} If the exercise or existence of a privately-held right interfered with, or frustrated, another's rights, then it caused "harm" within the meaning of the harm-benefit line. In addition, given interference with another's rights, the Court would not consider the privately-held right "purely private."\textsuperscript{57} As a result, the government could act to change, limit, or even eliminate altogether such a property right under the police power without implicating the compensation requirement.\textsuperscript{58}

The interaction of the police power and harm issues is evident in the Court's earliest takings cases—the railroad rate regulation cases.\textsuperscript{59} The following hypothetical illustrates the constitutional principles reflected in these cases.\textsuperscript{60} Two different states are considering the enact-

\textsuperscript{55} See Christopher G. Tiedeman, \textit{A Treatise on the Limitation of Police Power in the United States} 4 (1886) ("[T]he police power of the government, as understood in the constitutional laws of the United States, is simply the power of the government to establish provisions for the enforcement of the common as well as civil law maxim, 'Sic utere tuo, ut alienum non laedas.'").

\textsuperscript{56} See Lunney, \textit{supra} note 4, at 1909-19.


\textsuperscript{58} See Miller, 276 U.S. at 280 ("And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.").

\textsuperscript{59} The Court first struck a state statute under the Fourteenth Amendment for depriving an individual of property without due process of law in a railroad rate regulation case. See Chicago, M. & St. P. Ry. v. Minnesota, 134 U.S. 418, 438 (1890). While the Court struck the statute principally on procedural due process grounds, \textit{id.}, the Court soon thereafter struck a number of railroad rate regulation statutes on the ground that they failed to provide a just compensation for the public use of the railroad's private property. See Smyth v. Ames, 169 U.S. 466, 546 (1898) ("The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it."); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 412 (1894) ("And yet justice demands that every one should receive some compensation for the use of his money or property . . . ."); see also Covington & Lex. Turnpike Road Co. v. Sandford, 164 U.S. 578, 594-95 (1896) ("A statute which, by its necessary operation, compels a turnpike company, when charging only such tolls as are just to the public, to submit to such further reduction of rates as will prevent it from keeping its road in proper repair and from earning any dividends whatever for stockholders, is as obnoxious to the Constitution of the United States as would be a similar statute relating to the business of a railroad corporation.").

\textsuperscript{60} I have based the hypothetical in part on the facts in Northern Pacific Railway v. North Dakota, 236 U.S. 585 (1915).
ment of similar railroad rate regulation statutes. Each state considers its respective statutes essential to ensure that a fledgling coal mining industry, of critical importance to the welfare of each state and its citizens, can survive. Before each statute’s enactment, the respective railroad companies in the two states had each exercised its property right to determine what it would charge others to use its property, and was charging ten dollars per ton to transport the coal to its respective market. In each case, the state enacts a rate regulation statute mandating a maximum charge of five dollars per ton for transporting the coal. Both railroads challenge the statutes as a deprivation of private property without just compensation.

From these facts, it would appear that both statutes are substantially related to the state’s welfare, as both will ensure the survival of a coal mining industry of central importance to each state’s economy. As a result, the rate reduction appears to fall within the literal scope of the police power. In addition, both statutes prevent harm, in the ordinary sense of the word, by preventing the railroads from charging the higher, pre-regulation rate for their services, and by preventing the financial collapse of an important sector of each state’s economy. If we interpret Mugler literally, both rate regulations appear to be legitimate police power regulations that merely prohibit an undesirable use of property; that is, the charging of undesirably high rates by a railroad. Therefore, under a literal interpretation of Mugler, both regulations should be constitutional.

Yet, under the Court’s early jurisprudence, the statutes’ police power justification and purported harm prevention rationale would save the statutes from constitutional challenge only if the states set the regulated rate at a level that would enable the railroads to earn a reasonable return on their investments. So long as the regulated rates enabled the railroads to earn a reasonable return on their investments, the regulations would not amount to takings, and any pecuniary loss the railroads experienced as a result of the rate regulations would be noncompensable. If, however, the regulated rates prevented the

61. Indeed, if both railroads were transporting the same tonnage of coal, then both the harm prevented by the rate regulation and the burden imposed on the two railroads would be identical.

62. Compare Northern Pac. Ry. v. North Dakota, 236 U.S. 585, 590-91 (1915) (striking rate regulation because rates failed to provide a remunerative return) and Smyth, 169 U.S. at 546 (same) and Reagan, 154 U.S. at 412 (same) with St. Louis & S.F. Ry. v. Gill, 156 U.S. 649, 665-66 (1895) (evidence failed to establish that rate was unreasonable; rate regulation sustained) and Chicago & G.T. Ry. v. Wellman, 143 U.S. 339, 345-46 (1892) (same).

63. See, e.g., Munn v. Illinois, 94 U.S. 113, 133-34 (1877); see also Block v. Hirsh, 256 U.S. 135, 157 (1921) (“It may be assumed that the interpretation of ‘reasonable’ [as defining the level at which apartment rents are to be set] will deprive [the apartment building owner] in part at least of the power of profiting by the sudden influx of people to Washington caused by the needs of Government and the war, and thus of a right usually incident to fortunately situated property . . . .”); Edgar A. Levy Leasing
railroads from earning reasonable returns, the Court would find the rate reductions to be unconstitutional takings of private property, and the railroads would be entitled to have the rate reductions rescinded. Thus, in the hypothetical under discussion, if one of the railroads needed a haulage rate of seven dollars per ton of coal to earn a reasonable return, while the other railroad required a rate of only five dollars per ton to earn such a return, the rate regulation would be an unconstitutional taking as to the first railroad, but not as to the second.

The Court's decision to treat the two cases differently suggests that it did not read Mugler literally, nor should we. Even if a state action falls within the literal scope of the police power, and prevents what an ordinary observer would consider serious harm, it may nevertheless amount to an unconstitutional deprivation of private property. In drawing this line between permissible and unconstitutional rate regulation, the Court began by examining whether the railroad had set its rates at a level that interfered with, or frustrated, rights held by another. Such an interference would fall within the literal terms of *sic utere tuo, ut alienum non laedas* and would justify an uncompensated restriction of the railroad's rates. As a general rule, in determining whether such an interference had occurred, the Court would consider potential interference with two distinct categories of rights that might be held by another.

First, the Court would look for an interference with the property rights of adjoining landowners. The Court did not find such an interference in the railroad rate regulation cases. Courts have simply not considered the right to control the rates of a neighboring railway to be...
one of the sticks an individual obtains by purchasing a tract of nearby land. As a result, even if the unregulated railroad rates made certain uses of the neighboring lands unprofitable, those rates did not interfere with, or frustrate, the legal rights of the neighboring landowners as landowners.68

Second, despite the absence of such a conflict in private rights, the Court would nevertheless find an interference with another's rights if an individual had exercised her property rights in a manner that interfered with a right held by the public generally. In the railroad rate regulation cases, the Court found such an interference whenever the railroad had set its rates at a level greater than the level necessary to ensure the railroad a reasonable return on its investment. In reaching this conclusion, the Court essentially determined that the nature of railroads created a right on behalf of the public to demand travel at a reasonable rate.69 As the Court explained it, "a railroad is a public highway," a "corporation . . . created for public purposes" and "perform[ing] a function of the State."70 To facilitate its operation, the state has granted the railroad the "authority to exercise the right of eminent domain and to charge tolls . . . primarily for the benefit of the public."71 Given this background, the Court recognized a right held by the public at large to demand travel on railroads at a reasonable price.72 Once the Court recognized the public's rights to rail travel at a reasonable rate, action by the railroad to set its rates above a reasonable level would interfere with, or frustrate, the public's right to reasonably priced rail travel.73 Allowing the railroad to charge such a rate would not only cause harm, in the ordinary sense of the word, by forcing the public to pay a higher price for rail travel, but would also injure the public's rights by frustrating the public's legal right to reasonably priced rail travel. Given such an injury to the public's rights, the state could act under the police power to protect those rights by prohibiting the railroad from charging an unreasonable rate.74

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68. Compare Fountainebleau Hotel Corp. v. Forty-five Twenty-five, Inc., 114 So.2d 357 (Fla. Dist. Ct. App. 1959) (no common law right to light; blocking such light cannot constitute a nuisance because it does not interfere with landowner's legal rights), cert. denied, 117 So.2d 842 (Fla. 1960) with Prah v. Maretti, 321 N.W.2d 182 (Wis. 1982) (blocking light will constitute a nuisance if the harm outweighs the benefit of the conduct, regardless of existence of underlying common law right).

69. See Munn v. Illinois, 94 U.S. 113, 134 (1877).


71. Id. at 544-47; Covington & Lex. Turnpike Rd. Co. v. Sandford, 164 U.S. 578, 596-97 (1896).


73. Id. at 544 ("But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered."); Covington & Lex. Turnpike Rd. Co., 164 U.S. at 596 (in determining a just rate, "[t]he rights of the public are not to be ignored").

74. Smyth, 169 U.S. at 545-46 ("A corporation maintaining a public highway, although it owns the property it employs for accomplishing public objects, must be
On the other hand, the Court also ruled that the nature of the railroad did not extend so far as to create a public right to have the railroad carry passengers and freight at an unremunerative rate. In essence, the public did not have a right to subsidized travel. Rather, the public only had a right to travel at a reasonable rate. As a result, once the railroad had dropped its rates to a reasonable level, the state had no authority to force the railroad to reduce its rates any further. A reasonable rate might cost the public more than the regulated rate that the state sought to impose. A reasonable rate might even destroy a fledgling coal mining industry essential to the state's economy that the regulated rate would have preserved. Nevertheless, the reasonable rate would not interfere with, or frustrate, the rail travel rights held by the public. As a result, such consequences of the railroad's set rate, even if detrimental to the public welfare of the state, would not have constituted cognizable harm within the meaning of the harm-benefit line, and would not have justified further rate reductions under the police power in the absence of just compensation.

As the railroad rate regulation cases illustrate, cognizable harm within the meaning of the harm-benefit line did not encompass every action that an ordinary observer might consider harmful; even if substantial discomfort, economic loss, or inconvenience would not, alone,
amount to cognizable harm. To constitute cognizable harm, the existence or exercise of the property right at issue must interfere with, or frustrate, another's rights.\textsuperscript{78} Once we understand that the early Court, in applying the harm-benefit line, was determining whether the existence or exercise of a particular property right had interfered with, or frustrated, another's rights, rather than determining whether the right had caused harm in the ordinary sense of the word, cases that appear to reach differing results become entirely consistent.

For instance, the early Court's decision in \textit{Pennsylvania Coal Co. v. Mahon}\textsuperscript{79} appears to reach a quite different conclusion\textsuperscript{80} from its decisions in \textit{Reinman v. City of Little Rock},\textsuperscript{81} \textit{Hadacheck v. Sebastian},\textsuperscript{82} and \textit{Miller v. Schoene}.\textsuperscript{83} In each case, an adjacent, or subjacent, landowner used its land in a manner that caused serious discomfort, inconvenience, and economic loss to neighboring landowners. In each case, the government prohibited the land use to avoid the harm that the land use would otherwise create. In each case, the prohibition imposed a more or less serious pecuniary loss on a specific landowner. And, in each case, the affected landowner sued, asserting that the government's action constituted a taking. Despite these similarities, the Court found a taking in \textit{Pennsylvania Coal}, but not in the other three cases.\textsuperscript{84}

While the modern Court has attempted to reconcile these four cases by suggesting that the magnitude of the harm prevented, or the extent of the pecuniary loss imposed, differed,\textsuperscript{85} the material difference between the cases was that the Mahons had expressly relinquished their legal rights respecting the undesirable neighboring land use, while the neighboring landowners in \textit{Reinman}, \textit{Hadacheck}, and \textit{Miller} had not.\textsuperscript{86}

\textsuperscript{78} For that reason, I believe conflict-in-rights is a better description than harm prevention for what the Court was looking for before it would permit uncompensated restriction of a privately-held right. See Lunney, \textit{supra} note 4, at 1909-19 & n.193.

\textsuperscript{79} 260 U.S. 393 (1922).

\textsuperscript{80} Because of the apparent conflict, petitioner in \textit{Keystone Bituminous Coal Ass'n v. DeBenedictis}, 480 U.S. 470 (1987), made the implicit assertion that \textit{Pennsylvania Coal} had overruled \textit{Hadacheck} and \textit{Reinman}. Id. at 490.

\textsuperscript{81} 237 U.S. 171 (1915).

\textsuperscript{82} 239 U.S. 394 (1915).

\textsuperscript{83} 276 U.S. 272 (1928).

\textsuperscript{84} \textit{Compare Pennsylvania Coal Co.}, 260 U.S. at 416 (prohibition on mining of support coal a taking) \textit{with Miller}, 276 U.S. at 279-80 (prohibition on growing of rust-bearing cedar trees not a taking) \textit{and Hadacheck}, 239 U.S. at 410-11 (prohibition of brick manufacturing not a taking) \textit{and Reinman}, 237 U.S. at 176-77 (prohibition on operation of stable not a taking).

\textsuperscript{85} For example, both Justice Stevens and Justice Scalia have suggested that the Court reached a different decision in \textit{Pennsylvania Coal Co.} because it involved a denial of all economic use of "certain coal," while each of the other cases left the property owner with some remaining economic use for the relevant property. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899 & n.13 (1992); \textit{Keystone Bituminous Coal Ass'n v. DeBenedictis}, 480 U.S. 470, 498-502 (1987).

\textsuperscript{86} \textit{See Pennsylvania Coal Co.}, 260 U.S. at 414 ("It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining
Because the Mahons had expressly authorized the mining of the support coal from under their land, the Mahons held their property subject to Pennsylvania Coal's right to remove the underlying support coal.\textsuperscript{87} As a result, while the Mahons and the State of Pennsylvania may not have liked Pennsylvania Coal's actions, and those actions may have caused substantial discomfort, economic loss, and inconvenience to the Mahons and others, those actions did not interfere with, or frustrate, the Mahons' legal rights in their land and home.\textsuperscript{88} In the absence of any interference with, or frustration of, the Mahons' legal rights, Pennsylvania Coal's decision to exercise its right to mine the support coal did not cause the Mahons cognizable harm within the meaning of the harm-benefit line. In the absence of such cognizable harm, Pennsylvania Coal's right to mine the support coal remained "purely private," and hence beyond the reach of the state's police power.\textsuperscript{89}

In contrast, the neighboring landowners in Reinman, Hadacheck, and Miller had not expressly\textsuperscript{90} agreed to make their rights subject to an objectionable land use next door. As a result, Reinman's stable, Hadacheck's brickyard, and Miller's red cedar trees caused harm to their neighbors not only in the ordinary sense of the word, but also in the legal sense, by interfering with, or frustrating, the neighboring landowners' right to use their land.\textsuperscript{91} Reinman, Hadacheck, and

\begin{quote}
of coal under streets or cities in places where the right to mine such coal has been reserved."
\end{quote}

\textsuperscript{87} Id. at 413.

\textsuperscript{88} Given that the Mahons' rights in their land were subject to Pennsylvania Coal's right to remove the support coal, this is a truism.

\textsuperscript{89} Thus, in justifying its conclusion that the Kohler Act amounted to a taking, the Pennsylvania Coal Court explained:

The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. 260 U.S. at 415. The Court continued, "[s]o far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought." Id. at 416.

\textsuperscript{90} Hadacheck asserted that because he was first-in-time, the residents moving adjacent to his brickyard were aware of the smells, dust, and smoke associated it, and therefore implicitly agreed to hold their property rights subject to Hadacheck's right to continue to operate his brickyard. Hadacheck, 239 U.S. 394, 405 (1915). While this "coming to the nuisance" defense probably would have prevailed under private law nuisance principles applicable in California at that time, the Court rejected it. Id. at 409-10. A contrary result, the Court suggested, "would preclude development and fix a city forever in its primitive conditions." Id. at 410.

\textsuperscript{91} In Miller, the rust from the cedar trees interfered with neighboring landowners' right to use their land to grow apples. Miller, 276 U.S. 272, 279 (1928). In Hadacheck, the fumes, gases, smoke, soot, and steam from the brickyard interfered with the neighboring landowners' rights to use their land as residences. Hadacheck,
Miller, by using their land in a manner that interfered with their neighbors' property rights, had caused cognizable harm within the meaning of the harm-benefit line. Such harm justified bringing Reinman's, Hadacheck's, and Miller's relevant property rights into the public sphere, and made those rights subject to an uncompensated exercise of the state's police power.

Once one comprehends that harm within the meaning of the harm-benefit line refers to the exercise of a right in a manner that interferes with, or frustrates, another's rights, one can readily understand how the early Court could view the differing outcomes in these four cases as consistent, as it plainly did. In all four cases, the prohibited land use may have threatened harm in the ordinary sense of the word, but the land use in Pennsylvania Coal did not interfere with, or frustrate, legal rights held by another, while the land use in the other three cases did. As a result, the government action in Pennsylvania Coal did not address a cognizable harm, and could not, therefore, withstand constitutional challenge in the absence of compensation. The government action in the other three cases, however, was addressed to cognizable harm, and could therefore withstand constitutional challenge as valid police power measures, even in the absence of compensation.

Thus, in the early cases, the Court separated compensable government action from noncompensable government action by examining whether the government acted to prevent an individual's property rights from interfering with, or frustrating, another's rights. If such harm occurred, or was threatened, then the government could change, limit, or even eliminate entirely the property right at issue without providing compensation. If, however, such an interference or conflict with another right had not occurred, then the government could not change, limit, or eliminate the property right in the absence

239 U.S. at 408. In Reinman, the offensive odor and health hazard created by the stables interfered with the neighboring landowners' right to use their land as shops, hotels, and residences. Reinman, 237 U.S. 171, 178 (1915).

92. See Miller, 276 U.S. at 279 (incompatible nature of uses forced state to choose "between the preservation of one class of property and that of the other"); Hadacheck, 239 U.S. at 411 ("clearly within the police power of the state"); Reinman, 237 U.S. at 176 (same).

93. We may not agree with the Court, but that is a separate issue.

94. The Court decided Hadacheck and Reinman in 1915, and Miller in 1928 unanimously, and Justice Brandeis was the lone dissenter in the Court's 1922 decision, Pennsylvania Coal. See also Lunney, supra note 4, at 1928-31 & nn.174-76.

95. See Lunney, supra note 4, at 1906-19.


97. See, e.g., Miller v. Schoene, 276 U.S. 272, 279-80 (1928) ("And where the public interest is involved preference of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.").
of just compensation, however great the public interest warranting such a change.98

C. Interlude: Nebbia, Private Property and Public Rights

By defining harm as an interference with, or frustration of, another's legal rights, the early Court may appear to have provided a workable and neutral baseline for separating harm prevention from benefit extraction. If the existence or exercise of any given property right interfered with, or frustrated, the rights of another, then government action to prevent such an interference would prevent harm. On the other hand, in the absence of such an interference or conflict, government action to change, limit, or eliminate a privately held right would necessarily extract a benefit.99 However, to determine whether harm, so defined, had occurred, the early Court necessarily had to identify the rights held by another.

In cases such as Miller, in which an individual's use of his or her land prevented another from making a lawful use of his or her land, the interference with the other's rights was relatively plain. No one questioned the neighbors' legal entitlement to use their land to grow apple trees, nor did anyone dispute the destructive effect Miller's cedar trees would have on his neighbors' apple orchards. Accepting these two underlying considerations, the state could not avoid choosing between the neighbors' right to use their land to grow apple trees, or Miller's right to use his land to grow cedar trees. As the Court explained, "[i]t would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked."100 On the other side of the coin, cases such as Pennsylvania Coal, in which the neighbors are complaining about a land use that they had expressly agreed to allow, provide an equally clear example of situations in which the land use at issue had not interfered with another's rights.

Yet, not all the cases presented such clear-cut questions. Even in those cases adjusting the relative land use rights of neighboring landowners, determining whether a conflict in those rights existed that would justify state intervention was not always easy. If a court applying the common law of private nuisance would have permitted a given


99. Cf. Lunney, supra note 4, at 1922-23 ("Because every right was either public or private, defining the circumstances in which a right would become public implied that in all other circumstances a right would remain private.").

land use to continue, could a state nevertheless prohibit the land use in the absence of compensation, or would the common law's implicit allocation of rights and entitlements bind the legislature? Alternatively, even if a court would likely have found a given land use to be an actionable nuisance, could the legislature decide that the land use was a nuisance, and thereby deprive the landowner of the opportunity to have the issue tried? While the Court faced and resolved these issues, usually in a manner that favored broader legislative power, its justifications for granting the legislature the authority to label a particular land use a “nuisance” without a trial, and even if the prohibited land use would not have been a nuisance under the common law, were not particularly compelling, nor were they altogether consistent with its reasons for refusing to require compensation in other cases.

101. The land-use might not amount to a common law nuisance either because the complaining neighbors had come to the nuisance, or because they could not establish a substantial interference with their property rights that was both intentional and unreasonable.

102. Compare Yates v. Milwaukee, 77 U.S. (10 Wall.) 497, 505 (Dec. Term 1870) (legislature cannot simply declare an activity to be a nuisance if it is not a nuisance) with Mugler v. Kansas, 123 U.S. 623, 671 (1887) (legislature can simply decree an activity that is causing cognizable harm to be a nuisance). See also Chicago, M. & St. P. Ry. v. Minnesota, 134 U.S. 418, 438-40 (1890) (if legislature attempts to preclude judicial review of the reasonableness of a rate regulation, such action constitutes a deprivation of property without due process of law).

103. For example, if Hadacheck began his brick manufacturing operations in a place where “he did not expect or believe, nor did other owners of property in the vicinity expect or believe, that the territory would” become residential, see Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915), the common law’s “coming to the nuisance” defense would preclude these later-in-time neighbors from successfully asserting a common law nuisance action against Hadacheck. In essence, by providing a “coming to the nuisance” defense, the common law implicitly assigned Hadacheck the legal right to continue making bricks, and made the rights of the later-in-time neighbors subject to Hadacheck’s continuing operations. Because the common law made the neighboring landowners’ property rights subject to Hadacheck’s continuing operations, his operations, while they may have produced unpleasant sights, sounds, and odors, did not interfere with the neighbor’s legal rights. As a result, while it is the common law, rather than an express agreement, that made the complaining neighbor’s legal rights subject to the objected-to land-use, the common law’s implicit assignment of rights would seem to suggest that Hadacheck’s land-use, like Pennsylvania Coal’s, did not create cognizable harm, and should not have been subject to regulation under the police power in the absence of just compensation. The Court, however, rejected such an approach. In response to Hadacheck’s claim that the vested, or preexisting, nature of his operations established his right to compensation, the Court responded by asserting that government would be unable to afford such a broad interpretation of the compensation requirement. Id. at 410.

Yet, if this response was adequate to avoid the compensation requirement in a case involving an implicit assignment of rights, then it would seem an equally compelling response to Pennsylvania Coal’s compensation claims. After all, requiring compensation for Hadacheck seems no more or less likely to block “progress” than would requiring compensation for Pennsylvania Coal. But when the State of Pennsylvania asserted such an argument in Pennsylvania Coal Co., the Court rejected its plea by noting that “[t]he protection of private property in the Fifth Amendment presupposes
While the Court’s resolution of the harm issue in cases involving a government adjustment of the relative land use rights of neighboring landowners was therefore sometimes troubling, far more troubling was its resolution of those cases in which the existence or exercise of a property right interfered, not with the right of a neighboring landowner, but with a right held by the public at large. For example, the Court did not resolve the railroad rate regulation cases by examining whether the unregulated rates interfered with the property rights of a neighboring landowner. Instead, the Court determined that if a railroad, in exercising its property rights, set an unreasonably high rate, there would be an interference with the general public’s right to reasonably priced rail travel.

But where did the public’s right to reasonably priced rail travel come from, and what were its limits? More importantly, if the legislature decided to expand the public’s rights by enacting legislation that gave the public the right to “subsidized” rail travel, should the Court deny the legislature the authority to recognize, and provide for, a public need for such subsidized travel? Admittedly, such “subsidized” travel might “kill a goose that lays golden eggs,” and would set a rate inconsistent with the optimal pricing structure natural monopoly economics might suggest. Yet, neither of those concerns otherwise justified limits on the legislature’s authority. “If all that can be said of legislation is that it is unwise, or unnecessarily oppressive . . . , [the adversely affected property owners’] appeal must be to the legislature, or to the ballot-box, not to the judiciary.”

Nevertheless, through the 1930s, the Court limited the legislature’s authority to redistribute property in these public rights cases to those instances in which the Court determined that the privately-held right at issue had become “clothed with a public interest.” To identify which privately-held rights had become clothed with a public interest, the Court attempted to define a corresponding set of rights held by the general public with respect to certain land uses and businesses. Once the Court had defined these publicly-held rights, a privately-held right would become clothed with a public interest if the existence or exercise of that right interfered with, or frustrated, one of the publicly-held rights. Such an interference amounted to cognizable harm,
and would make the privately-held right subject to uncompensated police power regulation.¹¹⁰

Yet, as some may already have realized, this definition of cognizable harm, as an interference with a publicly-held right, did not resolve the issue, but merely pushed the dispute back one step. Resolution of any given case would turn on whether the Court decided to recognize any given public interest as something the public not only wanted, but had a legal right to demand. Thus, government could, without providing compensation, prohibit private action that threatened the health, safety, or morals of another citizen because the Court recognized the public interest in preserving the health, safety, and morals of its citizens as something that the public had a legal right to demand.¹¹¹ If the Court had not so recognized the state’s interest, then the state could not have prohibited such private action in the absence of compensation.¹¹² Resolving the compensation question, then, became a matter of separating those public interests that the Court would recognize as public rights, from those public interests it would not so recognize.

In addressing this underlying question of whether the Court should consider the public interest, in any given case, as rising to the level of a public right, the Court focused on a variety of circumstances associated with the privately-held right.¹¹³ While the early Court could not

¹¹⁰ Thus, in the railroad rate regulations, the Court established and defined the public’s right to reasonably priced rail travel. Once the Court had established that right, any attempt by the railroads to set an unreasonable rate for rail travel would frustrate the public’s rights, and would justify state action to protect the public’s rights. See Smyth v. Ames, 169 U.S. 466, 544 (1898); Covington & Lex. Turnpike Rd. Co. v. Sandford, 164 U.S. 578, 596 (1896).


¹¹² In the absence of a public right, the private exercise of rights to threaten the health, safety, or morals of a state’s citizens might cause harm in the ordinary sense of the word, but it would not interfere with, or frustrate, any right held by the public.

¹¹³ These circumstances included what role, if any, government played in establishing the privately-held right, and the obligations expressly or implicitly assumed by the private right’s holder. See, e.g., Smyth v. Ames, 169 U.S. at 544-47. In Chas. Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522 (1923), the Court attempted to summarize the considerations that would justify clothing a privately-held right with the public interest:

Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills.

(3) Businesses which, though not public at their inception, may be fairly said to have risen to such and have become subject in consequence to some government regulation.
always agree whether the public interest, in any given case, justified uncompensated regulation of privately-held property, the early Court consistently ruled that the strong demands of the public interest alone were not sufficient; "something more special than this, something of more definite consequence" was required. Simply because the public really wanted, or even needed in some sense, a specific redistribution of private property would not, on its own, justify the state in redistributing the property without just compensation.

With the Great Depression, however, the legislative and executive branches of government came under increasing pressure to act to alleviate economic losses and stabilize the economy. Government responded to these demands through a variety of measures, including

114. See, e.g., Ribnik v. McBride, 277 U.S. 350 (1928) (concluding by a 5-1-3 vote that price regulation of employment agencies is beyond the scope of the police power), overruled by Olsen v. Nebraska, 313 U.S. 236 (1941); Tyson & Brother—United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418 (1927) (concluding by a 5-1-3 vote that price regulation of ticket agencies is beyond the scope of police power), overruled by Olsen v. Nebraska, 313 U.S. 236 (1941); Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926) (upholding by a 5-4 vote state power to enact zoning regulations); Block v. Hirsh, 256 U.S. 135 (1921) (upholding by a 5-4 vote temporary rent controls); Wilson v. New, 243 U.S. 332 (1917) (upholding by a 5-1-3 vote state authority to regulate railroad employee wages); German Alliance Ins. Co. v. Lewis, 233 U.S. 389 (1914) (upholding by a 6-3 vote state authority to regulate fire insurance rates); Brass v. North Dakota ex rel. Stoeser, 153 U.S. 391 (1894) (upholding by a 5-4 vote state power to regulate grain warehouse rates in the absence of any showing that warehouse occupied a monopoly position).

115. See, e.g., Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 602 (1935); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922); Great N. Ry. Co. v. Minnesota ex rel. State R.R. & Warehouse Comm'n, 238 U.S. 340, 346 (1915) ("The demands upon a carrier which lawfully may be made are limited by its duty . . . .").


117. There is a vast body of literature associated with the end of the so-called Lochner era in the mid-1930s. For a sample, see 1 Bruce Ackerman, We the People 48-49 (1991); Benjamin F. Wright, The Growth of American Constitutional Law 188-208 (Phoenix ed. 1967); Joseph Alsop & Turner Catledge, The 168 Days (1938); Richard C. Cortner, The Wagner Act Cases (1964); Edward S. Corwin, Court Over Constitution: A Study of Judicial Review as an Instrument of Popular Government 121-28 (1938); Edward S. Corwin, Constitutional Revolution, Ltd. 39-79 (1941); Alpheus T. Mason, The Supreme Court from Taft to Warren 85-113, 123-25 (1958); Michael E. Parrish, The Great Depression, the New Deal, and the American Legal Order, 59 Wash. & Lee L. Rev. 723, 728-35 (1984); Michael E. Parrish, The Hughes Court, the Great Depression, and the Historians, 4 Historian 286 (1978). Most of the points I make in the text are not in dispute, except as to the relative impact of external events and internal doctrinal changes on the Court's rejection between 1937 and 1943 of the Lochner-era approach to the Fourteenth Amendment. Compare Barry Cushman, Rethinking the New Deal Court, 80 Va. L. Rev. 201, 233 (1994) (emphasizing internal doctrinal changes as basis for rejection of Lochner-era approach) with Edward A. Purcell, Jr., Rethinking Constitutional Change, 80 Va. L. Rev. 277, 284-88 (1994) (suggesting that external events played a role as well). For the cases in which the Court rejected the Lochner-era approach, see Olsen v. Nebraska, 313 U.S. 236 (1941); United States v. Caroene Prods. Co., 304 U.S. 144 (1938); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934). As I am not attempting to address whether
extensive controls on privately-held rights, controls that the Court had previously considered beyond the reach of public authority in the absence of just compensation.\textsuperscript{118} The willingness of the executive and legislative branches to enact measures limiting such private rights, combined with their insistence that such limitations were essential both to redress the current economic crisis and to prevent a recurrence of such a crisis in the future, led to a series of direct conflicts between the judiciary and the coordinate branches concerning the proper scope of government authority.\textsuperscript{119} These conflicts placed considerable pressure on the Court's internal compromises and agreements that, though fragile at times,\textsuperscript{120} had enabled the Court to reach some consensus concerning those circumstances in which a public interest became a public right.

As the pressures from the Depression and the other two branches mounted, the Court began to admit that, insulated as it was, it might not be institutionally well-positioned to second-guess the legislature's determination regarding what action was necessary to ameliorate, and eventually end, the economic turmoil of the Great Depression.\textsuperscript{121} Responding to the mounting pressure, and perhaps to its own self-doubts, the Court, in cases such as \textit{Nebbia v. New York},\textsuperscript{122} and \textit{United States v. Carolene Products Co.},\textsuperscript{123} began to allow the legislature greater leeway to control and limit property and economic rights when the legislature, in its reasonable discretion, considered the limitation desirable.\textsuperscript{124} While modern commentators typically consider both \textit{Nebbia} and \textit{Carolene Products} to involve deprivations of liberty, rather than deprivations of property, two propositions from these cases would provide the foundation for the Court's subsequent takings jurisprudence.

First, in terms of takings doctrine, the \textit{Nebbia} Court rejected the notion that the Court should define a limited set of circumstances in

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{118} See 1 Ackerman, \textit{supra} note 117, at 48-49; Cushman, \textit{supra} note 117, at 252.
\item \textsuperscript{119} See 1 Ackerman, \textit{supra} note 117, at 48-49; Cushman, \textit{supra} note 117, at 234.
\item \textsuperscript{120} Even in the heyday of Lochnerism, the Justices could rarely agree as to which privately-held rights it should consider clothed with a public interest. \textit{See} \textit{Lochner v. New York}, 198 U.S. 45 (1905) (striking maximum hours statute as an improper deprivation of liberty by 5-4 vote); \textit{see also} HOWARD GILLMAN, \textit{THE CONSTITUTION BE-SIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWER JURISPRUDENCE} 114-46 (1993); Learned Hand, \textit{Due Process of Law and the Eight-Hour Day}, 22 \textit{HARV. L. REV.} 495 (1908).
\item \textsuperscript{121} Perhaps it would be more proper to say that the Court began to pay more attention to the principles of deference to the legislature it had always articulated. \textit{See} \textit{Nebbia v. New York}, 291 U.S. 502, 529 (1934) (suggesting that the Court had always resolved Due Process claims by examining whether government action was arbitrary).
\item \textsuperscript{122} 291 U.S. 502 (1934).
\item \textsuperscript{123} 304 U.S. 144 (1938).
\item \textsuperscript{124} \textit{See Carolene Prods. Co.}, 304 U.S. at 151-52; \textit{Nebbia}, 291 U.S. at 524.
\end{enumerate}
\end{footnotesize}
which the public interest would become a public right.125 Under the pre-Neibbia doctrine, the first inquiry was whether the government action addressed a right clothed in the public interest. If the government action did, then the only question was whether the government had acted arbitrarily or unreasonably. If, on the other hand, a government action addressed a purely private right—a right not clothed in the public interest—then the action was an unconstitutional deprivation of private property. The Neibbia Court rejected this doctrinal approach, holding that it would consider any right to be clothed in the public interest as long as control of the right was "for adequate reason" necessary "for the public good."126 Under Neibbia, the government would deprive an individual of property without due process only in cases in which the government acted arbitrarily or unreasonably.127 In essence, Neibbia gave the public a legal right to pursue the common good.

With this assertion that the public had a legal right to its desires, the Neibbia Court not only authorized state regulation of the retail price of milk, the property or liberty right at issue in the case,128 it also radically expanded the ability of government to limit property rights without providing compensation. If, under the harm-benefit line, cognizable harm refers to an interference with or frustration of another's right, including publicly-held rights, and the public has a right to pursue the common good, then any privately-held right whose exercise or existence interferes with or frustrates attainment of the public good would necessarily injure the public's rights. By interfering with the public's right to advance the common good, the privately-held right would be causing cognizable harm within the meaning of the harm-benefit line, and government could therefore change, limit, or even eliminate the privately-held right under the police power without compensation.129

125. Neibbia, 291 U.S. at 536.
126. Id.
127. Id. at 538-39.
128. See id. at 515, 523 (discussing scope of government authority over both property and freedom of contract).
The potential reach of such an interpretation of the harm prevention rationale is enormous. For example, convenient transportation, convenient mail service, and an adequate national defense all undoubtedly promote the common good. In a variety of circumstances, privately-held rights might prevent government from satisfying these needs. A particular landowner might seek to use his or her land in a manner other than as a freeway, post office, or air force base, even though use of the land in one of these capacities was necessary to advance the common good. Given these facts, the landowner would be exercising his or her rights in a manner that interfered with the public's right to provide for the common good, and would be causing cognizable harm to the rights of another. If the Court took *Nebbia*’s announced principle literally, the Court should presumably allow government to change, limit, or eliminate the privately-held rights without providing compensation to prevent the harm to the public’s welfare that would otherwise ensue. Under such a broad interpretation of harm prevention, even government action that resulted in physical invasion or acquisition of title, if reasonably necessary to serve the common good, could qualify as a harm-preventing police power regulation, and would therefore avoid the compensation requirement.\(^{130}\) Taken literally, *Nebbia* would give the legislature complete discretion to determine when a deprivation of private property warranted an award of compensation.

Of course, the modern Court has generally not permitted government acquisition or physical invasion of private property without compensation even when the action was necessary to advance the general welfare,\(^ {131}\) and has therefore not accepted the furthest implications of *Nebbia*.\(^ {132}\) Nevertheless, by rendering the underlying basis of the early Court's harm-benefit line meaningless, *Nebbia* requires some al-

\(^{130}\) While such a suggestion may seem outlandish to some, the Court has accepted such an argument with respect to the federal navigation servitude. Because of the public’s compelling need to provide for adequate navigation on the nation’s waterways, the federal government may physically invade privately-held land without providing compensation. *See, e.g.*, United States v. Kansas City Life Ins. Co., 339 U.S. 799, 809-10 (1950); Sanguinetti v. United States, 264 U.S. 146, 149 (1924); United States v. Cress, 243 U.S. 316, 327-28 (1917); Bedford v. United States, 192 U.S. 217, 225 (1904); United States v. Lynah, 188 U.S. 445, 468-70 (1903).

\(^{131}\) *See* Loretto v. Teleprompter, Manhattan CATV Corp., 458 U.S. 419, 433-41 (1982); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); *see also* Nollan v. California Coastal Comm’n, 483 U.S. 825, 831-32 (1987) (conditioning of building permit on homeowners’ grant of easement across their land is a taking, unless justified by a harm caused by the permitted activity); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011 (1984) (deprivation of right of exclusivity with respect to preexisting trade secret is a taking).

\(^{132}\) If it had, then the Takings Clause would essentially be gone, and only substantive due process would serve as a check on government control of private property. *See* Lunney, *supra* note 4, at 1923-24 & n.133; *cf.* Krier, *supra* note 28, at 7.
ternative definition of cognizable harm if a harm-prevention rationale is to provide any assistance in separating compensable restrictions on privately-held property from noncompensable restrictions.

Second, the Court in *Nebbia* and *Carolene Products* also provided a policy justification for its decision to retreat from enforcing the protections that the Constitution might appear to extend to property and economic rights. Both cases emphasized the need for judicial deference to legislative judgments concerning the need for, or desirability of, redistributions of property. In *Nebbia*, the Court noted as a jurisprudential matter that the legislature, composed of the elected representatives of the people, was the proper branch to identify which limitations on property rights were necessary to advance the public welfare. The legislature, rather than the courts, should set social policy. As the *Nebbia* Court explained:

> [s]o far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it.

In *Carolene Products*, the Court continued to emphasize the need for judicial deference to the legislative branch on economic issues. The Court justified such deference by suggesting that the political process itself would adequately protect property and economic rights from inappropriate government action, making Court review of the legislative decisions with respect to such interests largely unnecessary. As long as those who would be adversely affected by a proposed property redistribution had a reasonable opportunity to present their concerns to the legislature, the legislature would likely balance the burdens and benefits associated with the redistribution fairly, and place the cost on those best able, from a societal perspective, to afford...
The Carolene Products Court suggested that (1) the legislature could be trusted to redistribute property fairly, and (2) because courts are, in any event, ill-equipped to second-guess the legislature's determination as to whom should bear the burden of such a redistribution, the Court should allow the legislature virtually complete discretion to decide when a government-imposed property redistribution warranted compensation.  

These two propositions, one doctrinal and one jurisprudential, together would reshape the way in which the Court viewed the harm-benefit line, and redefine the extent to which government may change, limit, or even eliminate privately-held property rights in the absence of just compensation. The first proposition, that the public has a right to pursue the common good, has led the current Court to question whether the harm-benefit line retains any underlying meaning, or, alternatively, has simply become a convenient way of phrasing the Court's conclusion. At the same time, the second proposition, that we can trust the legislature to redistribute property fairly, and the varying extent to which it has proven persuasive to particular Justices at particular times, has led the present Court to develop two quite different definitions of what constitutes cognizable harm, and to develop two correspondingly different definitions of the scope of government's authority over private property in the absence of just compensation.

D. Modern Applications: Expanding the Police Power and Redefining Harm

The Court's analysis in three cases, Penn Central Transportation Co. v. New York City, Lucas v. South Carolina Coastal Council, and Dolan v. City of Tigard, illustrates the Court's struggle to define what role, if any, the harm-benefit line should play today. In each case, government acted to prohibit or condition a land use that would otherwise have caused harm in the ordinary sense of the word. In Penn Central, the City of New York acted to prohibit Penn Central from using its property rights associated with the Grand Central Terminal in a manner inconsistent with the terminal's historic architecture. In Lucas, the State of South Carolina acted to prohibit petitioner David Lucas from using his land in a manner that might

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137. See id. at 151-52. There, the Court suggested that only in those cases where an underlying flaw is present in the political process, should courts scrutinize legislative action more carefully. Id. at 152 n.4.

138. See id. at 151-52; see also Day-Brite Lighting, 342 U.S. at 423 ("[The Court does] not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare.").

139. See infra text accompanying notes 140-84.


have exacerbated coastal erosion and threatened the native flora and fauna, as well as the economic health of the region. In Dolan, the City of Tigard granted Florence Dolan a permit to expand her hardware store and pave her parking lot, but sought to condition the land-use permit so that her actions would not worsen traffic congestion or increase the flooding risks associated with an adjacent creek.

In none of these cases would the prohibited activity have interfered with the rights of neighboring landowners in a way that would have been actionable under private nuisance law, nor would they have interfered with, or frustrated, in any cognizable way, the neighboring landowners’ legal rights in their land, as the prohibited land uses had in Reinman, Hadacheck, and Miller. As a result, in deciding each case, the Court had to confront the void left by Nebbia and determine whether the government action required compensation, given that the action was reasonably intended to prevent the individual landowner from exercising its, his, or her property rights in a way that would have frustrated the government’s attempt to advance the common good.

1. *Penn Central Transportation Co. v. New York City*

In writing for the majority in *Penn Central*, Justice Brennan simply denied that the harm-benefit line had ever required anything more than a showing that the government action was “reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all similarly situated property.” So long as government action was “designed to promote the public welfare,” neither “diminution in property value, standing alone,” nor a substantially uneven distribution of benefits and burdens, would establish a taking.

While the Court based its analysis almost entirely on half-true, and otherwise misleading, interpretations of the Court’s early takings jurisprudence, its conclusion that government can act to prevent private property rights from frustrating government’s pursuit of the common good closely parallels the conclusion the *Nebbia* Court had reached forty-four years earlier. Moreover, the Court’s implicit suggestion that the legislature can generally be trusted to adjust fairly the benefits and burdens of economic life to promote the common good, and its later express statement that it was ill-positioned to

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143. See supra notes 79-92 and accompanying text.
144. See supra notes 121-39 and accompanying text.
146. Id. at 131, 133-34.
147. See Lunney, supra note 4, at 1927-32.
148. The Court draws a contrast between government action that “can be characterized as a physical invasion by government,” and government action “adjusting the benefits and burdens of economic life to promote the common good.” *Penn Central*, 438 U.S. at 124. The Court suggests that “[a] ‘taking’ may more readily be found” in the first situation than in the second, id., adopting Professor Sax’s suggestion that we
second-guess the city's determination of the value of preserving historic architecture,\textsuperscript{149} seem to echo the themes of deference to the legislature so powerfully articulated in both \textit{Nebbia} and \textit{Carolene Products}.

The \textit{Penn Central} Court, however, recognized that if it adopted such a broad definition of harm, without providing some exceptions, it would leave the legislature with essentially complete discretion as to when compensation should be provided for disaffected property owners, and would thereby render the Just Compensation Clause precautory.\textsuperscript{150} To avoid that result, the \textit{Penn Central} Court suggested in dicta several exceptional circumstances in which government action would amount to a taking even though it substantially advanced the public welfare. Specifically, the Court suggested that government action, even though it substantially advanced the public welfare,\textsuperscript{151} would constitute a taking if the action either: (a) entailed a physical invasion,\textsuperscript{152} (b) denied a property owner all “reasonable beneficial use” of the physical property affected by the government action,\textsuperscript{153} or (c) effectively acquired property for a uniquely governmental function.\textsuperscript{154}

If we recognize “benefit extraction” as simply a label applied to those government actions requiring compensation, then these “exceptional circumstances” categories of government action would constitute the only instances of cognizable benefit extraction. Only in these instances is government effectively requiring the individual to dedicate his or her property to public use. Only in these instances, therefore, will the Court require compensation. In all other cases, government is merely prohibiting the individual from exercising his or her property rights in a manner that the people’s elected representatives have determined to be harmful.

Yet “harm” and “benefit” are not simply legal labels, applied after the fact to the Court’s previously determined conclusion.\textsuperscript{155} Harm can trust the government to distribute benefits and burdens fairly when it is acting as arbitrator, but not when it is acting as enterprise. See Sax, \textit{supra} note 9, at 62-63.

\textsuperscript{149} \textit{Penn Central}, 438 U.S. at 134-35 (“Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole—which we are unwilling to do—we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law.”).

\textsuperscript{150} At least one commentator has suggested that James Madison intended the Compensation Clause to be largely precautory. See William Michael Treanor, \textit{Note, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment}, 94 \textit{Yale L.J.} 694, 708, 710-12 (1985).

\textsuperscript{151} As the \textit{Penn Central} Court recognized, “[i]t is, of course, implicit . . . that a use restriction on real property may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial public purpose.” \textit{Penn Central}, 438 U.S. at 127.

\textsuperscript{152} \textit{Id.} at 124.

\textsuperscript{153} \textit{Id.} at 138.

\textsuperscript{154} \textit{Id.} at 135.

\textsuperscript{155} For example, in 1987, the Court, by a 5-4 vote, found that a Pennsylvania statute intended to prevent the subsidence of significant parts of Pennsylvania was not
prevention and benefit extraction have not only a legal meaning, but also an ordinary meaning that exerts a powerful pull on our subconscious and implicates our underlying sense of propriety and responsibility. As a result, the Penn Central majority was careful, even while downplaying the need for the prohibited use to be “noxious,” to emphasize the value and importance of preserving historic architecture, and to suggest the harmful, even wrongful, nature of Penn Central’s attempt to destroy such architecture. The dissent, too, felt the harm-benefit line’s pull. It emphasized the affirmative duties the Landmark Law places on Penn Central, and suggested that the Landmark Law required Penn Central to give up its development plans for the affected land and preserve the building’s historic character “for the benefit of sightseeing New Yorkers and tourists.” At some level, both the majority and dissent recognized that if their characterization of the government’s action in terms of harm prevention or benefit extraction prevailed, they would have a significant edge in dictating the Court’s resolution of the takings issue.

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156. Penn Central, 438 U.S. at 133 n.30.
157. Id.
158. Id. at 146 (Rehnquist, J., dissenting) (“Appellees have placed an affirmative duty on Penn Central to maintain the Terminal in its present state and in ‘good repair.’”)
159. Id. at 147 (“Here, however, a multimillion dollar loss has been imposed on appellants.”)
160. Id. at 146 (Rehnquist, J., dissenting) (“The city of New York, because of its unadorned admiration for the design, has decided that the owners of the building must preserve it unchanged for the benefit of sightseeing New Yorkers and tourists.”)
161. Such characterization wars also took place in Nollan v. California Coastal Commission. Compare Nollan, 483 U.S. 825, 831 (1987) (“Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach... we have no doubt there would have been a taking.”) with id. at 843-44 (Brennan, J., dissenting) (“In this case, California has employed its police power in order to condition development upon preservation of public access to the oceans and tidelands.”).
2. Lucas v. South Carolina Coastal Council

Like Irving162 and Loretto163 before it, the Court's decision in Lucas v. South Carolina Coastal Council164 took one of the “exceptional circumstances” Justice Brennan had suggested in Penn Central and applied it.165 Specifically, the Lucas Court took Justice Brennan’s suggestion that the Court would find a taking in those cases in which government action deprived a property owner of all reasonably beneficial use of his or her property,166 even if the action was necessary to effect a substantial public purpose.167 As in Irving and Loretto, the Lucas majority’s decision to not merely recite one of the Penn Central factors, but to find a taking based on it, drew a heated dissent.168 As the dissenting Justices argued, enforcing the Compensation Clause


163. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (even if necessary to advance a substantial government objective, government action that requires permanent physical invasion is a taking); see also Nollan v. California Coastal Comm’n, 483 U.S. 825, 831-32 (1987); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011 (1984); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); cf. Yee v. City of Escondido, 503 U.S. 519 (1992) (government action that may entail permanent presence of individuals on another's land not a taking because individuals were originally invited onto the other's land).


165. In Irving, the Court found a taking because the government action was not substantially related to achieving the government’s objective. Irving, 481 U.S. at 718. In Loretto, the Court found a taking because the government action, while substantially related to advancing the public welfare, entailed a physical invasion (or deprivation of the right of exclusive occupancy). Loretto, 458 U.S. at 433-41.

166. By substituting the word “property” for the word “land,” which had appeared in the Court’s previous recitations of the denial of all economically viable use test, the Lucas Court reopened the question of the proper denominator for calculating the extent of the diminution. See Lucas, 112 S. Ct. at 2894 n.7. The Court suggested that courts should determine the proper denominator by examining “the owner’s reasonable expectations [as] shaped by the State’s law of property.” Id. As Justice Kennedy noted, however, in his concurrence, such an approach runs the risk of circularity; “for if the owner’s reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is.” Id. at 2903 (Kennedy, J., concurring).


168. See Lucas, 112 S. Ct. at 2904 (Blackmun, J., dissenting) (“Today the Court launches a missile to kill a mouse.”), at 2917 (Stevens, J., dissenting); see also Loretto, 458 U.S. at 442 (Blackmun, Brennan, White, JJ., dissenting). While the Court's decision in Irving did not draw a dissent, six members of the Court who joined the majority opinion concurred specially to address what effect, if any, its decision had on the validity of Andrus v. Allard, 444 U.S. 51 (1979). Compare Irving, 481 U.S. at 718 (Brennan, Marshall, Blackmun, JJ., concurring specially) (Court’s decision had no effect on Allard ruling) with id. at 719 (Scalia, Rehnquist, Powell, JJ., concurring specially) (Court’s decision effectively overruled Allard ruling). Two other Justices concurred in the Court’s conclusion that the government action was unconstitutional, but reached that result on Procedural Due Process grounds. Id. at 730-31 (“The Due Process Clause of the Fifth Amendment required Congress to afford reasonable no-
even in such "extraordinary circumstance[s]" is inconsistent with the Court's theme of judicial deference to the legislature on property rights issues in *Nebbia* and *Carolene Products*.

As in *Penn Central*, the *Lucas* Court attempted to address what role, if any, the harm-benefit line should play in separating compensable government redistributions of property from noncompensable redistributions, and like the *Penn Central* Court, seemed to be of two minds concerning the line. Consciously, the *Lucas* Court expressly rejected the harm-benefit line as a useful test for separating compensable government action from noncompensable. "[T]he distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder." Yet, at the same time, the Court incorporated the harm-benefit line into its analysis in at least two ways.

First, the Court justified its per se rule by reiterating the difference between government action that prevented a harm, and government action that extracted a benefit.

Surely, at least in the extraordinary circumstances where 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," in a manner that secures an "average reciprocity of advantage" to everyone concerned . . . .

On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—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.\textsuperscript{173}

The Court went on to compare such a complete, or near-complete,\textsuperscript{174} use prohibition to the creation of a wildlife park through formal condemnation and noted that “the benefits flowing to the public from the preservation of open space” would be the same whether the government formally acquired the land or simply prohibited its development.\textsuperscript{175} Moreover, in concluding this part of its opinion, the Court described the government action as requiring Lucas to “sacrifice” his property “in the name of the common good,”\textsuperscript{176} justifying the Court’s conclusion that “he ha[d] suffered a taking.”\textsuperscript{177}

Second, in addition to justifying its per se rule almost exclusively in terms of benefit extraction, the Court went on to create an exception to its rule when the government acts to prevent, or remedy, serious harm. Specifically, the Court ruled that government action will not constitute a taking, even if it deprives an owner of all economically viable use of his or her real property, if the same result “could have been achieved in the courts—by adjacent landowners . . . under the State’s law of private nuisance, or by the State under its complementary power to abate public nuisances that affect the public generally,

\textsuperscript{173} Id. at 2894-95 (emphasis added).

\textsuperscript{174} The South Carolina Beachfront Management Act allowed Lucas to construct a wooden walkway and a small wooden deck, \textit{id.} at 2889 n.2, and presumably would allow Lucas to use his land for nondevelopmental uses, such as “fishing or camping.” \textit{id.} at 2919 n.3 (Stevens, J., dissenting).

\textsuperscript{175} \textit{Id.} at 2895 (quoting Justice Brennan’s dissent in \textit{San Diego Gas & Elec. Co. v. City of San Diego}, 450 U.S. 621, 652 (1981)). \textit{Cf. Agins v. City of Tiburon}, 447 U.S. 255, 261 (1980) (“The State of California has determined that the development of local open-space plans will discourage the ‘premature and unnecessary conversion of open-space land to urban uses.’ The specific zoning regulations at issue are exercises of the city’s police power to protect the residents of Tiburon from the ill-effects of urbanization.”) (footnotes and citation omitted).

\textsuperscript{176} \textit{Lucas}, 112 S. Ct. at 2895.

\textsuperscript{177} \textit{id.}

\textsuperscript{178} The Court distinguished government regulations that affect personal property “by reason of the State’s traditionally high degree of control over commercial dealings.” \textit{Lucas}, 112 S. Ct. at 2899. Providing a different degree of protection for real and personal property is both inconsistent with the literal words of the Just Compensation Clause, which extends its protection to “private property,” not “land” or “chattels real,” and is also inconsistent with the results the Court actually reached in applying the takings clause from 1960 to 1984. During that time period, the Court struck as takings three measures that affected personal property, while striking only two that affected real property. \textit{See Ruckelshaus v. Monsanto Co.}, 467 U.S. 986 (1984) (government action affecting trade secret rights is a taking); \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419 (1982) (government action that affected right of exclusive occupancy for space on roof of apartment building is a taking); \textit{Webb’s Fabulous Pharmacies, Inc. v. Beckwith}, 449 U.S. 155 (1980) (government action that transferred incident of ownership associated with monetary fund is a taking); \textit{Kaiser Aetna v. United States}, 444 U.S. 164 (1979) (government action that affected right of exclusive occupancy of marina is a taking); \textit{Armstrong v. United States}, 364 U.S. 40 (1960) (government action that destroyed value of materialmen’s liens is a taking).
or otherwise.” The category “otherwise,” the Court noted, would encompass state destruction of real property “in cases of actual necessity, to prevent the spreading of fire, or to forestall other grave threats to the lives and property of others.”

Thus, the *Lucas* opinion suggests a two-tier definition of harm. For government action addressed to sufficiently serious harm, harm that would amount to an actionable common-law nuisance or present a “grave threat to the lives and property of others,” the Compensation Clause will permit the government to take, or even destroy, private property without compensation if that action is reasonably necessary to address the potential harm. For government action that does not address such serious harm, but only seeks to advance the public welfare more generally, the Compensation Clause will permit the government to impose substantial restrictions on private property if that action is reasonably necessary to advance the common good. However, no matter how important the public interest, if the government action does not address a serious harm, government action may not cause a physical invasion, a denial of all economically beneficial use, or an acquisition of property for a uniquely governmental function in the absence of compensation.

3. *Dolan v. City of Tigard*

In both *Penn Central* and *Lucas*, the Court attempted to distance itself from the harm-benefit line, yet found itself inevitably returning to the line as an appropriate means of describing how far government can go before the Court will require compensation. In *Dolan v. City of Tigard*, the Court expressed no qualms over adopting the principle of responsibility reflected in the harm-benefit line. In *Dolan*, Florence Dolan sought a building permit from the City of Tigard to expand her hardware store and pave her parking lot. The expansion of Dolan’s hardware store would increase traffic congestion in the area, while the paving of her parking lot would increase the potential

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180. Id. at 2900 n.16; see also Levmore, supra note 23, at 1335-40 (suggesting that there is and ought to be a symmetry between what the government can accomplish without paying compensation under the police power and what the government or other individuals can accomplish without paying compensation under tort law).
181. *Lucas*, 112 S. Ct. at 2900 n.16 (citing Bowditch v. Boston, 101 U.S. 16 (1880)).
182. In cases of such potentially serious harm, the Court may even allow a permanent physical invasion of an individual’s land. Cf. *Jackman v. Rosenbaum Co.*, 260 U.S. 22 (1922) (holding a city’s authorization of the construction of common firewalls extending six inches onto neighboring property not to be a taking because land ownership never included right to prevent physical invasion to construct common firewall).
183. In footnote 8, the *Lucas* Court hinted at additional categories in which government action advancing the public interest generally would constitute a taking. *Lucas*, 112 S. Ct. at 2895 n.8.
for flooding of nearby Fanno Creek. Before it would grant Dolan the building permit she needed to undertake her desired renovations, the city imposed two conditions, requiring that she (1) dedicate her land within the 100-year floodplain to the city as a greenway, and (2) dedicate an additional fifteen feet of her land to the city for use as a bicycle/pedestrian trail. The city intended both of these conditions to address the dangers of traffic congestion and increased flooding to which Dolan's proposed expansion would contribute.

In reviewing the conditions, the Court noted that the police power would justify government limitations on property rights reasonably necessary to prevent or minimize traffic congestion or the risk of flooding. But neither traffic congestion nor an increased, but still indefinite, threat of flooding, would warrant "simply requiring [Dolan] to dedicate a strip of land along Fanno Creek to public use." The city may use Dolan's desire for a building permit to induce Dolan to dedicate the desired land to the city by making such dedication a condition of receiving the building permit. Imposing such a condition will satisfy constitutional standards, however, only if the condition addresses a harm that the permitted activity is reasonably likely to cause. Moreover, the condition must be roughly proportional "both in nature and extent to the impact of the proposed development."

Thus, when a landowner seeks a building or other land-use permit, government may condition its grant of the permit in ways designed to address the problems to which the permitted land use will contribute. However, the Constitution will allow government to so condition a land-use permit only to the extent necessary to address the harm reasonably associated with the permitted land use: that is the harm the

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185. Id. at 2314.
186. While the Court found a sufficient nexus between the dedication of land within the 100 year floodplain and the risk of increased flooding created by Dolan's paving of her parking lot, Id. at 2318, my personal experience with flooding suggests that the nexus between the two is slight. While paving the lot will lead to faster and increased run-off into Fanno Creek, it will not likely lead to additional flooding immediately adjacent to the parking lot. Rather, the additional run-off will flow down the Creek until it hits a bottle-neck. At that point, the additional run-off may increase the risk of flooding, either by causing the Creek to flood where it had not flooded historically, or by making the flooding more severe where it had flooded historically. But the greenway adjacent to the hardware store does not address the potential harm from such downstream flooding. Only if the likely bottle-neck happens to be immediately downstream of the hardware store and its parking lot would the dedication of a greenway adjacent to the hardware store mitigate, or even address, the additional flooding risk created by paving Dolan's parking lot.
187. Id. at 2321.
188. Id. at 2321-22.
189. See id. at 2318; see also Nollan v. California Coastal Comm'n, 483 U.S. 825, 837-38 (1987).
190. Dolan, 114 S. Ct. at 2320.
land use causes; that is the harm the government may require the landowner to remedy.

II. ANALYZING THE HARM-BENEFIT LINE: RATIONALES, JUSTIFICATIONS, AND EXCUSES

Despite the difficulties that Nebbia's expansive definition of harm presented, the harm-benefit line has continued to play an important role in takings jurisprudence. While the Court has come to accept generally Nebbia's expansive definition of government authority, and its underlying justification of deference to the legislature on issues involving the redistribution of private property, it has separated "serious" harm, or harm that rises to the level of a common-law nuisance or poses an immediate threat to life or property, from "less serious" harm, or other threats to the public welfare. For property rights, the existence or exercise of which threatens serious harm, the Court follows the standard formulation of the harm-benefit line: government action that prohibits such harm is not compensable even if it entails a complete destruction of the property at issue. For property rights, the existence or exercise of which threatens less serious harm, the Court allows the legislature nearly complete discretion to decide whether to provide compensation for any given redistribution of property. The Court has limited the legislature's discretion by stepping in and enforcing the constitutional right to compensation only when the government action entails physical invasion, a denial of all economically beneficial use, or acquisition of property for uniquely governmental functions.

Perhaps more important than its continuing influence on formal takings doctrine, however, is the harm-benefit line's continuing intuitive attraction. Even when the Court has tried to reject the line expressly, it inevitably seems to return to the line as a natural way of describing the duties government may properly impose on individual property owners. While the members of the Court may disagree on the extent to which government may prohibit a "harmful" land use without incurring responsibility for compensation, the sense that someone who causes a problem ought to be responsible for remediying it remains a powerful, and widely-shared, principle.

The following sections explore the various rationales that courts have offered in support of the harm-benefit line, beginning with an examination of factual causation as justification for the harm-benefit line. In evaluating the adequacy of these rationales, we should also examine the related question of how the law can distinguish government action that prevents harm from government action that extracts a benefit. Presumably, if we can identify the reason why courts should allow the government to take property without compensation to prevent harm, that understanding should explain why any particular government action either requires or does not require compensation, and
would permit us to attach the appropriate label, either "benefit-extraction" or "harm-prevention." As a corollary, if one of the proffered rationales does not provide a means to distinguish harm-prevention from benefit-extraction, that failure suggests that the rationale cannot justify the harm-benefit line.

A. Factual Causation as Rationale for the Harm-Benefit Line

Probably the most common and universally accepted rationale for the harm-benefit line lies in the principle that one who causes a problem should be responsible for remedying it.\(^{191}\) Under this principle, when government acts to prohibit the exercise of, or to eliminate, a potentially harmful property right, such action should not require compensation because it places the burden of remedying the harm on the individual who, but for the government action, would have caused the harm.

Applying this principle, the pre-\textit{Nebbia} Court approved uncompensated government action that compelled railroads to provide grade crossings, fence their rail-lines, and provide drainage through their embankments.\(^{192}\) In each case, the Court explained that the railroad, being the factual cause of the problem, could be held responsible and forced to bear the cost of remedying the problem.\(^{193}\) The Court's decision in \textit{Chicago, Burlington & Quincy Railway v. State of Illinois ex rel. Drainage Commissioners}\(^{194}\) illustrates the central role that factual causation played in defining the extent to which government could burden particular individuals with the cost of preventing particular harms.


\(^{193}\) See \textit{Erie R.R. v. Board of Public Utility Comm'rs}, 254 U.S. at 410 ("[T]he State... has a constitutional right to insist that [places to which the public is invited] shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger.") (emphasis added); \textit{Chicago & A.R.R. v. Tranbarger}, 238 U.S. at 77 (regulation did not require compensation because "[t]he present regulation is for the prevention of damage attributable to the railroad embankment itself"); \textit{Chicago, B. & Q. Ry. v. Illinois ex rel. Drainage Comm'rs}, 200 U.S. at 592-94; \textit{Chicago, B. & Q.R.R. v. Chicago}, 166 U.S. at 255 (expense of gate crossings "necessarily result from the maintenance of a public highway"); as a result, state can force railroad to bear cost of providing such crossings); \textit{Minneapolis & S.L. Ry. v. Emmons}, 149 U.S. at 367 (State can force railroads to bear the expense of fencing their lines because "[t]he operating of railroads without fences and cattle guards undoubtedly increases the danger which attends the operation of all railroads.").

\(^{194}\) 200 U.S. 561 (1906).
In Chicago, Burlington & Quincy Railway, the state sought to widen an existing natural river to improve the drainage of certain upstream lands. The railroad had constructed a bridge across the river that could not coexist with the planned widening of the river. For the state to proceed with its drainage plans, someone had to remove the existing railroad bridge, widen and deepen the river's natural channel, and build a new railroad bridge across the widened channel. To widen and deepen the natural channel, someone would have to remove materials, such as stones and timbers, that had been placed in the waterway by the railroad in building its existing bridge, as well as additional natural soils. The state directed the railroad to undertake these activities. When the railroad refused, the state sought a writ of mandamus to compel "the railway company to forthwith enlarge, deepen and widen the waterway." \(^{195}\)

The Court broke the various expenses associated with improving the river's drainage into three categories. First, the Court held that the state could require the railroad to bear the cost of removing the existing bridge and the materials that the railroad had placed in the river bed to support the existing bridge. By placing "the obstructions . . . in the way of enlarging, deepening and widening of the channel," \(^{196}\) the railroad had caused the need to remove these materials, and should properly bear responsibility for removing them. Second, the Court held that the state could require the railroad to bear the cost of installing the new bridge. \(^{197}\) "[U]nless [the railroad] abandons or surrenders its right to cross the creek," the Court explained, the railroad's need to cross the river created the need for a new bridge. \(^{198}\) As a result, the state could properly force the railroad to bear responsibility for this expense. Third, because the railroad had not created the need for improved drainage of the upstream lands, the state could not force the railroad to bear the expense of widening or deepening the channel, aside from requiring the railroad to remove the obstacles that it had placed in the channel. \(^{199}\) In essence, the state could require the railroad to redress that portion, and only that portion, of the drainage problem the railroad had caused.

More recent cases, particularly the conditional permit cases, confirm that courts are assigning responsibility for remedying a particular harm to a particular property owner based on factual causation. For example, in Nollan v. California Coastal Commission, the State of California sought a lateral easement from the Nollans in return for a

\(^{195}\) Id. at 568 (statement of prior history).
\(^{196}\) Id. at 594. Justices Holmes, White, and McKenna disagreed on this point. Id. at 595 (Holmes, J., concurring) ("But the public must pay for the widening or deepening, and I think that it does not matter whether what it has to remove is the original earth or some other substance lawfully put in the place of the original earth.").
\(^{197}\) Id. at 594-95.
\(^{198}\) Id. at 595.
\(^{199}\) Id.
building permit. However, the Nollan Court denied the state the authority to impose such a condition on the Nollan’s building permit. Because the Nollan’s planned renovations did not create the need for the lateral easement, the state could not require them to bear the expense of remediating it. On the other hand, in Dolan v. City of Tigard, Florence Dolan had, through her land use, contributed to the problems the city was trying to address. Because she played an active role in causing the problems, the city could require her to bear a part of the expense of remediating the problems. In assigning Dolan a share of these expenses, the City could constitutionally require Dolan to bear only that portion of the expense roughly proportional to her active contribution to the problem.

Before exploring whether factual causation can justify the harm-benefit line, the following sections consider other rationales courts have offered in support of the line.

B. “Formal” Rationales for the Harm-Benefit Line

In Mugler v. Kansas, Justice Harlan articulated three formal propositions that he believed justified a refusal to provide compensation when the legislature prohibited a use of property that it had determined to be prejudicial to the public interest. First, Justice Harlan expressed the view that the Fourteenth Amendment did not impose any constraint upon the states’ “exercise of their powers for the protection of the safety, health, or morals of the community.” In asserting such a proposition, Justice Harlan relied on a series of Contracts Clause cases, and on those cases, such as Barbier v. Connolly, in which the Court first interpreted the Due Process Clause of the Fourteenth Amendment.

Neither of these bases will support continued application of the harm-benefit line today. Under the Court’s Contracts Clause juris-

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201. Id. at 838-42. The Nollans’ willingness to enforce their right of exclusive occupancy did cause the lateral access problem, but the Court ruled that this harm was insufficiently serious to warrant state action in the absence of compensation which would deprive the Nollans of this right. See id. at 831-32.
203. Id. at 2319-20.
204. By labeling these rationales “formal” in a post-formalism world, I mean, obviously, to denigrate their ability to justify application of the harm-benefit line. These rationales are, in a sense, nothing more than conclusions, which in the absence of some underlying support, become mere excuses for application of the harm-benefit line.
205. 123 U.S. 623 (1887).
206. Id. at 664.
207. See id. at 664-65, 666-67 (relying on Butchers’ Union Co. v. Crescent City Co., 111 U.S. 746, 751 (1884), New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650, 675 (1885), and Fertilizing Co. v. Hyde Park, 97 U.S. 659, 667 (1878)).
208. 113 U.S. 27 (1884).
209. See Mugler, 123 U.S. at 663.
prudence, the state was free to destroy preexisting rights of contract unless it had expressly agreed to limit its power in that regard. Applying the same reasoning, Justice Harlan suggested that the State of Kansas could destroy preexisting private property rights because it had never agreed to limit its power over such property. Yet, unlike the Contracts Clause, the Compensation Clause does not require any such express undertaking by the state; in its own right, the Compensation Clause imposes an obligation on the state to provide compensation when the state takes preexisting private property rights. Moreover, while the narrow view of the Fourteenth Amendment as principally directed at slavery and equality for the freed slave may have been more consistent with the original intent of the drafters, the Court has long since abandoned such a narrow view. Beginning with the Fifth Amendment's Just Compensation Clause, the Court has incorporated most of the protections the Bill of Rights affords individuals against government power into the Fourteenth Amendment's Due Process Clause. Together, these incorporated protections place substantial constraints on the state's power to protect "the safety, health, and morals of the community."

210. As a general rule, the Court inevitably found that the State, as a legal matter, had not used language sufficiently clear for the Court to conclude that the State had expressly agreed to limit its police powers, even in those cases where an ordinary observer would find the terms of the contract perfectly clear. See Railroad Comm'n Cases, 116 U.S. 307, 339-40 (1886) (Harlan, J., dissenting) (State had expressly agreed to grant chartered railroads right to decide appropriate charges for their services). 211. Mugler, 123 U.S. at 669.

212. See United States v. Clarke, 445 U.S. 253, 257 (1980) (noting the "'self-executing character of the constitutional provision with respect to compensation'") (quoting 6 P. NICHOLS, LAW OF EMINENT DOMAIN § 25.41 (3d rev. ed. 1972)); see also Truax v. Corrigan, 257 U.S. 312, 329 (1921) ("[T]he legislative power of a State can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve.").


216. Even in areas that implicate the central aspects of the police power, such as the State's authority to control crime, the Fourteenth Amendment imposes substantial constraints on the State's actions. Thus, the Court has read the Fourteenth Amendment to require cities to make a place in their community for pornographic film exhibition, see City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54 (1986) (Fourteenth Amendment "requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city"), and to control the manner in which police interact with criminal suspects. See,
Second, Justice Harlan suggested that a prohibition of injurious use does not require just compensation because the government has not acquired an interest in the affected land. As a factual assertion, this is untrue. When the state prohibits a previously lawful use of land, the state acquires a legal right to control the affected land’s use that it did not have before, and to that extent obtains an interest in the land. But, even if we accept the factual proposition that the government did not acquire an interest in the land by prohibiting an injurious use, the Court has, in later cases, decisively rejected the view that the government must acquire an interest in the land before its actions will require compensation.

Third, Justice Harlan suggested that, because “all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community, no individuals can hold as property a legal right that, in its existence or exercise, injures the rights of another.” As a result, government action that prohibits a landowner from using his or her land in a manner that injures another’s rights has not taken a property right properly belonging to the landowner. In essence, the landowner never held the legal right to injure another’s rights in the first place.

e.g., Terry v. Ohio, 392 U.S. 1 (1968) (defining “stop and frisk” requirements that control whether state may convict a criminal suspect based upon evidence discovered during frisk of suspect).

217. See Mugler, 123 U.S. at 668-72.

218. See Wesley N. Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16, 30-32 (1913) (imposing a duty on one person always creates a correlative “right” for another).

219. See United States v. General Motors Corp., 323 U.S. 373, 378 (1945) (“In its primary meaning, the term ‘taken’ would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. ... The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking.”); United States v. Dickinson, 331 U.S. 745, 748 (1947); see also Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1004-05 (1984).

220. Mugler, 123 U.S. at 665.

221. Id.

222. In some cases, a court may properly assert that the property owner never had a legal right in the first place. When the state acts to evict a trespasser, or to enforce a preexisting regulation through fines, or otherwise, such action is generally not a taking because it has not changed the nature of the individual's preexisting legal entitlements. See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1006-07 (1984) (when data submitted under law that authorizes its use or disclosure by EPA, such use or disclosure is not a taking); Interstate Consol. St. Ry. v. Massachusetts, 207 U.S. 79, 84 (1907) (railroad began operations subject to duty to carry public school pupils at half-fare; enforcement of such preexisting duty is not a taking); see also Margaret J. Radin, Diagnosing the Takings Problem, in Compensatory Justice 248, 250 (John W. Chapman ed., 1991). But see Nollan v. California Coastal Comm’n, 483 U.S. 825, 833-34 n.2 (1987) (“Nor are the Nollans’ rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.”); Loretto v. Teleprompter Manhattan CATV Corp., 458
While this proposition has remained a popular one, when courts offer it as support for refusing to provide compensation under the harm-benefit line, the proposition is both factually untrue and jurisprudentially unsound. While their actions may have been harmful in some sense, until the government acted to change their legal rights, Hadacheck, Reinman, and Miller held the legal right to use their land in the manner to which their neighbors objected. Indeed, if they had not held such a legal right, government action changing their legal rights would have been unnecessary. Even Justice Harlan, in Mugler, appeared to recognize that the state's prohibition statute changed Mugler's previously existing property rights. Before Kansas enacted its prohibition statute, Mugler could legally use his real property to manufacture alcoholic beverages; after the statute's enactment, he could not. Thus, to assert that these individuals never held a legal right in the first place, and that the state action did not, therefore, change their legal rights at all would be factually untrue.

U.S. 419 (1982) (allowing Loretto to challenge installation of roof-top cable box as a taking even though the box was in place before she purchased the apartment building).

223. See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 n.20 (1987) ("The special status of this type of state action can also be understood on the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity."); see also Michelman, supra note 9, at 1235-37; Sax, Public Rights, supra note 15, at 155-61.

224. See Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) ("There was a prohibition of a business, lawful in itself, there as here."); see also Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 133-34 n.30 (1978) ("We observe that the uses at issue in Hadacheck, Miller, and Goldblatt were perfectly lawful in themselves."); Sax, Police Power, supra note 9, at 50.

225. Cf. Mugler, 123 U.S. at 669 ("It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors.").

226. The railroads, too, in the absence of state action to impose regulated rates, would have held the legal right to determine their own rates. Even if the railroads had set a rate above the reasonable rate, no passenger would have the legal right to demand travel unless he paid the agreed rate. See Block v. Hirsh, 256 U.S. 135, 156-57 (1921) (recognizing that in the absence of state action, no person could dwell in apartment unless she paid the agreed rent); see also Oliver Wendell Holmes, Jr., Privilege, Malice, and Intent, 8 Harv. L. Rev. 1, 3, 8 (1894), reprinted in Oliver Wendell Holmes, Collected Legal Papers 117 (1921). Professor Carol Rose apparently believes the fiction, however. See Carol M. Rose, Property as Wealth, Property as Propriety, in Compensatory Justice 223, 224 (John W. Chapman ed., 1991). She relies on the work of Harry N. Scheiber to argue that the common law did not recognize a legal right to charge a monopolistic price. Id. However, while some parts of Professor Scheiber's work can be read to support such a proposition, Scheiber's work, as a whole, supports the notion that the railroad did have a preexisting legal right, but that such right was subject to uncompensated government control because it was "affected with a public interest." See Harry N. Scheiber, The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts, 5 Perspectives in Amer. Hist. 329, 357-60 (1971) (affectation with a public interest used to define the scope of the police power).
Even though factually untrue, the notion that a harm-causing property right is not property at all may, nevertheless, prove to be a convenient legal fiction. Yet, as a fiction, it cannot justify itself, nor can it define its own limits. If we take the proposition that a potentially harm-causing property right is "not property" as literally true, and adopt Nebbia's broad definition of harm, then any property right, the existence or exercise of which interfered with the attainment of the common good would not exist in the first place. As a result, the government could destroy, or even acquire for itself, such "not property" without implicating the Constitution's Compensation Clause.\(^\text{227}\) The Court has refused, however, to adopt such a position. This rejection establishes that the "not property" rationale is simply a fiction, a convenient rationalization for a decision not to require compensation. As a result, the "not property" rationale cannot, on its own, explain why the Court should or should not provide compensation in any given case, and cannot therefore support the harm-benefit line.

C. Substantive Rationales for the Harm-Benefit Line

Aside from the cause-based principle of responsibility that underlies the line, courts have articulated four substantive rationales for allowing government to prohibit, without compensation, a harmful use of property. These are that: (i) such prohibition secures an average reciprocity of advantage; (ii) government inevitably must choose between incompatible uses, and as a result, neither choice should require compensation; (iii) a property owner has no reasonable expectation that he or she will be allowed to use her property in a harmful manner; and (iv) if government had to "purchase" potentially harm-causing property rights, it could not afford to do so. However, neither individually nor collectively do these rationales support the current takings doctrine, nor do they support the harm-benefit line given the present exceedingly broad definition of harm.

1. Prohibiting Harm Does Not Ensure an Average Reciprocity of Advantage

On a number of occasions, certain members of the Court have suggested that government action that prevents harm does not require compensation because such action secures an "average reciprocity of advantage."\(^\text{228}\) In evaluating "average reciprocity of advantage" as a

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\(^{227}\) See text accompanying notes 125-32 \textit{supra}; see also Lunney, \textit{supra} note 4, at 1923-24.

\(^{228}\) See \textit{Keystone Bituminous Coal Ass'n v. DeBenedictis}, 480 U.S. 470, 491 (1987) ("The Court's hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of average 'reciprocity of advantage' that Justice Holmes referred to in \textit{Pennsylvania Coal}.") see also Paul Burrows, \textit{Getting a Stranglehold with the Eminent Domain Clause}, 9 Int'l Rev. L. & Econ. 129, 144 (1989) (suggesting that government can take any property
justification for the harm-benefit line, we should consider two different meanings associated with the phrase. Neither, however, can justify reliance on the harm-benefit line to identify compensable takings.

First, for the pre-Nebraska Court, an average reciprocity of advantage arose when government effectively exchanged an existing property right for another of roughly proportional value. Such an exchange might occur expressly, as in the switch from the tort system to the workers' compensation system, or implicitly by placing an equivalent restriction on the rights of adjacent property owners. The classic example of an implicit exchange would be reasonable building setbacks applied uniformly to a series of residential lots in the same neighborhood. After the government imposed such setbacks, each landowner would have lost the right to cover his or her entire lot with a building, but each landowner would have benefitted from the same restriction placed on his or her neighbors' land. However, for a uniform restriction on similarly situated property to create an average reciprocity of advantage, the benefits associated with the restriction must lie disproportionately with the restricted property owners as compared to those not subjected to the property restriction. Only by providing the affected property owners a disproportionate benefit could a uniform restriction amount to an implicit exchange of one

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it wants without providing compensation because existence of government is principally responsible for value associated with property).


230. See Champlin Ref. Co. v. Corporate Comm'n, 286 U.S. 210 (1932) (modification of Rule of Capture upheld as securing average reciprocity of advantage); Gorieb v. Fox, 274 U.S. 603 (1927) (set-back requirements on individual lots upheld on same basis); New York Cent. R.R. v. White, 243 U.S. at 201-07 (1917) (switch from tort system to worker's compensation system as means to provide recovery for injured employees upheld on same basis).

231. See, e.g., Gorieb v. Fox, 274 U.S. 603.

232. For example, the early Court dealt twice with Pennsylvania statutes that required coal companies to leave certain coal unmined. In the first case, Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914), the Court upheld the statute against a takings challenge. However, in the second, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), the Court struck down the statute as a taking. In reaching its decision, the Pennsylvania Court distinguished Plymouth Coal on the grounds that the state statute at issue therein had "secured an average reciprocity of advantage," while the Kohler Act at issue in Pennsylvania Coal had not. Pennsylvania Coal Co., 260 U.S. at 415. The statute at issue in Plymouth Coal, the Court explained, required a strip of coal to be left unmined in order to provide for the safety of the coal companies' own employees. Id. ("But that was a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws."). As a result, the parties burdened by the state action, the coal companies, were also, through increased safety for their employees, the principal beneficiaries of the rights change. In contrast, the statute in Pennsylvania Coal required a strip of coal to be left unmined in order to benefit the owners of the surface estate. Id. Because the coal companies were not the principal beneficiaries of the Kohler Act, that statute did not secure an "average reciprocity of advantage."
right for another, and thereby secure an average reciprocity of advantage.

For example, in *Plymouth Coal*, the government required all coal companies to leave a strip of coal in place along their property lines when they abandoned a coal mine if such a strip might be necessary to prevent water from the abandoned mine from flooding an adjacent mine.\(^2\) By its terms, the statute burdened individuals who own, mine, and thereafter abandon a coal mine. The state placed this burden on the mine owners to reduce the risk of mine flooding. While both the burdened mine owners and the public will likely benefit from the statute, the statute principally benefitted the mine owners. By reducing the risk of mine flooding, the statute protects the property of the coal companies\(^3\) and the lives and safety of their employees.\(^4\) The increased coal reserves and increased mine safety that the statute generated may lead to lower prices for coal, a benefit that the public generally can enjoy. Because of this public benefit, we cannot say that the burdened mine owners were the sole beneficiaries of the statute. Nevertheless, we can assert that the burdened mine owners received the principal and direct benefit of the statute, and that whatever benefits the public received were secondary in that they followed from the benefits enjoyed by the burdened mine owners. In this situation, in which the parties burdened by the government action were also the principal beneficiaries of the action,\(^5\) the Court would find an average reciprocity of advantage and uphold the statute. The disproportionate benefit provided by the measure would implicitly compensate the affected property owners for their otherwise disproportionate burden.\(^6\)

Whatever the merits of allowing such implicit compensation to provide the "just compensation" required by the Compensation Clause, they are entirely independent of the harm-benefit line. If government wants to replace a tort-based system for compensating injured employees with a workers' compensation system, there is no need to require a showing that the tort-based system is "harm-causing" before the government can, without running afoul of the Compensation Clause, make the switch. As long as the exchange is just, in terms of the relative values of the exchanged rights, receiving the new right

\(^2\) *Plymouth Coal*, 232 U.S. at 541.

\(^3\) Although it is possible to remove coal after a mine is flooded, to do so is much more expensive. Protecting a mine from flooding, therefore, protects the ability of a coal company to remove the available coal.

\(^4\) *See Pennsylvania Coal*, 260 U.S. at 415.


\(^6\) *See id.; see also Epstein, Takings, supra note 4, at 204-10.*
adequately compensates the affected individuals for the taking of the old right.\textsuperscript{238} Consequently, the mandate of the Compensation Clause, to provide just compensation for such a taking, has already been satisfied.\textsuperscript{239} Given that compensation has been provided, whether the government action is properly characterized as harm-preventing or benefit-extracting is beside the point. Thus, average reciprocity of advantage, as the early Court defined that phrase, cannot support the harm-benefit line as a means to identify compensable takings.

Certain members of the Court have espoused a second definition of "average reciprocity of advantage" in recent years. While purporting to rely upon the early Court's average reciprocity of advantage jurisprudence,\textsuperscript{240} these Justices have defined average reciprocity of advantage quite differently. Under this second definition, government action that prevents harm inevitably secures an average reciprocity of advantage.\textsuperscript{241} As Justice Stevens explained, "[w]hile each of us is burdened somewhat by such [harm-preventing] restrictions, we, in turn, benefit greatly from the restrictions that are placed on others."\textsuperscript{242} These benefits, in Justice Stevens' view, more than compensate the property owner for the disproportionate burden government may impose in any given case. Thus, while the early Court asked whether the particular government action at issue returned a disproportionate benefit to the otherwise disproportionately burdened property owners, Justices sharing this second view of average reciprocity of advantage consider the "advantage" the burdened property owner receives from "living and doing business in a civilized community"\textsuperscript{243} adequate recompense for any given disproportionate burden government may decide to impose.

Yet, this second definition of "average reciprocity of advantage" also cannot justify using the harm-benefit line to identify compensable takings. Like the notion that a harm-causing property right is not property at all, the expanded notion of average reciprocity of advan-

\textsuperscript{238} See New York Cent. R.R., 243 U.S. at 203-04.
\textsuperscript{239} See Epstein, Takings, supra note 4, at 195-215.
\textsuperscript{240} In articulating the principle that government action which secures an "average reciprocity of advantage" is not a taking, Justice Stevens has suggested that he is relying on "the notion of 'reciprocity of advantage'" articulated by Justice Holmes in Pennsylvania Coal, but his interpretation of that phrase differs from that of Justice Holmes. See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987). For him, the possibility that the coal companies "benefit greatly from the restrictions that are placed on others" was enough to secure an average reciprocity of advantage, and to save government action from constitutional challenge. Id. at 491-93. For Justice Holmes, and the Pennsylvania Coal Court, it was not.
\textsuperscript{241} Id. at 491 & n.21; see also Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 134-35 (1978) (because state action benefits "all New York citizens and all structures," Penn Central received sufficient benefits from ordinance to justify finding ordinance constitutional).
\textsuperscript{242} Keystone Bituminous Coal Ass'n, 480 U.S. at 491.
tte, among its other faults,\textsuperscript{244} has no discernable limits. If we can comfortably assume that Hadacheck's or Penn Central's losses were reasonably likely to even out through the vagaries of "civilized" life, we should be equally comfortable assuming that the losses the government imposed on Kaiser Aetna, Lucas, and Loretto would also even out. The burdens are, perhaps, significant and disproportionate in each case, yet they are almost certainly outweighed by the benefits of living in a civilized society. Similarly, if land must be taken for a post office, a military base, or a highway, the loss imposed upon the landowner by such government actions is still unlikely to exceed the benefits of civilized society. Moreover, while any such landowner might be disproportionately burdened in a particular case, he or she would benefit from similar burdens that government would impose on other property owners.\textsuperscript{245}

If we take seriously this second definition of average reciprocity of advantage, which I do not, then we should not rely on the harm-benefit line to identify compensable takings. Instead, we should adopt the full implications of \textit{Nebbia}, and allow government complete discretion to redistribute or eliminate property as it sees fit.

\section*{2. The Incompatible Use Paradox}

In \textit{Miller v. Schoene},\textsuperscript{246} the State of Virginia enacted a statute authorizing the state entomologist to cut down red cedar trees that were: (i) located within two miles of any apple orchard, and (ii) found to be

\textsuperscript{244} Under the first definition, the government action effectively exchanges one right for another of equal value, and thereby leaves the financial situation of the affected property owners relatively unchanged. They have, in essence, suffered no disproportionate financial loss. Under the second definition, on the other hand, the absence of any corresponding disproportionate benefit means that the disproportionately burdened property owners will remain disproportionately burdened as compared to other property owners. While they, like other property owners, will receive many benefits from living in a civilized community, these benefits shared in common with other property owners cannot restore the burdened property owners to the relative economic status they enjoyed before the government deprivation. See Jules Coleman, \textit{Corrective Justice and Wrongful Gain}, 11 J. LEGAL STUD. 421, 423 (1982) (if action is wrongful, actor must restore other party to pre-action wealth distribution); \textit{see also} Jules L. Coleman, \textit{The Mixed Conception of Corrective Justice}, 77 IOWA L. REV. 427, 437-41 (1992) (modifying annulment theory of corrective justice to explain why a particular individual must repair specific wrongful losses, but retaining annulment theory standard of compensation) [hereinafter \textit{A Mixed Conception}]. Although the Just Compensation Clause does not require "a system of delusive exactness" in the matching of benefits and burdens, "when the chance of the cost exceeding the benefit grows large and the amount of the not improbable excess is great," the Just Compensation Clause will impose a limit. See Martin \textit{v. District of Columbia}, 205 U.S. 135, 139 (1907).

\textsuperscript{245} \textit{Cf. Keystone Bituminous Coal Ass'n}, 480 U.S. at 491-93, 498 (compensation for loss of twenty-seven million tons of coal provided through similar restrictions on other harmful land-uses).

\textsuperscript{246} 276 U.S. 272 (1928).
hosts to cedar rust. The Court upheld the statute against a takings challenge because the prohibited land use threatened cognizable harm within the meaning of the pre-*Nebbia* cases. In doing so, the Court articulated what might be called the "incompatible use" paradox as a justification for the harm-benefit line.

Specifically, the cedar rust associated with the host cedar trees would destroy any apple trees within a two-mile radius; as a result, the host cedar trees and the neighboring apple trees could not coexist. One or the other land use could not continue. This incompatibility forced the state to choose between the two uses. It could either act to prohibit the growing of the host cedar trees, or it could fail to act and thereby doom the neighboring apple trees. But it could not avoid the choice. Because "the choice is unavoidable," the Court reasoned that making a reasonable choice should not warrant compensation.

Yet, the suggested paradox is false. It omits the possibility of resolving the incompatible uses through government's power of eminent domain. Government need not inevitably choose to recognize only one of two incompatible property rights because it can vindicate

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247. *Id.* at 277-78.
248. This, at least, is how the Court phrased the choice. The neighboring apple tree growers could, of course, try to buy out Miller's cedar trees, but collective action problems in organizing the apple tree growers to purchase Miller's right might preclude such a market transaction. *See* James M. Buchanan, *Politics, Property, and the Law: An Alternative Interpretation of Miller et al. v. Schoene*, 15 J.L. & ECON. 439, 443-48 (1972).
249. As the Court explained, "[i]t would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked." *Miller*, 276 U.S. at 279.
250. *Id.* at 280. Professor Sax articulates a similar justification for refusing to compensate when government prohibits a use of land that has spill-over effects. *See* Sax, *supra* note 15, at 155-61.
251. A more sophisticated argument in favor of the Court's position is that one of the choices, a failure by government to act, would certainly not require compensation, even though it resulted in the destruction of the apple trees. In the absence of state action, the Compensation Clause would not be implicated. As a result, if government failed to act, it would not be liable for the neighbors' *de facto* loss of their right to grow apple trees. Given that one of the available choices will not warrant compensation, one might argue that we should treat the other possible choice symmetrically, and not require compensation should government choose to destroy the cedar trees. I mention the argument at this point merely to bring it to the reader's attention; because of time and space limitations, I will not be able to consider it further in this Article. For a discussion of some of the issues such an argument might entail, see Levmore, *supra* note 4, at 291-93. *See also* Donald Wittman, *Liability for Harm or Restitution for Benefit?*, 13 J. LEGAL STUD. 57 (1984).
252. Correcting for the market failure that might otherwise result from collective action problems is one of the central justifications for the power of eminent domain. *See*, e.g., Michelman, *supra* note 9, at 1174-76. As a result, even if Professor Buchanan is correct in stating that market failure justifies government intervention in *Miller v. Schoene*, that does not explain why uncompensated government intervention was justified.
both the neighbors' right to grow apple trees and Miller's right to grow cedar trees by purchasing Miller's right. Because the availability of a forced sale and purchase through the power of eminent domain vitiates the supposed choice between the two incompatible rights, the inability of two property rights to coexist does not justify government's uncompensated elimination of one of those rights.

3. Expectations and Harmful Uses

As a third substantive rationale for the harm-benefit line, courts sometimes suggest that no individual would expect government to allow him or her to exercise his or her property rights in a manner that would be harmful to society.\textsuperscript{253} Because the individual does not expect government to allow such harmful uses, government action to prohibit such use would not cause the individual to feel that he or she has lost something. As a result, a failure to compensate the individual for his or her "formal" loss would not cause significant "demoralization,"\textsuperscript{254} or lead the individual to oppose desirable governmental action.\textsuperscript{255}

For this rationale to justify the harm-benefit line, actual expectations concerning allowable conduct must differ from the lawfulness of the conduct. If expectations concerning permissible land uses invariably conform to the law, an examination of expectations will reveal only the law. A landowner whose expectations conformed to the law would necessarily expect that he or she could use his or her land in

\textsuperscript{253} See, e.g., Smyth v. Ames, 169 U.S. 466, 545-46 (1898) ("A corporation maintaining a public highway, although it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, privileges, and franchises subject to the condition that the government creating it, or the government within whose limits it conducts its business, may by legislation protect the people against unreasonable charges for services rendered by it. It cannot be assumed that any railroad corporation, accepting franchises, rights and privileges at the hands of the public, ever supposed that it acquired, or that it was intended to grant to it, the power to construct and maintain a public highway simply for its own benefit, without regard to the rights of the public.").

\textsuperscript{254} Professor Michelman coined the phrase "demoralization costs" to describe the costs associated with an uncompensated government action. See Michelman, \textit{supra} note 9, at 1214. He defined "demoralization costs" as "the total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some occasion)." \textit{Id}. He has suggested that the purpose of the Compensation Clause is to prevent affected property owners, and those around them, from feeling excessive demoralization as a result of uncompensated government action. \textit{See id.}

\textsuperscript{255} I have suggested in a previous article that the purpose of the Compensation Clause is to reassure those who may be adversely affected by government action that they will receive compensation for their losses, and as a result, need not oppose desirable governmental action. \textit{See} Lunney, \textit{supra} note 4, at 1953-55.
any lawful manner, but could not use his or her land in any unlawful manner. Moreover, such a landowner would also expect that government could substantially restrict, without compensation, previously lawful land uses, because government has the legal authority to do so under the Court's present interpretation of the Compensation Clause. For such a landowner, an examination of his or her expectations would manage only to tell us what the law is, not what it should be. To avoid such circularity, expectations must differ from, and be independent of, the legal rules themselves.256

Yet, the Court has not attempted to separate an individual's expectations concerning permissible and impermissible uses from the law. Instead, when the Court has attempted to define an individual's expectations, it has inevitably equated the individual's expectations with the individual's rights as defined by applicable law. In *Ruckelshaus v. Monsanto Co.*,257 for example, the Court needed to define Monsanto's expectations concerning the possible disclosure and use of data it had submitted to the Environmental Protection Agency. The Court defined those expectations by equating them to Monsanto's legal rights in the data under applicable federal law.258 Similarly, in determining the "property interest" against which courts should measure a property owner's loss, the *Lucas* Court suggested that courts should examine "how the owner's reasonable expectations have been shaped by the State's law of property."259 Moreover, the Court has reinforced this equation of expectations with legal rights by providing protection only for *reasonable* expectations.260 "[A] mere unilateral expectation or an abstract need is not a property interest entitled to protection [under the Compensation Clause]."261 Only those expectations that "ha[ve] the law back of [them]" will count as property within the meaning of the Fifth and Fourteenth Amendments.262

Relying on "reasonable" expectations is problematic, however, not only because it tends to become circular, but also because the sense of deprivation experienced by the affected individual, and that individ-

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258. *Id.* at 1006-11.


262. *See* *Kaiser Aetna v. United States*, 444 U.S. at 178.
ual's willingness to fight the government's action, will turn largely on the individual's actual expectations. As a result, actual expectations, not reasonable expectations, should be the Court's principal focus in examining expectations.263

Defined properly, "reasonable" expectations may serve as a secondary factor in determining whether the Court should require compensation. If the Court defined "reasonable" expectations by looking at the average or typical expectations a landowner would hold under the circumstances, then "reasonable" expectations might address two issues relevant to the compensation issue. First, "reasonable" expectations, defined as average or typical expectations, would serve as a perjury check on the affected property owner's testimony concerning his or her actual expectations. Second, "reasonable" expectations, so defined, would also suggest the likely demoralization costs that those who had witnessed the uncompensated government imposition would experience, and would indicate the likelihood that the affected landowner would be able to organize effective opposition to the government's action.

As the Court defines them, "reasonable" expectations are not, however, a realistic reflection of the affected property owner's actual expectations, nor of the typical expectations an ordinary property holder would likely have under similar circumstances.264 Instead, the Court has defined "reasonable" expectations according to its own beliefs concerning what the property owner's expectations should have been.265 Given the arguments one can hear, and that the Court has

263. Cf. Armstrong v. United States, 364 U.S. 40, 42 (1960) (acquisition by government of ships made attached materialmen's liens worthless; the Court found a taking to protect workers' actual expectations with respect to the liens). Compare Michelman, supra note 9, at 1215-17 (use demoralization costs "ordinarily cognizant and sensitive members of society" would experience to determine whether efficiency requires compensation) with id. at 1223 (use demoralization costs "disappointed claimant" would experience to determine whether fairness requires compensation).

264. For example, the Court treated the transferable development rights ("TDRs") in Penn Central Transportation Co. v. New York City as fulfilling Penn Central's expectations concerning its air rights. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 136-37 (1978). Yet, those TDRs remain unused, and unusable, today, more than twenty-five years after the City first acted to deprive Penn Central of the right to develop the air space over the Terminal. See 383 Madison Assocs. v. City of New York, 598 N.Y.S.2d 180 (N.Y. App. Div. 1993) (upholding City's refusal to approve a proposed transfer of Penn Central's development rights to a proposed structure at 383 Madison Avenue), cert. denied, 114 S. Ct. 1830 (1994); see also David W. Dunlap, Grand Central Owner Seeks Broader Use of Air Rights, N.Y. TIMES, May 3, 1992, at J1 (tracing history of Penn Central's battle with the City over the TDRs).

265. See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1023 (1984) (O'Connor, J., concurring in part and dissenting in part). Compare Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust, 113 S. Ct. 2264, 2292 (1993) ("Concrete Pipe's reliance on ERISA's original limitation of contingent liability to 30% of net worth is misplaced, there being no reasonable basis to expect that the legislative ceiling would never be lifted.") (footnotes omitted) with id. at 580 (O'Connor, J., concurring) ("I agree that a withdrawing employer can be held responsible for its statutory 'share' of
accepted, concerning which actual, even typical, expectations are nonetheless not “reasonable,” one cannot help but conclude that “reasonable” expectations as the Court defines them are a painfully unrealistic reflection of ordinary expectations and values.

To date, the Court has tended to equate expectations with legal rights, and to determine “reasonable” expectations according to the Court’s sense of what the affected property owner’s expectations should have been, rather than what those expectations likely were. If actual expectations differ from legal rights, and if the Court were to examine the actual expectations of the affected property owner realistically, such an examination might provide some guidance on whether

unfunded vested benefits if the employer should have anticipated the prospect of withdrawal liability when it joined the plan.

266. One of my colleagues, for example, has suggested that Lucas had no reasonable expectation that he would be allowed to build on his land given how often the lots had been flooded over the last sixty years. With hindsight, and a predisposition to scapegoat Lucas as environmentally unsensitive, see Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2905 (1992) (Blackmun, J., dissenting) (describing Lucas as “a contractor, manager, and part owner” of the development in an attempt to distinguish Lucas from the average lot purchaser), the State’s imposition of the development ban might seem inevitable. However, saying that Lucas had no “reasonable” expectation that the State would allow him to build on his lots is painfully unrealistic as a statement of Lucas’s actual expectations at the time he purchased the lot, or even as a statement of the average person’s likely expectations had she been in Lucas’s situation. Not only was development of the lots legal in 1986, when Lucas purchased the lots, id. at 2889, but homes had already been built on the neighboring lots. Id. Lucas obtained bank financing when he purchased the lots, using the lots as collateral. Such bank financing would necessarily require an appraisal of the lots, and the bank’s conclusion that the lots would provide adequate collateral for the mortgage would tend to convince Lucas that his expectations were not unreasonable. Lucas, however, went further and specifically consulted with a firm that specialized in coastal erosion, and obtained the firm’s assurance that the lots were appropriate for his planned development. Finally, Lucas paid, or agreed to pay, nearly a million dollars for the two lots. To suggest that he would commit himself to pay such a price, without an expectation that he could use the land in a manner that would justify that price, would be absurd.

267. See Ruckelshaus v. Monsanto Co., 467 U.S. at 1008-09 (“In an industry that long has been the focus of great public concern and significant governmental regulation, the possibility was substantial that the Federal Government, which had thus far taken no position on disclosure of health, safety, and environmental data concerning pesticides, upon focusing on the issue, would find disclosure to be in the public interest.”); see also Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 496-502 (1987) (no reasonable expectation that companies would be allowed to mine support coal when right to mine such coal interfered with promoting common good); Agins v. City of Tiburon, 447 U.S. 255, 261-62 (1980) (no reasonable expectation that individual would be allowed to retain right to develop land when that right became inconsistent with public’s need for open-space); Andrus v. Allard, 444 U.S. 51, 67 (1979) (no reasonable expectation that individual would be allowed to retain right to sell physical property when right to sell became inconsistent with public’s need to preserve bird species); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-33 (1978) (no reasonable expectation that corporation would be allowed to develop air space over Terminal when such development was inconsistent with historic architecture of Terminal).
the Court should require compensation.\textsuperscript{268} But the Court has failed to consider what expectations a landowner might hold independent of the law, and has limited "reasonable" expectations to those expectations a majority of the Court happen to share.\textsuperscript{269} As a result, the "expectancy" rationale for the harm-benefit line has become: No "reasonable" person would expect government to compensate when it prohibits a harmful, though previously lawful, land use.\textsuperscript{270} Such a rationale cannot, however, justify application of the harm-benefit line. By substituting the Court's determination of what the property owner's expectations should have been, for an examination of what those expectations likely were, the statement becomes a legal conclusion, and, as such, cannot justify itself.

4. The Unduly Burdensome Expense of "Regulat[ing] by Purchase"\textsuperscript{271}

As a fourth substantive justification for the harm-benefit line, courts have at times suggested that government could not effectively protect the public interest in prohibiting a harmful use of land if it had to provide compensation.\textsuperscript{272} As Justice McKenna explained when the Court refused to require compensation for the deprivation Hadacheck experienced when the government closed his brickyard:

To [require compensation for the closing of the brickyard] would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community.\textsuperscript{273}

\textsuperscript{268} See, e.g., Ackerman, supra note 19, at 151-56. However, if a former property owner goes to the expense of discussing her deprivation with an attorney and bringing suit against the government challenging its actions, an examination of actual expectations would undoubtedly reveal her sense of deprivation.

\textsuperscript{269} See Ruckelshaus, 467 U.S. at 1022-24 (O'Connor, J., concurring in part and dissenting in part).

\textsuperscript{270} See also Ackerman, supra note 19, at 151 (no compensation required if government acts to prevent landowner from "using [her land] in ways a well-socialized person should recognize as unduly harmful").


\textsuperscript{272} See Andrus v. Allard, 444 U.S. at 65 (1979); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); see also John J. Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021, 1032 (1975); Sax, supra note 15, at 160 ("The prevailing view of compensation law has a considerable practical effect on resource allocation, since the prospect of having to pay compensation is a constraint on government regulation of private property."); cf. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 (1992) ("And the functional basis for permitting the government, by regulation, to affect property values without compensation—that 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law'—does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial use.") (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

\textsuperscript{273} Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915).
If we unpack this statement, we find that it rests on three underlying assertions: (1) prohibiting harmful land use is desirable; (2) if the Court required just compensation for such prohibitions, the government could not afford to pay the compensation; and (3) enforcing the compensation requirement in these circumstances would prevent government from prohibiting the undesirable land use because it could not afford to pay compensation. As a result, a requirement of compensation when government acts to prohibit harmful land use would limit government's ability to promote the public welfare.

Yet, taken at face value, such reasoning would again prove too much. If the rationale is simply protecting government's purse so that government can improve our lives, such a rationale would seem to apply equally well to cases of "benefit extraction." Government action that provides new freeways, a convenient mail service, or an adequate national defense is also desirable. In many cases, society may gain far more from such government action than it would from government action to prohibit "harmful" uses of land. Moreover, requiring compensation even in such classic cases of "benefit extraction" may strain government's purse as much, or more, as would a requirement of compensation in cases of "harm prevention." Because government could not afford to provide compensation in every instance of benefit extraction, enforcing the compensation requirement in cases of benefit extraction would limit government's ability to undertake desirable action. Thus, enforcing the compensation requirement in cases of benefit extraction would also limit government's ability to improve our lives. As a practical matter, the potential for constraining desirable governmental action appears equally serious, whether government intends the action in question to prevent harm or extract a benefit. As a result, a need to protect the public purse cannot justify the harm-benefit line.

In addition, in a representative legislature dominated by interest group, as opposed to majoritarian, politics, the fear that expanding the scope of the compensation requirement will block desirable governmental action is misplaced. As I have explained in more detail elsewhere, the compensation requirement, if properly interpreted and consistently applied, can act as a promise to property owners that government will provide compensation if it decides that it must re-

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276. See Lunney, supra note 4, at 1956-59.

277. See id. at 1954-63.
strict their property rights to advance the public welfare. Such a promise will, as long as the monetary award of compensation provides a "full and just" equivalent for the property taken, substantially placate the property owners and eliminate their opposition to the government action. Taxpayers who will bear the additional cost may oppose the government action, but as a dispersed group, their opposition will usually be far less effective than that of a more concentrated group of property owners. If we consistently enforce the Compensation Clause to shift the cost of government action from concentrated groups of property owners to a dispersed group—taxpayers—we will generally replace the more effective opposition of a concentrated group with the less effective opposition of a dispersed group. By reducing the effective opposition to the government action, providing compensation to such concentrated groups of property owners can ease the process of enacting desirable government restrictions on property rights.

Admittedly, such a broadening of the compensation requirement might surprise some state and local governments and force them to scramble to adjust their policies to satisfy a broader compensation requirement. Over the short run, a broader compensation requirement may, therefore, occasionally prevent government from regulating a land use it could otherwise have addressed. If government has already committed its resources to other, more important, programs, and is, therefore, unable to free up resources to provide the necessary compensation, requiring compensation would leave government unable to act. But this inability to act should fade as government adjusts, either by raising taxes or reorganizing its spending priorities, to meet the dictates of a broader compensation requirement. Once government adjusts to the broader compensation requirement, government must still face choices as to how best to spend its scarce resources. Yet, there is little reason to believe that over the long run, (and presumably constitutional provisions are intended to address the long run), a properly-defined broadening of the compensation requirement would limit government's ability to advance the common good. In-

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278. See Lunney, supra note 275, at 757-61.
279. See Lunney, supra note 4, at 1954-55.
280. See id. at 1959 ("This analysis suggests that a compensation requirement that focused on whether the government had taken the property of the very few to benefit the very many would not significantly impede desirable government action. Rather, this test would block government action that was either the result of fiscal illusion, inefficient absent compensation because the measure's high enactment costs would have exceeded any net benefit it created, or blocked by the concentrated group in any event.").
281. The increasing willingness of the Court to protect private property against government regulation over the past ten years should have served as a warning to governments concerning their freedom to restrict property rights without compensation. But I have seen few signs that governments have begun saving money in order to provide the compensation the Court seems increasingly willing to require.
HARM-BENEFIT LINE

Thus, the fear of bankrupting government through an overbroad reading of the compensation requirement, even if accepted at face value, does not justify separating compensable government action from noncompensable government action using the harm-benefit line. If the compensation requirement interferes with attaining the common good, the Compensation Clause should be interpreted as precautionary in every instance, and leave the decision whether to compensate completely in the legislature's hands. However, there is little reason to believe that, properly interpreted, the compensation requirement does or would interfere with government's attempts to advance the public welfare. As a result, a need to protect the government's purse cannot justify the harm-benefit line.

D. Conclusion: Factual Causation as Justification

This analysis suggests that of all the rationales courts have offered in support of the harm-benefit line, factual causation provides the most plausible justification for the line. The principle that one who causes a problem should bear the responsibility of remedying that problem seems difficult to dispute, and suggests that the harm-benefit line provides an appropriate means of separating compensable government action from noncompensable action. The following

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282. I am distinguishing "actually desirable" government action from the "apparently desirable" government action associated with fiscal illusion in a majoritarian representative process. See Lunney, supra note 275, at 751-53.

283. See Lunney, supra note 4, at 1956 ("After all, no one argues that we would have more roads or post offices if government could simply appropriate individuals' property for these purposes. Similarly, our roads would not likely be in better condition, nor our national defense more secure, if the government simply compelled the individuals in those industries to provide their services without compensation. On the contrary, more goods and services rather than fewer will almost certainly be forthcoming if government pays for what it desires.").

284. Cf. Michelman, supra note 9, at 1201 ("This is, then, a limited indictment of the harm-prevention/benefit-extraction test. We are not denying its strong intuitive appeal, not even that it contains an important core of truth. At this point we assert only that—no doubt because it is so captivating intuitively—the test invites improper application.").

285. If one accepts a factual causation principle of responsibility as justification for the harm-benefit line, then two central questions arise. First, what type of interference with the public welfare constitutes cognizable harm that would justify uncompensated government action? Second, are there any limits to the reach of the causation principle? These are the questions the Court has attempted to answer in continuing to apply the harm-benefit line. See text accompanying notes 140-80 supra. These are also the questions commentators who expressly or implicitly adopt a corrective justice notion of the Just Compensation Clause attempt to answer. See Robert C. Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls, 40 U. CHI. L. REV. 681, 729 (1973) (separating harm-prevention from bene-
section examines factual causation, and its associated principle of responsibility, more closely in an attempt to determine whether they can justify applying the harm-benefit line to resolve the takings issue.

III. CAUSATION AND RESPONSIBILITY

As discussed, the harm-benefit line appears to rest on the principle that if the harm would not have occurred but for the existence or exercise of a particular individual's property rights, government may, without providing compensation, limit or eliminate those property rights. Such actions would merely force the individual to bear responsibility for the harm that he or she would otherwise have caused. Yet, such a principle of responsibility cannot justify separating compensable government action from noncompensable government action under the harm-benefit line because it incorporates a flawed conception of causation. It suggests that we can identify the party whom we should consider "responsible" for the harm by identifying who caused the harm. But, as Professor Coase recognized in his seminal article, The Problem of Social Cost, a but-for factual analysis alone will invariably identify more than one cause for any particular undesirable result.

For example, in Chicago, Burlington & Quincy Railway v. People of the State of Illinois ex rel. Drainage Commissioners, the state sought to force the railroad to bear responsibility for widening a river channel over which the railroad had built a bridge. In resolving the takings issue, the majority allowed the state to force the railroad to remove the timbers and stones the railroad had placed in the river channel as part of the construction of its original bridge. Because the railroad had placed these obstructions into the river channel, the majority viewed the railroad as causing the problem. As a result, the Court held that the state could properly force the railroad to bear the expense of removing these obstructions. Justice Holmes, writing for himself and two other Justices, disagreed on this issue, however.

While Justice Holmes agreed that the Court should use factual causation to determine who should bear responsibility for removing the bridging materials, Justice Holmes believed that the need to improve the river's drainage, not the need for rail travel, factually caused the need to widen or deepen the river channel. Because the need for fit-extraction by examining "normalcy" of land-use government is seeking to control); Kmiec, supra note 11, at 1638-40 (examining whether prohibited land-use was, or would be, a nuisance at common law to determine whether government is preventing harm); Sax, supra note 15, at 161-72 (examining whether the effects of the prohibited land-use spilled-over onto neighboring land to determine whether government is preventing harm).

286. Coase, supra note 25.
287. 200 U.S. 561 (1906).
288. Id. at 594.
289. Id. at 595 (Holmes, White, McKenna, JJ., concurring).
290. Id.
drainage caused the need to remove the bridging materials, he thought that the Court should hold the public, not the railroad, responsible for the cost of removing those materials.\textsuperscript{291}

This dispute between the majority and the concurrence underscores the difficulty of relying on factual cause alone to assign responsibility. Neither the railroad's activities, nor the drainage needs of the state, alone caused the need to remove the materials the railroad had placed in the river channel. If there had not been a need for rail travel, the railroad would never have placed the original bridge and its supporting materials in the channel, and so there would be no need to remove them. In addition, because the original bridge and supporting materials did not interfere with the natural flow of the river,\textsuperscript{292} if there had not been a need to improve drainage, the materials could have remained where they were without causing any problem. Thus, the need for rail travel and the need for improved drainage, in combination, created the need to remove those materials.

Moreover, joint cause exists even in those cases in which the causal connection between the landowner's actions and the harm seems most clear. For example, if we apply a factual causation principle of responsibility to a case in which an individual named Lucas developed his beachfront lots, Lucas' construction on his land seems to be the cause of his land's development. If such development would be harmful to a recognized societal interest, his construction would cause the feared harm. As a result, a factual causation principle of responsibility would suggest that Lucas should be responsible for the consequences of his actions—he caused the problem and should therefore be responsible for redressing it. Moreover, if an after-the-fact remedy would not adequately protect the societal interest at issue, we might have to prohibit Lucas from developing his land altogether to prevent the harm his actions would otherwise inflict. Under a factual causation principle of responsibility, such a development ban would nevertheless be justified given that Lucas' actions, if not prohibited, would have caused the feared harm. Lucas should be responsible for preventing the harm because his actions would have caused it.

Yet, despite appearances, Lucas' actions are not the sole factual cause of his land's development. While viewing the harm as being caused by the combination of Lucas' actions and society's desire that the land remain undeveloped seems somewhat unsatisfactory,\textsuperscript{293} a

\textsuperscript{291} As Justice Holmes explained, the public should pay to widen and deepen the channel, whether that required the removal of "the original earth or some other substance lawfully put in the place of the original earth." \textit{Id.}

\textsuperscript{292} \textit{Id.} at 594.

\textsuperscript{293} In his example, Professor Coase identified the \textit{combination} of cattle and corn in close proximity as the cause of the cattle's destruction of the crops. Coase, \textit{supra} note 25, at 2-6. A similar analysis would apply in many takings cases. Thus, it was the combination of the apple trees in close proximity to the host cedar trees in \textit{Miller} that caused the undesirable result. \textit{Miller v. Schoene}, 276 U.S. 272, 277-78 (1928). And it
brief examination will reveal any number of actors who played a causal role in the land's development, including Justice Stevens. Putting to one side his role as a dissenting Justice in the *Lucas* case, what role did Justice Stevens play in causing the land's development? Simply this—Justice Stevens could have, but did not, purchase the land before Lucas. If Justice Stevens had, in fact, purchased the land, he could have set it aside voluntarily to preserve it in an undeveloped state. In other words, but for Justice Stevens' failure to purchase the land preemptively, the land would not have been developed. From this, it appears that the action of Lucas and the inaction of Stevens together caused the feared harm. If one tries to determine who should bear responsibility for preventing the land's development by determining who, as a factual matter, caused the land's development, one cannot.

Once one recognizes the situation as one of joint causation, one must turn to some principle other than factual causation to assign responsibility for the undesirable result. One possibility would be to assign responsibility by determining who could prevent the undesirable result at a lower cost. If one were to assign the responsibility to the lower-cost preventer, one would, in a world without transaction costs, probably assign responsibility for preserving the land in an undeveloped state to Justice Stevens, rather than Lucas. On average, such an assignment would preserve the land in an undeveloped state at a lower cost than would an assignment of responsibility to Lucas. If one ignores for the moment the constitutional issue of compensation, the combination of the railroad bridge and the need for drainage that caused the undesirable result in Chicago, B. & Q. Ry. v. Illinois ex rel. Drainage Comm'rs, 200 U.S. 561, 594-95 (1906). If we retain this perspective on how joint causation arises, we would view the undesirable result in *Lucas* as a combination of Lucas's development and society's desire that the land remain undeveloped.

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295. See Calabresi, supra note 34, at 26-31, 134-37; see also Frank I. Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi's Costs*, 80 YALE L.J. 647, 667-74 (1971) (book review). Professor Calabresi has also suggested that society place liability on the party who could most easily arrange to transfer liability if the initial liability assignment is inefficient. See Calabresi, supra note 34, at 150-52. If we applied such an approach, government would seem generally to be the "best bribers." It is a unitary actor, and so would not face significant collective action costs. Moreover, the availability of a forced sale through the power of eminent domain should enable the government to shift the responsibility to another without undue risk of hold-outs. Cf. Michelman, supra, at 669-72 (suggesting that polluting factories would be better bribers than average homeowner suffering effects of pollution from the factories under a regime where homeowner's rights are protected by a liability rule so long as there are relatively few factories involved; if there are few factories involved, the factories will face lower transaction and collective action costs in trying to shift the responsibility than would a larger number of homeowners).
the costs of ensuring that the land remains undeveloped in a world without transaction costs would include: (i) the development value of the land itself, which is lost when development is prohibited; (ii) the cost of initially imposing a development ban; and (iii) the cost of retaining the development ban once it has been imposed.

If one assumes\textsuperscript{296} that the first cost is the same for either Lucas or Justice Stevens, as reflected by the ability of either to acquire the land for a given market price, one can determine which alternative prevents development at a lower cost by comparing the relative costs of imposing and retaining a development ban. Because he supports the development ban,\textsuperscript{297} Justice Stevens might impose it on himself, or alternatively, might not oppose, or oppose less vociferously than Lucas, a government-imposed development ban. Therefore, imposing the ban would be less expensive had Justice Stevens acted, than it would be if government sought to impose the ban on Lucas. Moreover, because he wants the land to remain undeveloped, Justice Stevens will not constantly petition the legislature to grant exceptions to the development ban, as Lucas is likely to do.\textsuperscript{298} This suggests that retaining the ban would likely prove less expensive if Justice Stevens had acted than it would be if we tried to prohibit development by Lucas. Since the costs of imposing and retaining the development ban would be lower had Justice Stevens acted to purchase the land, a preemptive purchase by Justice Stevens would preserve the land in an

\textsuperscript{296}. In the compensation context, this assumption rests on the accuracy with which a trier of fact can measure, after-the-fact, the loss suffered by a particular property owner. If no compensation is awarded, or if the trier of fact awards compensation in an amount equal to or less than the actual loss experienced by the landowner, then society, as a whole, will "expend" the actual loss in value to achieve the desired rights change. Either the landowner will bear that loss, if no compensation is provided, or government will bear that loss if compensation is provided and the trier of fact determines the amount of the loss correctly. If the trier of fact underestimates the loss, then government and the landowner will share the loss. However, if compensation is awarded, and the trier of fact overestimates the landowner's loss, then society as a whole will "expend" resources equal to the amount of the loss, and will transfer additional resources from government to the affected landowner. While this transfer is not, in economic terms, an expense, systematic overcompensation may attract privately-owned resources that could have been more productively invested elsewhere. I do not believe such systematic overcompensation is likely, however, either under the Court's interpretation of the Just Compensation Clause, or under the interpretation I have proposed. See Lunney, supra note 275, 757-61, 767-68.

\textsuperscript{297}. Or at least Justice Stevens seemed to find the need to preserve the land in an undeveloped state persuasive when Lucas was the one paying for it. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2925 (1992) (noting Act's "compelling purpose").

\textsuperscript{298}. See Lisa A. St. Amand, Sea Level Rise and Coastal Wetlands: Opportunities for Peaceful Migration, in 1992 ZONING & PLAN. L. HANDBOOK 513, 528-32 (Kenneth H. Young ed.) (political pressures from those in South Carolina directly affected by development ban led legislature to grant exceptions to ban); see also David W. Dunlap, Grand Central Owner Seeks Broader Use of Air Rights, N.Y. TIMES, May 3, 1992, at J1 (reciting efforts by Penn Central to exercise its air-rights associated with the Grand Central Terminal).
undeveloped state at a lower cost than would an uncompensated restriction of Lucas's development rights. If one assigns responsibility to the lower-cost avoider, Justice Stevens, not Lucas, should be the one responsible for ensuring that the land remains undeveloped.

One response to this analysis of the responsibility issue is that there are transaction costs in the real world, and it is patently unrealistic to expect Justice Stevens, or any one individual no matter how sympathetic to the government purpose, to identify every situation in which a threatened harm requires a preemptive purchase of property rights. Moreover, free-rider problems may prevent Justice Stevens and other individuals who are interested in preserving undeveloped beachfront land from acting effectively. Yet, if one substitutes the relevant government authority for Justice Stevens as the preemptive purchaser, then both the concern for the transaction cost of identification and the free-rider issue should disappear. After all, government must have some sense of which property rights need to be limited to protect historic structures, ensure the survival of endangered species, or otherwise improve our lives before it can act legislatively or administratively to achieve such goals. Since the government would necessarily know which property rights it was going to limit, it would already have incurred the identification transaction costs that make it so very difficult for individuals to act preemptively to prevent harm. Moreover, because it can fund the purchase through uniform taxation, government need not worry that free-riders will limit its ability to raise the necessary funds.

If applying the least-cost, or here the lower-cost, avoider rule to the government makes sense, one should attempt to determine whether

299. Cf. Wittman, supra note 251, at 62-65 (suggesting that negative commands are less expensive administratively than affirmative commands); William M. Landes & Richard A. Posner, Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism, 7 J. LEGAL STUD. 83, 120 (1978) (“But imposition of liability . . . has one attractive feature in comparison to compensation: no transfer payment need be calculated or made in most cases because the threat of liability should suffice to induce the cost-justified level of expenditures on rescue.”).

300. See Calabresi, supra note 34, at 254 (suggesting that a polluting factory could more easily arrange transfer of “pollution rights” if such rights were misassigned initially than could a homeowner; as a result, factory should bear responsibility for pollution).

301. A colleague has suggested that there may be some reason to question whether Professor Coase’s rule developed in the context of a private party versus private party dispute should apply to a private party versus government dispute. Some may argue that government will always act appropriately, and so assigning liability to the government is unnecessary, or at least raises materially different issues, than assigning liability to a private party. I cannot accept either suggestion, as the Bill of Rights suggests that government, as much as any private individual, needs constraints. See also Lunney, supra note 4, at 1937-45 (need to regulate legislatures justifies constitutional right to compensation). Some may argue that by compensating a disaffected property owner, we have placed the decision on how to spend those resources in the hands of the property owner, rather than in the hands of government, or perhaps ourselves (through lower taxes). Building upon this transfer of control, some may argue that
the government or the private landowner is the lower cost avoider of a particular undesirable result. In essence, courts must determine whether one can impose and maintain the desired property rights change less expensively through an uncompensated regulation or through a compensated taking. As a resolution to this question, I would propose a "pure" theory of singling out. Under this theory, a court should first ask whether government has changed or restricted privately-held "property." In other words, has a taking occurred?

the property owner will choose to spend the resources in less desirable ways than society would have. I see no reason to believe that this is likely to be true as a general matter, and most economists would reject the notion that a mere transfer of wealth reduces social welfare. There is also a pure selfishness component to this argument: government is more likely than the compensated property owner to spend the money in a way that benefits me. But I do not understand how such a possibility would justify a refusal to provide compensation.

By referring to my theory of singling out as "pure," I mean to reject those versions of singling out that continue to rely on some aspect of the harm-benefit line in determining whether an individual has been singled out. Compare Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2923-24 (1992) (Stevens, J., dissenting) (judging whether landowner was singled out based upon number of landowners who experienced similar deprivation) with Pennell v. City of San Jose, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part) (not singling out if landowner had caused the problem the government is trying to prevent).

Defining "property" is a difficult task, and one I do not have the time to address fully here. I would make, however, two brief points. First, the Court has sometimes provided compensation when government destroys the value of a right without changing the formal nature of the right. Typically, the Court requires compensation for such consequential injuries when government has acted in a way that would render a private party liable under private law, but sovereign immunity prevents such private law liability from attaching to the government. See, e.g., Armstrong v. United States, 364 U.S. 40 (1960) (holding government's acquisition of ships, which rendered materialmen's liens unenforceable because of government's sovereign immunity, to constitute a taking); Causby v. United States, 328 U.S. 256 (1946) (holding that noise from government's adjoining land-use, which rendered Causby's land unusable, but where the government was not liable in private nuisance action because of sovereign immunity, to constitute a taking); Richards v. Washington Terminal Co., 233 U.S. 546, 550 (1914) (holding smoke and soot from government-authorized railroad, which interfered with Richards' use of his land, but where the railroad was not liable in private nuisance action because of sovereign immunity, to constitute a taking); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871) (holding the flooding of land by government project to constitute a taking although the government was not liable under trespass law because of sovereign immunity). As a general matter, I agree with these decisions, and might expand the principle somewhat further than the Court has. See Lunney, supra note 275, at 763-65.

Second, on the other side of the coin, when government simply enforces the preexisting distribution of legal rights by, for example, evicting a trespasser, no property right has been taken. See supra note 222. As a result, even if such government action focuses on a single person, it would not constitute singling out as I conceive that term. In separating those cases where government merely enforces the preexisting legal scheme, from those where government is changing the scheme, the Court should follow a relatively narrow view of enforcement, perhaps even narrower than the one articulated in Lucas v. South Carolina Coastal Council. See Lucas, 112 S. Ct. 2886, 2900-01 (1992). Cf. Margaret Jane Radin, Reinterpreting Property 171 (1993) (suggesting a view of enforcement which includes any government action taken to harmonize the formal law with the informal norms of society).
If it has, then the court should ask whether the government has taken a property right of significant value only to a very few people to benefit the very many. In other words, does the government action single out the very few to bear a burden in a way that benefits the very many? For reasons that I have explained elsewhere, if the answer to these two questions is yes, then that suggests that society can effect the desired rights change at the lowest cost through a compensated exercise of the power of eminent domain. To ensure that government effects the rights change using the lowest-cost method, courts should consistently require compensation for such government action. If the answer to either question is no, then that suggests that society can effect the desired rights change at the lowest cost through an uncompensated police power regulation. As a result, courts should not require compensation for such government action.

I have sought to justify such a resolution to the takings issue elsewhere, and do not want to revisit that issue here. Instead, I would like to examine a second reason why Justice Stevens should not be held responsible for the land's development. Rather than dispute the transaction costs and free-rider issue, a second response would seek to justify holding Lucas, rather than Justice Stevens, responsible on the grounds that Justice Stevens has not done anything wrong with respect to the development of the beachfront land at issue. Indeed, he has not done anything at all with respect to the land.

As a starting point, this second response resonates strongly with a parallel notion in tort law: one is liable for acting negligently, but not,  

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304. See Lunney, supra note 4, at 1965; Lunney, supra note 275, at 751-56.
305. See Lunney, supra note 4, at 1955-63; Lunney, supra note 275, at 750-56.
306. See Lunney, supra note 4, at 1946-63; see also Lunney, supra note 275, at 750-56. In essence, the argument runs as follows. With a few, easily identified claimants, the transaction costs of providing compensation are likely to be low. On the other hand, the affected group will usually be sufficiently concentrated to organize substantial opposition to the measure. Given this capacity to organize, these landowners will, in the absence of compensation, mount a persuasive and effective campaign against the proposed government action. In the absence of compensation, such concentrated groups will regularly block the enactment of desirable measures, or water-down those measures that are enacted. See, e.g., Bruce A. Ackerman & William T. Hassler, Clean Air/Dirty Coal 44-54 (1981). Moreover, even if the government succeeds in enacting a particular property rights restriction over the opposition of the affected property owners, the property owners are likely to be back every year arguing for exemptions, exceptions, or outright repeal of the land use restriction. Sooner or later, as the fickle passions of the electorate drift on to other issues, the constant badgering by the disaffected property owners will lead the legislature to grant special exceptions to the land-use restriction. Thus, to ensure the initial enactment of desirable measures, and to ensure that such measures are not watered-down, or later repealed, courts should require compensation for those rights changes that are concentrated on the very few.

307. Lucas, on the other hand, has acted in a way that some would consider "blameworthy." See Michelman, supra note 9, at 1188 n.47. Because his conduct is blameworthy, Lucas cannot claim an entitlement to corrective justice should government halt his conduct. See Radin, supra note 222, at 251-52.
absent special circumstances, for failing to act. Indeed, tort law's misfeasance-nonfeasance line seems to parallel generally the harm-benefit line in takings law. Thus, before we reject the harm-benefit line as reflecting a pre-Coasean notion of causation, tort law should be examined to assess why it retains the misfeasance-nonfeasance line, and to determine if the reasons for retaining such a line in tort law suggest any reason to retain the harm-benefit line in takings jurisprudence.

IV. Tort Law's Misfeasance-Nonfeasance Line

Professors often introduce students to tort law's misfeasance-nonfeasance line by examining two hypothetical cases built upon a drowning swimmer. In the first hypothetical, a person tries to rescue the drowning swimmer. However, as a result of the rescuer's negligence during the course of the rescue, the drowning swimmer dies. Is the negligent rescuer liable? The classic answer is yes, because the negligent rescuer has acted, and moreover acted in a manner that negligently caused the drowning swimmer injury. As a result, the negligent rescuer is liable. In the second hypothetical case, there is a potential rescuer on the beach who could easily rescue the drowning swimmer, but that potential rescuer makes no attempt to rescue. As a result of the potential rescuer's refusal to attempt a rescue, the swimmer dies. Is the potential rescuer liable? The classic answer is no, because the potential rescuer has not acted, and even if that failure to act was, in some sense, negligent, the potential rescuer is not liable.

If tort law has a valid reason to treat the negligent rescue and the negligent failure to rescue differently, that reason may also justify the parallel principle of responsibility reflected in the harm-benefit line. Both seem to rest "on the law's distinction between the infliction of harm and the failure to prevent it."

As a starting point, the standard justification for tort law's differing treatment of the two rescue situations is that the negligent rescuer, by beginning a rescue, has worsened the situation for the drowning swimmer. Perceiving that a rescue attempt has begun, "other would-be

308. See James Barr Ames, Law and Morals, 22 Harv. L. Rev. 97, 111-13 (1908); see also Mary Ann Glendon, Rights Talk 77-78 (1991); Bender, supra note 30, at 33-35; Epstein, Strict Liability, supra note 294, at 189-90; Heyman, supra note 30, at 678-69; Landes & Posner, supra note 299, at 83-84.

309. Restatement (Second) of Torts § 314 & cmt. c (1965) ("The rule stated in this Section is applicable irrespective of the gravity of the danger to which the other is subjected and the insignificance of the trouble, effort, or expense of giving him aid or protection.").

310. Weinrib, supra note 30, at 247; see also Keeton et al., supra note 29, § 56, at 373 ("Hence there arose very early a difference, still deeply rooted in the law of negligence, between 'misfeasance' and 'nonfeasance'—that is to say, between active misconduct working positive injury to others and passive inaction or a failure to take steps to protect them from harm.").

311. See Keeton et al., supra note 29, § 56, at 378, 381; see also 3 Harper et al., supra note 29, § 18.6, at 722.
rescuers will rest on their oars in the expectation that effective aid is being rendered."\textsuperscript{312} The negligent potential rescuer, on the other hand, has, if not improved the drowning swimmer's circumstance, at least made it no worse.\textsuperscript{313}

Even on a factual level, however, this distinction is not fully convincing. Unless a certain course of conduct is perceived as preordained, a bystander's decision not to rescue affirmatively worsens a drowning swimmer's situation. Immediately before the bystander made the decision not to rescue, there was at least some chance that the bystander would decide to attempt the rescue. After the bystander decided to not rescue, that chance disappeared.\textsuperscript{314} The decision not to rescue, on its own, eliminated a chance of rescue otherwise present, and has thereby worsened the drowning swimmer's plight. More generally, other commentators have attacked the distinction between "misfeasance" and "nonfeasance," or between "action" and "inaction," as anachronistic\textsuperscript{315} and immoral.\textsuperscript{316}

While a complete examination of the views held by the supporters and detractors of the misfeasance-nonfeasance line is beyond the scope of this Article, the following sections will explore two justifications for the misfeasance-nonfeasance line, each of which details a method for separating misfeasance from nonfeasance. First, we will


\textsuperscript{313} See Weinrib, supra note 30, at 253-55 (refusing to toss a drowning swimmer an easily available rope "is a case of real nonfeasance because the risk of drowning existed independent of the defendant's presence or absence").

\textsuperscript{314} Some commentators avoid this difficulty by asking whether the absence of the bystander from the scene would have worsened the drowning swimmer's situation. See Weinrib, supra note 30, at 254. Yet, this approach avoids the difficulty only by adopting a counter-factual view of the events. While Professors Landes and Posner do not directly address the issue, their economic analysis of the duty to rescue suggests that the misfeasance-nonfeasance distinction turns on how a person's absence will affect another's situation. If a person’s absence will increase the likelihood that the undesirable result will occur, then we should hesitate to impose liability that might encourage that person to go elsewhere. Thus, in the drowning swimmer hypothetical, liability may lead potential rescuers to go elsewhere. By encouraging potential rescuers to go elsewhere, imposing liability on potential rescuers would reduce the chance that the drowning swimmer will be found, and thereby increase the chance of the swimmer drowning. See Landes & Posner, supra note 299, at 123. If, on the other hand, a person's absence will increase the likelihood that a desirable result will occur, then we need not worry as much about the substitution response imposing liability would engender. Liability for negligent automobile driving may lead others to substitute some other way to get to work, such as walking or riding a bus, and that may mean fewer cars on the road. However, fewer cars on the road would presumably mean fewer chances for accidents, and increase the likelihood that fewer accidents will occur. Thus, a substitution response in this instance would help achieve the result we desire.

\textsuperscript{315} See 3 Harper et al., supra note 29, § 18.6, at 718-19, 725; Keeton et al., supra note 29, § 56, at 373.

\textsuperscript{316} See Restatement (Second) of Torts § 314 cmt. c (1965); 3 Harper et al., supra note 29, § 18.6, at 718-19; Keeton et al., supra note 29, § 56, at 376 ("Such decisions are revolting to any moral sense."); Bender, supra note 30, at 36.
examine Professor Richard Epstein’s argument that the understanding of causation reflected in ordinary language can support the misfeasance-nonfeasance line, and can adequately separate misfeasance from nonfeasance.317 Second, I will offer three “jurisprudential” principles as an alternate justification for the line. These jurisprudential principles can also serve as a means to separate misfeasance from nonfeasance. Having identified two plausible justifications for the misfeasance-nonfeasance line,318 I will then consider whether these justifications can support takings jurisprudence’s harm-benefit line.

A. Professor Epstein and “Ordinary” Causation

In his 1972 article, *A Theory of Strict Liability*,319 Professor Richard Epstein argued that proof of the proposition “A caused harm to B” should establish prima facie tort liability.320 While Professor Epstein

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318. Three other possible justifications for the action-inaction line warrant brief mention. First, the line, to a large extent, is the result of the historical development of common law torts. See Restatement (Second) of Torts § 314 cmt. c; Frances H. Hohlen, *The Basis of Affirmative Obligations in the Law of Torts*, in *Studies in the Law of Torts* 33 (1926). Second, Professor Weinrib has argued that a formal definition of corrective justice can justify the action-inaction line. See Ernest Weinrib, *Rescue and Restitution*, 1 S'VARA 59 (1990); Ernest Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403, 411 (1989); Ernest J. Weinrib, *Right and Advantage in Private Law*, 10 CARDOZO L. REV. 1283, 1286-93, 1297-1301 (1989) [hereinafter Right and Advantage]; Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 978 (1988); Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472, 489 (1987). Third, Professors Landes and Posner have used economics to suggest a justification for the action-inaction line. See Landes & Posner, supra note 299, at 119-24. While all of these are an important part of tort law's debate over the action-inaction line, I do not believe any of these can support takings jurisprudence’s harm-benefit line. The history of tort law is entitled, in my view, to little weight in deciding how we should interpret a constitutional provision concerning property rights today. Professor Weinrib’s formal approach shares the weakness associated with the pre-Nebbia Court's definition of harm. Both require a pre-existing assignment of rights in order to determine when one right interferes with another. As a result, Professor Weinrib's approach will fare poorly if applied to takings jurisprudence in a post-Nebbia world. I shall address this issue further in discussing some of the troubling aspects of Professor Epstein's arguments. See text accompanying notes 372-95 infra. The economic model Professors Landes and Posner derive to support the action-inaction line is ultimately too specific to the issue they are addressing to permit direct application to the costs and benefits associated with the harm-benefit line in takings jurisprudence. To the extent their economic modeling has some utility in suggesting how we should resolve legal issues, I hope that my economic modeling has adequately captured the concerns they would have raised.


320. Id. at 166-68.
articulated a number of defenses that would enable a defendant to avoid, in certain circumstances, responsibility for harm that he or she had caused.\textsuperscript{321} Proof of causation would, “prima facie, fasten[ ] responsibility upon the defendant.”\textsuperscript{322} In adopting this position, Professor Epstein rejected Professor Coase’s interpretation of causation. It is not enough, Professor Epstein argued, that A’s conduct was a necessary condition for B’s injury, or that but for A’s conduct B would not have been injured.\textsuperscript{323} To establish that “A caused B harm,” B must show that people, using ordinary language, would describe the interaction between plaintiff and defendant as one of A causing harm to B.\textsuperscript{324}

To illustrate the difference between “but-for” causation and “ordinary” causation, Professor Epstein examined a case in which A had struck B’s person.\textsuperscript{325} In such a case, B’s presence is a necessary condition of B’s injury—but for B’s presence, B’s injury would not have occurred. Yet, in ordinary usage, people, including lawyers, would describe the incident as one in which “A hit B,” not as one in which “B failed to avoid A’s fist.” Moreover, if we examine the ordinary description of the event, “A hit B,” the grammatical structure of that description differentiates A and B into subject and object, and links them through the use of a transitive verb.\textsuperscript{326} By differentiating the two parties into subject and object, the ordinary language phrasing demonstrates that, despite B’s but-for role in causing his injury, people would identify A as the cause of B’s injury.\textsuperscript{327} As a result, the law should attribute responsibility for B’s injury to A, unless A had some adequate excuse.\textsuperscript{328}

Having defined responsibility in terms of this “ordinary” notion of causation, Professor Epstein applied his theory of strict liability to suggest a means to separate misfeasance from nonfeasance.\textsuperscript{329} If A failed to rescue the drowning swimmer B, people using ordinary language would not describe the situation as one in which “A caused B harm.”\textsuperscript{330} As a result, tort law should label A’s conduct “passive inaction” or a failure “to protect others from harm,” and find no liabil-
ity.331 On the other hand, if A failed to apply his car's brakes to avoid an accident with B, "the constant and inveterate use of the English language" would lead ordinary people to describe the event as "A drove his car into B."332 As a result, tort law should label A's conduct "harm causing," and consider it sufficient to establish A's prima facie liability to B.

Thus, in Professor Epstein's view, we should separate harm-causing conduct from conduct that fails to prevent harm to others by examining how people would describe the event using ordinary language. Moreover, we should use that separation to assign prima facie tort liability. If a person using ordinary language would describe a defendant's conduct as causing harm to the plaintiff,333 then the defendant should be prima facie liable for the plaintiff's injuries. If a person using ordinary language would not describe a defendant's conduct as harming the plaintiff,334 then the defendant should not be liable for the plaintiff's injuries, even if the defendant could have prevented the plaintiff's injuries with minimal effort and no risk to herself.335

B. Jurisprudential Justifications for the Misfeasance-Nonfeasance Line

As an alternate rationale for tort law's misfeasance-nonfeasance line, I would like to suggest three "jurisprudential"336 principles that can distinguish misfeasance from nonfeasance. These jurisprudential principles are:

(1) the law should prefer a duty that can be enforced;
(2) the law should prefer a duty that can be consistently enforced against those subject to it; and
(3) the law should prefer a duty that can be enforced correctly.

331. Id.
332. Id. at 167-68.
333. Professor Epstein defined four instances that encompass the situations in which people using ordinary language might describe an event as "A causes B harm": (1) force; (2) fright and shock; (3) compulsion; and (4) dangerous conditions. Id. at 166-89.
334. Professor Epstein distinguished cases where the defendant both: (i) acted in a way that harmed, or created a serious risk of harm to the plaintiff; and (ii) failed to act to mitigate the harm caused, or to warn of the risks created. Defendant should be liable for injuries caused by the failure to mitigate the harm already caused, or by the failure to reduce the risks of harm defendant has created, because people using ordinary language would describe defendant's initial conduct, in both instances, as harming plaintiff. Id. at 190-92.
335. Id. at 190.
336. While I have described these three justifications as "jurisprudential," they are also substantive in the sense that they are costs that will vary as we consider assigning responsibility to various persons for a particular result.
Together these three jurisprudential principles establish whether the law can, at reasonable expense, shift a loss from where it initially lies. Attempting to impose a duty for which we cannot satisfy one or more of these jurisprudential principles may entail undue costs. First, if a duty cannot be enforced, then imposing the duty will create a situation in which some legal duties are enforced, while others are not. If people do not have perfect information concerning which of its duties the law will enforce, some people may mistakenly believe that a duty will be enforced, and consequently place undue reliance on the correlative right supposedly assured by the unenforced duty. Alternatively, some people may mistakenly believe that a duty will not be enforced, act contrary to the duty expressed, and force the law to the trouble and expense of formal enforcement of the duty. Second, if a duty cannot be enforced consistently, imposing the duty will lead to the judging of similarly situated individuals by differing standards. Such inconsistent treatment will lead some individuals to unfavorable conclusions concerning fairness in the legal system, and may lead others to reject law entirely as inevitably unfair. Third, if a duty cannot be enforced correctly, imposing the duty will lead inevitably to injustice in particular cases, and possibly a distrust for the law as a whole. Taken collectively or individually, the costs associated with these jurisprudential principles will be referred to as “jurisprudential” costs. Because they are a part of the costs of assigning responsibility to one person rather than another for an undesirable result, they must be considered, under an efficiency analysis, in determining to whom we should assign responsibility.

As a general matter, satisfying each of these jurisprudential principles will prove more difficult if we attempt to shift liability to a party who has failed to act than to a party who has acted. Assigning responsibility to someone who fails to act will, therefore, entail more substantial jurisprudential costs than would assigning responsibility to someone who acted. If we are trying to prevent or remedy a harm at

337. See Robert L. Hale, Prima Facie Torts, Combination and Non-Feasance, 46 COLUM. L. REV. 196, 214 (1946) (“It would not always be easy to determine on whom such duties [to rescue] should rest, or under what circumstances.”).
338. Cf. Landes & Posner, supra note 299, at 120 (suggesting that liability rules are efficient, in part, “because the threat of liability should suffice to induce the cost-justified level of expenditures on [the imposed duty]”).
339. See, e.g., Hale, supra note 337, at 214-15. The happenstance of a plaintiff’s successful identification of a particular potential rescuer does not seem a sufficient basis to justify holding that individual to a different legal standard than other equally capable, but unidentified, potential rescuers. Cf. Weinrib, supra note 30, at 254 (by excavating hole, excavator distinguishes himself from all others and provides a sufficient basis to treat him differently than others who may have prevented accident caused by hole).
341. See id. at 475-85.
the least cost, and the cost of preventing the undesirable result is otherwise the same to either an acting party or one who failed to act, the higher jurisprudential costs associated with assigning responsibility to the party who failed to act suggest that we should assign responsibility to the person who acted.  

For our purposes, these three jurisprudential principles can be utilized to determine whether any given conduct deserves the label “misfeasance” or the label “nonfeasance” by turning them into three corresponding questions. First, is the conduct at issue the sort of conduct that will enable us to identify a party who has engaged in the conduct? Second, is it the sort of conduct that will enable us to identify every party who has engaged in the conduct? Third, is it the sort of conduct that will enable us to evaluate accurately the conduct’s wrongful character and causal relationship to plaintiff’s injuries through an after-the-fact inquiry? If the answer to these three questions is yes, then we should be able to consistently and correctly enforce a duty to “avoid” such conduct. As a result, we can label such conduct “misfeasance” and impose liability if such conduct negligently causes injury to another. On the other hand, if the answer to any one of these three questions is no, we will not be able to enforce consistently and correctly a duty to “avoid” such conduct. We should, therefore, hesitate to impose a duty with respect to such conduct to avoid the heightened jurisprudential costs that imposing such a duty would entail. If the jurisprudential costs are sufficiently high, we might properly label such conduct “nonfeasance” or “a failure to prevent harm,” and refuse to impose any duty with respect to such conduct.

Using these three questions, we can, for instance, distinguish between cases in which A fails to attempt to rescue a drowning swimmer, and cases in which A begins a rescue attempt but negligently fails to complete it. First, on the identification issue, the conduct at issue will enable us to identify A more readily in the undertaken rescue example than in the failure to rescue example. If B is drowning off a crowded beach, it would be necessary to identify those who were capable of rescuing B, but failed to act, to enforce a duty to rescue. Yet, in a crowd of people, it will not usually be apparent who was capable of acting, but failed to do so. By remaining on the beach, A and other potential rescuers, blend in with the crowd, making them difficult to

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343. In a cost-benefit calculus, the jurisprudential costs become sufficiently high to warrant a no duty result when the jurisprudential costs of shifting a loss experienced by B to A, plus the costs of A preventing the undesirable result, exceed either the costs to B of preventing the undesirable result or the loss. See id. at 181-82; see also Hale, supra note 337, at 215 (“Even were the requirement confined to making the omission wrongful only when the act would cause less harm to the actor or to someone else than the omission causes to the plaintiff, it would be a requirement impracticable to administer.”).
identify. On the other hand, it will usually be readily apparent who began a rescue.\textsuperscript{344} If A dives into the water and begins swimming toward the drowning swimmer, that conduct will usually draw our attention to A, making him or her more easily identifiable when it comes time for the inevitable lawsuit. Thus, A’s conduct ensures that we will be able to identify A more readily in the undertaken rescue example than in the failure to rescue example.\textsuperscript{345} As a result, assigning responsibility to A for the failed undertaken rescue will usually entail lower jurisprudential costs than assigning responsibility to A for failing to rescue.

Second, on the consistency issue, the conduct at issue makes it more likely that we will be able to identify A and all other persons similarly situated with respect to B’s injury in the undertaken rescue example than in the failure to rescue example. Given that we can usually identify each and every person who leaves the beach to attempt a rescue, the law can hold all such persons to the same standard of care. Each person who undertook the rescue will be liable if her conduct falls below the appropriate standard of care and caused B injury, or free from liability if B cannot demonstrate these elements. Each person who undertook the rescue would thus be treated consistently under the law.\textsuperscript{346}

Extending a duty to rescue to anyone who is reasonably capable of effecting the rescue would, however, create a risk of unequal treatment among such potential rescuers.\textsuperscript{347} Because their conduct, remaining on the beach, does not draw our attention in any particular way, it is unlikely that we will be able to identify everyone capable of effecting the rescue who remained on the beach.\textsuperscript{348} As a result, some capable rescuers, those whom the plaintiff had successfully identified, would be held to one standard of care in determining their liability, while others, those capable rescuers whom the plaintiff was unable to identify, would be held to a different standard.\textsuperscript{349} Because we can

\textsuperscript{344}. Of course, A may hit and run, and on occasion, escape without being identified. But, in designing a general legal rule, we ought to start with the typical case. And as a typical case, we will usually be able to identify the A who crashed into B more easily than the A who remained on the beach.

\textsuperscript{345}. \textit{Cf.} Weinrib, \textit{supra} note 30, at 254 (law can hold excavator of hole liable for accident caused by failure to provide lighting that would have prevented the accident because excavating the hole enables us to identify excavator).

\textsuperscript{346}. See Fried, \textit{supra} note 342, at 182.

\textsuperscript{347}. Fried, \textit{supra} note 342, at 181-82.

\textsuperscript{348}. Because the conduct at issue will not usually bring these people to our attention, any given identified potential rescuer would have little more luck than the plaintiff at identifying other potential rescuers who remained on the beach. As a result, such an identified rescuer, when made defendant, would be unable, as a practical matter, to invoke the doctrine of contribution. \textit{But see} Weinrib, \textit{supra} note 30, at 262 (suggesting that device of contribution would prevent a particular defendant from being singled out for her failure to rescue when many others failed to rescue as well).

\textsuperscript{349}. See Fried, \textit{supra} note 342, at 181-82; cf. \textit{Keeton et al., supra} note 29, § 56, at 376 ("Yet thus far the difficulties of setting any standards of unselfish service to fellow
more easily identify every A who undertook a rescue than we can identify every capable A who remained on the beach, we can enforce a duty in the undertaken rescue example more consistently than we could enforce a duty to rescue. Consequently, assigning responsibility to A, and people like A, in the undertaken rescue example will entail lower jurisprudential costs than would assigning responsibility to A, and people like A, in the failure to rescue example.

Third, on the correct enforcement issue, the conduct at issue makes it more likely that we will be able to enforce a duty correctly in the undertaken rescue example than in the failure to rescue example. If we assume that the appropriate standard of care is negligence, then correctly enforcing either duty requires that the trier of fact find the defendant liable if, and only if, the defendant acted negligently and thereby caused plaintiff injury. If the defendant did not act negligently or if his or her actions did not cause plaintiff’s injury, then the defendant should be exonerated. Mistakes, or incorrect enforcement of a duty, can arise either when the trier of fact exonerates a culpable defendant, or when the trier of fact imposes liability on an innocent defendant. While mistakes of either type are inevitable in any human system of justice, there are likely to be more such mistakes in enforcing a duty in the failure to rescue example than in the undertaken rescue example.

To resolve the negligence or fault issue in the failure to rescue example, the trier of fact would need to determine whether the defendant was or should have been aware of plaintiff’s need for rescue, whether the defendant was capable of undertaking the rescue successfully, and whether the defendant had some other justification for remaining on the beach. While these issues might be subject to proof at trial, they are likely to be difficult to establish. For example, how do you prove that someone was capable of effecting the rescue if he or she chooses to deny any skill in life-saving—introduce a twenty-year-old scouting badge for life-saving?

Moreover, the issue here is not really whether the evidentiary hurdles make it impossible for a trier of fact to resolve these issues in any given case, but whether the evidentiary hurdles are likely to be significantly higher in the failure to rescue example than in the undertaken rescue example.

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351. See Keeton et al., supra note 29, § 56, at 377 (“Where the duty to rescue is required, it is agreed that it calls for nothing more than reasonable care under the circumstances.”).

352. See id.

353. She might, for example, have needed to remain on the beach to watch her children. See also Fried, supra note 342, at 181.
rescue example. And this answer, I think, is clear. As a general matter, resolving the question of fault correctly will usually be much easier in the undertaken rescue example because the defendant, by beginning the rescue, will have substantially answered many of the most difficult questions of the fault determination.\textsuperscript{354} Beginning the rescue demonstrates defendant’s awareness of plaintiff’s need for rescue, and so the trier of fact would not need to speculate as to what the defendant knew or should have known. In addition, beginning the rescue establishes defendant’s judgment both that he or she was capable of the rescue, and that he or she lacked a justification for remaining on the beach. In contrast to the fault determination in the failure to attempt a rescue context, the fault determination in the undertaken rescue context is likely to focus on a specific action or omission by the defendant. The plaintiff may argue, for example, that the defendant failed to use the proper grip or technique when he or she reached the plaintiff, or that the defendant failed to carry a readily-available life-preserver. Whatever faith we may have in the jury system and the adversary process, these more specific inquiries associated with a duty to exercise reasonable care in an undertaken rescue are both more susceptible to proof, and more likely to be resolved accurately by the trier of fact, than the issues in the failure to rescue example.\textsuperscript{355}

The issue of causation will also usually present a less difficult, and therefore less error-prone, inquiry in the undertaken rescue example. Once the defendant has begun the rescue, the causal relation between the defendant's negligence and the harm to the plaintiff will usually require fewer inferential steps to establish than it would in the failure to rescue context. If a defendant failed to exercise proper care, for example, by using an improper grip on the drowning swimmer or by failing to carry along a readily available life-preserver, the causal relationship between such negligent conduct and the harm to the plaintiff will usually be readily apparent. Because the rescue attempt was otherwise successful, the trier of fact would not need to speculate on the defendant’s ability to reach the plaintiff in a timely fashion, or on the possibility that some unforeseen event might have prevented a successful rescue. These factual uncertainties would have been resolved by the otherwise successful nature of the attempt.

The only question for the trier of fact would be defining the relatively specific relationship between the improper grip, or the failure to carry the life-preserver, and the plaintiff’s injuries. Because there is less potential for intervening events that might cloud the causal tie between the specific negligent act and the harm to the plaintiff, the trier of fact will seldom need to resort to speculation to resolve causa-
tion in cases in which an undertaken rescue has gone awry. Enforcing a duty to rescue, on the other hand, would require the trier of fact to determine whether any number of potentially intervening events would have prevented a successful rescue. As the defendant will no doubt testify, it is a long way from the beach to the plaintiff and back again, and a lot could happen along the way. Again, this is not to suggest that a trier of fact would be incapable, in every case, of deciding whether a defendant who remained on the beach could have successfully rescued the plaintiff. However, the causation issue, like the fault issue, will present more difficulty, and hence more opportunity for error, on average, in the failure to rescue example than in the undertaken rescue example.

Thus, because fault and causation would, on average, present more difficult inquiries in the duty to rescue example than they would in the undertaken rescue example, triers of fact would likely make fewer mistakes enforcing a duty in the undertaken rescue example than they would in the failure to rescue example. As a result, enforcing a duty to rescue will entail higher jurisprudential costs than would enforcing a duty to exercise reasonable care in an undertaken rescue.

This analysis suggests that a duty to rescue would be more difficult to (i) enforce (ii) consistently and (iii) correctly than would a duty to exercise reasonable care in an undertaken rescue. Note that these three "jurisprudential" concerns do not establish that enforcing a duty to rescue would necessarily be improper. As a society, we may be willing to tolerate a duty that is difficult to enforce, that holds similarly situated people to different standards of liability, and that leads to a higher than average number of mistaken liability findings, either to encourage people to undertake rescues or as an expression of our moral judgment on undertaking rescues. Whatever our ultimate decision on the appropriateness of such a duty, however, these three jurisprudential concerns do suggest that tort law may appropriately treat liability for misfeasance differently than liability for non-

356. Properly speaking, the law cannot encourage desirable conduct; it can only discourage undesirable conduct. Thus, I should have said "in order to discourage people from not undertaking rescues."

357. See Bender, supra note 30, at 33-36 (suggesting that we adopt duty to rescue as recognition of a "feminist ethic based upon notions of caring, responsibility, interconnectedness, and cooperation"). As previously discussed, tort law cannot promote "caring," "responsibility," "interconnectedness," or "cooperation." It can only punish for the lack of those things. While some may see the difference between promoting good behavior and deterring bad behavior as a matter of semantics, I see a clear moral distinction between the person who supports her children out of love and respect for them, and the person who provides child-support payments to avoid legal sanction. While either behavior may ensure that the children receive food, clothing, and shelter, the underlying motive for the behaviors distinguishes them into altruism and selfishness. Cf. Epstein, Strict Liability, supra note 294, at 200-01 (defining two systems of Western ethics, one depends on intention behind act, the other depends on desirability of act without regard to motive).
If we define "nonfeasance" to include those situations in which the difficulties associated with (i) enforcing (ii) consistently and (iii) correctly a given duty render the enforcement of that duty undesirable, tort law may properly refuse to find liability on the basis of such conduct, even if it were otherwise negligent.

C. A Brief Examination of the Exceptions to the Misfeasance-Nonfeasance Line

We can confirm that these three jurisprudential considerations play a substantial part in retaining the misfeasance-nonfeasance line by examining some of the exceptions to the failure to rescue doctrine that commentators have proposed and courts have applied. For example, Dean James Barr Ames proposed, in his classic lecture on Law and Morals, his version of the drowning swimmer hypothetical. In his version, Dean Ames was careful to address each of the three jurisprudential concerns I have identified. He assumed that we had somehow identified the potential rescuer, so that the duty could be enforced. He limited the number of potential rescuers to one, and thereby addressed the risk of potentially unequal treatment. And he assumed that the rescue could be undertaken at exceedingly small cost and with an exceedingly high chance of success, and thereby ensured that we could readily determine negligence and causation.

Yet, the real world is not as tidy as a law professor's hypothetical. Even if Dean Ames's hypothetical of a lone potential rescuer facing an easy rescue would define a situation in which we could enforce the duty to rescue without risking unequal treatment or an undue chance of mistaken liability findings, identifying the person who walked by such an easy rescue may prove difficult. A law professor can ignore this difficulty by simply assuming that we know the person's identity, but that option is not usually available in the real world. Moreover, even if we could define, as Dean Ames attempted to, a situation in which we could enforce a duty to rescue without implicating any of the three jurisprudential concerns, once such a duty was recognized,

358. See Fried, supra note 342, at 181-82.
360. I have trouble understanding how we would be able to identify someone who walked by and left the swimmer to drown. The swimmer, having drowned, would be unable to identify her potential rescuer. And if there was only one person walking by—a necessary assumption to avoid choosing who among many should have undertaken the rescue attempt—that person is unlikely to identify herself in order to expose herself to society's moral condemnation and a tort suit.
361. See also JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 293 (J. Burns & H. Hart eds., 1970) (suggesting that law adopt duty to undertake easy rescue).
362. See supra note 360.
we would face considerable costs keeping it confined to such precise facts.\textsuperscript{363}

As a result, courts have been reluctant to adopt a general duty to rescue, and have enforced a duty to rescue only when some special relationship of the parties has supplied a justification for imposing such a duty.\textsuperscript{364} The special relationship between the parties generally ensures that we can identify the specific individual who should have acted, distinguish that individual’s conduct from those around her, and resolve the negligence and causation issues without an undue likelihood of error.\textsuperscript{365} Thus, enforcing a duty to “rescue” in such cases does not risk undue jurisprudential costs, and is consistent with a need to consider such costs in assigning responsibility.

D. Do Either of These Justifications Support Takings Jurisprudence’s Harm-Benefit Line?

Both Professor Epstein’s notion of ordinary causation and the three jurisprudential principles provide a means to separate misfeasance from nonfeasance, and might also therefore provide a means to separate government action that prevents harm from government action that extracts a benefit.\textsuperscript{366} The following sections discuss each of these justifications to determine whether either one can support takings jurisprudence’s harm-benefit line. I begin by examining whether the three jurisprudential principles can provide a means to separate compensable and noncompensable government action.

\textsuperscript{363} See Epstein, \textit{Strict Liability}, supra note 294, at 199.

\textsuperscript{364} See \textit{Restatement (Second) of Torts} § 314A (1965); 3 Harper \textit{et al.}, \textit{supra} note 29, § 18.6, at 722; Keeton \textit{et al.}, \textit{supra} note 29, § 56, at 376.

\textsuperscript{365} For example, the Restatement (Second) of Torts has recognized such special relationships: (1) between a common carrier and its passengers; (2) between an innkeeper and her guests; (3) between a possessor of land opened to the public and invitees; (4) between a guardian and her ward, where the guardianship effectively prevents the ward from protecting himself; and (5) between employer and employee. \textit{Restatement (Second) of Torts} §§ 314A, 314B (1965). In each of these cases, the relationship between the parties ensures that we will readily be able to identify the particular party who bears the duty to “rescue,” and distinguishes the party forced to bear that duty from all other potential rescuers. Moreover, the Restatement limits the duty to cases where “the risk of harm, or of further harm, arises in the course of that relation.” \textit{Id.} § 314A cmt. c. By tying the risk of harm to the relationship, the Restatement attempts to ensure that questions concerning the party’s liability will not require undue speculation.

\textsuperscript{366} Specifically, if we would consider the property holder’s conduct to have caused the undesirable result in ordinary language, or if the conduct is the type that would enable us to (i) enforce (ii) consistently and (iii) correctly a duty against such conduct, then we should consider the property holder’s conduct to be misfeasance. As a result, government action designed to prevent such conduct would “prevent a harm,” and not require compensation. On the other hand, if neither the ordinary causation test, nor the three jurisprudential principles were satisfied with respect to the property holder’s conduct, then her conduct should be considered “nonfeasance.” Government action that would require a property holder to move from her position of nonfeasance would “extract a benefit,” and would require compensation.
1. Takings and the Three Jurisprudential Principles

If we apply the three jurisprudential principles to determine whether we should assign responsibility to Justice Stevens or Lucas for the development of Lucas's land, we can begin to articulate some of the reasons we felt discomfort at holding Justice Stevens, rather than Lucas, responsible for the land's development. First, Justice Stevens' conduct—not preemptively purchasing the land—is not likely to draw our attention in any particular way. As a result, if we attempted to enforce a duty that required Justice Stevens to "preemptively purchase" the land, his conduct with respect to the land would not enable us to identify him readily. (Indeed, the only reason we could identify Justice Stevens as a potential preventer is because of the strong support he expressed for the government's actions in his dissent.)

Second, even if we happened to identify Justice Stevens as a potential preventer, he is certainly not the only person who both shares a desire to preserve undeveloped beachfront and enjoys a financial position that would enable him to ensure that the land remained undeveloped. There are likely to be many such potential preventers. However, their conduct, not purchasing the land, would make identifying all of them extremely difficult, and would inevitably lead to some unequal treatment among the potential preventers.

Third, enforcing a duty that required Justice Stevens to purchase the land preemptively when he was a lower cost avoider of the harm would be tricky to enforce. We found Justice Stevens to be the lower cost avoider because of his expressed support for the government's action. Because he supported the measure, we could be relatively certain that the demoralization and opposition costs associated with imposing an uncompensated duty on Justice Stevens to leave the land undeveloped would be less than these costs would have been for a duty imposed on Lucas. However, if we use such expressions of support as a basis for identifying who can prevent an undesirable result at a lower cost, people will learn to conceal their preferences. Once people learned to conceal their preferences, we would face considerable difficulty in determining whether any given potential preventer

367. A person identified as a potential preventer would simply assert: "I'm not a least cost avoider. I would have developed the land just like Lucas, so government would have had to force me to leave the land undeveloped, over my kicking and screaming objections. You should, therefore, pick someone else as your preventer." Unless the potential preventer has otherwise clearly revealed her support for the government's action, as Justice Stevens has done with respect to preservation of beachfront land, she should be able to conceal her preference, making it difficult to recognize her as a potential preventer.

368. Cf. Michelman, supra note 9, at 1215 (arguing against the use of the subjective expression of demoralization costs because, among other reasons, a property owner "for strategic reasons, would not reveal the true answer even if he knew it.").
supported the government’s action in a way that would have made him or her a lower cost preventer.

Thus, the three jurisprudential considerations that justify the misfeasance-nonfeasance line in tort law also suggest that we should hesitate to impose a duty on Justice Stevens to prevent the land’s development, even if he were otherwise the least-cost preventer. Such a duty would likely be impracticable to enforce consistently and correctly in the real world, and its imposition would, therefore, entail excessive jurisprudential costs.

Yet, the choice we face in takings jurisprudence is not between assigning liability to Lucas or Justice Stevens, but between assigning liability to Lucas or the government and taxpayers of South Carolina. When we switch from a situation in which we are assigning responsibility as between two private parties to a situation in which we are assigning responsibility between a regulated property holder and the regulating government, we ensure that the three jurisprudential concerns will be satisfied however we assign liability. First, if we choose to assign responsibility to the regulating government, the identification issue should not present any difficulties. As with a party who bears a special relationship to the person in need of rescue, the government’s relationship to the property restriction enables us to identify it readily as someone to whom we could shift liability.

Second, on the consistent enforcement issue, the regulating government, by imposing the land-use regulation, distinguishes itself from every other party who wanted the land to remain undeveloped. We can, therefore, treat its conduct differently than that of other potential preventers and impose responsibility on the regulating government without violating the consistent treatment principle.

Third, on the correct enforcement issue, assuming we can define the scope of the government’s compensation duty, there is little reason to expect that courts would face any unusual difficulty in enforcing that duty. For example, under present law, the government must provide compensation when its actions result in physical invasion, a denial of all reasonable economic use of the land, or acquire resources for a uniquely governmental function. While precise definition of some aspects of this duty has so far eluded the Court, none of these issues, once legally defined, presents unusually difficult factual issues. As a result, there is little reason to suspect that a trier of fact would be unlikely to resolve these factual issues correctly.

369. Cf. Weinrib, supra note 30, at 254 (the excavator of a hole distinguishes himself from others and justifies the law in treating him differently than others who might have prevented an accident that hole caused).

370. See supra text accompanying note 183.

371. One of the key doctrinal difficulties is defining the property interest with respect to which a court should measure diminution in value. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 n.7 (1992).
Because an assignment of liability to the regulating government would satisfy all three jurisprudential concerns, these concerns should not prevent us from assigning responsibility to the government should such an assignment prove otherwise appropriate. Unlike an attempt to enforce such a liability against a random bystander who could, in theory, have prevented the harm at a lower cost, enforcing such liability against the regulating government will not prove impracticable. Once jurisprudential costs no longer play a substantial role in dictating to whom we assign liability, we should assign liability to the lower cost preventer, whether that be the regulating government or the regulated property holder.

2. "Ordinary" Causation and Takings

Similar concerns suggest that we should not rely on "ordinary" causation to resolve the takings issue. When Professor Epstein argued for prima facie tort liability based on a finding that "A caused B harm," he implicitly adopted causation, as that term is understood in ordinary life, as reflecting an appropriate judgment as to who should bear responsibility for the undesirable result. In adopting such a standard, Professor Epstein implicitly suggested that we should not take the language people ordinarily use to describe particular events as simply an incomplete factual assertion of who caused, in a but-for sense, an undesirable result. Instead, we should recognize that the ordinary description of an event contains an implicit value judgment as to which of the many but-for causes is the one we should consider responsible for the undesirable result.372

As a normative tool, ordinary causation seems most persuasive in which A physically strikes B's person. To deter A from striking B, and to compensate B for his injury, we assign liability to A.373 This paradigm would seem to apply equally well to cases such as Hadacheck v. Sebastian,374 in which one landowner is using his land in a manner that "injures" a neighboring landowner. Because people using ordinary language would likely describe Hadacheck's operation of his brickyard as ruining his neighbors' land for residential use, we should hold Hadacheck responsible for the harm he is "causing" his

372. See Epstein, Strict Liability, supra note 294, at 163, 164 ("[T]he major premise of most legal systems (until perhaps the recent past) is that causation provides, as a matter of policy, the reason to decide cases in one way rather than the other. . . . The concept [of causation] is dominant in the law because it is dominant in the language that people, including lawyers, use to describe conduct and to determine responsibility."). Cf. John Borgo, Causal Paradigms in Tort Law, 8 J. LEGAL STUD. 419, 432-40 (1979) (we identify one necessary condition as the "cause" of a particular undesirable result based upon underlying moral sense of responsibility).

373. Note that because the conduct of both A and B is of a type that will enable us to identify A and B readily. Thus, the assignment of liability to either party will likely impose jurisprudential costs of similar magnitude.

374. 239 U.S. 394 (1915).
neighbors.375 Because his actions "caused," in ordinary language, the harm at issue, government may act without providing compensation to prohibit Hadacheck's conduct.376

Yet, attempting to apply ordinary causation to resolve the takings issue introduces three complications not present in the paradigmatic case of A causing B personal injury. First, in the personal injury case, the law prohibiting the intentional act of physically striking another was in place before the defendant struck the plaintiff's person. Consistent enforcement of that prohibition provides a clear statement that can deter others from engaging in similarly unlawful behavior. In contrast, the takings issue arises only when the law changes in a way that makes a previously lawful activity or land use unlawful. Because the activity had previously been lawful,377 forcing uncompensated obedience to the new law may not desirably deter similar "improper" behavior in the future.

In terms of deterrence, unless one knows in advance which property rights the government will change in the future, and can do nothing to affect how and whether those changes occur,378 an individual cannot conform his or her conduct to a law that is yet to be. An individual will either be unaware of the need to avoid certain actions, or, if aware that government is considering making a given activity unlawful, will seek to convince government that it ought not prohibit his or her "harmful" behavior. As a result, forcing uncompensated obedience to one new law will not necessarily deter similar "improper" behavior in the future. In any event, even if a property holder is aware of an impending change in the law and can do nothing to prevent it, until government acts, it is not clear that we would want to deter the previously lawful activity. For example, the federal government will eventually need to construct additional post offices, as shifts in population density increase the demand for postal services in areas that are pres-

375. See Epstein, Takings, supra note 4, at 118-21.
376. Id. at 120-21.
377. See supra text accompanying notes 211-20.
378. Some argue that Just Compensation is simply a form of insurance, and like other forms of insurance, may lead individuals to "overinvest" in certain property rights on the assurance of recompense that the Just Compensation Clause provides. See, e.g., Daniel A. Farber, Public Choice and Just Compensation, 9 CONST. COMMENTARY 279, 285 (1992); William A. Fischel & Perry Shapiro, Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Law, 17 J. LEGAL STUD. 269, 272-74 (1988); Louis Kaplow, An Economic Analysis of Legal Transitions, 99 HARV. L. REV. 509, 529 (1986); Thompson, supra note 7, at 142. While I disagree that moral hazard is a serious risk in any event, see Lunney, supra note 275, at 768, these analyses implicitly treat government as some sort of immovable natural force. This is wrong. Government is a political force, and unlike hurricanes and earthquakes, lobbying and other influencing efforts can redirect government's course. See Lunney, supra note 4, at 1955 ("The essential insight of the proposed interpretation is that what the legislature will decide in any particular situation is not set in stone."); Robert D. Tollison, A Comment on Economic Analysis and Just Compensation, 12 Int'l Rev. L. & Econ. 139, 139-40 (1992).
ently rural. Yet, no one has argued that we should allow a government to acquire the land it needs for such post offices without providing compensation to deter uses of the land, such as residential housing, that will become “improper” when the government needs the land for these new post offices.

Second, unlike the liability choice in the personal injury context, the liability choice in the takings issue is not between two private parties, but between the regulating government and the regulated landowner. Because the Just Compensation Clause provides an additional party to whom we may assign liability, our moral sense of culpability, forged in the crucible of private party conflicts, may prove unreliable. If we were to apply ordinary causation to resolve the question whether Lucas or Justice Stevens should be responsible for preventing the land’s development, we could rely with reasonable comfort upon the outcome it would suggest because of the private party nature of the conflict. Ordinary causation implicitly recognizes the serious practical difficulties associated with attempting to assign responsibility to Justice Stevens and other potential preventers. In theory, even if Justice Stevens could prevent the land’s development at a lower cost than Lucas, the difficulties associated with forcing him to shoulder the responsibility would make this option impracticable. As a result, people using ordinary language would undoubtedly describe Lucas’s action, rather than Justice Stevens’s inaction, as causing the land’s development. Our ordinary understanding of causation, therefore, suggests that Lucas, not Justice Stevens, should bear responsibility for preventing the land’s development.

Yet, if we simply transfer those moral intuitions unexamined to the takings realm, we will fail to require compensation in many instances in which such compensation would prove desirable, in terms of both fairness and efficiency. For example, if we retain our intuitive conclusion that Lucas is the culpable party, then we are likely to assign responsibility for preventing the land’s development to Lucas. Yet, the demoralization and opposition costs attending an attempt to assign liability to Lucas are likely to be substantial. When he learns that the legislature of South Carolina is considering such a liability assignment, Lucas is not likely to stand idly by while the legislature destroys his million-dollar investment. Lucas and other similarly affected landowners are likely to organize and expend considerable resources opposing the proposed action.

379. See Weinrib, supra note 191, at 414 (“Causation is the element in this relationship that functions to particularize the former as the victim of the latter’s wrongdoing.”).

380. See also supra text accompanying notes 367-71.

381. See Lunney, supra note 4, at 1948-55.
such prohibitions are unlikely to remain politically enforceable over time. Should the fickle passions of the majority shift to some other issue, while the hostile feelings of the restricted landowners remain, sooner or later we will reach a point where the waning interest of the general public on this issue no longer outweighs the substantial interest of the landowners in developing their land. Soon after that crossover point is reached, the landowners will usually convince the legislature to begin granting exceptions to the development ban, as the legislature of South Carolina did in 1990.382

We can avoid these opposition costs, however, by exercising the power of eminent domain and forcing Lucas to sell his development rights. Such a forced sale would require society to bear the additional expense of determining and transferring just compensation to Lucas.383 However, if courts award such compensation only when government restricts the property rights of the very few in a manner that benefits the very many, these transaction costs will generally be less than the opposition costs that would result in the absence of compensation.384 This suggests that by providing compensation, society will generally be able to effect a desired rights change that takes from the very few to benefit the very many less expensively than by attempting to force through and maintain an uncompensated transfer. Unfortunately, if we rely too heavily on our moral intuitions drawn from private-party conflicts, we may overlook the advantages this forced sale option provides.

Third, as Professor Epstein recognized,385 once we leave the personal injury case,386 ordinary causation alone may not provide an adequate vehicle for properly resolving cases that involve disadvantage to

382. See St. Amand, supra note 298, at 528-32. While Penn Central has not yet succeeded in exercising its air rights associated with the Grand Central Terminal, it remains determined to do so. See Dunlap, supra note 264, at J1 (“The city and community should not misunderstand Penn Central’s resolve, ... and that is to realize the value of the air rights, which value has been denied it for so long.”) (quoting a Penn Central corporate spokesman). Moreover, equally troubling to me, when the state government inevitably decides to grant exceptions to its beachfront development ban, it will likely permit development of land owned by the politically well-connected, but not permit development by the ordinary, apolitical beachfront landowners. As a result, in addition to its general failure to preserve undeveloped beachfront over the long-run, an attempt to impose an uncompensated development ban would inevitably lead to disparate treatment of landowners according to their political connections.

383. The actual amount of the just compensation award is not a net loss to society because it simply transfers an existing loss from one party, the affected landowner, to another, the regulating government. See also supra note 296.

384. See Lunney, supra note 4, at 1955-59.

385. See Epstein, Nuisance Law, supra note 317, at 90-91; Epstein, Intentional Harms, supra note 317, at 424-33; Epstein, Defenses and Subsequent Pleas, supra note 317, at 197-98.

386. Even in the personal injury case, where A physically strikes B, Professor Epstein has assumed that B had a legal right to be free from physical contact by A, absent his consent to the contact. Epstein, Nuisance Law, supra note 311, at 50. As Professor Posner has pointed out, Professor Epstein has not adequately explained
another's property or economic interests. If A opens a business that competes with B, A's actions may impose severe financial losses on B, perhaps even drive B out of business. Moreover, many people would describe such an event, in ordinary language, as "A ruined B's business." Finding liability on the basis of such ordinary causation would, however, substantially threaten our ability to maintain a competitive marketplace. To avoid that result, Professor Epstein suggested two strategies. He first denied that people would describe the event as one in which "A drove B out of business." His arguments on that score are not entirely persuasive, however, and so he also advanced a second proposition. He asserted that A's actions, while they may have ruined B's business, did not interfere with any legal right held by B. Because B did not hold the legal right to be free from this sort of competition, B cannot recover from A for the losses A's actions caused B. Thus, for a plaintiff to recover for a loss sustained with respect to a property or economic interest, Professor Epstein would require a showing of ordinary causation and a showing that A's actions interfered with a legal right held by B before he would find A prima facie liable for B's loss.

Given this additional element, we must first determine whether B held a legal right with respect to A's actions before we can determine to whom we shall assign liability for any particular loss. This analy-

why B's right should extend to such contact without regard to the fault of A. See Posner, supra note 326, at 467; see also Weinrib, supra note 191, at 423-25 & n.31. 387. See Epstein, Nuisance Law, supra note 317, at 50-53. 388. Professor Epstein rejected this characterization of events, however.

On strict causal terms, the necessary presence of these possible customers [who faced a choice of doing business with A or B] means that the case does not involve the simple two-party situation implied by the phrase "defendant drove plaintiff out of business." The case, therefore, presents no parallel whatsoever to the straightforward trespass case of "A hit B" even though the plaintiff may speak, however earnestly, of what the defendant has done to him.

Epstein, Intentional Harms, supra note 317, at 431. 389. Id. at 431.

390. Id.; see also Weinrib, Right and Advantage, supra note 318, at 1284 ("At the heart of this example is the relationship between a right or a wrong, on the one hand, and an advantage or a disadvantage, on the other. An advantage is something that contributes affirmatively to the contingent level of welfare that someone enjoys at a relevant time, and a disadvantage is something that diminishes that level. . . . Having an advantage, however, is not the same as having a right, nor is suffering a wrong identical with suffering a disadvantage. I can infringe your rights without thereby disadvantaging you, as where a court would award nominal damages. I can disadvantage you without infringing your rights, for instance, by starting a business that competes with yours."). 391. Epstein, Intentional Harms, supra note 317, at 424-33; see also Epstein, Takings, supra note 4, at 130-31 (sales of alcohol do not cause harm); Epstein, Nuisance Law, supra note 317, at 90-91; Richard A. Epstein, Privacy, Property Rights, and Misrepresentations, 12 GA. L. REV. 455, 456-57 & n.5 (1978). 392. See also Coleman, A Mixed Conception, supra note 244, at 429 n.11; Weinrib, supra note 191, at 423-25.
sis eerily parallels the pre-Nebbia Court's analysis of the Just Compensation issue, in that both look for action that not only injures another, but injures another's rights. Both approaches suffer from the same telling weakness: How do you define B's initial bundle of rights? While Professor Epstein has suggested a means for defining B's initial bundle of rights, his argument, at that point, loses its connection to ordinary causation and breaks down into little more than an assertion about the supposed efficiency of some idealized set of common-law rights.

Thus, Professor Epstein's justification of the misfeasance-nonfeasance line cannot support use of the harm-benefit line to separate compensable from noncompensable government action. His notion of ordinary causation, while intuitively attractive, derives from the context of private-party disputes, and is inappropriate for direct application to resolve the takings issue. Moreover, when he adds the requirement that B demonstrate an interference with a legal right before B can recover, his analysis returns us to the problems that Nebbia's redefinition of rights created.

3. Conclusion: Causation, Responsibility, and Takings

This analysis suggests that the reasons behind tort law's misfeasance-nonfeasance line cannot support application of the harm-benefit line to resolve the takings issue. Our examination of the misfeasance-nonfeasance doctrine has not proven fruitless, however, as it has suggested the basis for the harm-benefit line's intuitive attraction. Because we have formed our moral compass from the sorts of disputes we regularly encounter at home, at work, and in everyday life, we have built our intuitions about responsibility and causation on a foundation of private-party conflicts. In such conflicts, we consistently assign responsibility to the "misbehaving" party because such an assignment ensures a practicable resolution of the conflict and serves to deter undesirable behavior in the future. Such an assignment of responsibility is, therefore, not only convenient and practical, but also likely to be desirable from a least-cost avoider point of view. Out of this assignment of responsibility, we have formed a relatively coherent

393. See Hale, supra note 337, at 198-201.
394. See Epstein, Takings, supra note 4, at 111-12 (define scope of police power according to "precise private law analogues").
395. See Proceedings of the Conference on Takings of Property and the Constitution, 41 U. Miami L. Rev. 49, 72, 96, 98-99, 102, 110-11 (1986) (idealized set of natural rights measured precisely by land's physical boundaries is most efficient because it minimizes situations where negotiating over property rights will take place in bilateral monopoly context, and opportunities for rent-seeking) (statements of Professor Epstein).
396. See Fischer, supra note 350, at 1337 (noting philosopher David Hume's proposition that "human knowledge of causation is derived from observing invariable sequence of events, such as A always following B").
and shared conception of “harm-causing” conduct to which we attach moral culpability.\footnote{397}

Having created, or been socialized to accept, such a framework for assigning liability for undesirable results, our willingness to apply that framework in other contexts is perhaps inevitable.\footnote{398} After all, the utility of such a decisional framework rests in large part on its ability to produce accurate results in a variety of situations. Because it usually works, we need not constantly and consciously reevaluate the framework when we apply it to a new situation. If the framework works, we can stop thinking about it, and allow it to become part of our subconscious process of perceiving the world. As such, the framework of cause and responsibility we have developed based upon our experiences in private-party disputes shapes how we frame the events we experience. As a result, it will always exert a substantial influence on our judgments concerning moral culpability and wrongdoing.

Yet, while we cannot avoid its pull, we must be careful not to adopt its conclusions in determining the proper resolution of the takings issue. The takings issue, because it involves a choice of assigning liability to either a private party or the regulating government, presents circumstances that are materially different than those that a conflict between private parties presents. In contrast to private-party disputes, jurisprudential costs will seldom present a serious problem in the takings area, and our ability and desire to deter “undesirable” behavior through uncompensated takings are, at best, questionable. To resolve the takings issue on its own merits, we must create a decisional framework that responds to the circumstances associated with the liability choice that the Just Compensation Clause presents, rather than rely on a framework drawn from materially different circumstances. Thus, we should reject the harm-benefit line as one manifestation of a framework we have created based upon, and to address, a lifetime of private-party conflicts.

V. Takings and the Lower-Cost Avoider: A Pure Theory of Singling Out

If, as this analysis suggests, we should not rely on the harm-benefit line to separate compensable government action from noncompensable action, courts should shift their focus away from any given actor’s relationship to, or apparent responsibility for, an undesirable result. The private-party conflicts that have largely shaped our perceptions of, and intuitions concerning, responsibility are inapposite to the public party-private party conflict at issue in the takings jurisprudence. As a result, relying on our intuitions concerning, and our ordinary per-
ceptions of, harm, causation, and responsibility will often lead us astray if applied directly to resolve the compensation question. Particularly, our intuitions from private-party conflicts are likely to lead us to leave a particular individual to bear a disproportionate government-imposed burden, even though the desired rights change could have been achieved at a lower cost through a compensated taking of the property at issue.

The Court has said that the purpose of the compensation requirement 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."399 Perhaps, it is time that the Court began to do exactly that. If government deprives the very few of their property to benefit the very many, the Court should require compensation.
